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Petition.

PETITION.

Essex County Orphans' Court

In the Matter of the Estate of CHARLES
DOWDEN, DECEASED.

} On Accounting.
Petition.

10

To the Orphans' Court of the County of Essex:

The petition of Jehiel G. Shipman, of the City of Newark, in the County of Essex and State of New Jersey, respectfully shows as follows:

1. Your petitioner is the trustee under the last will and testament of Charles Dowden, deceased, and herewith presents his account of his administration of the aforesaid estate. 20

2. The names and addresses of all persons interested in said accounting are as follows:

- Miss Florence A. Dowden, 33 Convent Ave., New York City.
 - Willis G. Dowden, 6 Walton Ave., South Orange, N. J.
 - G. Edward Dowden, 147 Clifton Ave., Newark, N. J.
 - Dawson B. Dowden, 86 North 7th St., Newark, N. J.
 - Miss Elsie B. Dowden, 330 Clifton Ave., Newark, N. J.
 - Harold V. D. Dowden, 330 Clifton Ave., Newark, N. J.
 - Mrs. Helen D. Burke, Deep River, Conn.
 - Miss Maude Dowden, 330 Clifton Ave., Newark, N. J.
 - Charles D. McCracken, Lambertville, N. J.
 - Frederic B. McCracken, 142 Lincoln Ave., Newark, N. J.
 - Mrs. Mary E. Newell, 258 Riverside Drive, New York City.
 - John H. McCracken, 142 Lincoln Ave., Newark, N. J.
 - Mrs. Henrietta Gulick, 73 W. Kinney St., Newark, N. J.
- 30

3. The following is a summary of his aforesaid account:

AS TO CORPUS.

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This accountant charges himself with.....	\$42,832.66
This accountant prays allowance for.....	246.89
Balance of corpus on hands of the trustee.....	\$42,585.77

Petition.

AS TO INCOME.

This accountant charges himself with.....\$12,912.42
 This accountant prays allowance for..... 4,982.15

Balance of income in the hands of the trustee.....\$ 7,950.27

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Your petitioner therefore prays that the said account may be allowed, and also for the allowance of commissions and counsel fees.

JEHIEL G. SHIPMAN,
Trustee.

Dated Newark, N. J., July 5th, 1917.

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STATE OF NEW JERSEY, } ss.
 COUNTY OF ESSEX. }

Jehiel G. Shipman, being duly sworn according to law on his oath, deposes and says: that he is the petitioner in the foregoing petition named, and that the matters and things therein contained are true to the best of his knowledge and belief.

JEHIEL G. SHIPMAN.

Sworn to and subscribed before me this 9th
 day of July, 1917, at Newark, N. J.

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LOUISE GECK,
Notary Public of New Jersey.

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First Account of Trustee.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of the Estate of CHARLES DOWDEN, Deceased.	} <i>First Account of Jehiel G. Shipman, Trustee and Admin- istrator, with the</i> 10 <i>Will Annexed.</i>
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The first account of Jehiel G. Shipman, Trustee and Administrator, with the will annexed, shows:

This accountant charges himself with corpus of the estate, as follows:

Bond of Rubin Mahler and first mortgage covering northwest corner of Wickliffe and Academy St., Newark, N. J.....	\$ 7,000.00	20
Bond of Meyer Levin and first mortgage on 251 Warren St., Newark, N. J.....	2,500.00	
Bond and first mortgage of Gustave F. J. Wegner on 260 Washington Ave., Newark.....	5,500.00	
Bond and first mortgage of Charles S. Orben on 22 Crestwood Ave., Nutley, N. J.....	1,500.00	
Bond and first mortgage of Mayer Krasner, northwest corner of Wickliffe and Academy Sts., Newark	4,000.00	
Three hundred and eighty-five shares of the capital stock of the American Insurance Co., value.....	6,930.00	30
Bond and mortgage of Mark S. Clark on New Ball St., Irvington, N. J. (deed has been given for this property in place of the mortgage with the condition that the title shall become absolute in the estate in one year, to wit., unless principal of the mortgage and interest, taxes, etc., are paid within that time), amount advanced on loan and due for interest, taxes, etc.....	750.00	
First bond and mortgage of Charles S. Orben, 213 Watsessing Ave., Bloomfield, N. J.....	1,000.00	40
Bond and mortgage of Thomas E. Summers, Valley St., Union Township, N. J.....	1,500.00	
House and lot known as 141 W. Grand St., Elizabeth, N. J., assessed value.....	6,500.00	

First Account of Trustee.

House and property known as 73 W. Kinney St., Newark, N. J., assessed value..... 3,900.00

Total value of securities and real estate held by the estate\$41,080.00

10 Feb. 23, 1916, principal of mortgage covering property in Nutley, held by the estate before the appointment of this trustee..... 1,500.00

Carried forward\$42,580.00

Brought forward 42,580.00

Interest upon this mortgage..... 16.26

July 6, received from J. H. McCracken, payment on account of principal of Rubin Mahler mortgage (McCracken present owner) 215.00

20 July 6, from J. G. Shipman, Trustee, for payments for water rent on 141 W. Grand St., Elizabeth, N. J., property owned by the estate, and repairs on 73 W. Kinney St., erroneously charged principal account (see vouchers) 21.40

Total\$42,832.66

This accountant prays allowance for disbursements from the corpus, as follows:

30 1916

March 30, to pay Tyler Parmly, Comptroller of the City of Newark, three installments behalf 73 W. Kinney St. assessment\$ 107.90

April 3, by check of J. G. Shipman, Trustee, special interest on mortgage of Nutley property, deposited. 16.26

April 16, to the Elizabeth Treasurer, 25 per cent. installment, payment on behalf assessment on 141 W. Grand St., for paving..... 34.33

40 April 24, Elizabethtown Water Company, for water rent, 141 W. Grand St..... 10.35

May 5, to Pitts Co., for laying sidewalk, 73 W. Kinney St. 67.00

May 9, to Department of Water of the City of Newark, water rent, 73 W. Kinney St., to Aug..... 3.75

First Account of Trustee.

June 21, to A. C. Doremus, carpenter work and repairs on 73 W. Kinney St.....	7.30
Total	\$ 246.89

SUMMARY AS TO CORPUS.

This accountant charges himself with corpus.....	\$42,832.66	10
This accountant prays allowance for.....	246.89	
Balance of corpus on hand.....	\$42,585.77	
This balance is made up as follows:		
Securities of the estate as heretofore shown.....	\$41,080.00	
Bond and mortgage of Thomas Summers covering property in Union Township, N. J.....	1,500.00	
Cash as shown above.....	252.66	
Total	\$42,832.66	20
Deduct disbursements	246.89	
Balance	\$42,585.77	

This accountant charges himself with receipts from the income as follows:

February 23, 1916.

Quarterly Am. Ins. Div. April 4/15.....	\$ 134.75	30
Six months' interest on Mahler Mtg.....	175.00	
Quarterly Am. Ins. Co. Div. July, 1915.....	134.75	
G. F. J. Wegner, six months' interest on mortgage (paid by Orben \$1,500).....	137.50	
C. S. Orben Int. on Mtg. (paid \$1,500 prin.).....	56.25	
Levin, six months' interest on mortgage.....	62.50	
Quarterly Am. Ins. Co. Oct. Div.....	134.75	
Quarterly Am. Ins. Co. Div. Jan.....	154.00	
Levin, six months' interest on mortgage.....	62.50	
McC., interest on Krasner mortgage.....	200.00	
February 28, 1916.		40
J. H. McCracken, rent 141 W. Grand St., Eliza., for Dec., 1914; Jan. to Aug., incl., and \$10 a/c September, 1915	370.00	
Six months' interest on Mahler, Wickliffe St., mortgage December 1/15	175.00	

First Account of Trustee.

	Six months' interest on 213 Watsessing Ave., Bloomfield, Aug. 1/14 to Feb. 1/16.....	90.00
	Six months' interest on 32 Crestwood Ave., Nutley, Dec. 15/15	45.00
	Six months' interest, Security Savings Bank.....	5.36
10	March 1, 1916.	
	From Mrs. Gulick, bal. rent 73 W. Kinney St., Jan. 1, 1915, to Jan. 1, 1916.....	94.84
	Rent, Jan., Feb. and Mar., 1916.....	84.00
	March 22, 1916, by check, C. S. Orben, int. on 22 Crestwood Ave., from Dec. 14 to June, 1915.....	45.00
	March 24, 1916, cash, Mrs. Kellogg, rent, Sept. 15, 141 W. Grand St., Elizabeth	30.00
	March 24, 1916, Acc. Int. April 3/16.....	16.26
	March 24, 1916, Acc. of Bank Int.....	2.57
20	April 3, 1916, Apr. rent, W. Kinney St.....	28.00
	April 7, 1916, Quarterly Div. Am. Ins. Co.....	154.00
	April 25, 1916, Oct. 15, rent 141 W. Grand St., Elizabeth	40.00
	May 8, 1916, May rent, 73 W. Kinney St.....	28.00
	May 29, 1916, Nov. 15, rent, 141 Grand St., Elizabeth	40.00
	June 9, 1916, June rent, 73 W. Kinney St.....	28.00
	June 6, 1916, six months' interest from Samuel Stein, Wickliffe and Academy Sts.....	175.00
30	June 21, 1916, one year interest, June 2/16, from Union Brewing Co., 260 Washington Ave.....	275.00
	June 27, 1916, Dec. 15, rent, 141 Grand St., Elizabeth.	40.00
	July 1, 1916.	
	Quarterly Div. Am. Ins. Co.....	154.00
	Int. from Dec. 16 to June 16, from C. Orben, Nutley Gardens	45.00
	Int.* six mos., F. Urgugiato, 251 Warren.....	62.50
	Rent for July, 73 W. Kinney.....	28.00
	August 1, 1916, August rent, 73 W. Kinney.....	28.00
40	August 10, 1916, Miss Kellogg, rent, 141 W. Grand St., Elizabeth, Jan., 1916.....	40.00
	September 15, 1916.	
	Miss Kellogg, a/c rent 141 W. Grand St., Elizabeth, part Feb., 1916	17.00
	Total carried forward	\$ 3,392.53

First Account of Trustee.

Brought forward	3,392.53	
1916.		
Sept. 15, Mrs. Gulick, rent 73 W. Kinney, Sept., 1916.	28.00	
Sept. 27, E. S. Mulford, balance February, 1916, 1/2 March, 1916	43.00	
October 5, Mrs. Gulick, Oct. rent, 1916.....	28.00	10
October 5, 1/4 Div. Am. Ins. Co.....	154.00	
Oct. 17, M. Vertinianian, six months' interest, 213 Watsessing Ave.	30.00	
Oct. 30, Mrs. Gulick, rent Nov., 1916.....	28.00	
Oct. 31, Miss Kellogg, 141 W. Grand St., 1/2 April and 1/2 March, 1916.....	40.00	
Dec. 11, Mrs. Gulick, Dec. rent, 73 W. Kinney St.....	28.00	
Dec. 11, Miss Kellogg, 1/2 April, 1/2 May, 1916, 141 W. Grand St.	40.00	
Dec. 15, Stein check, six mo. int., Wickliffe St. mortgage	175.00	20
1917.		
Jan. 4, 1/4 Am. Ins. Co. Div.....	173.25	
Jan. 4, Chas. Orben, six mo. int., 22 Crestwood Ave., Nutley	45.00	
Jan. 4, Urguggiato, six mo. int., 251 Warren.....	62.50	
Jan. 11, Mrs. Gulick, Jan. rent, 73 W. Kinney.....	28.00	
Jan. 15, Mulford, 1/2 May rent, 141 W. Grand.....	20.00	
Jan. 20, Mulford, June rent, 141 W. Grand.....	40.00	
Feb. 3, Mrs. Gulick, Feb. rent, 73 W. Kinney.....	28.00	30
Feb. 8, Union Brewing Co., six mo. int. Dec., 1916, 260 Washington Ave.	137.50	
Feb. 13, Miss Kellogg, July, 1916, rent, W. Grand....	40.00	
Feb. 16, M. Vertinianian, six mo. int., 213 Watsessing Ave.	30.00	
Feb. 17, G. Clymer, Summers, six mo. int. Dec., 1916, Valley St. mortgage.....	45.00	
Feb. 26, J. H. McC., int. \$4,000, Wickliffe St., Dec. 1/15-July 1/16, and on \$3,785 July 1-Dec. 1/16, mtg. reduced \$215 on July 6/16.....	195.52	40
March 5, Mrs. Gulick, rent 73 W. Kinney St.....	28.00	
Mar. 27, Miss Kellogg, Aug., 1916, \$5 a/c Cept.....	45.00	
April 3, 1/4 Div. Am. Ins. Co.....	173.25	
April 3, Mrs. Gulick, April rent, 73 W. Kinney St...	28.00	
May 7, Mrs. Gulick, May rent, 73 W. Kinney.....	28.00	
May 7, Miss Kellogg, a/c Sept., 1916.....	10.00	

First Account of Trustee.

	June 7, Mrs. Gulick, rent June, 28 Kinney.....	28.00
	June 7, Union Brewing Co., six mo. int. June 1, 260 Watsessing Ave.	137.50
	June 12, Uргуaggiato, six mo. int., 251 Warren.....	62.50
	June 18, Stein, six mo. int., Wickliffe St.....	175.00
10	June 26, G. L. Mason, six mo. int., Vauxhall mtg. to June 26, 1917	45.00
	June 27, Geo. Smith, Clk., Eliza. Dist. Court, a/c rent for 141 W. Grand St.....	50.00
	June 29, Mrs. Gulick, July rent, 73 W. Kinney.....	28.00
	July 2, Chas. Orben, six mo. int., 22 Crestwood Ave., Nutley	45.00
	July 2, J. H. McCracken, six mo. int. on mtg., Wick- liffe St.	94.62
	July 2, ¼ Div. Am. Ins. Co.....	173.25

20	Cash received in dollars.....	\$ 5,982.42
	Three hundred and eighty-five shares of American Insurance Co. stock paid the estate as stock divi- dend	6,930.00
	Total income receipts.....	\$12,912.42

This accountant charges himself with disbursements
from the income, as follows:

30	1916.	
	Feb. 23, painting 73 W. Kinney St., bill April 2/15 (charge to Dowden)	\$ 78.00
	Feb. 28, statement J. H. McC. as follows:	
	Water bill, April, 1915.....	\$ 10.35
	Plumb	62.42
	Repairs	8.00
	Water, Oct.	10.35
	Tax	145.00
	Insurance	23.13
40	Plumbing	41.13
	Com. \$370, rent 5%.....	18.50
		319.38

First Account of Trustee.

March 1, statement of Mrs. Gulick, 73 West Kinney St., as follows:

Repairs	\$ 1.63	
Int. H. D. G., \$230 note.....	6.90	
Water	3.75	
Com. Jan., Feb. rent.....	2.80	
	15.08	10
March 11, by check No. 1, trustee's bond.....	115.00	
March 11, by check No. 2, adm.'s bond.....	55.00	
March 11, by check No. 3, Stickel, Surro.....	11.95	
March 11, by check No. 4, Essex Bank.....	5.00	
April 3, to H. D. Gulick, 1/2 int. in income from Jan., 1915, to April 3, 1916.....	805.31	
April 3, Selena A. McCracken, 1/2 int. in income from Jan., 1915, to April 3/16.....	805.31	
May 26, F. G. Stickel, surrogate, order for trustee...	1.00	20
June 9, Mrs. Gulick, int. on note for \$251 for 6 mo., due June 4	7.53	
June 21, Mrs. Gulick, int. on mortgage for \$665.11, due June 20	19.65	
July 6, J. G. Shipman, trustee, paid by mistake from prin.:		
Eliza. Water Co.....	\$ 10.35	
Depart. of Water.....	3.75	
A. C. Doremus, carpenter, for Kinney St.....	7.30	
	21.40	30
July 6, J. Rau, plumb., 73 W. Kinney St.....	5.92	
Aug. 1, Mrs. Gulick, int. on note \$230, due July 29..	6.90	
Aug. 1, Dept. of Water, from Aug. to Nov. 16, on 73 W. Kinney St.	3.75	
Aug. 4, Mrs. Gulick, 1/2 int. in income from April 3, 1916, to August 4, 1916.....	529.67	
Aug. 4, Selena A. McCracken, 1/2 int. in income from April 3/16 to August 4/16.....	529.68	
Sept. 26, E. D. Mulford, services in reducing tax assessment, 141 W. Grand St.....	5.00	40
Oct. 7, Henry C. Broadnelle & Co., painting roof, 73 W. Kinney St.	8.00	
Oct. 31, Richard Franz, receiver, taxes 1916, 73 W. Kinney St., 1% off \$95.55.....	94.60	
Nov. 9, Dept. of Water, Nov. 1/16 to Feb. 1/17.....	3.75	

First Account of Trustee.

	Dec. 1, H. D. Gulick, six mo. int., note of est.....	7.53
	Dec. 20, Jacob Rau, Jr., plumb. and heating, 73 W. Kinney St.	1.90
	Dec. 20, H. D. Gulick, six mo. int., 73 W. Kinney, on \$655.11	19.65
10	1917.	
	Jan. 29, H. D. Gulick, six mo. int. on mortgage note of estate for \$230.....	\$6.90
	Feb. 1, E. D. Mulford, for services in tax appeal, 141 W. Grand St.	5.00
	Feb. 7, City of Eliza., taxes for 1916, 141 W. Grand St.	133.75
	Feb. 9, Dept. of Water, Feb. 1 to May 1/17, 73 W. Kinney St.	3.75
	Feb. 16, Essex Co. Nat'l Bank deposit box.....	5.00
20	Feb. 16, F. B. Behm, repairs to plumb. new wash trays, 141 W. Grand St.....	35.00
	Feb. 26, J. H. McC., for advancements:	
	Nov. 8/15, taxes, Clark prop., 1914.....\$	26.15
	Aug. 16/16, taxes, Clark prop., 1915.....	7.93
	Mar. 13/16, recording assignment of mortgage to J. G. S., trustee.....	1.82
	Oct. 1/16, water bill, 141 W. Grand St., to April 1/17	10.35
	Oct. 30/16, paid ins., 73 W. Kinney.....	8.75
30		55.00
	Feb. 28, John Giblon, premium of bonds.....	113.32
	Feb. 28, Town of Irvington, Collector of Taxes, for 1916 taxes, Mark S. Clark.....	7.19
	March 2, H. D. Gulick, 1/2 int. in income from Aug. 3, 1916, to March 1/17.....	495.22
	March 2, Selena A. McCracken, 1/2 int. in income from August 3, 1916, to March 1/17.....	495.21
	April 11, Frederick W. Schlosstein, search on New Ball St. prop.	21.13
40	April 20, Elizabethtown Water Co., rent for six mo. ending Oct. 1/17, 141 W. Grand St.....	10.35
	May 1, Bureau of Water, 73 W. Kinney St., to Aug. 1/17	3.75
	May 8, Geo. J. Smith, Clerk, fees for distraining tenant at 141 W. Grand St.....	4.00

First Account of Trustee.

May 7, Henry Kleinhaus, plumb., 141 W. Grand St.	.95	
June 20, Mrs. Gulick, six mo. int. note of estate \$251, due June 4	7.53	
June 20, Mrs. Gulick, six mo. int. mtg., 73 W. Kinney St.	19.65	
Surrogate's fees for filing and publishing this account	63.49	10
Total	\$ 4,962.15	

SUMMARY AS TO INCOME.

This accountant charges himself with receipts from income	\$12,912.42	
This accountant prays allowance for.....	4,962.15	
Balance in the hands of the trustee.....	\$ 7,950.27	20

JEHIEL G. SHIPMAN,
Trustee.

July 5, 1917.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

JEHIEL G. SHIPMAN, the trustee above named, being duly sworn according to law, on his oath deposes and says, that the above account is in all things just and true both as to the charges and discharges thereof, according to the best of his knowledge and belief. 30

JEHIEL G. SHIPMAN.

Sworn and subscribed to before me
this 5th day of July, 1917.

LOUISE GECK, (L. S.)

Notary Public of New Jersey.

*Exceptions to Account.***EXCEPTIONS TO ACCOUNT.****ESSEX COUNTY ORPHANS' COURT.**

10	In the Matter of the Estate of CHARLES DOWDEN, Deceased.	}	<i>First Account of Jehiel G. Shipman, Trustee and Administrator, with the Will Annexed.</i>
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Exceptions are filed to one item of the account filed herein for the following reasons:

20 WHEREAS, the late Charles Dowden, by his will, duly probated on the fourth day of February, in the year eighteen hundred and eighty-one, bequeathed to his two daughters, now Selena A. McCracken and Henrietta D. Gulick, the income of the residuary estate for life.

The will directed his executors to retain the stock held in the American Insurance Company, and on May 22, 1917, said estate being the owner of three hundred and eighty-five (385) shares of stock, said American Insurance Company increasing its capital from one million dollars (\$1,000,000) to two million dollars (\$2,000,000). From its accumulation of \$1,000,000 issued therefor 285 shares were issued to said estate of Charles Dowden.

30 The account filed on July 9, 1917, by the trustee aforesaid has designated said 385 shares as income, to which the following named persons, to wit., Selena A. McCracken, legatee of one-half of income for life, and Charles D. McCracken, Frederick B. McCracken and Mary E. Newell, children of Selena A. McCracken and residuary legatees through their proctor, John H. McCracken, except to that item in the account as filed and claim that only a small portion of said 385 shares of stock can be applied to income for the following reasons: The exceptants are prepared to prove that at the time of the death of said testator, on the first day of January, in the

40 year eighteen hundred and eighty-one, the accumulation on the stock of said American Insurance Company amounted to the sum of seven hundred and forty-eight thousand, nine hundred and sixty-seven dollars (\$748,967.00), and as shown by the official notice to stockholders the Insurance Company took the sum of one million dollars (\$1,000,000) of the surplus earned prior to the year 1895, for which all of the in-

Stipulation of Facts.

creased stock was given—as \$748,967.00 is to \$1,000,000.00 so the principal is to the income.

Therefore, the estate is entitled to the credit of 289 shares as principal out of the 385 shares as above stated, leaving 96 shares to be credited to income.

J. H. McCracken,
Proctor.

15

August 4, 1917.

STIPULATION OF FACTS.**ESSEX COUNTY ORPHANS' COURT.**

In the Matter of the Estate of
CHARLES DOWDEN, Deceased.

*Stipulations of Facts
Upon Exceptions to Ac-
count of Trustee.*

20

The following facts are stipulated for the purpose of determining the rights of life tenants and remainder-men named in the will of Charles Dowden, deceased, in the stock dividend declared by the American Insurance Company.

Charles Dowden died in October, eighteen hundred and eighty, and his will was admitted to probate by the Surrogate of Essex County on October thirtieth, eighteen hundred and eighty. The will provides, in the fifth paragraph, as follows:

30

“I give, devise and bequeath to my executors hereinafter named the survivors and survivor of them and their heirs as joint tenants all the residue of my property, real and personal, on the following trusts:

“And in further trust to divide the residue of said income into three equal parts and pay the same unto my wife, Susan, and my two daughters, Selena A. and Henrietta, respectively, during their respective lives; that is to say, one part to each, such payments to be made in such quarterly or half-yearly installments as may be found best.

40

“And in further trust, on the death of my said wife, to pay her share of said income to my daughters in

Stipulation of Facts.

10

equal proportions during their natural lives and on the death of said daughters, respectively, to pay one-half of the principal of all the residue of my estate to the children of each of my said daughters; that is to say, one half of said principal to the children of Selena A. and the other half of said principal to the children of Henrietta (the children of my deceased child to represent and take the share of their parent), subject, however, to my wife's life interest therein, in case she should survive my said daughters or either of them, in which event the principal out of which her share of the same is derived is not to be distributed until her death."

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30

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That both life tenants are living at the present time and Mrs. McCracken, one daughter, has children; that part of the estate, at the time of the testator's death, was two hundred and thirty-one shares of stock of the American Insurance Company, at that time valued (on par of five dollars) at eleven dollars per share; that in nineteen hundred and seven the executors purchased as an investment fifty-eight shares, and in nineteen hundred and nine also purchased as an investment of the estate ninety-six shares. On May twenty-second, nineteen hundred and seventeen, the estate owned three hundred and eighty-five shares of stock in this company, and the company, upon that date, passed resolutions and took proper steps to increase, and did subsequently increase, its capital stock from one million dollars to two million dollars, and issued to each stockholder additional shares equal in number to the shares held by them respectively, and 385 additional shares of stock were issued the estate of Charles Dowden. The one million dollar increase in the capital stock represented surplus earned by the American Insurance Company from the inception of the company until the year eighteen hundred and ninety-four, upon which latter date the surplus was one million dollars. On the first day of January, eighteen hundred and eighty-one, two months after the death of the deceased, the surplus of the company amounted to seven hundred and forty-eight thousand, nine hundred and sixty-seven dollars. The value of the shares of stock on May twenty-second, nineteen hundred and seventeen, was thirty-six dollars, and after the new issue the value decreased to eighteen dollars a share.

Exhibit 1.

The amount of capital stock and surplus in the years nineteen hundred and seven and nineteen hundred and nine will be found in the statement made by the American Insurance Company on file with the Court.

JEHIEL G. SHIPMAN,

Trustee.

10

J. H. McCracken,

Proctor for Remainder-Men.

EXHIBIT 1.

Statement of Capital and Surplus of The American Insurance Company of Newark, N. J., as of January 1st each year beginning with 1881.

20

			<i>Capital.</i>	<i>Surplus.</i>	
January 1st	.....	1881	\$600,000	\$748,967	
"	.....	1882	600,000	774,757	
"	.....	1883	600,000	805,632	
"	.....	1884	600,000	833,406	
"	.....	1885	600,000	844,750	
"	.....	1886	600,000	844,867	
"	.....	1887	600,000	902,050	
"	.....	1888	600,000	926,106	
"	.....	1889	600,000	956,234	30
"	.....	1890	600,000	1,014,853	
"	.....	1891	600,000	1,068,580	
"	.....	1892	600,000	1,108,824	
"	.....	1893	600,000	1,142,045	
"	.....	1894	600,000	1,170,961	
"	.....	1895	600,000	1,301,071	
"	.....	1896	600,000	1,453,431	
"	.....	1897	600,000	1,606,414	
"	.....	1898	600,000	1,718,229	40
"	.....	1899	600,000	1,816,872	
"	.....	1900	600,000	1,410,543	
"	.....	1901	600,000	1,599,792	
"	.....	1902	600,000	1,700,298	
"	.....	1903	600,000	1,883,099	

Exhibit 2.

10	January 1st	1904	600,000	2,165,875
	"	1905	600,000	2,036,901
	"	1906	600,000	2,430,459
	"	1907	600,000	1,463,510
	"	1908	750,000	1,601,615
	"	1909	750,000	1,954,999
	"	1910	1,000,000	2,355,055
	"	1911	1,000,000	2,620,399
	"	1912	1,000,000	2,962,549
	"	1913	1,000,000	3,135,103
	"	1914	1,000,000	3,252,859
	"	1915	1,000,000	3,366,394
	"	1916	1,000,000	3,712,898
	"	1917	1,000,000	3,951,427
20	March 31st	1917	1,000,000	4,079,176.24

EXHIBIT 2.

COPY OF THE RESOLUTION OF THE BOARD OF DIRECTORS OF THE
 AMERICAN INSURANCE COMPANY, NEWARK, N. J., ADOPTED
 APRIL 26TH, 1917.

30 WHEREAS, by certificate filed with the Commissioner of Banking and Insurance of the State of New Jersey, on April 27, 1914, the authorized capital stock of the American Insurance Company, a corporation of the State of New Jersey, was increased from \$1,000,000 to \$2,000,000, and such increased capital stock has not heretofore been issued; and

WHEREAS, it is deemed advisable that said authorized increase of capital stock should now be issued, in order that the security of the policy-holders may be thereby increased; and

40 WHEREAS, this Company had prior to January 1, 1895, accumulated from previous earnings a surplus exceeding \$1,000,000, and has ever since that date maintained a surplus in excess of said sum.

RESOLVED, That, subject to the approval of the Commissioner of Banking and Insurance of New Jersey, the sum of \$1,000,000 be and the same hereby is transferred to the capital account of this Company out of the surplus earned previous to January

Exhibit 2.

1, 1895, and that the surplus so transferred, and the investments representing the same, shall be considered full payment of said increase of capital stock of this Company, and that said increase of capital stock so fully paid, when approved by the said Commissioner of Banking and Insurance, be issued as full paid stock to the stockholders of this Company of record at such date as the Directors may hereafter determine, one share of such increase to be issued for each share then held by such stockholders respectively.

I certify that the foregoing is a true copy of said resolution and that the same was adopted by vote of the Board of Directors at a meeting duly called and held and convened on April 26th, 1917, a quorum being present.

P. HOADLEY,
Secretary.

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ESSEX COUNTY ORPHANS' COURT.

10 In the Matter of the Accounting of JEHIEL
S. SHIPMAN, as Substituted Trustee
under the Last Will and Testament of
CHARLES DOWDEN, deceased.

Mr. Jehiel G. Shipman, *pro se* Substituted Trustee and Accountant, and of Counsel with and Proctor for Henrietta Gulick.

MARTIN, *J.*

Exceptions were filed by Selena McCracken, a life beneficiary of one-half the income, and her children, Charles D. and Frederick B. McCracken and Mary E. Newell, remainder-men, ultimate owners of a part of the trust fund, to the account of Jehiel G. Shipman, as substituted trustee under the will of Charles Dowden, deceased. A stipulation was presented in part as follows:

“The * * * facts are stipulated for the purpose of determining the rights * * * in the stock dividend declared by American Insurance Company.

“Charles Dowden died in October, 1880. His will was admitted to probate October 30, 1880. The will provides * * * Fifth. I give, devise and bequeath to my executors * * * all the residue of my property * * * on the following trusts * * * to divide the residue of said income into three equal parts and pay the same unto my wife, Susan, and my two daughters, Selena A. and Henrietta, respectively, during their * * * lives * * * one part to each, such payments to be made in * * * installments * * * on the death of my * * * wife to pay her share of said income to my daughters in equal proportions during their * * * lives, and on the death of said daughters, respectively, to pay one-half of the principal * * * of my estate to the children of each of my * * *

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daughters * * * subject, however, to my wife's life interest therein, in case she should survive my daughters, in which event the principal out of which her share of the same is derived is not to be distributed until her death.

"That both life tenants are living at the present time and Mrs. McCracken, one daughter, has children; that part of the estate, at the time of the testator's death, was 231 shares of stock at that time, valued (on par of \$5) at \$11 per share; that in 1907 executors purchased as an investment 58 shares, and in 1909 purchased 96 shares. On May 22nd, 1917, the estate owned 385 shares * * * and the company upon that date passed resolutions to increase and did subsequently increase its capital from \$1,000,000 to \$2,000,000, and issued to each stockholder additional shares equal in number to the shares held * * * The increase represented surplus earned from the inception of the company until the year 1894, upon which latter date the surplus was \$1,000,000. On the 1st of January, 1881, two months after the death of the deceased, the surplus * * * amounted to \$748,967. The value (market) of the shares of stock on May 22nd, 1917, was \$36, and after the new issue the value decreased to \$18 a share.

"The amount of capital stock and surplus in the years 1907 and 1909 will be found in the statement on file with the Court."

There was also admitted in evidence a statement of capital and surplus as of the first of January in each year beginning with 1881 up to 1917, inclusive, and a like statement as of March 31, 1917. It shows that on January 1st, 1881, the date nearest the death of decedent in October, 1880, the capital stock was \$600,000, and surplus \$748,967, and the intrinsic value of each share was \$11.24, ascertained by dividing the capital and surplus by the total number of shares, there being 120,000 outstanding of the par value of \$5 each; on January 1st, 1895, the capital remained at \$600,000, surplus had increased \$552,104 to \$1,301,071, and the value of each share was \$15.84: (This date is taken and not the year before because the resolution later mentioned applied the surplus up to January 1st, 1895—to the stock dividend, not up to

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January 1st, 1894—the stipulation is erroneous in this respect) on March 31st, 1917, capital was \$1,000,000 divided into 200,000 shares of \$5.00 each and surplus was \$4,079,196.42 and the value of each share before distribution was \$25.39 and after \$12.69.

- 10 On February 26th, 1917, at a regular meeting of the board of directors, a resolution, reciting that by a certificate filed April 27th, 1914, the authorized capital stock had been increased from \$1,000,000 to \$2,000,000, and the stock had not been issued and that it was advisable to authorize the issue of the stock in order that the security of the policy-holders might be increased, and that prior to January 1st, 1895, there had been accumulated from previous earnings a surplus of \$1,000,000, and ever since maintained in excess of that sum was offered and it was resolved that subject to the approval
- 20 of the Commissioner of Banking and Insurance the sum of \$1,000,000 be transferred to capital account out of the earnings previous to January 1st, 1895, and that the surplus so transferred and the investments representing the same should be considered full payment of the increase of capital stock and when approved by the Commissioner be issued as fully paid stock to the stockholders, one share of such increase to be issued for one share held.

- 30 The testator held 231 shares at his death which have been retained since by the predecessors of the substituted trustee and now remain a part of the corpus. In 1907 the trust received by purchase 58, and in 1909, 96 additional shares, making a total of 385. The substituted trustee has received 385 shares as the stock dividend and credited all of them to the life beneficiaries and the exceptions properly raise the issue to whom the stock dividend belongs.

- 40 Where shares of stock are held in trust and the income is to go to a beneficiary for life, and the ultimate ownership to another party, the question of whether the life beneficiary or ultimate owner is entitled is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life interest began. In that case it is clear that in justice the remainder-men should receive it. If, however, it was earned after the life interest began, it is clear that the life beneficiary should have it. If it was earned partly before and partly after the life tenancy

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began, then it is apparent that in justice some apportionment should be made if possible. There are three well defined rules upon this subject, which are dominated respectively, (1) American or Pennsylvania, (2) Massachusetts, and (3) English rule. They lead to essentially contrary conclusions. 2 Cook on Corporations, Secs. 552-3-4.

The American or Pennsylvania rule is so called as it obtains in nearly every state in the Union. It proceeds upon the theory that the Court, in disposing of stock or property dividends, as between life tenants and remainder-men, may properly inquire as to the time when the fund out of which the extraordinary dividend is to be paid was earned or accumulated, and also as to the method of accumulation. Many courts take substantially this view, and, looking through the mere form of corporate action to the substance, and regardless of the question whether the particular dividend has been declared in cash, in script, or in new shares, inquire whether it is a dividend arising from earnings or profits, or from the capital of the company. If it is found that it has arisen from earnings or profits, it goes to the life tenant, although it is a dividend of new shares; but if it is found that it is a dividend of the capital of the company it will go to the remainder-men, although it has been declared in cash. *Nor is the mere name by which a dividend is called by the directors, at the time when they declare it, a controlling circumstance in determining its character; but the Court will look to its real substance,* and will for example declare it a dividend out of income and hence belonging to the life tenant, although it is called in the resolution by which it is declared a "special bonus." 10 Cyc. 559.

The early English rule was that extra dividends, or additions to the usual annual dividend, whether paid in cash or in capital stock, went to the corpus of the trust. But this rule was abandoned as unjust, and it is uniformly held in that country, and frequently in this country, that cash dividends, extra dividends or bonuses, declared from the earnings, are to be regarded as income, and go to the life tenant. And such is the rule, although the dividends or bonuses were earned before the creation of the trust but declared afterward. Cyc. *id.*

The Massachusetts rule is that where a corporation accumulates and invests part of its earnings and afterwards apportion them among its shareholders as capital, the amount so

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apportioned must be deemed an accretion to the capital of each share, the income of which is payable to the tenant for life. This rule makes the action of the corporation with respect to the use it makes of its earnings the determining feature. "What the company says is income shall be income, and what it says is capital shall be capital." *Minot v. Paine*, 99 Mass. 101; *Deland v. Williams*, 101 Mass. 571; *Leland v. Hayden*, 102 Mass. 542; *Rand v. Hubbell*, 115 Mass. 461. It is said that the United States Supreme Court upholds this doctrine in *Gibbon v. Mahan*, 136 U. S. 549, but see *Scenlein v. Scenlein*, 146 Wis. 330, 131 N. W. 739.

The Pennsylvania rule is stated in *Smith's Estate*, 140 Pa. St. 344:

"Where stock of a corporation is by will * * * given in trust, the income * * * for the use of a beneficiary for life, with remainder over, the surplus, profits which have accumulated in the lifetime of the testator but which were not divided until after his death, belong to the corpus of the estate; whilst the dividends of earnings made after his death are income and are payable to the life tenant, no matter whether the dividend be in cash, scrip or stock."

The leading case on the subject is *Eearp's Appeal*, 28 Pa. St. 368. The trust was to collect "rents, income and interest" for life tenants. The trustees held shares of stock of a corporation which for a series of years devote part of its annual earnings to a surplus fund and afterwards capitalized these earnings in the form of a stock dividend to the stockholders. It appeared that at testator's death the shares were worth \$67,500, and when the new issue was made \$108,000, the difference, \$40,500, representing "the amount of profits arising since the death of the testator." The Court says:

"These profits amounted, at the time of the issue of the new * * * stock, to the sum of \$40,500, exclusive of the current semi-annual dividends which had been previously * * * paid. That sum is the rightful property of the appellants. The managers might withhold distribution of it for a time, for reasons beneficial to the interests of the parties entitled. *But they could not by any form of procedure whatever, deprive the owner of it, and give it to others not entitled. The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership.* The distribution of it among the stockholders in the form of new certificates has no effect whatever

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upon the equitable right to it. It makes no difference whether this fund is secured by 540 or 1,350 certificates, its character cannot be changed by the evidences given to secure it. Part of it is principal—the rest is ‘income’ within the meaning of the will. The principal must remain unimpaired during the lives of the appellants, and the ‘income’ arising since the death of the testator is to be distributed among them.”

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The Court awarded so much of the new stock as represented the earnings of the company since the death of the testator to the life tenants.

Other instructive cases in Pennsylvania are *Wiltbank's Appeal*, 64 Pa. St. 256; *Moss' Appeal*, 83 Pa. St. 264; *Biddle's Appeal*, 99 Pa. St. 278; *Smith's Estate*, 140 Pa. St. 344; *Boyer's Appeal*, 224 Pa. St. 144, 73 Atl. 320; *Stokes*, 87 Atl. 971.

The reason for the rule is stated in *Moss' Appeal*, *supra*.

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“Where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of transaction, *equity, which disregards form and grasps the substance*, would award the things distributed, whether stock or moneys, to whomsoever was entitled to the profits.”

The Pennsylvania rule is an application of the maxim that equity regards that as done which ought to be done. A testator leaves to his life tenants the income and profits of certain shares of stock. If by the action of others the income and profits are diverted, equity traces the funds so diverted and fastens upon them in whatever form they may be the trust with which they were originally impressed. It does this the more readily because life tenants in nearly all instances are persons more nearly related to the testator, his children generally, whom he had most in mind in the distribution of his bounties.

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As is said in *Smith's Estate*, *supra*:

“Upon what principle of justice, then, should the act of the corporation, over which the parties have no control, be allowed to affect their rights, by taking from the remainder-men that which belongs to them and handing it over bodily to the life tenant.”

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The New York Court of Appeals, *McLouth v. Hunt*, 154 N. Y. 179, says:

“For all corporate purposes the corporation may doubtless convert earnings into capital when such power is

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conferred by its charter; but when a question arises between life tenants and remainder-men concerning the ownership of the earnings thus converted, *the action of the corporation will not conclude the courts.*"

10 In *Lang v. Lang*, 57 N. J. Eq. 325, 327, Mr. Justice Collins, speaking for the Court of Errors and Appeals, says that the underlying principle of the doctrine is

"That no corporate dividend declared after the right to the income has been severed from the ultimate ownership of the stock upon which such dividend is declared belongs in equity to the person entitled to income except so far as it is derived from the earnings of the stock after 'such severance,' * * * the general trend of judicial opinion in this country is towards the adoption of that principle, *and we adopt it without qualification.*"

20 In that case the reasonable and logical rule is laid down that a cash dividend from earnings is apportioned between the corpus of the estate and the life tenant, in the proportion of the lapse of time since the last dividend, unless proof is given that such dividend was earned not day by day but at irregular times. The trustee is justified in distributing the dividend on this basis unless notice by an interested party is given him not to do so.

30 Until the decision of in *Day v. Faulks*, 79 N. J. Eq. 66, affirmed 81 N. J. Eq. 173, the various decisions indicated that the American or Pennsylvania rule was firmly established in this state. *Van Doren v. Olden*, 19 N. J. Eq. 176 (1863); *Ashurst v. Potter*, 26 N. J. Eq. 625-635; *Pratt v. Douglass*, 38 N. J. Eq. 536, 541; *Lang v. Lang*, 56 N. J. Eq. 603, 57 N. J. Eq. 325; *Brown v. Brown*, 72 N. J. Eq. 667, 677; *Ballentine v. Young*, 74 N. J. Eq. 572-575, 76 N. J. Eq. 613; *Ballentine v. Young*, 79 N. J. Eq. 70.

In *Day v. Faulks* the Court again affirmed the rule laid down in *Lang v. Lang* in the following language:

"I must start out with the assumption that stock dividends, declared after the death of testator, go, insofar as they represent earnings made since his death, to the life tenants."

40 In *Day v. Faulks*, *supra*, at the time of the declaration of the stock dividend there in question, the surplus had already been invested in buildings, permanent structures, machinery, lands and property of comparatively permanent character, and had become a part of the capital of the company. The dividend in

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that case, by reason of the use to which the surplus had already been placed, could not have been paid in cash, unless the company had mortgaged its property or borrowed the money with which to make the payment. There is authority for the principle that what the company has made use of in the way of betterments, additions and improvements to the plant, by or through the very act of the company in so applying the money, it becomes capital, and must always be so considered by the courts. These cases generally go hand in hand with the cases which hold that when the corporation has declared a dividend it must be considered by the courts as a dividend unless the corporation has plainly used a misnomer. Some cases which hold that the application of moneys to betterments or other corporate assets, constitutes such assets as capital, are the following:

Gibbons v. Mahon, 136 U. S. 549; 34 Law Ed. 525;

D'Oge v. Leeds, 176 Mass. 558;

Minot v. Paine, 99 Mass. 101;

Matter of Rogers, 161 N. Y. 108.

In the case at bar, the surplus represented profits of the business and interest from investments, and the resolution authorizing the issuance of stock shows that much of the surplus was invested in securities. All of the surplus was invested in liquid assets and the dividend in question could have been paid in cash if desired, by selling some of the securities. It was not invested as capital. The excess of the market value of the stock at the time of the declaration of the dividend was due entirely to the earnings accumulated since the death of the testator and which were withheld from the life tenants. It was the profits and earnings of the stock of which the life tenants had been deprived, which gave to the stock the high market value it had in 1917 prior to the declaration of the dividend.

This citation of the authorities has seemed necessary because of the peculiar position taken that this case changes the established rule. The principle is reiterated by the same Vice-Chancellor in *Ballentine v. Young*, *supra*, that the Court will look through the frame of the corporation and ascertain for itself to what class of property the dividend declared by the corporation belongs.

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Since the declaration in *Day v. Faulks* the opinion in *Beyer*, 73 Atl. Rep. 320 (Penn.) has been published. The Court says:

“As between a life tenant and remainder-men under a trust created in corporate stock, *the remainder-man is entitled to what the stock was actually worth at the creation of the trust, no less and no more.*”

10 Since the decision in *Day v. Faulks*, which involved Singer Manufacturing Company stock, the question of apportioning the same stock dividend has been before the Court of Appeals of New York, *In the Matter of Osborne*, 209 New York 450-485, 50 L. R. A. N. S. 510. The opinion was written by Judge Chase, in which he disposed of the matter in the following language:

20 “*The proposition decided by us in the case is, that in all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired and the remainder thereof must be awarded to the life beneficiary.* The method of accomplishing this result is not difficult. The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in the trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust.

30 If the dividend is of money the amount of that difference is to be retained by the trustee as capital, and the remainder to the life beneficiary. If the dividend is in stock the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good, the remaining shares going to the life beneficiary. Market value, good will and like considerations cannot be considered in apportioning a dividend.”

40 Also since *Day v. Faulks* this entire question was again considered by the Pennsylvania courts *In Re Heaton's Estate*, 96 Atl. 21, where all of the various rules are considered. Judge Tayler, at p. 26, says as follows:

“It seems to us that it does not follow as a necessary conclusion, assuming that the corporation or its directors

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have the authority claimed for them over the disposition of its surplus earnings, that the action of the corporation or its directors is conclusive of the rights of the life tenant and remainder-men, and that therein lies the weakness of the argument. It fails to distinguish capital as regards the corporation and its stockholders from capital or corpus of the trust fund. Moreover, it rests upon a presumption that is altogether artificial as a rule of construction and little less than violent when applied to the facts of this case, where the testator was making provision for his children and grandchildren, who were at the time members of his own immediate family, by way of life income with remainder to a succeeding generation as yet unborn. If any presumption is to be indulged, it seems more rational to presume that the creator of the trust intends, in the absence of anything to the contrary, that the life beneficiary shall receive all the profits of the stock earned during the life tenancy which may be released from corporate control by distribution among the stockholders during the existence of the life estate, in whatever form the distribution may be made. This recognizes the assumed right of the corporation to distribute surplus earnings at such times and in such manner as best suits the purposes of the corporation, and at the same time takes into account the evident distinction between capital of the corporation and corpus of the trust fund when the rights of the life tenant and remainder-men are being considered.

In *Soenlein v. Soenlein*, 146 Wis. 330, 131 N. W. 739:

"To say that when a stockholder conveys his stock, as in this case, he thinks otherwise than that the term owner will take all benefits, as to such stock, of dividends out of earnings made during such term, regardless of the manner of making the dividends, seems contrary to common knowledge. Thompson on Corporations says 'The Massachusetts doctrine seems to be a rule of mere convenience and not a rule of justice. It loses sight of the real question under consideration, which is, what is capital of the estate disposed of by will, and not what is capital of the corporation? It goes entirely beyond tenable grounds when it allows this question to be determined, not by the judicial courts upon a view of the real substance of the case, but by a board of directors * * * persons entirely foreign to the will, in passing a resolution declaring a dividend.' Instead of attempting to lay down a hard and fast rule on the subject which shall be applicable to all cases—and herein lies the chief mistake

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which the courts have made in dealing with it—it should be determined upon the consideration of the actual nature of the dividend in each particular case.

10 It is also said that the life tenants are not entitled to the enhanced value of the corpus of the fund instancing the increase in value of the real property that forms part of this trust estate; but there is a clear distinction between accretions to the fund derived from earnings accumulated during the term, and the enhanced value of the trust property due to other causes. The court should in every case endeavor to do justice between the parties and at the same time effectuate the intention of the creator of the trust. We believe that this result is most closely approximated by classifying a dividend according to what it really represents, and not according to the form in which it is declared. By the rule we adopt, the life tenant receives all the profits of the corporation accumulated during the life of the trust which are released from corporate control and distributed among the stockholders during the life tenancy, regardless of the form of the distribution; and the remainder-man receives at the end of the term the corpus of the trust fund undiminished in value from what it was at the inception of the trust, which is all that he can justly claim. It works out exact justice between the parties, and we believe will more often give effect to the unexpressed intention of the testator.”

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30 Since the decision in the case of *Day v. Faulks, supra*, the Court of Chancery of New Jersey has been called upon to decide the ownership of the stock dividend of the Home Fire Insurance Company between life beneficiary and ultimate owner where the corpus was not diminished in any degree. This was done by Vice-Chancellor Backes in 1913 in the suit between Lewis L. Clarke, *et als.*, executors, complainants, and E. Stanley Clarke, *et als.*, defendants, and by Vice-Chancellor Stevens in *Douglass v. Whittemore* in 1918. There was no opinion rendered in either case. Vice-Chancellors Stevens and Backes awarded to the life beneficiaries all of the stock dividends, evidently because it represented surplus accumulated since the death of testator, notwithstanding that some of the surplus was accumulated prior to the death of the testator.

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Vice-Chancellor Stevens informally stated in reference to the stock dividend that under these circumstances it seemed to him that the beneficiaries of the income for life are entitled to a

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decree giving the stock to the life tenant "so far as and because it represents earnings since testator's death." There is no question of earnings used to increase plant."

The exceptants contend that what is legally distributed are the earnings up to January 1st, 1895, only, a large portion of which, \$748,967, were already earned at the time of the death of the testator, and that all of the 231 shares of the stock dividend should be given to corpus, as they claim *Day v. Faulks* seems to indicate the adoption of the Massachusetts rule when the question comes up squarely for decision, or at all events that it should be apportioned under the case of *Lang v. Lang*. This apportionment would be in the ratio as \$748,967 are to \$1,301,071, so 98 are to 231 or that 98 shares would go to corpus. It is the contention of the accountant and a life beneficiary that the stock dividend really represents a half interest in the entire capital and surplus of the company from the date of distribution and that the corpus of the trust fund will not be diminished in this exceptional case by declaring all the 231 shares to be the property of the life beneficiaries.

The resolution of the board is that the moneys and securities appropriated to make up the par value of the increased capital stock as full paid and non-assessable is \$1,000,000 of the earnings accumulated prior to January 1, 1895. Calculating the result in accordance with the method stated in the majority opinion in *Osborne, supra*, the intrinsic value of the trust investment is to be ascertained by dividing the total capital and surplus, \$1,348,967, at the establishment of the trust, by the number of shares of the corporation then outstanding, to wit, 120,000, which gives \$11.24 as the intrinsic value of each share, and the number of shares held in the trust was 231, making a total of \$2,596.44 the original corpus.

The doctrine sought to be established by exceptants is that the matter must be treated as if the distribution had been made on January 1st, 1895. After the dividend was paid as of January 1st, 1895, the value of the investment is ascertained by exactly the same method and the value fixed at \$15.84 for each original share of stock, and of \$7.92 for each share when distributed, and this multiplied by 231 gives a balance of \$1,829.52. The difference is \$766.92, representing the impairment in money, and this divided by \$7.92 gives the number of shares to be retained to make the impairment good, which is 96.58 shares. Ap-

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proximately the same result, as exceptants say *Lang v. Lang* requires, is obtained by apportioning the dividend in the ratio that surplus of \$748,967 bears to \$1,301,071, the surplus earned up to 1895, thus giving the life tenant 98 shares, and the remainder-men 133 shares. The theory of this entire calculation is that the corporation has the right to bind the life beneficiary and ultimate owner by its distribution of earnings. This is the contention, that the Court should overrule a long line of New Jersey cases and abandon the principle of law sustained by nearly all the states and follow Massachusetts and the old rule in England. It is said that the resolution was passed in this case subject to the approval of the Commissioner of Banking and Insurance of New Jersey. That, however, was merely a method of making the stock full paid and non-assessable.

The difficulty in approving the method of apportionment based upon the theory that the stock dividend was distributed as of the first of January, 1895, is that it violently disregards the facts. Equity might resort to a fiction to accomplish justice, but never to inflict injustice. The stock was distributed after March 31, 1917, when the board of directors authorized the issuance of additional stock, this stock carried with it, whether the board says so or not, the inherent value it represents of its proportionate part of the total capital and surplus. After the transaction was completed the capital became \$2,000,000, divided into 400,000 shares, and the surplus was at least \$3,079,176.42,

a total sum of \$5,079,176.42, of which \$3,330,209.42 was earned after the establishment of the trust, and \$2,778,105 after January 1, 1895. The stock dividend inherently represents the value of the surplus earnings of the company. In fact, each share was worth after the distribution not \$7.92, but \$12.69, and the market value was \$18. The original intrinsic value was \$11.24 at establishment of the trust. The old stock represents one-half of the company's assets, to wit, \$1,000,000 of the capital and \$1,539,588.21 of the surplus, and the new stock a like sum. The other method disregards the fact. Equity looks through the transaction; excludes the form and regards only the substance as shown by the *Soenlein*, *Osborne* and *Stokes* cases and the other authorities cited. It is not a dividend practically in specie such as is found in the case of *U. S. Trust & Mortgage Co. v. Heye*, 224 N. Y. 242-252-5 and is unlike the usual distribution in such cases as *Day v. Faulks*, *Lang v. Lang* and *Ballantine v. Young*, because they were cases in which if all the dividend were given to the life beneficiaries it would diminish the corpus. The *Lang* case

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was a distribution where the earnings constituting the surplus and represented by the stock dividend, if given the life beneficiaries, would have invaded the corpus. *Ballentine v. Young*, in relation to Lackawanna stock, is also of the same character. The proportionate interest of the trust fund in the corporation is lessened after the distribution (see *Day v. Faulks*, 81 N. J. Eq. 173-4), but the value of that interest is not decreased. The former capital is not invaded. This case as to 231 of the shares is not within the principle of those cases. 10

The original corpus of the trust is maintained intact. The stock dividend of 231 shares on the original 231 shares owned by testator if given to the life beneficiaries does not impair the corpus, or the value of the original investment, because the distribution was made in 1917. The original corpus was \$2,596.44 and after distribution was \$2,931.39. The case of *Douglass v. Whittemore*, decided by Vice-Chancellor Stevens, is a precedent for the result that 231 shares of the stock dividend are the property of the life tenants. The Court in the Osborne case says: 20

“Extraordinary dividends payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.” 30

The capital stock at the time of the purchase of the 58 shares of stock in 1907 was \$600,000 and surplus \$1,463,510, total \$2,063,510. This divided by 120,000 gives the intrinsic value of each share of \$17.19 and multiplied by 58 gives \$997.02. On March 31, 1917, the intrinsic value of each share after distribution was \$12.69 and of 58 shares was \$736.02, which gives impairment of the trust fund of \$261 and therefore this should be divided by \$12.69, which results in 20.5 shares to go to the ultimate owner. Apportioning pursuant to general rule, Lang case, would be as the original 1907 surplus, \$1,463,510, are to \$4,079,176, the surplus before distribution, as 20.8 shares are to 58, thus giving the corpus 20.8 shares. 40

Opinion.

10 In 1909 when 96 shares were purchased the capital was \$750,000 and \$1,954,999 and the total \$2,704,999. The number of shares was 150,000, the intrinsic value of each share was \$18.03, and of 96 shares \$1,730.88, after distribution 96 shares at \$12.69 were worth \$1,218.24 and the impairment of the fund is \$512.64, which divided by \$12.69 results in 40.4 shares for the remainder-man. Apportioning pursuant to the Lang case would be as the 1909 surplus \$1,954,999 are to \$4,079,176 the surplus before distribution, as 46 shares are to 96, thus giving the corpus 46 shares.

The slight difference in the result of the two methods arises in the fact that \$150,000 of increased capital was added in 1908 and \$250,000 in 1910. The method adopted in the Osborne case seems to be more accurate than that adopted in the Lang case.

20 The account of the substituted trustee may be amended by striking out 385 shares credited to the life tenants and inserting instead thereof 324 shares.

WM. P. MARTIN,
J.

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*Decree Adjudicating Upon Exceptions.***DECREE ADJUDICATING UPON EXCEPTIONS.****ESSEX COUNTY ORPHANS' COURT.**

In the Matter of the Account of JEHIEL
G. SHIPMAN, Substituted Trustee under
the Last Will and Testament of CHARLES
DOWDEN, deceased.

*On Exceptions.**Decree
Adjudicating
Upon Exceptions.*

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The Surrogate having audited and stated the account of Jehiel G. Shipman, substituted trustee under the last will and testament of Charles Dowden, deceased, and placed the same on the files of his office twenty days previous to the eighth day of August, 1917, and having on the day last aforesaid reported the same to this Court for allowance and settlement, and it having been proved to the satisfaction of the Court that notice of his intention to settle account the said eighth day of August, 1917, was given by said accountant, according to law;

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And exceptions having been filed to said account by Selena McCracken, life beneficiary of the income from the trust fund, and Charles D. McCracken and Frederick B. McCracken and Mary E. Newell, children of the said Selena McCracken and remainder-men; Mr. John H. McCracken appearing for the exceptants and Mr. Jehiel G. Shipman appearing *pro se* and of counsel with Mrs. Henrietta D. Gulick, life beneficiary under the trust fund created by the will of said Charles Dowden, deceased, and the proofs being taken and considered by the Court and counsel for both parties being heard;

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It is, on this thirtieth day of July, one thousand nine hundred and nineteen, ORDERED, ADJUDGED and DECREED that the exception respecting the distribution of the stock of the American Insurance Company be allowed in this respect; that the account of the trustee be amended as follows: that the item, three hundred and eighty-five shares of American Insurance Company stock, valued at \$6,930, with which the accountant charges himself as income, be stricken out and that three hundred and twenty-four shares of stock of the American Insurance Company, valued at \$5,832, be inserted; that the total income receipts stated at \$12,912.42 be stricken out, and the sum of \$11,814.42 inserted; that the balance of the income in the hands of the

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Decree Allowing Account.

trustee for distribution with which the trustee charges himself, to wit, \$7,950.27, be stricken out and the sum of \$6,852.27 be inserted; that the said account be further amended by adding to the corpus of the estate, with which the accountant charges himself, sixty-one shares of American Insurance Company stock, valued at \$1,098; and that the amount of the corpus of the estate, to wit, \$42,832.66, with which the accountant charges himself, be stricken out and the sum of \$43,930.66 be inserted; that the balance of the corpus of the estate with which the accountant charges himself, to wit, \$42,585.77, be stricken out and the sum of \$43,683.77 be inserted; and that a supplemental statement of the account be filed in accordance with the above amendments.

WM. P. MARTIN,
J.

DECREE ALLOWING ACCOUNT.**ESSEX COUNTY ORPHANS' COURT.**

In the Matter of the Account of JEHIEL
G. SHIPMAN, Substituted Trustee under
the Last Will and Testament of CHARLES
DOWDEN, deceased.

On Exceptions.

*Decree Allowing
Account.*

The Surrogate having audited and stated the account of Jehiel G. Shipman, substituted trustee under the last will and testament of Charles Dowden, deceased, and placed the same on the files of his office twenty days previous to the eighth day of August, 1917, and having on the day last aforesaid reported the same to this Court for allowance and settlement, and it having been proved to the satisfaction of the Court that notice of his intention to settle the said account the said eighth day of July, 1917, was given by said accountant according to law.

And exceptions having been filed to the said account and a decree adjudicating upon the said exceptions having been made in this matter and filed herein ordering amendments of the said

Decree Allowing Account.

account, as particularly stated in said decree, and ordering that a supplemental statement embodying the amendments as mentioned in said decree be filed, and the accountant having filed a supplemental statement in accordance with said decree; and the Court having examined the original account and the supplemental statement amending the said account and the vouchers and receipts for payments and disbursements claimed therein, and having found the same to be otherwise correct in all particulars;

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It is, on this thirtieth day of July, one thousand nine hundred and nineteen, ORDERED, ADJUDGED and DECREED that the said account as amended be allowed; and that there is a balance of corpus amounting to \$43,683.77 and a balance of income amounting to the sum of \$6,852.27 remaining in the hands of the said accountant to be disposed of according to law.

And it is further ORDERED, that the said accountant be allowed the sum of \$299.10 as and for his commissions on the sum of \$5,982.42 of income collected by him, and that a counsel fee of \$300 be allowed to Jehiel G. Shipman, as counsel with Henrietta D. Gulick, to be paid out of the income due to the said Henrietta D. Gulick from the trust fund created by the will of the said testator, she having consented to the same, and that a counsel fee of \$350 be allowed to John H. McCracken, counsel for the exceptants, to be paid out of the income of the entire estate.

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WM. P. MARTIN,

J.

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Amendment to First Account of Trustee.

ESSEX COUNTY ORPHANS' COURT.

10	In the Matter of the Estate of CHARLES DOWDEN, deceased.	}	<i>Amendment to First Account of Jehiel G. Shipman, Trustee with the Will Annexed Pursuant to the Decree of the Orphans' Court.</i>
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Amount with which the accountant charges himself with corpus of the estate, as shown by original account filed	\$42,832.66
61 shares of capital stock of the American Insurance Company, pursuant to decree of the Orphans' Court, be added to corpus	1,098.00
20	Total .....\$43,930.66

SUMMARY AS TO CORPUS.

This accountant charges himself with corpus.....	\$43,930.66
This accountant prays allowance for	246.89
Balance of corpus on hand.....	\$43,683.77
Amount with which accountant charges himself with receipts from income as shown on original account filed, amount received in cash	\$ 5,982.42
30 324 shares of capital stock of the American Insurance Company, pursuant to decree of the Orphans' Court, be charged to income instead of 385 shares.....	5,832.00
Total income receipts	\$11,814.42

SUMMARY AS TO INCOME.

This accountant charges himself with receipts from income	\$11,814.42
40 This accountant prays allowance for.....	4,962.15
Balance in hands of trustee	\$ 6,852.27

Amendment to First Account of Trustee.

STATE OF NEW JERSEY, } ss.
 COUNTY OF ESSEX.

Jehiel G. Shipman, substituted trustee under the last will and testament of Charles Dowden, deceased, being duly sworn according to law, on his oath deposes and says that the foregoing amended account is in all things just and true as to the charges and discharges thereof, according to the best of his knowledge and belief. 10

JEHIEL G. SHIPMAN.

Subscribed and sworn to before me this
 29th day of July, 1919.

FRANKLIN W. FORT,
Master in Chancery of New Jersey. 20

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Notice of Appeal.

NOTICE OF APPEAL.

Filed September 23, 1919.

ESSEX COUNTY ORPHANS' COURT.

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In the Matter of Accounting of JEHIEL
G. SHIPMAN, Substituted Trustee under
the Last Will and Testament of CHARLES
DOWDEN, deceased.

Notice of Appeal.

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Selena A. McCracken and Frederick B. McCracken, of Newark, New Jersey; Charles D. McCracken, of Lambertville, New Jersey, and Mary E. Newell, of the City and State of New York, being next of kin of Charles Dowden, deceased, hereby appeal to the Prerogative Court from the decree entered in the above entitled Court on July 30, 1919, allowing the exception respecting the stock of the American Insurance Company in certain respects, and decreeing that the account of the trustee be amended in respect to the distribution of the stock of the American Insurance Company, and allowing the account of the trustee as amended.

J. H. McCracken,
Proctor of Appellants.

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Dated September 23, 1919.

To FORT, HUNT & SHIPMAN,
Counsel for Henrietta D. Gulick, and the trustee.

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Notice of Appeal.

STATE OF NEW JERSEY.

ESSEX COUNTY SURROGATE'S COURT.

I, Howard Isherwood, Surrogate of the County of Essex and Clerk of the Orphans' Court of said county, do certify the annexed to be a true copy of the account, exception, stipulation, opinion, decree and of the amended account and decree, in the matter of the estate of Charles Dowden, deceased, as the same appear on file and of record in this office.

10

Witness my hand and seal of office, this twenty-third day of January, in the year of our Lord one thousand nine hundred and twenty.

HOWARD ISHERWOOD,
Surrogate and Clerk.

Filed in Prerogative Court January 30, 1920.

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Petition of Appeal.

PETITION OF APPEAL.

Filed October 21, 1919.

NEW JERSEY PREROGATIVE COURT.

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In the Matter of Appeal of SELENA A. McCracken, CHARLES D. McCracken, FREDERICK B. McCracken and MARY E. NEWELL from an Order of the Orphans' Court of the County of Essex, allowing the account of Jehiel G. Shipman as substituted trustee of the estate of Charles Dowden, deceased.

*Petition of
Appeal.*

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The petition of Selena A. McCracken, one of the life tenants, and Frederick B. McCracken, of the City of Newark and State of New Jersey; Charles D. McCracken, of Lambertville, New Jersey, and Mary E. Newell, a non-resident of the City and State of New York, who are residuary legatees,

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Respectfully shows that on the eighth day of August, 1917, Jehiel G. Shipman, the substituted trustee under the last will and testament of Charles Dowden, deceased, presented his account as such trustee at the Orphans' Court of the County of Essex, and exceptions having been filed thereto by your petitioners, the Orphans' Court on the 30th day of July, 1919, made its order overruling certain of the exceptions and ordering that such account as amended, be allowed.

The will of Charles Dowden, the testator, was dated September 17th, 1880, and proved October 13th of the same year.

The will recorded in X of Wills on page 155 for Essex County authorized his executors to sell any and all of his residuary estate at their discretion and to invest and re-invest such proceeds as they may think best.

40

In the "Fifth" section of his will, the testator forbids the sale of the stock he held in the American Insurance Company and says: His executors shall hold "In trust my American Insurance stock as a permanent investment."

The will created a trust and directed the payment of the income from the residuary estate to the testator's two daughters

Petition of Appeal.

during their lives, and at their death to be divided equally among their children.

At testator's death a small part of his estate consisted of two hundred and thirty-one shares of stock of the American Insurance Company, a corporation of New Jersey, and at that time the capital stock of the company was six hundred thousand dollars. During the year 1907 the company increased its capital stock to seven hundred and fifty thousand dollars and at that time the executors from the funds of the corpus of the estate bought and paid for fifty-eight shares of the new issue of stock.

In 1909 the company again increased its capital stock to one millions dollars and the executors used further funds from the corpus of the estate and purchased ninety-six shares which makes the total sum of three hundred and eighty-five shares of stock.

In May, 1917, this company increased the capital stock from one million to two million dollars. This increase was taken from the surplus of the company earned from its beginning. Hence one million dollars was taken from the surplus account and transferred to the stock account, leaving the financial condition as before, and each stockholder was allotted an equivalent number of shares to the number already held. Which reduced the market value of each share just one-half.

Your petitioners hereby appeal from the following portions of the aforesaid order of the Orphans' Court overruling appellants' exception to said account allowing said accountant to charge himself with three hundred and twenty-four shares of said new issue of the American Insurance Company stock as income from the estate of the said Charles Dowden, deceased.

Whereas your petitioners claim and insist that the intention and desire of the testator was to leave any and all of the said new issue of stock as aforesaid, three hundred and eighty-five shares of the American Insurance Company to be and remain as part of the corpus of said estate.

Your petitioners complain and allege that the aforesaid order of the Orphans' Court is erroneous, improper and illegal in the foregoing particulars and that your petitioners are grieved thereby.

Dated October 20th, 1919.

J. H. McCracken,
Proctor for and Counsel with Appellants.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed November 15, 1919.

NEW JERSEY PREROGATIVE COURT.

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Between

SELENA A. McCracken, CHARLES D.
McCracken, FREDERICK B. McCracken
and MARY E. NEWELL,

Appellants,

On Appeal, &c.

and

HENRIETTA D. GULICK and JEHIEL G.
SHIPMAN, Substituted Trustee,

Respondents.

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The answer of the above named respondents to the petition of appeal of the above named appellants:

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These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say they admit that a decree was made on the thirtieth day of July, 1919, by the Orphans' Court of Essex County in the cause and of the purport and effect as stated in the petition of appeal, but as to the substance and form thereof these respondents pray they may refer thereto when the same shall be produced; and these respondents are advised and believe that the said decree is proper and legal and pray that the same may be affirmed with costs to be adjudged to these respondents.

FORT, HUNT & SHIPMAN,
Solicitors and of Counsel with Respondents.

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Designation.

DESIGNATION.

Filed January 14, 1920.

NEW JERSEY PREROGATIVE COURT.

SELENA A. McCracken, *et als.*,

Appellants,

vs.

HENRIETTA D. GULICK, *et als.*,

Respondents.

*On Appeal from a
Decree of the
Essex County
Orphans' Court.*

Designation.

The above matter having been referred to the Hon. John H. Backes, one of the Vice-Ordinaries;

It is, on this 14th day of January, 1920, on motion of John H. McCracken, Proctor for the appellants, ordered that the twenty-fourth day of February, 1920, at eleven o'clock in the forenoon, be designated as the time and the Chancery Chambers in the City of Newark as the place where the above entitled matter will be heard.

JOHN H. BACKES,
V.-C.

Order of Reference.

ORDER OF REFERENCE.

Filed December 23, 1919.

NEW JERSEY PREROGATIVE COURT.

(10	SELENA A. MCCrackEN, <i>et als.</i>, <i>vs.</i> HENRIETTA D. GULICK, <i>et als.</i>, <i>Appellants,</i> <i>Respondents.</i> { } <i>On Appeal from a</i> <i>Decree of the</i> <i>Essex County</i> <i>Orphans' Court.</i> <i>Order of</i> <i>Reference.</i>
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(20 This matter being opened to the Court by John H. McCracken, Proctor for the appellants, and counsel for the respondents consenting;

It is, on this 23rd day of December, 1919, ORDERED, that the above matter be referred to Hon. J. H. Backes, one of the Vice-Ordinaries, to hear the same for the Ordinary and to report thereon to him and advise what order or decree should be made therein.

E. R. WALKER,
Ordinary.

(30 We consent to the entry of the above order.

FORT, HUNT & SHIPMAN,
Solicitors for Respondents.

Endorsed:

“Filed Dec. 23, 1919.

THOMAS F. MARTIN,
Register.”

Opinion of Vice-Ordinary.

OPINION OF VICE-ORDINARY.

Filed March 24, 1920.

NEW JERSEY PREROGATIVE COURT.

Between

SELENA A. MCCrackEN, CHARLES D. MCCrackEN,
FREDERICK B. MCCrackEN
and MARY E. NEWELL,

Appellants,

and

HENRIETTA D. GULICK and JEHIEL G.
SHIPMAN, substituted trustee,

Respondents.

*On Appeal from
Orphans' Court.*

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MEMORANDUM.

BACKES, V.-O.

The decree appealed from will be affirmed for the reasons stated in the opinion filed by Judge Martin in the Orphans' Court of Essex County.

Endorsed:

"Filed Mar. 24, 1920.

THOMAS F. MARTIN,
Register."

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Order of Affirmance.

ORDER OF AFFIRMANCE.

Filed March 30, 1920.

10 An appeal having been taken to the above-entitled court from certain decrees made by the Orphans' Court of Essex County on the 30th day of July, 1919, adjudicating upon certain exceptions filed to the accounting of Jehiel G. Shipman, substituted trustee under the last will and testament of Charles Dowden, deceased, and the record having been duly examined and John H. McCracken appearing for the appellants and Fort, Hunt & Shipman for the respondents, and the arguments of the respective counsel having been heard and the Court being of the opinion that the decrees should be in all respects affirmed;

20 It is, on this 30th day of March, 1920, on motion of Fort, Hunt & Shipman, of counsel with the respondents, ORDERED, that the said decrees made by the Essex County Orphans' Court on July 30th, 1919, be and the same hereby are affirmed, and that a counsel fee of \$250 be allowed to John H. McCracken, of counsel with the appellants and, a counsel fee of \$250 be allowed to Fort, Hunt & Shipman, of counsel with the respondents, to be paid out of the estate and that the costs of printing the state of the case in this court be paid out of the estate.

E. R. WALKER,
Ordinary.

30 Respectfully advised,

JOHN H. BACKES,
V.-O.

Endorsed:

"Filed Mar. 30, 1920.

THOMAS F. MARTIN,
Register."

*Notice of Appeal.***NOTICE OF APPEAL.**

Filed May 25, 1920.

Selena A. McCracken and Frederick B. McCracken, both of Newark, New Jersey; Charles D. McCracken, of Lambertville, New Jersey, and Mary E. Newell, of the City and State of New York, being next of kin of Charles Dowden, deceased, hereby appeal to the Court of Errors and Appeals in the last resort in all causes, from such part of the decree of the Prerogative Court entered on the 30th day of March, 1920, as affirms the decree of the Orphans' Court made the 30th day of July, 1919, and from such part as decrees that 324 shares of stock of the American Insurance Company constitutes income of the estate of Charles Dowden, deceased, and 61 shares of said stock constitutes principal.

(Signed) JOHN H. McCracken,
Proctor and Counsel with Appellants.

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Petition of Appeal.

PETITION OF APPEAL.

Filed June 4, 1920.

New Jersey Court of Errors and Appeals

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Between

SELENA A. MCCrackEN, CHARLES D. MCCrackEN,
FREDERICK B. MCCrackEN
and MARY E. NEWELL,

Appellants,

and

HENRIETTA D. GULICK and JEHIEL G.
SHIPMAN, substituted trustee,

Respondents.

*On Appeal from
Prerogative
Court.*

*Petition of
Appeal.*

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The petition of Selena A. McCracken, one of the life tenants, and Frederick B. McCracken, of the City of Newark and State of New Jersey; Charles D. McCracken, of Lambertville, New Jersey, and Mary E. Newell, a non-resident of the City and State of New York, who are residuary legatees, respectfully show:

30 1. That on the 8th day of August, 1917, Jehiel G. Shipman, the substituted trustee under the last will and testament of Charles Dowden, deceased, presented his account as such trustee at the Orphans' Court of the County of Essex and exceptions having been filed thereto by your petitioners, the Orphans' Court on the 30th day of July, 1919, made its order overruling certain of the exceptions and ordering that such account as amended be allowed.

40 An appeal was taken to the Prerogative Court from said order of the Essex County Orphans' Court and the matter was duly argued before said Prerogative Court. Said Prerogative Court affirmed in all respects the order of the Orphans' Court of Essex County, and an order of affirmance was made by the Ordinary of the Prerogative Court on March 30th, 1920.

2. Your petitioners find themselves aggrieved by so much of the order of the Prerogative Court of March 30th, 1920, as

Petition of Appeal.

affirms the order of the Orphans' Court of July 30th, 1919, in declaring that 324 shares of stock of the American Insurance Company constitutes income and should be paid to life tenants under the terms of the last will of Charles Dowden, deceased. Petitioners contend that said 324 shares of stock are principal of said estate.

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3. The will of Charles Dowden, the testator, was dated September 17th, 1880, and proved October 13th of the same year.

The will recorded in X of Wills, on page 155 for Essex County, authorized his executors to sell any and all of his residuary estate at their discretion and to invest and re-invest such proceeds as they may think best.

In the "fifth" section of his will the testator forbids the sale of the stock he held in the American Insurance Company, and says: His executors shall hold "In trust my American Insurance stock as a permanent investment."

20

The will created a trust and directed the payment of the income from the residuary estate to the testator's two daughters during their lives, and at their death to be divided equally among their children.

At testator's death a small part of his estate consisted of two hundred and thirty-one shares of stock of the American Insurance Company, a corporation of New Jersey, and at that time the capital stock of the company was \$600,000. During the year 1907 the company increased its capital stock to \$750,000, and at that time the executors from the funds of the corpus of the estate bought and paid for fifty-eight shares of the new issue of stock.

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In 1909 the company again increased its capital stock to \$1,000,000 and the executors used further funds from the corpus of the estate and purchased ninety-six shares, which makes the total sum of 385 shares of stock.

In May, 1917, this company increased the capital stock from one million to two million dollars. This increase was taken from the surplus of the company earned from its beginning. Hence, \$1,000,000 was taken from the surplus account and transferred to the stock account, leaving the financial condition as before, and each stockholder was allotted an equivalent number of shares to the number already held, which reduced the market value of each share just one-half.

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Petition of Appeal.

4. Your petitioners hereby appeal from the portions of the aforesaid order of the Prerogative Court affirming the order of the Orphans' Court which allows said accountant to charge himself with 324 shares of said new issue of the American Insurance Company stock as income from the estate of the said Charles Dowden, deceased.

10 Whereas your petitioners claim and insist that the intention and desire of the testator was to leave any and all of the said new issue of stock as aforesaid, because at testator's decease he only owned 231 shares of the stock; and the purchase of additional stock of fifty-eight shares in 1907 and ninety-six shares in 1909 were purely investments by funds from the corpus of the estate; therefore the 385 shares of the American Insurance Company should be and remain as part of the corpus of said estate.

20 Your petitioners complain and allege that the aforesaid order of the Prerogative Court is erroneous, improper and illegal in the foregoing particulars, as stated in paragraphs 2 and 4, and is clearly against the intentions of testator's will, and your petitioners are grieved thereby.

Dated May 24, 1920.

JOHN H. McCracken,
Proctor for and Counsel with Appellants.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed June 4, 1920.

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

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say they admit that an order was made on the 30th day of March, 1920, by the New Jersey Prerogative Court in the cause and of the purport and effect as stated in the petition of appeal, but as to the substance and form thereof these respondents pray they may refer thereto when the same shall be produced; and these respondents are advised and believe that the said order is proper and legal and pray that the same may be affirmed with costs to be adjudged to these respondents.

FORT, HUNT & SHIPMAN,
Solicitors and of Counsel with Respondents.

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New Jersey Court of Errors and Appeals

SELENA A. MCCrackEN, <i>et als.</i> , vs. HENRIETTA D. GULICK, <i>et al.</i> ,	Appellants, Respondents.	} On Appeal, &c.
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BRIEF FOR THE APPELLANTS.

This appeal is taken from the Prerogative Court by Selena A. McCracken, a life tenant, and Charles D. McCracken, Frederick B. McCracken and Mary E. Newell, residuary legatees.

The last will and testament of Charles Dowden, deceased, was dated on the seventeenth day of September, eighteen hundred and eighty, and proved on the thirteenth day of October, in the same year. The will recorded in Book X of Wills, on page 155, for Essex County, authorizes his executors to sell any and all of his residuary estate at their discretion and to invest and re-invest such proceeds as they may think best.

In the fifth section of his will the testator forbids the sale of the stock he held in the American Insurance Company, and says his executors shall hold "in trust my American Insurance stock as a permanent investment."

The will created a trust and directed the payment of the income from the residuary estate to the testator's daughters during their lives, and at their death to be divided equally among their children.

At testator's death a part of his estate consisted of two hundred and thirty-one shares of stock of the American Insurance Company, a corporation of New Jersey, and at that time the capital stock of the company was six hundred thousand dollars, and the surplus \$748,967. During the year 1907 the company increased its capital stock to seven hundred and fifty thousand dollars, and at that time the company issued more stock and the executors bought and paid for fifty-eight shares.

In 1909 the company again increased its capital stock to one million dollars, and the executors then made a further purchase of ninety-six shares, which made the total sum of three hundred and eighty-five shares of stock.

In May, 1917, this company increased its capital stock from one million to two million dollars. This increase, as stated in the resolution offered in evidence upon the hearing (a copy of which, for convenience, is here inserted), of the exceptions, was taken from the surplus of the company earned from its beginning until the year 1894, at which time the company's surplus amounted to \$1,170,961.00. Each stockholder was allotted an equivalent number of shares to the number already held. Hence, one million dollars was taken from the surplus account and transferred to the stock account, leaving the financial condition of the company as before.

Notwithstanding the increase to \$2,000,000 of capital stock was authorized with the approval of the Commissioner of Banking and Insurance in 1894, when the surplus was only \$1,170,961, they could not consistently or legally reduce their surplus to the sum of \$170,961, so it was deferred until the year 1917, when the surplus had grown to the sum of about \$4,000,000. The fine showing of this surplus, together with its capital stock, shows conclusively why the business increased so rapidly, and to place its company on a more satisfactory showing before its policyholders, it added the sum of \$1,000,000 to its capital stock by taking it from the surplus account, simply a matter of book-keeping, without, in the least, affecting its financial standing.

It must be observed that a fire insurance company is doing an extra hazardous business, as the net losses at the recent Baltimore fire and the San Francisco fires go to prove. Hence, in taking \$1,000,000 from their surplus they did not pay it in cash so it could pass from their control, but simply placed it in the stock account, where it would be held as before, both stock and surplus, to protect the policyholders in case of unexpected losses by fire.

I am compelled in behalf of the appellants herein to contend that the conclusion reached by Judge Martin in the case at bar is illogical, inequitable and unjust. It certainly deprives the remainder-men from receiving that which the testator intended them to ultimately receive. And his opinion cannot be sustained by an impartial consideration of the facts in the case.

The opinion fixes the number of shares of the respective parties of the 385 shares issued as follows: 324 shares to the life tenants and 61 shares to the remainder-men.

To arrive at a proper conclusion in this matter let us take the facts as they existed at the time of the testator's decease and the changes as they transpired since.

It is very evident, as the testator forbids the sale of the American Insurance Company stock that he had no intention of giving it away, as claimed by my opponent in the case at bar.

The cases are numerous where the Court urges careful consideration of every will, so that testator's wish may be fully carried out.

"In re Mizeners Estate, 105 A. 46. The primary purpose in construing a will is to ascertain testator's intent which must be gathered from the terms of the will, the question not being what he intended, but the meaning of the words used."

Day v. Webler, 105 Atl. 105-618.

"A testator's intent is to be ascertained from the words of the will interpreted from the light of their context and from the surrounding circumstances."

As to whether a stock dividend should go to the remainderman, or be considered income and go to the life tenants. The Courts have laid down the following rules and cited numerous cases to sustain their views.

In *Smith v. Sana*, 60 Atl. 117 or 77 Conn. 543, Supreme Court of Errors of Conn., the Court says:

"As a general rule, between life tenants of a corporate stock held in trust between life tenants and remainderman, a cash dividend on the stock is to be regarded as income and stock dividends as capital."

Billings v. Warren, 216 Ill. 281.

"As between the life tenant entitled to the net income and the remainderman entitled to the principal of a trust estate invested in capital stock, a stock dividend is a part of the principal of the trust estate and goes to the remainderman."

Let us assume for argument sake that the American Insurance Company at the time of the decease of the testator had doubled its capital stock of \$600,000, or even made it \$748,000, to whom would the increase have belonged, when at that time the surplus earned in the lifetime of the testator was \$748,967.00, more than enough to pay for it? It certainly would belong to the remaindermen.

Now, I claim it to be just and right for the amount due the remaindermen to continue as their right to that extent, and the fact of the company deferring the time till the year 1917 did not take away the original claim they had at testator's death, and in the various cases cited in the courts of this State they all hold

the earnings prior to the testator's decease belong to the remainder-men.

The second point, in the opinion of the Court, in which I contend he was in error, is construing purchase of shares as though they were a stock dividend. The 58 shares issued by the company in 1907 and the 96 shares issued in 1909 were issued and sold by the American Insurance Company for cash, but it was not a stock dividend issue. And as I was acting as counsel for the executors at the time and being short in ready cash to make payment for the shares the executors borrowed the money temporarily on promissory notes to pay for them. And we were of the unanimous opinion that the executors were acting for the corpus of the estate in carrying out the provisions of the will to invest and re-invest the proceeds of the estate from time to time. No further thought was given concerning the life tenants than making an investment to draw a fair interest to pay them semi-annually or quarterly as directed by the will.

How the claim of the respondents that the life tenant should be entitled to the benefits of such part of the income that accrued after the life of the testator of the \$1,000,000 capital stock then as shown by Exhibit No. 1, on page 15, in state of the case, where the capital stock of American Insurance Company on January 1 was \$600,000 and the surplus was \$748,967, as only so much of the surplus was taken from that account to make the amount of \$1,000,000, then it is evident that as \$748,967 is to \$1,000,000 so the interest of the remainder-men stands to the life tenants which is as follows: Of the 385 shares, to the remainder-men 288 shares and to the life tenants 97 shares. As only \$1,000,000 was taken from the surplus, I contend that it makes no difference when it was taken or how much the increase of that capital stock amounted to when taken, the condition of the respective parties was not changed thereby.

I most respectfully insist that the foregoing statements of facts pertaining to the estate concerning the questions at bar are correct, and the reasoning touching the same is equitable and just, my knowing the testator so intimately, acting as his counsellor and attorney during his last year, and his forbidding the sale of the American Insurance Company stock causes me to firmly believe the views above set forth are carrying out his wish and desire.

Furthermore, I contend that the numerous able decisions of the Courts in so many states hold that a stock dividend, like the

case at bar, taken from the surplus accruing from profits before and after the trust became operative, belong to the remaindermen.

Supreme Court, State of Vermont, *Atlantic Monthly* 96, page 21, *In re Wheaton Estate*; Court says, in determining whether a life tenant should receive a stock dividend declared on corporate stock bequeathed in trust:

“The intention of the testator if it can be gathered from the will creating the trust will govern.”

And further says:

“A trustee needs some plain rule to guide him and the *cestui que* trust ought not to be subjected to the expense of going behind the action of the directors and in investigating the conduct of the corporation. A simple rule is to regard cash dividends however large as income, and stock dividends however made, as capital.”

The rule laid down by the Court in the case, *Minot v. Paine*, 99 Mass. 101, seems to explain the principle held by the courts touching cash dividends and stock dividends as follows:

“The Court states that a simple rule is to regard cash dividends however large as income and stock dividends however made as capital; and conclude that as the corporation has power to give to the shareholders either an increase of income or an increase of capital according to the discretion of its directors, it would seem to follow that an increase of capital should be kept for the remaindermen, and an increase of income should be paid to the tenant for life.”

If the testator had any desire for the life tenants to receive anything more than the interest from the various investments of his residuary estate, it could have been so expressed in a very few words, such as all stock dividends or all earnings, but in the absence of any such words it is reasonable to assume that it was not desired.

The case of *Spooner v. Phillips*, 62 Conn. 62, by a very elaborate and exhaustive opinion where the facts presented were almost identical with the facts in the case at bar, where Clapp Spooner gave to Mary A. Garland for life ten shares of stock of the Adams Express Company.

In trust, directing the trustee, Daniel Phillips, to pay to her the dividends and income during her natural life, the ten shares were increased from time to time by the action of the associa-

tion so that at the time of the death of Mrs. Garland there stood in the name of Mr. Phillips, the trustee, sixty-six shares of stock, which he, as trustee, claimed. Mr. Spooner claims that the sixty-six shares belong to him and brings suit. The Court says:

“The declaration of a stock dividend is not sufficient. That merely gives the receiver of the stock certain rights, but it gives him no title to any portion of the property of the corporation, and no individual right to control it, or interfere with its management. If it had been intended that Mrs. Garland should have all the earnings, even though they remained a part of the common property, it would have been very easy to have expressed that intention. A few words of general, but comprehensive, import, ‘all stock dividends,’ ‘all earnings, whether capitalized or not,’ or any similar words, would have been sufficient. The absence of any such language is significant.

The use of the stock seems to have been limited to the receipt of dividends and income. The word ‘dividends,’ if unqualified, signifies dividends payable in money. The word ‘income’ has a broader meaning, but hardly broad enough to include things not separated in some way from the principal. It is not synonymous with ‘increase.’ The value of stock may be increased by good management, prospects of business, and the like. But such increase is not income. It may also be increased by an accumulation of surplus; but so long as that surplus is retained by the corporation, either as surplus or increased stock, it can, in no proper sense, be called ‘income.’ ”

In this elaborate opinion the Court says an important case on this subject is *Gibbons v. Mahan*, 136 U. S. 549, which so thoroughly sustains the views we entertain that we quote from it at some length:

“Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and remaindermen, legal or equitable thereof.

“Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock, for the benefit of all persons interested in it, either for a term of life or for years, or by way of remainder in fee, or should be distributed and paid out as income, to the tenant for life or for years, excluding the remainder-man from any participation therein, is a question to be determined by the action of the corporation itself, at such times and in such manner as the fair and honest administration of its whole property and business

may require or permit, and by a rule applicable to all holders of like shares of stock; and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts, as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder, and by a distinct and separate investigation," etc. The case then goes on to hold that, in ascertaining the rights of such persons the intention of the testator, so far as manifested, must, of course, control, and that, "when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares." It then holds that "ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income of such share."

And further adds the conclusion of the Superior Court by saying:

"The Superior Court is advised that the equitable title to said sixty-six shares of the Adams Express Company is in Clapp Spooner, and that said Daniel Phillips should be required to transfer and deliver to said Spooner, by proper instrument, said sixty-six shares, together with all dividends received by him since the death of Mrs. Garland."

The trustee of this estate received three hundred and eighty-five additional shares of stock and, being under the impression that the testator owned 385 shares instead of 231 at the time of his decease, charged himself with their receipt as income of the estate. The remainder-men filed exceptions, claiming that this stock or a portion of it belonged to them, because the value of the original one million dollars of stock when the new issue was effected decreased to one-half its original value. It depreciated from \$36.00 to \$18.00 per share, and the dividends on the two millions of stock will be no more than one million produced before the new issue, which certainly was seriously affecting the corpus or principal of the estate to that extent.

To arrive at an equitable and fair conclusion it seems to me the first matter to be considered is: What was the intention and desire expressed in the will of the testator? As the testator was a person of culture and experience and the writer of his will the Hon. Frederic W. Stevens, it may be readily inferred that

the phraseology of the language plainly expressed his desire. As his will directs his executors to invest and re-invest his residuary estate, knowing the lawful intent to be six per cent. per annum, which he was providing as the income for the life tenants, and directing his executors to not sell, but hold the stock in the American Insurance Company as a *permanent investment*. Is it not reasonable to believe that his faith in the American Insurance Company desired that his stock to be retained with its accumulations as principal for the remaindermen, for at that period the interest on that stock was (in 1880) 10% per annum? Furthermore, it kept rapidly increasing, until in 1916 it had reached 36 per cent. Thus it shows the life tenants were greatly benefited by the increased interest, as well as the remaindermen.

The reasons and conclusion of the Court in *Spooner v. Phillips* seems to carry sound reasoning and equity between life tenants and remaindermen. Where the stock was added to the capital stock by taking that sum from the surplus it should of necessity go to the remaindermen, because if a great loss by fire should reduce the principal far below its par value the loss would certainly fall on the remaindermen; therefore, if assets of the principal should increase in value, should they not be entitled to the increase?

I have not been able to discover in any reported case, where it holds that if the real estate or personal effects left by a testator greatly increased in value above the inventory, that it should be paid over to the life tenants, so why should stock in a hazardous business be considered under a different rule?

In carefully examining the cases in this State it is difficult to arrive at a definite conclusion, and the examination of the reports in other states makes it still more difficult. One of the most recent cases reported in this State is *Day v. Faulks*, 79 N. J. Eq. 60, in which V.-C. Stevens carefully reviews the decisions at great length, touching the question between a life tenant and remaindermen, referring to his opinion in *Ballantine v. Young*, page 70, and shows very plainly the trend of the opinion of the Courts in this State to regard extra dividends as belonging to the corpus of the estate, instead of going to the life tenant. This opinion applies to the case at issue. When the capital stock was doubled the total value of the stock remained the same, and the income on the original stock with the increased stock was only the same.

Since stating the foregoing part of my brief I have procured an elaborate opinion from a case in the United States Supreme Court where the issue was joined on a state of facts parallel with the case at bar—*Mark Eisner, Collector, etc., plaintiff-in-error, v. Myrtle H. Macomber, defendant-in-error*, decided March 8, 1920. The facts, in outline, are as follows: "On January 1, 1916, the Standard Oil Company of California, a corporation of that State, out of an authorized capital stock of \$100,000,000, had shares of stock outstanding, par value \$100 each, amounting in round figures to \$50,000,000. In addition, it had surplus and undivided profits invested in plant, property, and business and required for the purposes of the corporation, amounting to about \$45,000,000, of which about \$20,000,000 had been earned prior to March 1, 1913, the balance thereafter. In January, 1916, in order to readjust the capitalization, the board of directors decided to issue additional shares sufficient to constitute a stock dividend of 50 per cent. of the outstanding stock, and to transfer from surplus account to capital stock account an amount equivalent to such issue. Appropriate resolutions were adopted, an amount equivalent to the par value of the proposed new stock was transferred accordingly, and the new stock duly issued against it and divided among the stockholders.

Defendant-in-error, being the owner of 2,200 shares of the old stock, received certificates for 1,100 additional shares, of which 18.07 per cent., or 198.77 shares, par value \$19,877, were treated as representing surplus earned between March 1, 1913, and January 1, 1916."

In this very elaborate opinion delivered by Justice Pitney citing decisions from so many states including *Minot v. Paine*, 99 Mass. 101, concurred in by Chief Justice White and three other Judges. Holding that no stock dividend can be considered *income*.

Hence it must belong to the remainder-man.

And Justice Brandeis in his dissenting opinion speaks of the three well-defined rules, one of which is the Massachusetts' rule of *Minot v. Paine*, which he seems to approve and says—this Court adopted in *Gibbon v. Mahon*, as the rule of administration for the District of Columbia. The opinion being delivered in 1890 by Justice Gray.

In view of the facts above set forth it seems the law is well settled in the case at bar that the stock dividend belongs to the remainder-man.

Permit me to say in conclusion, (1) that it seems obvious from the language in the will the testator intended to retain the American Insurance Company stock as a permanent investment—intended it with the accumulations to remain in the corpus.

2. The life tenants have been benefited by the cash dividends and will continue to be benefited by keeping the new issue of stock in the corpus.

3. Should a portion of the new stock be given to the life tenants it would be unjust to the remainder-men because the corpus would be reduced thereby fifty per cent. from 36 to 18.

4. As the surplus at testator's death was \$748,967, and the amount transferred from the surplus in 1894 of \$1,000,000. If the principal was followed in the Lang case the 231 shares owned by testator would be divided as follows, 58 shares to the life tenants, and 275 shares to the remainder-men.

5. The fact that one of the life tenants, Selena A. McCracken, conscientiously declines to take any part of the 231 shares of the new American Insurance Company stock from the corpus, believing it to be against her father's will and desire, is worthy of consideration.

6. The board of directors had power to declare that the stock dividend should be paid out of the surplus accumulated prior to the 1894 and did so apply it. Hence the decisions in the cases referred to plainly show that the assets transferred from surplus to capital was not disturbed but remained in the corpus, was simply a matter of bookkeeping.

7. In view of all the circumstances in this case, the burden of proof being on the trustee to sustain his contention.

I believe that equity and justice would be fully met by leaving the 385 shares in the corpus for the remainder-men, with the cash dividends thereon going to the life tenants as before.

Respectfully submitted,

J. H. McCracken,

*Proctor for Selena A. McCracken, Life Tenant, and
Charles D. McCracken, Frederick B. McCracken
and Mary E. Newell, Residuary Legatees,
lants.*

Appellants.

I am to say in connection with it that it seems to me from the language of the will that the property is to be divided among the children of the testator, and that the property is to be divided among the children of the testator, and that the property is to be divided among the children of the testator.

2. The life tenants have been provided for in the will, and the remainder is to be divided among the children of the testator, and the property is to be divided among the children of the testator.

3. Should a portion of the property be given to the life tenants, it should be given to the children of the testator, and the property is to be divided among the children of the testator.

without consideration from the principal was followed by the testator, and the property is to be divided among the children of the testator.

of consideration.

The first and second divisions of the property are the first and second divisions of the property, and the property is to be divided among the children of the testator.

proof being on the issue.

I believe that the property is to be divided among the children of the testator, and the property is to be divided among the children of the testator.

The property is to be divided among the children of the testator.

WITNESSES:

James A. McArthur, John E. McArthur, and Mary E. McArthur, all of the County of ... State of ...

4th day of ...

New Jersey Court of Errors and Appeals

SELINA A. McCracken, *et als.*,

Appellants,

vs.

HENRIETTA D. GULICK, *et als.*,

Respondents.

On Appeal, &c.

BRIEF FOR THE RESPONDENT.

Facts.

This is an appeal taken from the Prerogative Court by Selina A. McCracken, a life tenant, Charles D. McCracken and others, remainder-men, under the provisions of the will of Charles Dowden, deceased. Charles Dowden died in October, 1880, and his will was duly admitted to probate. In the fifth clause he created a trust fund out of the residue of the estate, the income to be paid in equal parts to his wife during her lifetime and to his two daughters, Selina A. and Henrietta, during their respective lives. The wife died some years ago. Selina is one of the appellants, and the other life tenant, Henrietta Gulick, is a respondent. In February, 1916, by order of the Essex County Orphans' Court, Jehiel G. Shipman was appointed substituted trustee of the estate, in place of the executors, one of whom had died and the other desired to be relieved. Among the assets of the estate delivered to the trustee were 385 shares of stock of the American Insurance Company. This company passed a resolution on April 26, 1917, to increase its capital stock from \$1,000,000 to \$2,000,000. The resolution recited that the increase should be made from earnings of the company prior to January 1st, 1895. A copy of the resolution is in evidence (p. 16). On May 27, 1917, the stock was actually issued, each stockholder receiving an equivalent number of shares to the number already held. The trustee received, therefore, 385 shares. The question was then presented as to the proper distribution of this stock as between the life tenants and the remainder-men under the trust.

The substituted trustee prepared and filed his first account in July, 1917, and after a considerable study of the legal aspect of the case, came to the conclusion that the stock should be con-

sidered as income and divided equally between the life tenants, and charged himself with the 385 shares as income in his account. We call the Court's attention here to the fact that the trustee charged himself with the entire 385 shares of the stock dividend as income under the misapprehension that this number of shares had been owned by Charles Dowden at the time of his death, in 1880. After the account was filed it was discovered that only 231 shares were owned by Mr. Dowden at the time of his decease. In 1907 stockholders were given the right to subscribe to new shares by the company, and the executors purchased 58, and in the year 1909 they purchased 96 shares under the same rights, thus making the total of 385 which was owned by the estate when the stock dividend was declared.

We mention this fact because if the trustee had known the correct facts he would have proportioned the stock dividend between the life tenants and remainder-men, just as was done in the decision rendered by the Essex County Orphans' Court; that is, the 231 shares received as a stock dividend for the original 231 owned by Charles Dowden are chargeable as income; $37 \frac{5}{10}$ shares of the shares given as a dividend for the 58 shares purchased by the executors in 1907 are income, and $55 \frac{6}{10}$ shares of the dividend given for the 96 shares purchased by the executors in 1909 are income; $20 \frac{5}{10}$ shares of the 58 shares purchased in 1907 must be applied to principal and $40 \frac{4}{10}$ shares of the 96 shares purchased in 1909 must be applied to principal, thus making the total of 324 shares to be charged as income and 61 as principal.

A copy of the account as filed is shown on pages 3 to 11, the stock appearing on page 8, line 22. Exceptions were filed to the account by the appellants here, asserting that the entire 385 shares should be charged to principal, on the theory that the remainder-men were entitled to the stock. A stipulation of facts was filed with the Court for the purpose of obtaining a decision upon the exceptions (case, p. 13). We call attention to the fact that the stipulation is erroneous in one respect; it states that the stock dividend was paid out of earnings accumulated prior to January, 1894. The resolution which is in evidence (p. 16) provides that the dividend be paid from earnings accumulated prior to January 1, 1895. The Orphans' Court rendered its opinion (case, pp. 18-32), deciding that 324 shares of the stock should be charged to income and 61 to principal, and decrees were entered in accordance with the opinion (pp. 33-35), and an amendment to the account was filed (p. 36). We call attention

to certain errors in printing in the opinion. First, page 20, line 3, the surplus given should be "\$4,079, 176.42," instead of "\$4,079, 146.42." On page 20, line 6, the statement "On February 26, 1917," should be "On April 26, 1917."

An appeal was taken from the decrees of the Orphans' Court and the matter was heard by Vice-Ordinary Backes, who affirmed the decrees on the opinion of Judge Martin, and an order of affirmance was entered and an appeal has been taken from this order.

I.

The stock dividend of 231 shares on the original 231 shares owned by the testator is income and should be distributed between the life tenants.

Counsel for the respondents cannot do better in this brief than refer the Court to Judge Martin's opinion in the Orphans' Court and comment upon it. The opinion goes most thoroughly into the facts, and we believe that it is entirely correct in point of law.

The trustee based his action upon the following line of reasoning: the stock dividend represents a half interest in the entire surplus and capital of the company; the most recent decisions upon the question of proper distribution of stock dividends as between life tenant and remainder-men hold, that a sufficient amount of extraordinary dividends, whether money or stock, must be retained in the corpus of the trust to maintain that corpus unimpaired. The corpus must not be diminished. The stock owned by the trust must have the same intrinsic value after the dividend has been declared as it had at the time that the trust was created. If the intrinsic value of the stock is shrunk because of the dividend, so that the value of the corpus is less than at the time when the trust was created, so much must be appropriated to corpus as will be sufficient to restore the original value. In this instance the corpus is not diminished by the declaration of the dividend. In fact, the intrinsic value of the 231 shares of stock owned by the testator at his decease is greater after the declaration of the dividend than at the time the trust was created, therefore, the entire 231 shares are income and should be distributed between the life tenants.

Exactly the same reasoning was followed with respect to the shares purchased in 1907 and 1909, but it was found that the value of these particular shares was slightly less after the stock

dividend was declared than at the time they were purchased, which is the reason for applying 61 shares of principal. We explain this calculation later in the brief.

The principal cases upon which the trustee relied are, *In the matter of Osborne*, 209 N. Y., 450-485; 50 L. R. A., N. S., 510. And two decisions in the Court of Chancery in this State, one by Vice-Chancellor Backes, *Louis L. Clarke, Executor, v. E. Stanley Clark*, and one by Vice-Chancellor Stevens, *Douglass v. Whittemore*. No opinion was rendered in either case in Chancery. The later decisions (*Day v. Faulks*, 81 N. J. Eq., 173) of the Court of Errors and Appeals lean toward the method of distribution followed in the Osborne case.

We think that the reasoning of the Orphans' Court is generally based upon this theory, and the method of distribution in the Osborne case was followed.

Judge Chase wrote the opinion in the Osborne case and explains clearly the method of distribution followed there. The language of the opinion in the Osborne case is quoted by Judge Martin in his opinion (case, p. 26, l. 17):

"The proposition decided by us in the case is, that in all cases of extraordinary dividends, either of money or stock, sufficient of the dividend must be retained in the corpus of the trust to maintain that corpus unimpaired and the remainder thereof must be awarded to the life beneficiary. The method of accomplishing this result is not difficult. The intrinsic value of the trust investment is to be ascertained by dividing the capital and the surplus of the corporation existing at the time of the creation of the trust by the number of shares of the corporation then outstanding, which gives the value of each share, and that amount must be multiplied by the number of shares held in trust. The value of the investment represented by the original shares after the dividend has been made is ascertained by exactly the same method. The difference between the two shows the impairment of the corpus of the trust.

If the dividend is of money the amount of that difference is to be retained by the trustee as capital, and the remainder to the life beneficiary. If the dividend is in stock the amount of impairment in money must be divided by the intrinsic value of a share of the new stock, and the quotient gives the number of shares to be retained to make the impairment good, the remaining shares going to the life beneficiary. Market value, good will and like considerations cannot be considered in apportioning a dividend."

On page 31, line 22, a further quotation from the Osborne case is made:

“Extraordinary dividends payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they intrench in whole or in part upon the capital of the trust fund as received from the testator or maker of the trust, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund.”

Calculating the result along the lines of the above quotation, the value of the corpus of the trust in the case at bar is ascertained by dividing the total amount of the capital stock and surplus at the time the trust was created in 1881, \$1,348,967 (p. 15, l. 21), by the number of shares outstanding at that time, 120,000 (capital 600,000 divided by \$5 par value of a share), which gives \$11.24 intrinsic value of each share; multiply this by the number of shares held by the estate at that time, 231, makes the original corpus worth \$2,596.44.

On March 31, 1917, the date just prior to the adoption of the resolution for issuing the additional shares (case, p. 16), the capital was \$1,000,000, the surplus was \$4,079,176.42. There were 200,000 shares of the par value of \$5.00 each outstanding, making the intrinsic value of each share before distribution \$25.39. After the \$1,000,000 had been transferred from surplus to capital, the figures were, capital, \$2,000,000; surplus, \$3,079,176.42, and capital stock, 400,000 shares, and the value of each share would, therefore, be \$12.69, and the value of 231 shares, \$2,931.39.

So it appears that the intrinsic value of the original 231 shares of corpus is greater after the distribution of this stock dividend than when the trust was created. If the 231 shares are given to the life beneficiaries, it does not impair the corpus or the value of the original investment. In both the Clarke case, decided by Vice-Chancellor Backes, and *Douglass v. Whittemore*, decided by Vice-Chancellor Stevens, all the stock dividends were awarded to life beneficiaries because they represented the surplus accumulated since the testator's death, notwithstanding that some of the surplus was accumulated prior to his death. Vice-Chancellor Stevens stated informally that the beneficiaries of the income for life were entitled to the stock “so far as and because it represented earnings since testator's death” (opinion, p. 29. l. 1).

Other decisions which were cited in the opinion (pp. 26-28) which have followed this method are:

In re Byer, 73 Atl. Rep., 320 (Pa.). Where the Court says: "As between a life tenant and remainder-man under a trust created in corporate stock, the remainder-man is entitled to what the stock was actually worth at the creation of the stock, no less, no more."

Also, *In re Heaton's Estate*, 96 Atl. Rep., 21 (Pa.). A lengthy quotation from this case is found in the opinion (case, p. 27).

Also *Soenlein v. Soenlein*, 146 Wis., 330; 131 N. W., 739.

We refer the Court to the quotation from the latter case on pages 27 and 28.

The difficulty encountered in the case at bar was the argument presented by the appellants here that the distribution of the stock dividends should be made as if taking place on January 1, 1895, because the resolution (Exhibit 2, p. 16) provided that the amount of the surplus earned previous to January 1, 1895, be transferred to capital account, and that the stock dividend was made up from surplus earned prior to that time. In other words, the corporation has the right to bind the beneficiary and remainder-men by the language employed in creating a stock dividend. This is the method followed by the Courts of Massachusetts, making the action of the corporation the determining feature as to the nature of a stock dividend. This method is followed only in Massachusetts, so far as we have been able to ascertain, the other method of distribution being followed in almost every other State in the Union. This latter method is known as the American or Pennsylvania rule, and Judge Martin explains it on page 21, line 10, and says (p. 23, l. 28):

"The Pennsylvania rule is an application of the maxim that equity regards that as done which ought to be done. A testator leaves to his life tenants the income and profits of certain shares of stock. If by the action of others the income and profits are diverted, equity traces the funds so diverted and fastens upon them in whatever form they may be the trust with which they were originally impressed. It does this the more readily because life tenants in nearly all instances are persons more nearly related to the testator, his children generally, whom he had most in mind in the distribution of his bounties."

The first case adopting this rule is *Earps' Appeal*, 28 Pa. St., 368, cited by the lower Court on page 22, line 27. The reason for the rule is stated in *Moss' Appeal*, 83 Pa. St., 264, cited in the opinion, page 23, line 20. The Court there says:

“Where a corporation, having actually made profits, proceeds to distribute such profits amongst the stockholders, the tenant for life would be entitled to receive them, and this without regard to the form of transaction. Equity, which disregards form and grasps the substance, would award the thing distributed, whether stocks or moneys, to whomsoever was entitled to the profits.”

This rule was followed by the Courts of New Jersey and appeared to be settled in this State until the case of *Day v. Faulks*, 79 N. J. Eq., 66, affirmed 81 N. J. Eq., 173. The earlier decisions which followed the Pennsylvania rule are, *Lang v. Lang*, 57 N. J. Eq., 325; *Van Doren v. Olden*, 19 N. J. Eq., 176, in which *Earps' Appeal* is cited with approval; *Ashurst v. Potter*, 26 N. J. Eq., 625-635; *Ballentine v. Young*, 74 N. J. Eq., 527-575; 76 N. J. Eq., 613; 79 N. J. Eq., 70.

Then followed the case of *Day v. Faulks*, *supra*, and the appellants here contend that the opinion would seem to indicate the adoption of the Massachusetts rule, so that in the case at bar the distribution should be made under the rule in the case of *Lang v. Lang*; that stock dividends from surplus earned prior to testator's death should be credited to principal and that earned thereafter to income.

We call attention to the fact that the most recent decisions which we have cited heretofore, that is, in the matter of *Osborne*, *supra*; in the matter of *Heatons' Estate*, *supra*; in *re Byer*, *supra*, and *Soenlein v. Soenlein*, *supra*, as well as *Clarke v. Clark* and *Douglass v. Whittemore*, the two cases decided by our Court of Chancery, are all decisions rendered since that of *Day v. Faulks*.

We contend that the language of Mr. Justice Swayze, speaking for the Court of Errors and Appeals in *Day v. Faulks*, rather indicates the tendency to apply stock dividends as was done in the last-cited cases. Justice Swayze says (81 Eq., 174):

“We agree with the Vice-Chancellor that it would be inequitable to award the whole stock dividend to the life tenants, and that for two reasons. First, because stock dividends are not dividends set aside as earnings by the corporation. Second, because to permit the new stock to go to the life tenant would lessen the proportionate interest in the estate in the corporation, a result that cannot have been contemplated by the testator.”

In this case all of the earnings had been invested in erecting buildings and permanent structures. In other words, it had been capitalized before the stock dividend had been declared, and it was held that the dividend was really a distribution of capital.

In disposing of appellant's contention, the Orphans' Court held that it would be inequitable and in violent disregard of the facts to make a distribution upon that basis (case, p. 20, l. 19).

Quoting from the opinion (p. 20, l. 19):

"The excess of the market value of the stock at the time of the declaration of the dividend was due entirely to the earnings accumulated since the death of the testator and which were withheld from the life tenants. It was the profits and earnings of the stock of which the life tenant has been deprived which gave to the stock the high market value it had in 1917 prior to the declaration of the dividend.

The difficulty in approving the methods of apportionment based upon the theory that the stock dividend was distributed as of the first of January, 1895, is that it violently disregards the facts. Equity might resort to a fiction to accomplish justice, but never to inflict injustice. The stock was distributed after March 31, 1917. When the board of directors authorized the issuance of additional stock, this stock carried with it, whether the board says so or not, the inherent value it represents of its proportionate part of the total capital and surplus."

There is no doubt that this stock dividend when issued represented inherently the value of the surplus earnings of the company; the old stock represents one-half of the company's assets, \$1,000,000 of the capital and one-half of the surplus, to wit, \$1,539,588.21, and the new stock dividend represents a like sum.

If the method presented by the appellants is adopted, it would mean that the Court must make a distribution placing the intrinsic value of the stock at \$15.84, its intrinsic value on January 1, 1895, before distribution, and \$7.92 after distribution; and this, although the actual value when the distribution was made, was \$25.39 before and \$12.69 after distribution. This is contrary to all fact and reasoning. The testator provided that the income from the trust fund, part of which was the American Insurance Company stock, should be paid to the beneficiaries for life. Can the American Insurance Company, or any other corporation, arbitrarily withhold its surplus which is the income meant by the terms of the trust and then unexpectedly distribute this income in such a manner that the beneficiaries are deprived of the

income from earnings and surplus to which they are entitled by the terms of the will? This would be the result if the method advanced by the appellants should be adopted. As was said in *McLouth v. Hunt*, 154 N. Y., 179:

“For all corporate purposes the corporation may doubtless convert earnings into capital when such power is conferred by its charter; but when a question arises between life tenants and remainder-men concerning the ownership of the earnings thus converted, the action of the corporation will not conclude the Courts.”

Also *Heaton's Estate*, 96 Atl. 21 (Pa.);

Smith's Estate, 140 Pa. St., 344.

It was urged by the appellants in the Prerogative Court that the intention of the testator, as evidenced by the fifth clause of his will, was to keep the American Insurance Company stock as a permanent investment, and that, therefore, this stock dividend should go to the remainder-men. So far as the language of the clause of this provision of the will is concerned, it means that the stock is not to be sold. The will provides that the income shall be divided into three parts and paid to his wife and two daughters. It seems quite plain to us that the testator owned the 231 shares of the insurance company stock and considered it an excellent investment, and did not wish it sold by the trustee, but he wished the income from this stock, which consists of dividends from earnings of the company, to be paid to the life beneficiaries. The stock dividend here declared was from earnings. It is income, and there is not doubt that the testator intended that any dividend derived from his stock which represented earnings should be distributed as income. Suppose the dividend had been declared in cash, with the right to subscribe. There would then be no question but that it would go to the life tenants.

We will say a word here with respect to the recent decision of the United States Court in the case of *Eisner v. Macomber*, reported in *Advanced Opinions*, U. S. Supreme Court, No. 10, page 248. This case, we think, does not affect the situation here, as it only adjudicates upon the nature of a stock dividend as between the government and a taxpayer.

The case of *Gibbons v. Mahon*, 136 U. S., 549, was cited, but that was a case where the surplus had been invested in permanent structures, such as buildings, etc. In other words, the surplus had been capitalized before distribution. In fact, in the *Macomber* case decided by the Supreme Court the Standard Oil Company had capitalized its securities before distribution.

In the dissenting opinion of Mr. Justice Brandeis it is expressly stated that the decision does not affect the relation of a stock dividend as between life tenant and remainder-man. He says:

"This Court adopted in *Gibbons v. Mahon* as the rule of administration for the District of Columbia the so-called Massachusetts rule, the opinion being delivered in 1890 by Mr. Justice Gray. Since then the same question has come up for decision in many of the states. The so-called Massachusetts rule, although approved by this Court, has found favor in only a few states. The so-called Pennsylvania rule, on the other hand, has been adopted since by so many of the states (including New York and California) that it has come to be known as the 'American Rule'. Whether, in view of these facts and the practical results of the operation of the two rules as shown by the experience of the thirty years which have elapsed since the decision of *Gibbons v. Mahon*, it might be desirable for this Court to reconsider the question there decided as some other Courts have (see 29 *Harvard Law Review*, 551), *we have no occasion to consider in this case*. For, as this Court there pointed out (p. 560), the question involved was one 'between the owners of successive interests in particular shares,' and not as in *Bailey v. Railroad Co.*, 22 Wall., 604, 22 L. Ed. 840, a question 'between the corporation and the government and (which) depended upon the terms of a statute carefully framed to prevent corporations from evading payments of the tax upon their earnings.' "

A further evidence of the fact that the decision does not affect life tenant and remainder-men is found in the case of *Tax Commissioner v. Putnam*, 227 Mass., 522, where the Massachusetts Court held that a stock dividend was income for taxing purposes under the Massachusetts statute, whereas the Massachusetts Courts have followed a rule entirely alone in holding that stock dividend as between life tenant and remainder-men is capital.

We also call the Court's attention to a very interesting article found in the *Harvard Law Review* for May, 1920, Vol. 33, touching upon the taxability of stock dividends as income, particularly pages 895 to 899. The article is written by Prof. Edward H. Warren of the Harvard Law School. He says, in part, on page 895:

"May the word income reasonably be construed as broad enough to include stock dividends under any circumstances? Our answer would be in the affirmative, and would be based on the following propositions: (1) capital increment may be taxed as income; (2) so far as a stock dividend capitalizes earnings made during the taxpayer's ownership of the stock (upon which the dividend is paid),

it is predicated upon facts showing an increment in the stockholder's capital, and the payment of the dividend furnishes a proper basis for taxing such increment."

II.

To take up the new shares that were given for the remaining shares, the lower Court, by the same process of reasoning as adopted in the distribution of the 231 original shares, found that a certain number of shares, to wit, 61, should be applied to principal. He arrived at this decision in the following manner: 58 shares were purchased in 1907 by the executors of the estate. On page 31 of the case, line 30, by calculating in the same manner as was done in the Osborne case, the Court finds that the intrinsic value of these 58 shares in 1907 was \$997.02; after the stock dividend was declared in 1917 the intrinsic value was \$736.02. The trust fund was, therefore, impaired so far as the 58 shares were concerned to the extent of \$261, or 20.5 shares.

In the same manner 96 shares were purchased by the executors in 1909. At that time the intrinsic value of these shares was \$1,730.88, and after the distribution of the stock dividend in 1917 it was \$1,218.24, so that as to the 96 shares the fund was impaired to the extent of \$512.64, or 40.4 shares, making in all 61 shares of stock which must be applied to principal.

The trustee desires to say to the Court that he has waived any claim or right to commissions upon the 324 shares of stock declared to be income, so that there may be no misunderstanding as to his motive in appearing for the life tenant, the respondent, and taking the position that the stock dividend is income.

In fact when the trustee prepared his account he was convinced that it was proper for the stock to be applied to income and distributed between the life tenants, and this was before any controversy had arisen. The respondent then requested the firm, of which the trustee is a member, to appear for her, which was done. Of course, the trustee, in his capacity as trustee, is entirely neutral.

It is respectfully submitted that the decree of the Prerogative Court should be affirmed.

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Proctors of Respondent.

JEHIEL G. SHIPMAN,
Of Counsel with the Respondent.

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