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BILL OF COMPLAINT.

(Filed Nov. 19, 1930.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, The American National Bank of Camden, Executor and Trustee under the will of William E. Morgenweck, deceased, a banking corporation organized under the laws of the United States of America, doing business in the City and County of Camden, State of New Jersey, respectfully shows that:

1. The complainant was on July 17, 1928, due and legally granted by authority of the United States Government, the power to exercise trust functions and to act as fiduciary, such as to hold and discharge the offices of executor and trustee, either or both.

2. William E. Morgenweck, late of the said City of Camden, died on March 5, 1930, leaving a last will and testament, dated February 6, 1919, a codicil thereto dated July 26, 1929, and a further codicil dated February 4, 1930, all of which were on March 17, 1930, duly proven before and admitted to probate by the Surrogate of the County of Camden. True and complete copies of said will and codicils are hereto annexed, marked Schedule "A," and made a part hereof.

Said codicil of February 4, 1930, provided in part as follows:

"Out of this account there should be paid (or set aside from Month to Month a sum sufficient to pay the Sime-anual interest and other expenses that there may be) and from the balance there should be paid to my be-loved Wife the sum of $100.00 a week during her Life.

To my Son Wm. P. Morgenweck I bequeth the sum of $50.00 (Fifty Dollars) a week during his Mothers life time, but at her death if he survives her this amount shall be increased to One Hundred Dollars ($100.00) a week during his lifetime. Under no condition can this money be attached by any one to pay any debt or debt's incurred by said Wm. P. Morgenweck. If said Wm. P. Morgenweck should have any direct issue at his death, then after his death $100.00 (One Hundred Dollars) shall be set aside weekly to cloth and educate the same, after which each of them shall receive Ten Dollars Weekly ($10.00) until they marry after which this amount shall be increased to $25.00 a week with the following provission, That his or her mate as the case may be cannot attach the same for there use under any circumstances.

Should however my son Wm. die without issue then at his death and from then on until the end of her natural life his Lawful Wife shall receive a weekly sum of $50.00 (Fifty Dollars) as long as or providing she does not marry again, but should she marry again she will forfeit this allowance.

As stated above it is my wish that these bequests can under no condition be attached for the satisfaction of a debt of any nature created by any of the above named beneficiarys. After the death of My Wife, My Son, His Wife, Or their issue should they have any the income from my estate shall be equally devided semi-annually (after expenses have been deducted therefrom) with ## the local Hospitals in equal proportions."

3. On March 17, 1930, letters testamentary were issued thereon unto complainant, The American National Bank of Camden, the executor and trustee in the said will named, which bank has taken upon itself the burden of administering the said estate and performing the said trust.

4. The said William E. Morgenweck was one of the organizers of the said bank and was elected its first president serving in that capacity for a period of two and one-half years up to the time of his death, but had had no previous experience in the management or conduct in any capacity of any bank, trust company or similar financial institution.

5. The said last will and testament of William E. Morgenweck dated February 6, 1919, was prepared by counsel from instructions given by the said William E. Morgenweck, but both of the said codicils were prepared by the said William E. Morgenweck without legal advice and were personally written by him by means of his own typewriting

machine and were intended as mere temporary documents, the last of which was made in the rush of preparations for a vacation trip in Florida, and to be superseded by a new will or codicil to be prepared in collaboration with counsel, when upon his return he should find time to give it further attention.

6. That the said William E. Morgenweck did not die as the result of a lingering illness, but his death was unexpected, without warning, and instantaneous while on a fishing trip off the coast of Florida.

7. While the said William E. Morgenweck was a man of considerable experience in dealing with human nature, his primary or academic education was limited by economic circumstances which were in his early life particularly acute. His occupation during most of his life was that of the tailoring business which later evolved into the business of pressing, cleaning and dyeing. He was not versed in legal principles nor did he understand either by study or experience the distinctions between the functions, powers and duties of different fiduciaries such as the distinction between those of executors and trustees.

8. At the time of the execution of his said will on February 6, 1919, the said William E. Morgenweck was the owner of premises #17 Broadway, Camden, New Jersey, under deed from Hattie Satinsky, singlewoman, dated July 13, 1918, of record in the office of the Register of Deeds of Camden County in Book 431 of Deeds, page 84 &c.; and a

property in the rear thereof known as #10 Hudson Street, Camden, New Jersey, under deed from Hubert H. Pfeil, singleman, dated December 1, 1916, of record in said Register of Deeds office of Camden County in Book 412 of Deeds, page 428, &c., which were used by him for the conduct of his said business.

9. At that time, February 6, 1919, he was associated in some organization or organizations with Patrick H. Harding, a member of the Bar of this State, having offices in the said City of Camden, and would occasionally have Mr. Harding represent him as counsel.

10. In his said last will and testament, the decedent named Patrick H. Harding executor and trustee, but in his last codicil he substituted the complainant as executor and trustee.

11. On October 3, 1919, the said William E. Morgenweck acquired the title to premises #8 Hudson Street, Camden, New Jersey, under deed from Anna E. Golden and Richard Golden, by deed dated October 3, 1919, of record in said Register of Deeds Office of Camden County in Book 451 of Deeds, page 643, &c., and then constructed or remodelled the buildings used in his said business, utilizing the rear portion, fronting on Hudson Street, as "plant" and workrooms in which cleaning, dyeing and pressing was done and utilizing the front, facing on Broadway, as a retail store for the receipt and delivery of goods, another portion of the front, facing

on Broadway, for the occupancy of a tenant upon a rental basis, and utilizing the upper floors as living quarters for himself and family.

12. On October 14, 1925, the said William E. Morgenweck made and executed his bond unto the Trustees of Centenary Tabernacle Methodist Episcopal Church of Camden, N. J., to secure the payment of the just debt of $50,000, payable at the expiration of five years, with interest thereon at the rate of 6% per annum, which debt is now due and payable.

13. The said bond was secured by a mortgage bearing even date therewith made by said William E. Morgenweck and Margaret S. Morkenweck, his wife, unto the Trustees of Centenary Tabernacle Methodist Episcopal Church of Camden, N. J., recorded in the office of the Register of Deeds of Camden County in Book #270 of Mortgages, page 186, payable at the expiration of five years, with interest at 6% per annum covering as a first lien said premises #17 Broadway, #8 and #10 Hudson Street, Camden, New Jersey, which mortgage is now due and payable.

14. On December 19, 1928, the said William E. Morgenweck and wife executed and delivered unto Walgreen Co., a corporation of the State of Illinois, a lease of the said premises, #17 Broadway, #8 and #10 Hudson Street, Camden, New Jersey, for the term of thirty years, beginning July 1, 1929, for a net rental of $13,000 each and every year during

the said term. The said lease appears of record in the office of the Register of Deeds of Camden County in Book 702 of Deeds, page 86. A copy of which lease is hereto annexed, Marked Schedule "B," and made a part hereof.

15. The said Walgreen Co. thereupon on December 19, 1928, executed and delivered unto the said William E. Morgenweck and wife, a Junior Lease upon premises #8 and #10 Hudson Street (and 12 or 13 feet in rear of #17 Broadway) upon which is erected the "plant" for the term of five years at a rental of $2,000 per year. A copy of which lease is hereto annexed, marked Schedule "C," and made a part hereof.

16. On April 4, 1929, the said William E. Morgenweck sold his said business of cleaning, dyeing and pressing unto Bornot, Inc.

17. The Walgreen Co. is in possession of the said premises #17 Broadway under its lease; and premises #8 and #10 Hudson Street, known as the "plant", is in the possession of the said William E. Morgenweck or the complainant as his executor and trustee, but at present is unoccupied, and non-revenue producing.

18. At the time of death of the said William E. Morgenweck, he owned no other real estate except a one-fourth interest in a piece of land in the Township of Pensauken, Camden County, New Jersey, at the southwest corner of Cove Road and Burling-

ton Pike in which his net investment amounted to less than $3500.00. The other owners having interest in the said property are Arthur E. Armitage, William Heckenhorn and Charles A. Smith.

19. Decedent's interest in the said Pensauken Township property is evidenced by a declaration of trust in writing, dated February 11, 1925, made and executed by Arthur E. Armitage, a true copy of which is hereto annexed, marked Schedule "D," and made part hereof.

20. The said decedent was possessed of personal property in the estimated value of $50,048.11 including certain investments in corporate shares of stock hereinafter referred to and including also a life insurance policy of the Provident Life Insurance Company, of Philadelphia, #466391, in the amount of $5,000, the proceeds of which have been paid to the complainant. His debts and funeral expenses amounted to $31,013.07 including the following unpaid negotiable notes of the deceased:

Barton S. Muir, Inc.	$645.00
The American National Bank of Camden	13,900.00
Interest	198.91
Caroline Reutsch	1,000.00
Camden Safe Deposit and Trust Co.	400.00
Interest	4.74
The American National Bank of Camden, endorser on note of H. M. Beck and Frank Voigt	320.00
Interest	15.61

At the time of his death, the decedent also owed certain other debts which are included in the amount of $31,013.07, and as near as can be ascertained are as follows:

Elmer G. Van Name	$50.00
Barton S. Muir, Inc.	14.17
Camden County Council Boy Scouts of America, Inc.	25.00
N. J. Bell Telephone Co.	6.20
Standard Oil Co. of N. J.	107.12
Barton S. Muir, Inc.	15.34
West Jersey Homeopathic Hospital	100.00
Chamber of Commerce of Camden	25.00
Bornot, Inc.	19.75
John A. Crate, DDS.	64.00
City of Camden	48.90
Wm. B. Calhoun	20.19
Dr. H. Nachman	15.00
Peterson Bros.	25.00

21. The said William E. Morgenweck at the time of his death was possessed of certain corporate certificates of stock to which reference has been made in the preceding paragraph, the respective cost of each and the present market value as near as can be ascertained, being set opposite each item, as follows:

# sh.		Total Cost	Pres. Market Value Per Sh.	Total
43	The American National Bank of			

		Camden @ $166.67 per sh.	$7,166.81	$140.	$6,020.
	100	American Brown Boveri Electric Corporation, Class "A" Participating @ $14.	1,400.00	8⅜	837.50
10	1000	Bornot, Inc., Class "B" @ $10	10,000.00	6½	6,500.00
	50	West Jersey Trust Company @ $60	3,000.00	$60.	3,000.00
	50	American Stores @703/7	3,518.75	38½	1,925.
	14	Trustees System Service Corp. Pref. @ $60.	840.00	$45.	630.
	2	National Association Institute of Dyeing and Cleaning, Inc. (Par $100.) Pref. @ $100.	200.00	00	000
	2	Community Hotel Corporation, Pref. @ $100.	200.00	$65.	130.
	1	Community Hotel Corporation, Common	2.00	00	00
	100	Bankers & Investors Securities Corp., common, @ $1.	100.00	00	000
	2	Camden Masonic			

Association Bonds, @ $25.	50.00	$25	50.

22. The complainant as executor and trustee would be unable to pay the annuities provided in the Codicil of February 4, 1930, except from the rental of the said premises, #17 Broadway, #8 and #10 Hudson Street, Camden, New Jersey, or some fund or income producing investment substituted for the said real estate.

23. The said Margaret S. Morgenweck, widow of the deceased, is living and is 59 years of age. The said William P. Morgenweck, son of the deceased, is living and is 35 years of age. Lena V. Morgenwick, wife of the said William P. Morgenweck, is living and is 35 years of age. The said William E. Morgenweck left surviving him no other children or issue of deceased children. The said William P. Morgenweck and Lena V. Morgenweck, his wife, have no issue.

24. In the City of Camden there are but two hospitals operating as charitable institutions, to wit, West Jersey Homeopathic Hospital, located on the west side of Mt. Ephraim Avenue, between Atlantic Avenue and Everett Street, and the Cooper Hospital, located on the east side of Sixth Street between Mickle and Stevens Streets.

25. Pursuant to the directions of the said codicil, dated February 4, 1930, the complainant, acting in its representative capacity, has paid unto the said

Margaret S. Morgenweck, her weekly allowance of $100 per week for twenty-six weeks making a total of $2600, and has paid unto the said William P. Morgenweck, son of the deceased, his allowance at the rate of $50.00 per week for twenty-six weeks, making a total of $1300.00.

26. None of the securities owned by the deceased have been sold. Their market value is and has ever since the death of the deceased been less than their cost to the decedent.

27. The diamond cluster opal pin mentioned in paragraph 3 of the will of the deceased, dated February 6, 1919, was delivered to the said Caroline Reutsch by the decedent prior to his death.

28. The two stop watches mentioned in paragraph 4 of the said will were stolen from the decedent during his life time, and not recovered.

29. The clothing mentioned in paragraph 5 of the said will has been delivered to the said Frank and Edward Morgenweck by the complainant acting in its representative capacity.

30. The diamond cluster scarf pin mentioned in paragraph 6 of the said will has been delivered to the said Mae Dilmore by the complainant acting in its representative capacity.

31. The gold watch, chain, stick pins, rings and all other jewelry and trinkets mentioned in para-

graph 7 or such of them as could be found at the time of decedent's death have been delivered to the said William P. Morgenweck by the complainant acting in its representative capacity.

32. At the time of the death of the said William E. Morgenweck, he was indebted to Caroline Reutsch in the amount of $1,000 which debt was properly proven by her and paid by the complainant in lieu of any payment to her under and by virtue of paragraph 8 of the said will.

33. The legacy of $200 mentioned in paragraph 9 of the said will has been paid to the said Mae Dilmore by the complainant acting in its representative capacity.

34. Complainant is willing to carry out the provisions of the will and codicils of the said decedent but is in doubt concerning the true and proper construction of the said documents and cannot safely proceed further with its duty in the premises without the directions of this Court.

35. Questions have been raised with respect to the construction of the said documents and other questions may in the future be raised.

36. Complainant hereby submits some of the questions that have been raised or may be raised.

36 a. What effect, if any, does the codicil dated July 26, 1929, have?

36 b. What effect, if any, does the codicil dated February 4, 1930, have?

36 c. Was the first codicil revoked by the second codicil?

36 d. Does the trustee have the power at all times to execute and deliver a mortgage or mortgages covering the real estate of the deceased including #17 Broadway, Camden, New Jersey, and the power to fix the amount and terms of the said mortgage, and to pay any cost and expense to be incurred in obtaining the same according to its own discretion?

36 e. Does the said trustee have the power at all times to bind the estate by the execution and delivery of a bond or bonds and warrant or warrants of attorney to confess judgment to accompany any such mortgage or mortgages?

36 f. Does the trustee have the power at all times to execute and deliver a declaration or declarations of no set-off at the time of any assignment or assignments of mortgages covering real estate owned by the decedent including #17 Broadway, Camden, New Jersey?

36 g. Is it the duty of the trustee to pay all debts of the decedent in full even though the payment of the annuities may thereby be delayed?

36 h. Does the trustee have the power in its discretion and is it the trustee's duty to sell the cor-

porate stocks owned by the decedent at any definite time even though there may be received a price lower than that paid by the decedent for the respective stocks without liability on the part of the trustee for losses occasioned thereby?

36 i. Is the widow of the decedent entitled to dower in any of his real estate or has she not elected to accept the benefit of the trust provided for her in lieu of dower?

36 j. Is the provision of paragraph 10 (F) of the will of the decedent revoked by the last codicil or should a fund of $3,000 be set aside in accordance with that provision of the will? If so, should it be taken from the general estate of the deceased or from the proceeds of the sale of #17 Broadway, Camden, New Jersey, at some definite time?

36 k. Does the trustee have the power to rent or lease premises #8 and #10 Hudson Street, Camden, New Jersey, known as the "plant", during the remainder of the five-year term fixed by the Junior lease, and if so, may the trustee in its own discretion fix the amount of rent and other terms of such tenancy?

36 l. Does the trustee have the power to rent or lease premises #17 Broadway, #8 and #10 Hudson Street, Camden, New Jersey, any or all of them, from time to time after the termination of the thirty year term set forth in the said lease with the Walgreen Co., or to lease the same prior to the termina-

tion of said thirty year period should the said Walgreen Co. default in the performance of the terms of the said lease, and does the trustee possess the power to litigate any future question of default in the performance of the said lease by the said tenant?

36 m. Does the trustee's power to sell and convey premises #17 Broadway, Camden, New Jersey, arise at the time of death of the widow of the decedent, or is it postponed to the time of death of decedent's said son, or some other period, or is the said power of sale revoked by either or both codicils?

36 n. Does the gift to the issue of William P. Morgenweck validate the rule against perpetuities? If so, what is the effect thereof?

36 o. If the gift to the issue of William P. Morgenweck is valid, is it limited to income or does it include corpus?

36 p. If the gift to the issue of William P. Morgenweck is invalid, how, if at all, are the gifts to Margaret S. Morgenweck, William P. Morgenweck, Lena V. Morgenweck and the hospitals affected thereby?

36 q. When should final distribution take place, if at all, or should the corpus of the estate be perpetually held by the trustee and the income paid to the designated charities?

36 r. What hospitals are intended in the codicil by the use of the words "the income from my estate shall be equally divided semi-annually with the local hospitals in equal proportion"?

36 s. Is the trustee bound to sell premises #17 Broadway, Camden, New Jersey, immediately upon the death of Margaret S. Morgenweck, or may the trustee hold the same for income, and if so, for what period?

36 t. Is the power to sell #8 and #10 Hudson Street, Camden, New Jersey, as contained in the Will limited or revoked by the lease created by the decedent, or by the specific reference to the Hudson Street properties contained in the last Codicil?

36 u. Does the trustee have a general power to convey, with or without consideration, to mortgage, to lease and to otherwise deal with the one-fourth interest in the said Pensauken Township property and pay carrying charges thereon, even though such carrying charges exceed the income?

36 v. Did the decedent die intestate with respect to any of his property?

36 w. Does the trustee have the power to invest and reinvest all trust assets, to change investments from time to time, and to blend both real and personal property as a general fund?

36 x. To what investments is the trustee limited?

36 y. Does the trustee have the power to vote corporate stock at stockholders' meetings?

36 z. Does the trustee have power to make distribution in kind without converting assets into cash either during the continuance of the trust or in final distribution at its termination and upon what basis of value?

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Margaret S. Morgenweck, William P. Morgenweck, Lena V. Morgenweck, Patrick H. Harding, West Jersey Homeopathic Hospital, The Cooper Hospital, Young Men's Christian Association of Camden, N. J., Arthur E. Armitage, William Heckenhorn and Charles A. Smith who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That this Court may construe the last will and testament and codicils of the said William E. Morgenweck, deceased, and declare the rights of the complainant and the respective defendants thereunder.

3. That this Court may construe the last will and testament and codicils of the said William E. Morgenweck, deceased, and give the complainant directions in the premises and insofar as necessary or advisable specific directions with regard to the questions raised in paragraph 36 of this bill of complaint.

4. That this Court declare the rights, status and other legal relations existing between the parties hereto, whether affirmative or negative in form and effect pursuant to an Act concerning Declaratory Judgments and Decrees, approved by the Legislature of New Jersey in the year 1924 (P. L. 1924, Chapter 140, page 312).

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

ELMER G. VAN NAME,
Solicitor for and of Counsel with Complainant.

SCHEDULE "A."

IN THE NAME OF GOD, AMEN.

I, William E. Morgenweck, now residing at No. 17 Broadway, Camden, New Jersey, being of sound and disposing mind, memory and understanding, do make, publish and declare this as and for my last Will and Testament, in the manner and form following:

1. I direct all of my just debts and funeral expenses to be paid by my executor hereinafter named, as soon after my decease as by him shall be found convenient.

2. I hereby revoke any and all Wills and testamentary papers of every nature and kind by me at any time heretofore made.

3. I give and bequeath unto my sister, Miss Caroline Reutsch, of Jamaica, Long Island, my diamond cluster opal pin, and this legacy shall not lapse by reason of her death.

4. I give and bequeath unto my brother, Frank Morgenweck, of New York, my two stop watches.

5. I give and bequeath unto my two brothers in equal shares, Frank Morgenweck, of New York, and Edward Morgenweck, of Philadelphia, or the survivor of them, all of my clothing.

6. I give and bequeath unto Miss Mae Dilmore, of No. 424 Haddon Avenue, Camden, New Jersey, my other diamond cluster scarf pin.

7. I give and bequeath unto my son, William P. Morgenweck, my gold watch, chain, stick pins, rings, and all other jewelry and trinkets that I may have.

8. I give and bequeath unto my said sister, Caroline Ruetsch, the sum of six hundred dollars in discharge of a debt of five hundred dollars that I now owe her, and this legacy shall not lapse by reason of her death. In case I should extinguish said indebtedness, this legacy shall lapse.

9. I give and bequeath unto the said Miss Mae

Dilmore, because of her faithfulness in looking after my business during my recent illness, and also looking after it when I had the influenza, the sum of two hundred dollars.

10. I give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal, wherever situate, of which I shall be seized, or to which I may be entitled at the time of my decease, including, any lapsed legacies, unto my friend, Patrick H. Harding, and his successors, in fee, as trustee, for the following uses and purposes:

(A) To permit my beloved wife, Margaret S. Morgenweck, during her lifetime, to occupy and use the upper floors of my property, No. 17, Broadway, Camden, N. J.

(B) To rent or lease the store, workrooms, and outbuildings at No. 17 Broadway, together with machinery, equipment, and trade fixtures, or any part thereof, to the best advantage of my estate; provided, however, that as between those willing to give an equal amount of rental, my son, William P. Morgenweck, shall have the preference. My trustee shall take such precautions and require such guarantees or sureties as will compel the leasee to keep the premises occupied by him, and the fixtures and equipment up to and in the same standard repair as the same may be in at the time he receives them, and if a lease be given, the same shall contain a provision that it may be terminated by my trustee, should the leasee fail to comply with this requirement.

(C) The net profit produced by the rental of said property after the payment of taxes and other expenses, shall be paid by my trustee to my said wife, Margaret S. Morgenweck, which shall be paid to her monthly.

(D) To sell and convey, at any time, at public or private sale, according to his own judgment, any of my property, except 17 Broadway, Camden, N. J.

(E) Upon the death of my said wife, Margaret S. Morgenweck, my trustee shall sell the said property, 17 Broadway, to the best advantage; provided, however, that as between those offering the same price, preference shall be given to my said son, William P. Morgenweck.

(F) At the death of my said wife, the sum of three thousand dollars shall be invested and re-invested by my trustee and his successors as a perpetual fund, the income of which shall be paid by my trustee in equal shares, unto the three following institutions, namely: The Central Y. M. C. A., the Trustees of The Cooper Hospital, and The West Jersey Homeopathic Hospital, all of Camden, New Jersey, payments to be made semi-annually. Should any cease to exist, the others shall take all of said income.

(G) Of the remainder of said trust estate, my trustee shall, after the death of my said wife, pay and deliver unto my said son, William P. Morgenweck, one-half, as his own absolute property.

(H) The other half of said remainder of said trust estate shall be divided into two equal parts and held by my trustee for the following purposes: One part thereof to be used to give to the first child born to my said son, if a boy, a good school and college education, and any surplus to be paid to such child at his arrival at the age of twenty-one years. The other part thereof to be used to give his second child, if a boy, a good school and college education, and any surplus to be paid to such child at his arrival at the age of twenty-one years. Should either or both of the first two children of my said son be a girl or girls, the two parts provided for, shall be held by my trustee until her or their arrival at the age of twenty-one years, when the same shall be paid to her or them, respectively. It is my intention that the first two of the children of my said son arriving at the age of twenty-one years, shall take all, to the exclusion of any younger children. Should there be no child or children of my said son, William P. Morgenweck, having taken or capable of taking under this clause at a period twenty-one years after the time of his marriage, or should he not marry within twenty-one years after the death of the survivor of myself and wife, my trustee shall pay and deliver unto my said son, William P. Morgenweck, the remaining one-half of the proceeds of the sale of said trust estate, or such part thereof as may then remain in the hands of my trustee. Should any son of my said son, William P. Morgenweck, enter into the enjoyment of his share and die before reaching the age of twenty-one years, he shall not be counted and the remainder of the part of my

estate that would have gone to such son, shall remain a part of my trust estate, and be subject to the provisions of this clause.

(I) In case of the death of my said son, William P. Morgenweck, before my death, the income of the entire remainder of my said trust estate shall be paid to the three parties named in paragraph F, in the manner therein provided.

(J) My said trustee shall have power to invest the assets of the trust estate, in such securities as are allowed by law, and shall secure if possible, such securities as produce a stated income, and such as are exempt from taxation, and may from time to time, change or substitute the securities.

(E) In case of the death, resignation, or removal of my said trustee or executor, a successor or successors shall be appointed by the Court from time to time, each of whom shall have all of the powers hereby conferred upon the original trustee and executor.

11. I do hereby nominate, constitute and appoint the said Patrick H. Harding to be the executor of this my last Will and Testament.

12. I do hereby direct my executor to convert into cash my Chalmers car for the best price obtainable, also to convert into cash my Saxon car and my Twombly car, for the best prices obtainable. Also to convert into cash premises No. 10 Hudson Street,

Camden, New Jersey, when and upon such terms as in his judgment shall be for the best interest of my estate.

13. I also direct my executor to convert into cash all Liberty Bonds that I may have on hand; to convert into cash my two shares of stock in Avalon Land Company, and to convert into cash all woolens, trimmings, and other things representing stock in trade of the tailoring business. I also desire my executor to collect all of my insurance, including $2,000 policy of the Prudential Life Insurance Co., and $1,000 policy of the Metropolitan Life Insurance Co.

14. I also direct my executor to secure an accounting from Mark D. Bulifant, for any interest in premises No. 19 Broadway, Camden, New Jersey, either by suit or otherwise, as in his judgment shall seem best, this matter now being in the hands of Charles A. Wolverton, as my counsel.

15. I also desire my executor, Patrick H. Harding, to obtain damages or compensation from the company that insured the car which caused my recent injury, as in his judgment shall seem best.

16. I also desire my executor to pay off and discharge the Building and Loan mortgage against premises 17 Broadway, and if he should have insufficient money on hand for this purpose, to borrow at interest, enough to make such payment.

17. I hereby empower my said executor to make sale and conveyance of any and all of my said property, except as above provided, at public or private sale, and upon such terms as may in his judgment be best, without the aid of any Court. The purchaser shall not be liable for the application of the purchase money.

18. I hereby authorize the acting executors or executor for the time being of this my will, to satisfy any debts claimed to be owing to me or my estate, and any liabilities to which I or my estate may be alleged to be subject, upon any evidence they or he shall think proper, and to accept any composition or security for any debt, and to allow such a time for payment (either with or without taking security), as to the said acting executors or executor shall seem fit, and also to compromise, or submit to arbitration, and settle all accounts and matters belonging or relating to my estate, and generally to act in regard thereto as they or he shall deem expedient, without being responsible for any loss thereby occasioned.

19. And I direct that all legacies given by my said will, or any codicil thereto, shall be paid free from any inheritance or other tax, and shall be without any deductions whatever.

20. My said executor and trustee shall give Bond with The Fidelity and Deposit Company of Maryland, as surety thereon, for the actual amount which shall from time to time come into or remain in his

hands, and in no case shall he be required to follow the rule of giving a Bond in a double the amount.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this sixth day of February, in the year of our Lord, One thousand nine hundred and nineteen.

William E. Morgenweck (S)

Signed, sealed, published and delivered by the above named Testator, William E. Morgenweck, as and for his last Will and Testament, in the presence of us, who at his request, in his presence, and in the present of each other, have hereunto subscribed our names as witnesses.

John C. Doughten.
Elmer G. Van Name.

———

July 26th 29—

Codicil to my will.

I Wm. E. Morgenweck of Sound mind desire to make following changes to my will:—My finances as regards application to my wife & Son to be changed as follows, after other arrangements are complied with (and to do such there are plenty of funds available) I desire that the income from the rental of 17 Broadway shall be used in the following manner. 1st a suitable sum shall be taken out of each months income to pay the mortgage interest as it comes due & renew same upon maturity. 2 of the balance 75% should be giving to my wife for her Support in weekly installments She to open an

(The American National Bank)

account in this bank & the installments placed to her acct. The net balance to be given in 3 monthly periods to my son Wm. P. Morgenweck during his lifetime this to be free from attachment by any one.

Wm. E. Morgenweck

Witness to Signature
J. Oscar Hunt
Arthur W. Rogers

I Wm E Morgenweck, of the City of Camden and County of Camden & State of New Jersey, being of sound and disposing mind do make, Publish and declare this a Codicil to my last Will and Testament; As soon as possible after my demise all my bills shall be paid from the proceeds of a $5000.00 Life Insurance Policy that I have. When my securities will bring more that I paid for them they should be sold and the proceeds used to pay off the balance of notes or debt still unpaid. The balance to be placed to the account of the estate—to which there shall also be added the monthly revenue derived from the rental or lease of the property's 17 Broadway and No's 8 and 10 Hudson street. Out of this account there should be paid (or set aside from Month to Month a sum sufficient to pay the Simeanual interest and other expenses that there may be) and from the balance there should be paid to my be-loved Wife the sum of $100.00 a week during her life. To my Son Wm. P. Morgenweck I bequeth the sum of $50.00 (Fifty Dollars) a week during his Mothers life time, but at her death if he survives her this amount shall be increased to One Hundred

Dollars ($100.00) a week during his lifetime. Under no condition can this money be attached by any one to pay any debt or debt's incurred by said Wm. P. Morgenweck. If said Wm. P. Morgenweck should have any direct issue at his death, then after his death $00.00. (One Hundred Dollars) shall be set aside weekly to cloth and educate the same, after which each of them shall receive Ten Dollars weekly ($10.00) until they marry after which this amaunt shall be increased to $25.00 a week with the following provission. That his or her mate as the case may be can not attach the same for there use under any circumstances. Should however my son Wm. die without issue then at his death and from then on until the end of her natural life his Lawful Wife shall receive a weekly sum of $50.00 (Fifty Dollars) as long as or providing she does not marry again, but should she marry again she will forfeit this allowance. As stated above it is my wish that these bequests can under no condition be attached for the satisfaction of a debt of any nature created by any of the above named beneficiarys.

After the death of My Wife, My Son, His Wife, Or their issue should they have any the income from my estate shall be equally devided semi-annually (after expenses have been deducted therefrom) with ## the local Hospitals in equal proportions.

I also name the American National Bank as my Executers of my Estate.

Witness this my signature this day of our lord February 4th 1930

Wm. E. Morgenweck

Witness. Arthur W. Rogers
Witness. J. Oscar Hunt

STATE OF NEW JERSEY
COUNTY OF CAMDEN

I, GEORGE W. WHYTE, Surrogate of the County of Camden, do hereby certify that the foregoing is a true copy of the last will and testament and Codicils of William E. Morgenweck, deceased, late of the County of Camden and State of New Jersey, upon which Letters Testamentary were granted on March 17th, 1930, unto American National Bank, the executor named therein. Said Will and Codicils were filed March 17th 1930, and recorded in the Surrogate's Office of the County of Camden, in Book No. 75 of Wills page ——.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, at Camden, this seventeenth day of March, A. D. 1930.

(SEAL)

GEO. W. WHYTE.
Surrogate

By: C. M. Powell Quicksall
Deputy Surrogate

SCHEDULE "B."

This Indenture, made the 19th day of December, A. D. 1928, between William E. Morgenweck & Margaret S., his wife, of the City and County of Camden, State of New Jersey, hereinafter called "Lessor", and "Walgreen Co.," (a corporation duly incorporated and existing under the laws of the State of Illinois), hereinafter called "Lessee".

WITNESSETH:—

That the Lessor, in consideration of the rents, covenants and conditions herein reserved and contained on the part of the Lessee to be paid, kept and performed, does hereby lease unto the Lessee, and the Lessee does hereby hire and take from the Lessor the buildings and premises in the City of Camden, State of New Jersey and described as follows:

(a) ALL THAT CERTAIN entire three-story building situate and known as #17 Broadway, Camden, New Jersey, described as follows: BEGINNING at a point in the West line of Broadway, one hundred and forty feet and four inches, southward from the south line of Federal Street; thence (1) southward in said west line twenty feet nine inches to a corner; thence (2) westward, parallel with Federal Street one hundred and ten feet to a corner; thence (3) northward parallel with Broadway twenty feet nine inches to a corner; thence (4) eastward one hundred and ten feet to the place of beginning.

BEING the same premises which Hattie Satinsky, singlewoman by Indenture bearing date the 13th day of July, 1918, and recorded in the office of the Register of Deeds for Camden County, New Jersey, in Book #431 of Deeds, page 84 &c., granted and conveyed unto William E. Morgenweck, in fee.

(b) — ALL THAT CERTAIN entire two-story building situate and known as #8 Hudson Street, Camden, New Jersey, described as follows:

BEGINNING on the east side of Hudson Street at the distance of one hundred and forty-six feet southward from the southeast corner of Hudson and Federal Streets; thence eastward at right angles with Hudson Street one hundred feet to a corner; thence southward parallel with Hudson Street fourteen feet to a corner; thence westward at right angles with Hudson Street one hundred feet to a corner in the easterly line of said Hudson Street; and thence northward by the said line, fourteen feet to the place of beginning.

BEING the same premises which Anna E. Golden and Richard Golden, by Indenture bearing date the 3rd day of October, 1919, and recorded in the Office of the Register of Deeds for Camden County, New Jersey, in Book #451 of Deeds, page 643, &c., granted and conveyed unto William E. Morgenweck in fee.

(c) — ALL THAT CERTAIN entire two-story building situate and known as #10 Hudson Street, Camden, New Jersey, described as follows:

BEGINNING at a point in the easterly line of Hudson Street, at the distance of one hundred and sixty feet southwardly from the southeast corner of Federal and Hudson Streets, and extending thence southwardly along the said Easterly line of Hudson Street twenty feet in front or width, and extending eastwardly of that frontage, between parallel lines at right angles to said Hudson Street, the distance of one hundred feet in length or depth.

BEING the same premises which Hubert H. Pfeil, singleman, by Indenture bearing date the 1st day of December, 1916, and recorded in the Office of the Register of Deeds for Camden County, New Jersey, in Book #412 of Deeds, page 428 &c., granted and conveyed unto William E. Morgenweck, in fee; as shown by survey of Remington & Vosbury, dated August 15, 1919, which survey is annexed and made part hereof.

TO HAVE AND TO HOLD the same premises for the term of thirty (30) years commencing the first day of July, 1929, and ending on the Thirtieth day of June, 1959, at a net rental of Thirteen Thousand/Dollars, lawful money of the United States of America or at the Lessor's option and upon demand in gold coin of the present standard of fineness, ($13,000.) per annum.

The aforesaid net annual rental shall be payable in equal monthly installments in advance, on the First day of each and every month during the said term; provided, however, the first month's rent shall be paid at the execution of this lease.

It is hereby mutually covenanted and agreed that this Indenture is made upon the foregoing and following terms, covenant and conditions:

FIRST: That lessee, its successors and assigns, shall and will during the term hereby demised, pay unto the Lessor the said yearly rent herein reserved on the days and at the time and in the manner hereinbefore limited for the payment thereof; both the

fact of payment and the time of payment shall be of essence in the payment of said rentals and mere payment of interest shall not be regarded as justifying delay, and if the Lessee, its successors or assigns fail to pay the rent as aforesaid, or shall fail in the performance of any or either of the covenants, conditions or provisions of this lease on its part to be observed, performed, fulfilled and kept, then, at all times thereafter if such defaults shall continue after notice as hereinafter provided, the Lessor may at his option re-enter and repossess the said premises and have and enjoy the same again as of its former estate and interest therein; or, in case he or they shall think proper, may relet the same as agent of the tenant, in the name of the tenant, or of the Lessor, applying the avails thereof, first, to the payment of the expenses of re-entering, and then to the payment of the rent reserved by this lease, and the balance, if any, to pay over to the tenant; and the tenant covenants to pay to the Lessor any deficiency between the amount received on such reletting and the rent reserved by this lease. And it is further agreed, that in case of re-entry by the Lessor, and whether he shall relet as agent of the tenant or not, that the tenant shall be liable to the Lessor for a sum equal to the rents hereby reserved, and payable at the same periods, less any sum that shall be received by the Lessor as rent of said premises for the said periods.

SECOND: The Lessee, its successors or assigns, in addition to the rent herein above reserved, shall pay and discharge all duties, taxes, water rents, as-

sessments and payments of whatsoever kind which shall, during the term hereby demised be imposed upon or grow due or payable out of, or for, or by reason of said demised premises or any part thereof, except inheritance, estate, and income taxes against the Lessor or his estate, and shall pay the same within sixty (60) days after the same or any of them shall be imposed, grow due or payable and should any such duty, tax, water rates, assessment or payment remain unpaid for said sixty (60) days after notice and demand, then, and in that event, it shall be lawful for the Lessor at his option to enter upon and take possession of said premises or any part thereof; failure to pay the same or any part thereof shall be regarded as failure to pay rent and the Lessor entitled to all remedies herein provided for non-payment of rent. The taxes, water rates and assessments affecting said premises are to be paid by the Lessee, as hereinabove provided shall be apportioned for the first and last years of the demised term so that the Lessee shall only be required to pay such part thereof as the number of months of that year bears to the entire year.

In the event that the Lessee shall desire to contest the legality of any tax, duty or assessment which it is bound to pay under the provisions of this lease, it shall be at liberty upon such contest to postpone the payment thereof provided that such contest shall be promptly and diligently prosecuted and that such tax, duty or assessment shall be paid by the Lessee within sixty (60) days after the amount thereof shall have been judicially determined; provided, however, that in no case shall the Lessee

permit the demised premises to be sold for non-payment of any tax, assessment or other municipal claim or levy for which the Lessee is liable.

THIRD: That the said Lessee, its successors or assigns shall and will make and do at its own proper cost and expense, all repairs and replacements of whatsoever kind and nature to the said premises and appurtenances and conveniences, whether exterior or interior, and shall keep said premises, buildings thereon, and appurtenances in good order during the term of this lease, and shall deliver up the demised premises, the buildings and appurtenances erected thereon, at the expiration hereof, including any improvements on the same which the said Lessee, its successors, assigns, or sub-tenant shall have made during the term hereof, in good condition and order, reasonable wear and tear excepted, free and fully discharged of and from all and any debts or liens of any nature whatsoever, which by this lease the said Lessee, its successors or assigns is charged with the payment of. It being expressly understood and agreed that all expenditures on said premises, buildings and appurtenances for repairs or improvements and replacements, during the term hereof, shall be at the proper cost and expenses of the said Lessee, its successors or assigns, and the cost thereof shall not, nor shall any part thereof, be deducted from any of the said rental or rentals herein covenanted to be paid as aforesaid.

FOURTH: That the said Lessee, its successors and assigns, shall and will, in any improvement,

alteration or repairs it may make, do the same in conformity to the ordinances of the city corporation, and observe and fulfill all orders and requirements of the Board of Health and Police or Building or other City or Governmental Departments for the correction, prevention and abatement of nuisances, or other grievances, and for the conduct of said property; and generally that it, during the term hereof, shall and will fully and freely execute and fulfill all such ordinances, order and regulations, in, upon or connected with said premises, at its own proper cost and expense.

FIFTH: And that it is further agreed by and between the parties hereto that the Lessee shall, at its own proper cost and expense, keep the buildings on said premises insured against loss by fire for their full insurable value exclusive of foundations, 80% co-insurance clause being permitted; failure to pay the same or any part thereof shall be regarded as failure to pay rent and the Lessor entitled to all remedies herein provided for non-payment of rent, said policies shall bear mortgage clauses in favor of mortgagees from time to time and the policies or standard certificates be delivered to such mortgagees; and that in the event that said buildings are damaged or destroyed by fire, the Lessee, its successors or assigns, shall repair or rebuild the same as the case may be, but the Lessee shall not be required to expend any sums in excess of the insurance monies paid to the Lessee by the Lessor as hereinafter provided. The Lessee, however, shall have the right in rebuilding after a

fire to erect a larger or different building or buildings than are now erected on the demised premises provided it does so at its expense. The Lessor shall pay to the Lessee a sum equal to the amount of the insurance monies paid by insurance companies following said fire, including all monies paid on all insurance policies, whether paid to the Lessor, any mortgagee, or to any other person or corporation except the Lessee, its successors or assigns. The Iessor shall not make any settlement of loss or damage with any insurance company or companies under any of the insurance policies on said building because of a fire, without the written approval of the Lessee; and in the event of a fire provided the Lessor fails diligently to collect such insurance monies, the Lessee shall have the right, at its expense, to proceed in such manner as it elects, in the name of the Lessor or otherwise, to collect such insurance monies.

All premiums on fire insurance policies then covering the buildings upon the demised premises shall be apportioned at the beginning of the term of this lease.

In the event of the destruction of a major portion of said building by fire within four (4) years of the expiration of this lease, then in that event the Lessee may, at its option, terminate this lease as of the date of such total or substantial destruction.

Should the building or improvements on the demised premises be damaged or destroyed by fire or other casualty prior to the beginning of the demised term, the same shall be restored and repaired by the Lessor at its expense to at least as good

condition and state of repair as same were in prior to such destruction or damage; and the Lessee shall not be required to pay any rent, taxes or other charges as herein provided, until said building and improvements are completely restored and repaired and ready for occupancy. In the event of the total or partial destruction of the building by fire, prior to the beginning of the demised term, Lessee shall have the right to designate the type of floor and front, the cost of which is not to exceed the expense necessary to replace that part of the building in its former condition. The Lessee agrees in the event of the destruction of, or damage to the buildings upon the demised premises by wind or tornado, to replace the said buildings and to fully indemnify the Lessor against loss or damage by the wind during the life of this lease.

SIXTH: Should the demised premises be totally destroyed or partially damaged or destroyed during the demised term, the Lessee shall not be entitled to an abatement of rent; neither shall any municipal or governmental ordinance, rule, law or regulation made from time to time affecting the use of said premises or otherwise, entitle the Lessee to an abatement of rent.

SEVENTH: The Lessee, its successors or assigns, further covenant that it will permit the said Lessor or its agent, to show the premises to persons wishing to hire or purchase, and during the last four years of the demised term, will permit the usual notice of "to Let" or "For Sale" to be placed

upon the walls of said premises, except the fronts and doors, and remain thereon without hindrance or molestation.

The Lessee shall have the right at any time during the term of this lease to make structural and non-structural alterations, improvements and repairs to the demised premises, at its own expense, provided the same do not weaken the structure of the building, and to conform with rules and regulations of the Municipal or other Governmental authorities having jurisdiction thereof and insurance carriers. The Lessee shall also have the right, at any time during the term of this lease, at its expense, to demolish any or all of said buildings and improvements now erected upon said premises, and to erect and construct new building or buildings thereon, provided, the new buildings are at least of equal value to the building or buildings to be demolished and provided that before commencing the work of demolition, the Lessee submits plans and specifications of said new building or buildings to the Lessor and obtains Lessor's written approval thereof, but such approval shall not be unreasonably withheld, and provided further that said building or buildings are erected and completed in accordance with the rules and regulations of the Municipal or other Governmental Departments having jurisdiction thereof, and insurance carriers.

The Lessee shall have the right, at its expense, at any time, during the demised term, to make openings in the walls of said buildings, or to remove said walls so as to connect said buildings with any adjoining building or buildings, provided said open-

ings may be made or said walls removed without injuring the strength of said buildings, and provided further that the work in connection therewith is done in accordance with the rules and regulations of Municipal or other Governmental authorities having jurisdiction thereof. Should the Lessee make any such openings or remove said walls, it shall, at its expense, on or before the expiration of the demised term, close up said openings and restore said walls,—Should the Lessor so request within six months of the expiration or other termination of the within lease.

The Lessee covenants and agrees to indemnify and hold harmless the Lessor from any and all damage and injury to persons or property which may occur in connection with the making of any of said alterations or the construction of any new building as aforesaid.

EIGHTH: Said Lessor covenants that the said Lessee, its successors or assigns, on paying the said yearly rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said premises for the term aforesaid; provided, however, the Lessor may at reasonable times enter upon said premises for the purpose of inspection.

NINTH: The Lessor hereby designates and appoints the Lessee, its true and lawful attorney, with full power of substitution irrevocable, and hereby authorizes and empowers the said attorney and its substitutes for him and in his name to execute,

acknowledge and deliver any and all written consents, applications, petitions or such other instrument as may be necessary for the owner of the said premises to sign for the purpose of obtaining permission to erect signs or to alter the buildings upon said demised premises or for the purpose of obtaining a license or permit for the conduct of any lawful business in the said premises, or any part thereof, but this designation and appointment shall in no way extend or enlarge any of the rights of the Lessee under this lease, provided, that in the exercise of such powers the Lessor shall not be made liable to any persons, natural or corporate by reason thereof, but the Lessee shall assume any such liability.

TENTH: Notwithstanding anything hereinbefore contained to the contrary, none of the terms, covenants, provisions or conditions herein contained shall be deemed, breached or violated unless the same remain uncomplied with for thirty (30) days after written notice thereof shall have been sent to the Lessee by U. S. Registered mail addressed to Lessee at No. 744 Bowen Avenue, Chicago, Illinois, or to its last known address. It is hereby agreed that if the default or breach of covenant or condition shall consist of the failure of the Lessee to do anything which could not with due diligence be performed within the above mentioned period of thirty days, then a diligent, prompt and continuous effort on the part of Lessee to complete or correct the same shall be sufficient to prevent the termination or cancellation of this lease from becoming effective until

after the lapse of a sufficient number of days after said thirty day period as shall be sufficient to complete or correct the same with due diligence. A waiver at any time or from time to time by the Lessor of any right or notice shall be a waiver only pro tanto and shall not bind the Lessor to continue waiving any such right or notice.

ELEVENTH: The Lessee, its successors and assigns agree to assume liability for any claim for personal injuries or otherwise which may be enforced against the property or its owners for damages accruing or growing out of the use and occupancy of said premises. It is understood, however, that the Lessee may obtain so-called floater liability policies covering the demised premises and other premises, and delivery by the Lessee to the Lessor of a certificate indicating that the Lessor is covered by a liability policy or policies, as above indicated, shall be deemed to be a compliance with the provisions of this paragraph.

TWELFTH: In the event that the principal and/or interest upon any mortgage or mortgages upon the demised premises shall remain over due and unpaid for a period of thirty days after the same shall become due and payable thereunder, notice of such default shall be given by the Lessor to the Lessee, and the Lessee shall have the right to pay such principal and/or interest to the mortgagees, and in such event the Lessee shall be entitled to deduct the amount of such payment with interest from the rent, taxes or other payments which may

accrue under this lease until the full amount of such payment and interest shall have been deducted or repaid to the Lessee. Or Lessee may purchase such mortgage or encumbrance and thereupon be subrogated to the rights of the mortgagee or encumbrance thereunder and such action shall not cause a merger with the title of lessee but lessee shall be free to deal with such encumbrance as though it had no other relation to such premises.

THIRTEENTH: The Lessee shall have the right, during the term of this lease, to sublet all or any part of the demised premises for all or any part of the demised term, and to assign this lease, but such assignment shall not release the Lessee from its obligations hereunder. The Lessee shall also have the right to mortgage this lease.

FOURTEENTH: The Lessor covenants and agrees to deliver possession of the demised premises to the Lessee at the beginning of the term of this lease free from all leases and occupancies (excepting a certain lease between the within mentioned Lessor and the Hanover Shoe Company, Lessee, covering the southerly half of First Floor and Basement of Premises #17 Broadway, Camden, New Jersey, which lease expires July 1, 1930), and free from any and all violations or unfulfilled orders of any and all Federal, State and Municipal laws, regulations or other Governmental or quasi-governmental rules, regulations, ordinances or requirements, and free from all mechanics' liens or other liens, excepting mortgages existing at the date of the exe-

cution of this lease. The Lessor agrees to deliver said buildings and improvements on the demised premises to the Lessee at the beginning of the demised term in as good condition and state of repair as the same are now in, ordinary wear and tear excepted.

FIFTEENTH: All improvements placed upon the demised premises, excepting trade fixtures of Lessee and/or its sub-tenants shall, at the expiration or termination of said lease by any means whatsoever, be and remain the property of the Lessor.

SIXTEENTH: It is understood and agreed that the demised premises are subject to the lien of a mortgage made by the Lessor to the Centenary Tabernacle Church of Camden, New Jersey, upon which there is now due Fifty Thousand Dollars ($50,000) of principal, which said mortgage is payable on October 14, 1930; and that in the event of the exercise by the Lessee of its right of demolition and reconstruction, it shall make such arrangements with the said mortgagee as to fully protect the Lessor from any and all liability as well as demand for payment of said mortgage before maturity arising out of such demolition and/or reconstruction.

SEVENTEENTH: Lessee agrees that it will at any time upon the request of the Lessor, subordinate this lease from time to time to the lien of a to-be-created first mortgage or mortgages not exceeding in amount sixty (60) percent of the then value thereof, land and buildings, such value to be

fixed by the appraisal of any Trust Company or Bank maintaining a place of business in Camden County, N. J., and/or, upon the request of the Lessor, to subordinate such lease to the lien of a Bond Issue Mortgage upon the demised and other adjoining premises, leased or to be leased, by the Lessee; PROVIDED, that the amount of such Bond Issue Mortgage shall not exceed Sixty (60) per cent of the aggregate value of the said demised and adjoining premises as ascertained by appraisal by the method above set forth.

EIGHTEENTH: This lease and the estate hereby created shall cease and determine, at the option of the Lessor, in the event the Lessee is adjudicated a Bankrupt or insolvent in Receivership Proceedings; provided, however, that in the event the specified rent as determined by the conditions and covenants herein, shall be paid, in that event bankruptcy or insolvency as aforesaid shall not avoid the term hereby created and this lease shall remain in full force and effect.

NINETEENTH: As a further consideration in the making of this lease Morgenweck and wife agree to sublease from the Walgreen Co. for a term of five years from July 1, 1929, at the annual rental of Two Thousand Dollars ($2,000.00) premises as more accurately described in said lease between Walgreen Co. and Morgenweck and wife. Should the said Morgenweck fail to pay the rentals on the dates specified, and said rentals remain unpaid for a period of thirty days after notice to Morgenweck ac-

cording to the plan set forth in paragraph #10, then the said Walgreen Co. shall deduct the amount of said unpaid rentals from any sum due or to become due at any future date, under the terms of the herein lease, due and payable to Morgenweck and wife under the terms of lease covering #17 Broadway and #8 and #10 Hudson Street, of which the therein demised premises are a part.

TWENTIETH: This Indenture and the covenants and agreements herein contained shall inure to the benefit of and bind the parties hereto, their personal representatives, successors and assigns.

IN WITNESS WHEREOF, the individual parties hereto have hereunto set their hands and seals, and the corporate parties have caused these presents to be signed by their officers, and their corporate seal, attested by their secretary, to be affixed, the day and year aforesaid.

William E. Morgenweck (S)
Margaret S. Morgenweck (S)
WALGREEN Co.
By A. C. Thorsen
Vice-President.

IN THE PRESENCE OF:
ATTEST:
Harry Goldstine
Secretary
(SEAL)
J. McKinley
O. K.
Schwache

STATE OF NEW JERSEY:
COUNTY OF CAMDEN :SS.

BE IT REMEMBERED, that on this 24th day of December in the year of our Lord One thousand nine hundred and twenty-eight, before me, A Master in Chancery of New Jersey, personally appeared William E. Morgenweck and Margaret S., his wife, who, I am satisfied are the Lessors mentioned in the above lease and I having made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed.

Elmer G. Van Name
Master in Chancery of New Jersey

———

STATE OF Illinois :
County of Cook :SS

Be it Remembered, that on this 19th day of December in the year of our Lord one thousand nine hundred and twenty-eight, before me, Siegfried S. Nagle, a Notary Public personally appeared Harry Goldstine who being by me duly sworn on his oath saith, that he is the Secretary of Walgreen Company, the grantor within named, and that A. C. Thorsen is the Vice-President; that deponent knows the common or corporate seal of said grantor and that the seal annexed to the within Lease is such common or corporate seal; that the said Lease was

signed by the said vice-president and the seal of said grantor affixed thereo in the presence of deponent, that said Lease was signed, sealed and delivered as and for the voluntary act and deed of said grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said grantor; and at the execution thereof this deponent subscribed his name thereto as witness.

Sworn and Subscribed the day
and year aforesaid

Siegfried D. Nagle
Notary Public

(SEAL)

Commission expires Mar. 31, 1929.

SCHEDULE "C."

THIS INDENTURE, made the 19th day of December, A. D. 1928.

BETWEEN "WALGREEN CO." (incorporated under and by virtue of the laws of the State of Illinois) of the first part, and WILLIAM E. MORGENWECK, and MARGARET S. MORGENWECK, his wife, of the City of Camden in the County of Camden and State of New Jersey of the second part.

WITNESSETH, that the said party of the first part hath let, and by these presents doth grant, demise

and to farm let unto the said party of the second part all that certain entire premises situate and known as #8-10 Hudson street, Camden, New Jersey, and 12 or 13 feet in rear of #17 Broadway upon which is erected a portion of brick dry room, with the appurtenances, for the term of five (5) years, from the first day of July nineteen hundred and twenty-nine (1929) at the annual rent or sum of TWO THOUSAND DOLLARS ($2,000.) per annum, payable in equal monthly installments of One Hundred Sixty-Six and 67/100 Dollars ($166.67) to be paid in advance, on the first day of each and every month, PROVIDED, that if any rents shall be due and unpaid, or if default shall be made in any of the covenants, conditions and rules herein contained, then it shall be lawful for the said party of the first part, at his option, without notice and without any demand for said rent, or for the performance of said covenants, conditions and rules and regulations, to declare this lease null and void and said term ended, and to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

AND the said party of the second part doth hereby covenant and agree to and with the said party of the first part to pay the said rent in the proportions and upon the conditions aforesaid; and further agrees to observe the following, which are hereby agreed to be not only covenants, but also rules and regulations governing said premises, viz: not to permit any person or persons to occupy the same,

or any part thereof, nor use or permit any part thereof to be used for sale of products similar to those sold by Walgreen Co.; and also, at the expiration of said term, to yield up and surrender possession thereof, with the appurtenances, in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear thereof and accidents happening by fire and other casualties excepted.

AND IT IS FURTHER AGREED, that the acceptance of rent by the party of the first part, after knowledge of any breach by the party of the second part of said covenants, conditions, rules and regulations, or any of them, or suffering said party of the second part to remain in possession thereafter, shall not operate as a waiver by said party of the first part of said covenants, conditions, rules and regulations, or of any of them, or of any breach thereof.

ANYTHING HEREINBEFORE CONTAINED TO THE CONTRARY NOTWITHSTANDING, Lessor may cancel this lease and regain possession of the herein demised at any time during the within mentioned term, by serving notice in writing upon the Lessee at least nine (9) months prior to such cancellation date. During the time of his occupancy of the demised premises under this lease, the Lessee hereby agrees to furnish heat, at lessee's own cost and expense, for the herein demised premises and building known as #17 Broadway, Camden, N. J., from October 15th to May 1st, of each year. Should

the present building at #17 Broadway be rebuilt, this contract regarding heat and compensation for the same shall remain in force if the cubical contents of the new building does not exceed the present building. Should any new building be erected exceeding such cubical contents, then the Lessee herein shall thereafter not be required to furnish heat. The Lessor hereby agrees to contribute the sum of $300.00 (Three Hundred Dollars) per annum towards the cost of heating premises #17 Broadway, said sum to be deducted by Lessee in equal monthly installments of $25. from the rent herein stipulated to be paid by Lessee to Lessor.

It is mutually agreed that either party hereto may determine this lease at the end of said term by giving to the other party written notice thereof at least three months prior thereto, but in default of such notice, this lease shall continue upon the same terms and conditions as are herein contained for a further period of one year and so on from year to year unless or until terminated by either party hereto, giving the other three months' written notice for removal previous to expiration of the then current term.

AND the said party of the first part doth covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may, peaceably and quietly, have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF, the said parties have

interchangeably set their hands and seals hereto the day and year first above written.

WALGREEN CO. (SEAL)
By A. C. Thorsen
Vice-PRESIDENT
ATTEST
Harry Goldstine
SECRETARY

O. K.
Schwache
J. McKinley
Wm. E. Morgenweck (S)
Margaret S. Morgenweck (S)

SIGNED, SEALED AND DELIVERED :
IN THE PRESENCE OF :

STATE OF NEW JERSEY :
CAMDEN COUNTY :ss.

BE IT REMEMBERED, That on this 19th day of December in the year of Our Lord one thousand nine hundred and twenty-eight, before me, a Master in Chancery of New Jersey, personally appeared William E. Morgenweck and Margaret S. Morgenweck, his wife, who I am satisfied are the grantors mentioned in the above deed or conveyance, and I having made known to them the contents thereof they acknowledged that they signed, sealed and delivered the same as voluntary act and deed.

ELMER G. VAN NAME
A Master in the Court of Chancery of New Jersey

SCHEDULE "D."

To all to whom these presents shall come, I, Arthur E. Armitage, of the City and County of Camden and State of New Jersey, send greeting:

Whereas, on the twenty-fifth day of November, 1924, Sue N. Church, for the consideration therein expressed, to her in hand paid, by deed under her hand and seal, did grant and convey in fee unto me, the said Arthur E. Armitage,

All those certain tracts or parcels of land and premises situate in the Township of Pensauken, in the County of Camden and State of New Jersey, known and designated as Lots Nos. 7, 8, 9, 10, and 11, in Section "C," on Plan of North Merchantville, hereinafter described together as one lot, as follows:

BEGINNING at the intersection of the southwesterly line of Stockton Avenue (Old Cove Road) by the southeasterly line of Westfield Avenue, and extending thence (1) southwestwardly, along the southeasterly line of Westfield Avenue, seventy-five feet, to a corner to lot No. 6, said plan; thence (2) southeastwardly, at right angles to Westfield Avenue, one hundred feet to another corner to said lot No. 6; thence (3) southwestwardly, parallel with Westfield Avenue, seven feet nine and five-eighths inches to a corner to lot No. 12, in said plan, in the line of lot No. 6, aforesaid, distant one hundred feet northeastwardly from the northeasterly line of Penn street, measured on a line at right angles thereto; thence (4) southeastwardly, parallel with Stockton

Avenue, thirty-eight feet eleven and three-quarter inches to a corner common to lots Nos. 14, 15, and 16, on said plan; thence (5) northeastwardly, at right angles to Stockton Avenue one hundred feet to the southwesterly line thereof; thence (6) northwestwardly, along the southwesterly line of Stockton Avenue, one hundred twenty-one feet nine and three-eighths inches, to the corner and place of beginning.

Now know ye, that I, the said Arthur E. Armitage, do, in consideration of one dollar to me in hand paid by William E. Morgenweck, William Heckenhorn and Charles A. Smith, hereby make known, admit and declare that said premises were so conveyed to me, and that I now hold and will continue to hold the same in trust, only, for the use and benefit of the said William E. Morgenweck, William Heckenhorn, Charles A. Smith and myself, as tenants in common, in equal shares, in fee.

And I do further admit and avow that the consideration moneys expressed in said deed were paid by the said William E. Morgenweck, William Heckenhorn, Charles A. Smith and myself equally.

And I do covenant and agree to and with the said William E. Morgenweck, William Heckenhorn and Charles A. Smith, that I, my heirs or executors, shall and will convey the said premises or any part thereof by a good and sufficient deed to each person or persons as may be agreed upon by all of the parties hereto, their respective heirs, executors or assigns, or a majority or them.

And it is expressly agreed that all losses, expenses,

investments, obligations and profits or income shall be paid, borne, received and distributed equally between all of the four parties hereto.

And it is further agreed that all matters of importance requiring the decision or action by any of the four parties hereto including the matters of financing and the execution of mortgages or security, shall be considered, decided and controlled by a majority of the four parties hereto, their respective heirs, executors, or assigns.

And it is further agreed that in the determination of all questions, each party hereto shall have one vote, and the representative or representatives of each party hereto shall have one vote.

And it is further agreed that in case of the death of the said Arthur E. Armitage, a new trustee shall be elected in his place and stead from among the three remaining original parties hereto or their survivors, and in accordance with provisions of the preceding paragraph herein.

And I, the said Arthur E. Armitage, do hereby agree that with respect to all deeds or mortgages executed by me, they shall be made free and clear of dower and free and clear of and from all and every encumbrance thereon by me or my heirs, and that I or my heirs shall not do or knowingly suffer or permit any act, deed, matter or thing whereby or by means whereof said premises, or any part thereof, can, shall or may be in anywise impaired, injured or encumbered in title, interest, charge, estate, or otherwise, however, except as may be authorized pursuant to the terms of this document.

In witness whereof, I have hereunto set my hand and seal this eleventh day of February, 1925.

Arthur E. Armitage (S)

Signed, sealed and delivered :
in the presence of :

STATE OF NEW JERSEY :
COUNTY OF CAMDEN :ss.

BE IT REMEMBERED, that on this eleventh day of February in the year of our Lord, one thousand nine hundred and twenty- before me, a Notary Public, personally appeared Arthur E. Armitage, who, I am satisfied, is the person who executed the above Declaration of Trust, and I having first made known to him the contents thereof, he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed. All of which is hereby certified.

J. Daniel Hoyt
Notary Public of N. J.
(SEAL) My commission Expires Sept. 19, 1929

ANSWER.

(Filed January 6, 1931.)

IN CHANCERY OF NEW JERSEY.

82-31

Between:

THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee under the will of WILLIAM E. MORGENWECK, deceased,

Complainant,

and

MARGARET S. MORGENWECK, *et als.*,

Defendants.

On Bill, &c. Answer.

The answer of Margaret S. Morgenweck, William P. Morgenweck and Lena V. Morgenweck to the bill of complaint in the above-entitled cause says that:

1. The defendants, Margaret S. Morgenweck, William P. Morgenweck and Lena V. Morgenweck, file this answer for the purpose of joining issue in order

that an order of reference may be made and to reserve to themselves the right to file whatever answer they may desire as to any one or all matters contained in the bill of complaint, and also reserve the right to move to strike the said bill or any part thereof or to make any other motion directed to the bill, notwithstanding this answer be filed.

JOSEPH H. CARR,
Solicitor for and of Counsel with Defendants.

Consent is given to the filing of the within answer upon the terms therein set forth.

ELMER G. VAN NAME,
Solicitor for the Complainant.

Consented to 1-2-31.

ANSWER.

(Filed June 17, 1931.)

IN CHANCERY OF NEW JERSEY.

82-31

Between:	
THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee, &c., *Complainant,* and MARGARET S. MORGENWECK, *et al.,* *Defendants.*	On Bill, &c. Answer of Defendants, Margaret S. Morgenweck, William P. Morgenweck and Lena V. Morgenweck.

The defendants, Margaret S. Morgenweck, William P. Morgenweck and Lena V. Morgenweck, answering the bill of complaint, say that:

1. Paragraph 1 of the bill is admitted.

2. The date of the death of William E. Morgenweck is admitted, but it is not admitted that said William E. Morgenweck left a will dated February 6, 1919, or a codicil, dated July 6, 1929, or a codicil

dated February 4, 1930, effective as to the real estate owned by the said William E. Morgenweck at the time of his death. It is admitted that certain proceedings were taken for probating certain paper writings claimed to be a will and two codicils of William E. Morgenweck, as in said paragraph 2 set forth, but these defendants expressly deny the validity of said will and deny the validity of said codicils, insofar as the same relate to real estate or attempt to affect in any way the real estate of which the said William E. Morgenweck died seized. As to the contents of said papers, these defendants refer to the same when produced.

3. It is admitted that letters were issued to complainant as executor, but these defendants deny that The American National Bank of Camden was named as trustee in said alleged will. Defendants say they have no knowledge as to what complainant may have done toward executing said will and leave complainant to proof thereof, but these defendants deny that complainant has taken any steps in performance of any trust referred to in said paragraph.

4. Defendants say that they have no knowledge or information as to the allegations of paragraph 4 and leave complainant to its proof, if said allegations be material.

5. Paragraph 5 of the bill is denied.

6. Paragraph 6 of the bill is admitted.

7. Paragraph 7 of the bill is denied.

8. Defendants are without sufficient knowledge or information to answer paragraphs 8 and 9, and leave complainant to its proof thereof, so far as the same may be material.

9. Defendants, in answer to paragraph 10, say that in said alleged will Patrick H. Harding was named as executor and trustee thereof, but deny that in said alleged codicil complainant was named as trustee thereunder, or substituted as executor and/or trustee in the place and stead of Patrick H. Harding.

10. Defendants are without sufficient knowledge or information to answer paragraphs 11, 12, 13, 14, 15 and 16, and leave complainant to its proof thereof, so far as the same may be material.

11. In answer to paragraph 17, defendants deny that any part of said premises are in possession of complainant, and as to the remainder of said paragraph say that they are without sufficient knowledge or information to answer the same and leave complainant to its proof thereof, so far as the same may be material.

12. Defendants are without sufficient knowledge or information to answer paragraphs 18, 19, 20 and 21, and as to the allegations thereof leave complainant to its proof.

13. In answer to paragraph 22, these defendants deny that complainant is trustee and deny the remaining allegations of said paragraph.

14. In answer to paragraph 23, defendants say that defendant, Margaret S. Morgenweck, is now fifty-nine years of age, defendant, William P. Morgenweck, is now thirty-five years of age, and defendant, Lena V. Morgenweck, is now thirty-five years of age. The remaining allegations of paragraph 23 are admitted.

15. Defendants are without sufficient knowledge and belief to answer paragraph 24 and leave complainant to its proof thereof, so far as the same may be material.

16. Defendants, in answer to paragraph 25, say that defendant, Margaret S. Morgenweck, has received $2600.00 from complainant, and defendant, William P. Morgenweck, has received $1300.00 from complainant and deny the remaining allegations of said paragraph.

17. Defendants are without sufficient knowledge and belief to answer paragraphs 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35, and leave complainant to its proof thereof so far as the same are material.

18. Defendants in answer to paragraph 36 and its various subdivisions, say that they are without knowledge as to what questions have been or may be raised and leave complainant to its proof.

19. In further answer to paragraph 36, these defendants say that they are without sufficient knowledge or information to determine which of the questions set forth in said paragraph and its said various subdivisions are ripe for decision, and leave complainant to its proof in that respect; that many of such questions are not ripe for decision; that many of such questions relate solely to matters which may never arise for determination in fact, and to many matters, which if they do arise for determination in fact, will not only arise in the indefinite future, but also may arise when persons not now before the court may be interested in their decisions and may be entitled to be heard with respect thereto.

20. In further answer to paragraph 36, these defendants say that questions 36 a and 36 b are too general and too indefinite to require to be answered by this court.

21. In further answer to paragraph 36, these defendants say that questions 36 c, 36 g, 36 j, 36 n, 36 o, 36 p, 36 q, 36 r, 36 v, 36 w and 36 z, or any other of said questions there set forth insofar as the same may be construed to relate to real estate owned by William E. Morgenweck at the time of his death, are not properly before the court for decision, as the complainant has nothing to do with such real estate, not being named in said alleged will or in said alleged codicils as trustee thereof.

22. In further answer to paragraph 36, these de-

fendants say that questions 36 d, 36 e, 36 f, 36 i, 36 k, 36 l, 36 m 36 s, 36 t, 36 u, relate solely to real estate of said decedent and that complainant has nothing to do with said real estate.

23. In further answer to paragraph 36, these defendants say that insofar as any of the questions contained in said paragraph 36 and its various subdivisions refer to the trustee, particularly insofar as questions 36 d, 36 e, 36 f, 36 g, 36 h, 36 j, 36 k, 36 l, 36 m, 36 n, 36 o, 36 p, 36 q, 36 r, 36 s, 36 t, 36 u, 36 w, 36 y and 36 z are concerned the complainant has nothing to do with the same, as neither the alleged will nor the two alleged codicils name complainant as trustee.

24. In further answer to paragraph 36, these defendants say that insofar as said questions raise the question of title to the real estate owned by decedent at the time of his death, said questions are legal questions, not cognizable in this court in any event, and that this court is without jurisdiction to answer the same.

25. In further answer to paragraph 36, these defendants say that question 36 i does not present an issue as to the defendant, Margaret S. Morgenweck; that the right of defendant, Margaret S. Morgenweck, to dower cannot be determined in the manner presented by complainant; and said defendant, Margaret S. Morgenweck, further says that she has never made or been put to an election with respect to her dower in the real estate of which her husband

was seized in his lifetime. This defendant, Margaret S. Morgenweck, had no knowledge that she was required or expected to elect with respect to her dower at the time payments were made to her by the complainant and this defendant, Margaret S. Morgenweck, was not so informed by the complainant. Complainant is not and has not been in a position to require this defendant, Margaret S. Morgenweck, to elect with respect to her dower as complainant is not named as the trustee in the alleged will and codicils.

26. In further answer to paragraph 36, these defendants say that insofar as any of the questions contained in paragraph 36 present legal questions as distinguished from equitable questions, this court is without jurisdiction to declare the answers thereto.

27. In further answer to paragraph 36, these defendants say that to the extent that the questions presented are ripe for decision, as to which these defendants are without knowledge, and to the extent that such questions relate to the proper duties and functions of executors in the administration of personal property they are content that the questions presented shall be answered and they do hereby submit themselves to the jurisdiction of this court with respect thereto, but not further.

28. By way of further answer to the bill, these defendants say that under the language of the alleged will and alleged codicils, Patrick H. Harding

was named as an executor thereof, and these defendants further say that said Patrick H. Harding has never renounced his right to act as such executor and that complainant alone has no standing to secure the relief prayed for in the bill of complaint, and that the said Patrick H. Harding as executor of said alleged will is a necessary party to this suit in his capacity as such.

29. By way of further answer to the bill, these defendants say that they deny the validity of the alleged will and codicils of William E. Morgenweck as to the real estate of which he died seized and claim the right to have the validity thereof determined at law.

HENRY M. EVANS,
Solicitor for Defendants, Margaret S. Morgenweck, William P. Morgenweck and Lena V. Morgenweck.
JOSEPH H. CARR,
Of Counsel with said Defendants.

[ENDORSED]

Consent is hereby given to filing the within answer immediately.

ELMER G. VAN NAME,
Solicitor for Complainant.

Dated: June 12, 1931.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.
82-131

Between:

THE AMERICAN NATIONAL BANK OF CAMDEN, Executor and Trustee under the will of WM. E. MORGENWECK, deceased,
Complainant,
and
MARGARET S. MORGENWECK, *et al.*,
Defendant.

Bill to Construe Will.

June 24, 1931.

LEAMING, V. C.

ELMER G. VAN NAME, ESQ., for complainant.
JOSEPH H. CARR, ESQ., for defendants, Margaret S. and Wm. P. Morgenweck.
WILFRED B. WOLCOTT, ESQ., for West Jersey Homeopathic Hospital.
HAROLD BENNETT, ESQ., for Y. M. C. A.

The Court: I haven't had time to read these pleadings. I started to, and I read the bill, but I haven't had a chance to examine the will or codicil, and I am fearful the complainant has neglected to ask some questions that he may desire to have answered. If so, you had better amend your bill.

Mr. Van Name: I notice a typographical error on page ——

Mr. Carr: With respect to the rule against perpetuities, the bill uses the word "validate" and it should be "violate."

Mr. Van Name: On page 11, question 36 n reads, "Does the gift to the" ——

The Court: Now, wait a minute.

Mr. Van Name: On page 11, 36 n, it uses the word "validate" and it should be "violate the rule against perpetuities." I would like to move for that amendment.

The Court: Counsel will have to enlighten me as to what matters there are needing my attention, and what the issues are. I have not, of course, examined the answer, or the will, or codicil, so I will have to depend on your statements.

Mr. Van Name: I think the most important questions raised by the pleadings are whether or not

the American National Bank is trustee under the will, or whether that bank is merely executor. Mr. Carr takes the position the bank is merely executor, and not trustee.

The Court: In that case it will be necessary to determine that.

Mr. Carr: The will named a trustee, the will itself named a trustee.

Mr. Van Name: The original will named one person, Patrick H. Harding, to be executor and trustee. The second codicil was silent on the subject, the first one was, and the second codicil used the word, after setting up a new scheme of distribution for the life of the wife and son, and grandchildren, and so on, "I also name the American National Bank as the executor of my estate," and our contention is those words when properly construed, considering the surrounding circumstances in which the testator found himself, carry a trust to the American National Bank. Mr. Carr challenges that position. Another important question is whether or not there is any trust at all. We contend there is. While some parts of the trust relating to future events may be in question, yet there are immediate trusts to be executed, and the scheme as a whole is not a unit, but is divisible, so the Court can at least declare and enforce the trust that is now in existence, even though the Court may have some question concerning the validity of the future distribution of the corpus and may not at the present

moment pass on those future questions. Mr. Carr challenges that position, I believe, and is under the impression there is no present valid trust. Another important question is the determination of the question as to who has the right to re-create a mortgage on the Broadway property. There is a mortgage now there of $50,000 which is due and has been called; the value is in excess of the amount of the mortgage, and the proper thing to do is to refinance that property and pay off the present mortgage, and the same is true of a property in Pensauken Township, someone must quickly refinance that property, whether it is the heirs at law, or one trustee or the other, and I am asking the Court to pass on that question, whether the complainant has the right to re-create that mortgage, and I am contending the complainant does have that right. Another question is whether or not the widow of the deceased was put to an election with respect to her dower rights, and whether or not she had made that election. The will gives her an annuity of $100 a week for life, and she has received quite a number of payments, weekly payments, under that plan, and our contention is not only was she put to an election, but she has elected to accept the provisions of the will and not to claim dower, contrary to the will. I think those are the principal questions that are raised by the pleadings.

The Court: Can't she be put to a definite election?

Mr. Van Name: The codicil does not contain any

words on the subject of dower or election to take under or against the will, there is no reference whatever to the subject in the codicil.

The Court: Isn't it within the power of the Court to require her to determine whether she will demand her dower or not?

Mr. Van Name: I think it is.

The Court: The statute has a specified time in which the dissent must be made.

Mr. Van Name: It seems to me she must.

The Court: Does she claim dower now?

Mr. Van Name: Yes, under the pleadings ——

Mr. Carr: I represent the wife, and I will be glad to speak for her.

The Court: If she does claim dower ——

Mr. Carr: She is entirely willing to make an election, but she requires further information before she does it, that will be my statement.

The Court: Is there any testimony to be taken? I think the only proper way, and the only feasible way to dispose of this, is to take such testimony as either side may desire, and then to submit the matter on brief.

Mr. Carr: What I would like to have from the complainant—I represent the son, and also represent the widow, and the wife of the son, who is named in the will—and what I think we ought to have, and I would like to have a statement from the solicitor for the complainant, as to the construction which he or his client puts upon this will. The bill does not set forth the theory of the complainant, or the theory claimed by any other person. I have some idea about what I think the will means, and to what extent it is invalid, but I think that we ought to have from Mr. Van Name some statement as to his views, because that might limit the testimony that would be desired to be put in.

Mr. Van Name: I have no objection to stating my views as to the law that applies, but I am wondering whether this is the proper time to do it, without any testimony.

The Court: It would aid counsel, and I don't think it would be any more than an expression of your views, and what you propose to contend, because counsel will not need to offer testimony on matters you do not contend for contrary to his views.

Mr. Van Name: My contention is, first, the will is valid, that it does set up a trust, that the codicil does name the American National Bank as trustee, either expressly, or by implication, and that provision can be amplified in argument. I maintain the annuity to the wife, Mrs. Morgenweck, is perfectly

valid, and the annuity to the son is valid; that the gift to the grandchildren are valid without stating the quantity of their interest, but I have some doubt about whether the grandchildren who were not yet born would, if born, take the fee, or whether the gift over contingently to the parties is valid. I am satisfied the gift to the wife of the son, I think her name is Lena Morgenweck, is invalid, as violating the rule against perpetuities. She is not specifically named in the will, there is a mere reference to the lawful wife, which leaves open the possibility of a remarriage to some person not yet born in legal contemplation. I maintain the widow had knowledge of the will and its contents at the time she accepted the checks and that she was still willing to accept checks when the bank decided of its own motion not to pay, after filing this bill, because there was insufficient money to pay the debts, in fact, the debts have not been paid yet, and we felt the creditors had a prior right over the distributees. I think that is all I had in mind.

The Court: Does that enlighten you fully, Mr. Carr?

Mr. Carr: I know his views, and it is of some assistance.

The Court: That is what he contends. Will that enlighten you as to the scope of the testimony you want to produce?

Mr. Carr: To some extent. I think I should probably make a statement.

The Court: Yes, but I wanted first to inquire ——

Mr. Carr: I think that tells me in a general way what Mr. Van Name's views are.

The Court: I wanted to inquire of Mr. Van Name whether the estate is solvent, whether the estate can meet all these provisions of the will, are there sufficient assets to enable the executor and trustee to pay the debts, and all the legacies?

Mr. Van Name: I will answer that in the affirmative providing there is no foreclosure of the first mortgage on the real estate, wiping out a very valuable equity, and I am optimistic about that, that no foreclosure will result, and the debts can be paid, as well as the legacies mentioned in the codicil.

The Court: Will there be any difficulty in the refinancing of the mortgage if the dower exists?

Mr. Van Name: As a practical matter of securing the mortgage?

The Court: Yes.

Mr. Van Name: I think not, I think we can secure the mortgage if we can satisfy the title requirements of the mortgagee. At the present time I have analyzed the matter and recognize the fact that we can't induce any mortgagee to accept the title in its uncertain state.

Mr. Carr: I may say this with respect to the real estate. The real estate is a property on Broadway just below Federal Street, on the west side of the street, it is under a thirty-year lease at $13,000 a year over and above taxes. There is a $50,000 mortgage, so the property has a clear net income of $10,000 per year, and the lessee is responsible. The mortgagee is the Centenary Church, and they have called the mortgage, but they do not insist upon the mortgage being paid, I have talked with them, it happens I am a member of that church, not very active, but I see the church treasurer now and then, and I spoke to the church about this mortgage, and I am told they will not take a position that will harass or embarrass the estate, because they recognize the security is ample, so while it is important that this question should be answered, the mortgage question, yet it is not of pressing importance.

The Court: I do think if it became necessary to place a new mortgage in the place of the present one—is a larger amount anticipated?

Mr. Van Name: No, the same amount is anticipated.

Mr. Carr: That depends on whether these trusts are valid, and I will go into that. My view is that the heir—I don't want to anticipate that either—my view is the son takes as heir to the remainder, but I am anticipating ——

The Court: If there were no minors that could

not consent it would be to the interest of everybody to refinance in case the mortgagee wants the money.

Mr. Carr: The church takes the position that I have stated, they are not going to embarrass the estate by foreclosure, or by pressing it. The original will Mr. Morgenweck made provided for some small legacies of personal property, one or two small money legacies, and he devised and bequeathed all the rest, residue and remainder of the estate, real and personal to Patrick H. Harding, as trustee, providing for certain payments to be made out of that during the life, I think it was, of the wife, or his widow, and then under certain contingencies to the son outright. That will was prepared by an attorney, obviously, and contains the proper attestation clause, and is, apparently, on its face, well executed. The first codicil of the two codicils involved was written on a piece of scratch paper, it is in court, at my request Mr. Van Name had the Secretary of State send the codicil here, there is no attestation clause, it was proved, but not in solemn form, and the second codicil, the same thing can be said, it is written on the back of a letterhead, it has no attestation clause, and while it has been proved, it has not been proved in solemn form. Most of the estate involved this property on Broadway and not being satisfied with the validity of the will as far as real estate is concerned, in the answer I filed for the widow and the son, I state specifically we did not admit the validity of this will so far as the real estate was concerned, and I think it follows that this court cannot pass upon the question of legal

title to that real estate. If that question does arise, however, the question as to the validity of the trust set up in the will would nevertheless remain for decision, because that applies to the personalty as well as the real estate, so that does not eliminate in the case the question of the validity of these trusts. Speaking first of the widow's dower, it is apparently going to be to Mrs. Morgenweck's interest to elect to take under the will, I say apparently because there has been no inventory of the estate filed, we are without information ——

Mr. Van Name: Yes, there has.

Mr. Carr: Not up to two days ago, there has been no inventory filed. We have had no statement of the debts, we don't know what cash is in hand, and we never received sufficient information for Mrs. Morgenweck to make an election. It isn't necessary, and it won't be necessary, for the Court to make us make an election, she will when she gets the information to which she is entitled, and I think her election is going to be in favor of the will, I think it will be, but I am not making that as a positive statement, because we want this information first. As to the son, there is one child, the son who is in court—the first codicil was, as I think, eliminated by the second codicil. As far as construction and intention is concerned, the subject-matter of the first codicil is rather supplemental to the trust set forth in the will. The second codicil set forth a new scheme and a revocation of the first codicil, and the terms of the trust contained in the

will itself. The terms of the second codicil is what causes the difficulty and where the Court's labors will probably all end. It is drafted by Mr. Morgenweck in rather untechnical language, and I will read it and state my views as I go along.

The Court: What page is it?

Mr. Carr: It is an unnumbered page after the foot of the bill, there is a copy of the will, and it is three or four pages—I don't think it is numbered. Is it numbered, Mr. Van Name?

Mr. Van Name: Yes.

Mr. Carr: The original codicil, Vice-Chancellor, is here.

The Court: You said the will and the codicil have been admitted to probate?

Mr. Carr: Yes. "As soon as possible after my demise all my bills shall be paid from the proceeds of a $5000.00 life insurance policy that I have. When my securities will bring more than I paid for them, they should be sold and the proceeds used to pay off the balance of notes or debts still unpaid. The balance to be placed to the account of the estate—to which there shall also be added the monthly revenue derived from the rental or lease of the properties 17 Broadway and Nos. 8 and 10 Hudson Street. Out of this account there should be paid (or set aside from month to month a sum sufficient to

pay the semi-annual interest and other expenses that there may be) and from the balance there should be paid to my beloved wife the sum of $100.00 a week during her life." At that point my view is it was Mr. Morgenweck's intention that both income and principal of his personal estate and real estate should go into one fund and the annuity payments were to be made from that fund without regard to whether the payments were more or less than income, and Mrs. Morgenweck, and the son, in any event, are entitled to be paid the annuity right along, of course, saving the possibility that there are unpaid debts, of which we have no knowledge. "Out of this account there should be paid or set aside from month to month a sum sufficient to pay the semi-annual interest and other expenses that there may be and from the balance there should be paid to my beloved wife the sum of $100.00 a week during her life." That provision, I think, is a valid provision, and I think it comes, as I say, out of principal if there is not enough income. "To my son, William P. Morgenweck, I bequeath the sum of $50.00 a week during his mother's lifetime, but at her death, if he survives her, this amount shall be increased to $100 a week during his lifetime." That, I think, also is a valid provision and it comes out of principal if there is not enough income. "Under no conditions can this money be attached by anyone to pay any debt or debts incurred by said William P. Morgenweck." It is not material whether that is good or not for this purpose. This next clause, I think, is a bad trust. "If said William P. Morgenweck should have any direct issue at his death, then

after his death $100 shall be set aside weekly to clothe and educate the same, after which each of them shall receive $10.00 weekly until they marry, after which this amount shall be increased to $25.00 a week with the following provision, that his or her mate, as the case may be, cannot attach the same for their use under any circumstances." It seems to me that is a bad provision for the reason that we have an annuity which is for an indefinite time, and the time when the $10.00 a week shall be payable might very well be more than twenty-one years after the death of the testator, and the present son, William P. Morgenweck, their marriage may be over twenty-one years after the death of the testator and the present son, and this $100 a week, under the terms of the clause, might be changed, so I take it that clause is an invalid provision. The next clause is, "Should however my son, William, die without issue, then at his death and from then on until the end of her natural life, his lawful wife shall receive a weekly sum of $50 as long as or providing she does not marry again, but should she marry again she will forfeit this allowance." That is bad for the reason no wife is named, and the son might marry a woman not born at the death of his father, and under the decisions that clause, as well as the decisions on the previous clause, will make them both invalid. "As stated above it is my wish that these bequests can, under no condition, be attached for the satisfaction of a debt of any nature created by any of the above named beneficiaries." It is not so material as to whether or not that is good. "After the death of my wife, my son, his wife, or

their issue, should they have any, the income from my estate shall be equally divided semi-annually (after expenses have been deducted therefrom) with the local hospitals in equal proportions." With respect to that, I contend that is also bad. Now, I would like to know whether the $100 per week to the widow, and the $50 a week to the son, provided for by the will, is conceded by the executors to be payable out of principal as well as out of income. If that be so, our proof would be directed to showing what moneys are on hand.

Mr. Van Name: To answer Mr. Carr's question, my view is these annuities are payable out of income or corpus, and that reminds me of the fact I wanted to ask to amend the bill to present that question to the Court. I think there is sufficient doubt about it.

Mr. Carr: I thought it was presented. I see Mr. Harding in court, and I ought to say this with respect to the proceedings. There is an allegation in this that the American National Bank is the executor and trustee. Mr. Harding, in his personal capacity, was a defendant, but did not defend that, there was a decree pro confesso against Mr. Harding.

I recognize the fact, as far as the ultimate preservation of this building is concerned, if Mr. Harding is trustee, this Court is going to devote a lot of time to an executor that does not elect to proceed, and if the title is in the trustee, and if these payments are to be made by the trustee, then the trustee should be in court, or renounce, so the Court can

take hold of the thing. I can't conceive how it can be argued to your Honor that Mr. Harding has ever been removed, and unless Mr. Harding is asking for some relief, this Court can't do anything with respect to the personal property, that is what I am afraid of.

The Court: If Mr. Harding has allowed a decree to go against him by default, wouldn't the prudent thing to do be to have Mr. Harding renounce and a new trustee be appointed in his place so there would be no open question there when it comes to taking a mortgage? It may be the mortgagee will want the decision of a court, at least, on it.

Mr. Carr: Mr. Harding is here and he can say whether he will act or not, and why he hasn't acted.

Mr. Harding: If the Court please, when this matter was first called to my attention I examined the will and the codicil, and the language, I thought, was susceptible of doubt, as to whether the American National Bank was to be the trustee in addition to being executor. If the will and codicil are read together your Honor will see there is no reference whatever in either instrument to the American National Bank as trustee. I immediately took it up with Mr. Van Name by correspondence, after the filing of the bill, I told him, of course, I did not want to push myself in where perhaps I might not be welcome, and he asked me if I would be willing to renounce my rights, if I had any, under the will, and I said that I didn't care to do that, and I said

I was perfectly willing that the Court pass upon it, and I didn't think I ought to assume the position of filing an answer in my own behalf. I did, in a letter to Mr. Van Name, ask him to include that in his questions to the Court, but he replied saying he had read his bill carefully and that he would let it remain as it was, and that question, under the bill, is not presented to the Court at all.

Mr. Van Name: I think the question is presented in this respect, that we have styled ourselves executor and trustee under the will, and have asked the Court what our powers are, and unless we are the trustees, then we have no right to ask any questions with respect to the real estate unless we are given, either expressly or by implication, a position as trustee.

Mr. Carr: The bill did not ask the question. I raised it by my answer because I thought we had to know.

The Court: I think very little of the controversy can be determined without directly or indirectly passing upon that question. I think you have got to establish the trust in order to maintain your bill.

Mr. Van Name: The cases so hold. I investigated that before filing it.

The Court: Supposing counsel introduce any testimony that you have that will in any way aid in the matter of the construction of the will, having in

mind the scope of the controversy, which is clear in the minds of both counsel now.

Mr. Wolcott: I would like to be noted as appearing on behalf of the West Jersey Homeopathic Hospital, for whom I have filed an answer, with the privilege of submitting a brief at the proper time on the question as to whether or not the hospital has an interest under the will or codicil.

The Court: You have filed an answer?

Mr. Wolcott: Yes.

The Court: Which one?

Mr. Wolcott: The West Jersey Homeopathic Hospital.

The Court: What about the other hospital?

Mr. Carr: Mr. Reynolds filed an answer, but he apparently is not here this morning.

Mr. Bennett: I would like to have it noted on the record in the same manner, that I appear for the Camden Y. M. C. A., which is mentioned in the will, and that I may have the privilege of filing a brief at the proper time.

Mr. Van Name: If the Court please, Mr. Carr raised the question as to the right of a trustee to pay annuities out of corpus in case the income was

insufficient, and I have examined the bill and I find I did not ask that question in the bill directly, and I would like at this time to amend the bill to present that question to the Court, whether in case the income is insufficient the annuities can be paid out of corpus, and where the income is greater than the annuities, the excess is to fall into capital.

The Court: If there is no objection you may make the amendment in that respect.

Mr. Carr: If the Court please, it is stipulated William E. Morgenweck died March 5th, 1930, and left him surviving his widow, Margaret S. Morgenweck, and also left surviving one child, a son, William P. Morgenweck, who was married at that time to Lena V. Morgenweck, also a defendant. At that time William P. Morgenweck had no children, and he has no children now. There never were any other children of William E. Morgenweck except the present son. Mrs. Morgenweck, Sr., is fifty-nine; William P. Morgenweck is thirty-five; Lena V. Morgenweck is thirty-six. Mr. Morgenweck died as the result of a heart attack on a boat while he was out fishing off the coast of Florida.

The Court: It also may be stipulated, probably to save the necessity of taking testimony, that there are only two hospitals in the City of Camden?

Mr. Carr: No, sir, that is not a fact. There are two hospitals operating as charities, but there are other hospitals in the city, and as to local hospitals,

I don't know how broad the scope of that will be, what will be local hospitals.

The Court: Have any of the hospitals been made defendants except these two?

Mr. Carr: I think not.

Mr. Van Name: I only made the two charitable hospitals parties defendant, the Cooper and West Jersey.

The Court: I don't know whether we could bind the others, if there are others.

Mr. Van Name: I am working on the assumption the testator intended to do something valid, and not something invalid, and a perpetual trust to a private corporation would be invalid.

The Court: Still, that may not be the views of the other hospitals.

Mr. Van Name: I offer in evidence three deeds, one made by Hattie Satinski to William E. Morgenweck, dated July 13th, 1918, covering property known as 17 Broadway, Camden, and of record at the Register's office, in Book 431, Page 84.

(Said deed offered in evidence and marked Exhibit C1.)

Mr. Van Name: I offer in evidence a deed from

Annie E. Golden, and husband, to William E. Morgenweck, dated October 3rd, 1919, covering No. 8 Hudson Street, and of record in Book 451 of Deeds, Page 643.

(Said deed offered in evidence and marked Exhibit C2.)

Mr. Van Name: I offer in evidence a deed from Hubert H. Pfeil, to William E. Morgenweck, dated December 1st, 1916, covering No. 10 Hudson Street, and of record in Book 412, Page 428.

(Said deed offered in evidence and marked Exhibit C3.)

Mr. Van Name: I also offer copies of the last will and testament of William E. Morgenweck, and two codicils, certified by the Surrogate.

Mr. Carr: We have the original here, why not offer the original.

Mr. Van Name: I will. They are both certified by the Surrogate of Camden County as being of record in his office in Book 75 of Wills, Page 72.

(Said papers offered in evidence and marked Exhibit C4.)

Mr. Van Name: I offer in evidence the original will and two codicils brought into Court by a messenger from the office of the Secretary of State of New Jersey.

(Said papers offered in evidence and marked Exhibit C5.)

Mr. Van Name: To which original copies are annexed letters testamentary issued to the American National Bank as Executor, and Certificate of Probate signed by the Surrogate of Camden County. I also offer in evidence a certified copy of Inventory and Appraisement filed by the American National Bank with the Surrogate of Camden County showing the personal assets of the estate.

(Said paper offered in evidence and marked Exhibit C6.)

Mr. Van Name: Including the affidavits of the Appraisers. You do not require any strict proof from the Secretary's office that these are the originals?

Mr. Carr: No. I did not object to them, they are in.

J. Oscar Hunt, sworn.

By Mr. Van Name:

Q. Mr. Hunt, you are the Cashier and Assistant Trust Officer of the American National Bank?

A. Yes, sir.

Q. Of Camden, I should say?

A. Yes, sir.

Q. How long have you been such?

A. Since its organization in 1927.

Q. After Mr. Morgenweck's death on March 5th, 1930, what testamentary documents relating to his estate were found, and where?

Mr. Carr: I object to this, this is not material, we have the wills in evidence. I thought we were trying to save time. The wills are in, and I haven't objected to them going in.

The Witness: The will was found in the safe deposit box.

Q. Where?

A. The safe deposit box of the American National Bank. The second codicil, I am not positive, and the third codicil ——

Q. There were only two codicils?

Mr. Carr: Now, wait, he is testifying.

The Court: Did you find three codicils?

The Witness: No, sir, two.

Q. Where was the first codicil found?

A. I am not positive.

Q. Where was the second codicil found?

A. The second codicil was in Box 107, which belongs to the American National Bank, along with some other papers which Mr. Morgenweck gave me before he went to Florida.

Q. Did you have access to that box?
A. Yes, sir.
Q. In which the second codicil was found?
A. Yes, sir, and no one else.
Q. Was the second codicil in an envelope or not?
A. It was an envelope inside of another envelope along with some other papers which he gave me.
Q. Would you know the envelope in which the envelope was contained, if you saw it?
A. I think so.

Mr. Carr: Are you going to offer this?

Mr. Van Name: Yes.

The Court: What is the purpose of this? It has been admitted to probate.

Mr. Van Name: It is my thought I should set up all of the surrounding circumstances.

The Court: You can if they are relevant, if they are of any use, but that question ——

Mr. Van Name: I plan to use this and other exhibits as proof that the testator was not skilled in the written use of English.

Mr. Carr: You can tell that by reading the codicils.

The Court: I don't think there is any doubt about that.

Mr. Van Name: I think the Court ought to have this.

The Court: Go ahead and put it in.

Mr. Carr: If the Court please, I do think if Mr. Van Name has a lot of scattered memoranda that he is going to use as to what this man intended, it is objectionable, and if it isn't proof of intent, it has no relevancy at all.

Mr. Van Name: I have several exhibits besides this which will give the Court an idea, a more definite idea than the codicil, of his incorrect use of the written English.

Mr. Carr: He isn't on trial for bad grammar.

The Court: What is the purpose of introducing these papers?

Mr. Van Name: I think it is essential to show the Court that Mr. Morgenweck was not skilled in legal principles, and not skilled between the distinction of fiduciaries, and to give the Court all the information I can.

The Court: Put it in, and its relevancy and competency will have to be determined at some future time.

Mr. Carr: It is understood that it is over my objection?

The Court: Oh, yes.

Mr. Van Name: I might add, this has further importance because I will show Mr. Morgenweck had the aid of a book dealing with the preparation of wills and codicils.

The Court: Go ahead and show any surrounding circumstances.

Mr. Van Name: And the codicil was a better product than his ordinary product.

Q. Is this the envelope in which the codicil was found?
A. Yes, sir.

Mr. Van Name: I offer the envelope.

(Said envelope offered in evidence and marked Exhibit C7.)

Q. Do you know who composed and actually wrote the second codicil to the will?

The Court: Do you know?

The Witness: Mr. Morgenweck told me himself.

The Court: You were asked if you knew?

The Witness: Yes, sir.

Q. Who wrote it, and how do you know?
A. Mr. Morgenweck told me himself.

Q. When and where did he tell you?
A. In his office in the bank.

Mr. Carr: I object to this also.

The Court: I don't think it is competent, what Mr. Morgenweck told him; statements made by the deceased in his lifetime touching what he had done. No.

Mr. Van Name: Isn't that part of the res gestae in the matter?

The Court: No. If you can show the typewriter was still hot, it is part of the res gestae.

Mr. Van Name: The witness can state when he was told this was so.

Mr. Carr: He hasn't said yet he was told.

The Court: He said the source of his knowledge was what was stated to him. When was the statement made to you to which you refer?

The Witness: A few days before he signed it.

The Court: Before what?

The Witness: Before he signed the last codicil, the second one. Dare I tell in a few words what did happen?

The Court: No. I don't think so. I don't think

Mr. Morgenweck's statement to this gentleman a few days before the date of the codicil is admissible.

Mr. Van Name: I don't see how else one could prove he wrote it except by a statement he would make concerning it.

Q. Did you at, or about, the time that the codicil was prepared lend Mr. Morgenweck a book dealing with the subject of the preparation of wills?

A. Yes.

Mr. Carr: I object to that as immaterial, if the Court please.

The Court: What do you mean by at, or about, that time.

The Witness: Within ten days.

Q. Prior to the signing of the codicil?

A. Yes, sir.

Q. You were a witness to the codicil?

A. Yes, sir.

Q. How soon after the delivery of the codicil in your possession did Mr. Morgenweck leave for Florida?

A. The following day.

Q. When did Mr. Morgenweck become the President of the American National Bank?

A. At its organization.

Mr. Carr: I object to that. We will be here all day if we are going into all the side issues.

The Court: I think it may be competent. Let it stand.

Q. When was that?

A. September, 1927.

Q. At that time in what business was Mr. Morgenweck engaged, and where?

A. 17 Broadway, Camden, in the dyeing and cleaning business.

Q. What was the occupancy of the building at that time?

Mr. Carr: I object to that unless it is pointed out why that is relevant.

The Court: I have got to read what he says and find out from what he says what he intended, and I can't find out what he intended from anything other than what he says.

Mr. Van Name: I will withdraw the question.

Q. On what date did the American National Bank acquire the right to act as a fiduciary?

A. July, 1928, I can't give you the exact day it was.

The Court: The right to do what?

Mr. Van Name: To act as a fiduciary under the United States law.

Q. Now, from the time the bank acquired this

right until Morgenweck's death, did the bank handle any fiduciary estates of any kind?

A. No, sir, this was the first one.

Mr. Carr: I object to that as immaterial, and ask that it be stricken out.

The Court: I will let it stand, I think it is competent. Did you say the bank never had acted?

The Witness: That was the first estate.

Q. Will you state what, if anything, Mr. Morgenweck said with respect to his appointment of the bank to handle his estate?

Mr. Carr: I object to that.

The Court: I don't think it is relevant.

The Witness: Mr. Morgenweck spoke several times ——

Q. Will you state anything that you may know with respect to Mr. Morgenweck's attitude toward Mr. Harding as a representative of his estate?

Mr. Carr: I object to that, it is too general. In the first place, it is an attempt to get a statement in without asking for that statement.

The Court: It might be useful in case they had a breach that occurred between them between the date of the codicil and the date of the will.

Mr. Carr: This is an effort to get a statement out in another way.

The Court: I don't mean that, what Mr. Morgenweck said is not competent.

Mr. Carr: That question will draw that out.

The Court: I didn't want him to testify to that. If he knows from any other source, or any reliable source, any definite source, I think he may state.

Mr. Carr: May we first know how he knows anything about it?

Mr. Van Name: I expect him to state what Mr. Morgenweck had told him.

The Court: No, I will exclude that. Supposing Mr. Harding had been employed by Mr. Morgenweck, or the bank had employed him for a short time before this codicil was drawn, and at that time he was discharged by the bank, I think that might be relevant.

Mr. Van Name: That isn't what I had in mind.

Mr. Carr: Nothing like that has happened, as far as I know.

Mr. Van Name: I will withdraw the question.

Q. After Mr. Morgenweck's death, did you furnish a copy of the will and codicil to his wife and son?

A. Yes, sir.

Q. And how soon after his death was that done?

A. I can't give you the exact number of days, but within a reasonable length of time after his death.

Q. Without specifying the exact number of days, can't you say more definitely?

A. I would say within a month or two months, but I can't recall the exact number of days.

Q. Did you talk with Mrs. Morgenweck and her son, or either of them, concerning the provisions of the will and codicils after Mr. Morgenweck's death?

A. I talked to Bill, I can't recall that I ever talked to Mrs. Morgenweck.

Q. When and where?

A. Various places. I have talked to him on several occasions since that.

Q. Did you discuss with him the provisions of the will?

A. Yes, sir.

Q. Since Mr. Morgenweck's death, has Mr. Harding made any claim to the bank that he is the trustee?

Mr. Carr: I object to that as immaterial. Besides, all we need to know is what he still says about that.

The Court: I don't think that is material, and Mr. Harding's attitude, as defined here this morning, is being unwilling to renounce.

Mr. Van Name: I wanted to show that Mr. Harding has exercised no active dominion over the estate. I don't know whether he is here or not.

Mr. Carr: Is that material, if the Court please? It doesn't seem to me whether he has attempted to take possession or not is material.

The Court: I don't think there can be any renunciation by simple inactivity. You can show no efforts have been made on the part of Mr. Harding to administer this estate as Trustee, and that that has been done so far by your bank.

Mr. Carr: I will concede that.

Mr. Van Name: Are you in a position to do that? You don't represent Mr. Harding?

Mr. Carr: No, I do not.

The Court: Let him testify.

Q. Has Mr. Harding, to your knowledge, acted in any way to assert dominion or control over the real estate left by the deceased?

A. No, sir.

Q. Has the American National Bank done so?

A. Yes, sir.

Q. Will you kindly produce the checks that were issued by the American National Bank to Mrs. Margaret S. Morgenweck?

Mr. Carr: Are they the ones I saw, Mr. Van Name?

Mr. Van Name: Yes.

The Witness: Do you want me to read these?

Mr. Carr: I don't object to your offering them.

Mr. Van Name: I offer checks of the American National Bank issued by the Trust Department to Margaret S. Morgenweck on various dates from April 9th, and numbered and dated as follows: No. 4, dated April 9th, 1930, $400; No. 25, dated May 16th, 1930, $600; No. 33, dated June 25th, 1930, $400; No. 41, August 7th, 1930, $800; No. 47, dated September 16th, 1930, $400. I offer these.

(Said checks offered in evidence and marked as one exhibit, Exhibit C8.)

Q. Calling your attention to the fact they are all endorsed by Margaret S. Morgenweck, for what were these checks issued?

A. Money due Mrs. Morgenweck in accordance with the second codicil, the annuities were due her for weekly payments.

Q. Will you produce any checks issued by the bank through its Trust Department to William P. Morgenweck?

A. Yes, sir. They are all there.

Mr. Carr: They total $1300.

The Witness: I looked at the endorsements and amounts, I didn't total them. They should be half of what Mrs. Morgenweck received.

Mr. Van Name: No. 3, April 9th, 1930, $200; 26,

May 16th, 1930, $300; 34, June 25th, 1930, $200; 42, August 7th, 1930, $400; 48, September 16th, 1930, $200. All endorsed by William P. Morgenweck.

(Said checks offered in evidence and marked as one exhibit, Exhibit C9.)

Q. And what were those checks for?

A. Weekly allowances or annuities payable to William P. Morgenweck.

Q. Were any checks issued to either Mrs. Morgenweck or William P. for annuities, and refused by them?

A. No, sir.

Q. Have you since the testator's death had any conversations with his son, William P. Morgenweck, with regard to the management of the real estate?

A. Yes, sir.

Q. What conversations did you have?

Mr. Carr: I object to that, if the Court please. We are trying to find out what this will means.

The Court: What is it you are trying to establish now.

Mr. Van Name: An admission by the answering defendant that the bank was named as a Trustee.

The Court: What?

Mr. Van Name: That the bank was named as Trustee under the will.

Mr. Carr: We can't construe this will by admissions, or consent, or anything else.

The Court: I don't think the Court could act upon that even if you should stipulate it, it wouldn't make any difference, I have got to determine what the testator intended.

Mr. Van Name: I will withdraw the question.

Q. I show you nine small slips of paper containing writing and ask if you can state who wrote those slips?

A. They are the handwriting of William E. Morgenweck.

Q. And on pages numbered ——?

Mr. Carr: I object to anything being read from them into the record.

Mr. Van Name: I won't read yet.

Q. On Pages Nos. 5 and 7, I call your attention to the name "William P. Morgenweck."

A. Yes.

Q. And ask if that corresponds with the signature of the deceased except for the middle initial?

The Court: Excepting for what?

Q. Excepting for the middle initial?

A. In other words, you want to know whether that is his signature with the exception of the middle initial?

Q. Yes.
A. It is.

Mr. Carr: You are not going to offer that in evidence, are you?

Mr. Van Name: Yes.

Mr. Carr: When you do, I will object.

The Court: What is this you are trying to establish now, what is the purpose of it, in other words?

Mr. Van Name: They constitute memoranda made by him just before the preparation of his original will, containing his idea of what that will should provide. Now, I don't offer these for the purpose of interpreting the original will, I have offered them as showing the testator's lack of knowledge of legal principles and his customary form of expression as an aid to the Court in interpreting the codicil.

Mr. Carr: I object to the offer.

The Court: Well, if they will show that he has used the word "Executor" in a way that is apparently intended to embrace the duties of a Trustee, I think it may be competent. I will let them go in for what they are worth.

Mr. Carr: Before it is admitted, let us know whether that is the contention.

Mr. Van Name: Yes, that is the contention, these

slips will show that in his preliminary draft of the original will he sets up a trust and names an executor and said nothing about a Trustee, and Counsel in the preparation of the will ——

Mr. Carr: Are you testifying now?

Mr. Van Name: I am answering your question.

Mr. Carr: You are going way beyond any question I asked you.

Mr. Van Name: And these slips will show Counsel furnished the word "Trustee" in the preparation of the original will.

The Court: You may introduce them if they go that far.

Mr. Carr: Isn't this true, having had his attention called at that time to the fact that Executor and Trustee were two different things, this proposed offer has just the reverse effect than what it is intended for?

Mr. Van Name: That is a matter of argument.

Mr. Carr: I understand it is offered for that sole purpose.

The Court: Yes, to show he uses the word "Executor" where he should have said "Trustee."

Mr. Carr: That is the only purpose of your offer?

Mr. Van Name: No, I stated my purpose more particularly than that.

Mr. Carr: I understood that is all it was admitted for. I object if it goes to any further extent than that. We are bound by the will, and we have to take the will the way it stands.

Mr. Van Name: I offer it for that specific purpose, and for the general purpose of showing lack of knowledge of the law on the part of the testator, and as a specimen of his form of expression.

The Court: It may go in and be marked.

Q. I call your attention to two sheets of paper?

The Court: Two what?

Q. Two sheets of paper that are typewritten and are signed in two places by the name "Billy" and I ask you if you can tell me who wrote that word "Billy"?

A. Mr. Morgenweck.

Q. The deceased?

A. Yes, sir.

Mr. Van Name: I offer these in evidence as specimens of the decedents forms of expression, and the general process of his mind.

Mr. Carr: I don't know, if the Court please—I know this other paper has been introduced—but does this have anything in it about the will.

Mr. Van Name: No, it does not.

Mr. Carr: Am I to understand you can rummage through a man's papers and bring out something that shows the general process of his mind, and then come in here and offer it as such?

The Court: No, but I think he can show habitual expressions of his that may be useful.

Mr. Carr: May I ask Mr. Van Name to point out what part of that paper has reference to this case?

Mr. Van Name: It has no relationship to the will, or the intentions contained in the will, it relates to a wholly separate matter, and is offered merely to aid the Court in placing itself in the shoes of this testator to learn something about his mental processes and his forms of expression in writing.

The Court: You may put them in, and I think this witness could also testify, if you desire, whether he was a man that was educated, and if so, to what extent, as far as the witness is able to state, and whether he is a lawyer, or whether he is familiar with legal matters, anything of that kind, I think, can go in.

Mr. Carr: This letter, if the Court please, this two-page letter, apparently has to do with some dispute in the bank between Mr. Morgenweck and some other officer, nothing at all to do with this case.

Mr. Van Name: I offer the letter.

The Court: Let it go in, for the purpose of showing the type of man Mr. Morgenweck was.

(Said paper offered in evidence and marked Exhibit C10.)

Q. In your capacity as Assistant Trust Officer of the bank, do you have some working knowledge of the duties of the respective fiduciaries?

A. Yes, sir.

Q. Did you have, during your association with Mr. Morgenweck, an opportunity to learn whether or not he had any knowledge of the distinction between the respective duties of executors, trustees, guardians, and so on?

A. My honest opinion is he thought it was practically all one.

Mr. Carr: I object to that and ask that it be stricken out.

The Court: It may be.

Q. Can you answer the question any more definitely than that?

A. He didn't know just the difference.

Q. Upon what do you base that statement?

A. His general conversation.

Q. Did he have a general working knowledge of banking matters?

Mr. Carr: I object to that, if the Court please. What has that to do with this?

The Court: I think it makes a difference whether he was a man of culture, or not.

The Witness: No, sir.

Mr. Carr: He was the President of this man's bank.

Q. Now, with respect to No. 17 Broadway, Camden, who is the present occupant?

A. Walgreen's, and Bornot's have a car stored in the back garage.

Q. In making that statement are you looking at 17 Broadway and 8 and 10 Hudson Street as one property?

A. Yes, sir.

Q. Other than the Bornot car in the rear, is there any occupant of the Hudson Street end?

A. No, sir.

Q. With respect to the securities owned by Mr. Morgenweck at the time of his death, have any of them had a market price in excess of their cost?

A. No, sir.

Q. Will you give us more detail on that, the names of the stocks ——

A. American Stores; West Jersey Trust; Bornot, Common; American National Bank stock; American Brown Boveri participating; Bankers Securities, I think it is called, 2 Shares of the Associated Dyeing and Cleaning Association; Tavistock Country Club certificates; City Athletic Club.

Q. Any hotel stocks?

A. I think he did.

Q. Any stock of the Trustee system?
A. Yes, several shares of that.

Cross-examination.

By Mr. Carr:

Q. You spoke of a third codicil, Mr. Hunt?
A. I did not.
Q. Just a minute ago you spoke of a third codicil and then you corrected yourself. You found how many codicils?
A. Two.
Q. How many wills?
A. One.
Q. Did you find any other will than the will which is probated?
A. No, sir.
Q. The will which preceded that in point of time, did you find that?
A. I didn't know there was such.
Q. You didn't find it?
A. No, sir.
Q. As far as you know there never was any prior will to this will that was prepared?
A. No, sir.

Mr. Carr: Now, this is not cross-examination, but I think we ought to have on the record an idea of what personalty there is on hand. I anticipated you were going to bring that out.

Mr. Van Name: I have no objection to your developing that.

Mr. Carr: You don't propose to prove that by any other witness?

Mr. Van Name: No, I didn't expect to. I have no objection to your bringing that out.

Q. How much personal estate is there on hand in this matter?

A. I can't give you that off-hand.

Q. Have you ever furnished a statement of that to William P. Morgenweck, or Margaret S. Morgenweck?

A. Of the personal property, no, sir.

Q. What debts have been paid?

A. Debts that were incurred, such as funeral expenses, and what few bills Mr. Morgenweck had.

Q. Are there debts of Mr. Morgenweck's not paid?

A. Yes, I suppose there are.

Q. Don't you know positively?

A. Yes, there are.

Q. I am talking about debts of William E. Morgenweck.

A. The mortgage on 17 Broadway.

Q. Aside from the mortgage? Wasn't there money due the American National Bank?

A. Yes, that is not all paid. $10,000 has been paid on account.

Q. How much is still due?

A. $3000 and interest.

Q. Any money due other banks?

A. No, that has been paid.

Q. These loans of the bank were secured by collateral, were they?

A. No, sir. They are in our bank, but the note in Broadway was not.

Q. Have there been any sales of collateral?

A. No, sir.

Q. What is the total indebtedness of the estate at this time?

A. I would say between fifty-five and sixty thousand dollars.

Q. The personal estate?

A. Including the real estate.

Q. The personal estate?

A. $5000.

Q. How much cash have you on hand?

A. I didn't look before I came, but there is not that much actual cash on hand.

Q. You haven't sold any of the stocks that belong to the estate?

A. No.

Q. You stopped paying the annuity to William P. Morgenweck and the annuity to Margaret S. Morgenweck upon your own initiative?

A. Upon my own?

Q. You or the bank?

A. Upon the bank's initiative.

Q. On instructions from Counsel, I suppose?

A. Yes.

Q. The inventory filed in February shows a personal estate of $49,743.11. A great deal of that has been reduced to cash, has it?

A. No, sir.

Q. Have any shares or bonds represented by that list been reduced to cash?

A. The only one was the Bornot bond, it is paid to date, but there's still a balance due.

Q. How much?

A. I think it is $5000.

Q. $10,000 has been paid by Bornot, is that what you mean?

A. I think it was $15,000 originally.

Q. According to this it was fifteen?

A. If that says so there, it is right.

Q. You collected this insurance policy?

A. Which one?

Q. Is there more than one?

A. I don't know.

Q. You don't know much about this estate?

A. Not from memory.

Q. Who handles it?

A. I handle it.

Q. Have you any records in Court which will show what you have received for the estate?

A. No, sir.

Q. Or what you paid out?

A. No, sir.

Q. Or what balance there is for paying debts and these annuities?

A. No, sir.

Q. And you never supplied that information to Mrs. Morgenweck or to her son?

A. I answered all the questions they asked me.

Q. You never gave them a statement of the receipts and disbursement of the estate?

A. No.

Q. And you are not prepared now to tell us?

A. Not right from memory, if I had my books I could, there is a complete record of everything.

Q. There is, however, more than sufficient personal estate to pay the $5,000 or $6,000 of debts, and leave a substantial balance toward the payment of these annuities, isn't that true?

A. No, sir, I would say there is not.

Q. There is still five or six thousand dollars of debts?

A. Approximately that.

Q. And you still have for sale all these stocks and bonds?

A. Yes, but we are not permitted to sell those securities.

Q. I am not asking what you are permitted to do, I am asking for figures?

A. Yes.

Q. You still have in your hands assets amply sufficient to pay all the debts, haven't you?

A. If we are permitted to sell them, yes.

Q. And amply sufficient to give a surplus over that for the payment of annuities?

A. If we are permitted to sell the securities.

Q. Answer the question. You have enough money, more than enough to pay the debts and annuities?

A. Not in cash, no, sir.

Q. In stocks?

A. Yes, sir.

Q. Have you ever applied to the Court for authority to sell those stocks?

A. No.

Q. You have acted for the estate for a year and a half and never applied for permission to sell these stocks?

Mr. Van Name: That is in this suit. There is a question directed to that.

Q. I am asking the Executor might have applied to the Orphan's Court for permission to make the sale, and that has not been done, Mr. Hunt?

A. No, sir, this is the first that I know of.

By Mr. Van Name:

Q. Has the remaining $5000 due by Bornot been paid to the bank?

A. It is not due yet.

Q. And that is set forth in the inventory as an asset?

A. That is right.

Q. Why hasn't the bank sold any of the stocks Mr. Morgenweck owned?

A. Because the codicil states they shall not be sold until they bring what he paid for them.

Q. Has there been any time since his death when they would bring what he paid for them?

A. No, sir.

Q. Did you anticipate you would be asked the list of questions that Mr. Carr has asked you?

A. No, sir.

Q. Do the books of the bank give all the information that he has asked for?

A. Yes, sir.

Q. Has Mrs. Morgenweck or her son ever asked for information that has not been supplied to them?

A. No, sir.

By Mr. Carr:

Q. Why do you say that? You said a little bit ago you had never talked to Mrs. Morgenweck about this?

A. He asked if any information had ever been denied them.

Q. Didn't you say you never talked to Mrs. Morgenweck?

A. I have.

Q. About this will?

A. No.

Q. Mrs. Morgenweck has never made any request to you personally that has not been complied with?

A. No.

Q. You don't know who else she may have asked?

A. No.

Q. And the same thing applies to Mr. Morgenweck?

A. All I know is the conversations I had with him.

Q. Do you mean to say William E. Morgenweck has never asked anybody connected with your bank for a statement?

A. No, sir. In the beginning he asked several questions pertaining to the will.

Q. Do you say William P. Morgenweck has never asked for a statement of anybody at your bank?

A. He never asked for any information that we haven't given him, that we had.

Q. You don't know whether he asked anybody else?

A. No, certainly not.

HAROLD A. WALBURN, sworn.

By Mr. Van Name:

Q. Mr. Walburn, what is your line of business?
A. I am a certified public accountant of the State of New Jersey.
Q. And what is your business address?
A. 118 North 3rd Street, Camden, New Jersey.

Mr. Carr: I know Mr. Walburn, I know he is a certified public accountant, and I know he is all right. Now, is there something I can agree to?

Mr. Van Name: Suppose I try my questions, and if they are objectionable, you can object.

Q. In preparing for the examination as a certified public accountant, was it necessary for you to study, to some extent, legal principles?
A. It was.
Q. Did you ever do any accounting work for the decedent?
A. Yes, sir, I prepared his Federal income tax return, for the years 1928, and 1929, and also made an examination of his books for the two-year period ending December 31st, 1929.
Q. You had access to his books?
A. Yes, sir.
Q. Of account?
A. Yes, sir.
Q. Did you have access to the stock certificate book of Morgenweck, Inc.?

A. Yes, sir.

Q. Did you have any opportunity to determine whether or not Mr. Morgenweck was skilled in legal principles?

Mr. Carr: If the Court please, I will suggest again that that is improper from this witness. Mr. Morgenweck is not on trial, and that is not necessary in order to construe this will.

The Court: I will let him pursue that to ascertain what type of man he was with reference to his educational qualities.

The Witness: My contact with Mr. Morgenweck impressed me he had a very meagre educational background, and in my opinion ——

Mr. Carr: You were not asked for your opinion.

The Witness: I would say he did not have a knowledge of law, or legal principles, or of accounting principles, for that matter.

Q. Do you know whether or not Mr. Harding did any legal work for Mr. Morgenweck during the last three or four years of his life?

A. Not to my knowledge.

Mr. Carr: You don't know, you mean to say.

The Witness: I will say, so far as my examination of the books and records of the company, including its minutes, indicated, he did not do any legal work.

Q. This question may be objectionable, but I don't know how to find out except by trying. Don't answer this until the Court has ruled on it. Did Mr. Morgenweck, prior to the preparation of his last codicil, discuss with you his attitude towards Mr. Harding?

Mr. Carr: I do object to that, I don't think that's proper. Mr. Harding is not here to speak for himself.

The Court: I don't know just how far to go in that. I do think if there was a breach between him and Mr. Harding between the time the will was drawn and the codicil was drawn it might be relevant.

Mr. Carr: I happen to know Mr. Harding was of Counsel for matters in which Mr. Morgenweck was involved, and he was on the record and is still on the record. It doesn't matter to me who the Trustee is, but I don't think it is proper to try to reflect on Mr. Harding. I say that out of fairness. I know Mr. Harding was Counsel for Mr. Morgenweck.

The Court: I don't know how far Counsel should go along these lines. It is well settled statements made by the testator to the man drawing his will cannot be used, and I doubt whether the statements made by Mr. Morgenweck touching Mr. Harding would be competent. I will let it stand on the record, over objection, and if they are not competent, they can at least be there. I very much doubt their com-

petency, though. My recollection is conversations between the testator and the scrivener of his will are not competent.

Mr. Carr: That was my understanding.

The Court: I will let it go in if you think it will be of service to you.

Mr. Van Name: I am satisfied to have it stay subject to Mr. Carr's objection.

The Witness: Yes, Mr. Morgenweck did indicate that he didn't think that Mr. Harding had taken care of some matters the way he should have. Without saying what he said to me, I don't know what I can say, but they had difficulty.

Q. You are entitled to state what Mr. Morgenweck told you, under the Court's ruling.

A. Mr. Harding came up in the course of our conversation regarding the audit, and I remarked that I thought Mr. Harding was a good attorney, and he stated he didn't think he was so hot, that he had had some trouble with him, but he did not specify what trouble it had been.

The Court: How long was this before his death?

The Witness: This was in November of the year preceding his death.

Q. That would be November, 1929?

A. Yes.

The Court: Before the date of the codicil.

Mr. Carr: Yes, sir.

Mr. Van Name: I wonder if I might have Mr. Bleakly testify at this point? He is limited for time.

Mr. Carr: I thought we were going to stipulate to it.

Mr. Van Name: I think we may be able to.

Mr. Carr: I am willing to stipulate.

Mr. Van Name: I would like to stipulate that there is a bond and mortgage covering properties 8 and 10 Hudson Street and 17 Broadway, Camden, in the amount of $50,000.

Mr. Carr: There is.

Mr. Van Name: $50,000, which is overdue by its terms, and that E. G. C. Bleakly, representing the mortgagee, has requested payment of the mortgage, and that that mortgage bears interest at 6%, and I would like to ask Mr. Bleakly the name of the present holder of the mortgage.

Mr. Bleakly: Centenary Tabernacle M. E. Church of Camden.

Mr. Carr: I will agree to that.

Mr. Bleakly: I think the interest is paid up to April last, or whatever the last due date was.

Mr. Van Name: Has the mortgage been assigned to anyone as collateral, or otherwise?

Mr. Bleakly: Yes.

Mr. Van Name: To whom was it assigned.

Mr. Bleakly: First National Bank and Trust Company of Camden, New Jersey.

The Court: Mr. Bleakly's testimony will stand as on the record by consent of Counsel.

Mr. Van Name: I was going to ask Mr. Walburn to identify some of these exhibits on the written work of Mr. Morgenweck, but I don't believe that is necessary.

Mr. Carr: What exhibits do you mean, some that are already in?

Mr. Van Name: Yes.

Mr. Carr: They are already proved and in evidence.

Mr. Van Name: There is no question about that in your own mind?

Mr. Carr: They are in evidence.

Q. From your examination of Mr. Morgenweck's books, will you state whether or not he owned some cleaning and dyeing stores operated under the name of "Diamond Dollar Cleaners"?

A. Yes, those stores were owned by William E. Morgenweck.

Q. Was Mr. Morgenweck the largest and principal stockholder of Morgenweck, Inc., which operated the cleaning and dyeing business at 17 Broadway?

A. Yes, sir, he owned substantially all of that.

Q. Were those businesses sold, and if so, to whom, and when?

A. They were sold to Bornot, Inc., and the agreement of sale for them was executed on the 27th day of March, 1929.

Q. Do you have a signed copy of the agreement of sale?

A. I have, yes, sir.

Q. Does Mr. Morgenweck's signature appear on there as President of Morgenweck, Inc.?

A. Yes, sir.

Q. And does his signature appear there in his individual capacity?

A. Yes, sir.

Mr. Van Name: I offer this agreement of sale in evidence.

Mr. Carr: If the Court please, I am entitled to know the purpose of this. I can't imagine what possible relevancy this may be, and, on the other hand, if Mr. Van Name has a theory on which it is relevant he ought to state it.

The Court: I understand he simply sold out his business before he died, is that right?

Mr. Van Name: Yes, and I thought it would possibly be enlightening to the Court to know his entire situation. It is offered for that purpose.

Mr. Carr: What do you mean, his entire situation?

Mr. Van Name: The situation surrounding the testator at the time he died. It appears he did not operate the business at that time.

Mr. Carr: I object to encumbering the record with exhibits that have nothing to do with the case. Five or six pages of an agreement that Court and Counsel have got to study to see its relevancy, and I don't think it is proper to have the Court do it. We all know the business was sold.

Mr. Van Name: Why do you deny it in the answer, and I wouldn't have had to prove it?

The Court: Let it stand. He had sold out his corporation before he died and had retired from that business.

Mr. Carr: Is this agreement going in evidence if the Court please, or not?

The Court: Yes, let it go in.

(Said paper offered in evidence and marked Exhibit C12.)

Q. Now, I show you a lease made by Mr. and Mrs. Morgenweck to the Walgreen Company, dated December 19th, 1928, for premises 17 Broadway, and 8 and 10 Hudson Street, with a blueprint of a survey attached, and ask if that agreement bears the signature of the decedent, William E. Morgenweck?

A. Yes, sir, it does.

Mr. Van Name: I offer this in evidence.

The Court: Leasing of the premises in the rear.

Mr. Van Name: This is the lease of the main piece of real estate which produces the income mentioned in the codicil.

The Court: All right.

(Said paper offered in evidence and marked Exhibit C13.)

Mr. Van Name: Lease dated December 19th, 1928, by Walgreen Company to William E. Morgenweck and Margaret S. Morgenweck, of premises 8 and 10 Hudson Street, and a very small portion on the rear of 17 Broadway, for a five-year period beginning July 1st, 1929, at a rental of $166.67 a month.

Mr. Carr: No objections.

Mr. Van Name: I offer that in evidence.

(Said paper offered in evidence and marked Exhibit C14.)

(No cross-examination.)

WILLIAM P. MORGENWECK, sworn.

By Mr. Van Name:

Q. Mr. Morgenweck, you are the son of the decedent?

A. Yes, sir.

Q. And your present address is what?

A. 936 Somerset Street, Gloucester, New Jersey.

Q. How long have you lived there?

A. Eight years this August.

Q. How long has your mother lived there with you?

A. Since the death of my father, March 5th, 1930.

Q. And you have no children?

A. No, sir.

Q. During the later three or four years of your father's life, did he, to your knowledge, have Mr. Harding do any legal work for him?

A. Not to my knowledge.

Q. Did he have legal work to be done?

A. Yes, sir.

Q. And did that work go to someone other than Mr. Harding?

A. Yes, sir.

Q. After your father's death was a copy of the will and codicil furnished to you by the bank?

A. I asked for them and they were furnished.

Q. And did you show those to your mother, or tell her of their contents?

A. I told her of the contents, but did not show them to her.

Q. Shortly before April 21st, 1930, and after your father's death, did you consult Mr. Harding and request him to tell you what the documents meant?

A. I did.

Q. Has Mr. Harding at any time since your father's death asserted any control over your father's real estate?

Mr. Carr: I object to that, if the Court please.

The Court: He may testify if he knows.

The Witness: No, sir.

Q. When you have had something to say or do with respect to the real estate, who did you consult or request to act?

Mr. Carr: Is that question clear to you, Mr. Morgenweck?

The Witness: I think so. I haven't consulted anyone with reference to real estate.

Q. What did you do with respect to the removal of the Morgenweck sign on 17 Broadway after your father's death?

A. That was left entirely to Walgreen's.

Q. Did you write me a letter requesting that the sign be removed, and asking who should remove it?

A. Only from the instructions from Bornot.

Q. What is that?

A. Only from instructions from Bornot.

Q. But you did write me such a letter?

A. I think so.

Q. Did you, in that same letter, mention the fact that Bornot was still using the garage and they owed the estate $16.00 for rent?

A. Yes, sir.

Q. And didn't you also state the Walgreen Company was using the plant that they had not rented for storage purposes, and they drew the nails off the door and left the door wide open.

A. Yes, sir.

Q. And did you say that you thought someone ought to go down there and see the foreman who was on the job and get after him?

A. Yes, sir.

Q. And that letter was addressed to me, wasn't it, and dated August 20th, 1930?

A. Yes, sir.

Mr. Van Name: I offer the letter in evidence.

Mr. Carr: May I see the letter?

(Said letter offered in evidence and marked Exhibit C15.)

Q. Did you write to Mr. Hunt at the American National Bank on October 9th, 1930, stating there was no power back in the Hudson Street building to operate the oil burner when it gets to be cool weather, and that you thought it would be a good thing to have Mr. Peterson go over and see that everything is in running order when the time comes to use it, did you write such a letter as that?

A. I did.

Mr. Carr: How many more of these are there? I don't see any relevancy this has.

Mr. Van Name: I think that is all I will offer.

The Court: I don't see it, either. Let it go in.

(Said letter offered in evidence and marked Exhibit C16.)

Q. Was your father an officer at any time during his life of any bank other than the American National?

A. Not to my knowledge.

Q. Was he a director of any other bank?

A. No, sir.

Q. Was he ever an executor of anyone's estate?

A. Yes, sir.

Q. Whose estate?

A. Phillip Stefani, his father-in-law.

Q. Was he an executor or administrator?

A. It was between he and Mr. Nixon, whether they were executors or administrators, I don't know.

Q. How did Mr. Nixon figure in it, did he do the legal work?

A. Yes, sir.

Q. For the Stefani estate. You don't know whether he was executor or administrator?

A. That is too many years ago.

Cross-examination.

By Mr. Carr:

Q. Mr. Morgenweck, at the time you wrote these letters here in evidence, by whom were you employed?

A. Employed by Bornot.

Q. They were the people who bought this business from your father?

A. Yes, sir.

Q. And they occupied the back of this property?

A. They rented the garage.

Q. Were those letters written when you were employed by them?

A. Yes, sir.

Q. And written at their request?

A. With reference to the sign it was at their request, but the others were simply because the building was opened and neglected, and I wrote that.

Q. Nobody was paying attention to the building?

A. No, sir.

Q. And that is why you wrote the American National Bank asking them if they wouldn't do those things?

A. Yes, sir.

By Mr. Van Name:

Q. As a matter of fact, when did Bornot remove from the building?

Mr. Carr: If you know, Mr. Morgenweck.

The Witness: When did they move out?

Q. Yes.
A. At the expiration of their lease, which you no doubt have.
Q. About when was that?

Mr. Carr: If you know, Mr. Morgenweck.

The Witness: About July 1st, 1930, as near as I can tell you.

Q. And that was the date when your mother also removed from the second floor of 17 Broadway and came to live with you?
A. No, she came with me on March 3rd.
Q. Before that date?
A. Yes, sir—March 5th, rather.
Q. I call your attention to the fact that both of these letters were after the date named, July 1st, 1930, and you said they were written during the occupancy of the property?
A. While I was employed by Bornot.

Mr. Carr: You were employed in Philadelphia as well as Camden?

The Witness: Yes.

Q. It was after Bornot left the property?
A. Yes, sir.
Q. Therefore, Bornot was not interested in the heating of the building?

A. No, sir.

Q. Nor were they interested in the fact the building was tampered with and left unlocked?

A. No, sir.

Q. You didn't write those things on their suggestion?

A. No, sir, only the sign.

ARTHUR E. ARMITAGE, sworn.

By Mr. Van Name:

Q. Mr. Armitage, you are the General Secretary of the Camden Y. M. C. A.?

A. I am.

Q. I show you a document called a Declaration of Trust, dated February 11th, 1925, it appears to be, and ask if you signed that declaration?

A. That is my signature.

Q. Who had, and still has the legal title to the property described in this Declaration, at the corner of Cove Road and Westfield Avenue, in Pensauken township?

A. I have.

Q. What interest, if any, did Mr. Morgenweck have in that property?

A. He had a one-fourth interest.

Mr. Carr: I think that is set forth in the Trust Agreement.

Mr. Van Name: It states he had a one-fourth interest.

Mr. Carr: Let it go by that then.

Mr. Van Name: I offer this Declaration of Trust in evidence.

(Said paper offered in evidence and marked Exhibit C17.)

Q. Is the property in question occupied or not?

A. It is unoccupied at the present time.

Q. Has it been occupied at any time since Mr. Morgenweck's death?

A. Spasmodically.

Q. State the general nature of the property?

A. It is a corner property, 75 feet on the Burlington Pike, and approximately 130 feet on Cove Road, with a two-story frame building used as a store and dwelling.

Q. Are the carrying charges more or less than the rental income based upon the assumption that the property is capable of constant occupancy at the rental you received when it was occupied?

A. It would just about break even if it were rented at the rental we do get when it is rented.

Q. As the facts are, it shows a loss?

A. Yes.

Q. How much mortgage is there on that property?

A. $6000.

Q. When is, or was, the principal due on that mortgage?

A. The mortgage was placed with the Camden Safe, and I don't know that it is for any specific time—I imagine for a year, but I don't know.

Q. What interest does it bear?

A. 6%.

Q. Has Mr. Harding in any way communicated with you concerning that property, or attempted to exercise any dominion over it?

A. No, I never heard anything from him.

Q. Has he made any claim for any portion of the rentals?

A. No, sir, I have had nothing to do at all with him.

Q. Has Mr. Morgenweck communicated with you with regard to any alleged claim of dower on her part?

A. No.

Q. Has she asked you for any share of the rent?

A. No.

(No cross-examination.)

MARGARET S. MORGENWECK, sworn.

By Mr. Van Name:

Q. Mrs. Morgenweck, you lived with your husband at 17 Broadway for a good many years up to the time of his death?

A. At the time he left Camden I went home with William.

Q. And that was about February 7th, 1930?

A. Yes.

Q. At the time he left for Florida?

A. Yes.

Q. And you have been living with your son continuously since that time?

A. I have.

Q. Except for a trip to California, which was about how long?

A. Not quite three months.

Q. When did you first learn of your husband's will and codicils?

A. I don't recall just when, I don't quite recall.

Q. Do you recall the occasion when Mr. Hunt and I came to your home at 17 Broadway within a week after your husband's funeral with a copy of the will and codicils?

A. Yes, I recall.

Q. Did you see the newspaper account of the contents of the will and codicils testifying what you were to receive, $100 a week?

A. Yes, I had an extra copy of the paper.

Q. Now, we had here a number of checks payable to you issued by the Trust Department of the American National Bank at the rate of $100 per week, which say they are for weekly allowances.

Mr. Carr: They do not all say that, do they, Mr. Van Name?

Mr. Van Name: I will look at them and be sure of it.

Q. Check No. 4 says, "Four weeks' support for the weeks ending March 12th, 19th, 26th, and April 2nd." You understood when you received that check and cashed it that it was money payable to you under the codicil of Mr. Morgenweck's will?

A. Yes, that was the understanding.

Q. And that No. 25 says, "Allowance from April 2nd to May 14th, 1930, inclusive." When you cashed that you understood it was under your husband's will?

A. That was his own writing, wasn't it?

Q. No. I say, when you cashed that check you knew that was payable under his will?

A. Yes.

Q. I show you a check No. 33, it says, "Income to June 11th, 1930." When you cashed that you knew that was payable under his will?

A. Yes, sir.

Q. I show you check No. 41, it says, "In payment of allowance from June 11th, 1930, to August 6th, 1930." You knew that was a payment at the rate of $100 a week under the will, is that right?

A. That is right.

Q. I show you check No. 47, it says, "Payment of income to date, September 3rd, 1930." When you endorsed that you understood it was a payment under the will?

A. I did.

Q. Now, have you ever received any checks from the bank for weekly allowances that you have refused and returned?

A. Not any.

Q. You cashed all that were sent you?

A. All that were sent.

Q. And you asked for further allowances after you got this last one of September 16th, 1930, which were not sent to you, isn't that right?

A. That is right.

Q. Mrs. Morgenweck, you were rather depending on your son for advice in business matters?

A. Yes.

Q. And he has asked you to follow his advice, hasn't he?

Mr. Carr: If the Court please, I don't know just what that is intended for. Certainly it is leading. I object to the form of the question.

The Court: I think the form is objectionable.

Q. Has your son, William, asked you to do or not to do anything with respect to business matters?

A. He has not.

Q. Have you asked your son to write letters to the bank asking for your allowances?

A. No, not to my knowledge.

Q. On whose judgment have you been acting since your husband's death?

Mr. Carr: If you understand the question, Mrs. Morgenweck. Do you understand what Mr. Van Name means?

The Witness: Does he mean legally? William really has been my adviser in everything. I have been quite ill after the shock and was not depending on myself.

Q. On business matters, you depended on William?

A. Yes, sir.

Q. And you were satisfied with whatever he did?

A. Whatever he did was correct.

Q. Have you made any claim for dower in any of the real estate that Mr. Morgenweck left?

Mr. Carr: If the Court please, I think I want to object to that, it is leading. In her answer she says she has never been given an opportunity to make an election, and when I spoke for her a little earlier I said we had never been given an opportunity to make an election, and I don't think Mr. Van Name should ask the question of this woman, who is not skilled in the law, and get from her on the witness stand what may be construed as an election.

The Court: No claim has been made?

Mr. Carr: We have not made our election, and we want information before we do it.

The Court: No election has been made as yet.

Mr. Carr: I think Mr. Van Name is contending we have elected.

Mr. Van Name: By the acceptance of these payments.

The Court: No claim of dower or dissent.

Mr. Van Name: My next question was whether she did file a form of dissent.

The Court: I think we had better have some luncheon. Make up your mind if that is important before we come back.

(At this point a recess was taken until 1:30 o'clock P. M.)

(Trial of the Court resumed at 1:30 o'clock P. M., pursuant to adjournment, in the presence of the Court, and Counsel for the respective parties.)

Mr. Carr: What I am willing to stipulate is Mrs. Morgenweck has never made any formal demand for dower on 17 Broadway, or any other real estate, and neither has she ever formally elected not to claim dower, but she will do that, she will elect, but she requires some additional information.

Mr. Van Name: That stipulation is satisfactory to me, and we will furnish any information you want, anything that we have got in our possession.

J. Oscar Hunt, recalled.

By Mr. Van Name:

Q. Don't answer this question until we see if there is an objection to it, it is a repetition of a question I asked this mornng, but in view of the fact a similar question was permitted of the latter witness, I desire to ask the question of Mr. Hunt. What, if any, statement did Mr. Morgenweck make to you prior to the execution of his codicil, within two years prior to the execution of his codicil, with respect to his attitude towards Mr. Harding?

Mr. Carr: I think it is incompetent, but the Court, I understand, allowed Mr. Walburn to testify to a similar matter.

The Court: To save any error.

The Witness: He made a statement that Mr. Harding had high-hatted him on two or there occasions lately since he was representing the Public Service and he didn't care to have him represent him any more.

Mr. Carr: Had high-hatted him?

The Witness: Yes, they are the exact words.

By Mr. Carr:

Q. You didn't know, or do you know, as a matter

of fact, that Mr. Harding was ever attorney for Mr. Morgenweck in a suit involving assessment proceedings on Broadway, Camden?

Mr. Van Name: I object, there is no evidence there is any such suit.

A. No, sir, I do not.

Mr. Van Name: I understand that suit was for an organization, and not for Mr. Morgenweck.

Mr. Carr: He says he doesn't know.

WILLIAM P. MORGENWECK, recalled.

By Mr. Van Name:

Q. I show you a book purporting to be the minute book of Morgenweck, Inc., and ask you if that is the minute book of that corporation?

A. Yes, sir.

Q. You are one of the incorporators of the company along with your father and Mr. Harding?

A. Yes, sir.

Q. I call your attention to the minutes of March 29th, 1926, and ask if that is your signature as Secretary?

A. Yes, sir.

Q. And when you signed as Secretary you knew that the minutes stated the following, "Patrick H.

Harding, having tendered his resignation as a member of the Board of Directors, it was, on motion duly carried, ordered that the same be accepted effective immediately.''

A. I knew he tendered his resignation on the Board, but I didn't know just how the minutes were written up.

Q. But he did tender his resignation on or about that date?

A. Yes, sir.

The Court: That was before the will was made, March 26th?

Mr. Van Name: No, it is not. That was after the will was made and prior to the codicil.

Mr. Van Name: I have no further testimony to offer.

Mr. Carr: I haven't any.

PETITION.

(Filed about June 23, 1933.)

IN CHANCERY OF NEW JERSEY.
82-31

Between:
THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee, &c., *Complainant,*
and
MARGARET S. MORGENWECK, *et al.*, *Defendants.*

On Bill, &c.
Petition.

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

The petition of William P. Morgenweck, of the City of Gloucester, County of Camden and State of New Jersey, respectfully shows:

1. Your petitioner is one of the defendants in the above-entitled matter. In said matter Margaret S. Morgenweck, widow of William E. Morgenweck, deceased, was one of the parties defendants.

2. Said Margaret S. Morgenweck departed this life on May 18th, leaving her last will and testament which was probated in the office of the Surrogate of Camden County on June 8, 1933, recorded in Book 84 of Wills, and in and by said last will and testament of Margaret S. Morgenweck she named your petitioner, William P. Morgenweck, as the executor thereof, and your petitioner has duly qualified as such executor.

3. Margaret S. Morgenweck had in her lifetime certain interests in the subject-matter of this suit and such interests have passed to your petitioner as executor under the last will and testament of the said Margaret S. Morgenweck.

Your petitioner, therefore, prays that this suit may stand revived with respect to the interest of the said Margaret S. Morgenweck, and against your petitioner, William P. Morgenweck, as executor under the last will and testament of Margaret S. Morgenweck, deceased, as a party defendant hereto.

Your petitioner will ever pray, etc.

HENRY M. EVANS,
Solicitor for and of Counsel with William P. Morgenweck, executor U/ W of Margaret S. Morgenweck, deceased.

State of New Jersey, }
County of Camden, } ss.

WILLIAM P. MORGENWECK, being duly sworn according to law, upon his oath deposes and says:

1. I am the petitioner in the foregoing petition named, and the matters and things therein set forth are true.

2. My mother, Margaret S. Morgenweck, departed this life on May 18th, leaving her last will and testament which was probated in the office of the Surrogate of Camden County on June 8, 1933, recorded in Book 84 of Wills, and in and by said last will and testament she named me as the executor thereof, and I have duly qualified as such executor.

3. Margaret S. Morgenweck had in her lifetime certain interests in the subject-matter of this suit and such interests in the said subject-matter have passed to me as executor under the last will and testament of the said Margaret S. Morgenweck.

(Signed) WILLIAM P. MORGENWECK.

Sworn and subscribed before me this 22nd day of June, A. D. 1933.

(Signed) OLIVER J. STETSER,
Notary Public of New Jersey.

(Notary Seal)

My commission expires July 16, 1933.

ORDER FOR REVIVOR.

IN CHANCERY OF NEW JERSEY.
82-31

10

Between: THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee, &c., *Complainant,* and MARGARET S. MORGENWECK, *et al.,* *Defendants.*	On Bill, &c. On Petition, &c. Order for Revivor.

20

It appearing by the petition and affidavit filed herein by William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, deceased, one of the defendants herein, that the said Margaret S. Morgenweck has died and that
30 by reason of her death William P. Morgenweck as executor under the said last will and testament of the said Margaret S. Morgenweck, duly probated, has acquired certain interests in the subject-matter of the suit, and that the said executor should be added as a party defendant hereto, and the Court

being satisfied that the allegations of the petition and affidavit are true;

It is, on this day of June, A. D. nineteen hundred and thirty-three, ordered that this suit stand revived against William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, in the place and stead of the said Margaret S. Morgenweck, deceased, with respect to the interest acquired by the said executor under the last will and testament of the said Margaret S. Morgenweck.

LUTHER A. CAMPBELL,
C.

Respectfully advised:
F. B. DAVIS,
V. C.

Consent is hereby given to the entry of the above order.

ELMER G. VAN NAME,
Solicitor for Complainant.

6-23-33.

OPINION.

DAVIS, V. C.:

William E. Morgenweck, late of the City of Camden, died March 5, 1930, leaving a will dated February 6, 1919, a codicil dated July 26, 1929, and a further codicil dated February 4, 1930, all of which

were duly probated by the Surrogate of Camden County on March 17, 1930.

Under the provisions of the second codicil, The American National Bank of Camden was made executor, and it assumed the duties of executor, as well as trustee, and has since been so acting.

Under the provisions of the will, certain specific bequests were made which were unaffected by the codicils.

By paragraph 10 of the will, the residuary estate was given to Patrick H. Harding and his successors, in fee, as trustee, and Mr. Harding was also named executor in the will.

The will was prepared by an attorney but both codicils were prepared by Mr. Morgenweck without legal advice. The first codicil made some changes affecting the trust set up in the will, which changes are consistent with it.

The testator was survived by his widow, Margaret S. Morgenweck, by his son, William P. Morgenweck, and by the latter's wife, Lena V. Morgenweck. William P. Morgenweck, the son, had no issue at the time of the testator's death, nor has any been born since, and there was no other deceased child or issue of a deceased child of the testator. Since the filing of the bill, Margaret S. Morgenweck, testator's widow, has died.

The testator, at the time of his death, was possessed of some personal property, but the principal part of his estate consisted of real estate. Of the latter, part was a business property, No. 17 Broadway, running through to Hudson Street, Camden, which was leased to a company doing a chain store

business, at a substantial rental, which lease is still in effect. This property was subject to a mortgage of $50,000. The other real estate consisted of an undivided interest in a property in Pensauken Township, Camden County, which has since been lost by foreclosure, leaving only the Broadway, Camden, property.

It must be determined to what extent the will and the first codicil were revoked by the second codicil. That part of the will which disposed of the residuary estate is as follows:

> "10. I give, devise and bequeath all of the rest, residue and remainder of my estate, both real and personal, wherever situate, of which I shall be seized, or to which I may be entitled at the time of my decease, including, any lapsed legacies, unto my friend, Patrick H. Harding, and his successors, in fee, as trustee, for the following uses and purposes:
>
> (A) To permit my beloved wife, Margaret S. Morgenweck, during her lifetime, to occupy and use the upper floors of my property, No. 17 Broadway, Camden, N. J.
>
> (B) To rent or lease the store, workrooms, and outbuildings at No. 17 Broadway, together with machinery, equipment, and trade fixtures, or any part thereof, to the best advantage of my estate; provided, however, that as between those willing to give an equal amount of rental, my son, William P. Morgenweck, shall have the preference. My trustee shall take such precautions and require such guaranties or sureties as will compel the leasee to keep the premises oc-

cupied by him, and the fixtures and equipment up to and in the same standard repair as the same may be in at the time he receives them, and if a lease be given, the same shall contain a provision that it may be terminated by my trustee, should the leasee fail to comply with this requirement.

(C) The net profit produced by the rental of said property after the payment of taxes and other expenses, shall be paid by my trustee to my said wife, Margaret S. Morgenweck, which shall be paid to her monthly.

(D) To sell and convey, at any time, at public or private sale, according to his own judgment, any of my property, except 17 Broadway, Camden, N. J.

(E) Upon the death of my said wife, Margaret S. Morgenweck, my trustee shall sell the said property, 17 Broadway, to the best advantage; provided, however, that as between those offering the same price, preference shall be given to my said son, William P. Morgenweck.

(F) At the death of my said wife, the sum of three thousand dollars shall be invested and re-invested by my trustee and his successors as a perpetual fund, the income of which shall be paid by my trustee in equal shares, unto the three following institutions, namely: The Central Y. M. C. A, the Trustees of The Cooper Hospital, and The West Jersey Homeopathic Hospital, all of Camden, New Jersey, payments to be made semi-annually. Should any cease to exist, the others shall take all of said income.

(G) Of the remainder of said trust estate, my trustee shall, after the death of my said wife, pay and deliver unto my said son, William P. Morgenweck, one-half, as his own absolute property.

(H) The other half of said remainder of said trust estate shall be divided into two equal parts and held by my trustee for the following purposes: One part thereof to be used to give to the first child born to my said son, if a boy, a good school and college education, and any surplus to be paid to such child at his arrival at the age of twenty-one years. The other part thereof to be used to give his second child, if a boy, a good school and college education, and any surplus to be paid to such child at his arrival at the age of twenty-one years. Should either or both of the first two children of my said son be a girl or girls, the two parts provided for, shall be held by my trustee until her or their arrival at the age of twenty-one years, when the same shall be paid to her or them, respectively. It is my intention that the first two of the children of my said son arriving at the age of twenty-one years, shall take all, to the exclusion of any younger children. Should there be no child or children of my said son, Wililam P. Morgenweck, having taken or capable of taking under this clause at a period of twenty-one years after the time of his marriage, or should he not marry within twenty-one years after the death of the survivor of myself and wife, my trustee shall pay and deliver unto my

said son, William P. Morgenweck, the remaining one-half of the proceeds of the sale of said trust estate, or such part thereof as may then remain in the hands of my trustee. Should any son of my said son, William P. Morgenweck, enter into the enjoyment of his share and die before reaching the age of twenty-one years, he shall not be counted and the remainder of the part of my estate that would have gone to such son, shall remain a part of my trust estate, and be subject to the provisions of this clause.

(I) In case of the death of my said son, William P. Morgenweck, before my death, the income of the entire remainder of my said trust estate shall be paid to the three parties named in paragraph F, in the manner therein provided.

(J) My said trustee shall have power to invest the assets of the trust estate, in such securities as are allowed by law, and shall secure if possible, such securities as produce a stated income, and such as are exempt from taxation, and may from time to time, change or substitute the securities.

(K) In case of the death, resignation, or removal of my said trustee or executor, a successor or successors shall be appointed by the Court from time to time, each of whom shall have all of the powers hereby conferred upon the original trustee and executor."

The second codicil reads as follows:

"I Wm E Morgenweck. of the City of Camden and County of Camden & State of New

Jersey, being of sound and disposing mind do make, Publish and declare this a Codicil to my last Will and Testament;

As soon as possible after my demise all my bills shall be paid from the proceeds of a $5000.00 Life Insurance Policy that I have.

When my securities will bring more than I paid for them they should be sold and the proceeds used to pay off the balance of notes or debt still unpaid. The balance to be placed to the account of the estate—to which there shall also be added the monthly revenue derived from the rental or lease of the property's 17 Broadway and No's 8 and 10 Hudson street.

Out of this account there should be paid (or set aside from Month to Month a sum sufficient to pay the Sime-anual interest and other expenses that there may be) and from the balance there should be paid to my beloved Wife the sum of $100.00 a week during her Life.

To my Son Wm. P. Morgenweck I bequeth the sum of $50.00 (Fifty Dollars) a week during his Mothers life time, but at her death if he survives her this amount shall be increased to One Hundred Dollars ($100.00) a week during his lifetime. Under no condition can this money be attached by any one to pay any debt or debt's incurred by said Wm. P. Morgenweck. If said Wm. P. Morgenweck should have any direct issue at his death, then after his death $00.00. (One Hundred Dollars) shall be set aside weekly to cloth and educate thee same, after which each of them shall receive Ten Dollars

Weekly (10.00) until they marry after which this amaunt shall be increased to $25.00. a week with the following provission, That his or her mate as the case may be can not attach the same for there use under any circumstances.

Should however my son Wm. die without issue then at his death and from then on until the end of her natural life his Lawful Wife shall receive a weekly sum of $50.00 (Fifty Dollars) as long as or providing she does not marry again, but should she marry again she will forfeit this allowance.

As stated above it is my wish that these bequests can under no condition be attached for the satisfaction of a debt of any nature created by any of the above named beneficiarys.

After the death of My Wife, My Son, His Wife, Or their issue should they have any the income from my estate shall be equally devided semi-annually (after expenses have been deducted therefrom) with ## the local Hospitals in equal proportions.

I also name the American National Bank as my Executers of my Estate."

It is apparent from a reading of this second codicil, that it substitutes different provisions for the disposition of the testator's residuary estate, and must be construed as revoking that part of the will.

Where provisions of the codicil conflict or differ from the provisions of the will, the said provisions

of the codicil shall be effective, and the provisions of the will which they change and abrogate, shall be null and void and of no effect whatever, and being thus revoked they are definitely and finally nonexistent as operative testamentary provisions, just as much as if the testator had physically destroyed them, no matter whether or not the codicil's substituted provisions or any part thereof be held invalid.

The function of the court is only to construe the will the testator has made, not to make a will for him. McGill v. Trust Co. of N. J., 94 N. J. Eq. 657; 121 Atl. 760.

The effect of this second codicil is to make void the provisions of the paragraph of the will which is quoted, including the trust fund provided therein for the defendants, the Central Y. M. C. A., the Trustees of the Cooper Hospital, and the West Jersey Homeopathic Hospital.

It is also obvious that the appointment of Patrick H. Harding as executor under the will, as well as trustee, is revoked, and that the executor named in the codicil, The American National Bank of Camden, is constituted not only executor but trustee to carry out such valid trusts as are provided in this second codicil.

It is contended on the part of the complainant that the second codicil, in the construction of which we are now concerned, makes a complete disposition of the testator's estate, and in no wise violates the rule against perpetuities.

As I construe this codicil, the testator directs payment of his debts from the proceeds of a life insurance policy, and provides that when his securities

will bring more than he paid for them, they shall be sold and the proceeds used to pay off debts still unpaid from the proceeds of the life insurance policy; and that the balance be placed to the account of the estate, adding the monthly revenue from his Broadway property known as 17 Broadway and 8 and 10 Hudson Street, Camden; and that from this account there be paid the interest on the mortgage on these premises and other expenses, and that there then be paid to his wife, Margaret S. Morgenweck, $100 a week during her lifetime, and to his son, William P. Morgenweck, $50 a week, which shall be increased to $100 a week after the death of his mother, such payment to be made during his lifetime. Upon the death of his son, William P. Morgenweck, should he leave any direct issue (such issue meaning any direct descendant such as a child or grandchild), the sum of $100 weekly shall be set aside to clothe and educate such issue (meaning this amount for all the issue as a class), after which each one of them shall receive $10 weekly until marriage when the amount shall be increased to $25 weekly. If the testator's son, William, should die without issue, then his lawful wife (who may not necessarily be William's present wife, Lena, but any lawful wife he may leave at the time of his death) shall receive $50 weekly during her lifetime unless she should marry again, in which case such payment shall cease; and after the death of testator's wife, his son, William, such wife as the son may leave him surviving at his death, and the son William's issue, should there be any, the income from the estate shall be equally divided semi-annually, after deducting

expenses therefrom, "with the local hospitals in equal proportions."

Professor Gray states the rule against perpetuities as follows:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray Perp. (3rd ed.) 174.

In McGill v. Trust Co. of N. J., *supra,* Vice-Chancellor Buchanan said:

> "It is not enough that the contingency may happen within the time limited by the rule; it must necessarily happen, if it happen at all, within that time. If there be a possibility that it may happen after the time limited by the rule, the gift is void."

In Graves v. Graves, 94 N. J. Eq. 268 (at p. 273), 120 Atl. 420, Chancellor Walker said:

> "It is the possibility that the period covered by a life or lives in being and twenty-one years thereafter may be exceeded, and not the certainty or even probability that it will be exceeded, in a given trust, which calls for the application of the rule."

Vice-Chancellor Lewis, in Gillen v. Hadley, 106 N. J. Eq. 286 (at p. 295), 150 Atl. 779, said:

> "But this limitation does not stand alone, but is only one of several contingencies, and the rule which requires the vesting of the remainder is satisfied only when each and every contin-

gency which is set up as a limitation upon alienation must necessarily take place within lives in being and twenty-one years."

The measuring life in being for the purposes of applying the rule in this case, is that of testator's son, William P. Morgenweck. The provision for testator's widow and testator's son, William, and for the latter's lawful wife, should any survive him, upon the contingency that he should leave no issue at the time of his death, are valid provisions. It will be noted that the testator's directions for payments are not from income alone from his estate, but from the fund made up from the balance of the proceeds of the sale of his securities after there is added thereto the net revenue derived from the rental of his Broadway property, and that no mention is made of the payment of income from the estate, except in the paragraph of the codicil referring to the payment of the income after the death of his wife, son, his wife, and their issue.

The provision for the un-named local hospitals violates the rule against perpetuities for the reason that it may not vest until after twenty-one years from some life in being. It is quite possible that testator's son may remarry and that such wife may not be in being at the time of testator's death and may live for more than twenty-one years after the death of the son William, the life in being at the time of testator's death, thus violating the rule.

So far as the provision for the issue of testator's son, William, as a class, of $100 a week for clothing and education, is concerned, even if it could be said

that this provision terminated with the education of the last member of that class, leaving aside the plain direction of clothing in addition to education, it well may be that this provision cannot be carried out within twenty-one years after the death of testator's son, because of the possibility that the education of some one of this class will run beyond that period, and certainly the clothing of them would. It is quite obvious that the provision of $10 per week to each of the issue after all of them are clothed and educated, with the increase to $25 a week upon marriage, may well vest and become operative beyond the time permitted by the rule. These provisions for the issue of testator's son, constituting one general plan, violate the rule and are, therefore, void.

It is contended that there is a vesting at the time of the testator's death, of his remaining estate, in the local hospitals, and that only the enjoyment thereof is postponed. With this contention I do not agree.

The complainant herein, named as executor, who becomes trustee as well as executor, is vested with the title to the testator's estate in trust for the purpose of carrying out the valid provisions of the second codicil. If any estate remains after the termination of the trust, then the testator died intestate as to that estate.

There is no power given to the complainant, executor and trustee, under the will or the second codicil, to mortgage or convey the Broadway, Camden, property.

So far as the direction in the second codicil to

sell the securities of the testator when they will bring more than he paid for them, the complainant may make application to the Court to authorize the sale, upon adequate proof of the facts relating to the specific securities, should the complainant feel that it cannot safely sell without such authority.

Determined, October 18, 1933.

FINAL DECREE.

(Filed Dec. 15, 1933.)

IN CHANCERY OF NEW JERSEY.
82-131

Between: THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee, &c., *Complainant,* and MARGARET S. MORGENWECK, *et als.,* *Defendants.*	On Bill, &c. Decree.

This cause coming on to be heard in the presence of Elmer G. Van Name, Esq., solicitor for the complainant; Joseph H. Carr and Henry M. Evans,

Esqs., solicitors for the defendants, William P. Morgenweck, Lena V. Morgenweck and William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, deceased; Wilfred B. Wolcott, Esq., solicitor for the defendant, The West Jersey Homeopathic Hospital; Harold W. Bennett, Esq., solicitor for the defendant, Young Men's Christian Association of Camden, N. J.; and George Reynolds, Esq., solicitor for the defendant, The Cooper Hospital;

And it appearing that this bill was filed for the construction of the will and codicils of William E. Morgenweck, deceased; that the Young Men's Christion Association of Camden, N. J., The Cooper Hospital, the West Jersey Homeopathic Hospital, William P. Morgenweck, Lena V. Morgenweck and Margaret S. Morgenweck all filed answers thereto and that the defendants, Arthur E. Armitage, William Heckenhorn, Charles A. Smith and Patrick H. Harding, failed to answer, and that a decree *pro confesso* was taken against them; and that Margaret S. Morgenweck died after the said bill was filed and that the cause was revived as against her executor, William P. Morgenweck, and that the matter was first brought on for hearing before Honorable E. B. Leaming, then a Vice-Chancellor of this court and that the matter was, after the resignation of the said Honorable E. B. Leaming, referred to the Honorable Francis B. Davis, one of the Vice-Chancellors of this court, to review the same and consider the testimony theretofore taken for the Chancellor and to report thereon to him and to advise what order or decree should be made herein;

And it appearing that counsel stipulated that the matter should be determined by the Honorable Francis B. Davis, one of the Vice-Chancellors of this court, on the testimony taken before the Honorable E. B. Leaming;

And it further appearing that on the 25th day of April, 1933, the said bill of complaint was amended to directly raise the question whether under a proper construction of the will and codicils of William E. Morgenweck, deceased, the complainant, The American National Bank of Camden, is a trustee hereunder, and if so, whether it is the sole trustee; whether the defendant, Patrick H. Harding, is a trustee hereunder, and if so, whether he is the sole trustee; and whether the said complainant and the said Patrick H. Harding are co-trustees hereunder;

And it further appearing that a decree *pro confesso* has been taken against the defendants, Arthur E. Armitage, William Heckenhorn, Charles A. Smith, Patrick H. Harding, William P. Morgenweck, executor of Margaret S. Morgenweck, deceased, William P. Morgenweck, Lena V. Morgenweck, The Cooper Hospital, West Jersey Homeopathic Hospital and Young Men's Christian Association of Camden, N. J., for failing to answer the amendment to the said bill of complaint;

And it appearing that certain questions raised in the pleadings need not be answered at this time but that certain other questions require an answer; and the Court having considered the testimony, having heard the arguments of counsel, and considered the matters involved;

It is, on this 15th day of December, A. D., 1933,

on motion of Joseph H. Carr, solicitor of the defendants, Wm. P. Morgenweck, Lena V. Morgenweck and Wm. P. Morgenweck, executor, ordered, adjudged, and decreed that paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 9 of the said will of the decedent dated February 6, 1919, are valid and not revoked;

And it is further ordered, adjudged and decreed that the provisions of the second codicil to the will of William E. Morgenweck, dated February 4, 1930, are inconsistent with paragraph ten, sub-divisions A to K and paragraphs 11, 12 and 13, inclusive, of the original will of William E. Morgenweck, dated February 6, 1919, and are inconsistent with the terms of the first codicil to the will of William E. Morgenweck, dated July 26th, 1929, and that said paragraph ten, sub-divisions A to K and paragraphs 11, 12 and 13, inclusive, of the will dated February 6th, 1919, and said codicil dated July 26th, 1929, were entirely revoked and made void by the second codicil dated February 4th, 1930, and are of no effect, and that thus the devise to Patrick H. Harding upon the trusts set forth in said paragraph ten, sub-divisions A to K, inclusive, of the will of February 6th, 1919, and the provisions as modified by the codicil of July 26th, 1926, as well as each and all of the said trusts are wholly revoked and void.

And it is further ordered, adjudged and decreed that the second codicil dated February 4th, 1930, revoked the appointment of Patrick H. Harding, as executor of the last will and testament of William E. Morgenweck, deceased, and that Patrick H. Harding is neither the executor under the said will and codicils, nor trustee of any property or estate

of the said decedent, and that The American National Bank of Camden, the complainant herein is sole executor under the last will and codicils to the will of William E. Morgenweck and is also sole trustee appointed by the said will and codicils, and is entitled to act in those capacities.

And it is further ordered, adjudged and decreed that under the true construction of the said second codicil dated February 4th, 1930, the testator, William E. Morgenweck, directs payment of his debts from the proceeds of a life insurance policy, and provides that when his securities will bring more than he paid for them, they shall be sold and the proceeds used to pay off debts still unpaid from the proceeds of the life insurance policy; and that the balance (if any) be placed to the account of the estate, adding the monthly revenue from his Broadway property known as 17 Broadway and 8 and 10 Hudson Street, Camden; and that from this account there be paid the interest on the mortgage on these premises and other expenses, and that there then be paid to his wife, Margaret S. Morgenweck, one hundred dollars a week during her lifetime, and to his son, William P. Morgenweck, fifty dollars a week which shall be increased to one hundred dollars a week after the death of his mother, such payment to be made during his lifetime; and also invalidly directs that upon the death of his son, William P. Morgenweck, should he leave any direct issue (such issue meaning any direct descendant such as a child or grandchild), the sum of one hundred dollars weekly shall be set aside to clothe and educate such issue (meaning this amount for all the

issue as a class), after which each one of them shall receive ten dollars weekly until marriage when the amount shall be increased to twenty-five dollars weekly; and validly directs that if the testator's son, William P. Morgenweck, should die without issue, then his lawful wife (who may not necessarily be William's present wife, Lena, but any lawful wife he may leave at the time of his death) shall receive fifty dollars weekly during her lifetime unless she should marry again, in which case such payment shall cease; and invalidly directs that after the death of testator's wife, his son, William, such wife as the son may leave him surviving at his death, and the son William's issue, should there be any, the income from the estate shall be equally divided semi-annually, after deducting expenses therefrom, "with the local hospitals in equal proportions."

And it is further ordered, adjudged and decreed that the measuring life in being for the purpose of applying the rule against perpetuities in this case is that of the testator's son, William P. Morgenweck.

And it is further ordered, adjudged and decreed that the provision for Margaret S. Morgenweck of one hundred dollars per week during her lifetime is a valid and enforceable provision which she elected to accept in lieu of her dower, and she was entitled to receive one hundred dollars per week from the time of the death of William E. Morgenweck to the time of her own death.

And it is further ordered, adjudged and decreed that the provision for William P. Morgenweck of

fifty dollars per week during the lifetime of his mother, Margaret S. Morgenweck, and the provision for William P. Morgenweck of one hundred dollars per week after the death of his mother, Margaret S. Morgenweck, and to the time of his death, are valid and enforceable provisions under which he was entitled to receive fifty dollars per week from the time of the death of his father, William E. Morgenweck, to the time of the death of his mother, Margaret S. Morgenweck, and the sum of one hundred dollars per week from the time of the death of his mother, Margaret S. Morgenweck, until the time of his own death.

It is further ordered, adjudged and decreed that the payment to the lawful wife of William P. Morgenweck, should any wife survive him, upon the contingency that he should leave no issue at the time of his death, is a valid and enforceable provision under which, if William P. Morgenweck should die without leaving issue at the time of his death, his lawful wife, should one survive him, shall be entitled to receive the sum of fifty dollars per week from the date of the death of William P. Morgenweck, to the date of her death or re-marriage.

It is further ordered, adjudged and decreed that the valid trusts for Margaret S. Morgenweck, William P. Morgenweck and the lawful wife of William P. Morgenweck, hereinabove referred to are charges against a fund made up or to be made up of the balance of the decedent's personal estate after the payment of specific legacies and legacies to Caroline Reutsche and Mae Dilmore and after the payment of debts and administration expenses,

to which balance there is to be added the net revenue from decedent's real estate at 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, said net revenue being the balance after deducting interest on mortgages and other expenses of said real estate.

It is further ordered, adjudged and decreed that the provision set forth in the second codicil to the will of William E. Morgenweck, for the issue of William P. Morgenweck, which reads, "If said Wm. P. Morgenweck should have any direct issue at his death, then after his death $00.00 (One Hundred Dollars) shall be set aside weekly to cloth and educate the same, after which each of them shall receive Ten Dollars Weekly ($10.00) until they marry after which this amaunt shall be increased to $25.00 a week with the following provission, That his or her mate as the case may be can not attach the same for there use under any circumstances," is in contravention of the rule against perpetuities, is invalid and wholly void.

It is further ordered, adjudged and decreed that the provision of the said second codicil of February 4th, 1930, reading as follows: "After the death of My Wife, My Son, His Wife, Or their issue should they have any the income from my estate shall be equally devided semi-annually (after expenses have been deducted therefrom) with ## local Hospitals in equal proportions," is in contravention of the rule against perpetuities, is invalid and wholly void.

It is further ordered, adjudged and decreed that American National Bank as trustee under the will

and codicils of William E. Morgenweck, is vested with such an estate in a fund made up or to be made up of the balance of the personal estate of William E. Morgenweck after the payment of specific legacies and legacies to Caroline Reutsche and Mae Dilmore and after the payment of debts and administration expenses and is vested with such an estate in the net revenue from decedent's real estate at 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, said net revenue being the balance after deducting interest on mortgages and other expenses of said real estate, as is necessary to enable it to pay to Margaret S. Morgenweck or to her executor, the moneys due her under the trust in her favor; to pay to William P. Morgenweck the moneys due him under the trust in his favor and to pay to the lawful wife of William P. Morgenweck, if one should survive him, the moneys which would be due to her under the trust in her favor; *and that as to the balance, if any, of the net revenue from decedent's real estate at* 17 *Broadway and* 8 *and* 10 *Hudson Street, Camden, New Jersey, said net revenue being the balance after deducting interest on mortgages and other expenses of said real estate;* and as to the fee simple title to the said real estate of which William E. Morgenweck died seized, known as 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, *the same vested, upon the death of William E. Morgenweck, in William P. Morgenweck as the heir at law of William E. Morgenweck, subject only to the valid trusts for Margaret S. Morgenweck, William P. Morgenweck and the lawful wife of William P. Morgenweck, on the*

contingency above set forth; and that as to any other real estate of which the said William E. Morgenweck died seized, the said William P. Morgenweck was vested with the fee simple title thereto upon the death of William E. Morgenweck as the heir at law of William E. Morgenweck, free and discharged of any and all of the trusts set forth in the will and codicils of William E. Morgenweck.

It is further ordered, adjudged and decreed that the said American National Bank presently pay from the said fund made up or to be made up of the balance of the decedent's personal estate after the payment of specific legacies and legacies to Caroline Reutsche and Mae Dilmore and after the payment of debts and administration expenses, to which balance there is to be added the net revenue from decedent's real estate at 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, said net revenue being the balance after deducting interest on mortgages and other expenses of said real estate, to William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, the balance now due her on the trust in her favor; and to William P. Morgenweck the balance now due him on the trust in his favor and that after said payments are made, American National Bank pay to William P. Morgenweck, the sum of one hundred dollars weekly from the said fund *and that William P. Morgenweck is vested with and is entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue on the real estate known as* 17 *Broadway and* 8 *and* 10 *Hudson Street, Camden, New Jersey, not cur-*

rently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust, and upon the death of William P. Morgenweck without leaving issue and leaving a wife surviving him, the said wife shall be entitled to receive the sum of fifty dollars per week until her death or re-marriage; *and that during the continuance of said trust, the heirs executors, administrators or assigns of William P. Morgenweck are vested with and shall be entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue from the said real estate not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust.*

It is further ordered, adjudged and decreed that the complainant and any of the defendants who have an interest in the valid trusts under the will of William E. Morgenweck, deceased, may hereafter apply for further directions and relief, particularly in the event that any such parties be advised that because of changed circumstances, some provision should be made for accumulation of surplus income, this provision, however, to be without prejudice to any of the parties.

It is further ordered, adjudged and decreed that the said executor and trustee pay at this time to the solicitors for the defendants, William P. Morgenweck, Lena V. Morgenweck and William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, deceased, their costs herein, in which shall be included a counsel fee of $3,000.00; and that the said executor and trustee

shall pay at this time to the complainant's solicitor, its costs herein, in which shall be included a counsel fee of $3,000.00; and that the said executor and trustee shall pay at this time to the solicitor for the Cooper Hospital, the sum of $50.00 counsel fee; and the said executor and trustee shall pay at this time to the solicitor for the Camden Young Men's Christian Association, the sum of $50.00 counsel fee; and the said executor and trustee shall pay at this time to the solicitor for the West Jersey Homeopathic Hospital, the sum of $50.00 for counsel fee.

LUTHER A. CAMPBELL,

C.

Respectfully advised:

F. B. DAVIS,

V. C.

[Italics indicate portions from which appeal is taken.]

NOTICE OF APPEAL.

(Filed Dec. 15, 1934.)

IN CHANCERY OF NEW JERSEY.

82-131

Between:

THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee, under the will of WILLIAM E. MORGENWECK, deceased,

Complainant,

and

MARGARET S. MORGENWECK, *et als.,*

Defendants.

On Bill, &c.
Notice of Appeal.

The complainant, The American National Bank of Camden, executor and trustee under the will of William E. Morgenweck, deceased, hereby appeals from so much of the final decree made by the Chancellor on the advice of Vice-Chancellor Francis B. Davis, in the above entitled cause on December 15, 1933, as adjudges, orders and decrees the following:

1. "And that as to the balance, if any, of the net revenue from decedent's real estate at 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, said net revenue being the balance after deducting interest on mortgages and other expenses of said real estate, the same vested, upon the death of William E. Morgenweck, in William P. Morgenweck as the heir at law of William E. Morgenweck, subject only to the valid trusts for Margaret S. Morgenweck, William P. Morgenweck and the lawful wife of William P. Morgenweck, on the contingency above set forth."

2. "And that William P. Morgenweck is vested with and is entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue on the real estate known as 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust."

3. "And that during the continuance of said trust, the heirs, executors, administrators or assigns of William P. Morgenweck are vested with and shall be entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue from the said real estate not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust."

To the Court of Errors and Appeals in the Last Resort in all Causes.

Notice of Appeal

Dated: December 14, 1934.

ELMER G. VAN NAME,
Solicitor for and of Counsel with Complainant, The American National Bank of Camden, executor and trustee under the will of Wm. E. Morgenweck, dec'd.

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

ELMER G. VAN NAME,
Of Counsel with Complainant, The American National Bank of Camden, executor and trustee under the will of William E. Morgenweck, deceased.

PROOF OF SERVICE OF NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.
82-131.

Between:
THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee under the will of WILLIAM E. MORGENWECK, deceased,
Complainant,
and
MARGARET S. MORGENWECK, *et als.,*
Defendants.

On Bill, &c.
Proof of Service of Notice of Appeal.

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

GWENDOLYN FLECKENSTEIN, of full age, being duly sworn on her oath according to law, deposes and says that she is employed by Elmer G. Van Name, solicitor of the complainant in the above entitled cause; that on December 14, 1934, at 3:20 o'clock in the afternoon she served the notice of appeal in this

matter personally upon Henry M. Evans, Esquire, by handing a copy thereof to him, and upon Joseph H. Carr, Esquire, by leaving a copy thereof with Ruth B. Flohr, a clerk in his employ, at their offices in the Land Title Building, Fifth and Market Streets, Camden, New Jersey; the said Henry M. Evans and Joseph H. Carr appearing in this cause as solicitors of the defendants, William P. Morgenweck, Lena V. Morgenweck and William P. Morgenweck, executor, under the last will and testament of Margaret S. Morgenweck, deceased.

GWENDOLYN FLECKENSTEIN.

Subscribed and sworn to before me this 14th day of December, A. D. 1934.

GEO. H. PLUM,
Notary Public of N. J.

(Seal)

My Commission expires Jan. 6. 1936.

PETITION OF APPEAL AND GROUNDS.

(Filed Dec. 29, 1934.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee under the will of WILLIAM E. MORGENWECK, deceased, *Complainant-Appellant,* v. MARGARET S. MORGENWECK, *et als.,* *Defendants-Appellees.*	On Appeal from the Court of Chancery. Petition of Appeal and Grounds.

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

The petition of The American National Bank of Camden, executor and trustee under the will of William E. Morgenweck, deceased, the appellant in the above entitled cause, respectfully shows that:

Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Luther

A. Campbell, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Francis B. Davis, bearing date the 15th day of December, 1933, in a certain cause in said Court of Chancery wherein the said The American National Bank of Camden, executor and trustee under the will of William E. Morgenweck, deceased, was complainant and the said William P. Morgenweck, Lena V. Morgenweck and William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, deceased, *et al.*, were defendants, in this respect, to wit, that the said decree adjudges, orders and decrees the following:

"And that as to the balance, if any, of the net revenue from decedent's real estate at 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, said net revenue being the balance after deducting interest on mortgages and other expenses of said real estate, the same vested, upon the death of William E. Morgenweck, in William P. Morgenweck as the heir at law of William E. Morgenweck, subject only to the valid trusts for Margaret S. Morgenweck, William P. Morgenweck and the lawful wife of William P. Morgenweck, on the contingency above set forth.

And that William P. Morgenweck is vested with and is entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue on the real estate known as 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust.

> And that during the continuance of said trust, the heirs, executors, administrators or assigns of William P. Morgenweck are vested with and shall be entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue from the said real estate not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust."

And petitioner appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the grounds that the same is erroneous in that:

1. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent (after the payment of one hundred dollars per week to William P. Morgenweck under valid "spendthrift trust" for his life), with respect to the further payment to William P. Morgenweck of any and all excess income of the estate when and as it may in the future accrue, without the funding and maintenance from said surplus income of a reserve to meet the specified valid legacies during the probable "lean income" of future periods.

2. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent in that it does not provide for an accumulation during the continuance of valid trusts of future income, if any, in excess of (expenses and) the amount required to pay weekly the legacies for certain lives held by the Court to be valid.

3. The said decree is erroneous in that the possible future "excess income" is held to have vested in William P. Morgenweck as the heir at law of William E. Morgenweck, and that said William P. Morgenweck is entitled to receive from time to time as the same accrues the surplus thereof, if any, during the continuance of the said trust.

4. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent (after the weekly payment of legacy to William P. Morgenweck under the valid gift for life) with respect to the further payment to William P. Morgenweck of any excess income when and as it may in the future accrue, without the establishment and maintenance of said excess income in a "fund" as a source from which to pay to any lawful wife which he may leave her legacy for life in a specific amount of fifty dollars a week held by the Court to be valid.

5. The said decree is not correct in that (after payment of said specific valid legacies for the lives of William P. Morgenweck and any wife that he may leave under spendthrift trusts) it should have ordered the accumulation of any possible future income (exceeding expenses), during the lives of the said William P. Morgenweck and any lawful wife that he may leave, for the purpose of meeting future contingencies, such as the probable reduction of current income below the amount of the current legacies, the possible foreclosure of the existing over-due mortgage, and other contingencies (which testator

foresaw but could not specify, and that cannot now be predicted), in order that the said valid legacies may not be reduced or discontinued, unless or until their payment becomes impossible under conservative management in accordance with testator's intention and the "spendthrift trusts" set up by him.

6. The said decree does not embody the true and correct construction and interpretation of "spendthrift trusts" created by the decedent for the continuous payment of legacies each week, undisturbed by probable variations in income and expenses, as well as improvidence of the annuitants.

7. The said decree is not correct in that the Court having held valid the gifts for certain lives, it ignores the collateral incidents inseparably attached to the said valid gifts according to the testator's expressed intention, *i. e.* protection against improvidence of legatees.

8. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent which look to the preservation of the real estate from which the legacies are solely derived, free from the possible total extinguishment thereof by foreclosure of the existing and over-due mortgage debt.

9. Although the portions of the said decree from which the appeal is taken were not mentioned in the Court's written opinion, they are not consistent with the true construction of other parts of the will as

found by the Court below; and likewise inconsistent with the other orders of the said decree founded thereon holding the legacies to be valid.

Petitioner, therefore, prays that the said decree of the said Chancellor may be, in the particulars aforesaid reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

ELMER G. VAN NAME,
Solicitor for and of Counsel with Appellant.

PROOF OF SERVICE OF PETITION OF APPEAL AND GROUNDS.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee under the will of WILLIAM E. MORGENWECK, deceased,
Complainant-Appellant,
v.
MARGARET S. MORGENWECK, *et als.,*
Defendants-Appellees.

On Appeal, &c.
Proof of service of petition of appeal and grounds.

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

GWENDOLYN FLECKENSTEIN, of full age, being duly sworn on her oath according to law, deposes and says that she is employed by Elmer G. Van Name, solicitor of the complainant in the above entitled cause; that on December 31, 1934, at 2:35 o'clock in the afternoon, she served the petition of appeal and

grounds filed in this matter personally upon Joseph H. Carr, Esquire, by handing a true copy thereof to him at his office, Land Title Building, 5th and Market Streets, Camden, New Jersey; and that on January 3d, 1935, at 2:45 o'clock in the afternoon she served the said petition of appeal and grounds personally upon Henry M. Evans, Esquire, by leaving a true copy thereof with him, at his office in the Land Title Building, 5th and Market Streets, Camden, New Jersey, the said Joseph H. Carr and Henry M. Evans appearing in this cause as solicitors of the defendants, William P. Morgenweck, Lena V. Morgenweck, and William P. Morgenweck, executor under the last will and testament of Margaret S. Morgenweck, deceased.

GWENDOLYN FLECKENSTEIN.

Subscribed and sworn to before me this 4th day of January, A. D. 1935.

GEO. H. PLUM,

(Seal) *Notary Public of N. J.*

My Commission expires Jan. 6. 1936.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee under the will of WILLIAM E. MORGENWECK, deceased,

Complainant-Appellant,

v.

MARGARET S. MORGENWECK, *et al.*,

Defendants-Appellees.

ON BILL, &c.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR COMPLAINANT-APPELLANT.

I.

THE QUESTION INVOLVED.

This appeal involves the question whether any rental income of the estate of decedent (exceeding payment of expenses and a legacy payable weekly for life) should be accumulated by the trustee in

accordance with testator's intention during the life of testator's son, William P. Morgenweck. The Court of Chancery decided it in the negative; and it is from this part of the decree that the appeal is taken. The various reasons why the affirmative should prevail will be discussed.

That the Court of Chancery correctly held to be *valid* the legacy presently payable weekly to William P. Morgenweck during his life time, is not in dispute. And likewise, it is not disputed that the Court's decree is correct in holding as *valid* the future legacy payable weekly to *any* lawful wife that the said William P. Morgenweck may leave. We concede that said court correctly held the other gifts *in remainder after the death of William P. Morgenweck* to be void as violative of the rule against perpetuities.

The appellant concedes that the Vice-Chancellor correctly ruled that the schemes of distribution contained in the will and the first codicil of the decedent were revoked by the scheme of distribution set up in the second codicil, bearing date February 4, 1930 (S. C., pp. 28-29).

Paragraph 23 of the bill of complaint (S. C., p. 11) was admitted by the answer (S. C., p. 63). This paragraph reads as follows:

> The said Margaret S. Morgenweck, widow of the deceased, is living and is 59 years of age. The said William P. Morgenweck, son of the deceased, is living and is 35 years of age. Lena V. Morgenweck, wife of the said William P. Morgenweck, is living and is 35 years of age.

> The said William E. Morgenweck left surviving him no other children or issue of deceased children. The said William P. Morgenweck and Lena V. Morgenweck, his wife, have no issue.

Since then, Margaret S. Morgenweck died on May 18, 1933 (S. C. 144).

Although the proofs do not indicate the existence of any excess income, nevertheless the question is not premature because the decree deals with the subject, and the complainant was obliged to appeal within a year, or not at all.

Since the grounds of appeal (all of which are urged) are similar or related, we offer our arguments as a whole (but divided into natural subdivisions) as better than an attempt to discuss each "ground" separately. It would seem that if the arguments sustain any of the grounds of appeal, a reversal would be justified.

II.

THE ERROR OF THE DECREE.

The specific language of the decree to which the appellant takes exception is indicated by italics in the State of the Case (pages 168, 169, 170), and for ready reference is here repeated:

> "And that as to the balance, if any, of the net revenue from decedent's real estate at 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, said net revenue being the

balance after deducting interest on mortgages and other expenses of said real estate, the same vested, upon the death of William E. Morgenweck, in William P. Morgenweck as the heir at law of William E. Morgenweck, subject only to the valid trusts for Margaret S. Morgenweck, William P. Morgenweck and the lawful wife of William P. Morgenweck, on the contingency above set forth.

And that William P. Morgenweck is vested with and is entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue on the real estate known as 17 Broadway and 8 and 10 Hudson Street, Camden, New Jersey, not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust.

And that during the continuance of said trust, the heirs, executors, administrators or assigns of William P. Morgenweck are vested with and shall be entitled to receive from time to time as the same accrues, the surplus, if any, of the said net revenue from the said real estate not currently required for the satisfaction of said trust payments, less any and all proper charges and expenses of the said trust."

And appellant appeals from that part of the decree of the Chancellor which decrees as aforesaid, upon the grounds that the same is erroneous in that:

1. Said decree does not embody the true and correct construction and interpretation of the will and

codicils of the decedent (after the payment of one hundred dollars per week to William P. Morgenweck under valid "spendthrift trust" for his life), with respect to the further payment to William P. Morgenweck of any and all excess income of the estate when and as it may in the future accrue, without the funding and maintenance from said surplus income of a reserve to meet the specified valid legacies during the probable "lean income" of future periods.

2. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent in that it does not provide for an accumulation during the continuance of valid trusts of future income, if any, in excess of (expenses and) the amount required to pay weekly the legacies for certain lives held by the Court to be valid.

3. The said decree is erroneous in that the possible future "excess income" is held to have vested in William P. Morgenweck as the heir at law of William E. Morgenweck, and that said William P. Morgenweck is entitled to receive from time to time as the same accrues the surplus thereof, if any, during the continuance of the said trust.

4. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent (after the weekly payment of legacy to William P. Morgenweck under the valid

gift for life) with respect to the further payment to William P. Morgenweck of any excess income when and as it may in the future accrue, without the establishment and maintenance of said excess income in a "fund" as a source from which to pay to any lawful wife which he may leave her legacy for life in a specific amount of fifty dollars a week held by the Court to be valid.

5. The said decree is not correct in that (after payment of said specific valid legacies for the lives of William P. Morgenweck and any wife that he may leave under spendthrift trusts) it should have ordered the accumulation of any possible future income (exceeding expenses), during the lives of the said William P. Morgenweck and any lawful wife that he may leave, for the purpose of meeting future contingencies, such as the probable reduction of current income below the amount of the current legacies, the possible foreclosure of the existing over-due mortgage, and other contingencies (which testator foresaw but could not specify, and that cannot now be predicted), in order that the said valid legacies may not be reduced or discontinued, unless or until their payment becomes impossible under conservative management in accordance with testator's intention and the "spendthrift trusts" set up by him.

6. The said decree does not embody the true and correct construction and interpretation of "spendthrift trusts" created by the decedent for the con-

tinuous payment of legacies each week, undisturbed by probable variations in income and expenses, as well as improvidence of the annuitants.

7. The said decree is not correct in that the Court having held valid the gifts for certain lives, it ignores the collateral incidents inseparably attached to the said valid gifts according to the testator's expressed intention, *i. e.* protection against improvidence of legatees.

8. Said decree does not embody the true and correct construction and interpretation of the will and codicils of the decedent which look to the preservation of the real estate from which the legacies are solely derived, free from the possible total extinguishment thereof by foreclosure of the existing and over-due mortgage debt.

9. Although the portions of the said decree from which the appeal is taken were not mentioned in the Court's written opinion, they are not consistent with the true construction of other parts of the will as found by the Court below; and likewise inconsistent with the other orders of the said decree founded thereon holding the legacies to be valid.

III.

TESTATOR'S INTENTION TO CONSERVE.

The law gives effect to the predominant idea of the testator as against all doubt and conflict which might of themselves defeat it.

Peer v. Jenkins, 102 N. J. E. 235.

None will dispute that *the cardinal rule of construction is the testator's intention,* which in this case was to protect his beneficiaries against improvidence. He knew that he could not *force* them to be prudent, and that he must therefore appoint *a trustee with power* to receive the income and disburse the legacies. He said to the trustee *give them this much and no more.*

Coleridge said,

> "The rules of prudence, in general like the laws of the stone tables, are for the most part prohibitive. Thou shalt not, is the characteristic formula."

The valid trusts necessarily exist by creation of the testator for the period of time and subject to the modifications, incidents and implications intended by him. The legatees take their continuing legacies *cum onere.*

Testator directed that the balance of his personal property become part of a fund (which he called his "estate"), intending that the rents should be added

thereto, at least during the life of his son (S. C., pg. 28); hence this blended fund cannot now be distributed in a lump sum as upon an intestacy.

The variation in *amount* of the several legacies depending at different times upon various contingencies indicate that the testator had in mind a fund upon which to draw. This is all the more significant because the testator was not thinking in terms of the disposal of the entire income of the property. *Witness his determination not to currently dispose of so much of the income as remained after the payment of legacies.* In other words, he had no intention of simultaneously exhausting all of the income, but supposed that the trustee would conserve it.

The variation in *amount* of the various legacies

The Court may (if necessary) supply the clause to carry out testator's intention. *City Bank Farmers Trust Co. v. Hentz,* 107 N. J. E. 283.

> "Where practically entire estate was given to trustees, with directions to apply income, and no mention was made of surplus income, testator will be held to have died intestate as to it; whether surplus income from trust estate, as to which testator died intestate, should be accumulated until principal is distributable, in absence of any indication in will itself, depends on circumstances from which intention of testator can be inferred; where testator made substantial provision for children in his lifetime, and trustees had discretionary power to increase annuities, surplus income from trust estate, as to

which testator died intestate, will be accumulated until principal is distributable."

Swetland v. Swetland, 100 N. J. E. 196, affirmed 102 N. J. E. 294.

It cannot be said that the testator contemplated the futile plan of having his representative pay the annuities to his son, and then to pay to the same person all excess income. The testator knew that during the first five years of his lease there was a probability of the income being insufficient, and he also must have known of the possibility of the income being insufficient if the present lease should be modified or breached, or if the beneficiaries should live beyond the term of the lease. The testator must also have known of the possibility of there being a surplus. What did he intend should be done? He did not dispose of the entire income by giving it in fractional parts, such as, one-third of it to his son and two-thirds of it to his (testator's) widow during her life, and after her death by giving all of the income to his son. On the contrary, he specified that a definite amount should be taken out of the income, which means that in the "good" years he expected the income to be accumulated, and in the "bad" years he expected the annuities to be paid, if possible, out of the funded income. It was not the testator's intention that the next of kin should further benefit until final distribution. Nowhere did he provide for any "rests" or accounting periods when the books were to be closed and all excess or deficits charged off. There is no provision in the codicil for *distribution* (during Williams's life) of

excess income or anything other than the annuities. The theory advanced by the defendant cannot be correct for when by failure to "fund" at any certain period there shall be insufficient income to pay the fixed amount of the annuities, the beneficiaries would not receive what the testator intended.

This testator by the express terms of his will attempted to create a "spendthrift trust" to prevent the beneficiaries from frittering away their money and making mistakes of judgment in the handling of the funds. He also wanted to protect them against the possibility of creditors taking away their future livelihood; and he tried to protect the annuities against claims for alimony or maintenance. A reading of the codicil makes it perfectly clear that the testator did not want his son in his youth to scatter the income of the estate and have nothing in his old age.

> "The instrument need not call the *cestui que* trust a spendthrift, nor is it necessary that it shall contain all the specifications and qualifications incident to such a trust. If it appear that the donor or testator intended a spendthrift trust, that is enough. The Court will not inquire whether he is a spendthrift."
>
> *L'Hommedieu v. L'Hommedieu,* 98 N. J. E. 554;
>
> *Castree v. Shotwell,* 73 N. J. E. 590;
>
> *Bouvier's Law Dictionary* (1914).

If testator wanted his son (under present circumstances) to have all the income, or even to handle it during his lifetime, he would have said so; and if

he intended the trust to commence only at his son's death for the benefit of the persons whose gifts have been declared invalid, he would have said that. It is plain that he intended it to commence immediately at his death and to accomplish some practical object.

Von Fell v. Spirling, decided by this court, 97 N. J. E. 527, opinion by Chancellor (then Justice) Campbell (the last two paragraphs), recognizes the intention of the testator as controlling accumulations of income.

Bye, et al. v. Strasbourge, 102 N. J. E. 300, also a decision by this Court, in which Chief Justice Gummere wrote the opinion, holds that surplus income not disposed of must be accumulated.

While the facts in the above cases are not identical with the case at bar (and they never are in will cases), the principle of law applies.

In *Rhode Island Hospital Trust Company v. Peck,* 101 Atl. 430, the Supreme Court of Rhode Island held:

> "The provisions for disposition of the estate after the wife's death were void, since the entire class might not be ascertainable within the period allowed by the rule against perpetuities.
>
> Where testator created a trust in favor of his wife and his heirs, providing for payment of a stipulated sum annually from the income of the corpus as required, and the income was sufficient to provide a surplus over the stipulated payment, the income should be permitted to accrue to provide for the possibility that the in-

come might eventually become insufficient to pay the stipulated sums."

The defendants may cite *Camden Safe Deposit and Trust Company v. Guerin,* 89 N. J. E. 556, in which the testator disposed of the entire income; and in which this Court held that it was only necessary for the trustee to hold one-fifth of the corpus in order to pay one-fifth of the income to Mary Rue; and that it was not necessary to hold the *entire* estate (after the other four-fifths of corpus was due and payable) in order to pay to her the *proportionate* share of income to which she was entitled. The Vice-Chancellor's error in that case was merely in requiring the *entire* estate to be held too long. This case did not involve dissimilarity of the amount of current income and annuities, hence has nothing to do with the point now involved—a possible deficit or surplus in income, and the intention of the testator with respect to either.

IV.

DIVISIBILITY OF THE TRUST, AND EFFECT THEREOF.

The Vice-Chancellor very properly considered the testator's scheme as divisible. The real questions are, When should the division be made? And what effect does it have upon the incidents annexed to the gifts? We contend that the testator's intention controls in all things, except so far as struck down by

the application of the rule against perpetuities, and that while the rule may change the identity of the persons who are to benefit, and will prevent unduly prolonged control over property, nevertheless *a remainder following life estates still retains its character as a remainder,* and that the life estates themselves exist *in kind as the testator intended.*

All of the rents were bequeathed; therefore, the *trustee has a legal estate in the rents, pur autre vie.*

Intestacy with reference to the "remainder" at the point where the "rule" operates does not spell intestacy for the initial plan of the testator, nor any portion of it. Where testator directs the trustee to collect in *full* such rent as may accrue now and in future, add the net amount thereof to his "estate," and pay (what to him appeared for a time, at least, to be) *portions* thereof in legacies, there can be drawn *but one logical conclusion, as plain as if fully expressed in words,* that the trustee was given no authority to pay *more* from the blended fund, but is to *husband any remainder* thereof for future events. *With such a stipulation "speaking louder than words" it cannot be said that testator died intestate as to any possible gleanings during the existence of the measuring life.* Why should a severe "rule" striking at remote interests defeat the plain intention respecting *present gifts of the peculiar nature of "spendthrifts" trusts?*

No merger can take place in defeat of this trust.

In re Nilsson, et al., 112 N. J. E. 445.

Though the title to the land may immediately devolve upon the heir, charged with the trusts pre-

scribed by the testator, this *cannot advance the time of distribution* of the blended fund contemplated by the codicil.

He created the fund for a *purpose* and that purpose *has not yet failed.* Then why should the fund be too hastily dissipated?

The logical division is between income and corpus, between life interests and remainder, present enjoyment and future, all well recognized in the law, and simple to apply. Any other basis of separation seems stultified and incongruous.

We contend that the division between valid and invalid trusts is made upon a *time* basis, not laterally, so as thereby to immediately and continuously deprive the life estates of the characteristics and limitations imposed by the testator. In the application of an absolute, and somewhat harsh, rule, such as the rule against perpetuities, in defeat of the testator's intention, should we not "temper the wind to the shorn lamb"? Why make the testator's *expressed intention* for provident management a dead letter *prior to the time when the rule makes it necessary.* The testator intended the trustee to exercise complete control over the *whole* fund, consisting almost entirely of rents, at least during his son's life, and *that* is not invalid. He had in mind an entire plan regarding his whole estate during his son's life. Why strip it of this characteristic *while the son lives* when legal divisibility can be made very appropriately at the time of his death.

The case of *Hewitt v. Greene,* 77 N. J. E. 345 (which may be cited by *defendants*) recognizes the divisibility of the valid and the invalid parts of the

trust plan, and gives consideration to *what the testator presumably would have done had he known how much of his contemplated plan would be adjudged void,* and therefore incapable of execution. If we apply this test to the case at bar, it is perfectly plain that the testator would have retained the "spendthrift trust" provisions, and would have created annuities in the same specific amounts, but would have created a valid (instead of an invalid) gift of *corpus,* plus accumulations of excess income (if any) to William's issue, with a provision that if he should leave no such issue at the time of his death, then to certain named hospitals. In other words, the testator, Morgenweck, if he had been skilled in the law, would have specifically stated his requirement for the accumulation of excess income (if any) during his son's life, as a fund to more or less guarantee the stability of the annuities. Then he would have made valid gifts to take effect at the termination of the measuring life, instead of the invalid gifts which he actually did make. The accumulations in the case at bar will not have an invalid purpose at a period too remote; but will serve the valid purpose of providing a continuous and (as nearly as possible) a guaranteed income for William P. Morgenweck throughout the latter's life, regardless of the changing circumstances of his life and health, and of the estate itself, and, likewise for his wife. It can, therefore, be said that the case of *Hewitt v. Greene* supports the *complainant's* contention in that the testator's presumed intention will be recognized and enforced.

We contend that *since the life interests are valid* and do not violate the rule against perpetuities then, *a fortiori, the incidents annexed to them by the testator are also valid.* In other words, that the trust estate necessarily exists in the form, and subject to the restraints imposed by the testator.

Since the trusts set up by the testator are divisible, to that precise extent the incidents and limitations annexed thereto by the testator are also divisible, and fix the time when accumulation shall cease.

It is fundamental that all remainders (even though vested) are not for immediate possession or enjoyment, but that such *enjoyment is always postponed until the termination of the life interests.*

The testator's intention should be recognized except only so far as the rule proscribes, and since the rule operates only upon remainders to take effect *after* the death of the two living life tenants, it should not cast its shadow retroactively upon valid trusts.

The testator's expression that "something void shall be done after my son's death" does not annul his expression "folly shall not rule in the present."

It is apparent from a reading of the will and both codicils that the testator *did not intend* his immediate beneficiaries to have *possession of the corpus* of the estate. Under his original will, he desired the estate to be in the hands of his attorney, and under the last codicil in the hands of the bank with which he was associated, to prevent the beneficiaries from squandering it. Therefore, he attempted in his own way to create a "spendthrift trust."

The testator said "the balance to be placed to the account of the *estate* to which there should be added the monthly revenue derived from the lease." When he spoke of his estate he thought of it as a *separate* fund. A gift or devise may be implied in order to carry out the testator's intention even though the Court may find it necessary to supply an entire clause as was done in *City Bank Farmers Trust Co. v. Hentz,* 107 N. J. E. 283, *supra.*

In the present case, the testator changed the plan of distribution to his family and he changed the identity of the trustee, but *nowhere in the codicil did he attempt to change or revoke the estate given to the trustee, nor the general framework of the powers and duties of the trustee.*

Why should defendant wish to go beyond the necessities of the case to defeat testator's intention?

After defendant has elected to accept and enjoy the benefits provided for him in the codicil, should he be heard to totally repudiate it? (S. C. 101-102).

V.

NECESSARY PROTECTION OF WIFE'S REMAINDER.

William P. Morgenweck has no children and his wife is living. Therefore, *she now stands ready to receive her legacy* if he should immediately die. To that extent her interest may be considered *fixed,* though it may be subject to loss under certain contingencies. Since the gift is to *any wife* that William P. Morgenweck may have, it cannot be ascertained until the time of his death *who will be the identical legatee.* For the protection of this unascertained person, any excess future income should be conserved. The immediate life tenant is never permitted to consume the entire fund to the injury of a future interest. If William P. Morgenweck were permitted to use *all* of the income as well as the corpus of the personal estate, he might at his death leave nothing but the Broadway property (if not alienated either voluntarily or through foreclosure) which would descend to his heirs, and if at that time the income were lost, the wife then entitled to the weekly legacy would not receive it in accordance with the testator's intention.

The son's interests are separate and not coextensive, hence *cannot merge*; for otherwise the interest of an undetermined person might be defeated.

In re Nilsson, et al., 112 N. J. E. 445.

Likewise, if he and his *present* wife should join in a sale and conveyance of the property and consume the entire estate, nothing would be left for a future wife under the trust held by the Court to be valid for her benefit. It is not sufficient for the defendant to say, the corpus will always be intact and always produce income. Why permit the present beneficiary to "kill the goose that lays the golden egg"?

VI.

TESTATOR'S PRUDENCE REGARDING UNKNOWN FUTURE CONTINGENCIES.

It is impossible to predict future contingencies. Therefore the income should be funded. We might suggest, however, the contingency of a foreclosure of the mortgage on the property, from which the income arises, which at the time of the hearing amounted to $50,000, and is overdue (S. C. 121-2). If foreclosure proceedings were instituted it might be impossible to refinance. Neither does the estate have a sufficient fund to discharge the obligation.

There is no certainty that the income of the property will be maintained. The continuance of the Walgreen rent depends upon the solvency of that company, the ability of our lease to withstand any legal attack they make upon it, and their ingenuity in devising a plan of evasion, or securing another reduction in rent. The property might stand idle and produce no income for a time; and any new

tenant could not be expected to pay what a lease executed in December, 1928, calls for—$13,000 *net* per year in Gold Coin (S. C. 33).

VII.

THE DECREE NULLIFIES OPINION OF VICE-CHANCELLOR.

In his opinion the Vice-Chancellor says that the weekly payments are to be made from a "*fund*" (S. C., page 158, line 16), and he says that the complainant "is vested with the title to the testator's estate in trust for the purpose of carrying out the valid provisions of the second codicil. If any estate remains after the *termination* of the trust, then the testator died intestate as to that estate" (S. C., page 159, line 25).

But the decree amounts to a nullification of these expressions of opinion, and of the nature of the trust desired by the testator. Carried to its extreme conclusion, the decree would permit the total defeat of the rights of the unascertained wife of William P. Morgenweck, and of the spendthrift trusts; and it would reduce the trustee to a mere collector of rents upon commission instead of a conservator as the testator intended. It would also seem to make the entire estate liable to creditors of William P. Morgenweck, likewise contrary to the expressed intention of the testator.

To declare that the son is to be paid currently the excess income would make the existence of a pres-

ent trust useless, and be almost equal to a withdrawal of the opinion of the Vice-Chancellor to the effect that the trusts for the lives of the son and such lawful wife as he may leave are valid and effectual. Since they are valid under the Court's opinion, they can only be made effectual by adhering to the words and the intention of the testator. The opinion already expressed by the Court will be carried into effect or wholly frustrated by the decision now to be reached on this point concerning the proper handling of any excess income; and likewise on the equally important point, how deficits in income are to be treated. The question is not purely academic.

The testator did not intend to die intestate, and the legal presumption is to that effect. *Hicks v. Hicks,* 99 N. J. E. 92, affirmed 100 N. J. E. 346.

The inability to determine future events at the present time with respect to this estate is not unusual. If by funding the income it should ultimately transpire that the children of William P. Morgenweck should benefit in some way as his heirs or next of kin, it would certainly not be *contrary* to the testator's general *intent that they should at least have something.*

VIII.

AN ANCIENT PRECEDENT.

> "And, behold, seven other kine came up after them, poor and very ill-favored and lean-fleshed, * * *

And the lean and ill-favored kine did eat up the first seven fat kine:

And when they had eaten them up, it could not be known that they had eaten them; but they were still ill-favored, as at the beginning." * * *

And Pharaoh said, "I told it unto the magicians; but there was none that could declare it to me.

And Joseph said unto Pharaoh, * * * the seven lean and ill-favored kine that came up after them are seven years; * * * they shall be seven years of famine, * * * plenty shall not be known in the land by reason of that famine which followeth; for it shall be very grievous." * * *

"Let them gather all the food of these good years that come, and lay up grain under the hand of Pharaoh for food in the cities, and let them keep it.

And the food shall be for a store to the land against the seven years of famine, * * * that the land perish not through the famine." * * *

Genesis, Ch. 41, V 19, etc.

"For these two years hath the famine been in the land: and there are yet five years, in which there shall be neither plowing nor harvest." * * *

Genesis, Ch. 45, V 6.

Respectfully submitted,

ELMER G. VAN NAME,

Solicitor for and of Counsel with the Complainant-Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

THE AMERICAN NATIONAL BANK OF CAMDEN, executor
and trustee, &c.,
Complainant-Appellant,
v.
MARGARET S. MORGENWECK, *et al.,*
Defendants-Appellees.

ON BILL, &c.

ON APPEAL FROM THE COURT OF CHANCERY.

BRIEF FOR DEFENDANTS-APPELLEES.

STATEMENT OF THE CASE.

The brief filed on behalf of the complainant-appellant contains no statement of the facts of the case, so that we are under the necessity of making a statement of the facts.

The bill was filed for the construction of the will of William E. Morgenweck, deceased. The com-

plainant was the executor and trustee under the will and the defendants were Margaret S. Morgenweck, the testator's widow; William P. Morgenweck, the testator's son; and Lena V. Morgenweck, the latter's wife. The widow, Margaret S. Morgenweck, died before final decree, and the action was revived as to her interest against her son, William P. Morgenweck, her executor. The son, the son's wife, and the son as executor of his mother's estate unite in resisting this appeal.

The decedent died March 5, 1930, leaving a will dated February 6, 1919, a codicil dated July 26, 1929, and a second codicil dated February 4, 1930. The second codicil is the source of the present litigation. The will and both codicils were probated March 17, 1930, in Camden County. The will is printed at p. 19 of the State of the Case, the first codicil at p. 27, and the second codicil at p. 28.

The decree determined that the second codicil revoked paragraph 10, subdivision A to K, and paragraphs 11, 12 and 13 of the original will, and also revoked the first codicil (decree, p. 163, will and codicil, pp. 21-25-27). The effect of this revocation is to leave, as the only effective provisions of the original will, several provisions for small legacies, with the result that recourse must be had to the second codicil to determine the disposition of the principal estate of the decedent. All of the parties concede that this question was correctly decided.

The second codicil is short, and will be quoted in full. It reads as follows:

"I, Wm. E Morgenweck, of the City of Cam-

den and County of Camden & State of New Jersey, being of sound and disposing mind do make, Publish and declare this a Codicil to my last Will and Testament; As soon as possible after my demise all my bills shall be paid from the proceeds of a $5000.00 Life Insurance Policy that I have. When my securities will bring more that I paid for them they should be sold and the proceeds used to pay off the balance of notes or debt still unpaid. The balance to be placed to the account of the estate—to which there shall also be added the monthly revenue derived from the rental or lease of the property's 17 Broadway and No's 8 and 10 Hudson street. Out of this account there should be paid or set aside from Month to Month a sum sufficient to pay the Sime-anual interest and other expenses that there may be) and from the balance there should be paid to my be-loved Wife the sum of $100.00 a week during her life. To my Son Wm. P. Morgenweck I bequeth the sum of $50.00 (Fifty Dollars) a week during his Mothers life time, but at her death if he survives her this amount shall be increased to One Hundred Dollars ($100.00) a week during his lifetime. Under no condition can this money be attached by any one to pay any debt or debt's incurred by said Wm. P. Morgenweck. If said Wm. P. Morgenweck should have any direct issue at his death, then after his death $00.00 (One Hundred Dollars) shall be set aside weekly to cloth and educate the same, after which each

of them shall receive Ten Dollars weekly ($10.-00) until they marry after which this amount shall be increased to $25.00 a week with the following provission. That his or her mate as the case may be can not attach the same for there use under any circumstances. Should however my son Wm. die without issue then at his death and from then on until the end of her natural life his Lawful Wife shall receive a weekly sum of $50.00 (Fifty Dollars) as long as or providing she does not marry again, but should she marry again she will forfeit this allowance. As stated above it is my wish that these bequests can under no condition be attached for the satisfaction of a debt of any nature created by any of the above named beneficiarys.

After the death of My Wife, My Son, His Wife, Or their issue should they have any the income from my estate shall be equally devided semi-annually (after expenses have been deducted therefrom) with # # the local Hospitals in equal proportions.

I also name the American National Bank as my Executers of my Estate.

Witness this my signature this day of our lord February 4th 1930.

Wm. E. Morgenweck"

Witness. Arthur W. Rogers

Witness. J. Oscar Hunt"

The testator left personal estate amounting to approximately $50,000.00, with debts of approximately

$31,000.00 (S. of C., p. 8). He also left the property 17 Broadway, Camden, which includes premises 8 and 10 Hudson Street, in the rear. This property will hereafter be described as 17 Broadway. The testator leased this property December 19, 1928, to Walgreen Company, at the annual rental of $13,000.00 over and above taxes and other charges (S. of C., p. 30-47, and 125). This lease was for the term of thirty years from July 1, 1929, and is still in effect and in good standing. The property was encumbered by a first mortgage in the amount of $50,000.00, at six per cent interest, at the time of testator's death, so that the net income from the property was $10,000.00 per year.

At the time of the final hearing the personal estate was more than sufficient to pay the balance of $5,000.00 then due to creditors of the decedent. None of the stocks of the decedent had been sold, in view of the provision of the codicil that they should be sold for more than was paid for them (S. of C., pp. 112 to 115). Also the several legacies provided for in the unrevoked portion of the original will had been paid.

The mortgage has been substantially reduced in principal amount and is in good standing. The reductions in the mortgage and the personal debts have been (substantially) paid out of the income from the real estate.

The testator provided that the balance of his personal estate remaining after the payment of debts and the monthly revenue from 17 Broadway should be added together, and from the account so consti-

tuted certain payments should be made, the remainder, after certain contingencies should occur, to go to "the local hospitals."

The payments to be made from this account, were, first, an annuity of $100.00 per week for the widow; second, an annuity of $50.00 per week for the son during the life of the widow, which sum was to be increased upon the death of the widow to $100.00 per week; third, if the son should die without issue, an annuity to the son's surviving wife of $50.00 per week for her life or until her re-marriage.

These provisions were held by the Court below to be valid and enforceable, and no one questions that the result reached below was correct.

There was another provision for direct issue of William P. Morgenweck, the son, which was followed by the provision that:

> "After the death of my wife, my son, his wife, or their issue should they have any the income from my estate shall be equally divided semi-annually (after expenses have been deducted therefrom) with the local hospitals in equal proportions."

These last two provisions, *i. e.*, for the issue of the son, and the portion quoted, were determined by the Court of Chancery to be invalid and void, being in contravention of the rule against perpetuities. There is no question raised by any one, but that this question was properly decided.

It will be noticed:

1. That the testator did not dispose of any surplus of income existing after the payment provided for by the will, and that the local hospitals, if the provision for their benefit had been valid, would not have received any income arising before the death of "my wife, my son, his wife, or their issue." The testator, therefore, if all the provisions of the will and codicils had been valid, died intestate as to all income not required to meet the annuities.

2. That there was no devise of the fee of the real estate to any one.

3. That there is no question made as to the propriety of the provision of the decree relating to the balance of the personal estate.

4. That the testator made no provision for an accumulation of income.

5. That there is no power of sale of the real estate in the executor and trustee. (Note: The power contained in the original will, paragraph 17, p. 26, contained an exception, "as above provided" and the provision so referred to, related to 17 Broadway, and was revoked, as we have seen, by the second codicil.)

6. That the testator used language which the trustee claims constituted a "spendthrift" trust (and which is referred to frequently in the appellant's argument). After providing for the son's annuity, the testator said: "Under no condition can this

money be attached by any one to pay any debt or debts incurred by said William P. Morgenweck;" and later said: "As stated above, it is my wish that these bequests can under no condition be attached for the satisfaction of a debt of any nature created by any of the above named beneficiaries." This language, therefore, if effective to create a spendthrift trust, is limited to the valid or invalid bequests in the will.

7. That no creditors' rights are involved, and, therefore, no one is now concerned with the question of establishing or construing these so-called "spendthrift" provisions. And the bill did not ask for a construction of these provisions.

8. That the appellant is a mere stake holder, and the interested parties all desire the decree affirmed.

9. That the decree determined that the son, William P. Morgenweck, was seized in fee of the premises 17 Broadway, and that there is no appeal from, nor question raised as to this ruling.

10. That the necessary effect of the foregoing is that the testator died intestate as to all of his remaining estate, except only the annuity to the widow, which ceased on her death, and the valid annuity to the son, now amounting to $100.00 per week, and the contingent annuity of $50.00 per week to the son's wife.

The Court below, giving the necessary and logical effect to its other findings directed that the surplus

of net revenue, not currently required for the satisfaction of the trust payments, and less the expenses of the trust, be paid to William P. Morgenweck, his heirs, etc., from time to time, as the same accrued. It is from this provision that appeal is taken. No complaint is made of any of the other findings. And the appeal is taken, notwithstanding the decree provided (p. 170), that the complainant and defendants might thereafter apply for further directions and relief, particularly if, because of changed circumstances, some provision should be made for accumulation of surplus income, this provision, however, to be without prejudice. No such application has been made, there has been no attempt of the appellant to show changed circumstances.

ARGUMENT.

The appellees' points will be argued under the following points:

1. THE TRUSTEE HAS TITLE TO SO MUCH OF THE INCOME FROM THE REALTY AS IS REQUIRED TO MEET THE VALID TRUSTS, AND THIS TITLE ARISES BY IMPLICATION OF LAW.

2. AS THERE IS AN INTESTACY AS TO PART OF THE INCOME FROM REALTY, THE HEIR (OWNER OF THE FEE) IS ENTITLED TO THE EXCESS AS IT ACCRUES.

3. THE QUESTION RAISED BY THE APPEAL IS ACADEMIC AND AT THE PRESENT TIME MOOT.

The appellant's points will be answered herein at the close of the argument upon the appellees' points above stated.

1. THE TRUSTEE HAS TITLE TO SO MUCH OF THE INCOME FROM THE REALTY AS IS REQUIRED TO MEET THE VALID TRUSTS, AND THIS TITLE ARISES BY IMPLICATION OF LAW.

The codicil contains no express devise of the title to the real estate to the bank, or to any one else; the bank was not given the right to rent the property; and there was no express nomination of the bank as trustee. But that the bank has duties to perform under the codicil is certain, and those duties, are of necessity, in the nature of a trust.

To the extent, therefore, that the bank has duties to perform in the execution of trusts, to that extent it is a trustee. But it is a corollary of the foregoing, that to the extent that the trusts are invalid, there is no title in the bank. They have no duties to perform respecting such trusts which require the implication of a trusteeship, and, therefore, there is no trusteeship in that respect.

The doctrine that the title and power of a trustee extend to and are limited to the duties which they have to perform in the execution of trusts is stated in Perry on Trusts (7th Ed.) Sec. 312, where it is said:

> "* * * the extent of the legal interest of a trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust upon which the estate is given. On this principle, two rules of construction have been adopted by courts: first, 'Wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not.' And, second, 'Although a legal estate

> may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried farther than the complete execution of the trust necessarily requires.' "

The principle is exemplified in the following New Jersey cases (among others):

> *Chandler v. Thompson,* 62 N. J. E. 723 (Court of Errors and Appeals);
> *Lindley v. O'Reilly,* 50 N. J. L. 636 (Court of Errors and Appeals);
> *Wright v. Keasbey,* 87 N. J. E. 51 (Stevens, V. C.);
> *Crane v. Bolles,* 49 N. J. E. 373 (Chancellor McGill).

See also 65 C. J. "Trusts" Sec. 274, p. 527.

As we have seen, the decree of the Court of Chancery that the son has the fee is not questioned by any one. That ruling is correct, under the rule stated in Perry on Trusts (7th Ed.) Sec. 317, that

> "* * * Where it is plain that the trustees are to pay all charges, debts, legacies, annuities, or other moneys out of the rents and profits of the estate, and no anticipation of the income is necessary or contemplated for that purpose, they will take a chattel interest, or a term for years necessary for the purpose, and not the legal inheritance;"

The question presented is whether the trustee has any duties to perform respecting the excess of in-

come over valid trusts (annuities). It seems clear that it has no such duties. It is given no express power to sell, or to rent, or to accumulate income. There is no need for any such powers in connection with the trust and, therefore, they do not exist.

2. AS THERE IS AN INTESTACY AS TO PART OF THE INCOME FROM REALTY, THE HEIR (OWNER OF THE FEE) IS ENTITLED TO THE EXCESS AS IT ACCRUES.

The intestacy in this case is due to the invalidity of the provisions of the will and also to the failure of the testator to dispose of the excess of income in any event.

The valid provisions of the will dispose of approximately one-half of the income. The yearly surplus is approximately $5,000.00. This surplus was not disposed of by the testator by the valid or invalid portions of the will. The ultimate provision in the will for the benefit of the local hospitals (which was held to be invalid) disposed of the entire income, but this provision clearly applies to income arising after the death of the parties specified by the testator. It does not relate to income arising before that time. Nowhere in the will did the testator attempt to dispose of the entire income prior to the death of his wife, son, and son's wife, or their issue. Therefore, without regard to the rule against perpetuities, the testator died intestate as to all income not disposed

of. He did not direct an accumulation, nor direct what should be done with any income which might be accumulated. There was, therefore, an intestacy as to any surplus.

When the Court decided (correctly, as is agreed by all) that certain provisions, including the ultimate provision for hospitals, were void, the extent of this intestacy was enlarged.

The Court recognized this situation and gave effect to it in the decree in the provisions now under review, which are that the heir (owner of the fee) is entitled to the surplus income from the real estate currently and should receive the same from time to time.

The Court's action is supported by several New Jersey authorities.

In *Hewitt v. Green,* 77 N. J. E. 345 (V. C. Stevenson), there was a trust fund of $100,000.00 held for two independent objects, one legal and valid, and the other illegal and void. Vice-Chancellor Stevenson discusses the authorities which in his view sustained the power of the court to make a division of such a single trust fund, so as to reduce the fund to such amount as was required for the accomplishment of the legal object (pages 368 to 371, inclusive), and concluded that so much of the fund as was devoted to producing income for the illegal purpose was released from the trust and fell into the residuary estate. He called attention to the fact that the authorities, in such a case, and in order to accomplish the desired result, would inquire into estimates and

valuations for which there could be only somewhat uncertain measures.

This case went further than anything which was done or asked to be done by the Court in the present case. There, a part of the principal was released entirely. The Court did not merely order paid over the income released from the trust, but the principal as well. All that the Court did here was to order the current surplus income paid to the heir. If this real estate were sold, and we were asking for a part of the sales price to be released, the situation would be more nearly analogous to the Hewitt and Green case.

In *Camden Safe Deposit & Trust Co. v. Guerin,* 89 N. J. E. 556, the Court of Errors reversed the Court of Chancery (V. C. Leaming). The Court of Chancery had determined that certain provisions of the will were invalid, and this was sustained by the Court of Errors. The Vice-Chancellor, however, had concluded that notwithstanding the will was invalid in part because of conflict with the rule against perpetuities, yet the trust should continue to operate as a whole, for the period of duration of the valid trusts, thus accumulating income for no specific purpose. With these conclusions the Court of Errors disagreed and reversed.

Justice Bergen, delivering the opinion for the Court of Errors, said:

> "* * * We do not agree with the Vice-Chancellor in this conclusion, for when the right to the income and the ownership of the corpus becomes vested in the same person and all that

remains to be done is the collection of the income from a fund and pay it over without any qualification to the person who owns the fund, the trust becomes passive, and in equity, the legal estate of the trustee passes to and vests in the owner.

"The purpose of the trust in this case was to limit the interest of the children and grandchildren to the income alone and to preserve the fund for a remainderman who cannot take because the gift over is void, creating an intestacy as to the fund which is now vested in the life tenant, in which event the separation of the two estates comes to an end. Where the purposes of the trust fail, either in whole or in part, by lapse or otherwise, the trustee holds the fund in favor of those who are entitled to it under the statute as the next of kin of the testator (Skellenger's Executors v. Skellenger's Executor, 32 N. J. Eq. 659), and the trustee can only hold it so far as is necessary to perform the duties of any part of the trust remaining active. * * *

"Striking out the gift over of the corpus, we have a trust to collect and pay the income on a fund to the very person who owns it, which is in effect a gift of a fund for the benefit of the owner without discretion of any kind in the trustee. In such case the trust being simple or passive, the owner is entitled to possession of the fund. Where there was a gift of a fund in trust to pay it with accumulation of income to

a beneficiary at the age of twenty-four years, it was held he may, if exclusively interested, call for immediate payment on attaining the age of twenty-one and qualified to execute a release. Lew. Trusts 689, and cases cited. * * *

"By operation of law, because of the failure of the gift over of the corpus, the trust has terminated as to any disposition of it by the trustee under the trust, undertaken to be established by the will, beyond the receipt of the income from one-third of the fund, and that the trustee is entitled to hold for the purpose of collecting the income and pay it to a surviving husband or widow during their respective lives.

"By the avoidance of the gift over of the corpus all that remains of the trust is the collection and payment, to the surviving husbands or widows of the settler's children, of the income on one-third of some of the shares of the corpus, and to that the trust is now limited, and the two-thirds of the corpus in each of such cases is not distributable.

"It is not a requirement that the trustee divest itself, from time to time, of different parcels of a trust estate, but of the right to hold more than sufficient to satisfy the only remaining trusts—that is, to pay the income from one-third of the shares given to surviving husbands and widows of testator's deceased children. As to the residue of the corpus the possession of the trustee is only that of a naked trust to pay over to those to whom it has descended by inheritance.

> "The Vice-Chancellor seems to have overlooked the fact that by the destruction of the gift over of the corpus a very large portion of the attempted trust never had any legal existence, and that as to the shares now under consideration, the only active duty imposed upon the trustees is the collection of the income of one-third of such shares and pay it to a life tenant. It is not so much a question of merger as of the partial termination of a trust by operation of law. * * * "

This case involved, as did the Hewitt case, a division of principal as well as income. Certainly, if the principal in such a case should be divided, so should the income, and that is what the court below decreed in the present case. The Guerin case is as nearly parallel on the facts to the present case as any case which can probably be found, and we believe controls.

In *Graves v. Graves,* 94 N. J. E. 268, there was a partial invalidity of the trust. Chancellor Walker directed that a sufficient part of the estate be retained to provide for the valid annuity of $20,000.00 per year to the widow, and that the rest be presently distributed, not only income, but principal.

In our case we have a corpus producing approximately $10,000.00 per year, charged at the present time with a valid annuity of $5200.00 per year, leaving approximately $5,000.00 yearly surplus. No attempt is being made to secure a part of this corpus. All that is asked is that the surplus income be cur-

rently distributed. It is impossible to perceive any error in the decree in this respect.

The trustee is given no duty to perform with respect to this surplus income, which if received by it, is received and held by it as a dry trustee, and the trustee must pay it over to the owner of the fee.

Camden Safe Deposit & Trust Co. v. Guerin, 89 N. J. E. 556;
65 *C. J. "Trusts"* Sec. 268 and 269;
Radley v. Radley, 70 N. J .E. 248.

C. J. Vol. 65, Sec. 730, p. 850-851, in part says:

"Although a trustee cannot compel a beneficiary who is *sui juris,* to receive the benefits of the trust, he should not, except where the instrument creating the trust confers authority to do so, withhold or defer payment of income

ADDENDA TO MORGENWECK BRIEF.

Page 19, following citation of *Orr v. Yates*
And by the New Jersey cases of:

In re: Baker, 61 N. J. E. 592, Chancellor Magie;
Reed v. Longstreet, 71 N. J. E. 37, Chancellor Magie;
Sandford v. Blake, 45 N. J. E. 247 (Court of Errors and Appeals).

> "The Vice-Chancellor seems to have overlooked the fact that by the destruction of the gift over of the corpus a very large portion of the attempted trust never had any legal existence, and that as to the shares now under consideration, the only active duty imposed upon the trustees is the collection of the income of one-third of such shares and pay it to a life tenant. It is not so much a question of merger as of the partial termination of a trust by operation of law. * * * "

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C. J. Vol. 65, Sec. 730, p. 850-851, in part says:

"Although a trustee cannot compel a beneficiary who is *sui juris,* to receive the benefits of the trust, he should not, except where the instrument creating the trust confers authority to do so, withhold or defer payment of income, but should pay it over, as it accrues, to the person entitled thereto by the express terms of the trust, or in the absence of other provision, to the person entitled to the principal estate, in the absence of sufficient reasons for not doing so, and should continue to pay it over during the length of time contemplated by the instrument creating the trust."

The text is supported by the cases of

Gasquet v. Pollock (N. Y.), 37 N. Y. S. 357; aff. 53 N. E. 1125;
Orr v. Yates (Sup. Ct. Illinois), 70 N. E. 731, at pp. 736-737.

Having concededly found that the fee of this real estate was vested in the son, it would be inconsistent

to hold that the son was not entitled to the surplus income. So long as it is admitted (as it is) that the codicil violated the rule against perpetuities, and that the son owned the fee, the undisposed of income cannot be kept from him. To do so would require the Court to reverse that part of the decree which has not been appealed from.

Gray on Perpetuities, Sec. 414, says:

> "414. When, by reason of an equitable interest being too remote, there is a legal interest vested in trustees, without any corresponding equitable interest, there is a resulting trust to the heir of next of kin."

It has frequently been decided in cases where there was a power of sale in executors (here there is none) and no disposition was made of the rents and profits of the land pending such sale, that the heirs are entitled to the rents until sale. In other words, that the rents in such a case are intestate property.

Brengel v. O'Toole, 102 N. J. E. 178;
Todd v. Wortman, 45 N. J. E. 723;
Current v. Current, 11 N. J. E. 186;
Ware v. Hall, 16 N. J. L. 333;
Herbert v. Tuthill, 1 N. J. E. 141.

3. THE QUESTION RAISED BY THE APPEAL IS ACADEMIC AND AT THE PRESENT TIME MOOT.

We have shown that all debts and legacies have been paid, and that there is a substantial surplus

of revenue. Nothing is shown to justify nor suggest any cause for apprehension regarding the corpus which is producing the income. There is no present cause shown for retaining the income.

The Court below provided in the decree that any of the parties might apply for further directions and relief, particularly if, because of changed circumstances, some provision should be made for accumulation of surplus income, this provision, however, to be without prejudice. No application has been made under this provision; no reason for making such an application appears.

The complainant is a mere stake holder. All the interested parties wish the decree affirmed.

It would seem, therefore, that the questions raised by the appellant are academic and moot and that the appeal should be dismissed for that reason.

> "It is not within the province of appellate courts to decide abstract, hypothetical, or moot questions, disconnected from the granting of actual relief, or from the determination of which no practical relief can follow."
>
> 3 *C. J.* "*Appeal and Error*" p. 358, 359.

ANSWERS TO DEFENDANTS' POINTS.

1. Testator's alleged intention.

The argument in the brief on this point (pp. 8 to 13, inclusive) is stated to be based on the testator's intention.

The assumed intention, as we understand the contention, is said to include the following:

1. The addition of the rents to the balance of the personal estate and their retention during the life of the son.

2. A determination not to currently dispose of the income remaining after the payment of legacies, but rather that the trustee would "conserve" it.

3. That there was a probability or possibility in the testator's mind that the income would be insufficient.

4. That there was a possibility of a surplus income.

5. That testator intended income to be accumulated.

6. That the next of kin should not benefit until final distribution, beyond the provisions for annuities.

7. That the so-called "spendthrift" provisions were intended to apply to the surplus income.

8. That he intended accumulation until the son's old age.

9. That if he had wanted his son to have the surplus income he would have said so.

These claims of intention on the part of the appellant we believe are without any foundation in the will, they are in part inconsistent with each other, they are purely speculative, and in effect, attempt to accomplish an indefinite accumulation of income.

On the one hand it is said the rents were intended to be retained for the life of the son, and then it is said they were to be retained for his old age. There is no direction for retention at all, and this claim is pure speculation as well as being inconsistent.

It is said the trustee was to conserve the surplus. But the codicil does not say so, nor provide for the ultimate disposition of the surplus after it is "conserved." For how long should it be conserved and for what purpose?

The testator knew his income greatly exceeded the annuities, and did not dispose of the surplus. This was perhaps an oversight, but it does not make a foundation for surmises that because he thought the income would be more or less than the annuities, therefore, it should be accumulated. There is, it is true, no disposition of current surplus income, but (and this seems to be entirely overlooked by the appellant) neither is there any disposition of accumulated surplus income. Neither case was provided for. It is simply an instance of a partial intestacy. In his first codicil, the testator disposed of all his income for a period of time, at least. But in the second codicil he did not dispose of all his income at any time.

It is said testator did not intend his next of kin to benefit (beyond the annuities) "until final distribution." Counsel does not suggest at what point of time this will take effect. If it is meant at the time the hospitals would have taken under the invalid clause in their favor, it will be observed that this provision did not take effect until after testator's wife and son, the latter's wife and their issue should have died.

Much point is made of the "spendthrift" clause, so called. But this language, by its terms applies only to the specific annuities. It does not apply to the surplus income now in question. It cannot possibly be extended to intestate property. And even on the supposition that there is here a valid spendthrift clause, it does not require the accumulation of undisposed of or surplus income. A spendthrift clause will not do double duty and become a clause for accumulation, at the whim of a trustee.

One fundamental misconception of appellant's argument is that as the court has already determined that the intention of the testator as expressed in his will is invalid, that this hiatus can be filled up by a supposed intention attributed to the testator in a situation where he (as is assumed) knew a part of the will was invalid. Now we know that the testator in fact never had any intention based upon the invalidity of any part of his will or codicil so that any such intention must be created out of nothing in order to prevent the next of kin and heirs from receiving the fruits of the Court's decision that a certain part of the will is contrary to law.

It may be well enough and perfectly proper for counsel to argue, with respect to a will which is valid throughout, what the testator's intention is and what expressed, and what can be implied, but to deliberately import into this will a provision for accumulation of the undistributed income, is no more or less than to make an entirely new will for the decedent, because, forsooth, his own disposition has become partially ineffective.

The appellant cites three cases.

First, *Van Fell v. Spirling,* 97 N. J. E. 527. In this case there were money legacies given to children and grandchildren, with the provision that the legacies were to be retained until the legatees reached the age of twenty-two years. The decree below had directed that the income should be paid from time to time. The Court of Errors said that this was erroneous, and that the interest should be paid with the legacies. This in effect, said that the interest was to be held till the principal was payable. The question has no resemblance to the one now before the court. Here there is intestate property not disposed of. The son owns the fee, and the surplus income. The payment is sought to be deferred for an indefinite time.

Second, reference is made to *Bye, et al. v. Strasbourge,* 102 N. J. E. 300. This case is not in point for the reason that there it was held that there was no intestacy and that the portion of income not specifically disposed of fell into the residue, and was payable at the time the residue was payable. There are many points of difference, but the principal one

is that here there is concededly an intestacy, there is no residuary clause, and no time for payment of the income, if accumulated, is provided for.

As the principal (corpus) in our case is the real estate, and as that came to the son immediately on his father's death, the income, undisposed of, should, by analogy to the cases cited, come to the son as it accrues.

Reference is also made to a Rhode Island case. *Rhode Island Hospital Trust Co. v. Peck*, 101 At. Rep. 430. That case is not in point because the testator contemplated the accumulation of income and the will expressly provided for the distribution of any accumulation of income. In any event, construed as appellant would have it, it is inconsistent with our own decisions, such as *Hewitt v. Green, supra,* and *Camden Safe Deposit & Trust Company v. Guerin, supra,* and would not be followed in this State.

Swetland v. Swetland, 100 N. J. E. 196 (appealed on another point, 102 N. J. E. 294), is relied on. That case is like the Van Fell and Spirling case, in that the Vice-Chancellor held that surplus income on a trust fund was distributable when the corpus was distributable. There is no question about that at all.

The Vice-Chancellor, however, in the same case recognized a distinction in the case of a void direction for accumulation. He said:

> "* * * The directions for the accumulation of the New York income being void, such part of it as is not needed for the purposes of the trusts

created by the will is distributable amongst those entitled to the next eventual estate. United States Trust Company v. Soher, 178 N. Y. 442; Matter of Kohler, 96 Misc. (N. Y.) 433. The 'next eventuals' are named in the fifteenth paragraph of the will, and the class comprises the three daughters, and the son as trustee. St. John v. Andrews Institute, 191 N. Y. 254; Matter of Kohler, *supra*. Under the provisions of the will as here construed, however, all income, including that on the New York realty, is first applicable to the purposes of the trusts created by the will for the benefit of the widow and half-sister and before making any distribution of the surplus New York income, ample provision by way of reserve should be made for the contingent requirements for the life tenants above current annuities."

In our case there was no direction for accumulation at all.

2. Divisibility.

The argument in the brief on this head (pp. 13 to 18, inclusive) seems to be based upon the following points:

1. The trustee was to "husband any remainder (over annuities) for future events."

2. That there is a spendthrift trust.

3. That testator intended the trustee to retain the whole fund during the son's life and that "legal divisibility can be made very appropriately at the time of his death."

4. An assumption as to what the testator would have done if he had known his codicil was invalid, the details of which assumed intention are supplied by counsel.

5. That the testator did not intend his son to have possession of the corpus.

6. That the income was to be accumulated as a separate fund.

These points seem to be merely restatements of points presented under the appellant's heading regarding testator's intention, already discussed. No good purpose can be served by repeating our comments.

The appellant's arguments are characterized by the utmost uncertainty. For what future events is the trustee to hold the surplus income? What power has the trustee to use the rest for indefinite "future events"? What *legal* difference is apparent, which, at the time of the son's death would permit of the payment of the surplus then, if it cannot be paid now? None is stated and none is apparent.

It is said the testator did not intend his son to have possession of the corpus. But the real estate is the corpus and the son has the fee. The questions here involve the income.

The argument of appellant may merely mean that the trustee believes it should accumulate, and distribute this money in the manner it believes the testator would have done if he had made a valid will. That is the only explanation which is consistent with the appellant's brief.

3. Wife's remainder.

It is said that excess income should be conserved for the protection of the $50.00 per week annuity to the wife of William, if he dies without issue, with her surviving him.

The argument (p. 19-20) proceeds upon the assumption that the distribution of the surplus income is a consumption of the corpus. The corpus will not be in any way affected by the distribution of the income.

Appellant seems to be of the opinion that the income should be accumulated into a capital fund, and it is not suggested how this fund is to be limited, or whether appellant believes it should roll up until the income in turn produces sufficient income for the wife's annuity.

And how is this claim made to consist with the view previously stated by the appellant that the income may properly be distributed on the son's death?

It is suggested that the wife's estate can be cut out for conveyance. No authority is given for this statement and we believe it has no foundation.

4. Testator's Prudence.

Under this head it is suggested that the mortgage may be foreclosed, rents may be uncollectible, etc., and that for the reasons there suggested the income should be "funded". Again the appellant is trying to make a new will for testator. And the argument that the surplus income should be used to pay mortgages, etc., is inconsistent with the other claims asserted by appellant.

The practical answer to all this is, that the mortgage has been materially reduced, and none of the contingencies suggested, exists in fact. If circumstances should arise, application may be made to the Court of Chancery, under the permission contained in the decree.

It would be equally permissible for appellees to suggest reasons why they would not want an accumulation of income to remain in the hands of the trustee. The trustee's argument seems to be largely this that they should manage the surplus income because they can do much better with it than the son, who is legally entitled to it. But he has a right to judge of the merits of that argument and chooses to receive the surplus income himself.

5. That the decree nullifies the opinion of the Court.

It is quite true that because of the invalidity of a large part of the codicil the trust is of little practical use. But that is because of the will the testa-

tor made. It may be true that the trustee becomes a mere collector of rents. If so, it is because of the fact that there is an intestacy.

It is respectfully submitted that the decree should be affirmed and the appeal dismissed.

JOSEPH H. CARR,
HENRY M. EVANS,
Solicitors for and of Counsel with Defendants-Appellees.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THE AMERICAN NATIONAL BANK OF CAMDEN, executor and trustee under the will of WILLIAM E. MORGENWECK, deceased,

Complainant-Appellant,

v.

MARGARET S. MORGENWECK, *et als.,*

Defendants-Appellees.

ON BILL, &c.

ON APPEAL FROM THE COURT OF CHANCERY.

REPLY BRIEF FOR COMPLAINANT-APPELLANT.

This reply is made necessary by reason of the defendants-appellees' misstatements of fact, and their erroneous characterization of our points. It is our purpose herein to be directly responsive thereto.

I.

FACTS AND FIGURES.

The defendants-appellees state that "this lease" (of 17 Broadway and 8-10 Hudson Street, Camden) "is still in effect and in good standing;" that the yearly surplus will be approximately $5,000; and that "the mortgage has been substantially reduced in principal amount and is in good standing." *The facts are* that all parties to this appeal have executed a contract reducing the rent by $2,000 a year, because the tenant in Chicago absolutely refused to pay any rent unless the estate would share a relatively small part of their current loss; and the mortgage (now reduced to $42,000) has been and still is subject to immediate "call" and foreclosure. Out of the present rent of $11,000 there must be paid the interest presently amounting to $2532 per year, trustee's commissions amounting to approximately $550, income tax of unknown rate and amount, and such reductions of the principal amount of the mortgage (or the whole amount) as the mortgagee may demand. No matter how these reductions may be set up in the "accounts," the demands of creditors must come before legatees, even though the latter should, for a time, receive nothing; for only in this way can the *very source of the income* be protected against involuntary execution sale. The arrears of legacies now unpaid will consume all surplus (if and when it arises) for several years to

come. If the present lease-contract (S. C., p. 30) created at the peak of the "boom" should be further modified, or be totally breached by an insolvent tenant, or expire, a new tenant could not be secured at a rent high enough to pay any annuities whatever, nor probably to reduce the principal of the mortgage.

Since the appellees are confused concerning conservation of income for the more-advanced age of decedent's son, and the unascertained widow of said son, we are called upon to illustrate. Decedent's son is 39 years old, and his expectancy of life is 28.9 years. If the present rental of $11,000 withstands "every storm that blows" for a period of, say fifteen years, there might be a surplus of about $2,000 a year, or total accumulations of $30,000 for the period. Out of this, about $13,200 would be required to pay off arrears of legacies now due. This would leave $16,800 in the fund fifteen years hence. Should the income thereafter be reduced, or the expenses be increased to the point where only $2200 per year would be available from current income for the payment of the legacies, then it would be necessary to take $3,000 a year out of such accumulated surplus of prior years in order to maintain the legacies at $100 a week as directed by the testator. And in about five and one-half years such estimated surplus would be exhausted. Should the rental after fifteen years, however, be so low as to provide no net profit for the payment of legacies (which is not unlikely), then such accumulations during the previous period would be exhausted in approxi-

mately three years. The same principle (but different figures), would apply if there were a greater or lesser number of "good" years preceding the "lean" years. It is, therefore, possible that at the death of testator's son any accumulated surplus would have been long since exhausted, and that his more recent income from this estate might have been less than $100 a week because limited by the income of the period. Nevertheless, if a surplus can be worked out in the near future, and conserved, not as capital, but as surplus income, it would tend to overcome future current shortages, which are almost certain to occur. The effect of the decree may therefore be considered serious.

II.

TESTATOR DID NOT INTEND INTESTACY.

By the last codicil, the testator directed that to his personal estate there should "also be added the monthly revenue derived from the *rental or lease* of the properties" and "*out of* this account there should be paid" (expenses) "and from the *balance* there should be paid" the several weekly legacies in *various* amounts. It is perfectly plain that he expected his estate and the entire rents to constitute a *fund,* and that he "carved" out of this fund certain payments to be made from time to time; and, therefore, knew that there might be a surplus remaining in the hands of his fiduciary. In the succeeding paragraph he must have had in mind that

all income, both accumulations and current income, should go to the hospitals. There is nothing in the codicil to limit or negative this view (S. C., p. 28). Since the presumption is against intestacy, that is sufficient to turn the scales to this as the true and reasonable construction of the codicil. The fact that the testator gave specific parts of the income for the living expenses of his legatees and tried to protect them against creditors, indicates that the testator intended to protect also any excess income during some "good" period in two ways; first, by not giving it to the legatees, and second, by retaining it in his estate where it could not possibly be liable for the debts or engagements of the legatees. His plan was not only to create spendthrift trusts, but *to conserve his estate on an even broader basis.* The testator did not intend to die intestate (*Baldwin v. Baldwin,* 107 N. J. E. 91; *Hicks v. Hicks,* 100 N. J. E. 346), therefore, he intended in his own way (as above indicated), the clause naming the hospitals, as a *residuary* clause. But he lacked knowledge of legal terminology by which to express himself (S. C., pp. 108-118-129). He did not know of the rule against perpetuities. Were it not for this rule, he would not have died intestate with respect to the corpus of his real estate; for the final gift of all income on a perpetual basis is a gift of the corpus itself. *Frelinghuysen v. Frelinghuysen,* 80 N. J. E. 482. He intended an accumulation of any excess income to take place, from time to time, for a period greater than the "rule" permits, hence the sole question is: At what time does the rule operate

upon a *valid gift of the legal title to all the rents;* that is, upon an estate in the trustee in all the income *pur autre vie.* By the original will, the trustee was given *express authority to rent* the Broadway property (were it to become vacant); in the alternative, it would undoubtedly have such a right by the *strongest implication* (*Lindsley v. O'Reilly,* 50 N. J. L. 636); for only in that manner could it continue to obtain rental income by which to continue payment of the legacies. No intestacy exists, except that produced by the "rule." The circumstances of this case, justify the construction for which we contend.

III.

A SHORT-SIGHTED POLICY.

Improvidence always demands cash *now,* and is gaily unconcerned about the future. The appellees' argument (as does also the decree) recognizes the possibility of the current future income being insufficient, and the necessity for a further application to the Chancellor *at that time. The sole difference between the parties, then, is this:* We want to prepare *now* as the testator intended, while they want to do it when *too late.* What a short-sighted policy! Have we not learned from the depression that *the very hour of the greatest financial need always finds the treasury depleted.* If we wait until trouble is upon us, *it is too late to go back* and recover the dollars that have been spent. The testator indicated

his desire for adherence to the adage of "saving for a rainy day." Anybody will lend an umbrella on a clear day, but he wants it back when it rains. Reduced rent, insolvent tenants, increased expenses, threats of foreclosure, jeopardized annuities, all are *facts* that cannot be met *after* they have occurred by "regrets" and "good intentions." They must be met by real cash in the bank. Should future legacies be made entirely dependent upon future income, by reading into the testator's will what is not there, a desire of the legatee for current distribution?

IV.

FUTURE INTERESTS ENTITLED TO THEIR DAY IN COURT.

The appellees repeat and emphasize the thought that *they* are satisfied with the decree. Again they are living in the *present* and are not now interested in the future widow of testator's son *who is not a a party to these proceedings. Is she not entitled to be heard at the time when the question becomes vital to her?* Surely the living and ascertained parties cannot "consent-away" the rights of an unascertained person. Her interest in the fund would vest at the time of the death of her husband (whose life is the measuring life) as required by the "rule." *Ackerman v. Vreeland,* 14 N. J. E. 23. Being then fixed and determined, payments to her continuing beyond the time-limit of the rule would be valid.

Murphy v. Markis, 99 N. J. E. 888; *Trippe v. National,* 100 N. J. E. 356.

V.

THE TIME OF DISTRIBUTION.

The appellees contend that we indicate the time of death of testator's son as the time for distribution. What we said was that the fund should be accumulated *at least until the time of his death,* meaning that it might be accumulated *longer;* recognizing, of course, that we cannot now speak for an unascertained person (the future widow of testator's son) and that she may be entitled to an opportunity to oppose distribution at that time. In Section V of our original brief we cite a case concerning the rights of unascertained persons. (The question of the time of distribution may be premature.) The sole problem now is, Shall we accumulate any surplus income, if, and when, it may accumulate?

VI.

THE TRUSTEE'S TITLE AND POWERS.

The trustee's office, and title to the rents, does not arise by *implication* as alleged in the first point of the appellees' argument. This point was settled by the decree, and not raised by appeal. We might say, however, that the testator by his original will

set up a general plan for the conduct and *management* of his estate, as distinguished from gifts of *beneficial interests. The last codicil is not a complete substitute*, as is illustrated by the fact that the legacies called for by the first few paragraphs of the will were recognized as valid. *Lyon v. Clawson,* 56 N. J. E. 642.

In this codicil the testator changed the scheme of distribution to his family, because he had in the meantime sold his business and leased his property, and he concluded by saying in effect: "Having changed the plan, I also change the fiduciary to carry out the plan." He did not know the difference between one fiduciary and another (S. C., p. 108). *N. J. Title Guaranty Co. v. Smith,* 90 N. J. E. 386; *Lavaggi v. Borella,* 73 N. J. E. 419. In the "notes" in testator's own handwriting, from which counsel prepared his original will, he planned continuing trust provisions but merely referred to Mr. Harding as *executor.* Counsel supplied the technical term *trustee,* and caused the will to read "*executor and trustee.*" (S. C., p. 105.) It is, therefore, but natural that the testator, in preparing the codicil, *used the same word in the same sense,* and meant to say: "Having changed the plan of distribution, I also change the fiduciary." This amounts to an *express* appointment, and indicates that the testator expected the fiduciary to have *all of the trust powers set forth in his original will.* A previous hint of this is contained in our original brief at page 18. Even if the appellees were correct that the trust is raised only by implication, it would be just as broad as the powers to collect *all*

the rents, and to pay *out of* them certain items; whereupon the trustee *by the very nature of things would have left in hand* whatever was *not* paid out. That which is *implicit* must, of course, be held to be *explicit*.

VII.

THE RELIEF DESIRED.

The cases that we have already cited in our first brief likewise support the views herein expressed. The appellees have not adequately answered our points; they have merely set up caricatures and answered *them*. They try to put words in our mouth which we did not utter. For instance: Nowhere did we say that we desired that "income should roll up until the income in turn produces sufficient income for the wife's annuities." Appellees' defense hangs upon two *untenable* points: (1) That testator intended to die intestate had not the "rule" applied, and (2) That the rights of the unascertained widow of decedent's son may be ignored. All we ask the Court to say is that no decree to disburse current excess income should have been made, but rather that such income should be accumulated until some facts (not merely a rule operating in the future) arise to require or justify distribution.

Respectfully submitted,

ELMER G. VAN NAME,

Solicitor for and of Counsel with Complainant-Appellant,