COURT OF

ERRORS AND APPEALS.

Between

JOHN M. READ and CHARLES MACALESTER, Surviving Executors and Trustees of John R. Thomson, deceased,

Appellants,

and

CAROLINE NORRIS, ADELINE THOMSON, and EDWARD R. THOMSON,

Respondents.

} On Bill.

TRENTON:
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1868.

N. J. Court of Errors and Appeals.

In Chancery of New Jersey.

Between

JOHN M. READ and CHARLES MACALESTER, surviving executors and trustees of John R. Thomson, deceased,
Appellants,
and
CAROLINE NORRIS and others,
Respondents.

On Bill.

Bill of Complaint.

To his Honor Abraham O. Zabriskie, Chancellor of the State of New Jersey.

Humbly complaining, show unto your Honor your oratrixes, Caroline Norris and Adeline Thomson, and your orator, Edward R. Thomson, all of the city of Philadelphia, in the state of Pennsylvania, that John R. Thomson, late of Princeton, in the state of New Jersey, deceased, whose domicil for many years prior and up to the time of his death, was at Princeton, in the state of New Jersey aforesaid, de- 10
parted this life at Princeton aforesaid, on or about the twelfth day of September, in the year eighteen hundred and sixty-two, possessed of considerable real and personal estate; and shortly prior to his death, on or about the twentieth day of July, in the same year, duly made and published his last will and testament, in the presence of three subscribing witnesses, a full copy of which will is hereto annexed as part of this bill, marked *A*.

And your oratrixes and orator further show, that by his said

will, the said testator, John R. Thomson, directed that his debts and funeral and testamentary expenses be paid, and appointed the defendants, John M. Read, and Charles Macalester, and Alexander Hamilton Thomson, [of whom the last named has since died,] to be the executors thereof, and gave and bequeathed certain household furniture, &c., and horses and carriages to his wife, the defendant, Josephine A. Thomson.

And all the rest and residue of his real and personal estate, of whatsoever nature and kind, or wheresoever situate, he gave, devised, and bequeathed to the defendants, John M. Read, Charles Macalester, and the said Alexander Hamilton Thomson, their heirs, executors, and administrators, in trust, for the following uses and purposes, that is to say: in trust, to pay certain specific bequests, and an annuity to his, the said testator's brother, the complainant Edward R. Thomson. And the said testator did then direct, that from the income of the residue of his estate there should be paid an annual sum of ten thousand dollars, payable semi-annually, to his wife, the defendant Josephine A. Thomson; and he did authorize and empower his said wife, by her last will and testament, duly executed, to direct, limit or appoint, give or devise, the portion of the estate so appropriated for an income of ten thousand dollars a year for her support, to give or devise the same to and amongst all and every, the children of his, the said testator's sisters, the complainant Caroline Norris, and the defendant, Amelia Read, and their children in such proportions, and for such estate or estates, as she might think proper; or, if his wife should so choose, she might, by her last will and testament aforesaid, direct, limit, or appoint, give or devise the same to and among his sisters, the said Caroline, Adeline and Amelia, and their children and grandchildren, and his, the said testator's brother, the complainant, Edward R. Thomson, in such proportions, and for such estate or estates, as she might think proper; and his, the said testator's trustees, their heirs, executors, and administrators, were thereby required to pay, assign, convey, and transfer the same to the said appointees, according to the directions, limitations, appointments, gifts, and devises in the said last will and testament of his said wife.

And the said testator did further direct, that if the income from his estate, after the payment of the bequests thereinbefore made, should exceed the sum of ten thousand dollars a year, the surplus be invested in good securities, and that his said wife, Josephine, should be authorized and empowered by her said last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions as she might think proper; and in default of such directions, limitations, and appointments, and so far as the same should not extend, then to pay, assign, convey, and transfer the residue to his, the said testator's, three sisters, Caroline, Adeline, and Amelia, and his brother, Edward, their heirs, executors, and administrators, to whom he gave and devised the same.

And he did thereby authorize his said trustees and executors, to retain and hold whatever investments he might have at his decease, unless requested in writing, by his said wife, to change the same.

And he did further authorize his said executors and trustees, in either capacity, to sell and convey all, or any part of his estate, real and personal.

And your oratrixes and orator further show, that the said will of the said testator was duly admitted to probate, in the county of Mercer, in the state of New Jersey aforesaid, and letters testamentary thereon were, on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and sixty-two, duly issued to the said defendants, John M. Read, Charles Macalester, and the said Alexander Hamilton Thomson, all of the city of Philadelphia, in Pennsylvania, who thereupon took upon themselves the burden of the administration thereof, and have, as the complainants are informed, paid the debts of the testator, and the said several specific legacies, and made divers investments and re-investments of the accumulated income of the estate, but of the particulars thereof the complainants have no certain knowledge, and pray that the defendants, trustees, may set forth an account of the present position and condition of the subjects of their trust.

And your oratrixes and orator, the complainants herein, have been advised, and so show to the court, that the said

bequest of the testator, of the accumulated income of his estate, exceeding ten thousand dollars a year, to such benevolent, religious, or charitable institutions as his said wife, the defendant, Josephine A. Thomson, should by her last will and testament limit and appoint, is void, by reason of the vagueness and uncertainty of the designation of the objects of the testator's bounty, and that, by reason thereof, that part of the estate falls into the residue thereof, which he, the said testator, gave and devised, in default of such appointment, to his said three sisters and brother; and they are further advised, that the power of discrimination given by the testator to his said widow over the portion of his estate appropriated for an income of ten thousand dollars a year, to and amongst the children of his sisters, Caroline and Amelia, or among all his said sisters, and their children and grandchildren, and his brother, Edward, in such proportions and for such estates as she, the said Josephine, might think proper, can be released and extinguished, by agreement between the said several parties; and being so advised, and deeming that a permanent settlement of the said estate would be greatly for the benefit of the family and next of kin of the said testator, the complainants, with their said sister, the defendant Amelia Read, have entered into a family arrangement with the defendant Josephine, the testator's widow, whereby it has been agreed between them, that the said estate of the testator, with its present accumulated income, should be divided between and among the said several parties, in certain shares and proportions, and in consideration thereof, the said Josephine has agreed not to exercise her said several powers of appointment, but to release, extinguish, and destroy the same. The particulars of this family arrangement are set forth in the agreement hereto annexed as part of this bill, marked *B*.

And your oratrixes and orator further show, that by an act of the legislature of the state of New Jersey, approved the tenth day of April, in the year of our Lord one thousand eight hundred and sixty-eight, entitled "An Act to confirm the settlement of the estate of John R. Thomson, deceased," it was enacted that the said settlement be, and the same was thereby, confirmed and established, and that the said powers

of appointment and disposition, in and by said will given to said widow, except as to that portion of said estate which was assigned to her in said settlement, be, and the same were, and were thereby declared to be, severally and respectively, ended and determined, and that the surviving executors and trustees of said will be authorized to carry out and effect the said settlement. A copy of this said act is hereunto annexed as part of this bill, marked *C.*

And your oratrixes and orator further show, that they, with their sister, the defendant, Amelia Read, and the said defendant, Josephine, have thereupon applied to the said defendants, trustees, for the payment and transfer to them of the funds, securities, and investments of the said estate, in their hands as executors and trustees under the said will, but the said defendants, trustees, wholly refuse to comply with such requests, pretending that the will of the said testator is valid as to each and all of the dispositions by him therein made, and cannot be altered or affected by agreement between the said parties, and further, that the confirmation of the said agreement by the said act of the legislature, is wholly without effect, and inoperative; and they further insist, that whether this may, or may not, be true, they cannot safely act in the premises without the direction and decree of this honorable court.

All of which is contrary to equity, and tends to the injury of the complainants in the premises.

In consideration whereof, and forasmuch as the complainants can only have adequate relief in the premises in a court of equity, where matters of this kind are properly cognizable: To the end, therefore, that the said defendants may, without oath, answer the premises, and that the defendants, trustees, may set forth a just and true account of the present subjects of the trust, now in their hands as such trustees, and that they may be compelled by the decree of this honorable court, to pay, assign, convey, and transfer the same to and among the said several parties to the said agreement, in the shares and proportions therein mentioned; the complainants hereby offering to give to the defendants, trustees, such indemnification in the premises as may be necessary; and that for these purposes all proper directions may be given,

and that the complainants may have such other and further relief in the premises, as the nature of the case may require and to the court shall seem meet.

May it please your Honor, to grant unto your oratrixes and orator the state's writ of subpœna, to be directed to the said John M. Read, Charles Macalester, Amelia Read, and Josephine A. Thomson, commanding them, at a certain day, and under a certain pain to be therein limited, personally to be and appear in this honorable court, and then and there full, true, direct, and perfect answer make, to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein, as to your Honor shall seem meet.

And your oratrixes and orator will ever pray, &c.

WILLIAM L. DAYTON,
Solicitor.

EDWARD W. SCUDDER,
Of counsel with the complainants.

The following are the exhibits referred to in said bill, and thereto annexed:

Exhibit A.

This is the last will and testament of John R. Thomson, of Princeton, in the state of New Jersey.

I direct my debts, and funeral and testamentary expenses, to be paid, and I appoint John M. Read, Charles Macalester, and Alexander H. Thomson, my executors.

I do hereby give and bequeath, all and singular, the books, pictures, plate, china, wines, and liquors, and all other household goods and furniture of every kind, which shall be in and about my house at Princeton, and also in and about my house at Washington, and all my horses and carriages, to my wife, Josephine A. Thomson.

All the rest and residue of my real and personal estate, of whatsoever nature or kind, or wheresoever situate, I give, devise, and bequeath to John M. Read, Charles Macalester, and Alexander H. Thomson, their heirs, executors and administrators, in trust, for the following uses and purposes:

First. To give to my sister, Mrs. Caroline Norris, two hundred and fifty shares of the capital stock of the New York and Baltimore Transportation Line; to my sister, Adeline Thomson, two hundred and fifty shares of the capital stock of the said line; to my sister, Amelia Read, wife of the Hon John M. Read, two hundred and fifty shares of the capital stock of the said line; to my nephew, Alexander Hamilton Thomson, one hundred and twenty-five shares of the capital stock of the said line; and to my niece, Elizabeth Norris, one hundred and twenty-five shares of the capital stock of the said line.

Secondly. I give to my friends, John M. Read, William H. Gatzmer, Richard Shippen, Dr. Phineas J. Horwitz, and Joseph P. Norris, the husband of my sister, Caroline Norris, five bonds, of one thousand dollars each, of the Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transportation Company, redeemable in 1889, one bond to each one of the above named legatees.

I also direct to be paid an annuity of five hundred dollars, during his natural life, to my brother, Edward R. Thomson, of the United States Navy.

And I further direct, that from the income of the residue of my estate, there shall be paid an annual sum of ten thousand dollars, payable semi-annually, to my wife, Josephine A. Thomson, and I authorize and empower my said wife, by her last will and testament, duly executed, to direct, limit, or appoint, give or devise, the portion of the estate so appropriated for an income of ten thousand dollars a year for her support, to give or devise the same to and amongst all and every the children of my sisters, Caroline Norris and Amelia Read, and their children, in such proportions, and for such estate or estates, as she may think proper; or, if my wife so chooses, she may, by her last will and testament aforesaid, direct, limit or appoint, give or devise the same to and among my sisters, Caroline, Adeline, and Amelia, and their children, and grandchildren, and my brother, Edward, in such proportions, and for such estate or estates, as she may think proper; and my said trustees, their heirs, executors, and administrators, are hereby required to pay, assign, convey, and transfer the same to the said appointees, according

to the directions, limitations, appointments, gifts, and devises in the said last will of my said wife.

And I further direct, that if the income from my estate, after the payment of the bequests herein before made, shall exceed the sum of ten thousand dollars a year, that the surplus be invested in good securities, and that my said wife, Josephine, shall be authorized and empowered, by her last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions, as she may think proper.

And in default of such directions, limitations, and appointments, and so far as the same shall not extend, then to pay, assign, convey and transfer the residue to my said three sisters, Caroline, Adeline, and Amelia, and my brother Edward, their heirs, executors, and administrators, as tenants in common, to whom I give and devise the same.

Fourthly. I authorize my said trustees and executors to retain and hold whatever investments I may have at my decease, unless requested, in writing, by my wife, to change the same.

I authorize my said executors and trustees, in either capacity, to sell and convey all, or any part of my estate, real and personal.

I hereby revoke all former and other last wills.

In witness whereof, I, the said John R. Thomson, the testator, have, to this my last will and testament, set my hand and affixed my seal, this twentieth day of July, in the year of our Lord one thousand eight hundred and sixty-two.

JNO. R. THOMSON. [L. S.]

Signed by the said John R. Thomson, the testator, and declared by him to be his last will, in the presence of us, present at the same time, who have hereto subscribed our names thereto, as witnesses, in the presence of the testator and of each other.

CHAS. H. CONOVER.
WILLIAM CLAYTON.
J. P. MURPHY.

Exhibit B.

This Article of Agreement, made the third day of April, in the year eighteen hundred and sixty-eight, between Josephine A. Thomson, widow of John R. Thomson, late of Princeton, in the state of New Jersey, deceased, of the first part; and Caroline Norris, Adeline Thomson, John M. Read, and Amelia his wife, and Edward R. Thomson, acting herein by his attorney in fact, the said Adeline Thomson, all of Philadelphia, in the state of Pennsylvania, [the said Caroline, Adeline, Amelia, and Edward, being the sisters and brother of the said John R. Thomson,] of the second part;-[the said John M. Read becoming a party hereto, only by virtue of his marital rights as husband of the said Amelia, and not as one of the surviving executors and trustees of the last will and testament of the said John R. Thomson, deceased]; witnesseth:

Whereas, in and by the last will and testament of the said John R. Thomson, deceased, the said testator, besides certain specific and other legacies, gave to his said widow, Josephine A. Thomson, for her support, an annuity of ten thousand dollars per annum, during her life, and did empower her, by her last will and testament, to direct, limit and appoint, give or devise, the portion of the estate so appropriated for an income of ten thousand dollars a year for her support, to and among the children of the said Caroline Norris and Amelia Read, and their children, in such proportions, and for such estates, as she might think proper; or to and among the said Caroline, Adeline, and Amelia, and their children and grandchildren, and the said Edward, in such proportions, and for such estates, as she might think proper; and did, amongst other things, further direct, that if the income from his, the testator's estate after the payment of the bequests therein made, should exceed the said sum of ten thousand dollars a year, the surplus should be invested in good securities, and that his said wife should be authorized and empowered, by her last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions as she might think proper; and in default of

such directions, limitations, and appointments, and so far as the same should not extend, he, the said testator, directed the said trustees to pay, assign, convey, and transfer the residue to his three sisters, Caroline, Adeline, and Amelia, and his brother Edward, their heirs, executors, and administrators, as tenants in common, to whom he gave and devised the same: and whereas, the said Josephine, for the consideration hereinafter named, is willing to release, surrender, and relinquish the several powers of appointment to her given in and by the said will, as above mentioned; and the said residuary legatees and devisees of the said John R. Thomson, deceased, to wit, the said Caroline, Adeline, Amelia, and Edward, in consideration of such release and surrender, are willing to make an equitable division of the said estate with the said Josephine, whereby a permanent settlement of the said estate may be effected, which will be greatly to the benefit of the family and next of kin of the said testator:

Now, therefore, in consideration of the premises, it is hereby mutually agreed, by and between the said Josephine, party of the first part, and the said parties of the second part, that the said estate of the said John R. Thomson, deceased, which shall remain after payment of his debts and the expenses of administration and trust thereof, and of the specific and pecuniary legacies mentioned in the said will, shall be divided between the said Josephine and the said parties of the second part, in manner following, that is to say: the said parties of the second part, being the residuary legatees and devisees of the said will, shall have one-third part of the said estate, to be divided between them in such proportions and manner as shall by them, the said parties of the second part, be mutually agreed upon; and the said Josephine shall have two-thirds part, being all the remainder of the said estate, as her own absolute property forever.

And in consideration of the said division, and the foregoing agreement, it is further mutually agreed, by and between the said parties, that the said Josephine shall, and she hereby doth release, surrender, relinquish, and yield up, the said powers of appointment given to her in and by the said will of her husband, and she, the said Josephine, for herself, her heirs, executors, and administrators, doth covenant and agree,

to and with the said parties of the second part, and each of them, their, and each of their, executors, administrators, and assigns, that she has not exercised or used, and that she will not exercise or use, her said powers of appointment, or any or either of them, but will wholly desist and refrain from exercising or using the same, hereby revoking all and any appointment by her made, or to be made, by virtue of said will.

And the said parties of the first and second parts do hereby join in requesting the surviving executors and trustees of the said last will and testament of the said John R. Thomson, deceased, to divide the securities, funds, and property, belonging to, and constituting the said estate, in manner before expressed, and to assign, transfer, and deliver one-third part thereof to the said parties of the second part, and two-thirds part thereof to the said party of the first part, each party for himself and herself agreeing to execute and deliver to said executors and trustees, all necessary and proper releases, acquittances, and covenants of indemnification in the premises.

Nevertheless, the said John M. Read doth hereby reserve and declare, that he joineth his said wife herein, only for the purpose of rendering effectual her execution hereof, and only so far forth as his co-operation is necessary to that end, expressly reserving and declaring that his position and obligations as one of said surviving executors and trustees, are not in any manner to be conceded or compromitted by anything herein contained; and that his action, or refusal to act, as such executor and trustee, is to be entirely free and discretionary in the premises, as though he had not signed this agreement.

And provided always, and this article of agreement and everything herein contained, are made and entered into upon this express condition, to wit, that if, for any cause, independent of the will or devise, or beyond the control of the said parties hereto, the carrying out of this agreement shall be found to be impracticable, as, if it shall be judicially decided that it cannot be legally accomplished so as to make the said executors and trustees entirely secure; or if, for any other reason, the said executors and trustees cannot be required and decreed to perform the same, according to the true intent

and meaning hereof, then this article of agreement, and everything herein contained, is to be void.

In witness whereof, the said parties have hereto set their hands and seals, the day and year first above written.

JOSEPHINE A. THOMSON, [L. S.]
CAROLINE NORRIS, [L. S.]
ADELINE THOMSON, [L. S.]
E. R. THOMSON, [L. S.]
by ADELINE THOMSON, [L. S.]
Attorney.
JOHN M. READ, [L. S.]
AMELIA READ, [L. S.]

Sealed and delivered in the presence of us—
ALBERT A. OUTERBRIDGE,
ANGELO T. FREEDLEY,
As to John M. Read and Amelia Read only.
JAMES W. KYD,
E. L. M. BERGHMANS,
As to Mrs. Josephine A. Thomson.
ELIZABETH NORRIS,
ADELINE BROWN.

Exhibit C.

An Act to confirm the settlement of the estate of John R. Thomson, deceased.

Whereas, by the last will and testament of John R. Thomson, late of Princeton, in this state, deceased, the testator, after giving certain other legacies and directions, did direct, substantially as follows, to wit: that from the residue of his estate there should be paid a certain annual sum to his wife: and then gave her discretionary power, by her last will and testament, to appoint the portion of his estate so appropriated to raise by its income said annual sum, to and amongst the children of his sisters, Caroline Norris, and Amelia Read, and their children, or to and among his three sisters, Caroline, Adeline, and Amelia, and their children and grandchildren, and his brother, Edward, as his said wife might

choose; and if the income of the estate, after paying the other bequests, should exceed the annual sum given to his wife, the testator gave her discretionary power, by her will, to give and devise the same among such benevolent, religious, or charitable institutions as she might think proper; and in default of such limitations and appointments, and so far as the same should not extend, gave the residue to his said three sisters and brother, they being the residuary legatees: and whereas, a settlement of said estate between the said widow and the said residuary legatees, has been agreed upon and made, whereby, amongst other things, the said widow hath agreed to release and surrender, and hath released and surrendered the said powers of disposition by will, so far as the same may affect any part of said estate not given to her for her own use in and by said settlement: and whereas, it is desirable that said settlement should be confirmed and established, as a family settlement of said estate; therefore,

Sec. 1. Be it enacted by the Senate and General Assembly of the state of New Jersey, That the said settlement be and the same is hereby confirmed and established, and that the said powers of appointment and disposition, in and by said will given to said widow, except as to that portion of said estate which hath been assigned to her in said settlement, be, and the same are, and are hereby declared to be, severally and respectively, ended and determined, and that the surviving executors and trustees of said will be authorized to carry out and effect the said settlement.

Sec. 2. And be it enacted, That this act shall take effect immediately.

Approved April 10th, 1868.

In Chancery of New Jersey.

Between

Caroline Norris, Adeline Thomson, and Edward R. Thomson, complainants,

and

John M. Read and Charles Macalester, surviving executors and trustees of John R. Thomson, deceased, the said John M. Read and Amelia, his wife, and Josephine A. Thomson, defendants.

The separate answer of the above named John M. Read and Charles Macalester.

[Filed May 1, 1868.]

The said defendants, saving and reserving all exceptions, &c., answer the bill of said complainants as follows:

They admit the death of the said John R. Thomson, and the execution of his said last will and testament, and believe the copy thereof annexed to the complainants' bill to be correct, but for greater certainty crave leave to refer to the original thereof, when the same shall be produced on the hearing of this cause.

These defendants have paid the debts and funeral and testamentary expenses of the said testator, and have delivered over to his widow, the defendant Josephine A. Thomson, the household furniture, &c., to her bequeathed by the said testator. They have also paid the specific legacies bequeathed by the testator, and have regularly paid the annuity by him bequeathed to his brother, the complainant Edward R. Thomson, as also the annual sum of ten thousand dollars by him, the said testator, directed to be paid to his widow, the defendant Josephine A. Thomson.

The income from the said testator's estate, after the payment of the said bequests, has exceeded the sum of ten

thousand dollars a year, and the surplus thereof has, in compliance with the directions in the said will contained, been invested in good securities, and the defendants annex hereto, as part of their answer, a schedule, setting forth the funds, securities, and investments, now forming the subject of their trusts.

The defendants have been informed that the sisters and brother of the said testator, and his said widow, [all of them being parties, complainants or defendants, in this cause,] have entered into some agreement between themselves, for a division between them, in certain proportions, of the said testator's estate, and they believe the copy of the said agreement annexed to the complainants' bill to be correct, but for greater certainty pray leave to refer to the original thereof; and in particular, the defendant, John M. Read, shows to the court that, as will appear by the said agreement, he joined in the execution thereof, solely in his marital right, and not otherwise. The defendants have been also informed that an act of the legislature of the state of New Jersey has been passed, purporting to confirm the settlement of the estate of the said testator; they believe the copy thereof annexed to complainants' bill to be correct, but crave leave to refer to the original thereof.

The defendants admit that the complainants, with their sister, the defendant Amelia Read, and the said defendant, Josephine A. Thomson, have applied to them, as trustees, for the payment and transfer to them of the funds, securities, and investments of the estate in their hands, as executors and trustees under the said will, and that they have refused to comply with the request so made to them. These defendants are advised that the will of the said testator is valid as to each and all of the dispositions by him therein made, and cannot be altered or affected by any agreement between the said parties. They are further advised that the attempted confirmation of the said agreement by the said act of the legislature, is wholly without effect and inoperative, and that whether this may or may not be true, they cannot safely act in the premises without the direction and decree of this honorable court.

And the said defendants submit to act herein in all respects as the court may direct, being indemnified in the premises, and praying to be hence dismissed, with their proper costs and charges in this behalf most wrongfully sustained.

CHARLES E. GREEN,
Solicitor.

WM. HENRY RAWLE, and
WM. M. MEREDITH,
Of counsel with defendants,
John M. Read and Charles Macalester.

IN CHANCERY OF NEW JERSEY.

Between
CAROLINE NORRIS, and others, complainants,
and
JOHN M. READ and CHARLES MACALESTER, surviving executors and trustees of John R. Thomson, deceased, and others, defendants.

The separate answer of the defendant, Amelia Read.

[Filed May 1, 1868.]

This defendant, saving and reserving all exceptions, &c., answers the bill of the said complainants as follows:

She admits all the statements in the said bill contained to be true, and prays to be hence dismissed with her costs.

EDW. T. GREEN,
Solicitor, and of counsel with defendant, Amelia Read.

In Chancery of New Jersey.

Between
Caroline Norris and others, complainants,
and
John M. Read and Charles Macalester, surviving executors, &c., and others, defendants.

The separate answer of the defendant, Josephine A. Thomson.

[Filed May 1, 1868.]

This defendant, saving and reserving all exceptions, &c., answers the bill of the complainants as follows:

That she believes the will of her late husband, the Honorable John R. Thomson, to be correctly set forth in the said bill, but for greater certainty she begs leave to refer to a proper exemplication thereof, when the same shall be produced. This respondent was perfectly satisfied with all the provisions contained in the said will, and her affection for her late husband, and her respect for his memory, induced her to desire to carry out the provisions of the said will in every particular, but, on learning that some doubt existed under the laws of New Jersey, respecting her right of disposition by will, over the surplus of the estate as therein provided for, and believing that such a course would, in this contingency, accord with her late husband's intentions towards his brother and sisters, she entered into the arrangement or settlement referred to in the said complainants' bill, and is desirous that the same should be carried into effect. She believes the statements contained in the said bill to be true, and she prays to be hence dismissed with her costs.

Josephine A. Thomson.

Sworn and subscribed this 23d day of April, A. D. 1868, before me.

W. W. Dougherty,
Alderman.

Decree.

[Filed October 28, 1868.]

This cause coming on to be heard at the last term of the court, and being argued by Joseph P. Bradley and George M. Robeson for the complainants, by William Henry Rawle, esq., for the defendants, executors, and by Mr. Porter, of Philadelphia, for the defendant, Josephine A. Thomson, and the Chancellor having taken time to consider of the same, and being of the opinion that the power given by the said John R. Thomson, deceased, in and by his said will to the said defendant, Josephine A. Thomson, by her will to direct, limit and appoint, give or devise the portion of his estate appropriated for an income of ten thousand dollars a year for her support, to and amongst the children of his sisters, Caroline Norris and Amelia Read, and their children, or to and amongst his sisters, Caroline, Adeline, and Amelia, and their children and grandchildren, and his brother Edward, was a power which the said Josephine could lawfully surrender and release, and that the further power given by said John R. Thomson, in and by his said will, to the said Josephine, by her will to give and devise the surplus income of his estate among such benevolent, religious, or charitable institutions, as she might think proper, was and is void; and that the said Josephine A. Thomson, and the said Caroline Norris, Adeline Thomson, Edward R. Thomson, and John M. Read, and Amelia his wife, had full power and lawful authority to make the said agreement for settlement of said John R. Thomson's estate, which is recited in the bill of complaint, and a copy of which is annexed thereto; and that the act of the legislature, set forth and annexed to said bill, is valid and effectual for confirming and validating said agreement, even though the said last mentioned power were lawful and valid:

It is, therefore, on this twenty-first day of October, in the year eighteen hundred and sixty-eight, at a stated term of the Court of Chancery, held at Trenton, by the Chancellor, ordered, adjudged, and decreed, that the said agreement for

settlement, and every article and clause thereof, are, and the same are hereby declared to be valid and binding, and that the said John M. Read and Charles Macalester, executors of the last will and testament of John R. Thomson, deceased, and trustees under said will, do account to the complainants, and to the defendants, Josephine A. Thomson and Amelia Read, for the balance of said estate of John R. Thomson, deceased, in their hands, which may remain after payment of his debts and the expenses of administration and trust thereof, and of the specific and pecuniary legacies mentioned in said will; and that they pay, assign, convey, and transfer said balance to and among the several parties to said agreement, in the shares and proportions therein mentioned, that is to say, one-third part thereof to the said Caroline Norris, Adeline Thomson, Amelia Read, and Edward R. Thomson, and two-thirds part thereof to the said Josephine A. Thomson. It is further ordered, adjudged, and decreed, that it be referred to Frederick Kingman, esquire, a master of this court, to take and state the account of said estate in the hands, or that has come to the hands of said executors and trustees, and to make due allowance for all payments and discharges to which they may be entitled, with power to cause said executors and trustees, and any other persons to come before him to be examined touching said estate, and to cause all and any books and vouchers touching or concerning the same to be exhibited; and the Chancellor doth hereby reserve the right to make such further directions as equity and justice may require. It is further ordered, that the costs of the complainants and defendants in this suit, and reasonable counsel fees for the respective counsel, be paid by the said executors and trustees out of the said estate. On motion of William L. Dayton, solicitor for the complainants.

A. O. ZABRISKIE, *C.*

Opinion.

THE CHANCELLOR. The complainants are Caroline Norris, Adeline Thomson, and Edward R. Thomson, the sisters and brother of the testator, John R. Thomson. They, with the defendant, Amelia Read, who is a sister of the testator, are his next of kin. The defendants are John M. Read and Charles Macalester, the surviving executors, Josephine A. Thomson, the widow of the testator, and John M. Read, and Amelia his wife. The defendants have all appeared and answered.

John R. Thomson, the testator, by his will, dated July 20th, 1862, after certain specific and other legacies, directed as follows:

"And I further direct, that from the income of the residue of my estate there shall be paid an annual sum of ten thousand dollars, payable semi-annually, to my wife, Josephine A. Thomson; and I authorize and empower my said wife, by her last will and testament, duly executed, to direct, limit or appoint, give or devise, the portion of the estate so appropriated for an income of ten thousand dollars a year for her support, to give or devise the same to and amongst all and every the chilldren of my sisters, Caroline Norris and Amelia Read, and their children, in such porportions, and for such estate or estates, as she may think proper; or if my wife so chooses, she may, by her last will and testament aforesaid, direct, limit or appoint, give or devise the same, to and among my sisters, Caroline, Adeline, and Amelia, and their children and grandchildren, and my brother Edward, in such proportions, and for such estate or estates as she may think proper; and my said trustees, their heirs, executors, and administrators, are hereby required to pay, assign, convey, and transfer the same to the said appointees, according to the directions, limitations, appointments, gifts, and devises in the said last will of my said wife.

"And I further direct, that if the income from my estate, after the payment of the bequests hereinbefore made, shall

exceed the sum of ten thousand dollars a year, that the surplus be invested in good securities, and that my said wife Josephine, shall be authorized and empowered by her last will and testament, to give and devise the same among such benevolent, religious, or charitable institutions as she may think proper.

"And in default of such directions, limitations, and appointments, and so far as the same shall not extend, then to pay, assign, convey, and transfer the residue to my said three sisters, Caroline, Adeline, and Amelia, and my brother Edward, their heirs, executors, and administrators, as tenants in common, to whom I give and devise the same."

The widow and other legatees being advised that the powers of appointment in said will to benevolent, religious, or charitable institutions, was void, or at least of doubtful validity, and being desirous to terminate a trust which would be long and troublesome, agreed among themselves as to the division of the property; and as they are the only parties, beside the benevolent, religious, or charitable institutions, who have any interest in the property, they, on the third day of April, 1868, executed an agreement under their hands and seals to effect that object, which is set out in the pleadings. By this it is stipulated that after payment of debts, expenses of administration, and the specific and pecuniary legacies, the estate of the testator shall be divided between them in such manner that Mrs. Thomson shall have two-thirds, and the brother and sisters of the testator together, one-third of it; and Mrs. Thomson released, surrendered, relinquished, and yielded up her power of appointment, and covenanted and agreed not to exercise the same. And in that agreement, each party requested the executors to pay to the other party the share so agreed upon, and agreed to execute to them all proper releases and discharges.

By an act of the legislature, approved April 10th, 1868, reciting this agreement of settlement, it was confirmed and established, and the powers of appointment in the will were declared to be ended and determined, and the executors were authorized to carry out and effect the settlement.

The executors, not being satisfied that they were author-

ized to yield up the trust property on the strength of this settlement, even when confirmed by the legislature, declined to pay over the trust funds. This suit is brought to compel such payment by them.

The executors contend that the powers of appointment are valid, and cannot be surrendered or released by Mrs. Thomson, and that it is beyond the power of the legislature to give validity to an agreement which disposes of the property contrary to the provisions of the will, and the rules of law which give effect to those provisions.

The complainants contend that the power of appointment to benevolent, religious, or charitable institutions, is void, and that the other appointees have power to surrender; also, that the power to appoint is a power in gross, and that Mrs. Thomson, at whose option it must be exercised, can now determine that option and release or surrender it. And even if this could not be done by the law as it stood, that the act of the legislature gives it validity.

First, as to the validity of the power. This depends upon the doctrine of charitable uses, and its application to this case. The Court of Chancery has, for many years, compelled the performance of gifts and bequests to charitable and other like uses. It is a matter that falls properly and naturally within the jurisdiction of that court. In England, few cases are to be found in chancery, before the statute on that subject known as the statute of charitable uses. 43 *Eliz.*, *Cap.* 4. That statute gave the court directly, no jurisdiction over charitable uses. But in its preamble, which may be found with the statute in full in 2 *Coke Inst.* 797, or condensed in 2 *Roper on Legacies* 1115, and 2 *St. Eq. Jur.*, § 1160, it recites that many gifts for the twenty-one objects enumerated in it, have not been employed according to the charitable intent of the givers and founders thereof. And it provides that four commissioners, one of whom shall be the bishop of the diocese, shall be appointed by the chancellor, authorizing them to inquire, by the oaths of twelve men, of the abuses and misappropriation of property "given, limited, appointed, or assigned, to or for any of the charitable and godly uses therein rehearsed." It directs the commissioners to make order for the application of such property to the uses and

intents for which it was given. It directs them to report their orders into the Court of Chancery, which is charged with the execution of them; parties aggrieved having the right of appeal to the Chancellor.

On the equity of this statute and the rights established by it, that court took jurisdiction of all charities or subjects included within it. Many of them, as the maintaining of bridges, causeways, and houses of correction, were neither charitable nor religious objects, in the usual sense of these terms. Yet, in proceedings by bill and information instituted in that court, and not in any way under the provisions of the act, the Court of Chancery has always defined charitable and religious objects according to the enumeration in the preamble of that act; not limiting the objects by the terms of the act literally, but limiting them to matters of like nature.

That statute is not in force in this state, and therefore cannot limit the authority of this court to enforce charitable gifts, not included within it. It was not used for that purpose by the English equity courts—but it was used by them to enlarge their power. The rule of law and in equity before that statute, was, that a gift or devise for a purpose or object so vague and indefinite that the Court of Chancery could not enforce it, was void. After the statute of charitable uses, the court held that all gifts for any object enumerated in it, were for purposes sufficiently definite, and therefore would be enforced in chancery. In cases where the object of the gift would not have been held sufficiently definite without the statute, and have since been held sufficient by force of the statute, the authority of the decision might perhaps be questioned, on the ground that the statute is not in force here. But where, on the other hand, the English courts have held the object too indefinite, and the use therefore void notwithstanding the statute, their decisions are entitled to the same respect here as in all other cases in which we take them for our guide. The object of the statute of Elizabeth was not to make void or restrain, but to give effect to gifts for charitable and pious uses.

Then the question in this case is, whether the power of appointment given in this will "to give or devise the same among such benevolent, religious, or charitable institutions

as she may think proper," is so vague and indefinite as to be void. As the power is to give to any of the three, if one of them is too vague, the power clearly is void. She has the right to elect not to give to the other two. It is conceded that by the English decisions, the words "charitable and religious" are sufficiently definite, and it is contended that, by the same authorities, the word *benevolent* is not; and that a gift to *benevolent* objects or *benevolent* institutions, is void.

The word *benevolent* is certainly more indefinite, and of far wider range than *charitable* or *religious;* it would include all gifts prompted by good will or kind feeling towards the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it; it has no legal meaning, separate from its usual meaning; the word "charitable" has acquired a settled limited meaning in law, which confines it within known limits.

In all the decisions on this subject, it has been held that a devise or bequest in England for *benevolent* objects, or in trust to give to such objects, is too indefinite, and therefore void, and not being within the scope of the statute of Elizabeth, are not saved by it. And the reasoning of the judges by whom it has been so decided, is too clear, and their authority too great to admit of any doubt upon the question at this day.

In *Morice* v. *The Bishop of Durham*, the bequest was to the bishop in trust, to dispose of to such objects of *benevolence* and liberality as he, in his discretion, shall most approve of. Sir William Grant, 9 *Ves.* 399, and Lord Eldon, on appeal, 10 *Ves.* 522, held the trust specified to be void, and decreed the bishop to hold in trust for the next of kin. In *James* v. *Allen*, 3 *Merivale* 17, a gift to executors in trust for benevolent purposes, was held void. Many other cases sustain the principle on which these decisions rest. *Ellis* v. *Selby*, 7 *Sim.* 352; *S. C., on appeal before Lord Cottenham*, 1 *Myl. & Cr.* 286; *Williams* v. *Kershaw*, 1 *Keen* 227 (*n*); *Kendall* v. *Grange*, 5 *Beav.* 300; *Vezey* v. *Jamson*, 1 *Sim. & Stu.* 69; *Brown* v. *Yeall*, 7 *Ves.* 50, (*n*); *Ommaney* v. *Butcher*, *Turn. & Russ.* 260.

The same doctrine has been established in the courts of New York, where such gifts are held void, unless the object

of the gift is specific. While they hold that there need not be any legally existing institution to receive the gift, they maintain that the object or purpose of the gift must be specified. *Potter* v. *Chapin*, 6 *Paige* 650; *Williams* v. *Williams*, 4 *Seld.* 547; *Owens* v. *Missionary Society*, 4 *Kernan* 397; *Beekman* v. *Bonsor*, 23 *N. Y. Rep.* 298.

And this is stated as the law in such case, in 2 *St. Eq. Jur.*, § 1163 and *n*; 2 *Redfield on Wills*, 800, § 80; *and* 2 *Roper on Legacies*, *ch.* 19, § 1 *and* 6.

The only disposition invalid on this account is so much of the power as authorizes the appointment to benevolent, religious, or charitable institutions. The power to dispose of to the persons designated is valid.

The *second* point is, whether the release of the power by Mrs. Thomson is a valid extinguishment of it, so far as the power extends to the brother and sisters of the testator. As they join in the instrument, there can be no question of its validity; had it no other effect, they and all persons claiming through and under them, would be estopped. The children of Mrs. Norris and Mrs. Read have not joined, nor does it appear in the case whether they have any children or grandchildren. But the power to devise to them only extends to the fund which produces the interest given to Mrs. Thomson, and in which she has thus a life estate. This, therefore, is a power in gross, which she herself can release and extinguish, without their consent. It is a settled rule, that where a life interest or other estate is given to the person who is authorized to devise or appoint the property, the person authorized to appoint can release and extinguish the power. This is called a power in gross. But where the power to appoint is given to one who has no estate or interest in the property to be distributed, which is called a power simply collateral, the person entrusted with the power cannot release or extinguish it, but may exercise it, notwithstanding any covenant or agreement to the contrary. 4 *Kent* 346; 1 *Sug. on Powers*, 80, 90, 93, 100; *Smith* v. *Death.*, 5 *Mad.* 371; *Albany's Case*, 1 *Rep.* 111; *West* v. *Berney*, 1 *Russ. & Mylne* 431; *Bickley* v. *Guest*, *Id.* 440; *Horner* v. *Swann*, *Turn. & Russ.* 430; *Hillyard* v. *Miller*, 10 *Barr* 326; *Miles* v. *Knight*, 12 *Jurist* 666.

Such being the rule of law, by the release contained in the article of settlement the power is extinguished as to the whole, except the power to appoint to the benevolent, religious, or charitable institutions; this power regards property in which Mrs. Thomson has no interest—that is, the surplus income of the estate, or the income of the part which does not yield her annuity. As regards that part, it is a power simply collateral. But the power as to this is void, by the conclusion before arrived at; the property, therefore, will be held in trust for the next of kin, who have joined in the article of settlement.

Lastly, the act of the legislature is, in my opinion, sufficient to render the settlement valid, and to give it efficacy to extinguish the powers, had the power to appoint to charitable uses been a valid power, and had it been, by the rules of law incapable of being extinguished by a release of Mrs. Thomson, because a power simply collateral. The rule of law that forbids the release of a power simply collateral, is like every law in the control of the legislature; they can alter any law, however wise and just, and change it to one that is inexpedient and unjust. Much more can they alter a mere arbitrary and technical rule like this, for there is no reason why a power to appoint can be relinquished by a trustee having a life interest in the property, and cannot by a trustee who has no interest.

No one would question the validity of a statute declaring that both powers, simply collateral and in gross, may be released and extinguished by the person to whom they were given. Such law would operate on powers in existence and created before its passage. The legislature can, at its pleasure, change the law of descents and of wills, and of operation of entailments, so as to affect and change all estates not already vested under them. They can enact and have enacted, that surviving executors and administrators with the will annexed, shall exercise power to sell lands given by the will jointly to all the executors named, and such law affects the powers created by wills, prior to its enactment.

They have the power to make this change universal, or local, or private, only applying to a particular will or instrument. A statute declaring that John Den may break an entail by

feoffment with warranty, would be valid. The only limitations on legislative power in this respect are those prescribed in the constitution, and the restriction universally acknowledged, that no law shall be passed taking away vested rights of property. Taking property for public use, is a proper exercise of the law-making or legislative power, and compensation in such case is provided by the constitution. If the power to appoint to the testator's brother and sisters had been limited to them, instead of being as it is, in the alternative, they would each have a vested right to some proportion which the legislature could not take away without their consent. But before any estate or property is vested, the legislature have the power to change the rules of law by which, as they are, it would eventually vest in one class of persons now in existence, so that it will vest in another class, or in different proportions. The statutes altering the law of descents and the law af entailments, and regarding the rights of married women, are of this class.

Such effect has been given to private statutes by the Supreme Court of this state, in *Richman* v. *Lippincott*, 5 *Dutcher* 44, and by the Supreme Court of the United States in *Croxall* v. *Sherrerd*, 5 *Wall.* 268, and in *Kearney* v. *Taylor*, 15 *How.* 494.

Notice of Appeal.

[Filed October 29, 1868.]

The defendants, John M. Read and Charles Macalester, executors, &c., hereby appeal from the final decree made in this court, in the above stated cause, to the Court of Appeals in the last resort in all causes of law.

Dated October 29th, 1868.

CHARLES E. GREEN,
Solicitor of defendants.

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

CHARLES E. GREEN,
Of counsel with defendants.

Petition of Appeal.

[Filed October 29, 1868.]

COURT OF APPEALS.

Between

JOHN M. READ and CHARLES MACALESTER, surviving executors, &c., appellants,

and

CAROLINE NORRIS, and others, respondents.

On Bill.

To the Honorable the Court of Appeals in the last resort in all causes of law.

The humble petition of John M. Read and Charles Macalester, executors, &c., the appellants in the above stated cause, respectfully shows, that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery, by his Honor, Abraham O. Zabriskie, Chancellor of the state of New Jersey, bearing date on the twenty-first day of October, instant, wherein the said Caroline Norris and others were complainants, and John M. Read and Charles Macalester, executors, &c., and others, were defendants; and your petitioners humbly appeal from the said decree of the Chancellor, in every part thereof, upon the ground that the same is in all respects erroneous. Your petitioners therefore pray that the said decree of the said Chancellor may be in all things reversed, set aside, and for nothing holden; and that they may have such relief in the premises as to this honorable court shall seem meet.

Dated October 29th, 1868.

CHARLES E. GREEN,

Solicitor for and of counsel with appellants.

Answer to Petition of Appeal.

[Filed October 29, 1868.]

COURT OF APPEALS.

Between

JOHN M. READ and CHARLES MACALESTER, surviving executors, &c., appellants,

and

CAROLINE NORRIS and others, respondents.

On bill.

The answer of Caroline Norris, Adeline Thomson, and Edward R. Thomson, to the petition of appeal of John M. Read and Charles Macalester, appellants.

These respondents, not confessing or acknowledging all or any of the matters and things in the said petition of appeal contained, to be true, for answer thereto, say that they believe it to be true that such decree as is complained of by the appellants was made in the Court of Chancery, by the Honorable Abraham O. Zabriskie, Chancellor of the state of New Jersey, but as to the date, substance, and contents thereof, these respondents humbly crave leave to refer thereto, when the same shall be produced.

And these respondents are advised and believe, that the said decree complained of by the said appellants in their petition of appeal, is agreeable to equity; and they therefore humbly pray that the same may be in all respects affirmed, and that the said petition of appeal may be dismissed by this honorable court, with the costs of these respondents.

Dated October 29th, 1868.

WILLIAM L. DAYTON,
Solicitor for respondents.

In Chancery of New Jersey.

Between Caroline Norris and others, Complainants,
and
John M. Read and Charles Macalester, Executor, &c., of John R. Thomson, dec'd, and others, Defendants.
} On Bill, &c.

BRIEF OF DEFENDANTS, EXECUTORS AND TRUSTEES.

1. The trustees under Mr. Thomson's will are bound, as well by the confidence which their testator has reposed in them, as by the oath which they have taken as executors, to defend the trust which that will has created. They have, and can have no discretion in the matter—no personal feelings or views. The will is not theirs, it is their testator's, and unless its provisions are unlawful, they are bound to carry them into effect. If the testator's family think that they could have made a better will, and, consequently get together, and execute what they call a "family settlement," and then ask for the decree of this Court to carry it into effect, they can only succeed on the ground of the will itself being intrinsically defective. The class of cases of which Stapilton *vs.* Stapilton, (1 Atkins, 2; 3 Lead. Cases in Equity, 684,) is the leading one, never went so far as to substitute a family settlement for a will, and to allow the latter to be repealed by the former.

As a mere family settlement, therefore, the case of the complainants has no especial merit.

2. If such be the case, no such act of the Legislature as has been passed can give it validity as against the will of the testator. That will has created certain trusts, and if those trusts are valid, no legislative act can give validity to a family bargain by which they are agreed to be considered as invalid. The safety of every State requires that the difference between the judicial and the legislative branches of government should be sharply drawn, and if the trusts created by this will be in themselves valid, and a chancellor should deem himself bound to refuse to substitute the settlement for the will, the Legislature cannot rush in where the judiciary has feared to tread.

But it is urged that the act takes away no vested interest or vested estate, and therefore that under the authority of Croxall *vs.* Shererd, 5 Wallace, 268, and other cases of this class, it can validate an agreement made between all the parties now *in esse*.

But the distinction is familiar between legislative acts which operate as modes of assurance—which give powers of sale—which unfetter restrictions—which confirm defects, and legislative acts which divert the channels of the testator's bounty—which take away property from one person and give it to another. All the cases referred to are of the former class; not a case can be cited in which an act of the latter class has ever been sustained;* and when this statute of April 10th, 1868, undertakes to approve and confirm the release by a donee of a power which is purely collateral, it is simply an act of confiscation of that power, and a repeal of a settled principle of the common law from the Year Books down. Unless, therefore, the trust is in itself bad, no act of the Legislature can, it is submitted, have any operation whatever.

3. We, therefore, come down to the investigation of the will itself.

a. There are two powers of appointment given to the widow: one, a power to appoint the *corpus* of her annuity to the testator's family, which is a power in gross, and the other a

*See the authorities cited in the appellant's argument in Stanley *vs.* Colt, 5 Wallace, 131, in which case an act which allowed trustees of a charity to sell real estate was held constitutional, *because there was no diversion of the gift.*

power to appoint the surplus income accumulated at her death (in which she has and can have no interest whatever) to certain institutions, and this is a power purely collateral.

As to the former power, the authorities seem to decide that it may be released in favor of the ulterior objects of the appointment; and if the widow had made a settlement with the appointees under *that* power, it is probable that no subsequent execution of the power, inconsistent with the terms of this settlement, would be supported either at law or in equity.

b. It is far different in the case of a power simply collateral. From the case printed by Mr. Sugden from the Year Book of 14 Henry VII, and from Digge's case which followed it, down to this day, the authorities are consistent that such a power cannot be suspended, released or extinguished. The claim, then, of these plaintiffs, must be based upon the invalidity of the power itself.

At this day, the general principles of the law of charitable uses are familiar to all. Trusts that would be invalid as to other objects, are supported in favor of charities—the rule against perpetuities has yielded in their favor—and when the charities themselves which the testator has named have, from particular reasons, been disabled from taking, others have been substituted, and thus a fund for the erection of a Jews' synagogue has been transferred to a foundling hospital. The law has followed the gospel in the prominent position which it has given to charity.

The class of cases of which Morice *vs.* The Bishop of Durham, decided by Sir William Grant in 1804, and affirmed by Lord Eldon in 1805, is the leading one, took the distinction between objects which *might* indeed be charitable, but which *might* also be much more or much less. The trust was for such objects of "benevolence and liberality" as the Bishop of Durham should approve, and this was held bad, not because it did not include objects of charity, but that it included more, and being indivisible, was therefore bad for uncertainty.

Then followed the cases, cited by the complainants, of James *vs.* Allen, 3 Merivale, 17; Williams *vs.* Kershaw, 5 Clark & Finelly, 111, note; Ellis *vs.* Selby, 1 Mylne & Craig, 286 (where the bequest was to "such charitable or other purposes"); and Williams *vs.* Williams, 5 Law Journal, ch. 4.

It is principally upon the authority of Williams *vs.* Kershaw, decided in 1835 by Lord Cottenham,* that the complainants ask for a decree. The devise was to "such benevolent, charitable and religious purposes as the executors should, in their discretion, think most advantageous and beneficial." The decision is not reported at length, and but one part of the reasoning is given:—"It is argued, in order to prove the gift to be good, that the terms must be taken conjointly; if so, every application must be to a religious purpose, which would no doubt be benevolent, and, in a legal sense, charitable; but the question is, did the testator so consider it? Did he mean that there should be no application of any part of the residuary fund, except to religious purposes? Such does not appear to me to be his intention: he intended to restrain the discretion of the trustees, only within the limits of what was benevolent, or charitable, or religious. If this be the right construction, then the question is, what the decisions have ascertained to be the rule on the subject." And after referring to the authorities already cited, and to three others,† the decision was that the gift could not take effect, and that the residue was undisposed of.

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* He had heard the case in the Rolls Court, and decided it after he came on the woolsack.

† Waldo *vs.* Caley, 16 Vesey, 206; Ommany *vs.* Butcher, Turn. & Russel, 260; and Vezey *vs.* Jamison, Simons & Stuart, 69.

Waldo *vs.* Caley, decided by Sir W. Grant in 1809, was a bequest of money to be spent "in promoting charitable purposes, as well those of a public as a private nature, and more especially in relieving such distressed persons, either the widows or children of poor clergymen, or otherwise, as his wife should judge most worthy and deserving objects, giving a preference always to poor relations;" which was held to be good.

In Ommany *vs.* Butcher, (decided by Sir Thomas Plumer, in 1820,) "in case there should be any money remaining," said the testator, after making sundry bequests to charitable institutions, "I should wish it to be given in private charity." This bequest was held to be bad.

The authority of this decision has been much questioned, (see Boyle on Charities, 294,) and it seems to have been shaken by the later case of Horde *vs.* Earl of Suffolk, 2 Mylne & Keen, 59, decided in 1833 by Sir John Leach, where the income of a perpetual fund to be "given away in charity, either to individual persons or to public institutions, in such sums, ways and manner as the trustees should think fit, without any interference or control;" and it was held that the case was not distinguishable from Waldo *vs.* Caley.

Vezey *vs.* Jamison was decided by Sir John Leach in 1822, and in that case a bequest of the residue to executors, to dispose of at their pleasure, either for charitable or public purposes, "or to any person or persons in such shares, &c., as they should think fit," was obviously held bad.

The complainants' brief suggests that Mr. Boyle, in his Treatise on the Law of Charities, admits the correctness of this decision if the change of the disjunctive preposition be correct, which he doubts; but a consideration of all the author's strictures on the decision seems to show that his doubts had a much wider range,—though, as is well known, there is not, with English text writers, the same free spirit of criticism of adjudicated cases which prevails here.

But the language in Williams *vs.* Kershaw differs from that used in this case. There it was "to such benevolent, charitable and religious *purposes*." Here it is "to such benevolent, religious or charitable *institutions*."

In Hill *vs.* Burns, 2 Wilson & Shaw, 80,* the bequest seems to have been to trustees, "in aid of the *institutions* for charitable or benevolent purposes established or to be established in the city of Glasgow or its neighborhood;" and it was thought that the term *benevolent*, would not bear any other meaning than charitable, being employed in favor of a public institution. It was, therefore, a mere redundancy of expression, and did not communicate any ambiguity to the gift, which was accordingly upheld.

In Miller *vs.* Rowan, 5 Clark & Finelly, 99, decided in the House of Lords, in 1837, the bequest of the residue was to trustees, to distribute the same to such charitable and benevolent purposes as they should think proper; and Lord Brougham, in delivering the judgment, said:—"Is this gift validly given to charitable uses? The maker of the deed first says that the residue shall be applied by the trustees to such benevolent *and* charitable purposes as they may think proper. Suppose we read 'and,' 'or;' the authorities in the Scotch law do not entitle us to hold that this is so uncertain as to be void. In Hill *vs.* Burns, decided by this House, the fund was to be distributed among institutions established or to be established in Glasgow or its neighborhood, 'for charitable and benevolent purposes,' the same words; this was held sufficiently certain by

* Wilson & Shaw's Reports (Scotch) are not in anyof the public or private libraries to which counsel have been able to refer. The case is *said*, in Boyle on Charities, 286, and elsewhere, to be cited in 2 Dow & Clark, 101; but this is an error. It is referred to in 5 Clark & Finelly, 102, note (*a*).

the Court of Sessions, and their judgment was affirmed by your Lordships. Indeed, the distinction between charitable and benevolent uses was not taken in that case, and there appears nothing in the authorities on this subject which should lead us to suppose that the Scotch law has ever given the technical meaning to the word 'charity' or 'charitable,' which our English law has given since the Statute of Elizabeth. It is true that, in Hill *vs.* Burns, institutions in or near Glasgow are named, but I am now citing the case on the use of the word 'benevolent' only. For that nothing can turn upon the generality of the words in the present case, namely, 'charitable purposes,' if the addition of benevolent does not vitiate the gift, appears clear from the latest decision of the House, that in Crichton *vs.* Grierson, where it was held, after a careful consideration of all the authorities by the noble and learned Lord who then presided, that a gift to trustees, to be applied to such charitable purposes as they shall think fit, is good by the law of Scotland. The addition in that case, of bequests to friends and relations, was much relied on in the argument at the bar and in the printed cases, but it does not form the ground of the decision. My noble and learned friend, Lord Lyndhurst, expressly held that charitable purposes would be sufficient by the law of England, and that the Scotch law is less strict than ours in this respect, of which, indeed, there can be no doubt."

The latest cases show a disposition to restrict the rule of Morice *vs.* Durham. In Whicker *vs.* Hume, 14 Beavan, 509, the testator, who had long resided in the East, and was skilled in Oriental languages and literature, left a fund to trustees to be appropriated "as in their uncontrolled discretion they should think proper and expedient, for the benefit, advancement and propagation of education and learning in every part of the world, as far as circumstances would permit."

It was objected to this bequest, that inasmuch "as those purposes alone are considered charitable which the Statute of Elizabeth enumerates, or which, by analogies, are deemed within its spirit and intendment;* this gift was too large, as the only 'learning' mentioned in the statute is 'schools of learning,' and

* Sir Wm. Grant's language in Morice *vs.* Bishop of Durham.

the only 'education,' 'the education of orphans;'" and after referring to the cases of Williams *vs.* Kershaw, Ellis *vs.* Selby, &c., it was urged that the bequest embraced the whole sphere of literature and science, in any civilized or uncivilized country; the fund might be given to a distinguished French astronomer or an Indian brahmin, and it would be impossible for the Court to regulate its application. But it was held by Sir John Romilly, M. R., (1851,) that the trust was not too indefinite, and that, if necessary, the Court would compel the proper application of the fund by the trustees, and this decision was, in 1858, affirmed in the House of Lords, (7 Clark's Appeal Cases, 124,) Lord Chelmsford, Lord Cranworth and Lord Wensleydale all concurring that the testator meant to use the word learning as connected with education.

In the present case, therefore, it may well be presumed that the testator did not intend to use the words "benevolent institutions" otherwise than so far as they were charitable or religious.

But, under any circumstances, it may well be doubted if there is any benevolent institution, in the proper and legal sense of those words, which is not also a charitable institution. The word institution means, in this connection, a lawful institution—one whose existence consists in perpetual succession for the purposes of general and public benevolence, and every such institution must necessarily be a charity.

WM. HENRY RAWLE,
Of Counsel for Defendants, Trustees.