COURT OF ERRORS AND APPEALS OF NEW JERSEY.

In the Matter of the Estate of GEORGE G. HARDY, deceased. GEORGE H. LAMBERT, Executor, etc., of CHAROTTE C. HARDY, *Appellant,* *vs.* CHASIE L. PHILLIPS, *Respondent.*	*On Appeal from New Jersey Prerogative Court.* *Memorandum Brief for Appellants.*

This is an appeal from an order of the Prerogative Court affirming two decrees from the Orphans' Court of Essex County, which said decrees of said Court are dated respectively December 9, 1914, and April 9, 1915.

The first involves the Court's decision on exceptions to the trustees' first intermediate account, called "the account of 1904." The other involves the Court's decision on exceptions to the trustees' third intermediate account, called "the account of 1914." There have been four accounts in all; first, the executors' only, and, therefore, final account of 1894; second, the first account of the said executors

as trustees in 1904; third, the second trustees' account of 1911, and fourth, the trustees' third account of 1914.

The controversy turns around payments of $400.00 a year to Clara J. Cook, the sister of the testator. The will (page 11), after a legacy to testator's sister, Chastina A. Duren, and to a brother-in-law, directed the payment to testator's sister, Clara J. Cook, of $400.00 annually, in quarterly payments, to commence one year after testator's death, and to continue during the lifetime of his wife. The question is whether these payments should be charged against corpus or against income. The executors, in their first and final account, that of 1894, treated these payments as charges against corpus and have continued this method of charging in every account since that time.

The exceptant (Respondent) is the daughter of Chastina A. Duren, and is interested as the representative of her mother, because the eighth clause of the will gave the residue of the estate to testator's wife for her life,

> "and at her decease any and all of my estate then remaining to go to my said sisters, Chastina A. Duren and Clara J. Cook, in equal shares; and should either be then deceased the representatives of such deceased sister to take her share,"

(page 12). Charlotte C. Hardy having died and Chastina A. Duren also dying, the exceptant, as the only child of Mrs. Duren, stands in her shoes.

The question was first raised by her on exception to the account of 1911. Judge Martin, of the Essex Orphans' Court, held that the payments in ques-

tion were annuities rather than legacies and were chargeable to the income. Then the exceptant applied to the Orphans' Court to open the first and second accounts, those of 1914 and 1904, and to be permitted to except to the payments to Clara J. Cook shown in those two accounts as charged against corpus. Judge Martin granted the application. (See his opinion, pages 58 to 72). He held that the application should be denied so far as it affected the account of 1894 because it was the executors' *final* account, but granted the application as to the account of 1904 because it was an intermediate account. Exceptions being filed pursuant to the leave thus given, some facts were put in evidence that had been discovered since the first argument. These appear in the stipulations (pages 73 to 86). We presented the same points and argument that had been presented on the previous contest over the account of 1911, with further points based upon these additional facts. Besides contending, as before, that by the true construction of the will these payments to Clara J. Cook constituted a legacy chargeable against corpus, we contended that the exceptant should be denied the relief sought because of her laches, her acquiescence in the method of charging the payments against corpus and an estoppel. Judge Martin of course decided as before on the original question of construction of the will, and then dismissed our points of laches, acquiescence and estoppel on the ground that the New Jersey Statute specifically permitted the exceptant to wait until this time to present her objections (pages 113, etc.). The surviving trustee, Judge Lambert, then presented a further account (being the account of 1914). Exceptions were taken to that on the same grounds, and after the same ruling by Judge Martin an

appeal was taken to this court. So we have the account of 1894 out of consideration because it was the final account not appealed from. We have the account of 1911 out of consideration because we did not appeal from Judge Martin's decision, and there are left the accounts of 1904 and 1914. The amounts involved are $3,700. and $700., being the totals of annual payments to Clara J. Cook in the said accounts respectively.

The Points of Law.

I.

THAT BY TRUE CONSTRUCTION OF THE WILL OF TESTATOR PAYMENTS TO MRS. COOK SHOULD BE REGARDED AS A LEGACY CHARGEABLE AGAINST CORPUS.

Testator called the provision for his sister, Clara J. Cook, an annuity, when he says,

> "In case my said wife shall die before my said sister or her said daughter shall have received the sum of $1,000. in annuities, then I direct that a sum equal to the difference between the total annuities paid, etc.,"

(page 12). But in the next sentence he calls it a "legacy," so we cannot get much light from the testator's own nomenclature. If it appear that the bequest is not an annuity it certainly will not become so because the testator so called it. The word annuity is frequently applied to any annual payment of money, but if these annual payments are only installments on account of a total gift, which total is plainly a legacy, the fact of the annual installments is not going to turn it into an annuity. Thus if a man says,

> "I give to my sister the sum of $2,000., to be paid to her in twenty annual installments of $100.00 each,"

that clearly would be a legacy, though payable in installments. And if later in the will testator referred to it as an annuity the court would nevertheless say it was not. That is just what was held by Chancellor Runyon in *Stevens Executors* v. *Milnor,* 24 Eq., p. 358, at page 373. The testator gave to the Newark Orphan Alylum Association the sum of $500.00, in sums of $100.00 a year. The court said this was not an annuity but a bequest of a sum of money to be paid in installments running through five years.

When the testator says in the fifth clause that should his wife die before his sister has received the sum of $1,000. in these annual payments of $400.00 each, a sum equal to the difference between the total "annuities" paid and the sum of $1,000. is to be paid to his sister if she be then living, and if not then to her daughter, we contend that this shows the testator's mind as contemplating these annual payments as a legacy, and this makes entirely natural the succeeding language where he speaks of the provision for his said sister and her daughter as legacies.

We think it is manifest that the testator used this word legacy referring to the entire provision for his sister and her daughter, and not simply to that one phase of it based on a contingency by which it might not exceed $1,000. Testator meant the provision in the fifth clause as a legacy of at least $1,000., that might be swelled. It may be significant that the testator uses the word annuity where he is speaking of the quarterly or annual

installments, but uses the word legacy when he is referring to the provision made for his sister as a whole.

The gift of the residue contained in the eighth clause supports our contention. It will be noticed that the eighth clause gives the residue to the testator's widow for her use during her natural life, and at her decease

> "any and all of my estate then remaining to go to my said sisters, etc."

Nowheres in the will is power given to the wife to use the principal, and the phrase "then remaining," though it implies so clearly a diminution of the corpus of the estate cannot be said to refer to such a diminution by the widow's expenditure of principal. The obvious explanation is that the testator thought of the principal of his estate as diminished by annual payments to his sister, Mrs. Cook, the amount of which was fixed as $1,000. as a minimum, and the maximum was to be determined by the number of years that his wife should live after the testator's death. He could not tell how much the principal might thus be diminished, but whatever it was, it was to go to his two sisters. Bear in mind the significance of the words "then remaining." This is not a simple gift of the residue. If it were only that it could be said that the testator had in mind the diminution of the corpus of his estate that would follow the payment of his debts and the legacy to the Mount Pleasant Cemetery Company, and to his sister, Mrs. Duren, set forth in the first three paragraphs of his will, but he speaks of the ascertainment of this residue as of the time of the death of his wife, presumably years after the payment of the legacies above men-

tioned. It is a gift of the residue of any and all his estate remaining "at her decease." This shows plainly that he was thinking of diminutions of principal continued throughout his wife's life and terminating at her death. That can only apply to these annual payments under the fifth clause, to his sister, Clara J. Cook. The natural claimants upon testator's bounty were his wife and his two sisters, Mrs. Duren and Mrs. Cook. First he wants to give some outright legacy to the sisters, so he sets apart $2,000. for Mrs. Duren. For some reason he does not want to pay over a like amount to his sister, Mrs. Cook, perhaps because she was less capable of handling money. We must assume that he knew his sister's surroundings, and that there was good reason for making provision for her differing somewhat in method, even though it might disturb equality of distribution between them. So Mrs. Cook gets the testator's bounty in a form that is certain to give her $400.00 a year, though uncertain in its total amount. It may be as little as $1,000. or it may exceed the $2,000. given to the other sister, Mrs. Duren, if testator's wife shall live more than five years. That the testator meant to give his wife the income of his estate is clear, and that he wanted it to be as large as possible with reasonable assumption. If the $400.00 a year were taken from the principal it would only diminish his wife's income by $16.00, the income of $400.00 at 4%. Is it reasonable to think that he meant that the modest amount of income from his estate from which his wife was to get her support should be diminished by $400.00 a year for a sister, Mrs. Cook?

Keeping in mind that the effort that the court is making in the construction of the will is to ascer-

tain the testator's intent, we submit that that intent appears on the face of the will and that the testator himself intended that the payments to Mrs. Cook should come out of the corpus of his estate. If the court shall so determine it becomes a matter of indifference whether the law calls the provision for Mrs. Cook an annuity or a legacy. We think it also clear that the testator looked upon the provision for Mrs. Cook as a legacy, that it was such, and that even though the testator had not stopped to think whether it would be paid out of corpus or income, it being a legacy, would as a matter of law come out of corpus.

II.

LACHES, ACQUIESCENCE AND ESTOPPEL.

The method of accounting now being objected to, by which these payments to Mrs. Cook were treated as installments of a legacy and were charged against corpus, was practiced by these accountants from the very beginning of their trust. The testator died July 18th, 1892. The first objection came January 11th, 1912, nearly twenty years later. In that interval of twenty years the executors had filed two accounts, those of 1894 and 1904. They both showed these payments as coming out of corpus. No objection was made. It is contended for the exceptant that the Statute Law gave her a license to thus stand inactive and without making any objection, basing this contention on the provisions of the Act of 1898. We will consider this later, but now we want to urge upon the court that in 1894, when the executors presented their first and final account, the Act of 1898 had not been passed. The account in question was plainly their final account. The present

exceptant perhaps then had no right to object because her mother was living, but her mother certainly had that right, and the daughter now stands in her mother's shoes. Mrs. Duren was then chargeable with the knowledge conveyed by that act that the executors had adopted that construction of the will, that they considered the provision for Mrs. Cook as a legacy, payable out of corpus. If she meant to object she was put to it then and there. Failing to object and standing by and seeing that account approved and a final decree sustaining, for the period that that account covered, this method of charging these payments against corpus, we say she thereby consented and is estopped, as is also her daughter standing in her shoes. When the Act of 1898 was passed, four years later, with all that may be inferred from it of permission to sit by and wait until final accounting, that was too late, the consent had already been given. If Mrs. Duren or her daughter wanted to thereafter have the benefit of the operation of that Act, word should have been given to the executors, saying,

> "We have heretofore consented to your charging these payments to Mrs. Cook against corpus. That consent is withdrawn."

The Act of 1898 cannot be said to nullify a consent. It does not say that under any and all circumstances, regardless of consent, the party having the right to object may wait until the last account. It does nothing more than shift the burden of proof, by providing that if any article of the account be afterwards excepted to, it shall be incumbent upon the exceptant to show the falsity thereof, etc. Suppose an estate whose administration began entirely after the Act of 1898, that is, a

testator died after the passage of the Act of 1898, and the executors came in with their final account, say two years after his death. Suppose this to be followed by several successive accounts as trustees until their final account as such. Then supposing the Act of 1898 to be still in force, let us imagine exception being filed to some one of these intermediate or trustees' accounts, or to their final account as executors. We are supposing a case with a plain right to defer the exceptions until the final trustees' account. But suppose that in answer to the exceptions then filed the trustees come forward with an express consent to the very method that is objected to. Is its binding effect one whit lessened by the existence of the Act of 1898 and its implied permission to postpone objection? Not at all. The Act of 1898 left the parties interested as free to consent as before. Consent once given was as effective as before, and so we urge upon this court that if there was, as we claim, a consent given in 1894, to the method of administration adopted by the executor, that is to the payment of these sums of money to Mrs. Cook out of corpus, there was nothing in the Act of 1898 to give Mrs. Duren, who had consented, the right to sit mute, knowing that the executors were acting with reliance upon her consent, and then come forward at this late day, after thousands of dollars had been spent in reliance upon her consent, with this objection. To thus argue is to make a pitfall of the law. No such construction can be given to the Act of 1898.

In all that we have said about Mrs. Duren's acquiescence in the method of charging these payments adopted by the executors and shown in the first account of 1894, it should be remembered that

she was all the time acting under the advice of intelligent and competent counsel. The record shows that she lived in Massachusetts and that her Massachusetts counsel, Mr. Francis W. Qua, represented her from the death of Mr. Hardy in 1892 until her own death in 1901,

> "in all matters relating to the interests of Mrs. Duren as one of the residuary legatees under the will of George G. Hardy, and particularly in the scrutiny of the administration of the estate of George G. Hardy by George H. Lambert and Charlotte C. Hardy, etc.,"

(page 73). Associated with Mr. Qua, in his "representation of the above mentioned parties," were Messrs. Guild & Lum, of Newark (page 73). Both New Jersey and Massachusetts counsel appeared for Mrs. Duren at the time the executors' account of 1894 was presented to the Orphans' Court and the decree entered thereon (page 74). They had a copy of the account of 1894 (page 75). They represented Mrs. Duren not only at the time of the accounting, but continuously between accountings, "in scrutiny of the administration." It cannot for a minute be said that Mrs. Duren did not know that payments to Mrs. Cook were being charged against corpus. It would be absurd to impute any such ignorance to her, represented as she was by able and competent counsel. Mr. Qua says that in connection with his attempt to compel the executors to file the first account (that of 1894), he went to the Surrogate's Office in Newark and inquired, either of the Surrogate or his Clerk, whether the allowance of the account would prevent any of the items being afterwards questioned, and was told that the allowance was only provisional, and that upon a final account objection could be made to

any of the items in the preceding intermediate account. It is evident that Mr. Qua is mistaken in assigning this conversation to the time of the first account. The section of the Orphans' Court Act which provided that an intermediate account should be "entered of record," not "allowed," and if any article thereafter be excepted to, the burden of proof was shifted to the exceptant, etc., came into the State in the revision of 1898. It is unlikely that any such information as Mr. Qua says he got would have been given out from the Surrogate's Office in 1894. That Mrs. Duren and her counsel understood fully that payments to Mrs. Cook were being charged against corpus, and that they consented thereto, is abundantly shown by the proof that competent counsel were in constant scrutiny of the administration of the estate, and saw by the account of 1894 that payments were being so charged. There is further corroboration by a letter written by Mr. Qua to Judge Lambert in 1894. They were in negotiation for a termination of the trust by sale to Mrs. Hardy of the respective interests of Mrs. Cook and Mrs. Duren (pages 76-78). In a letter to Judge Lambert Mr. Qua outlines the method of ascertaining the value of those interests. It is to first get the value of the entire estate by agreement or by appraisal,

> "then take out such a sum as will be sufficient to pay Mrs. Cook's annuity during Mrs. Hardy's life, subtract from the remainder the present worth of the two legacies above mentioned; then ascertain and deduct the value of Mrs. Hardy's life estate. Divide the remainder by two and the result will be the value of Mrs. Duren's interest or the price at which she will sell it. Mrs. Cook's share will be the

> same, plus the sum set apart to pay the annuity,"

(page 77). It will be noticed that he did not propose that that sum which invested would produce an income sufficient to pay Mrs. Cook $400.00 a year be set apart for future division, nor did he suggest that as Mrs. Cook's annual payments were charged against income the present value thereof should be deducted from the amount ascertained as the present value of Mrs. Hardy's life estate. On the contrary, he suggested that an amount sufficient to pay Mrs. Cook's annuity during Mrs. Hardy's life be taken out of the corpus and that thereafter there be further deducted the value of Mrs. Hardy's life estate, and then

> "give me one-half."

> "Mrs. Cook's share will be the same amount as I get plus the sum set apart to pay her annuity."

Evidently the sum so set apart was to be ascertained by getting from the Mortality tables the expectancy of life for a woman of Mrs. Hardy's age, and then calculating the sum of money which when invested would by the appropriation of all of the income and annual encroachment upon the principal, amount to a sum equal to $400.00 a year, multiplied by Mrs. Hardy's expectancy. It makes no difference, though, how they were going to ascertain or determine the sum so to be set apart, whether they ascertained it by the Mortality tables or by guess, whether they did it correctly or incorrectly, the point is that when ascertained it was to be taken out of the corpus of the estate before its division between the two sisters entitled to the residue, and was not to be taken out of Mrs.

Hardy's life estate, as it should be if in the contemplation of the parties it was an annual payment chargeable to income. We have said that the account of 1894 (the executor's first and final account), showed payments to Mrs. Cook out of corpus. This is only done by indirect statement, but it is done none the less clearly. The account separates corpus from income on the charge side of the account, but makes no such separation on the allowance side. Among the latter appear the payments to Clara J. Cook, which, for the period covered by the account amounted to $400, and are shown in the account in three payments (pages 28 and 29). When the executors come to compute the commisisons due them, however, we see the separation of income from principal. They pray allowance for commissions amounting to $1,770.18 and show the calculation by which they reach that amount. They say that the principal amounts to $58,756.26 and the income to $6,025.32; that they have calculated commissions on the income at five per cent., amounting to $301.27, and on the principal at two and a half per cent., thus making up the total of $1,770.18 above mentioned. They then show

> "net income paid Charlotte C. Hardy $5,724.05."

As this is the result of subtracting from the gross income $6,025.32, the amount of commissions, $301.27, it is plain that they had deducted nothing from the gross income except the commission, and that every other allowance item, including the payments to Clara J. Cook, had been charged against corpus.

Another significant feature of this account to which we will call the court's attention is that the

payments to Clara J. Cook just referred to, three in number, are described as "paid Clara J. Cook *legacy.*" This terminology also appears in the account of 1904 (pages 40 to 42).

Exceptant, who is the daughter of Mrs. Duren, says that she did not learn of her right to object to the charging of these payments to corpus until the filing of the third account. This is very unlikely, the probability being that through either her mother or her attorney, Mr. Qua, she was fully informed on this point. At any rate, she is chargeable with the knowledge that her mother had, as well as with the consent that her mother gave, because she stands in this suit as the representative of her mother under the eighth clause of the will of Mr. Hardy, which provided that upon the death of either of his sisters, Mrs. Duren or Mrs. Cook,

> "the representatives of such deceased sister to take her share."

Mrs. Phillips, in the exceptions filed by her, describes herself as a legatee, but it is manifest that she was not a legatee in her own right, but only as the representative of her mother.

Howell v. *Green,* 31 L. 570.

Green v. *Howell,* 30 L. 326.

The record shows that after the death of Mrs. Duren (in 1901), Mr. Qua

> "represented her estate and the persons interested therein and particularly Chasie L. Phillips, her daughter, in like manner and to the same extent,"

as stated with reference to his representation of Mrs. Duren; that is, from the death of Mrs. Duren, Mr. Qua represented Mrs. Phillips in all matters

relating to her interest in the Estate of George G. Hardy and in scrunity of the administration of that estate. And associated with Mr. Qua, as attorneys for Mrs. Phillips, were the New Jersey counsel, Messrs. Guild & Lum (page 73).

Miss Frances B. Stewart was attached to the office of Lambert & Stewart in the year 1903, and she says that Mr. Qua, in that year, called at the office to see Judge Lambert, that he was away, and that Mr. Qua then stated to her that he wanted the executors to file another account,

> "that everything had been satisfactory up to that time"

(pages 75 and 76). Mr. Qua does not contradict this, but contents himself with saying,

> "I do not remember the conversation with Miss Frances B. Stewart,"

(page 86). So we have Mrs. Phillips, not only charged as the representative of her mother with the knowledge that the latter had of the method of payments out of corpus and with the knowledge that her attorney had, but we have her through that attorney expressing her assent to those methods.

In *Sooy* v. *State*, 41 L. 394, the rule is laid down that the

> "knowledge of the agent is chargeable upon his principal whenever the principal, if acting for himself, would have received notice of the matters known to the agent."

Obviously, if Mrs. Phillips had acted for herself,

> "in scrunity of the administration of the estate,"

she would have learned that the executors had adopted a method of charging payments of these

so-called annuities to corpus, had presented an account in 1894 in which the payments to that date were so charged and had continued the same practice ever since.

In the arguments heretofore had in the courts below, this point of laches, acquiescence and estoppel has been criticised by the respondent as inequitable. We submit that it is the attitude of the courts, that equity can only help the diligent. A court of equity has always refused its aid to stale demands, when a party has slept on its rights or acquiesced for a great length of time. It seems unnecessary to cite authorities to support this proposition. Incidents of its application are found in

Stout v. *Seabrook*, 30 Eq., 187.

Mayer v. *Attorney General*, 32 Eq., 815-820.

Osborne v. *O'Reilly*, 43 Eq., 647.

Degraw v. *Mechan*, 48 Eq., 219.

Chetwood v. *Berrian*, 39 Eq., 203 (1 year).

Doughty v. *Doughty*, 7 Eq., 643.

Gifford v. *New Jersey, &c., Transportation Co.*, 10 Eq., 171.

Norfolk & New Brunswick Hosiery Co. v. *Arnold*, 49 Eq., 390 (9 years).

Coles v. *Vanneman*, 51 Eq., 323 (8 years).

Brady v. *Atlantic City*, 53 Eq., 440 (2 years).

There is infinite variety in the facts presented in the many cases that are referred to under this rule of law, and while there is no difference of opinion in the rule of law there is some diversity

in the application. We found one case that comes more nearly than all others to that at bar. It is that of *Rogers* v. *Ingham,* 3 L. R. Ch. Div., 351. Here an executor, acting on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of them being dissatisfied, took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years after the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claiming repayment from the other legatee. Vice-Chancellor Hall held that the suit could not be maintained, and the Court of Appeals affirmed the decision, saying that

> "When a trustee, by the direction or with the authority of a cestui que trust, pays money to a third person, no matter under what claim of right or under what circumstances, it is exactly the same as if the cestui que trust had received the money from the trustee and had herself paid it to that person."

The court said that with all the facts before her and before her solicitors, and being advised, she had allowed the matter to be settled in a certain way she ought not to be permitted to change her mind and litigate a question which she had before determined not to litigate (page 358).

We submit that the executors paid these annuities out of corpus, believing that the will so directed. Apparently Mrs. Duren, exceptant's mother, advised as she was by able Massachusetts and New Jersey counsel, agreed with this construction of the will, else they certainly would not have

accepted the account of 1894 which showed the payments made according to that construction, which account was final and to which no exceptions were then filed. Mrs. Duren continued in this attitude of acquiescence, authorizing the payments to be thus made right down to the time of her death in 1901. Her daughter, Mrs. Phillips, the present exceptant, who then became interested as the representative of her mother, continued the same acquiescence, and in 1903, through her counsel, Mr. Qua, expressed this acquiescence in the statement to Miss Stewart that everything was satisfactory. In 1904, when the executors filed their second account (but really their first account as trustees), it showed payments continued to that date by this same method of construction of the will. It is not contended by the exceptant that she then had it in her mind to object, and refrained from doing so. True, Mr. Qua says that he was told that exceptions need not be filed until the final account, but he does not say that he made the inquiry on this point, with these payments out of corpus in mind, or that there was any intention to object later to those particular payments. It was nothing more than a general inquiry, to be generally informed as to the conclusiveness of a decree on that account. At any rate, we know that Mrs. Phillips could have then objected and that she did not. This attitude of hers was not confined simply to the refraining from filing formal exceptions to the account, but there is not the slightest suggestion that she or her attorney or anybody for her notified the executors that there was going to be any objection. Apparently the light that has since come to the mind of the exceptant in the suggestion that there was another construction that might be given to that will, had not yet illumined her.

To all we set up to show laches, consent or estoppel exceptant has opposed the point that the Orphans' Court Act of 1898 gave permission to the exceptant to sit by when the account of 1904 was presented, and for that reason she could not be charged with laches. The exceptant also argues that she did not know her rights, and that anyway it is contrary to all equity that she should not now be permitted to object, even though she or her predecessor in interest had consented. But as we conceive the case, little weight can be given to such argument, and if the exceptant's case has any strength at all it is in Section 124 of the Orphans' Court Act of 1898 (P. L. 1898, page 760). Prior to the revision of 1898 the Orphans' Court Act (General Statutes, page 2379, Sections 104 and 105) provided that when the account of an executor, administrator, guardian or trustee was presented, the court was to examine it and if found to be correct decree an allowance, unless exception had been filed, in which case the court should hear and determine the exceptions and restate the account accordingly. Section 108 (General Statutes, page 2380) provided that the decree of the court on the final allowance of the accounts of executors, administrators, guardians or trustees should be conclusive except in cases of fraud or mistake. Under these sections the settled practice was to regard the decree allowing an executor's account as being final so far as related to the items shown in the account, even though it was not in fact intermediate. *Pomeroy* v. *Mills,* 10 Stew., 578, at page 581; *Voorhees* v. *Voorhees,* 18 Eq., 223-227; *Terhune* v. *Oldis,* 44 Eq., 146-147; *Weyman* v. *Thompson,* 50 Eq., 8, 20; 52 Eq., 263. The Revision of 1898, Section 124, extended to the intermediate accounts of executors, administrators or trustees the practice that had in

the prior statute only applied to the annual account of a guardian. That is, it took away the conclusiveness that had theretofore attached to a decree allowing any executor's or trustee's account, though it was intermediate in fact. It said that such decree of allowance, instead of barring the right to except, left that right in existence, but burdened with the duty of showing the falsity or injustice of the item objected to, if exception should later be filed. Section 125 of the Act of 1898 took the provision of old Sections 104 and 105 and repeated them with this change, that where the old sections had spoken generally of the account of an executor, etc., the new sections spoke of the final account. So by Section 125 it was provided that the court to which the *final* account of the executors, etc., was presented should examine it and if found correct

> "should decree an allowance of it."

And by Section 126 that

> "if any person interested in the settlement of the *final* account of any executor, etc.,"

should appear and except, the court should determine the exceptions.

Let us consider, then, the effect of these changes made by the revision of 1898 and their application to the rights of the present exceptant. They may be summarized as follows: When the account of 1904 was presented to the court, Mrs. Phillips had the right to except to it. She had this right, not by statutory enactment, for neither the act of 1898 or the prior legislation had conferred that right; that had been recognized as the right of any party interested. The court was charged with the duty of ascertaining whether the account was correct, and would welcome the aid of any person interested who

might by exception or otherwise call the court's attention to an incorrectness. All that the act of 1898 had done was to take away the conclusiveness that before that had attached to every decree of an allowance of an account, whether or not the account was in fact intermediate. It kept alive the right to object. This was the effect of the change from a decree allowing the account to a mere order that the account be entered of record. The first was an adjudication, the second was not. Having thus provided for action by the court on the intermediate account that should not be conclusive, and that should therefore keep alive the existing right to object, the Legislature imposed a condition upon the interested party who postponed objection, said the burden should thereafter be upon him to show the falsity or injustice of the item objected to. The rule theretofore had been that as to items on the allowance side of the account, the burden was on the executor, while if the objectors sought to charge the executor by something to be added to the charge side of the account, the burden was on the exceptant, so that Mrs. Phillips was free to object to the account of 1904, but was not bound to do it if willing to thereafter assume the burden above mentioned. But this did not take away the effect of a consent to any item theretofore given; it did not alter the ordinary rule of law that one who has acquiesced in the action of another amounting to a change of position, he shall not be thereafter permitted to object to it. It did not change the nature or effect of a consent, nor did it nullify the theroy by which the law establishes an estoppel. Therefore, we contend that the failure of Mrs. Phillips to except to these payments in the account of 1904 (where they were charged against corpus and criticised as payments on account of a legacy) was a

continuance of the consent theretofore given by her mother; but even if it was not affirmatively a continuance, the point remains that she was bound by her mother's previous consent and by the estoppel that had been worked thereby, and certainly she could not overcome that by anything short of a definite declaration that she proposed to object and was not to be taken as consenting to the items in the account of 1904.

In 1905 the Legislature amended Sections 125 and 126. Section 124 was put back in the condition it had been in prior to the act of 1898; that is, it treated the intermediate accounts of guardians only, thereby taking away the permission to object at some future time to the intermediate account of an executor or trustee. It took out of Section 125 the word "final," so that where before that section had provided for a decree of allowance or adjudication on the final account of every executor and trustee, it now provided for such adjudication on every account of an executor or trustee whether or not final. This showed clear legislative intent that an allowance of any account of an executor or trustee was to be taken as final as to so much of the administration of the estate as covered by it, and as taking away the right to reserve exceptions that had theretofore been given by Section 124. This is further confirmed by the amendment of 1905 to Section 126. The act of 1898 had provided that any person interested in a *final* account of executor, trustee, etc., might file exceptions thereto. The amendment of 1905 struck out the word "final" as to executors, administrators and trustees, but retained it as to the accounts of guardian. Let us apply this to the situation of the exceptant when the account of 1911 had been presented. First, we

remark that the effect of the amendment of 1905 had been to do away with the act of 1898. In other words, had substituted a decree of allowance on an intermediate account for a mere order that it be entered of record. It had taken away the right given by the act of 1898 to postpone the filing of exceptions until the final account. In other words, when Mrs. Phillips sat by and watched the account of 1904 being presented to the court and entered of record, relying upon the privilege given by the act of 1898 to object at some future time, she did that at the peril that that privilege might be taken away by the Legislature, and it was taken away by the amendments of 1905.

If this view be not accepted, the most that can be suggested on Mrs. Phillips's behalf is that she retained the deferred right to object up to the presentation of the account of 1911, but was charged with notice that if she did not then object the decree on that account would be final and conclusive, and that thereafter the deferred right of exception would be gone. In other words, if she had any right to object to the account of 1904 it was one that must be exercised before the account of 1911 was approved. In that account of 1911 the executor started with a balance carried forward from the account of 1904, and therefore made up of every item that had been in the account of 1904. When the court decreed the allowance of 1911 it decreed the allowance of that balance as the correct balance, and therefore by implication decreed the allowance of every item in any preceding account that went to make it up. Mrs. Phillips did object to the payments to Mrs. Cook shown in the account of 1911 so far as they were charged against corpus, but she did not object to any prior payments, nor to

the balance with which the account started. At this point it is significant to notice that Mrs. Phillips, after she had objected to the payments shown in the account of 1911, and after her objections had been sustained, applied to the court to open the account of 1904 and to permit the filing of exceptions. We submit that this was a misconception of her right, unless our contention that the right of deferred exception had been taken away be accepted, and that there was error in the ruling of the learned Orphans' Court Judge when he entertained such an application and permitted her to except to the account of 1904. He should have told her one of two things, either your right to postpone your objection had under the act of 1898 was taken from you by the repeal of that act, found in the amendments of 1905, or, if he did not say that, he should at least have said, you may have retained that right to postpone objection after the passage of the amendment of 1905, and until this account of 1911. But that right expired when the account of 1911 was allowed by this court without objection on your part to the items in the prior account.

So far we have been considering the effect of the amendments of 1905, and have urged that the decree on the account of 1911, being final, took away any permission that before had been given to postpone exceptions to the final account. But there is another line of reasoning by which the same conclusion can be urged, independent of the statute. It has always been the policy of the law not to permit litigation to be had piecemeal, and to call upon one who is making objections to state at that time all the objections that he has—all that was within his power to present on the facts then

known to or discoverable by him. Exceptions were presented to an account; later, and before the hearing, other exceptions were presented, and then at the hearing testimony was heard on the matter of objection to the account that had not been objected to on the former account. The court recognized the right to make further exceptions. Indeed, this is nothing more than the recognition of the power of amendment, but indicated that this would be confined to objections, the existence of which the exceptant did not know or had no means of knowing when his original exceptions were filed. *Tucker* v. *Tucker,* 28 N. J. E., 223-227, cites two New York Probate Court cases in support of this, and the same rule is laid down in 18 Cyc., p. 1174.

See in re *Dox Estate,* 76 Atl., 318.

In re *Nixon's Estate,* 86 Atl., 849-851.

In re *Milliken Estate,* 76 Atl., 248.

(The last three are Pennsylvania cases.)

In conclusion we submit that the equities of the accountants' case in this court are strong. They presented their account in 1894; they took one view of the will; they construed it as having given a legacy to Mrs. Cook, and that the legacy was chargeable to corpus. Certainly there was enough of uncertainty about the will, no matter how the court resolves that question, to make that attitude a reasonable one, even though mistaken. The persons interested in the trust all knew of the executors' policy. They saw them actually paying the money out of the corpus; they saw them paying out all the income to Mrs. Hardy; they said, not only by implication, but by direct and expressed approval, that that was all right; they were put

to such expression when the account of 1894 was presented, and they said that was all right. Between 1894 and 1904 they knew that that same method was being pursued and said nothing. When the account of 1904 was presented they saw that it was made up on the basis of such payments out of corpus.

~~In conclusion~~, We submit ~~that the equities of the appellant's case are strong, and~~ that it would be highly inequitable to permit Mrs. Phillips to take advantage of her own change of mind, based, undoubtedly, upon the advice of counsel, contrary to the advice she had long before and continuously had, and that she should not be permitted to come in twenty years after the death of the testator and object to the payments out of corpus that had been made by the executors with her mother's and her own intelligent acquiescence and consent. We do not believe that this court will accept the suggestion made for Mrs. Phillips that she had the right under these circumstances to stand mute and watch the executors doing something that she was going to object to. We believe that her present insistment that the executors shall be compelled to make good the amount that was thus paid out will shock the court's sense of equity. The respondent exceptant seems to think that anything of injustice or wrong in her attitude is removed by the suggestion that the surviving trustee, being also the executor of Mrs. Hardy, his co-trustee, is in possession of funds with which to make this good from her estate. Did Mrs. Hardy then get no right to retain the money that was thus paid to her with the consent of Mrs. Phillips and her mother, Mrs. Duren? Having consented that the whole income should be paid to Mrs. Hardy, and that payments to Mrs. Cook

should come out of corpus, would Mrs. Duren be permitted to turn upon Mrs. Hardy and demand that she should pay it back? Can Mrs. Phillips, bound by her mother's consent and renewing this with her own consent in 1903, turn upon Mrs. Hardy, after the lapse of these years, and demand that the money should be paid back? Certainly the suggestion that Mrs. Hardy could afford to pay the money back will not present a sufficient foundation of equity for this court to base any relief.

Respectfully submitted,

CHARLES H. STEWART,

Proctor for Appellant.

ALFRED F. SKINNER, *Esq.*,

On the Brief.

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

New Jersey Court of Errors and Appeals

In the Matter of George G. Hardy, Deceased. George H. Lambert, Executor, etc., of Charlotte C. Hardy, Deceased, *Appellant,* *vs.* Chasie L. Phillips, *Respondent.*	*On Appeal from Prerogative Court.*

Brief on Behalf of Respondent.

Statement of the Case.

George G. Hardy, late of the City of Newark, died on July 18, 1892, leaving him surviving his widow, Charlotte C. Hardy, and Chastina A. Duren and Clara J. Cook, his two sisters, as his only next of kin. His last will and testament was duly admitted to probate by the Surrogate of Essex County on August 23, 1892. A copy of the said will will be found set out at length in the printed case (p. 11). In and by his will he appointed his wife, Charlotte C. Hardy and George H. Lambert executors thereof, and as such they duly qualified immediately after probate.

The question raised in this proceeding concern the accounts of the legal representatives of this estate, and at this point we will refer to the accounts that have been rendered.

a. On or about October 23, 1894, the executors filed their first account. This is set forth at length in the printed case on pages 14 to 33 inclusive,

and on or about October 23, 1894, the Orphans Court made its decree to the effect that said account be in all things allowed as reported (case, p. 34).

b. On or about March 26, 1904, the said executors as trustees filed a second account, an abstract of which will be found on pages 35 to 37 inclusive of the printed case. By a decree made April 9, 1904, the Essex County Orphans Court ordered and decreed that the said account be entered of record.

c. On or about November 24, 1911, the said executors as trustees filed a third account in the Essex County Orphans Court, an abstract of which is set forth on pages 39 to 42 of the printed case. After adjudication upon certain exceptions thereto, to which reference will hereafter be made, a decree was made upon said account July 17, 1913. to which reference will hereafter be made.

d. On or about December 18, 1914, George H. Lambert as surviving trustee (his co-trustee having died in the meantime) filed his account, an abstract of which is set forth on page 92 of this printed case. After adjudication of exceptions to this account a decree was entered in the Orphans Court of Essex County on April 9 (case, p. 95), to which reference will hereafter be made.

After the filing of the third account and on December 28, 1911, and January 11, 1912, Chasie L. Phillips, one of the beneficiaries under the will of George G. Hardy, filed certain exceptions to that account, which are set forth on pages 43 and 44 of the printed case. The principal exception so filed was to the payment out of the principal of the estate of the said decedent of the moneys on account of the annuity given to Clara J. Cook under the will of said deceased. The exceptant claimed that by the true construction of said will

said annuity was payable out of the income of said trust estate and not out of principal. The payments to the said Clara J. Cook are provided for in the fifth paragraph of the will of the decedent (see case, p. 11). After hearing had upon the exceptions so taken the court determined that the annuity should be charged to the income and not to the *corpus,* and rendered its opinion, which is set forth in the printed case (pages 45-52). Thereupon, and on July 17, 1913, the Orphans Court made its decree that the exceptions submitted be allowed, and directed that the accountants pay over into the *corpus* of the trust fund in their hands the sum of $3,100. to the end that the same may be restored. (See case, p. 53.)

No appeal has been taken from this last mentioned decree. In fact, counsel for the appellant admitted in his argument before the Orphans Court that the time for taking an appeal from this latter decree had passed. (See case, p. 118.)

After the entry of the decree last mentioned the said Chasie L. Phillips, one of the beneficiaries under the will of George G. Hardy, filed her petition in the Orphans Court on or about August 7, 1913, wherein she prayed that the first and second accounts filed by the said accountants might be opened and the petitioner permitted to except to so much thereof as charged the payment of $400. a year made to Clara J. Cook, to *corpus* and not to income. Hearing was had upon this petition before the Orphans Court, and an opinion was filed by the court on or about May 11, 1914, whereby the application of the petitioner as to the executors' final account of 1894 (that is, the first account) was denied, and the application as to the trustees' first intermediate account of 1904 (second account) was granted. After filing the said opinion decree was entered thereon to the effect

that the first intermediate account of 1904 should be opened to the end that the said petitioner might be permitted to except to so much thereof as charges the annuity to *corpus* and not to income; and by said decree the application to open the final account of the said executors as such was denied. (See case, p. 87.)

Thereafter, the said Chasie L. Phillips, pursuant to leave granted by said last mentioned decree, filed exceptions to the account of 1904 whereby she excepted to the payments by the trustees to Clara J. Cook for her legacy out of the *corpus* of the estate, amounting in all to the sum of $3,700. After hearing thereon the court made its decree on or about December 9, 1914, whereby it decreed that the said exceptions submitted be allowed, and the trustees under the will of the testator were charged with the said sum of $3,700. as a portion of the *corpus* and principal of said estate. (Case, p. 90.)

On December 18, 1914, George H. Lambert as surviving trustee under the will of George G. Hardy, filed his account as above mentioned, and thereupon this respondent, Chasie L. Phillips, filed exceptions thereto, wherein she again excepted to the payments made to Clara J. Cook for her legacy out of the *corpus* of the estate, and wherein she claimed that the said payments should have been charged against income and not against principal (case, p. 93). Thereafter, the Orphans Court, on April 9, 1915, made its decree adjudging that the exceptions should be allowed and that the accountant should stand charged with the additional sum of $700. as a portion of the *corpus* of the estate (case, p. 95).

The appeals taken heretofore to the Prerogative Court challenged the validity of the decrees made by the Orphans Court on December 9, 1914, and

April 9, 1915. No appeal, as heretofore stated, has been taken from the decree of July 17, 1913, wherein and whereby it was first ordered and directed that the annuity to Clara J. Cook should have been charged against income.

Briefly then, the appellant called in question the propriety of the action of the Orphans Court in the opening of the decree made upon the trustees' first intermediate account in order to allow the respondent to except thereto; and further, the propriety of the action of said court in the allowance of the exceptions to the last account filed by the surviving trustee relative to the payment of the annuity.

Upon appeal from the above mentioned decrees of the Orphans Court to the Prerogative Court, on April 18th, 1916, a decree was made in the Prerogative Court affirming the said decrees of the Essex County Orphans Court. From the said decree of the Prerogative Court the appellant herein now appeals to this court.

Argument.

I. THE ANNUITY BEQUEATHED TO CLARA J. COOK UNDER THE FIFTH CLAUSE OF THE WILL OF GEORGE G. HARDY, DECEASED, SHOULD BE CHARGED TO INCOME AND NOT TO *CORPUS*.

This matter received consideration in the Orphans Court upon exceptions filed to the account of the trustees dated November 24, 1911. After argument the Court rendered its opinion which is set out in the printed case, pages 45 to 52 inclusive. Thereupon, and on July 17, 1913, a decree was entered, allowing the exceptions and directing the accountants to pay over into the *corpus* of the trust the sum paid thereout on account of the said annuity.

A copy of the decree is set out at length in the printed case, page 53.

From this decree relative to the status of this annuity no appeal has been taken and as hereinbefore stated counsel for the appellant admitted before the Orphans Court that the time had elapsed within which an appeal might be taken.

II. THE ESSEX COUNTY ORPHANS COURT HAD ~~NO~~ JURISDICTION TO OPEN THE INTERMEDIATE ACCOUNT OF THE TRUSTEES IN 1904.

On August 7, 1913, Chasie L. Phillips, as the sole heir at law and next of kin of Chastina A. Duren, one of the residuary beneficiaries under the will of the testator, filed her petition in the Orphans Court, wherein she prayed that the first and second accounts filed by the legal representatives might be opened and the petitioner permitted to except to so much thereof as charged the payment of annuity to *corpus* and not to income. After hearing thereon an order was entered on or about July 8, 1914, granting the prayer of the petition and opening the account and decree thereon to the end that the petitioner might except thereto.

Thereafter on July 9, 1914, specific exceptions were filed to this account of 1904 and these exceptions are set out at length on page 89 of the printed case. Further hearing was had upon these exceptions as filed and thereafter and on December 9, 1914 the exceptions were allowed and the trustees were charged with the sum of $3,700, as a portion of the *corpus* of the estate.

The appellant here, George H. Lambert, executor of the estate of Charlotte C. Hardy, on or about June 10, 1915, appealed from the last mentioned decree.

The question of the jurisdiction of the Orphans Court to open the account of 1904 was thoroughly considered and the jurisdiction of the Court sustained in the opinion filed by the Court below, which is set out at length on pages 58 to 72 of the printed case. A considerable part of the opinion deals with the question of the rights of the petitioner to have the first account of the executors opened. On this subject the Court decided against the application of the petitioner, so that the only question under consideration here is the propriety of the opening of the account of 1904.

The account of 1904 was practically the first account of the legal representatives as trustees and, necessarily, an intermediate account. In considering the powers of the Court at the time the said account was allowed reference must be had to the provisions of the Orphans Court Act of that date.

When this second account of March, 1904, was filed and the decree of April 9, 1904, was made thereon, the provisions of the Orphans Court Act of 1898 as originally enacted were in full force and effect.

We find the subject of intermediate accounts dealt with in Section 124 from which we quote the following:

> "Sec. 124. The intermediate account of either executor * * * or trustee after the same has been audited and stated by the Surrogate and reported to the Orphans Court and notice given to or citations served on the parties in interest as aforesaid, shall be examined by the court and, being found to be properly and fairly stated and the articles thereof to be supported and justified by the vouchers, *shall be entered of record;* and if any article of such accounts be at any time afterwards excepted to by *cestui que trust* or his representa-

tives, or other party interested, it shall be encumbent upon him to prove or show the falsity or injustice thereof unless notice on his behalf shall have been given at the time of passing the account that such article would be excepted to and a memorandum of that notice shall have been entered on the record or desire to be entered."

At the time that the decree on the second account was entered Section 126 of the Orphans Court Act provided that upon final account of any executor, administrator, guardian or trustee any person interested might appear and make exceptions to the said account.

Since the entry of this decree changes have been made by statute relative to matters of accounting. Consequently, it is essential to keep carefully in mind the statute in effect when this account and decree were entered.

It will be observed that Section 124 of the Orphans Court Act of 1898 provided that an intermediate account of executor or trustee after it had been audited and stated and reported to the Court shall be entered of record. By reference to the decree actually entered on April 9, 1904 (case, p. 38) it will be observed that the Court decreed "that the said account be entered of record." Now the rights of the parties interested with respect to this account is further considered in the statute wherein it is provided that if any article be at any time afterwards excepted to it shall be incumbent upon the exceptant to prove or show falsity and injustice thereof, unless notice, &c., shall have been given.

The accounting of 1904 is an intermediate account and it is to be taken only as *prima facie* correct; *Davis* v. *Combs,* 38 N. J. Eq., 473; 39 N. J. Eq., 336; *Pyatt* v. *Pyatt,* 44 N. J. Eq., 491.

It is abundantly established that an intermediate account may be corrected in a later account; see *Dey* v. *Codman,* 12 Stewart, 258; *Griggs* v. *Shaw,* 15 Stewart, 631; *Lyddel* v. *McVickar,* 6 Hal., 44; *Jackson* v. *Reynolds,* 12 Stew., 313.

It is equally well established that the Court has power to correct a mistake of law as well as a mistake of fact (see *Lyddel* v. *McVickar,* 6 Hal., 44).

The Court below properly held that the account of 1904 was an intermediate account and that it bars nothing and simply becomes *prima facie* correct.

The 124th Section of the Orphans Court Act simply required the party interested to show the falsity or injustice thereof. This we respectfully insist had amply been shown by reference to the decision or determination of the Orphans Court relative to the status of this annuity. It was immediately upon the determination of the Court of the error in the second trustee account that this respondent made application to the Court to open the former accounts to correct this same error and reference to this action of the Court was made by the petitioner in her petition. In other words, the falsity and injustice of this intermediate account had been thoroughly established so that no other course was left open to the Court but to grant the petitioner the relief for which she prayed.

Upon opening of the account the appellant here urged the same objections against the exceptions as he had practically urged against the opening of the account itself.

The appellant here urges that objections to the account of 1904 should have been made at the time the exceptions were filed to the account of 1911.

This subject received consideration of the Court below and we quote from the opinion as follows (case, p. 72):

> "The intermediate account of 1904 may be opened on the final account under the Act of 1898 before the amendment of 1905. Under the circumstances it makes no difference whether the account of the trustees is opened now or upon the coming in of the final account."

This subject received consideration in the case of *Jackson* v. *Reynolds,* 39 N. J. Eq., 313. In the course of the opinion it is stated as follows:

> "Regarding the method of procedure adopted in the present case it may be said that probably the better practice in dealing with a partial account in which an error is alleged to have existed is to attack it directly by a rule to set it aside in respect to the matter complained of. This has the advantage of directness and in bringing into court parties who may have been interested in the first, but have no interest in the last account."

It would seem, then, from the observations of the court in this case that the preferable way of dealing with partial accounts and intermediate accounts is to attack them directly.

Further, referring to the procedure in such cases the observations of the court in the Morris case, 65 N. J. Eq. 699, is important. In the course of the opinion, the court says:

> "The application to open these accounts which were so settled without objection has been put, in this aspect of the case, upon the ground of mistake therein. Such ground, when established by competent and sufficient proof to the satisfaction of the Orphans Court, justifies that court in opening any account passed and allowed by it, for resettlement,

under the provisions of the last clause of Section 127 of the Orphans Court Act of 1898."

In the last case cited application was made to open accounts the earliest of which had been allowed nearly seventeen years and the latest of which had been allowed nearly three years before the application was made. In the said last mentioned case the executors by their answer admitted the omission from the account of certain items and asserted that the omissions were the result of mere inadvertence and mistake. Thereupon the court observes,

"Upon such charge and such admission the case provided for by the statute manifestly was established."

From the above citations it will appear that the exceptant might attack the intermediate accounts separately or wait until the final account was presented and except to all the accountings at that time. In other words there is no provision of the statute which requires the respondent herein to except to the second account at the time the exceptions were filed to the third account. Each of these accountings was an intermediate account which as indicated by the decision above mentioned could best be dealt with separately or which the respondent could have attacked upon the final accounting of the trustees.

III. THE RESPONDENT HEREIN WAS NOT BARRED ON THE GROUND OF LACHES.

The appellant herein contends that the respondent was estopped from excepting to the action of the trustees.

In answer to this it should be urged that the rights of this exceptant in the premises are to be determined by the provisions of the Orphans

Court Act and the decisions of this State. The rights of the exceptant were well known to the accountants or should have been. There has been no evidence presented which could possibly estop this exceptant from proceeding to attack the accounts. In fact, nothing short of an absolute release could have such an effect.

In search for further objections to the respondent's rights the appellant herein adverts to the subject of assent or acquiescence. The appellant also insists that the respondent here was bound by the acts of her mother.

It is true that Mrs. Phillips is the representative of her mother and is the person designated by the testator by the use of such terms, but we respectfully insist that there was no privacy of estate between the mother and daughter. By reference to the eighth paragraph of the will of the testator it appears that he gave his residuary estate to his wife for her use during her natural life and at her decease the same was to go to his two sisters named in equal shares and then it is provided as follows:

> "Should either be then deceased the representatives of such deceased sister to take her share."

Clearly then the two sisters had only a contingent remainder and would become vested with an estate in possession only in case they survived Mrs. Hardy, the wife of the testator. The representatives of the deceased sisters take not through their parents but take directly under the will of the testator as the substituted beneficiaries.

In view of this fact it appears more and more appropriate to attack these intermediate accounts directly as was suggested by the Court of Errors and Appeals. If Mrs. Duren manifested any acquiescence in or gave her consent to any course

of procedure during her life time it could not and would not be binding in any way upon her daughter, Mrs. Phillips.

The appellant here has made reference to certain communications by letter between Mr. Qua and George H. Lambert, which are referred to in the stipulation (p. 74) and which are set out in the printed case, pages 76 to 81 inclusive. Much is made with respect to the letter from Mr. Qua to Mr. Lambert under date of July 21, 1894, soon after the death of the testator wherein certain tentative suggestions of the sale of the interests of the residuary beneficiaries was mentioned. It is respectfully insisted, however, that nothing stated in such a communication could be binding in any way upon the respondent herein. It will appear from the communication that Mr. Qua represented only Mrs. Duren and Mrs. Cook and the whole communication simply deals with a tentative suggestion of settlement. Certainly nothing contained therein could have any binding effect upon Mrs. Phillips, because of the want of any privity between her and her mother in this matter, if nothing more.

Lastly, we would respectfully insist that it was incumbent upon the executors and trustees to take such proceedings as were necessary to protect themselves in the administration of the estate of the testator. It was incumbent upon them to distribute his estate according to law and the will of the testator. Had they any doubts with respect to their duties under the will it was their privilege and in fact their duty to file a bill in equity for the construction of the will in any respect as to which their duties thereunder were not clear. Instead of the beneficiaries under the will being in *laches* or being estopped to assert their rights, the executors and trustees are themselves in *laches* in

failing to take advantage of the opportunities opened to them to secure the aid of the court in the administration of the estate. This should have been done at a time when no embarrassment would have ensued to any one; but it is inequitable now for the executors and trustees to impose a loss on the ultimate beneficiaries by reason of their failure to take such course as would have secured them, as well as the beneficiaries interested under their trust.

IV. THE DECREES OF THE ORPHANS COURT AND OF THE PREROGATIVE COURT SHOULD BE AFFIRMED.

The appellant herein has appealed also from the decree of the Orphans Court of April 9, 1915, which decreed that the exceptions submitted by the respondent to the account of George H. Lambert as surviving executor and trustee be allowed and charged the trustees with the additional sum of $700. as a portion of the *corpus* of the trust fund. The appellant here urges the same objections to this decree and the action of the court, as he alleged against the allowance of the exceptions to the intermediate account of 1904, consequently it will be unnecessary to do more than refer to the argument under the preceding headings.

Finally the respondent respectfully insists that the decrees of the Orphans Court and of the Prerogative Court should be affirmed with costs.

LUM, TAMBLYN & COLYER,
Proctors for Respondent.

RALPH E. LUM,
EGBERT J. TAMBLYN,
Of Counsel.

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NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, Deceased.	On Appeal from Decrees of Essex County Orphans' Court dated December 9, 1914; and April 9, 1915.

DECREE OF AFFIRMANCE.

Filed April 20, 1916.

This matter coming on to be heard before the court on appeal from a decree made on the ninth day of December, nineteen hundred and fourteen, in the Essex County Orphans' Court, and a further decree made in said court on the ninth day of April, nineteen hundred and fifteen, in the presence of Charles H. Stewart, Esquire, proctor for George H. Lambert, Executor of the Estate of Charlotte C. Hardy, the appellant, and Alfred F. Skinner of counsel, and Ralph E. Lum, Esquire, and Egbert J. Tamblyn, Esquire, of counsel with the respondent, Chasie L. Phillips, and the arguments of counsel having been heard and considered, and it appearing to the court that the said decrees of the Essex County Orphans' Court should be affirmed.

It is on this 18th day of April, A. D. nineteen hundred and sixteen, by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, ordered, adjudged and decreed, and the said ordinary doth by virtue of the power and authority of this court hereby order, adjudge and decree that the said decrees heretofore made on the ninth day of December, nineteen hundred and fourteen, and the

ninth day of April, ninteen hundred and fifteen, in the Essex County Orphans' Court on exceptions to the trustee's first intermediate account, and on exceptions to the third intermediate account of trustee, which are appealed from by the said appellant, be and the same are hereby in all things affirmed with costs of appeal to be paid out of the funds to be added to the corpus of the estate, and that the petitions of appeal be dismissed.

And it is further ordered, adjudged and decreed that there be allowed to Ralph E. Lum, Esquire, of counsel with the respondent, a counsel fee of three hundred and fifty 00/100 dollars, and to Charles H. Stewart and Alfred F. Skinner, of counsel with the appellant, a counsel fee of two hundred and fifty dollars, said counsel fees to be paid out of said funds, to be added to the corpus of the estate.

And it is further ordered that the record and proceedings be remitted to the Essex County Orphans' Court to the end that this decree may be carried into execution.

Respectfully advised.

JOHN E. FOSTER,
V. C.

E. R. WALKER,
Ordinary.

I hereby consent to the entry of the above order.

CHARLES H. STEWART,
Proctor for the Appellant.

Filed April 20, 1916..

THOMAS F. MARTIN,
Register.

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, Deceased.	On Appeal to the Court of Errors and Appeals.

NOTICE OF APPEAL.

Filed May 17, 1916.

George H. Lambert, executor under the last will and testament of Charlotte C. Hardy, deceased, hereby appeals to the Court of Errors and Appeals of New Jersey, from the decree entered herein on the 18th day of April, 1916, from so much thereof as orders, adjudges and decrees that the decrees heretofore made on the 9th day of December, 1914, and the 9th day of April, 1915, in the Essex County Orphans' Court on exceptions to the trustees first intermediate account, and on exceptions to the third intermediate account, be in all things affirmed, and that the petitions of appeal be dismissed, with costs of appeal to be paid out of the funds to be added to the corpus of the estate.

Dated May 15, 1916.

CHARLES H. STEWART,
Proctor for George H. Lambert, Executor under the Last Will and Testament of Charlotte C. Hardy, Deceased.

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

CHARLES H. STEWART,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, Deceased.	On Appeal to the Court of Errors and Appeals.

PETITION OF APPEAL.

Filed May 29, 1916.

To the Court of Errors and Appeals of Last Resort in all Cases:

The petition of George H. Lambert, Executor under the last will and testament of Charlotte C. Hardy, deceased, of the City of Newark, County of Essex and State of New Jersey, the appellant in the above stated cause, respectfully shows:

That your petitioner finds himself aggrieved by a decree made by the Ordinary in the Prerogative Court, dated the 18th day of April, 1916, in the matter of the estate of George G. Hardy, deceased, in that the said decree orders, adjudges and decrees that the decrees heretofore made on the 9th day of December, 1914, and the 9th day of April, 1915, by the Essex County Orphans' Court on exceptions to the Trustees' first intermediate account, and on exceptions to the Trustees' third intermedi-

ate account, be in all things affirmed, and that the petitions of appeal be dismissed, with costs of appeal to be paid out of the funds to be added to the corpus of the estate.

And your petitioner appeals from that part of said decree, as above recited, upon the ground that the same is erroneous for that it affirms the decrees of the Orphans' Court of the County of Essex heretofore made on the 9th day of December, 1914, and the 9th day of April, 1915, on exceptions to the trustees' first intermediate account, and on exceptions to the trustees' third intermediate account, which said decrees, respectively, ordered, adjudged and decreed:

1. (Decree of December 9, 1914) That the exceptions submitted by the exceptant, Chasie L. Phillips, be allowed, and that the sum of $3,700 should be restored to the corpus and principal of the said estate of George G. Hardy, and that Charlotte C. Hardy, and George H. Lambert, trustees under the said will of George G. Hardy, deceased, be charged with the sum of $3,700 as the portion of the corpus and principal of the trust fund of said estate which has been paid out of said fund to Clara J. Cook.

2. (Decree of April 9, 1915) That the exceptions submitted by the exceptant, Chasie L. Phillips, be allowed, and that this appellant stand charged with the additional sum of $700 as a portion of the corpus of the trust fund with which he charged himself, and that this appellant stand charged with the sum of $7,500 in addition to the balance shown on the account mentioned in the decree of the Essex County Orphans' Court bearing date the 9th day of April, 1915.

3. And upon the further ground that the costs of the appeal should have been ordered paid out of the general corpus of the estate, and not out of the particular funds to be added to the estate as in said decree directed.

He therefore prays that the said decree may be in all the particulars aforesaid reversed, set aside, and for nothing holden, and that he may have such relief as may be just.

CHARLES H. STEWART,

Proctor and Counsel for George H. Lambert, Executor under the Last Will and Testament of Charlotte C. Hardy, Deceased.

NEW JERSEY COURT OF ERRORS AND APPEALS.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, Deceased.

BETWEEN

GEORGE H. LAMBERT, Executor, &c., of Charlotte C. Hardy, Deceased,
Appellant,
and
CHASIE L. PHILLIPS,
Respondent.

ANSWER TO PETITION OF APPEAL.

Filed May 28, 1916.

The answer of the above named respondent to the petition of appeal of the above named appellant.

This respondent not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on the eighteenth day of April, nineteen hundred and sixteen, made and entered in the Prerogative Court, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the form and substance thereof this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said decree is agreeable to equity and she prays that the same may be affirmed with costs to be adjudged to this respondent.

LUM, TAMBLYN & COLYER,
Solicitor for and of Counsel with Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Estate of George G. Hardy, Deceased.		On Appeal.

ACKNOWLEDGMENT OF SERVICE.

Acknowledgment of service of the petition of appeal filed in the above entitled matter in the above entitled court is hereby acknowledged this 26th day of May, 1916.

LUM, TAMBLYN & COLYER,

Proctors of Appellee.

Probated August 23, 1892.

In the name of God, Amen, I, George G. Hardy, of the City of Newark, Essex County, New Jersey, being of sound mind, memory and understanding, do make and publish this my last will and testament, in manner following, that is to say:

First. I order and direct my executors to pay all my just debts and funeral expenses as soon as conveniently can be after my decease.

Second. I give and bequeath to the Mount Pleasant Cemetery Company the sum of two hundred dollars, in trust, nevertheless to be invested by said company and the income to be derived therefrom to be used for the keeping in repair and order of the lot in said cemetery belonging to me.

Third. I give and bequeath to my sister, Chastina A. Duren, wife of Edwin Duren, of Lowell, Massachusetts, the sum of two thousand dollars, and in case my said sister shall die before me, then I give and bequeath said sum of two thousand dollars to her daughter, Chasie L. Fox, and if both my said sister and her said daughter shall die before me, then the said legacy to lapse and become a part of the residue of my estate.

Fourth. I give and bequeath my gold watch and chain to my brother-in-law, Edwin Duren.

Fifth. I direct my executors to pay to my sister, Clara J. Cook, the sum of four hundred dollars annually in equal quarterly payments on the first day of the months of January, April, July and October, respectively in each year, the said payments not to commence until one year after my decease and to continue during the lifetime of my wife and

no longer, and if my said sister shall not be living at the time of my decease, then I direct my executors to pay said sums at the times aforesaid, to her daughter, Lillian L. Cook.

In case my wife shall die before my said sister or her said daughter shall have received the sum of one thousand dollars in annuities, then I direct that a sum equal to the difference between the total annuities paid and the sum of one thousand dollars be paid to my said sister if she be then living, and if not then to her said daughter, and in case my said sister shall die after me and before my said wife then I direct said annuities to be paid to said Lillian L. Cook until the decease of my wife.

In case both my said sister and her said daughter shall die before me then the above legacies to lapse and go into the residue of my estate.

Sixth. I give and bequeath the sum of four thousand five hundred dollars to the Young Men's Christian Association of Newark, N. J., same to be paid at the decease of my said wife.

Seventh. I give and bequeath the sum of five hundred dollars to the Women's Christian Association of Newark, New Jersey, for the benefit of the Home for Incurables, the same to be paid at the decease of my said wife.

Eighth. All the residue of my estate, real and personal, I give, bequeath and devise to my wife, Charlotte C. Hardy, for her use for and during the term of her natural life, and at her decease, any and all of my estate then remaining to go to my said sisters, Chastina A. Duren and Clara J. Cook, in equal shares, and should either be then deceased, the representatives of such deceased sister to take her share.

Ninth. I appoint my wife, Charlotte C. Hardy, and George H. Lambert executors of this my last will and testament and empower them to sell or mortgage any or all of my said estate in their discretion or at the request of my said wife.

In testimony whereof, I have hereto set my hand and seal this twenty-seventh day of May, A. D. eighteen hundred and ninety-two.

GEORGE G. HARDY. (L. S.)

Signed, sealed, published and declared by the said George G. Hardy, the testator, to be his last will and testament in our presence, who in his presence and at his request, and in the presence of each other have hereunto subscribed our names as witnesses.

The words "four thousand" interlined in sixth item before signing.

FRANCES B. STEWART,
60 Sherman Ave., Newark, N. J.

JOSEPH K. FRANKS,
765 Broad St., Newark, N. J.

(Filed Oct. 23, 1894.)

The account of Charlotte C. Hardy and George H. Lambert, executors of George G. Hardy, deceased, as well of and for the estate which has come to their hands to be administered as for their payments and disbursements out of the same.

Dr.

These accountants charge themselves—

1892			
Sept.	16	To the amount of inventory and appraisement	$ 58,230.53
Aug.	3	To amt. recd. from Wm. R. Honeyman, a/c agmt	9.54
Aug.	31	To amt. recd. from Clara A. Stevens, a/c agmt	1.07
Sept.	6	To amt. recd. from Wm. R. Honeyman, a/c agmt	8.54
Sept.	30	To amt. recd. from Clara A. Stevens, a/c agmt	9.29
Oct.	5	To amt. recd. from Wm. R. Honeyman, a/c agmt	9.62
Oct.	25	To amt. recd. from Clara A. Stevens, a/c agmt	11.12
Nov.	2	To amt. recd. from Wm. R. Honeyman, a/c agmt	210.70

Nov.	29	To amt. recd. from Clara A. Stevens, a/c agmt.....	7.98
Dec.	5	To amt. recd. from Wm. R. Honeyman, a/c agmt.....	9.80
Dec.	29	To amt. recd. from Clara A. Stevens, a/c agmt.....	9.44
1893			
Jan.	1	To amt. recd. from Wm. R. Honeyman, a/c agmt.....	11.70
Jan.	31	To amt. recd. from Clara A. Stevens, a/c agmt.....	9.13
Feb.	1	To amt. recd. from Wm. R. Honeyman, a/c agmt.....	10.84
Feb.	28	To amt. recd. from Clara A. Stevens, a/c agmt.....	10.23
Mar.	1	To amt. recd. from Wm. R. Honeyman, a/c agmt.....	10.88
Mar.	31	To amt. recd. from Clara A. Stevens, a/c agmt.....	8.54
April	12	To amt. recd. from Wm. R. Honeyman, a/c agmt.....	7.62
April	22	To amt. recd. from Clara A. Stevens, a/c agmt.....	12.38
May	3	To act. recd. from Wm. R. Honeyman, a/c agmt.....	13.68
May	17	To amt. recd. from Clara A. Stevens, a/c agmt.....	11.40
Carried forward			$58,623.03

Amount brought forward			$58,623.03
June	13	To amt. recd. from Wm. R. Honeyman, a/c agmt	8.06
June	29	To amt. recd. from Clara A. Stevens, a/c agmt	5.64
July	3	To amt. recd. from Wm. R. Honeyman, a/c agmt	14.06
July	29	To amt. recd. from Clara A. Stevens, a/c agmt	9.78
Sept.	14	To amt. recd. from Wm. R. Honeyman, a/c agmt	15.91
Oct.	11	To amt. recd. from Clara A. Stevens, a/c agmt	10.91
Nov.	10	To amt. recd. from Clara A. Stevens, a/c agmt	10.28
Dec.	7	To amt. recd. from Clara A. Stevens, a/c agmt	11.00
1894			
Jan.	12	To amt. recd. from Clara A. Stevens, a/c agmt	8.40
Feb.	23	To amt. recd. from Clara A. Stevens, a/c agmt	6.47
Mar.	30	To amt. recd. from Clara A. Stevens, a/c agmt	7.83
May	11	To amt. recd. from Clara A. Stevens, a/c agmt	16.12
June	16	To amt. recd. from Clara A. Stevens, a/c agmt	8.77
			$58,756.26

To Income from Estate.

1892			
July	26	Int. from Mary J. Hartung	$1.10
July	30	Rent from 21 Elliot St.	20.00
Aug.	1	Int. from Thomas Smith	9.80
Aug.	3	Int. from Wm. R. Honeyman	10.46
Aug.	5	Rent from A. E. Phaneuf	25.00
Aug.	5	Rent from Duke St., Kearny	14.00
Aug.	10	Rent from John St., Kearny	13.00
Aug.	17	Rent from John H. Paulding	13.00
Aug.	17	Rent from Mrs. M. Tunison	12.00
Aug.	24	Rent from 21 Elliot St.	22.00
Aug.	25	Rent from 142 Sylvan Ave.	18.00
Aug.	31	Int. from Clara A. Stevens	18.93
Sept.	6	Int. from Joseph Oliver	10.19
Sept.	6	Int. from Wm. R. Honeyman	11.46
Sept.	7	Int. from Wm. Rarick	10.85
Sept.	9	Rent from 30 S. 14th St.	9.00
Sept.	10	Int. from Rich & Isabella Brettor	2.07
Sept.	12	Rent from A. E. Phaneuf	25.00
Sept.	13	Int. from Wm. M. Smith	4.00
Sept.	19	Int. from Wm. A. Fairservice	7.88
Sept.	19	Rent from John H. Paulding	13.00
Sept.	21	Rent from John St., Kearny	13.00
Sept.	21	Rent from Duke St., Kearny	14.00
Sept.	28	Rent from 21 Elliot St.	22.00
Sept.	28	Rent from 142 Sylvan Ave.	18.00
Sept.	30	Int. from Clara A. Stevens	10.71
Oct.	1	Int. from Nth. End Club Stock	4.00
Carried forward			$352.45

	Brought forward			$352.45
	Oct.	3	Int. from Rapid Transit Railway Co.	50.00
	Oct.	5	Int. from Wm. R. Honeyman	10.38
	Oct.	10	Rent from A. E. Phaneuf	25.00
	Oct.	10	Rent from John H. Paulding	13.00
	Oct.	17	Int. from Saml. & Delia Van Duyne	14.86
10	Oct.	19	Int. from Emma F. Smyth	3.30
	Oct.	25	Rent from John St., Kearny	13.00
	Oct.	25	Int. from Clara A. Stevens	8.88
	Oct.	25	Rent from Duke St., Kearny	14.00
	Oct.	28	Rent from 21 Elliot St	22.00
	Oct.	28	Rent from 142 Sylvan Ave	18.00
	Oct.	31	Int. from Saml. & Sophia Crooks	27.62
	Nov.	2	Int. from Wm. R. Honeyman	9.30
	Nov.	10	Rent from N. E. Phaneuf	25.00
20	Nov.	15	Rent from 30 S. 14th St	12.00
	Nov.	15	Rent from John H. Paulding	13.00
	Nov.	15	Rent from 142 Sylvan Ave	9.00
	Nov.	17	Int. from Chas. S. Tunnell	3.01
	Nov.	22	Int. from Henry Smith	29.73
	Nov.	25	Rent from Duke St., Kearny	14.00
	Nov.	25	Rent from John St., Kearny	13.00
	Nov.	26	Int. from Moses James	16.67
	Nov.	28	Int. from Chas. W. Hatfield	2.13
30	Nov.	28	Int. from Catherine Doland (McWatters)	23.44
	Nov.	29	Int. from Clara A. Stevens	12.02
	Nov.	29	Int. from Mary McCormack	11.45
	Dec.	1	Int. from Robert L. Smith	17.16
	Dec.	1	Int. from Edgar P. Harrison (Davis Mtgs)	65.00
	Carried forward			$848.40
40				

Brought forward			$848.40
Dec.	1	Int. from Lucy A. Tallhurst	25.50
Dec.	1	Rent from 21 Elliot St	20.00
Dec.	5	Int. from Elizabeth Keller (Pain mtg.)	36.67
Dec.	5	Int. from Wm. R. Honeyman	10.20
Dec.	7	Rent from A. E. Phaneuf	25.00
Dec.	8	Rent from Duke St., Kearny	14.00
Dec.	8	Rent from John St., Kearny	13.00
Dec.	10	Int. from Thomas McWatters	28.40
Dec.	12	Int. from Rich and Isabella Brettor	7.95
Dec.	14	Rent from John H. Paulding	13.00
Dec.	14	Rent from 30 S. 14th St	12.00
Dec.	20	Int. from Henry Smith	48.30
Dec.	29	Int. from Clara A. Stevens	10.56
1893			
Jan.	1	Rent from 21 Elliot St	20.00
Jan.	1	Int. from Wm. R. Honeyman	8.30
Jan.	7	Int. from Chas. L. Zeliff	35.62
Jan.	9	Rent from A. E. Phaneuf	25.00
Jan.	14	Rent from John H. Paulding	13.00
Jan.	18	Rent from 30 S. 14th St	12.00
Jan.	18	Int. from Emma M. Richardson (Pain Mtg.)	36.67
Jan.	19	Int. from George Readding	11.24
Jan.	26	Int. from Mary J. Hartung	33.00
Jan.	27	Rent from John St., Kearny	13.00
Jan.	31	Int. from Clara A. Stevens	10.87
Feb.	1	Int. from Wm. R. Honeyman	9.16
Feb.	3	Rent from A. E. Phaneuf	25.00
Feb.	11	Rent from 30 S. 14th St	12.00
Feb.	14	Rent from 21 Elliot St	20.00
Carried forward			$1,397.84

	Brought forward			$1,397.84
	Feb.	18	Rent from John H. Paulding	13.00
	Feb.	20	Rent from Duke St., Kearny	14.00
	Feb.	20	Rent from John St., Kearny	6.00
	Feb.	24	Dividend from Hardy Machine Co. stock	30.00
	Feb.	25	Int. from Joseph Oliver	39.00
	Feb.	28	Int. from Clara A. Stevens	9.77
10	Mar.	1	Int. from Wm. R. Honeyman	9.12
	Mar.	2	Rent from N. E. Phaneuf	25.00
	Mar.	2	Int. from Thomas Smith	42.00
	Mar.	6	Int. from Wm. Rarick	45.00
	Mar.	11	Int. from Rich and Isabella Brettor	16.37
	Mar.	11	Rent from John H. Paulding	13.00
	Mar.	16	Rent from John St., Kearny	12.00
	Mar.	16	Rent from Duke St., Kearny	14.00
20	Mar.	19	Int. from Wm. A. Fairservice	31.87
	Mar.	21	Rent from 21 Elliot St	20.00
	Mar.	25	Rent from 30 S. 14th St	12.00
	Mar.	29	Int. from Chas. C. Hodge	15.00
	Mar.	31	Int. from Clara A. Stevens	11.46
	April	1	Rent from 142 Sylvan Ave	18.00
	April	1	Int. from Nth End Club Stock	10.00
	April	1	Int. from Rapid Transit Railway Co	50.00
30	April	11	Rent from N. E. Phaneuf	25.00
	April	12	Rent from John St., Kearny	8.00
	April	12	Int. from Wm. R. Honeyman	12.38
	April	12	Rent from Duke St., Kearny	14.00
	April	12	Interest from E. L. Stivers (Pain Mtg.)	33.33
	April	17	Int. from Delia Van Duyne	28.02
	Carried forward			$1,975.16
40				

Brought forward			$1,975.16
April	19	Int. from Emma F. Smyth	6.60
April	22	Rent from 21 Elliot St	20.00
April	22	Int. from Clara A. Stevens	7.62
April	23	Int. from Henry Doht	33.00
April	28	Rent from 30 S. 14th St	12.00
April	28	Rent from John St., Kearny	13.00
May	1	Int. from Saml. & Sophia Crooks	48.75
May	2	Int. from Moses James	20.83
May	3	Int. from Wm. R. Honeyman	6.32
May	3	Int. from Mr. Bernard (Pain Mtg.)	50.00
May	4	Rent from A. E. Phaneuf	27.50
May	6	Rent from 142 Sylvan Ave	18.00
May	8	Int. from Wm. M. Smith	37.50
May	11	Rent from John H. Paulding	13.00
May	17	Int. from Clara A. Stevens	8.60
May	22	Int. from Henry Smith	43.50
May	28	Int. from Chas. H. Hatfield	3.04
May	28	Int. from Catharine Doland (McWatters)	33.75
May	29	Int. from Mary McCormack	13.25
May	30	Rent from 21 Elliot St	20.00
May	30	Rent from 30 S. 14th St	12.00
May	30	Rent from John St., Kearny	13.00
June	1	Int. from Robt. S. Smith	23.40
June	1	Rent from John St., Kearny	13.00
June	1	Int. from Lucy A. Tallhurst	37.50
June	3	Rent from 142 Sylvan Ave	18.00
June	5	Rent from A. E. Phaneuf	27.50
June	7	Int. from Edgar P. Harrison (Davis Mtg.)	100.00
June	10	Int. from Chas. L. Zeliff	35.00
Carried forward			$2,690.52

	Brought forward			$2,690.52
	June	10	Int. from Thomas McWatters	36.25
	June	12	Rent from John Paulding	13.00
	June	13	Int. from Wm. R. Honeyman	11.97
	June	20	Int. from Henry Smith	54.00
	June	29	Int. from Clara A. Stevens	14.36
	June	30	Int. from 30 S. 14th St	12.00
10	July	8	Int. from N. E. Phaneuf	27.50
	July	8	Int. from Wm. R. Honeyman	5.96
	July	11	Rent from 21 Elliot St	20.00
	June	12	Rent from John H. Paulding	13.00
	June	15	Rent from 142 Sylvan Ave	18.00
	July	15	Int. from George Readding	12.54
	July	25	Rent from John St., Kearny	13.00
	July	25	Rent from Duke St., Kearny	14.00
20	July	29	Int. from Clara A. Stevens	10.22
	July	29	Int. from Mary J. Hartung	33.00
	July	29	Int. from Rich & Isabella Brettor	10.00
	July	31	Rent from 30 S. 14th St	12.00
	Aug.	1	Rent from Duke St., Kearny	12.00
	Aug.	5	Rent from A. E. Phaneuf	27.50
	Aug.	9	Rent from 21 Elliot St	20.00
30	Aug.	13	Rent from 142 Sylvan Ave	18.00
	Aug.	14	Rent from John H. Paulding	13.00
	Aug.	21	Rent from John St., Kearny	13.00
	Aug.	23	Int. from Sarah Melick	62.50
	Sept.	1	Int. from Thomas Smith	42.00
	Sept.	5	Rent from A. E. Phaneuf	27.50
	Sept.	6	Rent from 30 S. 14th St	12.00
40	Carried forward			$3,269.72

Brought forward			$3,269.72
Sept.	13	Rent from John W. Paulding	13.00
Sept.	14	Int. from Clara A. Stevens	4.09
Sept.	19	Int. from Wm. A. Fairservice	29.37
Sept.	21	Rent from Duke St., Kearny	12.00
Sept.	21	Rent from John St., Kearny	13.00
Sept.	27	Rent from 30 S. 14th St	12.00
Oct.	1	Int. from North End Club	10.00
Oct.	2	Dividend from Rapid Transit Rwy. Co.	50.00
Oct.	7	Rent from N. E. Phaneuf	27.50
Oct.	7	Rent from 142 Sylvan Ave	18.00
Oct.	7	Int. from Wm. Rarick	45.00
Oct.	11	Int. from Clara A. Stevens	9.09
Oct.	13	Int. from H. R. Goble	87.50
Oct.	13	Int. from John H. Paulding	13.00
Oct.	14	Int. from Delia Van Duyne	25.02
Oct.	14	Int. from Emma F. Smyth	6.60
Oct.	20	Rent from 30 S. 14th St	12.00
Oct.	23	Rent from Duke St., Kearny	7.00
Oct.	23	Rent from John St., Kearny	4.00
Nov.	3	Int. from Saml. & Sophia Crook	47.50
Nov.	6	Rent from A. E. Phaneuf	27.50
Nov.	10	Int. from Clara A. Stevens	9.72
Nov.	11	Rent from 142 Sylvan Ave	18.00
Nov.	14	Rent from 30 S. 14th St	12.00
Nov.	14	Rent from John H. Paulding	13.00
Nov.	15	Int. from Henry Smith	43.50
Nov.	28	Int. from Chas. W. Hatfield	3.40
Nov.	28	Rent from Duke St., Kearny	7.00
Carried forward			$3,849.51

	Brought forward			$3,849.51
	Nov.	28	Rent from John St., Kearny	14.00
	Nov.	28	Int. from Cathrine Doland	33.75
	Nov.	29	Int. from Mary McCormack	9.62
	Dec.	1	Int. from Robert L. Smith	23.40
	Dec.	1	Int. from Lucy A. Tallhurst	37.50
	Dec.	6	Rent from A. E. Phaneuf	27.50
	Dec.	7	Int. from Clara A. Stevens	9.00
10	Dec.	9	Rent from 142 Sylvan Ave	18.00
	Dec.	10	Int. from Lizzie R. Winterton	62.50
	Dec.	10	Int. from Thos. McWatters	36.25
	Dec.	11	Rent from John H. Paulding	13.00
	Dec.	12	Rent from 30 S. 14th St	12.00
	Dec.	19	Rent from Duke St., Kearny	7.00
	Dec.	25	Int. from Henry Smith	54.00
	Dec.	29	Rent from 142 Sylvan Ave	18.00
	1894			
20	Jan.	2	Rent from A. E. Phaneuf	27.50
	Jan.	4	Int. from Wm. R. Honeyman	20.00
	Jan.	6	Int. from Chas. L. Zeliff	35.00
	Jan.	12	Int. from Clara L. Stevens	11.60
	Jan.	13	Rent from John H. Paulding	13.00
	Jan.	16	Rent from 30 S. 14th St	12.00
	Jan.	18	Rent from John St., Kearny	37.00
	Jan.	19	Int. from E. P. Harrison (Davis Mtg.)	50.00
30	Jan.	19	Int. from Thos. L. Hanna (Davis Mtg.)	50.00
	Jan.	26	Int. from Mary J. Hartung	33.00
	Jan.	29	Rent from Duke St., Kearny	7.00
	Jan.	29	Rent from 142 Sylvan Ave	18.00
	Feb.	5	Rent from N. E. Phaneuf	27.50
	Feb.	12	Rent from John H. Paulding	13.00
	Feb.	19	Rent from 30 S. 14th St	12.00
40	Carried forward			$4,591.63

Brought forward			$4,591.63
Feb.	23	Int. from Sarah Melick	62.50
Feb.	23	Int. from Clara A. Stevens	13.53
Feb.	26	Rent from Duke St., Kearny	7.00
Feb.	29	Rent from 142 Sylvan Ave	18.00
Mar.	1	Rent from 30 S. 14th St	11.00
Mar.	2	Int. from Thomas Smith	42.00
Mar.	4	Rent from N. E. Phaneuf	27.50
Mar.	12	Rent from John H. Paulding	13.00
Mar.	14	Int. from Wm. R. Honeyman	20.00
Mar.	18	Int. from Duke St., Kearny	7.00
Mar.	19	Int. from Wm. A. Fairservice	26.87
Mar.	28	Int. from Harriet Rarick	45.00
Mar.	30	Rent from 142 Sylvan Ave	18.00
Mar.	30	Int. from Clara A. Stevens	12.17
April	1	Int. from North End Club	10.00
April	1	Int. from Emma F. Smyth	6.60
April	2	Rent from A. E. Phaneuf	27.50
April	3	Rent from H. R. Goble	87.50
April	5	Rent from Rapid Transit Rwy. Co.	50.00
April	12	Rent from John H. Paulding	13.00
April	12	Rent from 30 S. 12th St	11.00
April	14	Int. from Delia Van Duyne	25.02
April	18	Rent from Duke St., Kearny	7.00
April	30	Rent from 142 Sylvan Ave	18.00
April	30	Int. from Geo. Readding	12.54
May	1	Rent from Duke St., Kearny	7.00
May	1	Int. from Saml. & Sophia Crook	42.50
Carried forward			$5,232.86

	Brought forward			$5,232.86
	May	6	Rent from A. E. Phaneuf	27.50
	May	7	Rent from Duke St., Kearny	7.00
	May	9	Rent from 30 S. 14th St	11.00
	May	9	Rent from Wm. R. Honeyman	20.00
	May	10	Rent from Saml. Craig (Winterton Mtge.)	62.50
10	May	11	Rent from Clara A. Stevens	3.88
	May	12	Rent from John H. Paulding	13.00
	May	15	Int. from Henry Smith	43.00
	May	16	Int. from Thomas L. Hanna	50.00
	May	16	Int. from Edgar P. Harrison	50.00
	May	18	Int. from Henry Doht	33.00
	May	29	Int. from Mary McCormack	6.50
	May	30	Rent from 142 Sylvan Ave	18.00
20	June	1	Int. from Lucy A. Tallhurst	37.50
	June	2	Rent from Duke St., Kearny	7.00
	June	5	Rent from N. E. Phaneuf	27.50
	June	8	Rent from Duke St., Kearny	7.00
	June	10	Int. from Thos. McWatters	36.25
	June	13	Rent from John H. Paulding	13.00
	June	16	Int. from Clara A. Stevens	11.23
	June	25	Rent from 30 S. 14th St	11.00
30	July	7	Int. from Chas. L. Zeliff	32.50
	July	12	Rent from John H. Paulding	13.00
	July	31	Int. from Thos. L. Hanna	20.83
	July	31	Int. from Wm. R. Honeyman	40.00
	Aug.	5	Rent from A. E. Phaneuf	27.50
	Aug.	5	Int. from Robert Smith	6.00
	Sept.	8	Rent from A. E. Phaneuf	27.50
40	Carried forward			$5,896.05

Brought forward			$5,896.05
Sept. 14	Rent from John H. Paulding	26.00	
Sept. 17	Rent from 30 S. 14th St	22.00	
Sept. 19	Int. from Wm. A. Fairservice	26.87	
Sept. 20	Rent from Duke St., Kearny	25.40	
Sept. 22	Rent from 142 Sylvan Ave	29.00	
		$ 6,025.32	
	Corpus of Estate	58,756.26	
	Total		$ 64,781.58

Cr.

These accountants pray allowance—

1892				
	Sept.	9	Paid M. Issler, receiver taxes, 1892	$213.59
	Oct.	5	Paid Joshua Brierly, undertaker	284.00
10	Oct.	5	Paid Joshua Brierly, bill	10.00
	Oct.	5	Paid John B. Dusenberry, Surrogate	24.60
1893				
	Jan.	23	Paid Dr. C. M. Zeh, bill	34.00
	April	24	Paid S. J. Marshall, plumber for boiler, bathtub, etc., in Grant Ave. house, Kearny	185.00
20	June	9	Paid Wm. C. Bellis, carpenter improvements in house on Grant Ave., Kearny	49.23
	June	13	Paid Henry Dunnell, painting house on Grant Ave., Kearny	100.00
	Aug.	8	Paid Irving V. Dorland, treasurer, assessment for Belgrade drive improvement	93.35
30	Nov.	2	Paid Chastina A. Duren, legacy	2,000.00
	Dec.	18	Paid Irving V. Dorland, treasurer, assessment cutting through Duke St., Kearny	60.11
1894				
40	Jan.	2	Paid Clara J. Cook, legacy	200.00

April 2	Paid Clara J. Cook, legacy	100.00
April 16	Paid Albert Wolf, services assisting expert in examining books of Murphy Hardy Lumber Co	49.50
April 19	Paid W. G. Cullen, a/c services as expert	60.00
May 17	Paid W. G. Cullen, a/c services as expert	167.75
July 2	Paid Clara J. Cook, legacy	100.00
Sept. 27	Paid Bequest to Mt. Pleasant Cemetery Co	200.00
	Gold watch and chain delivered to Edward Duren and bequeathed to him appraised at	150.00
	Inventory and release	6.00
	Balance due on note of Patrick Doran, not collectable	45.00
	Bill of John B. Dusenberry, Surrogate, $1,468.91	75.38
	$58,756.26 (Prin.), 2½%, $6,025.32; (income) 5%, $301.27, Commissions of Executors	1,770.18
	Net income paid Charlotte C. Hardy	5,724.05
	Balance in hands of accountants	53,079.84
		$ 64,781.58

CHARLOTTE C. HARDY,

GEORGE H. LAMBERT,

Executors.

State of New Jersey,
County of Essex:

CHARLOTTE C. HARDY and GEORGE H. LAMBERT, the executors above named, being duly sworn upon their respective oaths, say that the above account is in all things just and true, both as to the charge and discharge thereof, according to the best of their memory and belief.

Sworn and subscribed before me this 29th day of Sept., A. D. 1894, at Newark, N. J.

Charlotte C. Hardy.
George H. Lambert.

JOSEPH K. FRANKS,
Mastery in Chancery
of New Jersey.

Securities in hands of Executors—

200 shares Murphy Hardy Lumber Co. stock valued at $100 each	$20,000.00	
Two bonds Rapid Transit Railway Co., $1,000 each, appraised at 105%	2,100.00	
Ten shares Hardy Machine Co. stock, valued at $30 each	300.00	
Four shares North End Club stock, valued at $100 each	400.00	10
Bond and mortgage made by Henry Smith, dated Nov. 22, 1884, for $1,500, 6%, on lands on John St., Kearny, N. J., balance due	1,450.00	
Bond and mortgage of Samuel and Sophia Crook, dated May 1, 1888, for $2,000, 5%, on lands in Clayton Ave., Harrison, N. J., balance due	1,700.00	20
Bond and mortgage of Catharine Doland, dated May 24, 1888, for $1,400, 5%, on lands on Fifth St., Harrison, N. J., balance due	1,350.00	
Bond and mortgage of Robert S. Smith, dated Dec. 1, 1887, for $950, 6%, on lands on John St., Kearny, N. J., balance due	780.00	
Bond and mortgage of Alexander Romaine, dated Sept. 1, 1887, for $700, 6%, on lands on John St., Kearny, N. J., now owned by Hannah Rarick, balance due	1,400.00	30
Bond and mortgage of Thomas Smith, dated Sept. 1, 1887, for $1,800, 6%, on lands on Clayton Ave., Kearny, N. J., balance due	1,400.00	
		40

Bond and mortgage of George Redding, dated July 1, 1885, on lands on Winthrop St., Newark, N. J.	419.33
Bond and mortgage of Mary McCormack, dated May 29, 1888, for $1,375, 5%, on lands on Walnut St., Kearny, N. J., balance due	260.00
Bond and mortgage of Henry Smith, dated June 30, 1888, for $2,000, 6%, on lands on John St., Kearny, N. J., balance due	1,800.00
Bond and mortgage of Mary J. Hartung, dated July 26, 1888, for $1,200, 6%, on lands on John St., Kearny, N. J., balance due	1,100.00
Carried forward	$34,459.33
Brought forward	$34,459.33
Bond and mortgage of Charles L. Zeliff, dated January 10, 1891, for $1,800, 5%, on lands on Sylvan Ave., Newark, N. J., balance due	1,300.00
Bond and mortgage of Thomas McWatters, dated June 10, 1891, on lands on Walnut St., Kearny, N. J., 5%	1,450.00
Bond and mortgage of Henry Doht, dated Oct. 23, 1891, on lands on Mt. Olivet Ave., Morpeth, Long Island, N. Y.	550.00
Bond and mortgage of Delia Van Duyne, dated Oct. 17, 1891, on lands on Walnut St., Kearny, N. J., 6%	834.00

Bond and mortgage of Emma F. Smyth, dated Oct. 19, 1891, on lands on Johnson Ave., Kearny, N. J., 6%	220.00
Bond and mortgage of William A. Fairservice, dated March 19, 1892, for $1,325, 6%, on lands on Johnson Ave., Kearny, N. J., balance due	1,075.00
Bond and mortgage of Joseph Davis, dated May 16, 1892, on lands on North Fifth St., Newark, N. J., 5% (now owned by Edgar P. Harrison)	2,000.00
Bond and mortgage of Lucy A. Tallhurst, dated June 1, 1892, on lands on Mill St., Belleville, N. J., 5%	1,500.00
Bond and mortgage of Sarah Melick, dated Feb. 23, 1893, on lands on Clifton Ave., Newark, N. J., 5%	2,500.00
Bond and mortgage of H. R. Goble, dated April 3, 1893, on lands on Plane St., Newark, N. J., 5%	3,000.00
Bond and mortgage of Lizzie R. Winterton, on property on North 15th St., East Orange, N. J., 5%	2,500.00
Household goods and furniture appraised at	446.00
Amount in Bank	1,245.51
Personal estate in hands of executors	$53,079.84

ESSEX COUNTY ORPHANS' COURT.

(Filed Oct. 23, 1894.)

September Term, A. D. 1894.

In the Matter of the Account of the Executors of George G. Hardy, deceased.

The Surrogate having audited and stated the account of Charlotte C. Hardy and George G. Lambert, executors of George G. Hardy, deceased, and placed the same on the files of his office, twenty days previous to Tuesday, the 23rd day of October, A. D. 1894, 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 this court that notice of their intention to settle the said account the 26th day of September, A. D., 1894, in this court was given by said accountant according to law, and the matter having been continued to this time, and the court having examined the said account and the vouchers and receipts for payments and disbursements claimed therein, and having found the same to be correct in all particulars, and no exceptions being made thereto.

It is on this 23rd day of October, A. D. 1894, ordered, adjudged and decreed that the said account be in all things allowed as reported and that there is a balance remaining in the hands of said accountant, amounting to the sum of $ to be disposed of according to law.

By the Court,

ANDREW KIRKPATRICK,
M. J. LEDWITH, Judges.

(Filed March 26, 1904.)

The account of Charlotte C. Hardy and George H. Lambert, trustees under the Will of George G. Hardy, deceased, as well of and for such and so much of the goods, chattels and estate of the said deceased as has come to their hands to be administered as for their payments and disbursements out of the same.

Dr.

These accountants charge themselves—

Balance of principal at last accounting	$53,079.84
Principal from other sources	6,385.02
	$59,464.86

Cr.

Per contra they pray allowance—

1894			
Oct.	2	Paid Clara J. Cook, legacy	$100.00
1895			
Jan.	2	Paid Clara J. Cook, legacy	100.00
April	1	Paid Clara J. Cook, legacy	100.00
July	1	Paid Clara J. Cook, legacy	100.00
Oct.	1	Paid Clara J. Cook, legacy	100.00
1896			
Jan.	2	Paid Clara J. Cook, legacy	100.00
April	1	Paid Clara J. Cook, legacy	100.00
July	1	Paid Clara J. Cook, legacy	100.00
Oct.	1	Paid Clara J. Cook, legacy	100.00

1897

Jan. 1 Paid Clara J. Cook, legacy..... 100.00
April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1898

Jan. 1 Paid Clara J. Cook, legacy..... 100.00
April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1899

April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1900

Jan. 1 Paid Clara J. Cook, legacy..... 100.00
April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1901

Jan. 1 Paid Clara J. Cook, legacy..... 100.00
April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1902

Jan. 1 Paid Clara J. Cook, legacy..... 100.00
April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1903

Jan. 1 Paid Clara J. Cook, legacy..... 100.00
April 1 Paid Clara J. Cook, legacy..... 100.00
July 1 Paid Clara J. Cook, legacy..... 100.00
Oct. 1 Paid Clara J. Cook, legacy..... 100.00

1904

Jan. 1 Paid Clara J. Cook, legacy..... 100.00

CHARLOTTE C. HARDY,
GEORGE H. LAMBERT,
Executors and Trustees.

Summary—

Balance of principal in hands of Executors on account of 1894.....	$53,079.84
Received principal from sale of land, etc.	6,385.02
Total	$59,464.86

CONTRA.

Disbursements	$14,832.09	
Costs on account.....	49.40	
Commission allowed by Court	1,189.30	
Balance in hands of acccountants to March 24, 1904....	43,394.04	
		$59,464.86

ESSEX COUNTY ORPHANS' COURT.

April Term, A. D. 1904.

(Filed April 9, 1904.)

In the Matter of the Intermediate Account of the Executors and Trustees of George G. Hardy, deceased. } *Decree.*

The Surrogate having audited and stated the intermediate account of Charlotte C. Hardy and George H. Lambert, executors and trustees under the Last Will and Testament of George G. Hardy, deceased, and placed the same on files of his office twenty days previous to the ninth day of April, A. D. 1904, and having on the aforesaid last day reported 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 on the said ninth day of April, A. D. 1904, in this court was given by said accountant according to law;

And the said account having been examined by the court and being found to be properly and fairly stated, and the articles thereof to be supported and justified by the vouchers.

It is, on this ninth day of April, A. D. 1904, by the Orphans' Court of the County of Essex, in the State of New Jersey, ordered, adjudged and decreed that the said account be entered of record.

It is further ordered that the said accountants be allowed the sum of $1,411.01 as and for their commissions on $28,220.30 of income collected by them, and a further allowance of two (2%) on corpus on account.

ALFRED F. SKINNER, *J.*

Filed November 24, 1911.

Account of Charlotte C. Hardy and George H. Lambert, Trustees under the Will of George G. Hardy, deceased, as well of and for such and so much of the goods, chattels and estate of the said deceased as has come to their hands and to be administered as for their payments and disbursements out of this same:

THESE ACCOUNTANTS CHARGE THEMSELVES:

1904.

May 23—

To balance of principal of estate at last accounting $43,394.07

Oct. 5—

To sale of premises No. 615 John St., Kearny, N. J., to Joanna Ward $1,500.00

Less commissions of agt...$37.50

Costs of Drawing Deed.... 10.00

—— 47.50

——— 1,452.50

1908.

Dec. 30—

To sale of premises No. 30 So. 14th St., Newark, N. J., under contract to Robert A. Gwaltney for $3,000.00

Less commissions of agt...$75.00

Costs of Drawing Deed and agreement 10.00

—— 85.00

——— 2,915.00

Carried forward..... $47,761.57

Brought forward $47,761.57

1909.

April 10—

To sale of premises No. 142 Sylvan Ave., Newark, N. J., to Edwin Greene and Annie M. Greene, under contract for.... $2,250.00

Less costs of surveys.....$16.00

Costs of Drawing Deed and Agreement 10.00

—— 26.00

2,224.00

Dec. 22—

To sale of premises No. 144 Sylvan Ave., Newark, N. J., to Peter Transue and Jennie M. Transue for..... $2,000.00

Less costs of Drawing Deed and Agreement 10.00

1,990.00

Total..... $51,975.57

PER CONTRA THEY PRAY ALLOWANCE:

1904.

April 1	Paid Clara J. Cook legacy.....	$	100.00
July 1	Paid Clara J. Cook legacy.....		100.00
Oct. 1	Paid Clara J. Cook legacy.....		100.00
Dec. 8.	Paid F. T. Johnson, Contr., Sylvan Ave. paving.....		270.00

1905.

Jan. 1	Paid Clara J. Cook legacy.....		100.00
April 1	Paid Clara J. Cook legacy.....		100.00
	Carried forward.....	$	770.00

	Brought forward	$	770.00
1905.			
June 5	Paid Est. Robert Fitzsimmons for repairing stone wall, 50 Clay St., Newark, N. J.		25.43
July 1	Paid Clara J. Cook legacy		100.00
Oct. 1	Paid Clara J. Cook legacy		100.00
1906.			
Jan. 1	Paid Clara J. Cook legacy		100.00
April 1	Paid Clara J. Cook legacy		100.00
July 1	Paid Clara J. Cook legacy		100.00
July 1	Paid J. H. Bacheller, comptr., sewer assessment on No. 30 South 14th St., Newark, N. J.		15.00
Oct. 1	Paid Clara J. Cook legacy		100.00
Dec. 29	Paid Clara J. Cook legacy		100.00
1907.			
Mar. 31	Paid Clara J. Cook legacy		100.00
July 1	Paid Clara J. Cook legacy		100.00
Oct. 1	Paid Clara J. Cook legacy		100.00
1908.			
Jan. 1	Paid Clara J. Cook legacy		100.00
Mar. 2	Paid Newark Blue Stone Co., for sidewalk on Sylvan Ave., Newark, N. J.		16.43
April 1	Paid Clara J. Cook legacy		100.00
June 29	Paid Clara J. Cook legacy		100.00
Oct. 1	Paid Clara J. Cook legacy		100.00
1909.			
Jan. 1	Paid Clara J. Cook legacy		100.00
April 1	Paid Clara J. Cook legacy		100.00
	Carried forward	$	2,426.86

	Brought forward	$2,426.86
July 1	Paid Clara J. Cook legacy	100.00
Oct. 1	Paid Clara J. Cook legacy	100.00
1910.		
Jan. 1	Paid Clara J. Cook legacy	100.00
April 1	Paid Clara J. Cook legacy	100.00
July 1	Paid Clara J. Cook legacy	100.00
Oct. 1	Paid Clara J. Cook legacy	100.00
1911.		
Jan. 1	Paid Clara J. Cook legacy	100.00
April 1	Paid Clara J. Cook legacy	100.00
July 1	Paid Clara J. Cook legacy	100.00
Oct. 1	Paid Clara J. Cook legacy	100.00
Balance in hands of accountants		48,548.71
		$51,975.57

CHARLOTTE C. HARDY,
GEORGE H. LAMBERT,
Trustees.

INCOME ACCOUNT.

April 1, 1904, to November 1, 1911, inclusive $19,115.30

Total net income has been paid to Mrs. Charlotte C. Hardy, as devisee.

CHARLOTTE C. HARDY,
GEORGE H. LAMBERT,
Trustees.

Securities in hands of Trustees:

Total amount of securities in hands of Trustees, $48,046.00.

CHARLOTTE C. HARDY,
GEORGE H. LAMBERT,
Trustees.

STATE OF NEW JERSEY,
ESSEX COUNTY, SS., SURROGATE'S OFFICE.

(Filed Dec. 28, 1911.)

In the matter of the account of the trustees under the will of George G. Hardy, deceased.	*Objections to Allowance of Account.*

And now comes Chasie L. Phillips, one of the beneficiaries under the said trusts, and objects to the allowance of the trustees' account filed in said matter on the 24th day of November, 1911, and for causes of objection says:

1. Said accountants charge themselves in the First Schedule of said account, wherein are contained their receipts and disbursements on account of the capital of said trust, with the sum of $51,975.57, and credit themselves with itemized payments, the total of which is $3,326.86, so that the balance in the hands of the accountants on the figures given by them should be $48,648.71 instead of $48,548.71.

2. Said accountants have failed to account for all of the principal belonging to said trust fund in that the sum of the items set forth in the last Schedule of said account entitled "securities in hands of trustees" is $48,046.00 instead of $48,648.71, as it should be if the items set forth in the First Schedule of said account are correct.

Wherefore the said Chasie L. Phillips prays the honorable court that said account be disallowed and that said accountants be ordered to charge themselves with the further sum of $602.71 belonging to the principal of said estate and to account therefor.

CHASIE L. PHILLIPS,
By her attorneys, F. W. and S. E. Qua.

STATE OF NEW JERSEY,

ESSEX COUNTY ORPHANS' COURT.

(Filed Jan. 11, 1912.)

In the matter of the account of CHARLOTTE C. HARDY and GEORGE H. LAMBERT, as trustees under the will of George G. Hardy, deceased.

Exceptions of Chasie L. Phillips to trustees' account dated November 24, 1911.

And now comes Chasie L. Phillips, one of the beneficiaries of said trust, and further excepts to the account of said trustees dated November 24, 1911, for that said trustees pray to be allowed out of the principal of said estate for payments on account of the annuity given to Clara J. Cook under the will of said deceased, whereas said Chasie L. Phillips claims that by the true construction of said will said annuity is payable out of the income of said trust estate and not out of principal.

CHASIE L. PHILLIPS,

By her attorneys, F. W. and S. E. Qua.

ESSEX COUNTY ORPHANS' COURT.

Filed June 27, 1913.

IN THE MATTER OF THE INTERMEDIATE ACCOUNTING OF CHARLOTTE C. HARDY AND GEORGE H. LAMBERT, AS TRUSTEES UNDER THE LAST WILL AND TESTAMENT OF GEORGE G. HARDY, *Deceased.*	On Exceptions to Account of Trustees.

Messrs. Lambert & Stewart (Hon. Alfred F. Skinner of counsel), proctors for accountant.

Lum, Tamblyn & Colyer (Ralph Lum of counsel), proctors for exceptant, Chasie L. Philips (Messrs. F. W. & S. E. Qua, of the Massachusetts Bar, of counsel).

MARTIN, J.: George G. Hardy, late of the City of Newark, died on the 18th day of July, 1892, leaving him surviving his widow, Charlotte C. Hardy, one of the accountants, and Chastina A. Duren and Clara J. Cook, his two sisters, the only next of kin. The last will and testament of George G. Hardy, which was duly probated by the Surrogate of Essex County, on the 23rd day of August, 1892, provides substantially as follows: (First) The executors are directed to pay all debts and funeral expenses; (Second) $200 is bequeathed to the Mt. Pleasant Cemetery in trust for the care of the cemetery lot; (Third) A legacy of $2,000 is bequeathed to his sister, Chastina A. Duren; (Fourth) A gold watch and chain are bequeathed to his brother-in-law, Edwin Duren; (Fifth) "I direct my executors to pay to my sister, Clara J. Cook, the

sum of $400 annually, in equal quarterly payments on the first of the month of January, April, July and October respectively in each year, the said payments not to commence until one year after my decease and to continue during the lifetime of my wife and no longer, and if my said sister shall not be living at the time of my decease, then I direct my executors to pay said sums at the times aforesaid to her daughter, Lillian L. Cook. In case my wife shall die before my said sister or her said daughter shall have received the sum of $1,000 in annuities, then I direct that a sum equal to the difference between the total annuity paid and the sum of $1,000 be paid to my said sister if she be then living, and if not then to her said daughter; and in case my said sister shall die after me and before my said wife, then I direct said annuities to be paid to said Lillian L. Cook until the decease of my wife. In case both my said sister and her said daughter shall die before me then the above legacies to lapse and go into the residue of my estate;" (Sixth) $4,500 is bequeathed to the Young Men's Christian Association to be paid at the decease of his widow; (Seventh) $500 is bequeathed to the Women's Christian Association to be paid at the decease of his widow; (Eighth) "All the residue of my estate, real and personal, I give, bequeath and devise to my wife, Charlotte C. Hardy, for her use for and during the term of her natural life, and at her decease any and all of my estate then remaining to go to my said sisters, Chastina A. Duren and Clara J. Cook, in equal shares, and should either be then deceased the representatives of such deceased sister to take her share;" and (Ninth) "I appoint my wife, Charlotte C. Hardy, and George H. Lambert, Executors of this my last Will and Testa-

ment, and empower them to sell, or mortgage, any or all of my said estate in their discretion, or at the request of my said wife."

The executors duly qualified immediately after such probate.

On the 23rd day of October, 1894, the executors filed their account in which the corpus and income were blended and allowance is therein prayed for payments to "Clara J. Cook" for her "legacy" in the total sum of $400. This account in said form was duly audited, reported and allowed by decree of this Court.

On the 9th day of April, 1904, Charlotte C. Hardy and George H. Lambert as Trustees filed their account, wherein corpus and income are separated and allowance is prayed for for payments made to "Clara J. Cook" for her "legacy" out of corpus and the total sum of $3,700. This account in said form was duly audited, reported and allowed by decree of this Court.

On the 4th day of November, 1911, citation to account was duly issued out of this Court and on the 24th day of November, 1911, Charlotte C. Hardy and George H. Lambert as Trustees filed their account, and on the 11th day of January, 1912, exceptions to the account were filed by Chasie L. Phillips, who is the person mentioned in the third clause of the will as Chasie L. Fox.

At the time of the decease of George G. Hardy he was possessed of personal property inventoried at $58,230.53 and certain real estate, all of which, with the exception of the testator's homestead in Newark, have been sold by the accountants, from which the sum of $8,750 has been realized.

It was agreed at the hearing that the testator's widow, Charlotte C. Hardy, and his sister, Clara J. Cook, are still living. The testator's sister, Chastina A. Duren, died between the 9th day of April, 1904, and the issuance of said citation, leaving as her sole heir-at-law and next of kin her daughter, the exceptant, Chasie L. Phillips.

The persons named as executors in the will are acting as Trustees and pray allowance in their account for payments made by them to Clara J. Cook under the fifth clause out of the corpus of the fund set apart by them under the eighth clause of the will.

The only question raised is whether the payments to Clara J. Cook, under the fifth clause of the will, are properly chargeable to the corpus or to the income.

An annuity is defined to be a yearly payment of a certain sum of money. *Walsh* vs. *Brown,* 43 Law, 37-42. It would seem, therefore, that the provision for Clara J. Cook is an annuity. See *Stephens Exrs.* v. *Milnor,* 24 Eq., 358. The use of the word legacy in the last paragraph of the fifth clause does not indicate that the testator regarded the payments to Mrs. Cook as legacies in the strict sense. He seems to refer to the payment to be made at the wife's death to make the sum received by the Cooks equal to $1,000 rather than to the annuity given in the earlier part of the fifth clause; or, if this is not so, the word may have been used by him in its common and general sense to include an annuity. *Titchenor* v. *Titchenor,* 41 Eq., 39. In three distinct places in the said fifth clause of the will he expressly refers to these payments as annuities.

It is contended by the accountants that the provision for the testator's sister, Clara J. Cook, is not an annuity: (1) because it does not become an annuity by the testator's reference to it as such; (2) because the testator called the provision for his sister a legacy; (3) because the provision in the latter part of the fifth clause that the payments shall be made up to the sum of $1,000 in any case is sufficient to determine the character of the whole provision as a legacy and not an annuity, and (4) the gift of the residue contained in the eighth clause confirms the theory that the provision for the sister in the fifth clause is a legacy and not an annuity. No particular weight can be attached to either the designation of the provision for the sister as an "annuity" or as a "legacy." The third reason seems to be unsound because it deals with a contingency that has not arisen. The fourth reason has no very great weight because the use of the words "any and all of my estate then remaining to go to my sisters" are the words usually employed for the purpose of referring to a residuary bequest.

Where a testator gives an annuity in general terms without specifying the manner of payment or the particular fund upon which it is chargeable, the payments on account of the annuity are chargeable upon the income of the estate and not upon the corpus. *Stephens* vs. *Milnor,* 24 Eq. 358-372; 2 *Williams on Executors,* 7th Edition, 663; *Hammond* vs. *Hammond,* 169 Mass., 82; *Blivin* vs. *Seymour,* 88 N. Y., 469, (2 Cyc. 465). This rule is illustrated by the line of cases in which it has been held to be the duty of executors to set aside and invest a sum of money sufficient to produce the annuity, the fund itself to be distributed among the remaindermen at the expiration of the annuity. *Slanning* vs. *Style,* 3 P.

William, 334; *Harvin* vs. *Masterman,* 1896, 1 Ch. 351, at pg. 355; *Healy* vs. *Toppan,* 45 N. H. 243, and *Wroughton* vs. *Colquhoun,* 1 De. G. & S.; 2 *Underhill on Wills,* Sec. 768. In a large number of cases where the question as to the payment of annuity out of income or corpus has been discussed, the income of the estate appears to be insufficient to pay the annuity and the question principally dealt with is whether the deficiency shall be made up from the corpus. It seems to be assumed that if the income were sufficient to pay the annuity the annuity would be chargeable to income. *Justice* vs. *Justice,* 20 Atl. Rep. 208; *Roll* vs. *Roll,* 68 Eq. 227.

The general rule stated that annuities are chargeable upon income and not upon corpus would seem to apply to this case. There is nothing in the Will to indicate that the testator intended the annuity to be paid out of the corpus. The fact that the testator gives an annuity by the fifth clause of his Will and subsequently in the eighth clause gives the "residue" in trust, does not indicate such an intention. It cannot be argued that the use of the word "residue" in the eighth clause implies that the annuities are to be first paid out of the corpus and that only what is left of the corpus is to be placed in trust, because it is obvious that the trust is to take effect during the period for which the annuity is to run; that is to say, the life of Charlotte C. Hardy. There is, therefore, no corpus out of which the annuity could be paid except that comprised in the trust of the residue created by the eighth clause. On the other hand, if it is the duty of the executors to set aside a sum of money out of the corpus and to pay the annuity from the income of the fund so established, then the meaning of the eighth clause becomes clear and the "residue" there placed in trust

would be exclusive of the sum previously set aside to pay the annuity. That the sum to come under the residuary clause is not intended to comprise only what is left after deducting the gifts conveyed in the previous clauses of the Will is also shown by reference to the sixth and seventh clauses which provide for the payment of certain legacies after the death of Mrs. Hardy. The corpus out of which these legacies are to be paid must be included in the the "residue," for it may not be supposed that the testator intended that his executors should simply hold this money and accumulate the income thereon during the lifetime of his wife.

In many of the cases cited where the annuity was held payable out of the income the provisions of the Will are substantially in the same form as in the case at bar.

There are strong reasons derived from the language of the Will itself indicating that the annuity is to be paid out of the income. That is, the annuity is made payable during the lifetime of the widow, which is the precise period of time during which the trust is to continue. The intention seems to be to provide for the widow and the sisters during the lifetime of the widow and at the death of the widow to divide the property equally between the two sisters. It would seem that the annuity for Mrs. Cook is charged by implication upon the wife's life estate during the pendancy of the trust.

If the annuity to Mrs. Cook is paid out of the corpus for a long series of years the result will be materially to decrease the income of the widow and also to reduce very greatly the share of the estate which would have gone to the sister, Mrs. Duren, at the death of the widow, thus defeating the obvious

intention of the testator, which was that the sisters should share equally in the final distribution.

The annuity should be charged in the last account to the income and not to the corpus and a decree will be entered sustaining the exception and allowing the account in accordance with these conclusions. Counsel fees will be allowed to counsel for exceptant and counsel for accountants out of the corpus because that fund has been largely increased as a result of the litigation.

The amount of such allowances will be fixed upon presentation of the decree.

ESSEX COUNTY ORPHANS' COURT.

Filed July 17, 1913.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	Decree on Account.

The account of Charlotte C. Hardy and George H. Lambert, trustees under the last will and testament of George G. Hardy, deceased, having been filed in the office of the Surrogate of the County of Essex, and exceptions thereto having been filed by Chasie L. Phillips, sole heir-at-law and next of kin of Chastina A. Duren, one of the residuary beneficiaries under the will of said deceased, and the
W. P. M., *J.* matter having been heard and considered by the Court in the presence of Ralph E. Lum, Esquire, of
W. P. M., *J.* counsel for the exceptant, and George H. Lambert, Esquire, and Alfred F. Skinner, Esquire, of counsel with the accountants, and it appearing to the Court
W. P. M., *J.* that the payments mentioned in said account made to Clara J. Cook under the sixth paragraph of said last will and testament as stated in said account are properly chargeable against the income of the trust estate, and not against the corpus of the fund, and it appearing to the Court as shown by the said account that the said accountants have paid unto the said Clara J. Cook the sum of three thousand one hundred dollars, out of the corpus of the said trust fund, which should have been paid from the income of said trust fund, and it further appearing to the Court that the said account is in all other particulars correct.

It is thereupon on this seventeenth (17th) day of July, nineteen hundred and thirteen, ordered, adjudged and decreed that the exception submitted

as aforesaid be and the same is hereby allowed, and that the said accountants do make and pay over into the corpus of the trust fund in their hands the sum of three thousand one hundred dollars, heretofore paid thereout as aforesaid; to the end, that the same may be restored and that said payment be made forthwith, and that the said accountants stand charged with the said additional sum of three thousand one hundred dollars as a portion of the corpus of the trust fund with which they have charged themselves, making a total of the corpus of the trust fund remaining in the hands of said accountants of fifty-one thousand six hundred and two dollars and seventy-one cents, to be disposed of according to law.

And it is further ordered that from the aforesaid balance of fifty-one thousand six hundred and two dollars and seventy-one cents of trust fund the said accountants be allowed the sum of five hundred (500) dollars as and for their commissions and that from the income as shown by said account of nineteen thousand one hundred and fifteen dollars and thirty cents the said accountants be allowed the sum of nine hundred and fifty-five 77/100 (955.77) dollars as and for their commission.

And it is further ordered that there be allowed to the said Alfred F. Skinner, Esquire, counsel for the accountants, a counsel fee of two hundred and fifty (250) dollars, and that there be allowed to Ralph E. Lum, Esquire, counsel for the exceptant, a counsel fee of three hundred and fifty (350) dollars; said counsel fees to be paid out of the corpus of the trust property.

WILLIAM P. MARTIN, *J.*

ESSEX COUNTY ORPHANS' COURT.

Filed August 7, 1913.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	Application to Open Intermediary Accounts.

PETITION.

To the Orphans' Court of the County of Essex:

The petition of Chasie L. Phillips shows that she is the sole heir-at-law and next of kin of Christina A. Duren, one of the residuary beneficiaries under the will of George G. Hardy, deceased, late of the County of Essex.

Your petitioner further shows that the said George G. Hardy in and by his last will and testament provided among other things for the payment of an annuity of four hundred dollars a year to Clara J. Cook, and that said will was duly proved, as will appear more at length by the records of this court to which your petitioner begs leave to refer, and that George H. Lambert and Charlotte C. Hardy, executors and trustees appointed by said last will and testament, duly qualified and took upon themselves the duties of office and proceeded to administer and care for said estate, and that a payment of two hundred dollars was made to said Clara J. Cook on the second of January, 1894; a payment of one hundred dollars on April 2nd, 1894, and every three months thereafter additional payments of one hundred dollars were made to said Clara J. Cook up until a recent date.

Your petitioner further shows that in the month of September, 1894, an intermediary account was

filed in this court by said executors, and that a further and other intermediary account was filed in the month of March, 1904, in this court, and that in both of said intermediary accounts the said payments at the rate of four hundred dollars a year made to said Clara J. Cook were charged to corpus by error, whereas they should have been charged to income; that your petitioner had no knowledge at the time as to what constituted corpus and what constituted income, or as to any legal points involved, and that your petitioner never consulted counsel, not knowing that there was any necessity therefor, and that as a result the error or mistake above mentioned never was called to your petitioner's attention until the third account was filed in this court.

Upon receiving a copy of the third account your petitioner was impressed with the fact that the estate seemed smaller than she had anticipated and she spoke to counsel showing him the account, and was forthwith informed that the four hundred dollars a year paid to Clara J. Cook had been improperly charged to corpus.

That thereupon your petitioner took proceedings to have exceptions filed to said third account, upon which exceptions a hearing was had and argument of counsel, which exceptions were sustained by an opinion filed in the matter by Honorable William P. Martin, one of the Judges of the Essex County Orphans' Court, and that a decree has been entered directing the repayment of the funds improperly paid and correcting the said third account.

And your petitioner respectfully prays that the first and second accounts above referred to may be opened and that your petitioner be permitted to

except to so much of said first and second accounts as charges the payments of four hundred dollars a year made to Clara J. Cook to corpus and not to income, and that said first and second accounts may be opened for the correction of the error which now clearly appears in said accounts as a result of a decree entered upon the third account filed herein.

And your petitioner will ever pray, etc.

CHASIE L. PHILLIPS,
Petitioner.

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

Ralph E. Lum, being duly sworn on his oath according to law, deposes and says that he is proctor of the petitioner in the above entitled cause; that he is familiar with the facts set forth in the said petition, and that the same are true to the best of his knowledge and belief.

Sworn and subscribed to before
me this 22nd day of July, 1913.

RALPH E. LUM.

MIRIAM L. LUFF,
Notary Public of New Jersey.

ESSEX COUNTY ORPHANS' COURT.

Filed May 11, 1914.

In the matter of the application of CHASIE L. PHILLIPS, a legatee, to open and resettle the final account of CHARLOTTE C. HARDY and GEORGE H. LAMBERT, as executors and their intermediate account as trustees under the last will and testament of GEORGE G. HARDY, *Deceased.*	ON PETITION AND ORDER TO SHOW CAUSE.

Messrs. Lum, Tamblyn & Colyer (Ralph Lum, Esq., of counsel), proctors for petitioner; Chasie L. Phillips (Messrs. F. W. and S. E. Qua, of the Massachusetts Bar), of counsel.

Hon. Alfred F. Skinner, proctor for and of counsel with George H. Lambert as surviving executor and trustee of the last will and testament of George G. Hardy, deceased.

Charles H. Stewart, Esq., proctor for and of counsel with George H. Lambert as surviving executor and trustee under the last will and testament of Charlotte C. Hardy, deceased.

OPINION.

MARTIN, J.

George G. Hardy, late of the City of Newark, died on the 18th day of July, 1892, leaving him sur-

viving his widow, Charlotte C. Hardy, and Chastina A. Duren and Clara J. Cook, his two sisters, the only next of kin. The last will and testament of George G. Hardy, which was duly admitted to probate by the Surrogate of Essex County on the 23d day of August, 1892, provides substantially as follows: (first) the executors are directed to pay all debts and funeral expenses; (second) two hundred dollars is bequeathed to the Mt. Pleasant Cemetery in trust for the care of the family lot; (third) a legacy of two thousand dollars is bequeathed to his sister, Chastina A. Duren; (fourth) a gold watch and chain is bequeathed to his brother-in-law, Edward Duren.

"Fifth. I direct my executors to pay to my sister, Clara J. Cook, the sum of four hundred dollars annually, in equal quarterly payments on the first day of the months of January, April, July and October, respectively, in each year, the said payments not to commence until one year after my decease and continue during the lifetime of my wife, and no longer, and if my said sister shall not be living at the time of my decease, then I direct my executors to pay the said sums at the times aforesaid to her daughter, Lillian L. Cook. In case my wife shall die before my sister or her said daughter shall have received the sum of one thousand dollars in annuity, then I direct that a sum equal to the difference between the total annuities paid and the sum of one thousand dollars be paid to my said sister, if she be then living, and if not, then to her said daughter; and in case my said sister shall die after me and before my said wife, then I direct said annuities to be paid to said Lillian L. Cook,

until the decease of my wife. In case both my sister and her said daughter shall die before me, then the above legacies to lapse and go into the residue of my estate."

(Sixth) forty-five hundred dollars is bequeathed to the Young Men's Christian Association, to be paid at the decease of the widow; (seventh) five hundred dollars is bequeathed to the Women's Christian Association to be paid at the decease of the widow.

"Eighth. All the residue of my estate, real and personal, I give, bequeath and devise to my wife, Charlotte C. Hardy, for her use for and during the term of her natural life and at her decease any and all of my estate then remaining to go to my said sisters, Chastina A. Duren and Clara J. Cook, in equal shares, and should either be then deceased the representative of such deceased sister to take her share.

Ninth. I appoint my wife, Charlotte C. Hardy, and George H. Lambert executors of this my last will and testament and empower them to sell or mortgage any or all of my said estate in their discretion or at the request of my said wife."

The executors duly qualified upon the probate of the will.

Prior to the 23d day of October, 1894, the executors filed their account as executors in the office of the Surrogate in which the corpus and income were blended and allowance was therein prayed for payments made to Clara J. Cook for her "legacy" in the total sum of four hundred dollars. This account was duly audited, reported and allowed

by the decree of this court. The decree entered October 23, 1894, expressly recites that the account is an account of the executors, and it is therein ordered, adjudged and decreed *"that the said account be in all things allowed as reported, and that there is a balance remaining in the hands of said accountants amounting to the sum of* $53,079.84 *to be disposed of according to law."* Prior to the 9th day of April, 1904, Charlotte C. Hardy and George H. Lambert filed their intermediate account in form as executors and trustees, showing in fact the discharge of their duties as trustees, only, wherein corpus and income are separated and allowance was prayed for payments made to Clara J. Cook for her "legacy" out of *corpus* in the total sum of $3,700. This account was also duly audited, reported and allowed by the decree of this court on said 9th day of April. The decree recites that the account has been examined, and being found to be properly and truly stated and the articles therein to be supported and justified by the vouchers directs *"that the said account be entered of record."*

On the 4th day of November, 1911, citations to the account were duly issued out of this court, and on the 24th day of November Charlotte C. Hardy and George H. Lambert, as trustees, filed their account, and on the 11th day of January, 1912, exceptions to the account were filed by Chasie L. Phillips, the petitioner herein, who is the person named in the third clause of the will as Chasie L. Fox, and claims to be the sole next of kin of said Chastina A. Duren, deceased. Chasie L. Phillips is now the official representative of the estate of Mrs. Duren as far as the proofs show. The issue raised upon the last intermediate accounting of the trustees was whether the payments to Clara J.

Cock under the fifth clause of the will were properly chargeable to the corpus or the income, and it was determined that the annuity should be charged in the said last account to the income and not to the corpus (see sub nom in re Charlotte C. Hardy and George H. Lambert, trustees, 36 N. J. L. J. 274), and a decree was entered in accordance therewith on the 17th day of July, 1913, charging the trustees with the sum of $3,100 as the portion of the corpus of the trust fund which they had paid out of that fund to Clara J. Cook.

Thereafter and on the 7th day of August, 1913, Chasie L. Phillips applied to this court, by petition, in which it is recited that she is the sole heir-at-law and next of kin of Chastina A. Duren, one of the residuary beneficiaries, and in the month of September, 1894, an intermediary account was filed by the said executors, and that a further and other intermediate account was filed in March, 1904, in this court, and that in both said intermediary accounts the payments at the rate of four hundred dollars a year made to said Clara J. Cook were charged to corpus by error, whereas they should have been charged to income; that the petitioner had no knowledge at the time as to what constituted corpus and what constituted income, or as to any legal points involved, and that the petitioner never consulted counsel, not knowing that there was any necessity therefor, and as a result the error or mistake above mentioned never was called to petitioner's attention until the third account was filed in this court, and the petitioner therefore prays that the relief may be granted her; that the first and second account referred to may be opened and that the petitioner be permitted to except to so much of the first and second accounts as charges

and payments of four hundred dollars made to Clara J. Cook to corpus and not to income, and that the said first and second accounts may be opened for the correction of the errors, which now appear in said accounts as the result of the decree entered upon the third account filed herein.

Mrs. Charlotte C. Hardy died on the 20th day of July, 1913. Her will was duly admitted to probate by the Surrogate of Essex County and letters testamentary were duly issued thereon on the 1st day of August, 1913, to George H. Lambert, who as such executor has appeared in this proceeding.

On the said 7th day of August, 1913, a rule to show cause was duly issued, returnable on the 19th day of September, 1913, why the prayer of the said petition should not be granted. Thereafter and from time to time the hearing upon the said petition had been continued and finally came on to be heard upon an agreed statement of facts.

The agreed statement of facts sets forth in addition to the matters of record containing most of the foregoing facts, that Francis W. Qua is a counsellor at law of Massachusetts, and as such represented Chastina A. Duren from the death of George G. Hardy on the 18th day of July, 1892, until the death of Mrs. Duren in 1901, in all matters relating to the interest of Mrs. Duren as legatee under the will of George G. Hardy, deceased, and particularly in the scrutiny of the administration of the estate by George H. Lambert and Charlotte C. Hardy; after the death of Mrs. Duren he represented her estate, and the persons interested therein, and particularly Chasie L. Phillips, her daughter, the petitioner in like manner; that he also represented Mrs. Clara J. Cook, the other residuary

legatee under the said will, during the period mentioned, and associated with Mr. Qua was the firm of counsel who are the proctors upon this application, and that with such firm of New Jersey lawyers Mr. Qua appeared for Mrs. Duren and Mrs. Cook at the time when the first and final account of the executors was presented and the decree thereon was made on the 23rd day of October, 1894, as well as when the second and intermediate account of the trustees was presented and the decree entered thereon on the 9th day of April, 1904. It also appeared that George H. Lambert had charge of the preparation of the account and delivered a copy of the account of 1894 to the New Jersey attorneys to be forwarded to Mr. Qua. Various letters are annexed to the agreed statement of facts. One from Mr. Qua to George H. Lambert dated July 21, 1894, contains a discussion of a proposed termination of the trust without waiting for the death of the life tenant by the purchase by the life tenant of the interest in remainder by Mrs. Duren and Mrs. Cook. The method of ascertaining the value of those interests is outlined, and the letter proceeds to state that the interest of Mrs. Cook will be the same as that of Mrs. Duren, in addition to the amount necessary to pay the annuity, showing that Mrs. Duren and Mrs. Cook, speaking through their joint representatives, understood at that time that in the division of the corpus of the estate Mrs. Cook would get more than Mrs. Duren by the amount required to pay the annuity, and elsewhere in the letter it is indicated that Mr. Qua expected the length of time for which these payments of annuities were to be made to Mrs. Cook was to be computed by the mortality tables. On February 12, 1904, a letter from Mr. Qua requests

the filing of an account. On October 17, 1904, George H. Lambert forwarded a copy of the account to Mr. Qua as is acknowledged by his letter on the 18th of October, 1904.

Mr. Qua testifies that he, at the outset of his employment, went to the office of the Surrogate in Newark and inquired either of the Surrogate or one of his clerks, whether an allowance of the account by the court would prevent any of the items in the account so allowed being afterwards questioned, and was informed by the Surrogate that the allowance of an account was only provisional and that upon a hearing upon the final account objection could be made to any item in any of the executor's accounts with the same effect as if it had been made before the allowance of each particular account, and that, relying upon this information, no exceptions were filed to the so-called first and second account. It is very probable that Mr. Qua was so informed by the Surrogate as to the so-called second or first intermediate account of the trustees, but it is entirely unlikely that he was so informed by the Surrogate as to the executor's account. At all events he is chargeable with knowledge of the law at the time.

This application, therefore, is to open the final account of Charlotte C. Hardy and George H. Lambert, as executors, allowed in 1894, and upon their intermediate accounts as trustees allowed in 1904 and entered of record. The petition is inaccurate in referring to the so-called first account as an intermediate account. It appears upon its face to be the account of the executors and was allowed as such. A cursory examination of the other accounts does not show any subsequent transactions as ex-

ecutors, but this point is not necessary to be determined because the account of the executors in 1894 was the final account as executors. When the first account was filed in September, 1894, section 108 of the Orphans' Court act of the Revision of 1874 was in effect (2 Genl. Stats. N. J. 1895, p. 2379).

> "108. That the sentence or decree of the Orphans' Court *on the final settlement and allowances of the accounts of executors* * * * *shall be conclusive upon all parties and shall exonerate and forever discharge every such executor* * * * from all demands of creditors, legatees or others beyond the amount of such settlement, except for assets or moneys which may come to hand after settlement as aforesaid, *excepting also in cases where the party applying for a resettlement shall prove some fraud or mistake therein to the satisfaction of the said Orphans' Court.*"

When the second account of March, 1904, was filed and the decree thereon entered, the provisions of the Orphans' Court act of 1898 were in full force and effect. (Since amended by the laws of 1905, p. 299.)

> "Sec. 124. The intermediate account of every executor * * * or trustee, after the same has been audited and stated by the Surrogate and reported to the Orphans' Court and notice given to or citation served on the parties in interest as aforesaid shall be examined by the court, and being found to be properly and fairly stated and the articles thereof to be supported and justified by the vouchers, *shall be entered of record;* and if any article of such accounts be at any time

> afterwards excepted to by *cestui que trust* or his representatives, or other party interested, it shall be incumbent on him to prove or show the falsity or injustice thereof unless notice on his behalf shall have been given at the time of passing the account that such article would be excepted to and a memorandum of that notice shall have been entered on the record or desired to be entered."

Section 126 substantially provided that upon final account of any executor or trustee any person interested may appear and make exceptions to the said account.

The statutes relating to the validity of intermediate accounts of executors, administrators, guardians and trustees have been changed and modified several times since the revised statutes. It is therefore necessary, in considering the cases bearing upon the power of the court to open decrees on intermediate accounts, to keep carefully in mind the statute which controlled at the time when the case arose. From the very beginning the accounts of the executors, administrators and trustees were segregated from those of guardians, and a different ruling applied and discontinuance to the present time, and should also be kept clearly in mind in considering the cases. Prior to the revision of 1898 there was no statutory provision expressly recognizing intermediate accounts of executors, administrators and trustees. From the time of the revised statutes down to the revision of 1898 (R. S. 374, Sec. 3), there existed, however, a statutory provision that the annual accounts of every guardian should be exhibited to the Orphans' Court, and if found correct, should be entered of

record, and the effect of such entry was to throw upon any future exceptant the burden of showing the falsity or injustice of the items excepted to. Sec. 124 of the Acts of 1898 is in effect a re-enactment of revised statutes 374, Sec. 3, except that it includes within its provisions the accounts of executors, administrators and trustees. In 1905 (P. L. 1905, 299, Sec. 2) Section 124 of the Orphans' Court act was amended by eliminating therefrom the provisions in regard to executors, administrators and trustees, leaving it applicable to guardians' accounts only, thus re-establishing to all intents and purposes the situation which existed at the time of the revised statutes.

The revised statutes (R. S. 205, Sec. 24) provided that the court to which the account of any executor, administrator, guardian or trustee shall be reported shall examine the same, and if found correct, and no exception being made to the report of the Surrogate, shall decree an allowance of the account as stated. This provision was re-enacted in Section 125 of the Revision of 1898, which, however, limited the provision of that section to final accounts of executors, administrators, guardians and trustees, a limitation not contained in the within provisions of the revision. This section was amended in 1905 (P. L. 1905, p. 299, Sec. 3) by making this section apply to "the account of any executor, administrator or trustee, or the final account of any guardian."

Since the time of the revised statutes (R. S. 205, Sec. 27) there has been a provision that the decree of the Orphans' Court on the final settlement and allowance of the accounts of executors, administrators, guardians or trustees shall be conclusive

upon all parties and shall exonerate such accountant from all demands of creditors, legatees, or others, beyond the amount of such settlement, except for assets or moneys which may come to hand after settlement as aforesaid, excepting also in cases where a party applying for a resettlement shall prove some fraud or mistake therein to the satisfaction of the Orphans' Court. This section was re-enacted without change by section 127 of the revision of 1898.

The petitioner urges that the first two accounts are intermediate accounts and that they are to be taken only as prima facia correct (*Davis* v. *Combs,* 38 N. J. Eq. 473; 39 N. J. Eq. 336; *Pyatt* v. *Pyatt,* 44 N. J. E. 491) and that an intermediate account may be corrected in a later account (*Dey* v. *Codman,* 12 Stew. 258; *Griggs* v. *Shaw,* 15 Stew. 631; *Lydell* v. *McVicker,* 6 Hal. 44; *Jackson* v. *Reynolds,* 12 Stew. 313) and that the court has equal power to correct a mistake of law as well as a mistake of fact, citing *Lydell* v. *McVicker,* Supra.

In the Morris case, 65 N. J. Eq., 699, the mistake was one of fact, the executors having failed to charge themselves with certain items of money and property of the testator which had been received by them. *Davis* v. *Combs; Pyatt* v. *Pyatt; Dey* v. *Codman; Lydell* v. *McVicker,* supra, also involved mistakes of fact. *Greggs* v. *Shaw,* supra, was a case in which the allowance of commissions was questioned. The intermediate account was not opened, but the excessive commissions were taken into consideration and the allowance of additional commissions in a later account. *Jackson* v. *Reynolds* was a case where the court allowed commissions in excess of the statute, which seems to be a

mistake of law. In the case at bar the mistake was in the application of a principle of law. The petition erroneously declares the first account to be an intermediate account, and the second account is properly declared to be an intermediate account, but it bars nothing and simply becomes prima facia correct.

The application in case of an alleged fraud or mistake is one addressed to the discretion and must be proved to the satisfaction of the court. *Engle* v. *Cromby*, 1 Zab. 164; *in re* Baker, 61 Eq. 592. The Orphans' Court may open a decree to review a matter resting in the discretion of the court, such as the allowance of commissions, Culver S. Brown, 16 Eq. 533.

Taking up for consideration first the final account of the executors it is probable that under Sec. 108 of the revision of 1874 it may be corrected for a mistake of law. Although this principle in general may be admitted, it ought not to be applied unless some grave injustice is done. A proper remedy is usually by appeal and should not be by petition for resettlement of the accounts twenty years after to another judge or his successor in office. The same question of law that the petition presents was presented to the court in the first account. In contemplation of law the account was then fully examined by the court, and in like contemplation of law the court knew the terms of the will contained in its own records. When a matter involving a question of law is once presented to a court of competent jurisdiction and is decided it should not again be threshed out in that court by the same parties or their successors in interest. The parties have had their day in

court. The petitioner was constructively in court and actually knew the facts and her predecessor in interest employed counsel to protect the very interest which she is now supporting.

Upon the merits of the present exercise of the discretion of the court to open the account of the executors, assuming that it has the power to open the account for mistake of law, petitioner says that she had no knowledge as to what constituted corpus and what constituted income, or as to any legal points involved and that she never consulted counsel and the matter was never called to her attention until the third account was filed in this court. Nearly twenty years have passed since the approval of the account of 1894. The petitioner acquiesced in the payments out of the corpus and Mrs. Duren, the petitioner's mother, consented to the very payments out of the corpus to which her daughter now objects. The mother was represented by New Jersey counsel, as well as Mr. Qua, at the time of the filing of the final account of the executors. It seems, therefore, that the discretion of the court should not be exercised in favor of a petitioner where the alleged mistake is one purely of the application of a principle of law, where the applicant's predecessor in interest was represented by counsel learned in the law, who was familiar with all the facts, conducted negotiations for a sale of the interest of the predecessor in title which involved the consideration of that particular point or principle of law; and the case shows the existence of the fact that the petitioner waited upward of eighteen or nineteen years to raise the question. The remedy in such case should be by appeal and not by resettlement of the account.

The intermediate account of ~~1894~~ 1904 may be opened on the final account under the act of 1898 before amendment of 1905. Under the circumstances it makes no difference whether the account of the trustees is opened now or upon the coming in of the final account.

The application as to the executors' final account of 1894 is denied and as to the trustees' first intermediate account of 1904 will be granted.

WILLIAM P. MARTIN,

Judge of Essex County Orphans' Court.

ESSEX COUNTY ORPHANS' COURT.

Filed July 8, 1914.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	On Application to Open Decrees. STIPULATION.

The following facts are hereby stipulated and agreed upon as in evidence in the above matter:

1. That Francis W. Qua is a Counsellor-at-Law, duly admitted to practice in the State of Massachusetts, and has been such since sometime before the year 1894; that he represented Chastina A. Duren from the death of George G. Hardy on July 19, 1892, until the death of Mrs. Duren in 1901 in all matters relating to the interest of Mrs. Duren as one of the residuary legatees under the will of George G. Hardy, and particularly in scrutiny of the administration of the estate of George G. Hardy, by George H. Lambert and Charlotte C. Hardy, the executor and executrix named in said will.

2. That after the death of Mrs. Duren he represented her estate and the persons interested therein, and particularly Chasie L. Phillips, her daughter, in like manner and to the same extent.

3. That the said Francis W. Qua, in like manner and to the same extent, represented Mrs. Clara J. Cook, another one of the residuary legatees under said will, from the death of Mr. Hardy on July 19, 1892, until after passing account in 1894.

4. That associated with Mr. Qua in his representation of the above mentioned parties were Messrs. Guild and Lum, Attorneys-at-Law of the

City of Newark, New Jersey, and with that firm appeared for Mrs. Duren and Mrs. Cook at the time when the first account of said executor and executrix was presented to the Essex County Orphans' Court and decree entered thereon of the date of October 23, 1894, as well as when the second account of said executor and executrix was presented to the said Court and decree entered thereon of the date of April 9, 1904.

It is further stipulated and agreed:

5. That the copies of the letters contained in Schedule "A," attached hereto, and enumerated as follows:

Letter from Francis W. Qua to George H. Lambert, dated July 21, 1894.

Letter from Francis W. Qua to George H. Lambert, dated February 12, 1904.

Letter from George H. Lambert to Francis W. Qua, dated February 19, 1904.

Letter from Francis W. Qua to George H. Lambert, dated February 22, 1904.

Letter from George H. Lambert to Francis W. Qua, dated October 17, 1904.

Letter from Francis W. Qua to George H. Lambert, dated October 18, 1904.

shall be admitted and shall be taken as in evidence without production or proof of the originals thereof, subject, however, to objection as to their admissibility on any other ground than lack of proper and formal proof.

6. That on the 23rd day of October, 1894, an order was made and entered in said Court upon

the first account presented by said executor and executrix, a copy of which order is attached hereto, marked Schedule "B," and is to be taken as in evidence, and used in place of the original decree, or the record thereof.

7. That on the 9th day of April, 1904, a decree was made and entered in said Essex County Orphans' Court on the second account of said executor and executrix, a copy of which is hereto attached, and marked Schedule "C," which copy is to be deemed in evidence, and may be used in place of the original of the said decree, or the record thereof.

8. That George H. Lambert, if called as a witness in this matter, would testify that he had charge of the preparation and presentation of the accounts of himself and Mrs. Hardy, as executor and executrix of George G. Hardy, deceased; that he had frequent meeting or communication with Mr. Qua, and with Messrs. Guild and Lum, as the representatives of Mrs. Cook and Mrs. Duren, with reference to the administration by himself and Mrs. Hardy of the estate of George G. Hardy, and in reference to the account filed by them in 1894, and that he delivered a copy of said account of 1894 to Guild and Lum, to be forwarded to Mr. Qua, and that his testimony to that effect shall be taken as in the record, without calling him as a witness.

9. That Miss Frances B. Stewart, if called as a witness in this matter, would testify that sometime prior to the filing of the second account, and, to the best of her recollection, in the year 1903, Mr. Qua called at the office of Lambert and Stewart in the Telephone Building, in the City of Newark, and requested to see Judge Lambert; that Judge Lambert

was away at the time, and that she so informed Mr. Qua; that Mr. Qua stated that he wanted the executors to file another account; that everything had been satisfactory up to that time, except that it was time another accounting was had, and that her testimony to that effect shall be taken as in the record, without calling Miss Stewart as a witness.

10. That the first, second and third accounts filed by said executor and executrix shall be deemed to be in evidence on this application, and that uncertified copies thereof may be used without the production of the original accounts, or the record thereof in the office of the Surrogate of Essex County.

LUM, TAMBLYN & COLYER,
Proctors for Chasie L. Phillips.

CHARLES H. STEWART,
Proctor for George H. Lambert, Executor of Estate of Charlotte C. Hardy, Deceased.

PITNEY, HARDIN & SKINNER,
Proctors for George H. Lambert, Executor Will of George G. Hardy, Deceased.

SCHEDULE "A."

"Lowell, Mass., July 21, 1894.

"Geo. H. Lambert, Esq.,

"DEAR SIR:—Your favor of recent date inclosing paid note of Clara J. Cook to Estate of Geo. G. Hardy for $250 received.

"I note what you say about settlement. Both Mrs. Cook and Mrs. Duren are willing to sell their respective interests in the estate for what they are

worth. Mrs. Cook is so circumstanced that she feels the need of the money more than Mrs. Duren does. They will do what I advise in the matter. I think Mrs. Hardy ought to be willing to pay what the shares are worth and that you and I can, by a little calculation, substantially agree upon this value.

"What Mrs. Hardy's life interest in the property is worth is susceptible of calculation; not, of course, with perfect accuracy, as all things in the future are uncertain, but upon scientific principles approved and acted upon by courts of equity in matters of great consequences.

"The present worth of the legacies to the Y. M. C. A. and Y. W. C. A. can be estimated in like manner. Taking out these my clients are entitled to whatever remains of the estate. The first thing to do is to ascertain by an appraisal the value of the entire estate if we cannot agree upon its value, which I think we might do; then take out such a sum as will be sufficient to pay Mrs. Cook's annuity during Mrs. Hardy's life, subtract from the remainder the present worth of the two legacies above mentioned; then ascertain and deduct the value of Mrs. Hardy's life estate. Divide the remainder by two, and the result will be the value of Mrs. Duren's interest, or the price at which she will sell it. Mrs. Cook's share will be the same plus the sum set apart to pay the annuity. It will not, however, be necessary to distinguish between Mrs. Duren's and Mrs. Cook's interest. If we ascertain what they are jointly worth, they and all other necessary parties will join in a conveyance. They will not have any difficulty in dividing it between them. If we cannot ourselves agree upon the price,

my clients will submit the whole matter to disinterested and competent arbitrators and covenant and bind themselves to sell at the price fixed by them.

"The principles on which the calculations are to be made may be stated in the submission, leaving the rate of interest and the value of the property entirely to the judgment of the arbitrators.

"If Mrs. Hardy is really willing to pay us the value of our interests and close the matter up, so far as we are concerned, I think it would be well for me to obtain from my clients power of attorney with ample authority to convey their interests and fix the price, then come to Newark and confer with you in person, and stay there until we have completed the transfer or fixed the price or come to some agreement in reference to it. Negotiations in a matter of this kind cannot so well be carried on by letter.

"On the other hand,if your suggestion only means that you think you can find some one to buy in case my clients will sell for enough less than the real value of their shares to make it a tempting speculation for outsiders, it will be of no use to attempt it. I have reason to believe that there are men of means in Lowell who would not be averse to such a speculation.

"Please let me hear from you soon.

"Yours truly,

"FRANCIS W. QUA."

"Lowell, Mass., February 12, 1904.

"Hon. George H. Lambert,
"Attorney-at-Law,
"Newark, N. J.

"Dear Sir:

"As attorney for Chasie L. Phillips, formerly Chasie L. Fox, of this city, who is the sole heir-at-law of her mother, Chastina A. Duren, mentioned in the residuary clause of the will of George G. Hardy, deceased, I write to request that you furnish my client with a statement of the condition of the estate at the present time and the securities in which it is invested. As the trustees have filed no account for several years, it seems reasonable that you give my client the statement requested.

"Please let me hear from you at your earliest convenience, and oblige,

"Very truly yours,
"FRANCIS W. QUA."

"Feb. 19, 1904.

"Francis W. Qua, Esq.,
"Hildreth Building,
"Lowell, Mass.

"Dear Sir:

"Yours of the 12th inst. received. Within a very short time the executors of the Hardy estate will file an account and append to this account a full list of all securities and I will send you copy of same. The estate is all invested upon first bonds and mortgages on real estate in this vicinity, at not more than 50% of value. I take it from your letter that Mrs. Duren has died. Is that the case? If so, I don't think Mrs. Hardy has any knowledge of the fact.

"Yours truly,
"GEORGE H. LAMBERT."

"Lowell, Mass., February 22, 1904.

"George H. Lambert, Esq.,
"160 Market St.,
"Newark, N. J.

"Dear Sir:

"Your favor of the 19th inst. received. I thank you for your prompt and satisfactory reply. Please send me copy of the account as soon as filed, and if it is all right, as I have no doubt it will be, we will consent to it.

"You are right in supposing that Mrs. Duren is dead. She died some three years ago, and her husband has since remarried. Her daughter Chasie is now the wife of Judson A. Phillips, of this city.

"Yours truly,

"FRANCIS W. QUA."

"Oct. 17th, 1904.

"Francis W. Qua, Esq.,
"Hildreth Bldg.,
"Lowell, Mass.

Dear Sir:

"I send you herewith copy of account of Trustees under will of George G. Hardy, deceased.

"I have written Mrs. Cook and told her that you would insist upon payments of at least $25 each. I presume she has written to your client before this, as she said she would write her, and also intended to write you. Will let you know what reply she makes.

"Yours truly,

"GEORGE H. LAMBERT."

"Lowell, Mass., Oct. 18, 1904.

"George H. Lambert, Esq.

"Dear Sir:

"We have just received from you the account filed by you of the estate of George G. Hardy, for which we wish to thank you.

"We have not yet heard from our client or from Mrs. Cook in regard to the note, but presume we shall hear in a day or two.

"Very truly yours,

"F. W. & S. E. QUA."

SCHEDULE "B."

ESSEX COUNTY ORPHANS' COURT.

September Term, A. D. 1894.

IN THE MATTER OF THE ACCOUNT OF THE EXECUTORS OF GEORGE G. HARDY, *Deceased.*

The Surrogate having audited and stated the account of Charlotte C. Hardy and George H. Lambert, Executors of George G. Hardy, Deceased, and placed the same on the files of his office, 20 days previous to Tuesday, the 23rd day of October, A. D. 1894, 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 this court that notice of their intention to settle the said account was given by said accountant according to law, and the matter having been continued to this time, and the court having examined the said account and the vouchers and receipts for payments and disbursements claimed therein, and having found the same to be correct in all particulars, and no exceptions being made thereto.

It is on this 23rd day of October, A. D. 1894, ordered, adjudged and decreed, that the said account be in all things allowed as reported and that there is a balance remaining in the hands of said accountant, amounting to the sum of $53,079.84 to be disposed of according to law.

By the Court,

ANDREW KIRKPATRICK,
M. J. LEDWITH,
Judges.

SCHEDULE "C."

ESSEX COUNTY ORPHANS' COURT.

April Term, A. D. 1904

In the Matter of the Intermediate Account of the Executors and Trustees of GEORGE G. HARDY, *Deceased.* — DECREE.

The Surrogate having audited and stated the intermediate account of Charlotte C. Hardy and George H. Lambert, Executors and Trustees under the Last Will and Testament of George G. Hardy, Deceased, and placed the same on files of his office twenty days previous to the ninth day of April, A. D. 1904, and having on the last day reported 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 on the said notice on the said ninth day of April, A. D. 1904, in this Court was given by said accountant according to law;

And the said account having been examined by the Court and being found to be properly and fairly stated, and the articles thereof to be supported and justified by the vouchers.

It is, on this ninth day of April, A. D. 1904, by the Orphans' Court of the County of Essex, in the State of New Jersey, ordered, adjudged and decreed, that the said account be entered of record.

It is further ordered that the said accountant be allowed the sum of $1,411.01 as and for their commissions on $28,220.30 of income collected by them, and a further allowance of two (2%) on corpus on account.

ALFRED SKINNER, J.

ESSEX COUNTY ORPHANS' COURT.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	On Application to Open Decrees. STIPULATION.

The following facts are hereby stipulated and agreed upon as in evidence on behalf of the exceptant in the above-entitled matter:

That Francis W. Qua, an attorney-at-law of Lowell, Massachusetts, if called as a witness, would testify as follows:

My first employment in connection with the estate of George G. Hardy, late of Newark, New Jersey, deceased, was sometime after the proof of the will. Chastina A. Duren, one of the legatees under the will, came to me with a letter received by her from George H. Lambert, one of the executors, enclosing a receipt for nineteen hundred dollars in full for the two thousand dollars specific legacy given to said Chastina A. Duren by the will and explaining that he retained one hundred dollars out of the legacy for the purpose of paying taxes and would send her a check for the balance on return of the receipt signed by her. I was asked to ascertain if the executors had a right to retain that hundred dollars. I examined the statutes of New Jersey, and informed my client that I found no statute imposing an inheritance tax on this legacy, and I was then requested to go to Newark, receive the two thousand dollars and a watch that by the terms of the will was given to Edwin Duren, and also to ascertain, as well as I could, the amount and value of the estate. I took with me a power of attorney authorizing me to collect.

Later I was employed by Chastina A. Duren and Clara J. Cook to try to effect a settlement between the parties interested, by which said Chastina A. Duren and Clara J. Cook would each receive the present value of their interests under the will, and put an end to the trust. I had considerable negotiations with Mr. Lambert with this purpose in view, and also saw Mrs. Hardy, the other executor, and had a conversation with her, but was unable to effect any agreement.

I was also employed by Mrs. Duren, and I think Mrs. Cook, to compel the executors to file accounts from time to time, and employed the firm of Guild & Lum to assist me in compelling the executors to file the first account. In connection with the obtaining of that account, I went to the Surrogate's Office in Newark and inquired, either of the Surrogate or his clerk, whether the allowance of an account by the Court would prevent any of the items in the account so allowed being afterwards questioned, and was informed that the allowance by the Surrogate of an account was only provisional, and that, upon a hearing upon a final account, objection could be made to any item in any of the executor's accounts, with the same effect as if it had been made before the allowance of each particular account. I think this conversation in the Surrogate's Office took place before the first account was filed, and before I had employed Guild & Lum to assist me in the matter. Relying upon the information so obtained, I did not deem it necessary to carefully scrutinize all the items of each of the accounts, but I did deem it wise to have frequent accounts filed, in order that we might know generally the manner in which the estate was being cared for and the kind of securities in which it was invested.

I never assented or intended to assent to any of the accounts nor do I believe that I ever had any authority so to do. If an account had been sent me with a request that it be assented to, I should have seen my clients and obtained their consent to it, if it was satisfactory to them and to myself after a careful examination.

I do not remember the conversation with Miss Frances B. Stewart, contained in Paragraph 9 of the annexed stipulation, but I do know that I never intended to bind my clients by consenting to any of the accounts filed by the executors in this case.

We hereby consent to the above stipulation as to evidence.

LUM, TAMBLYN & COLYER,
Proctors for Chasie L. Phillips.

CHARLES H. STEWART,
Proctor for George H. Lambert, Executor of Estate of Charlotte C. Hardy, Deceased.

PITNEY, HARDIN & SKINNER,
Proctors for George H. Lambert, Executor of George G. Hardy.

ESSEX COUNTY ORPHANS' COURT.

Filed July 8, 1914.

In the Matter of the Application of CHASIE L. PHILLIPS, a legatee, to open and resettle the final account of CHARLOTTE C. HARDY and GEORGE H. LAMBERT, as executors and their intermediate account as trustee under the Last Will and Testament. *of* GEORGE G. HARDY, *Deceased.*	On Petition, etc. ORDER Opening Intermediate Account of 1904.

This matter coming on to be heard before the Court in the presence of Ralph E. Lum, Esquire, Proctor for the petitioner, Chasie L. Phillips, and Alfred F. Skinner, Esquire, Proctor for George H. Lambert, as surviving executor and trustee under the last will of George G. Hardy, deceased, and Charles H. Stewart, Esquire, Proctor for George H. Lambert, as executor and trustee under the last will and testament of Charlotte C. Hardy, deceased; and the court having read the pleadings and proofs and having heard the argument of counsel; and it appearing to the Court that the first intermediate account of nineteen hundred and four of the said Charlotte C. Hardy and George H. Lambert as executors and trustees of the last will and testament of George G. Hardy, deceased, should be opened to the end that petitioner herein might be permitted to except to so much thereof

as charges the payments of four hundred dollars a year made to Clara J. Cook to corpus and not to income;

IT IS THEREUPON, on this eighth day of July, A. D. nineteen hundred and fourteen, on motion of Ralph E. Lum, Proctor for and of counsel with petitioner, ORDERED, ADJUDGED and DECREED that the first intermediate account of nineteen hundred and four of the said Charlotte C. Hardy and George H. Lambert as trustees under the last will and testament of George G. Hardy, deceased, and the decree entered thereon, be, and the same is hereby opened to the end that the petitioner herein be permitted to except to so much thereof as charges the payments of four hundred dollars per year made to Clara J. Cook to corpus and not to income.

And, it is further ORDERED, that the application of the petitioner, Chasie L. Phillips, to open the final account of Charlotte C. Hardy and George H. Lambert, as executors of George G. Hardy, deceased, filed September, eighteen hundred and ninety-four, be and the same is hereby denied.

WM. P. MARTIN, *J.*

I hereby consent to the form of the above order.

CHARLES H. STEWART,
Proctor for George H. Lambert.
Executor for Charlotte C. Hardy, Deceased.

Approved as to form.

PITNEY, HARDIN & SKINNER,
Proctor for George H. Lambert.
Executor for George G. Hardy, Deceased.

ESSEX COUNTY ORPHANS' COURT.

Filed July 9, 1914.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	Exceptions to Trustees' First Intermediate Account.

Exceptions taken by Chasie L. Phillips, a legatee, to the first intermediate account of nineteen hundred and four of Charlotte C. Hardy and George H. Lambert, as trustees under the last will and testament of George G. Hardy, deceased.

This exceptant excepts to the payment by the said trustees to Clara J. Cook for her legacy out of corpus of the estate amounting in all to the sum of thirty-seven hundred dollars ($3,700), and consisting of thirty-seven payments of one hundred dollars each in said account alleged to have been made on the following dates, to wit: 1894, October 2; 1895, January 2, April 1, July 1, October 1; 1896, January 2, April 1, July 1, October 1; 1897, January 1, April 1, July 1, October 1; 1898, January 1, April 1, July 1, October 1; 1899, April 1, July 1, October 1; 1900, January 1, April 1, July 1, October 1; 1901, January 1, April 1, July 1, October 1; 1902, January 1, April 1, July 1, October 1; 1903, January 1, April 1, July 1, October 1, and 1904, January 1.

And this exceptant excepts to the payments so alleged to have been made as aforesaid on the ground that the said payments should have been made out of and charged against the income of the said estate and not charged to the corpus thereof.

In which said several matters and respects this exceptant prays the judgment of this Court.

LUM, TAMBLYN & COLYER,
Proctors for Exceptant.

ESSEX COUNTY ORPHANS' COURT.

Filed December 9, 1914.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	On Exceptions to Trustees' First Intermediate Account. DECREE.

Exceptions having been filed by Chasie L. Phillips, a legatee, to the first intermediate account of 1904 of Charlotte C. Hardy and George H. Lambert, as Trustees under the last will and testament of George G. Hardy, deceased, and the Court having heard the proofs in the form of stipulation agreed to by the proctors for the respective parties, and the record of this Court showing that on the twenty-fourth day of November, nineteen hundred and eleven, the said trustees presented to this Court their account covering the administration of their trust from the account of 1904 above referred to, and starting with the balance left by said intermediate account of 1904 as the first item in said account of 1911, and that the said Chasie L. Phillips then excepted to certain payments of annuities to the said Clara J. Cook within the period covered by said account of 1911, but did not except in any manner to the account of 1904 nor to the item in the account of 1911 transferred from the accounting of 1904 as the balance determined thereby, and having considered said proofs and the argument thereon in the presence of Ralph E. Lum, as Proctor for the petitioner, Chasie L. Phillips; Alfred F. Skinner, Proctor for George H. Lambert, as surviving executor and trustee under the last will of George G. Hardy, deceased; Charles H. Stewart, Esquire, as Proctor for George H. Lam-

bert, as executor and trustee under the last will and testament of Charlotte C. Hardy, deceased, and being of opinion that the payments to Clara J. Cook at the rate of four hundred dollars ($400.00) per annum, shown in said intermediate account of 1904, should be charged to the income and not to the corpus of said estate.

IT IS THEREUPON, on this ninth day of December, nineteen hundred and fourteen, on motion of Mr. Ralph E. Lum, proctor for and of counsel with the petitioner, ORDERED, ADJUDGED and DECREED that the said exceptions submitted by said petitioner be allowed.

AND IT IS FURTHER ORDERED that the said trustees under the will of the said George G. Hardy, deceased, be and they are hereby charged with the sum of thirty-seven hundred dollars ($3,700) as the portion of the corpus and principal of the said trust fund of said estate which has been paid out of said fund to the said Clara J. Cook; and that said last mentioned sum be restored to the corpus and principal of the said trust estate.

AND IT IS FURTHER ORDERED that there be allowed to Ralph E. Lum, Esquire, of counsel with the petitioner, a counsel fee of three hundred fifty ($350); Alfred F. Skinner, two hundred fifty ($250), and Charles H. Stewart, one hundred ($100), said counsel fee to be paid out of said fund to be added to the corpus of the estate.

WM. P. MARTIN, *J.*

Filed December 18, 1914.

Account of George H. Lambert, surviving Trustee under the Will of George G. Hardy, deceased, as well of and for such and so much of the goods, chattels and estate of the said deceased as has come to his hands to be administered as for his payments and disbursements out of the same:

1911 This accountant charges himself: ****

Per contra he prays allowance:

1912.

Jan.	1—To Paid Clara J. Cook, legacy	$100.00
April	1—To Paid Clara J. Cook, legacy	100.00
July	1—To Paid Clara J. Cook, legacy	100.00
Oct.	1—To Paid Clara J. Cook, legacy	100.00

1913.

Jan.	1—To Paid Clara J. Cook, legacy	$100.00
April	1—To Paid Clara J. Cook, legacy	100.00
July	1—To Paid Clara J. Cook, legacy	100.00

ESSEX COUNTY ORPHANS' COURT.

Filed January 20, 1915.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	Exceptions to the account of the surviving trustee.

Exceptions taken by Chasie L. Phillips, a legatee, to the account of George H. Lambert, surviving trustee under the will of George G. Hardy, deceased, filed on or about the eighteenth day of December, nineteen hundred and fourteen.

This exceptant excepts to the payment by the said trustee to Clara J. Cook, for the legacy, out of the corpus of the estate, amounting in all to the sum of seven hundred dollars and consisting of seven payments of one hundred dollars each in said account alleged to have been made on the following dates, to wit: 1912, January 1; April 1, July 1, October 1; 1913, January 1, April 1 and July 1; and this exceptant excepts to the payments so alleged to have been made as aforesaid on the ground that the said payments should have been made out of and charged against the income of the said estate, and not charged to the corpus thereof.

This accountant excepts to the amount with which the accountant charges himself in the following item: "To balance of principal at accounting of Charlotte C. Hardy and this accountant, trustee, $48,502.71"; and this exceptant excepts thereto on the ground that the amount of said item should be $48,648.71 as will appear from the records of this Court.

In which said several matters and respects this exceptant prays the judgment of this Court.

LUM, TAMBLYN & COLYER,
Proctors for Exceptant.

Dated January 20th, 1915.

ESSEX COUNTY ORPHANS' COURT.

Filed February 26, 1915.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	Further Exception to Account of Surviving Trustee.

Further exception taken by Chasie L. Phillips, a legatee, to the account of George H. Lambert, surviving trustee under the will of George G. Hardy, deceased, filed on or about the eighteenth day of December, nineteen hundred and fourteen.

The exceptant further excepts to the said account on the ground that the said surviving trustee hath not charged himself with the additional sum of thirty-one hundred dollars, as a portion of the corpus of the trust fund pursuant to the decree of this court made in July, nineteen hundred and thirteen; and further on the ground that the surviving trustee hath not charged himself with the sum of thirty-seven hundred dollars as a portion of the corpus of the trust fund pursuant to the decree made by this court on or about the ninth day of December, nineteen hundred and fourteen, which said decrees will appear by reference to the files of this court.

In which said several matters and respects this exceptant prays the judgment of this court.

Dated February 25, 1915.

LUM, TAMBLYN & COLYER,
Proctors for Exceptant.

ESSEX COUNTY ORPHANS' COURT.

Filed April 9, 1915.

IN THE MATTER OF THE ESTATE OF GEORGE G. HARDY, *Deceased.*	On Exceptions to Account of Surviving Trustee. DECREE.

The account of George H. Lambert, surviving trustee under the will of George G. Hardy, deceased, having been filed in the office of the Surrogate of the County of Essex, and exceptions thereto having been filed by Chasie L. Phillips, sole heir at law and next of kin of Chastina A. Duren, one of the residuary beneficiaries under the will of the said deceased, and the Court having heard the proofs in the form of the stipulation agreed to by the proctors for the respective parties in the presence of Ralph E. Lum, Esquire, of counsel with the exceptant; Alfred F. Skinner, Esquire, proctor for the accountant, and Charles H. Stewart, Esquire, proctor for George H. Lambert, as executor and trustee under the last will and testament of Charlotte C. Hardy, deceased; and it appearing to the Court, as shown by the said account, that the said accountant has paid unto Clara J. Cook the sum of seven hundred dollars ($700) out of the corpus of the said trust fund which should have been paid from the income of said trust fund; and it further appearing to the Court that the said accountant has failed to charge himself with the sum of thirty-one hundred dollars ($3,100) as a portion of the corpus of the trust fund, pursuant to the decree of this Court made in July, nineteen hundred and thirteen, and has further failed to

charge himself with the sum of thirty-seven hundred ($3,700) as a portion of the corpus and principal of said trust fund, pursuant to the decree made herein on the ninth day of December, nineteen hundred and fourteen.

It is thereupon on this 9th day of April, A. D. nineteen hundred and fifteen, ORDERED, ADJUDGED AND DECREED that the exceptions submitted as aforesaid be and the same are hereby allowed, and that the said accountant stand charged with the said additional sum of seven hundred dollars ($700) as a portion of the corpus of the trust fund with which he has charged himself.

And it is further ORDERED, ADJUDGED AND DECREED that the said accountant stand charged with the sum of seventy-five hundred dollars ($7,500) in addition to the balance shown on the said account, making a total of the corpus of the trust fund remaining in the hands of said accountant at the end of the period covered by the said account of the sum of twenty-two thousand six hundred and thirty dollars and twenty-two cents ($22,630.22) to be disposed of according to law, and the will of said testator.

And it is further ORDERED that there be allowed to Ralph E. Lum, Esq., of counsel with the exceptant, a counsel fee of fifty dollars ($50); to Alfred F. Skinner, Esq., of counsel as aforesaid, thirty-five dollars ($35), and to Charles H. Stewart, Esq., of counsel as aforesaid, thirty-five dollars ($35), said counsel fees to be paid out of said funds to be added to the corpus of the estate.

WM. P. MARTIN, *J.*

4)

Filed June 23, 1915.

ESSEX COUNTY ORPHANS' COURT.

November 14, 1913.

In the Matter of the Estate
of
GEORGE G. HARDY, *Deceased.*

Mr. Ralph R. Lum.

Mr. Alfred F. Skinner.

Mr. Charles H. Stewart.

Stipulation giving agreed state of facts presented and both sides rest.

Mr. Lum: There is one additional fact, that the payments in the first and second account were made out of the corpus and not out of the income.

The Court: It is considered that the former accounts on file are part of the evidence of the case.

Mr. Lum: And that those accounts show that the payments on account of the annuity were made out of the corpus and not out of the income.

The Court: That is not so, because the original account of the executor shows that certain amounts of money were paid.

Mr. Lum: That is the fact, and Judge Lambert, if called, would admit it. As a result it is put on the record as a fact. The payments in fact were made out of the corpus.

Mr. Skinner: Mr. Lum's statement was a little broader. He said that the accounts would show

that; that invited your Honor's comment. He rests on the acounts. I think he is right, that the account shows it, not by a separation of income from corpus but by the fact that the receipts of income are separated from corpus. If you look at the account you will see that the amount of the distribution, the payments to Mrs. Hardy were entitled to the income—

Mr. Stewart: (Handing Court copy of account).

Mr. Lum: It is a fact that those payments were made out of the corpus, no matter how it appears.

The Court: The fact is there wasn't any separation of the corpus and income at the time the executors filed their account.

Mr. Skinner: Has your Honor got the account there?

Mr. Stewart: He has a copy of the account. He has sent for the original.

Mr. Skinner: Your Honor will see that the executors charged themselves with income, total $6,025.32. The receipts of principal you will see are separated from the receipts of income, so that we know how much income there was. Now, turn to the payments to the life tenant and commission and they take exactly the amount of the income, showing that all of the payments other than commissions and payments to the life tenant must have been made out of the corpus.

Mr. Lum: I simply want that to appear.

Mr. Skinner: We want it to appear on the record then as stipulated in the case that it was a fact that the payments were made out of the corpus —does that appear?

Mr. Lum: Yes.

Mr. Skinner: And further may we not have it stipulated then, if Mr. Lum agrees with me, that it is a fact that the account shows it.

The Court: The first account of the executors was filed on the 23rd day of October, 1894. The executors filed their account. On the 9th of April, 1904, another account was filed. Then this fourth day of November, 1911, and this is an application to open the account of April 9, 1904, and also former account of October 23, 1894.

Mr. Lum: Yes, sir.

The Court: And the application is made by Chassie L. Phillips who died prior to the accounts of the executors and trustees, on the 9th of April, 1904.

Mr. Lum: That was her mother who died then, Chassie L. Phillips is heir at law of Chassie L. Duren.

The Court: The applicant here.

Mr. Lum: Yes.

The Court: Had the same right as she has now, but she did not have the same right at the time of the first account. The mother was living and had different rights, she may have become possessed of since 1894.

Mr. Skinner: The announcement that Mr. Lum made of this additional fact was that it was shown by the account that the payments had been made out of the corpus.

Mr. Lum: I did not.

Mr. Skinner: And your Honor questioned that and said "No, that is not so." I ask Mr. Lum if he still sticks to that statement?

Mr. Lum: I want it shown that all the payments of annuity were made out of the corpus and not out of the income. That is a fact that Judge Lambert can be called to swear to.

Mr. Stewart: We admit that.

Mr. Lum: I do not want to incumber the record. They admit that.

The Court: Suppose you state what you think ought to be stipulated as an additional fact.

Mr. Lum: That all of the payments of annuity to Clara J. Cook made by the executors and trustees in this case were made out of corpus and not out of income.

Mr. Skinner: We stipulate accordingly and ask that counsel further stipulate as he at first offered to do.

The Court: Let us get that proposition out of the way. You both agree to that proposition of Mr. Lum?

Mr. Stewart: Yes.

The Court: The additional clause is what?

Mr. Skinner: We ask further that counsel stipulate, as we understood he first offered to do, that the accounts themselves show the fact that payments of this annuity were made out of the corpus.

Mr. Lum: I refuse to do that. The accounts themselves is the best evidence of that. My admission to what they show would add nothing if they do not show it, and if they do show it my admission is unnecessary.

Mr. Skinner: That answers it.

Argument.

Filed June 23, 1915.

ESSEX COUNTY ORPHANS' COURT.

Friday, October 2, 1914.

In the Matter of the Estate
of
GEORGE G. HARDY, *Deceased.*

Before Hon. William P. Martin, Judge.

Messrs. Lambert & Stewart, for George H. Lambert, executor of the Estate of Charlotte C. Hardy, Deceased.

Messrs. Pitney, Hardin & Skinner, for George H. Lambert, the surviving executor under the last Will and Testament of George G. Hardy.

Messrs. Lum, Tamblyn & Colyer, for Chassie L. Phillips, a beneficiary under the Will.

Mr. Skinner: This matter comes up really, on Mr. Tamblyn's application. He is the moving party; but the situation is this, that there is practically nothing to be said by him at first, at least. You will remember in the estate of George G. Hardy, an application was made for leave to file exceptions. The Court heard argument, took the brief of counsel and rendered a decision, deciding to grant the leave. When the matter came before your Honor on the settlement of the decree or order to be entered on that opinion, the one that had been prepared by counsel for petitioner was an order that disposed of the entire exceptions on their merits. We pointed out that all that was before the Court

was a petition, to be followed by a hearing on the exceptions, on which hearing there might or might not be other testimony than that which had been before the Court on the application for leave. We notice that while disposing of all other points that had been raised your Honor's opinion did not touch at all upon the point we had raised on estoppel, acquiescence or laches, whichever it might have been called. It might have been because your Honor did not think it of sufficient importance or because your Honor was looking forward to disposing of that question when the real disposition of exceptions was before you. So we have made an objection that the order ought to go no further than the granting of leave, which your Honor sustained, as the order was so entered. We then considered carefully—Mr. Stewart and myself, I believe—whether we wanted to introduce any other testimony than had been presented by your stipulation. After carefully looking through the correspondence one evening we concluded that the testimony before the Court was all we wished to present. We then entered into a stipulation with the other side that on this matter now, on the hearing of exceptions, the same testimony should be regarded as is before the Court. We have a stipulation of it.

The Court: The stipulation is on file and has annexed to it a number of letters, or copies of letters passing between Judge Lambert and Mr. Qua in Massachusetts, in Lyons.

Mr. Skinner: Then, if it be only in the correspondence that the stipulation has been made, we ought, now, to enter upon the record that very stipulation, that that stipulation, for instance, on

the application for leave, shall be deemed to be evidence before the Court on the motion to-day.

Mr. Tamblyn: Mr. Lum informs me that the stipulation contained in his letter is satisfactory to him.

The Court: Just agree what this letter was and read it into the record.

Mr. Skinner: Mr. Tamblyn thinks I have already stated it, but perhaps I can be safe and sure to put it in. I read, now, letter from Mr. Stewart to Mr. Lum of the date of September 17, 1914: "My understanding is that it is agreed on our part, and by you, that the matter shall then go on for hearing (referring to this hearing on exceptions) on the same evidence that was before the Court on your application for leave to file exceptions.

That is, the stipulation records—and so forth, that the stipulation is to be taken as the stipulation for the purpose of this hearing the same as for the application on which it was used." Mr. Tamblyn says that this was a correct statement of the understanding and we have a copy of the letter from Mr. Lum to myself to that effect, which is the same. That being so, it would be wasting your Honor's time to review the case at all. We have been before you once, and as I say we have no desire to inch up upon the other side, and upon the Court, to get two hearings of the same matter; only we point out that all that was before your Honor at the other application was an application for leave to file and that could be properly disposed of without any decision by your Honor as to what would be done with the exceptions when filed. It was, in its nature, nothing but an appeal to the discretion

of the Court to be permitted to present the case; it did not in any way involve or require a decision of the case. Your Honor in disposing of it, as a discretionary matter, examined somewhat into the law on the points we have presented without going to the merits of the exceptions. We do not ask to be reheard on that; we only point out that there was a portion of our objection—that there was one part of the opinion, and that was this question of acquiescence. That is all I want to be heard on, now.

Your Honor will remember that the account, the controversy, covered payments made from time to time, through a period of years, I think, totaling nineteen and the question in dispute was whether those payments were annuities or legacies. If they were annuities they would be chargeable, in law, your Honor, held, against income; and I think I am correct in recalling that your Honor held that if they were legacies they would be held against the property. I think your Honor found that they were annuities. Now, these payments, whether annuities or legacies, were known to Mrs. Cook and Mrs. Duran. Mrs. Duran, one of two sisters, was the mother of one of the two exceptants, Chasie L. Duran; the mother in whose shoes she stood, was one of two sisters. She stood by and saw the executor making these payments to Mrs. Cook that are now said to be payments of an annuity and not legacies, and knew of their being made. We say that she knew of them, and what she knew of the surrounding circumstances under which they were being made, justified the Court in knowing that she acquiesced in and consented to their being made as charges against the estate. We say that the accounts show

on their examination and surface the treatment of these payments as having that character. We say that they were called in the accounts the Clara J. Cook legacy; that is the way the executor termed it in the account; and that account was not only on file here but was examined by Mrs. Duran and their counsel, not only counsel in her own state but counsel here in New Jersey familiar with and versed in New Jersey law. We also point out that while there was no separation in the account—I mean no separation by tag, by designation—the examination of the account shows that there was an ascertainment, a separation of the ? from the principal. We gather that from the commission. That we can figure it, as it was in the brief to your Honor. We demonstrated that it was allowance on so much income. That whole amount had been expended, plus those other payments. In other words, the expenditures that were probably and unmistakably owed by income on which the commissions were allowed, showing that these other payments to Mrs. Cook were treated by the Court, the executors, and Mrs. Duran herself as being payments of the principal. We also refer your Honor to the correspondence, the letter from Mr. Lum, in which there was a discussion with Judge Lambert as to the interest of Mrs. Cook and Mrs. Duran.

(Mr. Skinner argues.)

The Court: The point, as I remember, of that branch of the case is, that the proposal and the negotiations then on required, in this action, a consideration and decision of the very point in question that is now raised to the charge, as to whether it should be income or corpus. The very same point was discussed by those parties and acqui-

esced in at that time. I do not think there is any doubt about it. What is a sum sufficient to pay the annuities?

Mr. Skinner: That is not stated; the letter is silent on that except that it is indicated by this: (Reads) "What Mrs. Hardy's life interest in the principal is worth is susceptible of ascertainment on scientific principles." Then it says, such sum as will be sufficient to pay Mrs. Cook in and during Mrs. Hardy's life.

(Mr. Skinner argues.)

The Court: In an estoppel, what you are trying to do is to charge them with knowledge, and understanding through knowledge and acquiesence. Now, there is enough in the situation to charge them with knowledge; at all events, knowledge of the law.

Mr. Skinner: And I emphasized the fact of Mr. Qua's letter, where he says, "divide the remainder by two and the result will be Mrs. Duran's interest, or the price at which she will sell." Your Honor asked whether the estate of George H. Hardy would be harmed. It was said that they had estates, that it would protect them, that they could get it back from the life tenant, Mrs. Hardy. Of course, as these payments were charged to Mrs. Duran as principal, it increased the income, it increased the payments of Mrs. Hardy, the widow, and she therefore was the one to reap the benefit of this feature of the case, as chargeable against legacy, against principal. It was also urged that it was highly inequitable to do what the executors have done. I submit that when the Court of Equity in this State held and found that it is highly equitable to make ? in the same situation, that

they have placed themselves with full knowledge that it is inequitable to have any one who wants to make an arrangement to repudiate it on any view of the law, for she made an arrangement that she might not have made; and there is no equity in her daughter coming in 19 years afterwards and trying to repudiate the arrangement on which this entire estate has been administered for 19 years.

The Court: It is not 19 years; it is 10 years. The only account which was opened is the account of 1904 or 1905, about that time. The final account of the executors, the Court refused to open, as I recall the decision. One of the elements of an estoppel is that there must be such an active acquiescence or representation by the parties to the estoppel or privity. What is there to show any privity between Mrs. Duran and Chasie L. Phillips? The property was left in trust for Mrs. Hardy. Certain payments were to be made to Mrs. Cook—$200 or $400 a year. Then, upon the death of Mrs. Hardy the estate was to be divided up between Mrs. Duran and Mrs. Cook. In the event of their death all to go to Mrs. Chasie L. Phillips. Now, what privity was there between the mother and the daughter, Mrs. Duran and Mrs. Phillips?

Mr. Skinner: I think Mr. Qua appears as having represented Mrs. Chasie L. Phillips.

The Court: That is not an answer to my question. If it is true that Mr. Qua did not represent Mrs. Phillips, then is your assertion correct in stating that any acquiescence of Mrs. Duran is binding upon Mrs. Phillips? Where is the legal, technical privity?

Mr. Skinner: That troubles me.

The Court: Well, now, you might consider that, if you desire to do so. I do not think it is wise to make a hasty answer that is not thorough. Here is another question which strikes the mind of the Court very forcibly, and that is, that no estoppel will operate, except on equitable principles. Therefore, one of the elements of estoppel is that to now assert the truth is to damage the other party. I think that will be admitted at once, that equity never works estoppel where to now assert the truth is going to be an injury. Where is the legal, technical, actual injury here?

Mr. Skinner: That I think I can answer.

The Court: Well, if Mrs. Hardy has had this money all she has got to do is to pay the money back. If it had been spent—if it would be a hardship in any other way than the mere payment of the money back, you might argue, that it is a detriment to her to have the truth stated. There must be some irreparable injury. That is perhaps rather strong, but that is the direction in which the cases are traveling.

Mr. Skinner: I think that is so. I do believe that if a person is paid money year by year, under an arrangement that it may be used by her, spent for her support, and she shall never be called upon to pay it back and therefore persuaded and induced to spend the money, that for her to be called upon in after years to pay it all back is a detriment, a tangible and I might almost say irreparable injury.

The Court: If you put her on the stand and prove that she, if she had to pay the money back, would be placed in an unpleasant position, for instance, having to give up her house, that would be one position.

Mr. Skinner: The money that she has received in semi-annual installments, to have to convert that into one lump sum and pay it back—being called upon to pay back in a gross lump sum the total, at once, is a disturbance of her finances. It makes no difference that she can do it. Why should that make a difference? Why should the law be different for the ones that can't than for the one who can?

The Court: I think the Court understands the views of counsel on that question; but here is the difficulty. Does your argument overlook the fact that the account which is now in question is not a final account but is an account which is filed here, under a very remarkable provision of 1898, which was amended in 1906, in which the statute itself provided that the account may be filed, and that exceptions might be introduced through the account upon the final account. If the Court has not stated the clause correctly it has stated the substance. That is to say, that it is nothing but an account which is ascertained and by the Court put on record; not an adjudication of anything; but just a public record of the account. Assuming that you are correct upon this other proposition does not your argument overlook the provisions of that particular statute which makes it nothing but a mere filing of an account without any adjudication?

Mr. Skinner: I think not. I think if there had never been any account at all, that if this or the preceding account were never filed, that the proof of the arrangement between these parties, and action upon it, and the management accorded by the executor, consenting to its being done that way, would be proof that could be taken by this Court

upon the final account, any account, whenever they came. Any statute that says the account shall not be final or binding does not in any way take away from the binding effect of a man's agreement. This Court will enforce the agreement, it will say that there is nothing in the statute that will save you from being precluded by your agreement. These people have agreed.

The Court: Then your argument is, it seems, that there has been no account filed at all. The account which has been filed was filed under such a peculiar statute that its filing does not amount to an adjudication of or fixing of the rights of the parties. Assuming that to be so—going on the general practice that here has been a course of dealings for twenty-one years, now Mrs. Phillips comes in and objects to something in which she has acquiesced. There you are brought right back again to the other proposition, has she acquiesced and has the acquiescence of her mother who is not a party in privity with her, upon any acquiescence of hers.

Mr. Skinner: I understand that Mrs. Duran's mother died in 1891. Three years before this account was filed, the account of 1904; that Mr. Qua represented Mrs. Chasie L. Phillips at the time of that account, for three years prior. I will call your Honor's attention to the eighth clause of the will. (Reads) I say that that makes Chasie L. Phillips in privity, and only as a representative of her mother does she take.

The Court: She is not taking because she is an heir but because she is a representative of the estate.

The Court: That is upon the long acquiescence and estoppel. Well, it was perhaps glanced at in the argument, but was not developed to anything like its full strength as it is to-day. The Court has frankly stated it is very reluctant to charge this to corpus, or rather to income, after it has been charged all these years to corpus; the Court has been very reluctant to change that; it is only doing it because it is absolutely and positively constrained to. That was the basis of the other decision, that it was a legacy and not corpus.

Mr. Tamblyn: I understand that the briefs before your Honor on the other applications had covered this point also. If that is not so I think I might ask the indulgence of the Court and counsel to present that to Mr. Lum, and if he desires to consider that point any more he might do it in some form, in writing.

Mr. Skinner: We would not think of objecting, of course, to that.

The Court: There is only a little time to file a brief. Perhaps it would be better to take a week and file a brief.

Mr. Tamblyn: With regard to this so-called arrangement, as I understand it, back of these times there was an attempt to improve and commute these interests, a mere suggestion of a method of commuting one or more of these interests was undertaken. So far as there being any arrangement made, my information was that there was no such thing as an arrangement, that there was nothing any more than a mere suggestion.

Mr. Skinner: It is in that representative capacity that she has any right at all.

The Court: Her name is mentioned in the Will.

(Mr. Skinner reads from the will.)

The Court: Then I will examine that and I will hear you.

Mr. Tamblyn: I didn't anticipate there was to be any argument and I am not familiar enough with the Will to meet the objections he has raised. I understand your Honor has decided the legal questions involved on the former account.

The Court: That is not your adversary's position. As the Court understands him it is this: The fact of these negotiations and the matters referred to in the letters are of such a character as to develop a proposition for the legal if not the actual fact that charges were going on against the corpus, not against the income; that it was acquiesced in; and that now an attempt is being made to assert that it ought to be charged to income, to the detriment or damage of persons whose acts they entirely acquiesced in heretofore.

(Mr. Tamblyn argues.)

The Court: You cannot be stopped as to a legal principle. Your proposition is that there was not any acquiescence, that you never had an opportunity to come in and meet the improper accounting, except this account of 1904, which was not final, and that under the statute you had a legal right to come in, then or now, as you saw fit, and that you elected to come in now.

Mr. Tamblyn: Yes, sir. Your Honor referred in your opinion to the way things went on for a number of years.

The Court: You can file briefs within a week.

Filed June 23, 1915.

ESSEX COUNTY ORPHANS' COURT.

November 13, 1914.

In the Matter of the Estate
of
GEORGE G. HARDY, *Deceased.*

Ralph E. Lum, Esq. (Lum, Tamblyn & Colyer)
Proctor for Exceptant.

The Court: The Court has very carefully considered the further reasons argued on the hearing for over-ruling of the exception based upon the doctrines of laches, acquiescence and estoppel. The Court believes that these doctrines cannot be applied to the present situation because the statute in New Jersey specifically provides that the exception may be filed at this time as shown by the opinion of the Court upon the reopening of the partial account of 1904. The exception will be sustained.

Now, the amount of money involved in that exception is $3,100. That amount is added to the corpus of the estate, and counsel fee should come out of that amount, as was directed by the Court in the prior hearing on the other exceptions to the later account. I think you better prepare a decree, Mr. Lum, and present an affidavit showing the amount of your services, and Judge Skinner may do the same, and the Court will be glad to have sugges-

tions from counsel as to the amount of money that they think they are entitled to. Mr. Stewart also is entitled to a counsel fee.

I suppose the other side ought to have a reasonable opportunity to appeal if they want to. Is the account ready?

Mr. Lum: I do not know, sir. It seems to me they could file their final account, if they desire to appeal, and it could be passed as to everything that they had in hand except this sum.

The Court: They may desire to charge the payments made to Mrs. Cook to the corpus and have the Court rule on that question again and then take up the whole matter.

Mr. Lum: Yes. Then may I take an order that they account forthwith or within a reasonable time or any time your Honor may fix?

The Court: I think they better have about twenty days.

STIPULATION IN OPEN COURT.

ESSEX COUNTY ORPHANS' COURT.

Filed June 23, 1915.

In the Matter of the Estate of George G. Hardy, *Deceased.*	February 18, 1915.

Alfred F. Skinner, Esq. (Pitney, Hardin & Skinner), Proctor for George H. Lambert, executor of the Last Will and Testament of George G. Hardy, deceased, and representing Charles H. Stewart, Esq., Proctor for George H. Lambert, executor of the Last Will and Testament of Charlotte C. Hardy, deceased.

Egbert J. Tamblyn, Esq. (Lum, Tamblyn & Colyer), proctor for Chasie L. Phillips.

Mr. Skinner: The program that we had was that we should tell the Court that the facts upon which these exceptions should be disposed of would be stipulated, and they would be the same facts as have been presented before as to exceptions on other accounts. In other words this would be the collection of all the proofs that have been made in prior proceedings before the Court; that we would then regard the same objections and arguments as being made to the acceptance by the Court of the exceptions and urge upon your Honor the same points that have been urged before collectively. I mean the aggregate of all that have been urged on the former proceedings.

The Court: Not only in the exception proceedings but in the defense to the application to open these old accounts.

Mr. Skinner: Yes, sir. Our objections based not only on our construction of the will but on the defenses of laches, estoppel and waivers which have been before your Honor. And then we will anticipate the same rulings that have been made by your Honor on the questions, and that the ruling would be adverse to us and sustaining the exceptions; and then we have planned to take an appeal from this proceeding and the preceding orders so as to present the questions before the Court as applied to all the accounts. Now that, I understand, is still the program without modification except that Mr. Tamblyn points out something wherein he wants to correct the exceptions that they have filed.

Mr. Tamblyn: I simply want to correct now the exceptions filed so that the matter will be a little clearer. The exceptions as filed to this account now before your Honor go toward the $700 of payment by the trustee to Clara J. Cook out of the corpus of the estate, as legacy, as will appear by the exceptions. There is a second exception calling attention to certain discrepancies in the balance. Upon looking over the papers I find, however, that it does not appear that the accountant has taken into consideration the decrees and orders which you have previously made surcharging him; that is the decree of July 13, I think, which directed the accountant to pay into the corpus of the trust fund the sum of $3,100; nor has the accountant taken into consideration your Honor's decree of the 9th of December, 1914, directing the trustees to be charged with the sum of $3,700 as a portion of the corpus and principal which has been paid out of the said fund to Clara J. Cook, and directing that the said last mentioned sum be restored to the corpus.

The Court: Has not the trustee appealed?

Mr. Tamblyn: He has not yet.

Mr. Skinner. The arrangement I had with Mr. Lum was that we knew the account was being demanded—citation was already had—and Judge Lambert had it in preparation, and we would wait until this account was in and similar exceptions and similar rulings, and then take an appeal that should cover the previous proceedings as well as this.

The Court: There isn't any substantial dispute, Mr. Tamblyn. If the ruling of the Court is correct on the prior accounts then this accounting will have to be passed on a corrected basis.

Mr. Tamblyn: Yes, your Honor.

The Court: The parties have seen that the question involved is a matter of law and this is a mere detail as to figures. It is very simple to agree upon what the total ought to be the moment it is discovered whether or not the money payable to Clara J. Cook is corpus or income, and whether or not you can raise the question at this late date. Now, that is all you desire to correct, isn't it?

Mr. Tamblyn: Yes. The point is this. In this last account, in chronological order, before the Court, the accountant has not taken into account—has not complied with the orders of the Court as heretofore made, directing him to charge himself with these amounts as additions to the corpus. I simply thought that inasmuch as he had gone on with the accounting, disregarding that, that it would be better to have it appear right here at this juncture—that this objection should be interposed, now that he should have charged himself with the amount as your Honor has already ordered.

The Court: I suppose the order ought to be made in accordance with that suggestion and the whole thing will go up on appeal. We ought to settle the case here in accordance with the views expressed by this Court and then you appeal from the whole thing.

Mr. Skinner: I might be misunderstood in something I said. I want to be careful not to be. I do not want to give the impression that I had an understanding with Mr. Lum that we should take an appeal again from all previous orders of the Court. One of the decrees of the Court, I think, the time for appeal had passed when I had this talk with Mr. Lum and my understanding with him did not include that. Now, the manner in which the executor stated this, ignoring the fact that the Court had already made the orders that it had, was done after we had mentioned his embarassment to the Court, and asked to be acquitted of any contumacy or any defiance or of any intention to avoid the order of the Court.

The Court: Simply to preserve your right.

Mr. Tamblyn: My object was to preserve our right.

The Court: I will sign the decree. You better agree informally upon the decree and then you can appeal from it. Of course you cannot formally agree because then you would have abandoned your right to appeal perhaps.

Mr. Skinner: Does it appear upon the record that my statement of the stipulation as to facts, etc., of how this matter comes before the Court is the stipulation and is the record now in this case?

The Court: Yes. As I understand it the testimony now before the Court in this hearing under these exceptions will show the same evidence and information and letters between Judge Lambert and Mr. Qua and all the rest of the testimony and no more than as heretofore recorded.

Mr. Skinner: It is the sum total of what has been before the Court in all its proceedings and not one bit more.

The Court: Yes.

Mr. Skinner: Mr. Stewart, representing Judge Lambert as executor of Mrs. Hardy's estate, was unable to be here this morning and he talked with me about it and his suggestion, which I was quite willing to accede to, was that whatever disposition was made this morning should be made impliedly with his consent unless, within, say a week, he signified his dissent and asked to be heard.

Mr. Tamblyn: That is the way I understood it.

The Court: Judge Lambert is here in person as executor and trustee under the will of Mr. Hardy and also as executor and trustee under the will of Mrs. Hardy, so that he represents himself as executor and trustee and accountant, and he represents the estate of the deceased trustee, and I will allow, before finally signing the decree, seven days to any party to make any other objection in the matter.

Mr. Skinner: We will have the order as prepared, signed by all the counsel.

Mr. Tamblyn: Will it be necessary for me to file any more formal exceptions than what we have presented here?

The Court: The exception must be in writing.

Mr. Tamblyn: With respect to the matter we have discussed, failure to comply with the two previous orders?

The Court: I think so. You have a right to amend your exceptions even after the decree comes back from the Court above.

Mr. Tamblyn: On the ground of mistake.

The Court: Yes. It is nothing but a matter of totals.