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Petition.

(Filed June 23, 1943.)

Essex County Orphans' Court

IN THE MATTER	}	On Petition for Decree of Distribution. Petition.	10
of			
The Estate of			
EUSTACE CAMERON BUTLER, Deceased.			

To the Orphans' Court of the County of Essex:

The petition of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, all of the Town of Caldwell, County of Essex and State of New Jersey, respectfully shows as follows: 20

1. Your petitioners are the executors named in the last Will and Testament of Eustace Cameron Butler, deceased, and have duly qualified before the Surrogate of Essex County.

2. Attached and marked Exhibit "A" is a copy of said Will, paragraph (4) of which provided as follows:

"4. The rest, residue and remainder of my estate I give, devise and bequeath to ROBERT E. DUNCOMBE, WILLIAM H. MAURA and KENNETH F. BUTLER, all of Nassau, Bahamas, in trust, nevertheless, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with full power to my said trustees to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office. It is my wish that preference in the 30 40

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10 awarding of these scholarships be always given to the descendants of my brothers and sisters if they are in need of and apply for such assistance. My said trustees or their successors in office shall and may make such reasonable rules and regulations as may to them seem advisable for the awarding of said scholarships. To the end that this trust shall not fail for want of trustees I authorize the appropriate probate authorities of Nassau aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify.”

20 3. Robert E. Duncombe, William H. Maura and Kenneth F. Butler, all residing in Nassau, the Bahamas, are named Trustees under said Will.

4. A petition was filed in the Court of Chancery of the State of New Jersey, alleging as follows:

30 A. The complainants believe and allege that it was the intention of the testator that all of the descendants of his brothers and sisters should be the only beneficiaries and recipients under the trust created in the will but your complainants believe and allege that the said intention, meaning and desire is not clearly, unequivocally or absolutely stated and a reading of the same renders its meaning extremely doubtful to the great harm of your complainants.

40 B. The complainants believe and allege that it was the intention, desire and meaning of the testator that the descendants of his brothers and sisters, regardless of the locality or place wherever they may be found, were to be preferred in the

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awarding of scholarships or were to be eligible to apply for scholarships but the said trust created in the will is not altogether certain and serious doubt exists as to whether or not it is necessary that the descendants of the testator's brothers and sisters be required to reside in Nassau, Bahamas, before being preferred in the awarding of scholarships or becoming eligible to apply for scholarships, to the great harm and prejudice of your complainants. 10

C. The complainants believe and allege that the intention, meaning and desire of the testator was that preference in the awarding of scholarships be always given to the descendants of his brothers and sisters, if they are deserving, but your complainants say that the will recites that the descendants of the testator's brothers and sisters are to be preferred in the awarding of scholarships "if they are in need" and your complainants say firstly that the term "need" was inadvertently and mistakenly made to appear in said trust created in the will and, secondly, that it was the intention, desire and meaning of the testator to have the word "need" defined as "deserving." 20

D. The complainants believe and allege that the following words: "higher", "education", "deserving", and "resident", appearing in the trust established in the will are uncertain, doubtful, misleading and not sufficiently definitively expressly so that the parties hereunder may be apprized of their meaning. 30

E. The complainants believe and allege that the trust created in the will is void and/or inefficacious in that it is indefinite and/or its purpose and object are unascertainable. 40

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F. The complainants believe and allege that the trust created in the will may be against public policy in that it provides for a substantial fund to be held in perpetuity for the benefit of a limited number of people.

- 10 G. The complainants believe and allege that it is apparent and in fact true that the intention of the testator cannot be effectuated or successfully carried out either under the construction that it is a private trust for the testator's brothers and sisters or a public charitable trust for the deserving children resident in Nassau, Bahamas, by reason of the fact that the present beneficiaries and such other beneficiaries as are contemplated by the trust would be of such a large number that
- 20 there would be an insufficient and inadequate income resulting from the trust fund to accomplish the purpose and object of the trust.

- H. The complainants believe and allege that the trust created in said will is a private trust for the benefit of the descendants of the testator's brothers and sisters but that it is not clearly unequivocally and well established as such and serious doubt exists as to whether or not said
- 30 trust is a public charitable trust or a private trust.

I. The complainants believe and allege that if said trust is a public charitable trust then it is void, unoperative, ineffectual and unenforceable in that:

- a. It is not for the benefit of persons of a sufficiently large or indefinite class so that the community is interested in protecting
- 40 and maintaining it.

Petition.

b. It is a mixed trust of an indivisible nature providing for both the "deserving children resident in Nassau, Bahamas," and descendants "of my brothers and sisters" which on the one hand may be a charitable trust and on the other hand may be a private trust.

10

c. If the construction of the complainants is correct that this is a trust for the benefit only for the descendants of the testator's brothers and sisters then the same does not qualify as a charitable trust.

J. The complainants allege and believe that the trust created in paragraph 4 of the will is a private trust and that the same violates the rule against perpetuities or the rule against remoteness and accordingly is void and unenforcible.

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K. Your complainants believe and allege that the testator devised and created paragraph 4 of the will involving the creation of a trust so that his estate might pass to his brother's and sister's descendants without the necessity of paying or incurring taxes which would ordinarily be due to the State of New Jersey and the United States of America and therefore as a matter of public policy said paragraph 4 insofar as it relates to the trust is void.

30

L. Your complainants believe and allege that if the executors, Howard E. Wright, Clarence A. Birdsall, and Walter G. Bradley, are permitted to transfer, deliver and remove the assets of the estate of Eustace Cameron Butler to the trustees, Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, who are residents of Bermuda,

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Petition.

said removal or transfer would seriously effect and prejudice the interests of your complainants and others in like relationship.

10 M. Your complainants believe and allege that if the said assets are removed and transferred to Nassau, Bahamas, then this court may be unable to adequately compel the trustees to perform the terms and conditions of the trust, and any order of this Court interpreting and construing said trust, to the great prejudice of the complainants and others in like relationship.

20 N. Your complainants believe and allege that if the trustees, Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, are permitted to transfer and remove the assets of the estate of Eustace Cameron Butler then your complainants and others in like relationship may have their rights seriously prejudiced by reason of the fact that the law of Nassau, Bahamas, may not be as favorable to them as is the law of the State of New Jersey and the United States of America.

30 O. Your complainants allege and believe that the defendants or some of them interpret and construe said paragraphs of the will heretofore mentioned contrary to and different from the complainants construction and interpretation thereof and against the interests of the complainants.

40 P. The complainants allege and believe that it is most desirable and necessary to the interests of all parties that the said will creating the trust be submitted to this Court for a construction as to meaning, validity, and enforceability.

Petition.

5. The said petition was filed on behalf of the children of John Webb Butler, deceased, a brother of the testator, who are the following:

Robert Butler	600 E. 178th St., New York City.	10
Dorothy Fisher	Address unknown	
Marjorie Arteaga	Address unknown	
Grace Manhino	140-20—173rd St., Springfield, L. I., N. Y.	
Amelia Lingelbach	Jutland, N. J.	
John Butler	Address unknown	20
Marion Gutierrez	171-24—140 Ave., Springfield, L. I., N. Y.	
Agnes Schroeder	172-24—128 Ave., Locust Manor, L. I., N. Y.	

6. Your petitioners have filed an intermediate account and will pray for a decree of distribution. 30

Your petitioners therefore pray that said will be construed and pray that distribution be decreed in accordance with such construction.

Dated: June 19, 1943.

HOWARD E. WRIGHT,
CLARENCE A. BIRDSALL,
WALTER G. BRANDLEY. 40

Exhibit "A" Annexed to Petition.

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

10 HOWARD E. WRIGHT, CLARENCE A. BIRDSALL and
 WALTER G. BRANDLEY, of full age, being duly
 sworn, upon their oaths depose and say:

They are the petitioners named in the fore-
 going petition and that the matters and facts
 stated therein are true, according to their infor-
 mation, knowledge and belief.

HOWARD E. WRIGHT,
 CLARENCE A. BIRDSALL,
 WALTER G. BRANDLEY.

20 Subscribed and sworn to before me, }
 this 19th day of June, 1943. }

MARGARET L. FOX,
 A Notary Public of N. J.

Exhibit "A."

30 I, EUSTACE CAMERON BUTLER, of the Borough
 of Essex Fells, County of Essex and State of New
 Jersey, do hereby make, publish and declare my
 last will and testament as follows:

1. I direct that all of my just debts and the
 expenses of my funeral be paid as soon after my
 death as conveniently may be done and that all
 inheritance, estate or similar taxes or imposts
 be paid out of my residuary estate.

40 2. I give to each of my three brothers, KEN-
 NETH FORBES BUTLER, HERMON FERGUSON BUTLER

Exhibit "A" Annexed to Petition.

and EDWARD HENDERSON BUTLER, and to my sister, IRENE MAY FARRINGTON, the sum of FIVE THOUSAND DOLLARS to their own use absolutely.

3. I give and bequeath to my brother-in-law WILLIAM H. H. MAURA, my two boats, the motor boat Eustanne and the schooner Lola E. Bennett, 10
to his own use absolutely.

4. The rest, residue and remainder of my estate I give, devise and bequeath to ROBERT E. DUNCOMBE, WILLIAM H. MAURA and KENNETH F. BUTLER, all of Nassau, Bahamas, in trust, nevertheless, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with full power to my said trustees to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office. It is my wish that preference 20
in the awarding of these scholarships be always given to the descendants of my brothers and sisters if they are in need of and apply for such assistance. My said trustees or their successors in office shall and may make such reasonable rules and regulations as may to them seem advisable 30
for the awarding of said scholarships. To the end that this trust shall not fail for want of trustees I authorize the appropriate probate authorities of Nassau aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify.

I appoint HOWARD E. WRIGHT, CLARENCE A. BIRDSALL and WALTER G. BRANDLEY, executors of this my last will and testament. I direct that no bond or other security be required of my executors in any jurisdiction. 40

Exhibit "A" Annexed to Petition.

I authorize and empower my said executors or the survivor of them, to sell and dispose of any and all of my real and personal property at such time and for such prices as to them shall seem advisable, and to execute and deliver good and sufficient instruments of title therefor.

10

IN WITNESS WHEREOF I have hereunto set my hand and seal this second day of April, 1941.

EUSTACE CAMERON BUTLER.

SIGNED, SEALED, PUBLISHED and DECLARED by the testator, EUSTACE CAMERON BUTLER, as and for his last will and testament, in the presence of us, who in his presence and at his request and in the presence of each other have hereunto subscribed our names as witnesses hereto.

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Rose R. Drummond,
3 Roseland Place
Roseland, N. J.

Walter G. Brandley,
Hawthorne Road,
Caldwell, N. J.

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Testimony.

Monday, November 22, 1943.

Before:

HONORABLE ALFRED C. CLAPP, Advisory
Master. 10

(On order of reference signed by the Hon-
orable Walter D. Van Riper, Judge.)

Appearances:

EDWARD L. STASSE, SR., proctor for Howard E.
Wright, Clarence A. Birdsall and Walter
G. Brandley, Executors.

LUKE MCKENNY, proctor for Robert E. Dun- 20
combe, William H. Maura and Kenneth
F. Butler, Trustees.

EDWARD L. STASSE, JR., proctor for Montague
Maura, John Maura, Bertrand Maura,
Helen Hilton and Alice Maura, children
of Amelia Kathleen Butler Maura, sis-
ter of deceased; Kenneth F. Butler, in-
dividually, Hermon F. Butler, Edward
H. Butler, Irene M. Farrington; Mar- 30
gery Arteago and Dorothy Fisher, chil-
dren of John Butler, deceased.

ROBINSON & MORRIS (by Mr. Morris), proc-
tors for Olga Butler, Grace Manhino,
John Butler, Marion Cutierrez, Agnes
Schroeder and Amelia Lingelbach.

KRISTELLER & ZUCKER (by Lionel Kristeller),
guardian ad litem for all infants. 40

Colloquy.

Mr. Stasse, Sr.: Mr. Kristeller is appointed guardian *ad litem*. I think if we just put it in generally and not try to be specific, so that we will not omit any, that will be the better way of doing it.

10 The Advisory Master: May I ask whether the suit in Chancery has been discontinued?

Mr. Stasse, Jr.: By a consent order that was entered.

I think before we take any testimony we ought to pin this down to a definite issue, that is, what would be litigated would be the question of the validity of the trust and, further, the rights of any children of John, the deceased, to benefit by the trust as provided in Paragraph 3. The petition that we filed here is really a copy of the bill filed in Chancery and I approved of it out of courtesy more than raise any issues on behalf of the executors or trustees, but I think those are the main points of contention.

20

The Advisory Master: Have you anything to add to that?

Mr. Morris: At this time I understand there will be a further hearing after this hearing today and at that time I will be in a position to advise.

30

Mr. Stasse, Sr.: You mean to take testimony or argue the law?

Mr. Morris: Well, we may require some testimony to be taken, which will be very short.

Mr. Stasse, Sr.: All right. We will decide on that after we get through for an early date.

Mr. Morris: Then, of course, Mr. Kristeller, if he represents all the infants, may raise an issue.

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Walter G. Brandley, for Petitioners—Direct.

WALTER G. BRANDLEY, called as a witness on behalf of the petitioners, being duly sworn, testifies as follows:

Direct examination by Mr. Stasse, Sr.:

Q. Mr. Brandley, you are a practicing lawyer of the State of New Jersey? A. I am. 10

Q. And for how long? A. Thirty-three years.

Q. Was Eustace Cameron Butler a client of yours? A. Yes.

Q. For how long? A. Probably most of that time. I met him when he came in 1910 and was a friend and attorney for him after that time.

Q. Did you draw the will of April 2, 1941? A. I did.

Mr. Stasse, Sr.: Can we have entered on the record that a copy has been introduced in evidence. 20

You do not have any objection to that?

Mr. Morris: Oh, no.

(Copy of will of April 2, 1941, is received in evidence and marked Exhibit P-1.)

Q. Had you drawn any prior wills for him?

A. Yes. I drew wills for him. I drew one some three or four more years prior to that and ten years prior to that and then earlier ones that I really do not know the dates of. 30

Q. Have you copies? A. I have carbon copies in my possession of two wills that I drew just immediately prior to this. One I think was in 1937 and one in 1933.

Q. On the execution of the one in evidence what happened to the prior wills? A. They were destroyed.

Q. Have you copies of them? A. Those are carbon copies (indicating) as they were drawn. 40

Walter G. Brandley, for Petitioners—Direct.

Q. Are these the ones (indicating)? A. Yes. Those are the carbon copies.

Mr. Stasse, Sr.: Can we have those marked for identification?

10 (Carbon copies of wills referred to are marked P-2 and P-3 for identification.)

Mr. Stasse, Sr.: Have you any objection to them being marked in evidence?

You can reserve the right to strike them out if you feel they should not go in. Why not tentatively have them marked in evidence and then let the Court rule on it?

20 Mr. Morris: We will make a formal objection to their being offered in evidence on the ground that the last will speaks for itself.

The Advisory Master: I will take the matter under advisement.

Mr. Morris: An exception.

30 Q. Mr. Brandley, would you tell us what transpired between yourself and Dr. Butler at the preparation and execution of this will? A. Well, of course, this will—I don't know whether it should be said or not—the trust provisions of this will had originated with him some time prior and they followed similar provisions in earlier wills. In the original determination of what he wanted to do, he said he did not want to leave any money specifically to any of his relatives because he felt it would be dissipated unwisely, and he felt it would be better to make provision for education, which he felt would be better for the public and his own relatives, too. Those were his instruc-

40 tions to me.

Walter G. Brandley, for Petitioners—Cross.

He had this plan worked out in the life time of his wife, and they worked out a plan to provide for education and he wanted a will that would provide that and would leave the discretion entirely to the three trustees he picked out, with as little restriction as possible.

Q. How long prior to this will did his wife die? 10

A. She died in 1940. I think in April, 1940.

Q. And did you discuss any revision of this will with him after she died? A. Well, of course, this will was drawn after she died. The previous will naturally recognized her.

Q. Is that one of those (indicating)? A. One of those. The 1937 will.

Mr. Stasse, Sr.: I think that is all.

Mr. Morris: For the purpose of the record, I would like to know whether the trustees have qualified in this court. 20

Mr. Stasse, Sr.: They have not formally.

Mr. Morris: Are they going to come up here singly and qualify?

Mr. Stasse, Sr.; Well, immediately after. I don't know whether they will come up here or qualify down there.

Cross examination by Mr. Morris:

Q. Mr. Brandley, is there anybody at the present time who is receiving any benefits under the trust arrangement set up under the will? A. Not at the present time. The executors have not attempted to carry out the provisions of the will in regard to that fact because the will speaks for itself on that. 30

Q. Well, isn't it a matter of fact that one of the children of the executors or trustees is presently going to school on sums advanced by this estate? 40

Walter G. Brandley, for Petitioners—Re-direct.

Walter G. Brandley, for Petitioners—Re-cross.

A. Not now.

Q. Was there not such an advance made? A. During the school year 1942-1943.

Q. And approximately how much was advanced for this child? A. \$700.

10 Q. May I have the name of the child? A. Donald Butler.

Q. And he is the son of whom? A. Kenneth Butler, who is left a legacy of \$5,000.

Q. Do you know of your own knowledge what method, if any, was employed in providing for Donald Butler? A. Butler had the boy's care started by the doctor during his lifetime and Donald was attending school under arrangements made by the doctor at the time of the death.

20

Re-direct examination by Mr. Stasse, Sr.:

Q. You did say, though, that \$700 was deducted from the legacy? A. Yes.

Q. And that was the understanding at the time the advance was made? A. Yes.

Re-cross examination by Mr. Morris:

30 Q. Was there not, in fact, an understanding in the event that the trust was upheld that this \$700 would be applied as against the trust fund? A. Well, of course, we had no understanding as to that. That would be something for the trustees to do, not the executors.

Q. Well, who received the request for the advance? A. Well, of course, the boy was here at the time. The doctor died in May. The boy was then in attendance at the school and he did not leave the school till some time the end of May, or

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Walter G. Brandley, for Petitioners—Re-direct.

the end of June. I have forgotten when. I think it was in June, and he returned to his home in Nassau and came back in the fall. As a matter of fact, the doctor had practically assumed his education—he had assumed the responsibility for it. He was brought here for that purpose.

Q. When Donald Butler came back to the United States did he have any correspondence with any of the executors relative to coming back to the United States? A. Well, if there was any it was with me. His father probably wrote to me. 10

Q. Have you any such letters from his father?

A. I have none with me this morning.

Q. Are there any such letters? A. I think so, yes.

Mr. Stasse, Sr.: Your Honor, I object. I do not see the materiality of that. 20

The Advisory Master: I do not see the materiality, either.

Mr. Morris: No further questions.

Mr. Kristeller: No questions.

Mr. Stasse, Sr.: Well, I do not see any necessity for putting on any other witnesses unless we are confronted with some evidence that you think ought to be introduced. 30

Mr. Morris: Well, we would like to reserve the right to put on a witness.

Adjourned to Monday, December
6, 1943, at ten a. m.

Advisory Master's Conclusions.

(Filed June 23, 1944.)

MR. EDWARD L. STASSE, SR., for the executors.

MR. LUKE M. McKENNY, for the trustees of
the residuary trust.

10 MR. EDWARD L. STASSE, JR., for certain next
of kin.

MESSRS. ROBINSON & MORRIS, for other next
of kin.

CLAPP, A. M.

The executors of Eustace Cameron Butler, applying for a decree of distribution, put before the court the question whether a valid charitable trust was set up by these words of his will:

20 "The rest, residue and remainder of my
estate I give, devise and bequeath to ROBERT
E. DUNCOMBE, WILLIAM H. MAURA and
KENNETH F. BUTLER, all of Nassau,
Bahamas, in trust, nevertheless, to use
the income thereof to provide annual
scholarships for higher education to deserv-
ing children resident in Nassau, Bahamas,
with full power to my said trustees to ap-
point their successors and/or substitute
30 trustees for this fund with power to name
and designate their successors in office. It
is my wish that preference in the awarding
of these scholarships be always given to the
descendants of my brothers and sisters if
they are in need of and apply for such assist-
ance. My said trustees or their successors in
office shall and may make such reasonable
rules and regulations as may to them seem
advisable for the awarding of said scholar-
40 ships. To the end that this trust shall not
fail for want of trustees I authorize the ap-
propriate probate authorities of Nassau

Advisory Master's Conclusions.

aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify.”

If the trust is valid, then, by the application, the court is asked, in effect, to direct distribution of the residuary estate to the trustees hereof; and if invalid, then to the next of kin. 10

I need stop at the preliminary question raised, namely, whether the validity of the trust is resolvable by the law of the Bahama Islands or by the law of New Jersey where the testator was domiciled at his death. *Rosenbaum v. Garrett*, 57 N. J. Eq. 186, 192; *In re Johnson*, 127 N. J. Eq. 576, 582, aff'd 129 N. J. Eq. 104; compare *Taylor's Ex'rs. v. Trustees of Bryn Mawr College*, 34 N. J. Eq. 101, 104; *Beale Conflict of Laws*, Sec. 295.1; *Restatement id.* Sec. 295; *Land, Trusts in the Conflict of Laws*, Sec. 17, 18, 19.. Counsel agree that the Bahama Islands are a common law jurisdiction. Since the matter in issue is one to be dealt with by the common law of this State, I shall presume (there being no proof to the contrary) that it is one that would have to be dealt with by the common law of the Bahama Islands unaltered by Imperial, local or other legislation. 20

In the absence of evidence—and there is none here—the common law of another common law jurisdiction is presumptively the same as that of the forum. *Restatement Conflict of Laws*, Sec. 622, Sec. 2; *Beale id.* Sec. 622 A.1 and 622 A.2; *Wigmore Evidence* (3d Ed.) Sec. 2536; *Cuba Railroad Company v. Crosby*, 222 U. S. 473; *Kales, Presumption of the Foreign Law*, 19 Harvard Law Review 401. I am concerned then with the law of the forum only. 30 40

Advisory Master's Conclusions.

The gift of the income of the residuary estate to provide higher education for "deserving" children is charitable. It is true that the word "deserving" carries the notion of "worth" and, in its application, is not to be confined to persons in need of assistance. However, a gift promoting education is charitable though not so confined. Upon this reasoning, a bequest "for the education of deserving youths" has been held a charity. *Nichols v. Allen*, 130 Mass. 211, 218. Indeed there are many cases holding a gift for education to be charitable, though it be available to the rich as well as the poor. *Hoyt v. Bliss*, 93 Conn. 344, 105 A. 699; *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371; *Godfrey v. Hutchins*, 28 R. I. 517, 68 A. 317. Further see *Jones v. Williams*, Amb. c. 651 (the language of which is approved in *Noice v. Schnell*, 101 N. J. Eq. 252; *Perin v. Carey*, 65 U. S. 465, 506; *People v. Cogswell*, 113 Cal. 45 Pac. 270; *American Academy of Arts & Sciences v. Harvard College*, 12 Gray 582, 594; *Bowditch v. Attorney General*, 241 Mass. 168, 134 N. E. 796; *Matter of McDowell's Will*, 217 N. Y. 454, 112 N. E. 177.

The first sentence of the words of trust above quoted need be probed no further; for counsel appear to concede that it creates a valid charitable trust. The contention is that by the second sentence the trust became infected with non-charitable objects. Without deciding it, I shall assume—as the objecting next of kin would have it—that the precatory words "it is my wish" have an imperative effect. *Deacon v. Cobson*, 83 N. J. Eq. 122. A trust for the promotion of education is held charitable although in the selection of beneficiaries preference must always be given to

Advisory Master's Conclusions.

the lineal descendants of testator's grandfather or to the testator's relations and descendants, or to the lineal descendants of a deceased person, or to the descendants of testator's brothers and sisters, etc. *Braund v. Earl of Devon*, L. R. 3 Ch. App. 800; *Perin v. Carey*, 65 U. S. 465; *Tarver v. Weaver*, 221 Ala. 663, 130 So. 209; *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371 *supra*; *Franklin v. Armfield*, 2 Sneed (34 Tenn.) 305; *Paschal v. Acklin*, 27 Tex. 173; compare *Gallagher v. Gallagher*, 106 W. Va. 588, 146 S. E. 623 (the West Virginia statute somewhat alters the common law); *Schoellkopf v. U. S.*, 36 F. Supp. 617. In general see *Restatement Law of Trusts*, Sec. 370 comment k, Sec. 375 comment c; *Scott on Trusts*, Sec. 375.3; *Bogert on Trusts and Trustees*, Sec. 362; 131 A. L. R. 1289. Charitable too is a trust for the relief of the poor with a preference required to be given always to poor relations, to the testator's kindred, to the descendants of a sister and named cousins, etc. *Waldo v. Caley*, 16 Ves. Jr. 206; *Attorney-General v. Duke of Northumberland*, L. R. 7 Ch. 745; *Continental Illinois National Bank & T. Co. v. Harris*, 399 Ill. 86, 194 N. E. 250; *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110; *Matter of MacDowell's Will*, 217 N. Y. 454, 112 N. E. 177; compare *Reasoner v. Herman*, 191 Ind. 642, 134 N. E. 276. Were the matter one of doubt, courts generally "are bound to lean in favor of charity rather than against it." *Noice v. Schnell*, 101 N. J. Eq. 252, 257; *Crane v. Morristown School Foundation*, 120 N. J. Eq. 583, 589. But the cases do not leave the matter in doubt.

I do not look into the question whether the trust would have been valid had it been created solely

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Advisory Master's Conclusions.

for the education of the testator's relatives specified. Upon this matter the authorities are not in harmony. 131 A. L. R. 1283; *Scott on Trusts*, Sec. 375.3; *Bogert on Trusts and Trustees*, Sec. 363; *Restatement Law of Trusts*, Sec. 370 comment k, Sec. 375 comment c. Counsel for the ob-

10 jecting next of kin argue that under the guise of his testamentary language, the testator intended to create such a trust. It is elementary that such an intention cannot be drawn from the testator's expressions dehors the will except in a narrow situation not presented here. *First Camden, etc. Trust Co. v. Collins*, 110 N. J. 623, 628, 114 N. J. Eq. 59, 61; *Griscom v. Evans*, 40 N. J. Law 402, aff'd 42 N. J. Law 579 is the leading case in this

20 State. Compare *Bogert Trusts and Trustees*, Sec. 364. The testimony respecting testator's expressions to the draftsman of the will will be disregarded. *Farnum v. Penn. Co. for Ins. etc.*, 87 N. J. Eq. 108, aff'd at p. 652. But even assuming that testimony to have been admissible, it furnishes no indication that the testator's aim was non-charitable. The testimony was that the trust was for the benefit of "the public and his own relatives too."

30 Nor plainly can an intention solely to benefit the testator's relatives named, be collected from the words of the will. That the trustees are related to the testator and have a power to name their successors is a matter of no consequence. were the trustees unrelated to him, they would still be obliged (I have assumed as above stated, that the precatory words have an imperative effect) to prefer his qualifying relatives. Nor is

40 anything to be made of the circumstance that the residuary estate is somewhat short of \$100,000

Advisory Master's Conclusions.

leaving, it is argued, nothing for deserving children of Nassau beyond the relatives. The fund providing annual scholarships is perpetual; and there may be many years when the testator has no qualifying relatives in need of assistance. All authorities located are unanimously of the view that such a trust such as this, is sufficiently for the benefit of the public to be deemed charitable. All the authorities too stand opposed to the sweeping language of Horace Binney, if that language be taken to define a trust as non-charitable where the motive of the testator was in a part to benefit privately his relatives in the manner done here. See *Noice v. Schnell*, 101 N. J. Eq. 252, 259. Respecting a testator's motives, compare *Scott on Trusts*, Sec. 368; *Bogert Trusts and Trustees*, Sec. 364; *Restatement Law of Trusts*, Sec. 368, comment d; *First Camden etc. Trust Co. v. Collins*, 110 N. J. Eq. 623, 628 approved apparently in this regard 114 N. J. Eq. 59, 61, *supra*.

At the hearing the executors offered in evidence revoked wills of the testator, as demonstrative, I take it, of the testator's charitable aim. In any case their admissibility is dubious (*Choa Eng Wan v. Choa Giang Tee* (1923) A. C. 469, 473; *Warren Interpretation of Wills*, 49 *Harvard Law Review* 708; 37 *Harvard Law Review* 278, 279) though they have been admitted in this State to show testator's prior usages of names. *Atterbury v. Stafford*, 58 N. J. Eq. 186; *Congregational Home Missionary Society v. Van Arsdale*, 58 N. J. Eq. 293, aff'd 59 N. J. Eq. 658; compare *Wigmore Evidence* (3d ed.) Sec. 2474. However, their materiality in the case *sub judice* not having been demonstrated, they will be disregarded.

There remains the question as to the court's jurisdiction. In the Margaret B. Chandler estate,

Advisory Master's Conclusions.

as in this case, an executor applied to this court for a decree of distribution seeking to have it determined, in substance, whether the trust under the will was an effective active trust. I as master found that it was. Furthermore, I held that in view of that finding there was no need for me to pass upon the question whether the court had the jurisdiction to determine the effectiveness of the trust; for if the court had not the jurisdiction stated, it would be bound to comply literally with the words of the will, directing distribution to be made to the trustee pursuant to the trusts of the will (I cited *In re Hedden*, 109 N. J. Eq. 157); and if the court had the jurisdiction, then as the trust was in my opinion effective, the decree would direct distribution in the same words, namely, to the trustee pursuant to the trusts of the will. The Orphans' Court decree embodying my conclusions was attacked collaterally in the Court of Chancery and that court, citing *In re McCown's Estate*, 221 Pa. 324, 70 A. 784, held the decree conclusive as to the effectiveness and activity of the trust. *First National Bank etc. Montclair v. Chandler*, 133 N. J. Eq. 335. The case settles the question here.

The question raised in the petition as to whether the descendants of brothers and sisters may apply for a scholarship only if they be located in Nassau, the questions therein raised as to the significance of the words "need," "higher," "education," "resident" and as to the administration of the trust may be deemed abandoned by counsel, without prejudice to their consideration in another proceeding.

Decree of Distribution.

The trust being valid, the decree will direct distribution of the residuary estate to the trustees thereof pursuant to the trusts of the will.

Dated: June 23, 1944.

ALFRED C. CLAPP,
Advisory Master

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Decree of Distribution.

(Filed September 21, 1944.)

A petition having been filed in this cause praying that the trust established in the Last Will and Testament of Eustace Cameron Butler, deceased, be construed and its validity determined, and that distribution be decreed in accordance with said construction; and an order to show cause having been made and entered herein on the 18th day of October, 1943, returnable on the 22nd day of November, 1943, at ten o'clock in the forenoon, before Honorable Alfred C. Clapp, an Advisory Master of the Orphans' Court, at the Hall of Records, Newark, New Jersey, directing that the parties in interest in said application, Olga Butler, Grace Manhino, John Butler, Marion Gutierrez, Agnes Schroeder, John Butler Jr., Charles Gutierrez, Robert Schroeder, Amelia Lingelbach, Richard Lingelbach, Howard E. Wright, Clarence A. Birdsall, Walter G. Brandley, Robert E. Duncombe, William H. Maura, Kenneth F. Butler, Robert Butler, Dorothy Fisher, Marjorie Arteaga, Irene May Farrington, Bertram Maura, Montague Maura, Helen Hilton, John Maura, Alice Maura, Harmon Ferguson Butler, Edward Henderson Butler, Katleen Butler, Karon Fisher, Cathleen Fisher, Dorothy Arteaga, Jack Arteaga, Olga Arteaga, Charles Arteaga, John R. Butler, Basil Butler, Donald Butler, Rodney Hilton,

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Decree of Distribution.

Grace Butler, Doreen Butler and Rosie Butler, show cause why a date should not be set for a hearing to the end that the trust established in the will of Eustace Cameron Butler, deceased, be construed and its validity determined, and further why an order should not be entered appointing a next friend and guardian of such infants as may have an interest in the construction and determination of such trust; and it appearing that true copies of the petition and order to show cause herein have been duly served upon all parties in interest in this application, and Lionel P. Kristeller having been duly appointed as Guardian ad Litem of such infants as may have an interest in this application; and the matter coming on to be heard, and the court having taken testimony and examined into the matter, and, being satisfied that the gift of the testator's residuary estate, contained in Paragraph 4 of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testator's brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate remaining in the hands of the Executors should be distributed to the Trustees named in the said Will, to be administered by said Trustees pursuant to the trusts of said will:

Decree of Distribution.

IT IS THEREUPON, on this 21st day of September, 1944, ORDERED, ADJUDGED, and DECREED that the entire balance of the residuary estate of said deceased, Eustace Cameron Butler, both as to the corpus and the income thereof, remaining in the hands of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, as Executors, after the payment of the costs of these proceedings and the counsel fees hereinafter allowed, be distributed and paid to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees under the Last Will and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust pursuant to the trusts contained and set forth in said will; 10

IT IS FURTHER ORDERED that a counsel fee of \$2,500 be allowed to Edward L. Stasse, Sr., Proctor for Howard K. Wright, Clarence A. Birdsall and Walter G. Brandley, Executors; that a counsel fee of \$1,000 be allowed to Luke M. McKenny, Proctor for Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees; that a counsel fee of \$100 be allowed to Edward L. Stasse, Jr., Proctor for Montague Maura, John Maura, Bertrand Maura, Helen Hilton and Alice Maura, children of Amelia Kathleen Butler Maura, sister of deceased; Kenneth F. Butler, individually, Hermon F. Butler, Edward H. Butler, Irene M. Farrington; Margery Arteago and Dorothy Fisher, children of John Butler, deceased; that a counsel fee of \$2,500 be allowed to Robinson & Morris, Proctors for Olga Butler, Grace Manhino, John Butler, Marion Gutierrez, Agnes Schroeder and Amelia Lingelbach; and that the sum of \$750 be allowed to Lionel P. Kristeller, Guardian ad Litem for the infant respondent; 20 30 40

Petition of Appeal.

ents, for his services as such Guardian ad Litem, said allowances to be paid out of the funds remaining undistributed in the hands of said Executors.

Respectfully Advised,

10 ALFRED C. CLAPP,
A. M.

DANIEL J. BRENNAN,
Judge.

Petition of Appeal.

(Filed October 13, 1944.)

*To the Honorable Luther A. Campbell,
Ordinary of the Prerogative Court.*

20 The petition of Olga Butler, Grace Manhino, John Butler, Marion Gutierrez, Agnes Schroeder and Amelia Lingelbach, the applicants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a decree of distribution made in the Essex County Orphans' Court by Daniel J. Brennan, Judge of the Essex County Orphans' Court, bearing the date September 21, 1944, in this respect, to wit, that the said decree adjudges:

30 "A Petition having been filed in this cause praying that the trust established in the Last Will and Testament of Eustace Cameron Butler, deceased, be construed and its validity determined, and that distribution be decreed in accordance with said construction; and an order to show cause having been made and entered herein on the 18th day of October, 1943, returnable on the 22nd day of November, 1943, at ten o'clock in the forenoon, before Honorable Alfred C. Clapp, an Advisory Master of the Orphans' Court, at the Hall

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Petition of Appeal.

of Records, Newark, New Jersey, directing that the parties in interest in said application, Olga Butler, Grace Manhino, John Butler, Marion Gutierrez, Agnes Schroeder, John Butler, Jr., Charles Gutierrez, Robert Schroeder, Amelia Lingelbach, Richard Lingelbach, Howard E. Wright, Clarence A. Birdsall, 10
 Walter G. Brandley, Robert E. Duncombe, William H. Maura, Kenneth F. Butler, Robert Butler, Dorothy Fisher, Marjorie Arteaga, Irene May Farrington, Bertram Maura, Montague Maura, Helen Hilton, John Maura, Alice Maura, Hermon Ferguson Butler, Edward Henderson Butler, Katleen Butler, Karon Fisher, Cathleen Fisher, Dorothy Arteaga, Jack Arteaga, Olga Arteaga, Charles 20
 Arteaga, John H. Butler, Basil Butler, Donald Butler, Rodney Hilton, Grace Butler, Doreen Butler and Rosie Butler, show cause why a date should not be set for a hearing to the end that the trust established in the Will of Eustace Cameron Butler, deceased, be construed and its validity determined, and further why an order should not be entered appointing a next friend and guardian of such infants as may have an interest in the construction and determination of such trust; 30
 and it appearing that true copies of the petition and order to show cause herein have been duly served upon all parties in interest in this application, and Lionel P. Kristeller having been duly appointed as Guardian *ad Litem* of such infants as may have an interest in this application; and the matter coming on to be heard, and the court having taken testimony and examined into the matter, and being 40
 satisfied that the gift of the testator's

Petition of Appeal.

10 residuary estate, contained in Paragraph 4 of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testator's brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate remaining in the hands of the Executors should be distributed to the Trustees named in the said Will, to be administered by said Trustees pursuant to the trusts of said will;

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IT IS THEREUPON, on this 21st day of September, 1944, ORDERED, ADJUDGED, and DECREED, that the entire balance of the residuary estate of said deceased, Eustace Cameron Butler, both as to the corpus and the income thereof, remaining in the hands of Howard E. Wright, Clarence A. Birdsall and Walter C. Brandley, as Executors, after the payment of the costs of these proceedings and the counsel fees hereinafter allowed, be distributed and paid to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees under the Last Will and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust pursuant to the trusts contained and set forth in said will;" and your petitioners humbly appeal from that part of the decree of the Essex County Orphans'

Petition of Appeal.

Court as aforesaid, upon the ground that the same is erroneous for that:

1. The trust declared upon is against public policy and therefore void.

2. The trust declared upon violates the rule against perpetuities or the rule against remoteness and is therefore void. 10

3. The trust declared upon is a mixed trust being in part private, in part public and in part charitable and is therefore void.

4. The trust declared upon is not a legal trust.

5. The trust declared upon is void in that the same is indefinite and is so created as to be unenforceable. 20

6. Lastly, the trust declared upon is void, ineffectual and unenforceable for divers other reasons.

Your petitioners therefore pray that the said decree of the said Judge of the Essex County Orphans' Court may be in the particulars aforesaid reversed, set aside and for nothing holden, and that the trust be declared and established as being void and ineffectual and that the executors be directed to administer said funds as though the decedent had died intestate insofar as said funds are concerned, and your petitioners pray that they may have such other relief in the premises as to this Honorable Court shall seem meet. 30

ROBINSON & MORRIS,
Solicitors for Appellants.

IRVING MORRIS,
Of Counsel.

Opinion.

June 8, 1945.

1. A trust to provide scholarships for higher education is a charitable trust.
2. If a trust be created for a charitable purpose, the giving of a preference to those members of a certain family who come within the general class of beneficiaries, does not deprive it of the character of a charitable trust or convert it into a private trust.
- 10 3. The question is not what the testator desired to accomplish but what will be the result of the trust upon the community and society in general.
4. The presumption is that trustees will fulfill their duties in an impartial manner.

MR. LUKE M. MCKENNY, for the Trustees.

MR. EDWARD L. STASSE, SR., for the Executors.

20 MESSRS. ROBINSON & MORRIS (MR. IRVING MORRIS), for the Appellants.

MR. LIONEL P. KRISTELLER, for Infant Respondents.

BIGELOW, *V.-O.*

30 Dr. Eustace C. Butler, late of Essex County, bequeathed his residuary estate to his brother Kenneth, and his nephews Robert E. Dunscombe and William H. Maura, all of Nassau, in the Bahama Islands:

40 “In trust, nevertheless, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with full power to my said trustees to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office. It is my wish that preference in the awarding to these scholarships be always given to the descendants of my brothers”

Opinion.

and sisters if they are in need of and apply for such assistance. My said trustees or their successors in office shall and may make such reasonable rules and regulations as may to them seem advisable for the awarding of said scholarships. To the end that this trust shall not fail for want of trustees I authorize the appropriate probate authorities of Nassau aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify.''' 10

The respondents, who are the next of kin of Dr. Butler, say that this is a private trust which violates the rule against perpetuities and therefore fails. A trust to provide scholarships for higher education is a charitable trust. *Noice v. Schnell*, 101 N. J. Eq. 252. But the respondents insist that the preference given to descendants of testator's brothers and sisters is fatal. A trust for the benefit of the descendants of the donor's relatives is not a charitable trust. But if a trust be created for a charitable purpose, the giving of a preference to those members of a certain family who come within the general class of beneficiaries, does not deprive it of the character of a charitable trust or convert it into a private trust. *In re MacDowell*, (N. Y.) 112 N. E. 177; *Restatement-Trusts*, sec. 375(c); *Bogart on Trusts*, sec. 362; 3 *Scott on Trusts*, 2081; *Annotation* 131 A. L. R. 1289. It seems to me clear that the preference desired by Dr. Butler does not invalidate the gift. His will means that if there shall be among the deserving children of Nassau, descendants of his brothers and sisters who are in need of financial assistance for their higher 20 30 40

Opinion.

education and apply to the trustees for scholarships, then they shall be given a preference. They will not be eligible unless they are deserving children, resident in Nassau, and unless they are in need of such assistance.

10 The respondents have presented evidence from which they argue that the trust was a clever scheme of testator to ensure the free education of descendants of his brothers and sisters, and that it was not his object to benefit the public of Nassau generally. "The question is not what the testator desired to accomplish by the trust, but what, in the opinion of the court, will be the result of the trust upon the community and society in general. What would be the net result of such a trust as testator described?" *Woodstown National Bank*

20 *v. Snellbaker*, 136 N. J. Eq. 62. The essential feature of a charitable trust is the benefit to the public or a sufficiently large class, so that the community has an interest in the trust. *Johnson v. Bowen*, 85 N. J. Eq. 76. I am told that Dr. Butler's residuary estate will probably bring in an annual income of \$3,000; that \$750 may be taken as a reasonable figure for a scholarship. It appears that one of testator's nephews is ready for a college education and that the trustees, if the trust is sus-

30 tained, expect to give him a scholarship. This would leave three scholarships for children not related to testator. The situation will vary from year to year, but it seems likely that the fund will be of real value for the promotion of higher education in the little City of Nassau.

40 Respondents also insinuate that the trustees, all related to the testator, will not only prefer their young kinsmen in awarding scholarships, but will make their scholarships much larger than those granted to others, sending the Butler group to

*Decree Affirming Decree of Distribution
and Remittitur.*

universities in the United States, while the less favored must be content with Queen's College in Nassau. The court cannot proceed on such an assumption. The trustees are directed to make reasonable rules and regulations which should, of course, apply to all scholarships alike. The presumption is that the trustees will fulfill their duties in an impartial manner, giving to their kinsmen only the preference which testator's will expresses. 10

The decree of the Orphans' Court, directing payment of the residuary estate to the trustees, is affirmed.

**Decree Affirming Decree of Distribution and
Remittitur.** 20

(Filed June 26, 1945.)

This matter having been brought to a hearing on appeal from a decree from the Essex County Orphans' Court, directing that the entire balance of the residuary estate of Eustace Cameron Butler, deceased, both as to the corpus and income thereof, remaining in the hands of Howard E. Wright, Clarence A. Birdsall, and Walter G. Brandley, as Executors, be distributed and paid to Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, Trustees under the Last Will and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust, pursuant to the trusts contained and set forth in said will; and the court having examined and considered the transcript of the testimony and the proceedings before said Essex County Orphans' Court, and having heard Robinson & Morris, Proc- 30
tutors for the appellants; Luke M. McKenny, Proc- 40

*Decree Affirming Decree of Distribution
and Remittitur.*

tor for the Trustees respondents; Edward L. Stasse, Sr. Proctor for the Executors respondents; and Lionel P. Kristeller, Guardian *ad litem* and proctor for the infant respondents, and being satisfied that the gift of the testator's residuary estate, contained in paragraph four of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testator's brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate remaining in the hands of the Executors should be distributed to the trustees named in said will, to be administered by said trustees pursuant to the trusts of said will;

IT IS, on this 19th day of June, 1945, on motion of Edward L. Stasse, Sr., Proctor for the Executors respondents, and of Luke M. McKenny, Proctor for the Trustees respondents, ORDERED, ADJUDGED, and DECREED that the said decree of the Essex County Orphans' Court, made on the 21st day of September, 1944, directing payment of the residuary estate of said Eustace Cameron Butler, deceased, to the trustees, from which the appellants appealed, be, and the same hereby is, in all things affirmed; and

IT IS FURTHER ORDERED that the record in this cause be remitted to the Essex County Orphans'

Notice of Appeal

Court for further proceedings thereon according to the law and the practice of that court.

Respectfully Advised,

JOHN O. BIGELOW,
V.-O.

LUTHER A. CAMPBELL,
O.

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Notice of Appeal.

(Filed August 23, 1945.)

To: EDWARD L. STASSE, SR., Proctor for Howard E. Wright, Clarence A. Birdsall, and Walter G. Brandley, Executors;

LUKE M. MCKENNY, Proctor for Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, Trustees; 20

EDWARD L. STASSE, JR., Proctor for Montague Maura, John Maura, Bertrand Maura, Helen Hilton, and Alice Maura, children of Amelia Kathleen Butler Maura, sister of deceased; Kenneth F. Butler, individually, Harmon F. Butler, Edward H. Butler, Irene M. Farrington; Margery Arteago and Dorothy Fisher, children of John Butler, deceased; 30

LIONEL P. KRISTELLER, Guardian *ad Litem* for the infant respondents.

SIRS:

PLEASE TAKE NOTICE that Olga Butler, Grace Manhino, John Butler, Marion Cutierrez, Agnes Schroeder and Amelia Lingelbach herewith appeal to the Court of Errors and Appeals from 40

Notice of Appeal

that part of the order or decree entered September 21, 1944 by the Honorable Daniel J. Brennan, Judge of the Essex County Orphans' Court, which reads as follows:

10 "A Petition having been filed in this cause praying that the trust established in the Last Will and Testament of Eustace Cameron Butler, deceased, be construed and its validity determined, and that distribution be decreed in accordance with said construction; and an order to show cause having been made and entered herein on the 18th day of October, 1943, returnable on the 22nd day of November, 1943, at ten o'clock in the forenoon, before Honorable Alfred C. Clapp, an

20 Advisory Master of the Orphans' Court, at the Hall of Records, Newark, New Jersey, directing that the parties in interest in said application, Olga Butler, Grace Manhino, John Butler, Marion Cutierrez, Agnes Schroeder, John Butler, Jr., Charles Cutierrez, Robert Schroeder, Amelia Lingelbach, Richard Lingelbach, Howard E. Wright, Clarence A. Birdsall, Walter G. Brandley, Robert E. Duncombe, William H. Maura, Kenneth F. Butler, Robert Butler, Dorothy Fisher, Marjorie Arteaga, Irene May Farrington,

30 Bertram Maura, Montague Maura, Helen Hilton, John Maura, Alice Maura, Hermon Ferguson Butler, Edward Henderson Butler, Katleen Butler, Karon Fisher, Cathleen Fisher, Dorothy Arteaga, Jack Arteaga, Olga Arteaga, Charles Arteaga, John R. Butler, Basil Butler, Donald Butler, Rodney Hilton, Grace Butler, Doreen Butler, and Rosie Butler, show cause why a date should not be set for a hearing to the end that

40 the trust established in the will of Eustace Cameron Butler, deceased, be construed and its valid-

Notice of Appeal

ity determined, and further why an order should not be entered appointing a next friend and guardian of such infants as may have an interest in the construction and determination of such trust; and it appearing that true copies of the petition and order to show cause herein have been duly served upon all parties in interest in this application, and Lionel P. Kristeller having been duly appointed as Guardian *ad Litem* of such infants as may have an interest in this application; and the matter coming on to be heard, and the court having taken testimony and examined into the matter, and being satisfied that the gift of the testator's residuary estate, contained in Paragraph 4 of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testator's brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate remaining in the hands of the Executors should be distributed to the Trustees named in the said Will, to be administered by said Trustees pursuant to the trusts of said will;

IT IS THEREUPON, on this 21st day of September, 1944, ORDERED, ADJUDGED, and DECREED, that the entire balance of the residuary estate of said deceased, Eustace Cameron Butler, both as to the corpus and the income thereof, remaining in the

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Notice of Appeal

hands of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, as Executors, after the payment of the costs of these proceedings and the counsel fees hereinafter allowed, be distributed and paid to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees under
10 the Last Will and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust pursuant to the trusts contained and set forth in said will;

and that part of the order or decree entered June 19, 1945, by the Honorable Luther A. Campbell, Ordinary of the Prerogative Court, upon the advice of Vice-Ordinary John O. Bigelow, which reads as follows:

20 “This matter having been brought to a hearing on appeal from a decree from the Essex County Orphans’ Court, directing that the entire balance of the residuary estate of Eustace Cameron Butler, deceased, both as to the corpus and income thereof, remaining in the hands of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, as Executors, be distributed and paid to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees under the Last Will
30 and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust, pursuant to the trusts contained and set forth in said will; and the court having examined and considered the transcript of the testimony and the proceedings before said Essex County Orphans’ Court, and having heard Robinson & Morris, Proctors for the appellants; Luke M. McKenny, Proctor for the Trustees respondents; Edward L. Stasse, Sr., Proctor for the Executors respondents, and Lionel P. Kristeller, Guardian *ad litem*
40 and proctor for the infant respondents, and being

Notice of Appeal.

satisfied that the gift of the testator's residuary estate, contained in Paragraph 4 of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testator's brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate remaining in the hands of the Executors should be distributed to the trustees named in said will, to be administered by said trustees pursuant to the trusts of said will; 10 20

IT IS, on this 19 day of June, 1945, on motion of Edward L. Stasse, Sr., Proctor for the Executors respondents, and of Luke M. McKenny, Proctor for the Trustees respondents, ORDERED, ADJUDGED, and DECREED, that the said decree of the Essex County Orphans' Court, made on the 21st day of September, 1944, directing payment of the residuary estate of said Eustace Cameron Butler, deceased, to the trustees, from which the appellants appealed, be, and the same hereby is, in all things affirmed." 30

ROBINSON & MORRIS,
Proctors for Appellants.

I conceive that there is good cause for this appeal.

IRVING MORRIS,
Proctor. 40

Petition of Appeal.

(Filed August 24, 1945.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

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IN THE MATTER
of
The Estate of
EUSTACE CAMERON BUTLER,
Deceased.

Petition of
Appeal.

To the Court of Errors and Appeals.

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The petition of Olga Butler, Grace Manhino, John Butler, Marion Gutierrez, Agnes Schroeder and Amelia Lingelbach, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by a decree of distribution made in the Essex County Orphans' Court by Daniel J. Brennan, Judge of the Essex County Orphans' Court, bearing the date September 21, 1944, in this respect, to wit, that the said decree adjudges:

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"A Petition having been filed in this cause praying that the trust established in the Last Will and Testament of Eustace Cameron Butler, deceased, be construed and its validity determined, and that distribution be decreed in accordance with said construction; and an order to show cause having been made and entered herein on the 18th day of October, 1943, returnable on the 22nd day of November, 1943, at ten o'clock in the forenoon, before Honorable Alfred C.

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Clapp, an Advisory Master of the Orphans' Court, at the Hall of Records, Newark, New Jer-

Petition of Appeal.

sey, directing that the parties in interest in said application, Olga Butler, Grace Manhino, John Butler, Marion Gutierrez, Agnes Schroeder, John Butler, Jr., Charles Gutierrez, Robert Schroeder, Amelia Lingelbach, Richard Lingelbach, Howard E. Wright, Clarence A. Birdsall, Walter G. Brandley, Robert E. Duncombe, William H. Maura, Kenneth F. Butler, Robert Butler, Dorothy Fisher, Marjorie Arteaga, Irene May Farrington, Bertram Maura, Montague Maura, Helen Hilton, John Maura, Alice Maura, Hermon Ferguson Butler, Edward Henderson Butler, Kathleen Butler, Karon Fisher, Cathleen Fisher, Dorothy Arteaga, Jack Arteaga, Olga Arteaga, Charles Arteaga, John R. Butler, Basil Butler, Donald Butler, Rodney Hilton, Grace Butler, Doreen Butler, and Rosie Butler, show cause why a date should not be set for a hearing to the end that the trust established in the Will of Eustace Cameron Butler, deceased, be construed and its validity determined, and further why an order should not be entered appointing a next friend and guardian of such infants as may have an interest in the construction and determination of such trust; and it appearing that true copies of the petition and order to show cause herein have been duly served upon all parties in interest in this application, and Lionel P. Kristeller having been duly appointed as Guardian *ad Litem* of such infants as may have an interest in this application; and the matter coming on to be heard, and the court having taken testimony and examined into the matter, and being satisfied that the gift of the testator's residuary estate, contained in Paragraph 4 of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura, and

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10 Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testators' brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate remaining in the hands of the Executors should be distributed to the Trustees named in the said Will, to be administered by said Trustees pursuant to the trusts of said will;

20 IT IS THEREUPON, on this 21st day of September, 1944, ORDERED, ADJUDGED, and DECREED, that the entire balance of the residuary estate of said deceased, Eustace Cameron Butler, both as to the corpus and the income thereof, remaining in the hands of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, as Executors, after the payment of the costs of these proceedings and the counsel fees hereinafter allowed, be distributed and paid to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees under the Last Will and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust pursuant to the trusts contained and set forth in said will;

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and by a decree of distribution made in the Prerogative Court of New Jersey by Luther A. Campbell, Ordinary of the Prerogative Court, upon the advice of Vice-Ordinary John O. Bigelow, bearing the date June 19, 1945, in this respect, to wit, that the said decree adjudges:

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"This matter having been brought to a hearing on appeal from a decree from the Essex County Orphans' Court, directing that the entire balance of the residuary estate of Eustace Cameron Butler, deceased, both as to the corpus and income thereof, remaining in the hands of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, as Executors, be distributed and paid to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, Trustees under the Last Will and Testament of said Eustace Cameron Butler, deceased, to be administered as a charitable trust, pursuant to the trusts contained and set forth in said will; and the court having examined and considered the transcript of the testimony and the proceedings before said Essex County Orphans' Court, and having heard Robinson & Morris, Proctors for the appellants; Luke M. McKenny, Proctor for the Trustees respondents; Edward L. Stasse, Sr., Proctor for the Executors respondents, and Lionel P. Kristeller, Guardian *ad litem* and proctor for the infant respondents, and being satisfied that the gift of the testator's residuary estate, contained in Paragraph 4 of the Last Will and Testament of said Eustace Cameron Butler, deceased, to Robert E. Duncombe, William H. Maura and Kenneth F. Butler, as Trustees, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with the wish that preference in the awarding of these scholarships be always given to the descendants of the testator's brothers and sisters if they are in need of and apply for such assistance, constitutes a valid charitable trust of said residuary estate, and being further satisfied that the balance of the residuary estate re-

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maining in the hands of the Executors should be distributed to the trustees named in said will, to be administered by said trustees pursuant to the trusts of said will;

10 IT IS, on this 19th day of June, 1945, on motion of Edward L. Stasse, Sr., Proctor for the Executors respondents, and of Luke M. McKenny, Proctor for the Trustees respondents, ORDERED, ADJUDGED, and DECREED, that the said decree of the Essex County Orphans' Court, made on the 21st day of September, 1944, directing payment of the residuary estate of said Eustace Cameron Butler, deceased, to the trustees, from which the appellants appealed, be, and the same hereby is, in all things affirmed;''

20 and your petitioners humbly appeal from that part of the decree of the Essex County Orphans' Court as aforesaid, and from that part of the decree of the Prerogative Court of New Jersey as aforesaid, upon the ground that the same are erroneous for that:

1. The trust declared is against public policy and therefore void.

30 2. The trust declared upon violates the rule against perpetuities or the rule against remoteness and is therefore void.

3. The trust declared upon is a mixed trust being in part private, in part public and in part charitable and is therefore void.

4. The trust declared upon is not a legal trust.

40 5. The trust declared upon is void in that the same is indefinite and is so created as to be unenforceable.

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6. Lastly, the trust declared upon is void, ineffectual and unenforcible for divers other reasons.

Your petitioners therefore pray that the said decree of the said Judge of the Essex County Orphans' Court and the said decree of the said Ordinary of the Prerogative Court may be in the particulars aforesaid reversed, set aside and for nothing holden and that the trust be declared and established as being void and ineffectual and that the executors be directed to administer said funds as though the decedent had died intestate insofar as said funds are concerned and your petitioners pray that they may have such other relief in the premises as to this Honorable Court shall seem meet.

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ROBINSON & MORRIS,
Solicitors for Appellants.

IRVING MORRIS,
Of Counsel.

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24 OCT T. 1945

New Jersey Court of Errors and Appeals

IN THE MATTER
of
The Estate of
EUSTACE CAMERON BUTLER,
Deceased.

On Petition for
Decree of
Distribution.
On Appeal.

BRIEF FOR APPELLANTS.

Issue.

This is an appeal from the decree of the Ordinary, Luther A. Campbell, respectfully advised by John O. Bigelow, Vice Ordinary, affirming the decree of distribution entered by Daniel J. Brennan, Judge of the Essex County Orphans' Court, under the advice of Alfred C. Clapp, Special Master. The order and the affirming decree adjudicated that the trust declared in the Last Will and Testament of the decedent, E. C. Butler, was valid and effectual and that the residuary estate be distributed and paid to the trustees. The position of the appellants is that the trust as created is void on the grounds and reasons hereinafter assigned.

Facts.

E. C. Butler, a white physician, resident of the State of New Jersey, died on May 12, 1942 and in his Last Will and Testament, provided as follows:

"4. The rest, residue and remainder of my estate I give, devise and bequeath to ROBERT E. DUNCOMBE, WILLIAM H. MAURA and KEN-

NETH F. BUTLER, all of Nassau, Bahamas, in trust, nevertheless, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with full power to my said trustees to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office. It is my wish that preference in the awarding of these scholarships be always given to the descendants of my brothers and sisters if they are in need of and apply for such assistance. My said trustees or their successors in office shall and may make such reasonable rules and regulations as may to them seem advisable for the awarding of said scholarships. To the end that this trust shall not fail for want of trustees I authorize the appropriate probate authorities of Nassau aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify.

“I appoint HOWARD E. WRIGHT, CLARENCE A. BIRDSALL and WALTER G. BRANDLEY, executors of this my last will and testament. I direct that no bond or other security be required of my executors in any jurisdiction.”

E. C. Butler had been married but his wife had predeceased him and there was no issue of said marriage. The decedent did leave surviving him, 3 brothers, 1 sister, 1 sister-in-law, approximately 20 nephews and nieces, and approximately 14 grandnephews and grandnieces. The appellants are part of this group and if the trust fails will be entitled to receive one-fifth of the residuary estate (\$150,000). The appellants are the only United States citizens; all others are citizens and residents of Nassau, Bahamas.

The executors, 3 in number, are unrelated to the decedent, and gained their appointment to their office because of their standing in the community

in which the decedent resided. They, the executors, are without power to appoint or nominate their successors, or substitute others to perform the duties of their office. The executors, neither directly or indirectly, have any interest in the persons who may receive the benefits under the trust. The executors have no interest, directly or indirectly, in the administration of the estate or the trust except to perform their official duties.

By way of contrast, the trustees are related to the decedent and are empowered * * * "to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office." The trustees are all of Nassau, Bahamas, and are directly and indirectly concerned with the benefits, for they are to determine whether or not their own descendants are to receive the benefits of the trust to the exclusion of all other persons. The trust purports to set up two classes of beneficiaries, one, the collateral heirs, and two, residents of Nassau, with the mandatory direction that the collateral heirs are to have the availability of the income for their own use, the remainder, if any, to the residents of Nassau. The children of Nassau must be deserving, whereas the collateral heirs must be in "need of assistance". This distinction, of course, gives a wide latitude to the trustees to ignore the children of Nassau. The trustees, by this wording, having a rigid control over outside interference. No person could reasonably complain if the trustees found no deserving residents of Nassau. They, the trustees, could adopt almost any definition for the word "deserving" and thereby make the trust fund unavailable to residents of Nassau. On the other hand, the collateral heirs could allege in any judicial proceeding their "need of assistance" and the court upon an examination could

find the existence of the "need of assistance". Then too, which is most important, the deserving residents have no way of reaching the benefits of the fund except as the trustees may determine whereas, under the will, the collateral heirs are expressly authorized to apply for such assistance.

One final factor is to be considered, which shows the ingenuity of the draftsman and the testator. E. C. Butler, during his lifetime, was a frequent visitor of Nassau, Bahamas, and as such knew that 85% of the population was and is colored and admittedly have little or no education so that for all practical purposes few, if any, could be selected for benefits for "higher education", not having the necessary primary education.

The opinion of the appellants that this was a private trust solely for the benefit of the collateral heirs is fortified by the practice of the decedent before his death, and the continuation of his policy by the executors and trustees after his death. Donald Butler, a son of one of the trustees, was granted a scholarship by the decedent during his lifetime, and this scholarship was continued by the executors and trustees after the death of E. C. Butler, with the proviso that if the trust failed the moneys so advanced would be repaid. This, though the trustees as yet have not qualified and taken their oath of office.

The executors, on June 23, 1943, filed the petition (State of Case p. 1) seeking a determination of the validity of the trust. The Orphans' Court of the County of Essex and the Prerogative Court have adjudicated the trust to be valid and hence this appeal.

ARGUMENT OF APPELLANTS.

POINT ONE.

The trust as established by its wording, makes it a trust for the private benefit of the heirs of the decedent. There is a mandatory injunction to the trustees to so execute it.

This will was prepared and drawn by a member of the Bar of the State of New Jersey familiar with the law relative to wills and trusts for a person (Dr. Eustace Cameron Butler) who was educated and intelligent, so that there can be no question that the words expressed in the will were used and intended to effect results and were not idly expended.

In the light of all the cases read by counsel nowhere does there appear such phrasing more indicative of a command to the trustees, except, where there is a direct bequest or devise.

The first consideration is the phrase "it is my wish" read together with the words "always" as they may have been considered by the courts of our state in determining whether or not these words are precatory or whether they are a command. The earliest case is *Ward v. Peloubet*, 10 N. J. E. 304 (Ch.) where the language employed by the testator was as follows:

" * * * *It is my wish* that my youngest daughters, Mary and Caroline, shall have an education equal to my daughter Phebe, and my two sons, Sydenham and John, to be educated, and fully prepared to enter college, or the study of a profession; but provided either of them should not choose to have such an education, the one who does not, to be made equal in property to the expense of educating the other, in which case the mother is to be

judge, or in case of her decease my executors whom I shall appoint. After the children arrive at age I leave it discretionary with Susan, my loving wife, what donation to make them out of the property, and in case of her decease or marriage to be left with the executors whom I shall hereafter name, but in every respect *I wish them* made as near equal as can be."

The court viewed the language as establishing a trust for the widow and children, while she lived and remained his widow, and the court necessarily found that the language employed was not precatory, but was mandatory.

An evaluation of precatory words and rules to be considered in determining them is to be found in the case of *Van Duyne v. Van Duyne*, 14 N. J. E. 397 (Ch.), rev. 15 N. J. E. 503. In that case the courts had before them for construction that part of a testator's will which provided as follows:

" * * * To them, their heirs and assigns forever, *hoping and believing* they will do justice hereafter to my grandson, Hiram Van Duyne, to the amount of one-half of the said homestead farm."

The lower court held that Hiram Van Duyne took nothing under the will upon the theory, that the words were precatory; the court of last resort reversed the lower court and held that Hiram Van Duyne had an interest in and to the extent of one-half of the homestead farm. The court of last resort did not dispute the principles and law as set forth in the lower court but differed in the result obtained. The language of the lower court in respect to rules governing interpretation of the words and phrases in the case and of words and phrases of like import states the following:

“A command certainly is sufficiently imperative. So a hope or wish may be, if addressed to an executor or trustee, the trust being created, or if coupled with other expressions indicating a clear intent that they shall operate as a command. But standing alone, and addressed to a legatee to whom property is given by the testator in terms importing an absolute gift, they are not imperative. A wish addressed to my agent, as to the mode of dealing with my property, is tantamount to a command; but a wish addressed to a third party, as to the mode of disposing of his own property, can amount but to a request, and nothing more.”

It is apparent that the language used by the testator in *Van Duyne v. Van Duyne*, *supra*, is not as mandatory in tone as is the case at bar.

Subsequently in *Eddy v. Hartshorne*, 34 N. J. E. 419, (Ch.) the Chancellor, guided by *Van Duyne v. Van Duyne*, *supra*, held the following:

“The rule of the English Chancery is, that when, by will, property is given absolutely to a person, and the same person is, by the giver, “recommended,” “entreated,” “requested,” or “wished” to dispose of that property in favor of another, the recommendation, request or wish is held to be imperative, and to create a trust, if the subject and objects are certain. That rule is recognized and established here.”

The court is respectfully referred to the footnote appearing on page 420 of 34 N. J. E. which is helpful in construing precatory and imperative words and phrases.

The word “desire” was interpreted in *Wood v. Camden Safe Deposit Co.*, 44 N. J. E. 460 (ch.), where the codicil said:

“I *desire* that one half of the shares of the property inherited from me by my daughter

Lydia shall be placed in trust, the Camden Trust Co. acting as trustees.”

The court said:

“The word “desire” is not, in the application made of it by the testatrix, the expression of a request, recommendation, or entreaty addressed to the legatee or devisee; but it is an order, direction or command, addressed to the executors of the will. Let the two so be read, and such reading cannot fail to make such impression. * * * At the same time it shows conclusively that the word “desire” was not used in any precatory sense, but by way of direction or command. No duty is more clearly enjoined on the executors than to place the one half of this one third in trust, if, in other respects, the will of the testatrix has been clearly enough made known.”

The logic of Vice Chancellor Bird is similarly applicable to the case at bar. There cannot be any other reading of the will of the decedent which would permit the trustees any discretion in preferring or not preferring the relatives of E. C. Butler; they must “always” prefer them.

The rule of testamentary construction as to words of like import in the case at bar is well defined in *Eberhardt v. Perolin*, 48 N. J. E. 596, (Preg. Ct.), and we quote:

“In short,” said Judge Story, in his work on Equity Jurisprudence § 1068, “It may be stated as a general result of the cases, in the language of Lord Eldon, that whether the words of the will are those of recommendation or precatory or expressing hope, or that the testator has ‘no doubt’, if the objects with regard to when such terms are applied are certain, and the subjects of the property, to be given, are also certain, the words are considered imperative and create a trust;” or,

as another learned judge has expressed it (in a form, indeed, open to some criticism)—Lord Avanely, in *Malim v. Keighley*, *supra*: “Wherever any person gives property and points out the object, the property and the way in which it shall go, that does create a trust unless he shows clearly that his desire expressed is to be controlled by the party that he should have an option to defeat it.”

The Ordinary was reversed in 49 N. J. E. 570 not on the principle but on the application of the law to the case before the court.

In 1914 Vice-Chancellor Leaming in *Deacon v. Cobson*, 83 N. J. E. 122, was called upon to determine whether the following residuary clause created a trust:

“Third: All the rest, * * * I give * * * to my daughter, Theodosia Borden, her heirs and assigns forever, but it is my wish and desire, and *I hereby request* my said daughter, Theodosia Borden, to keep intact so far as may be possible and practicable, the body of my estate which she is to receive by virtue of this third item of my will, using only the rents, issues, profits and income therefrom for her own separate use and maintenance. And I further desire and hereby request my said daughter, Theodosia Borden, to make a will wherein and whereby she shall devise and bequeath all the corpus of my estate which she is to receive by the third item of this will or so much as may be intact and remaining at the time of her death as follows: to Mary B. Borden * * * ”

The court in passing on the question affirms the adoption of the English law and states as follows:

“The question for determination is whether the words ‘wish,’ ‘desire’ and ‘request’ as used in that will and codicil, are operative to

create a trust in favor of the persons named by the testatrix.

“A rule of construction early adopted by the English court of Chancery was to the effect that when, by will, property is given absolutely to a person, and the same person is by the testator ‘recommended,’ ‘entreated,’ or ‘wished’ to dispose of that property in favor of another, the recommendation, request or wish will be held to be imperative and to create a trust, if the subject and objects of the trust are certain. That rule of construction was adopted by our court of last resort more than half a century ago, and has since been uniformly recognized by the courts of this state; it cannot be now questioned in this court. *Van Duyne v. Van Duyne*, 15 N. J. Eq. 503; *Eddy v. Hartshorne*, 34 N. J. Eq. 419; *Wood v. Camden Safe Deposit Co.*, 44 N. J. Eq. 460; *Eberhardt v. Perolin*, 48 N. J. Eq. 598; S. C. (reversed on appeal, but soundness of rule not questioned), 49 N. J. Eq. 570; *Cox v. Wills*, 49 N. J. Eq. 130; S. C. (reversed only as to method of accounting), 49 N. J. Eq. 573. It necessarily follows that the requests of testatrix in the will and codicil here in question must be given the same force as though the language adopted by testatrix had been, wherever the word ‘request’ occurs, it is my will and I do hereby order and direct. With this rule of construction uniformly recognized by our courts for so long a period of time, testators and scriveners may be said to have been privileged to reply upon its existence and future recognition.”

The word “wish” is further judicially defined in *Tzeses v. Tenez Construction Co.*, 97 N. J. E. 501 (E. & A.), where the will read as follows:

“I wish my niece, Miss Nellie Quinn, to be put in possession of all I have in clothes, money, jewelry, in fact, all I have.”

The court found that the word “wish” meant the same as “will” and that title even to real estate passed by these words.

A phrase not as mandatory as the one in the case at bar was considered in *Husted v. Husted*, 109 N. J. E. 378, where the testatrix provided:

“In case of death of both my daughters, Mary P. Husted and Ella T. Husted should they die without issue, it is my *wish* the rest and residue of my estate be given in fee simple to all Saints Episcopal Church * * * .”

The court adopted the rule in *Deacon v. Cobson*, *supra*, as to interpretation and accordingly held that a trust was created in favor of the beneficiary specified therein.

Two late cases adopting the *Deacon v. Cobson*, *supra*, rule are *Ryder v. Myers*, 113 N. J. E. 360, aff. 115 N. J. E. 169, and *First Mechanic National Bank v. First Mechanic National Bank, etc.*, 137 N. J. E. 106. In the latter case the will proposed to make an absolute gift to a brother but the scrivener, following the bequest, stated that it was “my wish” that the brother do certain things with the property bequested. V.-C. Jayne held that the wish was to be respected as imperative and if the subjects and objects of the desires disposition was certain, a conformable trust would be recognized.

The will was carefully prepared for it did not leave margin for error; judicial or otherwise; the employment of the word “always” insured the heirs as the beneficiaries. The word “always” has been defined to mean “in all cases; in every case; at any time.” 3 C. J. S., p. 1013.

Thus the mandatory injunction exists to establish a trust for the benefit of the collateral descendants. No discretion vests in the trustees to grant or withhold the benefits of the trust from the heirs.

POINT TWO.

Granting liberal construction of the words of the trust, and reducing it to practical operation, it resolves itself in the establishment of a private trust for the heirs and a remainder over to the residents of Nassau should the heirs be unable to take any of the benefits. In other words, the residents of Nassau benefit only incidentally, if at all. A superficial examination of the phrasing might lead one to suppose that this was a public charitable trust and that the primary objects of charity were the residents of Nassau. This was a legal guise to uphold the trust in the event of its attack. To all practical intent and purposes there was no trust in favor of the residents of Nassau except in a figurative sense. It is as though a testator, knowing full well that the amount on deposit in a bank is \$100,000.00, bequeaths \$100,000.00 to his heirs and the balance, if any, to the residents of Newark. The grant is nothing but a gesture.

POINT THREE.

All of the circumstances lend themselves only to the establishment of a private trust and as such it must fail, it being violative of the rule against perpetuities or the rule against remoteness as established in this state.

Extent of charity. Prior to the death of E. C. Butler there was a plan operative for the benefit of his collateral heirs and under it Donald Butler was studying at a university in the United States of America (State of Case, pp. 16 and 17). The executors and trustees, in accordance with the intent of the testator, after the death of the decedent provided for the further "higher education" of Donald Butler for the year 1942-1943. The ex-

ecutors and the trustees thus undertook the first step of carrying out the private trust. It is particularly noteworthy that no consideration, either before the trustor's death or after the trustor's death, was given to any resident of Nassau. Consideration was only given to a descendant of testator's brothers and sisters. This was clearly the manner in which the trust was to be executed; informally and for the benefit of the family.

Reason for trust. Then we find a fear expressed by the testator to Walter G. Brandley, the scrivener, that if the money were left directly to the heirs without some measure of control then the money might be dissipated unwisely (State of Case, p. 14). The trustor was a man of education and knew the value of education and it was, therefore, natural and normal that he would seek to give the advantage of education to his next of kin. The education of his next of kin unquestionably would have been of great benefit to them. There can be no quarrel with the selfish motive of the trustor to promote the well being of his heirs; every man in ordinary circumstances will prefer that his heirs obtain his property or the benefits of his property upon his decease. While the motive is understandable, sociologically it is bad, for it would permit of the accumulation of moneys in the hands of few for the selfish promotion of the few. The rule against perpetuities came into being because of such a situation as this. The exception came into being only because widespread public benefit would be obtained by the trust. Clearly, this trust does not come within the exception.

Ingenuity. The trustees, by an ingenious appointment, are given facility to ignore the residents of Nassau. This is no play on words but is fortified by an examination of the phrase dealing with the other children to benefit under the trust. Speaking

of other children we refer to children who are not related to the decedent. These children, if they are to qualify, must have had basic, primary and elementary education. This must necessarily be so for the trust awards scholarships for "higher education". Judicial notice must be taken, therefore, that basic, primary and elementary education must be possessed by the applicant to qualify. Then again the children must be resident of Nassau, Bahamas. This, of course, restricts the applicant to this particular locality and then, finally, assuming that these children can qualify, they must be "deserving" according to the interpretation of the trustees.

Of interest is the word "deserving" for it plays a large part in determining whether or not this is in fact a public charitable trust or whether or not it is a private family trust. These "deserving" children are not necessarily children of the poor nor do they necessarily have to be "in need of assistance". This is interesting by way of comparison with the qualification as to the relatives. The trustees, by virtue of this single descriptive adjective, have a wide latitude of discretion sufficient to effectively bar any person who would seek to interfere with the administration of the family trust. The word "deserving" has an interesting definition. Bouvier's Law Dictionary defines it as "Worthy or meritorious, without regard to conditions or circumstances. *In no sense of the word is it limited to persons in need of assistance, or objects which come within the class of charitable uses.* 130 Mass. 211." This definition finds favor in this state. Taking into consideration all of these factors and applying them to the actual state of affairs, to wit, the necessary residence in a small area, the limited number of persons who could qualify for "higher education", and the wide discretion of the trustees, it is apparent that this is a

feeble attempt to create the outward appearance of a public charitable trust. A mere matter of technicality to be of vital use to the trustees to fulfill the desire of the trustor, is to be noted when the heirs are given the right to apply for assistance in contrast to no right in favor of the children of Nassau. The children of Nassau are dependent upon the rules and regulations that may be established by the trustees. The heirs are automatically given a right to seek judicial enforcement of their rights under the wording of the trust but this right does not prevail in favor of the residents of Nassau.

If all factors up to this point do not establish a private trust in favor of the heirs then the factor of the personnel of the trustees and their successors disposes of that issue. The trustor, in contrast to the appointment of executors, appointed and nominated partial trustees who must pass upon the rights of their children to obtain scholarships. If the intendment of the trustor was to have an impartial public charitable trust why did he not, as in the instance of executors, appoint impartial trustees who could not be influenced by the desires of their own children. Then again, the trustor very carefully resolves in the instrument that the funds shall always be under the control and operation of his heirs and these trustees have the right to appoint and nominate their successors in office. No such right was conferred upon the executors. This indeed was clever planning.

Again, the trustees, showing the limited nature of the trust, allege under the authority of the wording of the trust, that the American citizens, the appellants, can never qualify for the benefits, unless they become residents of Nassau. If the trust can be so construed, as to oust New Jersey residents, what hope lies for the trust to be of

public and charitable benefit to the "deserving residents of Nassau". The ouster of the American citizens affects the children of a deceased brother of the decedent, and the construction that they are not eligible is made by their uncles. Of course, the uncles by this step make more certain that their own children will benefit, in that there will be fewer applicants to select from and the amount of the grant correspondingly will be greater. No trust that can be defeated as a public and charitable trust should be decreed valid. If relief is denied now, no court in New Jersey will be armed with enforceable jurisdiction to keep this a charitable trust, if it be so construed. *Hewitt v. Green*, 77 N. J. E. 345.

We now, taking into consideration all of the facts set forth, present for the court a consideration of the cases we believe in point which would aid in the proper determination of the question before it.

Vice-Chancellor Stevenson in *Hewitt v. Green*, *supra*, concerned himself with the plan of a testator who intended to defeat the law of the state by so phrasing his will that both an illegal and legal intent and execution could be gathered from the instrument. The court had no hesitancy in declaring that though the will could have been construed legally and illegally the intent governed and therefore the testamentary disposition in that regard was void.

The most recent case is *Central Hanover Bank & Trust Co. v. Helme*, 121 N. J. E. 406, where Vice-Chancellor Egan in an excellent opinion adopts the *Hewitt v. Green*, *supra*, views. We take the liberty to quote at length the argument adopted by the court which we feel could, without hesitancy, be applied to the case at bar.

“In *Graham v. Whitridge* (Md.), reported in 66 L. R. A. 408, the court says:

“This rule against perpetuities is a rule of law, and not one of interpretation. In determining the validity of testamentary dispositions, the objects of the testator’s bounty are first to be ascertained, without reference to the rule. The instrument is to be interpreted in precisely the same manner as if there was no rule against perpetuities, and as if the intention expressed by the words may lawfully be carried out. Having thus, apart from any consideration of the validity of this intention, arrived at the true construction of the will, the rule against perpetuities should then be applied to the objects so ascertained. *Pearks v. Moseley*, 5 App. Cas. 714; *In re Marvin* (1891), 3 Ch. 200. The rule against perpetuities is the same at law as in Equity.”

In *In re Friday*, 313 Pa. 328, the court says:

“As was said in *Lockhart’s Estate*, 306 Pa. 394, 401; 159 Atl. Rep. 874, 876: ‘The rule (against perpetuities) is not one of construction, but a positive mandate of law to be obeyed irrespective of the question of intention. The proper procedure is to determine the true construction of the will, just as if there was no such thing in existence as the rule, and then to apply it rigorously in complete disregard of the wishes and intention of the testator.’” (Italics mine.)

In *Heasman v. Pearse*, L. R. 7 Ch. 275, 283, the court said:

“It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any disposition which, so reading and construing it, are found to be the testator’s wishes must be taken to be his wishes, and if those wishes offend against the rule, the gifts would fall,

and must fail, accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established."

In *Hewitt v. Green*, *supra*, Vice-Chancellor Stevenson (77 N. J. Eq., at p. 332) said:

"The argument on behalf of the validity of this trust for the grandchildren naturally is based largely upon the rule that where two constructions of a will are possible and reasonable, and one of these constructions makes the testamentary disposition illegal while the other makes such disposition legal, the latter is to be chosen. This principle, however, seems to me sometimes to have been carried to such an extent as to result in a will being made for the testator which he never intended to make. Where it is reasonably plain what the testator's scheme was, and such scheme is illegal, a court ought not to resort to a fanciful construction and by excluding the illegal intention from consideration find a legal intention which in fact the testator never had. In order to have a situation to which the above mentioned well settled rule of construction is applicable, the testator's meaning must be doubtful without regard to the legality or illegality of one of the two possible meanings. Testators must execute their wills according to law, and must not endeavor to make unlawful testamentary dispositions of their estates or else their testamentary efforts will be abortive. The law undertakes to take care of the disposition of a man's property after his death so far as he does not make a lawful testamentary disposition of it. When by an artificial and technical course of reasoning the invalid gift which the testator intended to make is converted into an entirely different valid gift which the testator did not intend to make, the result is a very gross injustice and a violation of the rights involved

in the testamentary disposition of property. It is one thing to deny the right of a testator to make an illegal disposition of his estate, or of a portion of his estate; it is a very different thing after denying that right to distort the abortive illegal gift which the testator meant to make into a legal gift which he did not intend to make." (Italics mine.)

Therefore, the clear intendment of the trustor, under the facts and the wording of the trust, was to create a private family trust. The reference to "deserving children resident in Nassau, Bahamas," was a subterfuge, plan or design on the part of the scrivener and the trustor to make possible the legality of the trust.

POINT FOUR.

The rule against perpetuities, or the rule against remoteness, as it is sometimes called, obtains in the State of New Jersey. That the rule prevails cannot be questioned. The latest adjudication reaffirming the existence of the rule is *Clark v. Union County Trust Co.*, 127 N. J. E. 221 (ch.) where the court states it as follows:

"The rule against perpetuities is in force in this state as a part of the common law * * *. That rule requires that all future interests, legal or equitable, in realty (except dower and courtesy and rights of entry for conditions broken) or personalty, which are contingent and indestructible, must be such as necessarily to vest, if at all, within the term measured by the life or lives of a person or persons in being at the time of the creation of the interest and 21 years thereafter; otherwise they are invalid and void. *McGill v. Trust Co. of N. J.*, 94 N. J. E. 657; 121 A. 760; aff. 96 N. J. E. 331; 135 A. 108. See, also, *Camden Safe Deposit Co. v. Scott*, 121 N. J. E. 369; 189 A. 653."

So as not to burden this court we submit the following further authority in support of this premise:

Hewitt v. Green, supra;
Graves v. Graves, 94 N. J. E. 268;
In re Smisson, 79 N. J. E. 233;
Camden Safe Deposit & Trust Co. v. Guerin, 89 N. J. E. 566;
Stout v. Stout, 40 N. J. E. 479;
Kates, Trustee v. Walker, 82 N. J. L. 157;
Lembeck v. Lembeck, 75 N. J. E. 427, aff. 74 N. J. E. 848;
Guaranty Trust Co. v. Latz, 119 N. J. E. 194;
Central Hanover Bank & Trust Co. v. Helme, supra;
Mills v. Davison, 34 N. J. E. 659.

We believe that unless the case at bar comes within the established exception (charitable trust or use) to this rule, that then the trust must necessarily fail and consequently the heirs at law of the decedent become entitled to the estate. The motivation, reasoning and need for the rule is all too apparent and the present case is just one of those cases for which the rule is established. It was intended not to permit such trusts to come in existence because in the final analysis more harm than good would come to society. It is, of course, respectfully submitted that the case at bar offends the rule and does not come within the exception (charitable trust or use) and consequently is inoperative to pass any estate to the trustees.

POINT FIVE.

The rule against perpetuities as applied to private trusts, does not apply to gifts to charitable uses or the establishment of a charitable trust.

A word of caution should be inserted at this point of the argument. In a great many states of the Union there have been any number of definitions and decisions relative to what is or is not a public charitable trust. These decisions are of interest and some of them ordinarily would be entitled to great weight by this court. This state is not without law on the subject and there are admirable decisions helpful to this court to decide the question. It must become apparent that appellants position based upon the law of the State of New Jersey is sound and that respondents position is based upon law established without the State of New Jersey.

We will now show that by a reference to the cases decided by our courts and by the leading text writers that this was, pure and simple, a private trust violative of the rule of perpetuities and consequently void.

One of the landmark cases on the point is *Norris v. Thomson's Exec.*, 19 N. J. E. 308, aff. 20 N. J. E. 489. The Chancellor had before him the question as to whether or not a charitable trust was established by the employment of these words:

“ * * * And that my said wife, Josephine, shall be authorized and empowered by her last will and testament, to give and devise the same among such benevolent, religious or charitable institutions as she may think proper.”

The court lays down the principle of inquiry as to what is a charitable trust or use and accordingly holds that the employment of the word “benevolent” renders the trust non-charitable and we quote:

“The word ‘benevolent’ is certainly more indefinite, and of far wider range than charit-

able or religious; it would include all gifts prompted by goodwill or kind feeling towards the recipient, whether an object of charity or not. The natural and usual meaning of the word would so extend it. It has no legal meaning, separate from its usual meaning. The word 'charitable' has acquired a settled limited meaning in law, which confines it within known limits."

The Court of Errors & Appeals in reviewing the Chancellor's decision which was affirmed speaks with greater clarity on the point and states unhesitatingly that the common law of England and decisions founded on 43d of Elizabeth, ch. 4, which determined what is a charitable trust or charitable use are controlling. We quote from the decision speaking of the phrase "benevolent, religious and charitable institutions":

"Such a bequest, upon the familiar principles, is not to be sustained except upon the theory that it constitutes a gift to a charitable use. Is the purpose indicated, then, a charity in a legal point of view? I do not understand that there is any difference whatever between the common law of England and the law of this state upon the point as to what constitutes the legal definition of a charity. And by this common law I mean that system, so far as respects this question, which has grown up in a series of decisions founded, in part, upon the 43d of Elizabeth, ch. 4, (the statute of charitable uses). The doctrine of the English Court of Chancery with regard to the mere classification of things which are, and those which are not, charities in the eye of the law, has been generally recognized in this court."

The court thereupon in an examination of the case and more particularly *James v. Allen*, 3 Mer. 17, holds:

"That although many charitable institutions are very properly called benevolent, it

is impossible to say that every object of a man's benevolence is also an object of his charity."

The trust was therefore declared inoperative. This key case establishes the rule that charitable trusts or charitable uses must be created clearly as such and that words which tend to make possible other than the charitable use necessarily invalidates the trust.

The case of *De Camp v. Dobbins*, 31 N. J. E. 670, had before it the phrase

"To aid the missionary, educational and benevolent enterprises to which the said church is in the habit of contributing."

The court states that by reason of the facts adduced in open court that the benevolent enterprises of the church were strictly charitable and further by a reading of the entire instrument that the church was restricted in the use of the fund to the benevolent enterprises to which it is in the habit of contributing, that therefore it is a charitable trust or charitable use and the trust or use was upheld.

This case on first blush seems to disagree with *Norris v. Thomson's, Exec., supra*, but a careful reading justifies the distinction, and this case is even more pertinent to the inquiry at bar and it definitely states that the general meaning of the will must be established to determine its character.

Corle's case, 61 N. J. E. 409, shows the disinclination of the court to uphold anything other than a public charitable trust or use notwithstanding any sympathy that the court may have for the purpose that the testator had in mind. The court considered the following bequest:

"I give to my surviving executor in trust \$1,000.00, to be invested on bond and mortgage, the interest thereof, less the taxes, to be applied for keeping my burial plot in the graveyard at Cloverhill Church in good order. But, if in the judgment of my executors it did not require all the interest, less the taxes, to keep it in good order, then whatever may be remaining to be used toward keeping in repair the fences around the said graveyard."

The court speaking of the legacy and holding it void states:

"This legacy, unless saved by the act of 1878 (Gen. Stat. p. 351, sec. 14), is void, as an attempt to create a perpetuity. *Detwiller v. Hartman*, 10 Stew. Eq. 347; *Hartson v. Elden*, 3 Dick. Ch. Rep. 523; *Moore's Exec. v. Moore*, 5 Dick. Ch. Rep. 554. Nor can I see how the direction to keep up the fences around the graveyard can be regarded as a charitable bequest. In *Hartson v. Elden*, *supra*, the remainder of the interest of \$5,000.00 was to be used in the general improvement of the cemetery; yet the whole bequest was held to be void."

To come within the exemption the trust or use must be public in nature and so it is determined in *Jones v. Watford*, 62 N. J. E. 339, aff. 64 N. J. E. 785, where the court in construing the bequest said as follows:

"The bequest in the will now before me is a donation for the purchase of books upon a subject interesting to a large class of readers, access to which, by the express terms of the will, is required to be 'free to all who desire to think for themselves and who are seeking for the truth from the true and living God.' The class which may possess these prescribed characteristics is so indefinitely large that the gift is substantially for the benefit of the general public. No one is required to pay anything for the exercise of the privilege secured

by the gift. No one can receive any pecuniary profit from the performance of the trust. Its opportunities and benefits are freely offered to all, and it may fairly be classed as a charitable gift for the good of mankind."

The very pertinent inquiry at this point is does the case at bar meet with the rules established in this case. Is not the trust established in the case at bar a narrow trust for the pecuniary profit of the trustees own flesh and blood? Can it in anywise be termed public? A frank answer requires the conclusion that it is not a charitable trust or charitable use.

In *Hyde's Exec. v. Hyde*, 64 N. J. E. 6 (ch.), the will reads as follows:

"To give and distribute \$100,000.00 thereof, within 3 years from the date of my death, for such religious, charitable or educational or other purposes as they may deem advisable, provided, nevertheless, that no portion thereof shall be given to or distributed among my wife or children, individually or collectively."

The court in adjudicating the issue says:

"It is the undoubted law of this state that such a testamentary disposition of property as that now under consideration cannot be sustained except upon the theory that it constitutes a gift to a charitable use. Whether it is a gift of that character or not is to be determined by the language used by testator to express his intention in the particular clause in question, read with any other portions of the will tending to throw light upon and indicate the meaning of the words used.

* * * * *

But the serious difficulty in this case arises from the other contention on the part of complainants, viz, that the clause in question confers a power upon the executors unlimited to charitable uses, by making use of the words

'or other' to express some of the purposes permitted.

These words cannot be construed as intended to be read 'other such' or 'other like' or 'other of the same kind,' for such a construction would make them mere surplusage and deprive the clause of meaning. If so construed, the words simply repeat the idea 'charitable' previously expressed, for there are other charitable purposes than those which are educational or religious, such as the care of the poor, the sick, &c. But these purposes are naturally included in the expression 'charitable purposes'. Therefore, when the testator adds the words 'or other', the clause, looked at by itself, clearly expresses the intent to permit the trustees to devote the fund, if they choose to do so, to purposes other than those which are educational or religious or charitable. This view required a declaration that the gift is void."

MacKenzie v. Trustees of Presbytery of Jersey City, 67 N. J. E. 652, has incorporated language which should facilitate other courts in reaching a conclusion as to what constitutes a charitable trust or use.

Lewin, writing of trusts generally (Lew. Trusts (7th Eng. Ed.) 20), says:

"Public trusts and charitable trusts may be considered, generally, as synonymous expressions. * * * A public or charitable trust has for its objects the members of an uncertain and fluctuating body, and the trust itself is of a permanent and indefinite character.

* * * * *

"In *Jackson v. Phillips et al.*, 96 Mass 339, 566 (1867), Justice Gray says: 'A charity, in its legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of educa-

tion or religion, by relieving their bodies from disease, suffering or constraint; by assisting them to establish themselves in life; or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature.' Of this definition Mr. Perry, in his work on Trusts (5th Ed.) § 697, has said that it leaves nothing to be desired; and the editors of 5 Am. & Eng. Encycl. L. (2d ed.) 894, and of 6 Cyc. L. & P. 900, have accepted it as comprehensive and satisfactory. The decisions of the Courts of Massachusetts and New Jersey are not always at one in cases of charities; but for present purposes, we may give hearty assent to Justice Gray's definition."

* * * * *

A case concerning a gift for educational purposes was the key case of *Alfred University v. Hancock*, 69 N. J. E. 470, where Mr. Wooden left the residue of his estate to the university and the court was obliged to determine whether or not the gift was charitable. The court set the rule as follows:

"A bequest to such an institution is, in my judgment, a bequest to a charitable institution. All gifts for the promotion of education are charitable in a legal sense, where the elements of private gain are wanting and where the scheme is, in part, supported by public or private contributions. See cases collected in 5 Encycl. of Law (2d ed.) 929; *Taylor v. Bryn Mawr College*, 34 N. J. E. 101."

The trust in the case at bar is certainly for the private gain of the relatives of E. C. Butler and consequently the law does not favor the sustaining of the trust.

Again we find the court in *Hegeman's Exec. v. Roome*, 70 N. J. E. 562, holding that a trust to come within the exception as a charitable trust should be definite and subject to no other purpose or use other than a charitable use. Vice Chancellor Bergen had before him for construction a will containing the clause:

“I hereby give and bequeath the same to my husband, Benjamin A. Hegeman, for the purpose of making such distribution among religious, benevolent or charitable objects as he may select.”

The word “benevolent” in the opinion of the court is wider than charity in its legal significance and therefore the trust must fall.

A case of good contrast is *Hilliard v. Parker*, 75 N. J. E. 447, where the court had before it a will which erected a personal trust and a public charitable trust. The decedent in his will created a trust to keep certain graves in good condition forever and this the court said, is a purely private trust and is not a trust, the object of which, is a charity. Therefore the court held that as to this trust, the heirs took by way of intestacy. The court in considering that portion of the will which created a trust, the interest of which was to be expanded “in the purchase of fuel for the most needy women of the Broughtown of Woodstown”, held that this was clearly a public charitable trust and should be sustained. Again the court upholds a trust created for the Woodstown Library “to be expended in the purchase of books” and the court held that this was a public charitable trust and therefore the rule of perpetuities would not invalidate the same.

A charitable trust was defined in *Johnson v. Bowen*, 85 N. J. E. 76, as follows:

“The question is: Is the purpose of the trust legally ascertained? This is a charitable trust, and the essential idea of a charitable trust is, that the benefit of the trust is to be for the *whole public* or some *large class of the public* as distinguished from private persons. The fact that the beneficiaries must be indefinite distinguishes the charitable trust sharply from the private trust; and charitable trusts are treated with such greater leniency by the courts of equity than are private trusts; and so friendly is equity to the charitable trust, that it will stretch its power to sustain and carry out a charitable trust.”

One of the best decisions on public charitable trusts is that of Justice Katzenbach in *Noice v. Schnell*, 101 N. J. E. 252:

“There have been many definitions of a public charity given in the opinions in English and United States cases on this subject. They are in substantial accord because the common law of England and the law in this country is the same. From the wealth of decisions on this subject there are some outstanding cases which contain definitions of a public charity to which reference is frequently made. The definition of a public charity given by Horace Binney in his argument before the United States Supreme Court in the *Girard Will* case and adopted by the court (*Videl v. Girard*, 43 U. S. 127; 11 L. Ed. 205), is one of the most striking. It is as follows:

‘Whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense—given from these motives and to those ends—free from the stain or taint of every consideration that is personal, private or selfish.’ ”

In the able opinion in this court of the late Judge Green, in *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. E. 652, he approves

the definition given by the eminent Massachusetts jurist, Justice Horace Gray, in *Jackson v. Phillips et al.*, 96 Mass. 539, which is as follows:

“ ‘A charity, in its legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering of constraint; by assisting them to establish themselves in life; or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature.’ ”

Of the text-writers, Perry gives a comprehensive definition of a charitable trust in these words:

“Charitable trusts include all gifts in trust for religious and educational purposes in their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick and the afflicted, and all gifts for the public convenience, benefit, utility or ornament, in whatever manner the donors desire to have them applied.” 2 Perry Trusts (5th ed.) 314.

Of the shorter definitions Lord Camden's definition in *Jones v. Williams*, Amb. 631, is striking. He defines a charitable trust as, “A gift to the general public use which extends to the poor as well as to the rich.”

Another condensed definition is that of Mr. Justice Swain in *Ould v. Washington Hospital*, 95 U. S. 311, which is given in these words: “A charitable use where neither law or public policy forbids may be applied to almost anything that tends to promote the well-doing and well-being of social man.”

With these definitions in mind and more particularly the definition of the Supreme Court of

the United States, can it be honestly said that the gift of Dr. Butler was given for the love of God or for the love of his neighbor when it is given to his own kin; and can it be said that the gift was free from every consideration that is personal, private or selfish when it is given to his very own family? We do not think that there can be any quarrel or question that it was a pecuniary, personal, private, and selfish view in mind that impelled the gift. The only reason that the issue is before the court is by virtue of the fact that there is a reference that the "deserving children resident in Nassau, Bahamas," may stand to benefit by the trust. This bequest in face of the mandatory injunction vests no rights in the children resident in Nassau, Bahamas and in view of that fact tends to confuse the validity of the trust rather than help it.

While we believe that the citations heretofore referred to clearly establish that the trust in the case at bar is invalid on the ground that it is not a charitable trust but rather a private trust and fails because it violates the rule of perpetuities, we have taken the liberty of quoting the prominent authority Scott from his text on Trusts:

"The most important distinction between a private trust and a charitable trust is with reference to the beneficiaries. As has been stated a private trust is not valid unless there is a beneficiary who is definitely ascertainable at the time of the creation of the trust or definitely ascertainable within the period of the rule of perpetuities. * * * On the other hand, a trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." Section 364.

"A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the

community is interested in the enforcement of the trust. This is true even though the purpose of the trust is to promote education. Thus a trust to educate a particular person or named persons though valid is not charitable. Such a trust is a private trust and is valid unless it violates the principle of the rule of the rule of perpetuities. *So also a trust to educate the descendants of the testator, or any other persons, is not charitable.*" 370, C.

The case at bar is considered by the text writer Scott and he concludes that it would be unwise to uphold trusts similar to the case at bar as not only being contrary to law but definitely being bad public policy. His own words on the subject are:

"A more interesting question arises where a trust in favor of the relatives of the testator is not a trust for immediate distribution but one which is to continue indefinitely. Where a testator bequeaths money in trust to apply the income for the benefit of his descendants and the purposes of the trust are not limited to the relief of poverty or the promotion of education, the trust is not a charitable trust, and if it is to continue beyond the period of the rule of perpetuities it fails. Where, however, the trust is for the benefit of needy descendants of the testator, or where it is a trust to educate his descendants, there is a conflict of opinion on the question whether a valid charitable trust is created. In England the courts have upheld such trusts. In several cases in the U. S., however, it has been held that the class of beneficiaries is too narrow and that intended trusts fail. It is believed that American cases are based upon the better policy. *There is no good reason why a man who has acquired property should be permitted to make provision for the perpetual care or education of his descendants.*" 375.3.

POINT SIX.

A mixed trust of an indivisible nature involving both a private and public charitable trust which may be used for both purposes is void and such gift lapses and passes to the heirs of a decedent.

The leading case is that of *Kitchen v. Pitney*, 94 N. J. E. 485, decided by our Court of Errors & Appeals. The facts briefly were that the decedent created the following trust by will:

“They are to use such rest, residue and remainder of my estate for the purpose of establishing and maintaining, as hereinafter described, a home for the aged and respectable white bachelors and widowers, who may have, through misfortune lost the means which they once had for their own support and have become wholly or partially unable to support themselves. * * *”

The court in passing upon the question lays down the test:

“If the fund, in the discretion of the trustees under the will, or of the board of trustees who are to manage the home under its incorporation, can be used for purposes not strictly charitable, or partly for purposes charitable and partly for purposes not strictly charitable, the trust created is invalid. *Norris v. Thomson's Exec.*, 19 N. J. E. 507, aff. 20 N. J. E. 489; *Hyde's Exec. v. Hyde*, 64 E. 6; 53 A. 593; *Hegeman's Exec. v. Roome*, 70 E. 562; 62 A. 392; *Van Syckel v. Johnson*, 80 E. 117; 70 A. 657; *Thomas v. Scheibel*, 91 E. 431; 111 A. 519.”

The court concluded by reading of the will and application of the test that the trust was strictly charitable. There can be no question but that if the test were applied to the case at bar that the trust must necessarily be declared invalid.

In the case of *Van Syckel v. Johnson*, 80 N. J. E. 117, the court was not led astray by the joining of a charitable and non-charitable use. The court again held that a personal trust could not be set up in perpetuity notwithstanding that it was joined with a charitable trust. In that case the testator gave his executors \$6,000.00.

“In trust to be invested and the interest to be applied to keeping in good repair and condition that part of the graveyard attached to a certain church wherein his family were buried, also the rest of the graveyard; and if the church should fail to make up the salary of the pastor the balance of the interest or so much as necessary should go toward the salary.”

Some words of wisdom which are very applicable to the case at bar are to be found in the opinion of Vice-Chancellor Walker in *Van Syckel v. Johnson, supra*, where speaking of a similar problem concerning the trust he quotes from the Supreme Court of Errors in *Coit v. Comstock*, 31 Conn. 352:

“But the bequests as they are, although some portion of the income is to be devoted to a charitable purpose, cannot be supported. If it were otherwise it would be in the power of an individual to make a perpetuity of property to any extent, by devoting some small portion of the undivided income thereof to some charitable purpose. A little charity, in such a case, cannot preserve the entire bequest.”

In *Thomas v. Scheibel*, 91 N. J. E. 451, the testator of a will said as follows:

“And further I give * * * to * * * Mary Anne Thomas the house and lot * * * to be used by her for her own benefit during her life and the furtherance of those benevolent

designs she knows I wish carried out as a memorial of my deceased husband Hart A. Leavitt and which by her last will I direct that she shall appropriate to hospital or other equally desirable purposes."

The court held:

"Assuming that a gift to "hospital purposes" is a gift to charitable use, it is perfectly apparent that "other equally desirable purposes" permit the disposition of the property by complainant for purposes which are not charitable."

The law is clearly set forth in the text of Bogert on Trusts, par. 372, when he undertakes to clarify mixed trusts and their validity and we quote briefly from that section:

"When a court is faced with the mixed trust of an indivisible nature the only alternatives usually are complete validity or complete invalidity. Unless the court demanded of such a mixed trust that it live up to all the requirements of both charitable trusts and private trusts, mixed trusts would undoubtedly be used for purposes of evading either the rules and restrictions affecting the creation of private trusts, or those affecting charitable gifts. *If a mixed perpetual trust were relieved of these restrictive rules, one who desired a perpetual trust for his relatives and descendants could validate it by giving the trustee power to apply income in his discretion to charity, and one who was limited by statute as to the amount of property he could give to charity would escape the limitations by creating a trust for charity with a nominal power to distribute income to private persons.*

Nearly all mixed trusts which have been declared void have been indivisible trusts of a perpetual nature, where the trust has run afoul the rule that private trusts must be limited in duration to lives and 21 years."

It must be borne in mind that the court is without power to strike from the will that portion which speaks of the descendants of E. C. Butler so as to create a public charitable trust in favor of the "deserving children resident in Nassau, Bahamas". This would constitute making a new will and this has been disapproved of in the cases of *Hewitt v. Green, supra*, and *Central Hanover Bank & Trust Co. v. Helme, supra*.

It is, therefore, respectfully submitted that even if the court should be inclined to hold that the trust created by Dr. Butler was both for his family and the "deserving children resident in Nassau, Bahamas" then the trust must fail because it is a mixed trust devoted in part to charity and part to personal and private ends.

**REPLY TO OPINION OF ALFRED C. CLAPP,
ADVISORY MASTER.**

The facts submitted for adjudication are novel to the courts of New Jersey. The law and its social considerations have precedent as appears in the main brief.

The courts below, if they are to be confirmed, are successfully creating an exception to, or a breach of, the social doctrine that no one may keep in perpetuity property for his or his own, for their own uses. That is the narrow question. In other words, can man so dedicate his funds to his own heirs in perpetuity for their advancement in educational institutions?

The learned Advisory Master firstly concludes that the gift of income of a residuary estate to provide education to deserving children is charitable. There is no quarrel with this view. There is support for that contention as he points out.

Secondly, he concludes that though it is mandatory that the descendants of the deceased be always preferred in the distribution of the benefits under the trusts to the exclusion of all others, it is valid. There is quarrel with this view.

We have examined the authorities in his opinion, such as were accessible to the writer, and in our opinion his conclusion is not supported by the authorities cited.

Perin v. Carey, 65 U. S. 465, concerned itself with a trust for the benefit of the City of Cincinnati. The city was named trustee. There was a clause in the trust providing "preference to be given to my relations and collateral descendants". This point was not passed upon or raised. There was no mandatory injunction on the city to prefer any of the collateral descendants but, as a matter of fact, the trustor said "the establishment of the regulations necessary to carry out the objects of my endowment, I leave to the wisdom and discretion of the corporate authorities of Cincinnati". Is this on a par with the case at bar?

Tarver v. Weaver, 221 Ala. 663, 130 So. 209, and *Schoellkopf v. U. S.*, 36 F. Supp. 617, have little, if anything, in common with the case at bar.

Franklin v. Armfield, 2 Sneed (34 Tenn.) 305, in construing the validity of the trust adopts this test: "No interest in the property, or control over it, or over any part of the machinery of the charity, is given to the beneficiaries, singly or in the mass." In the case at bar the trustees are vested with authority to nominate their successors; now, in the future, or at the time of their death. The possibility is not removed that the trustees may name any possible beneficiary to be a trustee, leaving a situation where a trustee could pass upon his own right to share in the benefits of the trust.

Darcy v. Kelly, 153 Mass. 433, 26 N. E. 1110, held a trust was valid where the funds were placed in the hands of "Sisters of Charity" for the purpose of a relief fund for the poor; "and the same shall be devoted and appropriated in the first place to the aid of my poor relatives if any there be according to the discretion of the "Sisters of Charity". The impartial trustees and the discretion vested in them is not factually on the same basis as the case at bar.

The Matter of MacDowell's Will, 217 N. Y. 454, 112 N. E. 177, is important for the establishment of the rule that though a trust be for the advancement of education; if it be only for the benefit of the trustor's relatives or designated friends or their lineal descendants, it is void. The restricted class of beneficiaries and the personal and selfish motive of the trustor would defeat the trust. This view is supported by the following cases: *Johnson v. De Pauw University*, 76 S. W. 851; *Kent v. Dunham*, 7 N. E. 750; *In the Matter of Beekman's Estate*, 134 N. E. 183; *Talbot v. Riggs*, 191 N. E. 360; *Hamburger v. Cornell University*, 340 N. Y. 228; *Butler v. Green*, 18 N. E. (24) 928; *Literary Fund v. Dawson*, 10 Leigh, 147; *Wilce v. Van Anden*, 94 N. E. 42; *Reasoner v. Herman*, 134 N. E. 276; *McMillen's Appeal* (1882) 11 W. N. C. (Pa.).

In closing on this point we desire to make reference to *In Re Beekman's Estate*, 134 N. E. 183. A fund was left in perpetuity to a corporation for the purpose of educating members of the corporation and their successors. It devolved that the corporation which was named trustee was a corporation whose membership was limited to the Beekman family. The court set aside this trust and Mr. Justice Cardozo in setting aside the trust had this to say:

“Under our law, a trust created for the benefit of the deceased’s poor relatives, or for the purpose of educating his relatives, would not be a charitable trust, and a corporation created for such a purpose and receiving a gift to spend in this way would not be a charitable corporation. * * * It would be a very easy method of avoiding the Statute of Perpetuities if corporations could be created to perpetuate the family name and permit the use of funds for the maintenance and education of near or far removed relatives. As stated before, it is impossible to draw the line between the members of one family so as to make the gift to some a private gift and the gift to others a public charity.”

In support of this statement Mr. Cardozo cites the following New Jersey authorities:

Norris v. Thomson’s Ex’rs., 15 N. J. Eq. 493; 16 N. J. Eq. 218, 19 N. J. Eq. 307;
Detwiller v. Hartman, 37 N. J. Eq. 347;
Hartson v. Elden, 50 N. J. Eq. 522, 58 N. J. Eq. 478.

Thirdly, he admits that if the effect of the trust is that it is for the education of the testator’s relatives that there is grave doubt that it is a valid trust. We assert that he does not go far enough. We think that the law unequivocally is that if this is a trust for the education of relatives of a testator and for them alone that the trust is void.

Fourthly, the learned Advisory Master says that he cannot, from the attending circumstances, and the words of the will, conclude that the trust is solely for the benefit of the heirs. There is substantial quarrel with this view. The very argument he uses in support shows its weakness; states he, “The fund providing annual scholarships is perpetual; and there may be many years when the testator has no qualifying relatives in need of as-

sistance'' (State of Case, p. 23). We take it from this language that only when there is no qualifying relatives can others share in the trust. This makes the children of Nassau possible beneficiaries and any gift to them is a gift by reason of the failure of the heirs to be in a position to take. They receive the gift over, on contingency. Then again, what justification is there for the supposition that there may be many years when there will be no qualifying relatives; the contrary appears, for there were to start 7 brothers and sisters and they have 20 children who presently or later will qualify for the benefits of the trust. Then again, assuming that there is an absence of qualifying relatives no mandatory injunction is made that there must be annual scholarships. The trustees may elect to keep the income until there is a qualifying relative.

Lastly on this issue, he lightly declares that Horace Binney's definition is opposed by all the authorities. As far as we have been able to ascertain New Jersey still respects his definition. *Noice v. Schnell, supra.*

It is respectfully submitted that the conclusion reached by the Advisory Master is erroneous.

REPLY TO OPINION OF VICE ORDINARY JOHN O. BIGELOW.

The learned Vice-Ordinary prefaces his opinion with the statement that a trust to provide scholarships for higher education is a charitable trust. This is not challenged.

Secondly, he concludes that " * * * the giving of a preference to those members of a certain family who come within the general class of beneficiaries, does not deprive it of the character of a charitable

trust" (State of Case, p. 33). The statement is at best half correct. The citation in support of this statement, *In re MacDowell, supra*, when read completely, lends the light. The fact analogy between the cases cannot be made.

Thirdly, he quotes *Woodstown National Bank v. Snellbaker*, 136 N. J. Eq. 62, and arrives at the conclusion that the test is "What would be the net result of such a trust as testator described?" He, the Vice Ordinary, concludes that the trust will benefit the public or a sufficiently large class thereof so that the community has an interest in the trust. His factual argument is that the annual income of the trust fund is \$3,000.00; that \$750.00 is reasonable for a scholarship; that only one nephew is ready for the scholarship. Therefore, concludes he, that 3 scholarships for children not related to the testator are available to the children of Nassau. That the income will be \$3,000.00 we have no quarrel with but that only one nephew is ready to share in the benefits of the trust is an error for there are many more who are presently eligible. We are unadvised as to how the Vice Ordinary made this deduction. Confirming our legal view, but under an erroneous impression of fact, the Vice Ordinary says on his calculation that one heir and 3 non-heirs would share in the benefits of the trust presently. In other words, in his logic if there were 4 or more heirs each year available for the taking of the benefits of the trust then the children of Nassau would take nothing. Well, there are more than 4 now and the prospects of there always being more than 4 are very much present. From the original 7 brothers and sisters there is now a group of 34 persons who may share in the benefits of the trust and who may have offspring who will share in the benefits of the trust. Then again, there is nothing in the trust to lead

the Vice Ordinary to assume that the trustees must use the income each year; as a matter of fact, the trustees may or may not grant any scholarships any given year, any given two years, or any given five years. In other words, if the trustees have children or descendants who are not ready to take the benefits of the trust then in their discretion they can delay or postpone any grants until they are in a position to receive the benefits. The interesting query is who can challenge their question? What private citizen of Bahama could ask a court to direct the trustees to grant him a scholarship because he is a child, resident of Nassau, and is deserving? The question of who is deserving is one for the trustees and not the courts of Nassau. Then again, the Vice Ordinary says that the reasonable amount of the scholarship would be \$750.00. There is no factual basis for this conclusion. As a matter of fact, it is very likely that if these children go to a university in the United States of the kind and standing of Princeton, Harvard or Yale the cost of one scholarship, including the board of the child, would be substantially higher than \$750.00. As a matter of fact, this being an English Colony, the trustees may think it more desirable to send their own children to an English school of the standing of Cambridge or Oxford. It can be readily seen that the income could hardly be used for the benefit of anyone other than the heirs in Nassau.

It is, therefore, respectfully submitted that the decree entered by the Ordinary, upon the advice of the Vice Ordinary, is erroneous

Conclusion.

It is, therefore, respectfully submitted that the trust provided for in the residuary clause of the last will and testament of E. C. Butler is void and inoperative and consequently the trustees take nothing by said trust and the heirs at law of E. C. Butler are entitled to a decree in their favor providing that they take all of the property covered by the residuary clause by way of intestacy.

Respectfully submitted,

ROBINSON & MORRIS,
Solicitors for Appellants.

IRVING MORRIS,
Of Counsel.

Conclusion

It is therefore respectfully submitted that the trust provided for in the residuary clause of the last will and testament of E. C. Butler is valid and operative and consequently the trustees take nothing by said trust and the heirs at law of E. C. Butler are entitled to a share in that trust, provided that they take all of the property owned by the residuary clause by way of interest.

Respectfully submitted,

Thomas H. Evans

Attorney for Applicant

W. C. Evans

24 OCT T. 1945

New Jersey Court of Errors and Appeals

IN THE MATTER

of

The Estate of

EUSTACE CAMERON BUTLER,
Deceased.

On Petition
for
Decree of
Distribution.

On Appeal
from the
Prerogative
Court.

**BRIEF FOR APPELLEES, HOWARD E. WRIGHT,
CLARENCE A. BIRDSALL, and WALTER G.
BRANDLEY, Executors of the Last Will and
Testament of Eustace Cameron Butler, deceased,
and for ROBERT E. DUNCOMBE, WILLIAM
H. MAURA, and KENNETH F. BUTLER, Trus-
tees.**

The Issue.

This appeal brings up for review a decree entered in the Prerogative Court of New Jersey on June 19, 1945, made by the Ordinary, upon the advice of Vice-Ordinary John O. Bigelow, affirming a decree of distribution entered in the Essex County Orphans' Court on September 21, 1944, which adjudged and decreed that the entire balance of the residuary estate of Eustace Cameron Butler, deceased, remaining in the hands of Howard E. Wright, Clarence A. Birdsall and Walter G. Brandley, Executors, after the payment of the costs of proceedings and the counsel fees therein allowed, be distributed and paid to Robert E. Duncombe, William H. Maura, and Kenneth F. Butler, Trustees under the Last Will and Testament of Eustace Cameron Butler, deceased, to be admin-

istered as a charitable trust pursuant to the directions contained and set forth in said Will, which are as follows:

“4. The rest, residue and remainder of my estate I give, devise and bequeath to ROBERT E. DUNCOMBE, WILLIAM H. MAURA and KENNETH F. BUTLER, all of Nassau, Bahamas, in trust, nevertheless, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with full power to my said trustees to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office. It is my wish that preference in the awarding of these scholarships be always given to the descendants of my brothers and sisters if they are in need of and apply for such assistance. My said trustees or their successors in office shall and may make such reasonable rules and regulations as may to them seem advisable for the awarding of said scholarships. To the end that this trust shall not fail for want of trustees I authorize the appropriate probate authorities of Nassau aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify” (State of Case, pp. 8, 9 and 10).

The validity of this trust is attacked by certain next of kin of the testator, who have successively appealed to the Prerogative Court and to the Court of Errors and Appeals. The executors, as in duty bound, seek to uphold the validity of this trust. The trustees appointed under the will unite with the executors in this joint brief, submitting the following points in support of this trust:

I. A valid charitable trust may be created for the purpose of Education.

II. A charitable trust is not within the rule against perpetuities.

III. The settlor of a charitable trust may request or direct the trustee to give a preference to named individuals or to a fixed class of persons.

IV. To invalidate this trust the appellants improperly rely upon facts dehors the record.

V. Courts favor charitable gifts.

Facts.

The only facts upon which respondents find it necessary to agree with the statement contained in the brief of the appellants with a view to an adequate presentation of this issue to the Court are that the testator, Eustace Cameron Butler, died on May 12, 1942, a resident of Essex County, New Jersey, leaving a Last Will and Testament containing a paragraph numbered 4 which is hereinbefore set forth in full and appears in full on pages 8, 9 and 10 of State of Case; and that the corpus of the trust consists of approximately \$150,000. All other alleged matters of fact contained in the brief of appellants are dehors the will and some of them are dehors the record. As to the impropriety of reciting facts dehors the will in an application for the construction of the will where no latent ambiguity is shown to exist, authorities will be cited in the proper place in the paragraphs hereinafter devoted to argument.

ARGUMENT.

POINT I.

A valid charitable trust may be created for the purpose of Education.

In his opinion in the Court of Errors and Appeals in *Noice v. Schnell*, 101 N. J. Eq. 252, Mr. Justice Katzenbach has collected nearly all the

classic definitions of a charitable trust which are repeatedly quoted in the opinions of courts in all States dealing with the subject of Charitable Trusts. These definitions include the following:

(1) The definition of a public charity given by Horace Binney in his argument in the *Girard Will* case and adopted by the United States Supreme Court in *Vidal v. Girard*, 43 U. S. 127; 11 L. Ed. 205, as follows:

“Whatever is given for the love of God or for the love of your neighbor in the catholic and universal sense—given from these motives and to these ends—free from the stain or taint of every consideration that is personal, private or selfish.”

(2) The definition of Mr. Justice Gray in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, which was adopted by the Court of Errors and Appeals in *MacKenzie v. Trustees of Presbytery of Jersey City*, 67 N. J. Eq. 652, 61 A. 1027, 3 L. R. A. (N. S.) 227, which is as follows:

“A charity, in its legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies of disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it be so described as to show that it is charitable in its nature.”

(3) The definition contained in 2 *Perry on Trusts* (5th Ed.) page 314, as follows:

“Charitable trusts include all gifts in trust for religious and educational purposes in

their ever-varying diversity; all gifts for the relief and comfort of the poor, the sick and the afflicted; and all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied."

For the sake of completeness we may add to this already comprehensive list of definitions the pertinent purposes set forth in the *English Statute of Charitable Uses*, 43 Eliz., Chap. 4, in which the purposes mentioned in the preamble as charitable were as follows:

"Relief of aged, impotent and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning; free schools; scholars in university; houses of correction; repair of bridges, ports, havens, causeways, churches, sea-banks, and highways; education and preferment of orphans; marriages of poor maids; supportation and help of tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes."

We may also add the six divisions of charitable purposes recognized by the American Law Institute in the Re-Statement of the Law of Trusts, Section 368, as follows:

- "(a) The relief of poverty;
- (b) The advancement of education;
- (c) The advancement of religion;
- (d) The promotion of health;
- (e) Governmental or municipal purposes;
- (f) And other purposes the accomplishment of which is beneficial to the community."

See also 4 *Pomeroy's Eq. Jurisprudence* (5th Ed.) Section 1020.

To bring the citation of authority to date, we may refer to the latest case in New Jersey dealing with charitable trusts—*Woodstown National Bank and Trust Company v. Snelbaker*, 136 N. J. Eq. 62.

Tested in the light of the foregoing authorities, the trust created by the Will of Eustace Cameron Butler, deceased, is seen to be a valid charitable trust for the following reasons:

1. The beneficiaries are an indefinite and fluctuating class of the public—"deserving children resident in Nassau, Bahamas," and
2. The purpose is a charitable one—the advancement of education—"to provide annual scholarships for higher education."

POINT II.

A charitable trust is not within the rule against perpetuities.

Appellants make much of the point that the rule against perpetuities is a rule of law and not a mere rule of construction and properly show that the trust is construed as it would be construed in the absence of the rule against perpetuities and then the rule against perpetuities is applied (Appellants' Brief, p. 17, *et seq.*). But the rule against perpetuities is a rule of law applicable only to private trusts. Public, or charitable trusts are to be regarded as separate and distinct subject matter to which the rule has not and never has had any application except in the limited class of cases hereinafter mentioned.

“In (a) sense charitable trusts are perpetuities. And this is no arbitrary doctrine, but arises from the nature of such trusts. For while, generally, a trust is not good unless there be a natural or artificial *cestui que trust*, charitable trusts are an exception. They are recognized as valid, but yet they do not ordinarily have any definite *cestuis que trust*. They are therefore inalienable, because there is no one to alienate them. No one has any alienable rights, because no one has any rights.” *Gray, Rule Against Perpetuities* (4th Edition) Sections 589, 590.

It is submitted that the qualifications to this general statement discussed by the learned author in the subsequent sections of Chapter XVIII, *op. cit.*, have no application to the trust under discussion, since this trust is a present gift of the whole of testator's residuary estate; and there is here involved no question of the remoteness of the vesting of the gift of this estate.

Again, “Charitable gifts are not within the rule against perpetuities. In fact, a charitable trust contemplates perpetuity.” 11 *Corpus Juris*, page 302; 14 *Corpus Juris Secundum*, Title “Charities”, page 416.

“Trusts for charitable uses commencing *in praesenti* or within the period of the rule against perpetuities are not obnoxious to the rule, although they may continue forever and beneficial interests may arise under them at a remote time, so long as the property given in trust vests in the trustee immediately or within the period prescribed by the rule.” 48 *Corpus Juris*, title “Perpetuities,” pages 986-987, Sect. 78.

Matawan Y. M. C. A. v. Appleby, 97 N. J. Eq. 95, 127 A. 25; *Kitchen v. Pitney*, 94 N. J. Eq. 485, 119 A. 675; *Smith v. Pond*, 92 N. J. Eq. 211; *Lawrence v. Prosser*, 89 N. J. Eq. 248, at page 251; *Hilliard v. Parker*, 76 N. J. Eq. 447, 74 A. 447;

Mills v. Davidson, 54 N. J. Eq. 659, 35 A. 1072, 35 L. R. A. 113.

“The rule against perpetuities does not apply to gifts to charitable uses. A gift to a charitable use, with a direction that no part thereof should at any time be alienated, does not create a perpetuity in the sense forbidden by law but only a perpetuity allowed by law and equity in cases of charitable trusts.”
Mills v. Davison, 54 N. J. Eq. 659, headnote 1.

POINT III.

The settlor of a charitable trust may request or direct the trustee to give a preference to named individuals or to a fixed class of persons.

Before elaborating the point just stated, we may lay down a few broad distinctions. Trusts may, for the purpose of determining their validity or invalidity as tested by the rule against perpetuities, be divided into three classes:

- (1) *Private trusts*, which are subject to the rule against perpetuities;
- (2) *Public or charitable trusts*, which, for the reasons developed above, are not within the rule against perpetuities; and
- (3) *Mixed trusts*, that is, trusts in which private objects are intermingled with public or charitable objects, and which may or may not violate the rule against perpetuities.

Although the discussion under this point is devoted to the second class of trusts, we may glance at some examples of the third class in order to develop the distinction.

Tichenor v. Mechanics & Metals National Bank, 96 N. J. Eq. 560; 125 A. 323, may be taken as an

example of a trust which failed because the gift for an object not charitable was indivisible from a gift for a charitable object.

On the other hand, in *Sheen v. Sheen*, 126 N. J. Eq. 132, the Court of Chancery upheld a gift to further the study and science of medicine which provided for the payment of the net income of the gift as an award or prize to a doctor or doctors who have each year done something outstanding in the medical profession, although this gift was attacked on the ground that it was made for a private purpose.

Other examples of trusts with mixed public and private purposes are collected by the appellants to further their own argument and cited by them on pages 21 to 28, inclusive, of their brief, and need not be here repeated, although it is perhaps needless to say that we do not draw the same inference from these cases as appellants do.

It is respectfully submitted that counsel for the appellants have fallen into error through failing to observe the elementary distinction between those trusts, on the one hand, which are purely public or charitable and which may give a preference to certain named persons or a fixed class of persons, and on the other hand, mixed trusts which inseparably combine a private or public object, ~~on the other hand~~. They would have escaped this error and confusion if they had kept in mind the following rule appearing in *Bogert on Trusts and Trustees*, Section 362, page 1099:

“It is well established that the settlor may request or direct the trustee of a charitable trust to give a *preference* to named individuals, or to a fixed class of persons in distributing his bounty. Thus, there may be a trust to furnish a scholarship to aid a young man to go through college with a requested preference to deserving relatives of the settlor or a

trust to aid the poor and needy of a given town, with a direction to give first choice to needy relatives of the donor; or a trust to operate a home for the aged with a direction that A and B, aged friends of the settlor, be admitted. Here the definiteness of one or more of the possible or certain beneficiaries does not take away from the trust its tendency to confer substantial and widespread social benefits. The private trust aspects are minor and may be ignored. In its large outlines, the trust is for the social advantage of a substantial part of the public; that is, it is charitable."

The following cases are cited in the footnote to the above-quoted section from Bogert:

"*Waldo v. Caley*, 16 Ves. 206; Attorney General v. Duke of Northumberland, L. R. 7 Ch. 745; *In re Cohen*, 36 T. L. R. 16; *Perin v. Carey*, 24 How. 465, 16 L. Ed. 701; *Drew v. Wakefield*, 54 Me. 291; *Darcy v. Kelley*, 26 N. E. 1110, 153 Mass. 433; *Dexter v. President, etc., of Harvard College*, 57 N. E. 371, 176 Mass. 192; *Matter of MacDowell's Will*, 112 N. E. 177, 217 N. Y. 454, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853; *Franklin v. Armfield*, 2 Sneed (Tenn.) 305; *Paschal v. Acklin*, 27 Tex. 173; *Gallaher v. Gallaher*, 146 S. E. 623, 106 W. Va. 588.

"In *Spencer v. All Souls College*, Wilm. 163, the court enforced a preference in favor of a relative fourteen degrees removed from the founder.

"In *Braund v. Earl of Devon*, 3 Ch. 800, it was held that a preferred lineal descendant of the settlor must have the consent of the Charity Commissioners before suing for admittance to the benefits of the trust.

"The preference may be to any class of possible *cestuis*, as, for example, in the case of a trust

for educating orphans, a preference may be given to residents of a given city.

“*Vidal v. Girard’s Ex’rs.*, 2 How. 127, 11 L. Ed. 205.”

The same rule is stated in other language in *Scott on Trusts*, Vol. 3, page 2031:

“On the other hand, in the United States as well as in England it is held that a trust for the relief of poverty or the promotion of education is charitable, although by the terms of the trust it is provided that in selecting beneficiaries preference should be given to relatives or descendants of the testator or of other designated persons.”

Footnote 7 at page 2031, of *Scott on Trusts*, is set forth in full to demonstrate the general adoption of the preference:

“7 *Spencer v. All Souls College*, Wilm. Notes 163 (1762) (for establishing a fellowship in a college, preference to be given to testator’s poor relations); *Braund v. Earl of Devon*, L. R. 3 Ch. App. 800 (1868) (for founding a free school, preference to be given to lineal descendants of testator’s grandfather); *Perin v. Carey*, 24 How. 465, 16 L. Ed. 701 (U. S., 1860) (for founding a college, preference to be given in applications for admission to relatives and descendants of the testator and of other designated persons); *Tarver v. Weaver*, 221 Ala. 663, 130 So. 209 (1930) (trust for university scholarships with preference to descendants of a named relative of the testator); *Darcy v. Kelley*, 153 Mass. 433, 26 N. E. 1110 (1891) (perpetual fund for the poor, preference to be given to testator’s poor relatives); *Dexter v. Harvard College*, 176 Mass. 192, 57 N. E. 371 (1900) (to a college for the education of descendants of testator’s grandparents, any excess to be expended for the general purposes of the college); *Matter of MacDowell*, 217 N. Y. 454,

112 N. E. 177, L. R. A. 1916E 1246, Ann. Cas. 1917E 853 (1916) (home for poor gentlemen, preference to be given to descendants of testatrix and of other designated persons); *Gallaher v. Gallaher*, 106 W. Va. 588, 146 S. E. 623 (1929) (scholarships in a college with preference to descendants of certain relatives of the testator)."

It is interesting to note that the following cases are used in common by both Scott and Bogert in support of the proposition above set forth:

Spencer v. All Souls College, Wilm. 163; *Braund v. Earl of Devon*, 3 Ch. 800; *Perin v. Carey*, 24 How. 465, 16 L. Ed. 701; *Darcy v. Kelley*, 26 N. E. 110, 153 Mass. 433; *Dexter v. President, etc., of Harvard College*, 57 N. E. 371, 176 Mass. 192; *Matter of MacDowell's Will*, 112 N. E. 177, 217 N. Y. 454, L. R. A. 1916E, 1246, Ann. Cas. 1917E, 853; *Gallaher v. Gallaher*, 146 S. E. 623, 107 W. Va. 588.

The same rule is recognized in the American Law Institute's Re-statement of the Law of Trusts, Vol. 2, Sec. 370, sub-paragraph j and k; also Section 375.

"Section 370, sub-paragraph j. *Limitation of beneficiaries to a particular place or class.* A trust to establish or maintain a school or other educational institution, or otherwise to promote education, is charitable although the beneficiaries are limited to those residing in a particular district or those belonging to a particular class, provided that the class is not so small that the purpose is not of benefit to the community. A trust for the establishment or maintenance of a school is charitable although the beneficiaries are limited to the inhabitants of a particular place, whether a particular county, state, city, town, or parish. So, also,

a trust to establish or maintain a school is charitable although the schools are limited to persons of a particular sex or religion or to the children of persons of a particular profession or trade. So also a trust is charitable where it provides for free scholarships although scholarships are similarly limited. Thus, a scholarship available to persons of a particular not uncommon surname is charitable (See section 375).”

“Section 370, sub-paragraph k. *Where class is too narrow.* A trust for the promotion of education is not charitable if the beneficiaries are limited to members of a class so small that the relief of the class is not of benefit to the community. Thus, a trust for the education of persons designated by name is not charitable. The mere fact that the class of persons to be benefited is potentially large is not necessarily enough to make a trust for their education a charitable trust. Thus, a trust for the use of the descendants of the settlor is not a charitable trust but a trust to establish the scholarship not limited to descendants of the settlor is charitable although preference is to be given to descendants of the settlor. (See Section 375.)”

“Section 375, sub-paragraph c. *Where class of beneficiaries is limited* * * * A trust to assist needy descendants of the settlor, or to educate descendants of the settlor is not a charitable trust. On the other hand, a trust for the relief of poverty or the advancement of education which is not so limited is none the less a charitable trust, although by the terms of the trust preference is given to descendants of the settlor.”

POINT IV.

To invalidate this trust the appellants improperly rely upon facts dehors the record.

To avoid the compelling effect of the clear language contained in the will, the appellants accuse the testator of a degree of ingenuity, directed to circumventing the rule against perpetuities, which amounts to positive guile. It is said that testator's motive in favor of descendants of his brothers and sisters was first manifested during his lifetime, when he gave a scholarship to Donald Butler, a nephew (Appellants' Brief, p. 4); that testator feared that his next of kin would dissipate his residuary estate, and he, therefore, tied up his benefaction to his family with the objective of education of his family, intending, however, that no one outside of his family should benefit (Appellants' Brief, p. 13); and that the qualifying word "deserving" gives the trustees such a wide scope of discretion that all persons not descendants of testator's brothers and sisters could be excluded from this benefaction (Appellants' Brief, pp. 3 and 4 and pp. 14 and 15), particularly in view of the fact that the testator has named only relatives as trustees, who will "make more certain that their own children will benefit" (Appellants' Brief, p. 16). In answer to the obvious question as to whether the ingenuity imputed to the testator did not expose him to the peril of being taken at his word and having some part of his benefaction go to some qualifying person who was a non-relative, the court is given a gratuitous lesson in the educational sociology of Nassau, Bahamas. The argument runs as follows: Of the population of Nassau, eighty-five per cent. is colored, with little or no education (Appellants' Brief, p. 4). Of the remainder of the residents of this island, a still

smaller number have the "basic, primary, and elementary education" that would enable them to qualify for scholarship for higher education (Appellants' Brief, p. 14). Of this lessened remainder, the scholarships are further restricted to those applicants found "deserving," and, of this latter number, preference must be given to descendants of testator's brothers and sisters. And, after this preference is indulged, the income of the fund would be used up, although appellants do not offer any convincing demonstration of the means by which the annual income of an estate approximating \$150,000 can be exhausted in providing scholarships to qualified descendants of decedant's brothers and sisters. We believe that we have, fairly and without detraction, stated all the essential elements of appellants' position. We proceed now to examine its defects.

In the first place, in order to arrive at this position, it has been necessary for appellants to bring in material of an alleged factual nature which is not only dehors the will but dehors the record, and is not even supported by citations of lay authorities as to such matters as population statistics and the structure of the educational system of the island. The language of the will of Eustace Cameron Butler, whatever may be thought of the legality or illegality of the object sought to be accomplished, is plain and unambiguous enough, and needs no extrinsic aid to its construction.

"Extrinsic evidence of the circumstances, situation and surroundings of the testator and of his property, is legitimate to place the court which expounds the will, in the situation of the testator who made it, and thus to enable the court to understand the meaning and application of the language he has adopted; but the testator's intention must ultimately be determined from the language of the instrument as explained by such extrinsic

evidence, and no proof, however conclusive, can be admitted with a view of setting up an intention inconsistent with the writing itself." *Griscom v. Evans*, 40 N. J. Law 402, aff'd 42 N. J. Law 579.

Or, as more briefly stated in Justice Depue's opinion, in 40 N. J. L., page 406, 407.

"In every case of a controverted construction, the sole question is *non quod voluit sed quod dixit.*"

See also *Hudson Trust Co. v. Horwood*, 124 N. J. Eq. 20; *Fidelity Union Trust Company v. Noll*, 125 N. J. Eq. 106, wherein numerous illustrative cases are cited.

But, assuming, without conceding, that this extrinsic evidence was properly admitted—we refer now to the facts appearing in the record and not to the more sweeping statements of which the court is asked to take judicial notice (e. g., Appellants' Brief, p. 14)—the fallacy of appellants' argument rests in the basic assumption that the entire income of this trust fund must necessarily and inevitably be applied to the exclusive use of descendants of the brothers and sisters of the testator. However, it is obvious from a careful reading of this paragraph of the will that the main purpose of this trust fund is "to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas," and that the descendants of the brothers and sisters of the testator are to participate in the benefits of this trust fund only "if they are in need of and apply for such assistance."

If such descendants of the testator's brothers and sisters are in need of such assistance and apply to the trustees for such assistance, then, of course, they are to be given preference in the dis-

tribution of the scholarships; but to assume that the trust is for their exclusive benefit would be to assume, first, that the line of descendants of the testator's brothers and sisters will never be extinguished; secondly, that these descendants will never cease to reside in Nassau, Bahamas, and will always be so numerous and so needy and so eager to apply for scholarships and so well qualified to receive a higher education that their applications will annually exhaust the number of available scholarships under this trust; and, finally, that it can be stated as a matter of certain prediction that, when the preferences are made in favor of these descendants, no further benefits will be available for any of the other deserving children resident in Nassau, Bahamas.

Appellants make a number of disparaging references to the selfish motives of the testator in establishing this trust, as, for example, those appearing on pages 3, 4, 14, and elsewhere in their brief. On the question of testator's motives, we refer to 2 *Bogert, op. cit.*, Sec. 364, page 1110, quoted with approval by the Court of Chancery in *Sheen v. Sheen*, 126 N. J. Eq. 132, wherein it is stated:

“that most courts consider only the effect of a particular trust in deciding whether it is charitable or not. The question is not what the testator desired to accomplish by the trust, but what in the opinion of the court will be the result of the trust upon the community and society in general. The settlor may have founded the trust solely to satisfy his family pride, for self-glorification, in order to emulate and rival a neighbor's bounty, to improve living conditions in his home city and thus strengthen his own business interests, or for other reasons unconnected with social advancement in the region in question. The court should not be interested in these incidental psychic or even material advantages to

the settlor or his family. The court should, and generally does, direct its attention merely to the question whether the net result of the trust in operation will be to advance the religious, educational, eleemosynary, governmental, or other charitable interests of the community and thus to produce the social advantage required for the charitable trust."

POINT V.

Courts favor charitable gifts.

For a good statement in support of this point, we refer to the following quotation from Vice-Chancellor Sooy's opinion in the case of *Sheen v. Sheen*, 126 N. J. Eq. 132; 8 Atl. 2nd 136, as follows:

"The case of *Noice v. Schnell*, 101 N. J. Eq. 252, at page 257, 137 A. 582, 584, 52 A. L. R. 965, states the rule as laid down by the Court of Errors and Appeals as follows: 'A court's attitude in the consideration of a bequest intended for a charitable purpose should be in favor of the charity rather than against it. The court should take a friendly, not a hostile, attitude, toward the gift. It should be the aim of the court to execute the testator's intent by sustaining the trust, rather than to overthrow it, if it can be sustained without violating well recognized and established principles of the law.' The court in the above case then cites, with approval, *Hesketh v. Murphy*, 36 N. J. Eq. 304, and proceeds with a citation of numerous cases in which the courts of this State have upheld charitable trusts."

The most recent pronouncement of the Court of Chancery on this point is found in *Woodstown National Bank and Trust Company v. Snelbaker*, 136 N. J. Eq. 62.

For the foregoing reasons, and for the reasons set forth in the opinion of Vice-Ordinary Bigelow, we respectfully submit that the decree of the Prerogative Court, affirming the decree of the Essex County Orphans Court, should be affirmed.

Respectfully submitted,

LUKE M. MCKENNY,
Proctor for and of Counsel with
Robert E. Duncombe, William H.
Maura, and Kenneth F. Butler,
Trustees-Appellees.

EDWARD L. STASSE, SR.,
Proctor for Howard E. Wright,
Clarence A. Birdsall, and Walter
G. Brandley, Executors-Appel-
lees.

For the foregoing reasons, and for the reasons set forth in the opinion of Vice-Chief Justice Bischoff, we respectfully submit that the decree of the Probate Court, affirming the decree of the Essex County Orphans Court, should be affirmed.

Respectfully submitted,
Luka M. McKenry,
Attorney for said of Counsel with
Robert E. Dunne, William H.
Blair, and Kenneth F. Butler,
Trustees-Appellees.
Edward J. Breen, Esq.,
Attorney for Howard R. Wright,
Charles A. Birdsell, and Walter
G. Branley, Executors-Appel-

lants.

Accepted for filing and recording this 12th day of June, 1911.

New Jersey Court of Errors and Appeals

IN THE MATTER
of the
ESTATE OF
EUSTACE CAMERON BUTLER,
Deceased.

On Petition for
Decree of
Distribution.

On Appeal from
Prerogative
Court.

BRIEF FOR INFANT RESPONDENTS.

(Italics ours, unless otherwise indicated.)

The appeal herein is from the decree of the Ordinary advised by Vice-Ordinary Bigelow dated June 19th, 1945, and filed on June 26, 1945 (S. C., p. 35), affirming the decree made by Hon. Daniel J. Brennan, Judge of the Essex County Orphans' Court on September 21, 1944 (S. C., p. 25), upon the advice of Hon. Alfred C. Clapp (S. C., p. 18), based upon the petition filed by the executors in the Essex County Orphans' Court (S. C., p. 1) for a construction of the Will of the decedent Eustace Cameron Butler, to the end that the executors may make a proper distribution to those entitled thereto. The petition of the executors in the Orphans' Court sets forth fully the facts and circumstances and will therefore not be herein re-stated, but, the Court is respectfully referred to said petition.

The specific provision of the Will in controversy is paragraph "4" thereof (S. C., p. 9), which reads as follows:

"4. The rest, residue and remainder of my estate I give, devise and bequeath to ROBERT E. DUNCOMBE, WILLIAM H. MAURA and KENNETH F. BUTLER, all of Nassau, Baha-

mas, in trust, nevertheless, to use the income thereof to provide annual scholarships for higher education to deserving children resident in Nassau, Bahamas, with full power to my said trustees to appoint their successors and/or substitute trustees for this fund with power to name and designate their successors in office. *It is my wish that preference in the awarding of these scholarships be always given to the descendants of my brothers and sisters if they are in need of and apply for such assistance.* My said trustees or their successors in office shall and may make such reasonable rules and regulations as may to them seem advisable for the awarding of said scholarships. To the end that this trust shall not fail for want of trustees I authorize the appropriate probate authorities of Nassau aforesaid, to appoint trustees in the event at any time of the failure of trustees to be appointed as I have provided and qualify."

The questions suggested by the foregoing provision, are:

(1) Does the apparently mandatory preference to the decedent's designated relatives render the trust non-charitable because the testator actually intended to benefit only the relatives therein referred to and to perpetuate the trust fund for them?

(2) If not, is the trust, which involves personalty, *i.e.*, money, to be paid over to residents of Nassau, to be administered under the laws of Nassau (England) or the laws of New Jersey? (The trustees reside in Bermuda).

(3) If the trust is to be administered under the laws of Nassau, is the trust valid under English law, *i.e.*, Statute of Charitable Uses, Mortmain & Charitable Uses Act, 51 & 52 Vict. C. 42 (1888); Charitable Uses Act, 54 & 55 Vict. C. 73 (1891)?

An examination of the authorities indicates that the English Courts have greater latitude in declaring so-called charitable trusts invalid, in preventing the perpetuation of trusts for essentially private purposes, or in terminating them. This restricted latitude given to charitable gifts by the laws of England is reflected in *Miller v. Rowan*, 5 Cl. & Fin. 99, 110; 5 E. R. C. 563, 570, 579; and, the English notes there following at 571, 573. Cf. *Morice v. The Bishop of Durham*, 9 Ves. 399; 5 E. R. C. 547.

The Statute of Elizabeth, except for the preamble, was repealed in 1888 (See 3 Scott on Trusts, p. 1923, *et seq.*), and said preamble reads as follows:

“Be it enacted by authority of this present parliament, That it shall and may be lawful to and for the Lord Chancellor * * * from time to time to award commissions under the Great Seal of England * * * to the bishop of every several diocese * * * and to other persons of good and sound behaviour, authorizing them * * * to enquire * * * of all and singular such gifts, * * * and of the abuses, breaches of trusts, * * * or misgovernment of any lands, * * * goods, chattels, money or stocks of money, heretofore given, * * * or which hereafter shall be given, * * * for any of the charitable and godly uses before rehearsed: * * * and upon such enquiry * * * set down such orders, judgments and decrees, as the said lands, * * * goods, chattels, money and stocks of money, may be duly and faithfully employed, to and for such of the charitable uses and intents before rehearsed respectively, for which they were given * * * by the donors and founders thereof; which orders, judgments and decrees, not being contrary or repugnant to the orders, statutes or decrees of the donors or founders, shall be the authority of this present parliament stand firm and good * * * and shall be executed ac-

cordingly, until the same shall be undone or altered by the Lord Chancellor * * * upon complaint by any party grieved to be made to them * * *.”

Notwithstanding the repeal aforesaid, the foregoing preamble has nevertheless, to a large extent, shaped and influenced the law in England and in the United States. “It is to the preamble that the Courts have turned to determine whether a trust is charitable.” (3 Scott on Trusts, p. 1925.) Although Parliament provided for the appointment of a permanent Charity Commission over charitable trusts, all trusts for educational purposes are under the supervision of, and entrusted to the Board of Education (Act 1899, 62 and 63 Vict. C. 33).

The rules of law applicable to the administration of trusts is determined by the situs. This principle is comprehensively treated in the exhaustive annotations which may be found in 115 A. L. R. 802, at 803. The governing law is there stated as follows:

“Although the cases do not lay down any general principle with regard to the law governing matters relating to administration of testamentary trusts, the rule which may be deduced from the results reached in the individual cases may be said to be, as it is broadly stated by some secondary authorities, *that the law of the situs of the administration of the trust is the law governing all matters relating to its administration.* Am. Law Inst. Restatement, Conf. Laws, § 298; 2 Beale, Conf. L. §§ 297, 297.3, 299.1; *Re Vanneck*, (1936) 158 Misc. 704, 286 N. Y. S. 489.

“In the absence of expressed intention indicating that the trust is to be administered elsewhere, *the situs of administration is usually presumed to be the domicile of the testator at the time of his death;* and, although

there is authority to the contrary (see *Lozier v. Lozier* (1919) 99 Ohio St. 254, 124 N. E. 167), the fact that the testator designates as his trustee a corporation organized and doing business in another state is presumptive evidence that he intends the trust to be administered in the state of such trustee's domicile. Am. L. Inst. Restatement, Conflict of Laws, § 298.

“American Law Institute's Restatement of the Law of Conflict of Laws provides: ‘Section 298. A testamentary trust of movables is administered by the trustee according to the law of the state of the testator's domicile at the time of his death unless the will shows an intention that the trust should be administered in another state. Comment: a. * * * In the case of a testamentary trust, the state in which the testator intended the trust to be administered is presumptively the state of the testator's domicile at the time of his death, since it is natural to suppose that he intended the trust to be administered in the same place in which his estate was to be administered, and under the direction of the courts of that state. b. In the case of a testamentary trust, however, it may appear that the trust is located in another state than that of the testator's domicile. c. * * * If the testator appoints as trustee a trust company of another state, presumptively his intention is that the trust should be administered in the latter state; the trust will, therefore, be administered according to the law of the latter state.’ ”

See also annotations to *Mount v. Tuttle*, 2 L. R. A. (N. S.) 438 (main case, 2 L. R. A. (N. S.) 428, 183 N. Y. 358, 76 N. E. 873); *Kennedy v. Town of Palmer*, 1 Thompson & Cook, 581 (N. Y.); 2 Beale Confl. of Laws, Vol. 2, Sec. 297.2, p. 1024; also, Vol 1, *Id.*, Sec. 101.4, p. 440.

In the case of *Re MacDowell's Will*, 217 N. Y. 544, L. R. A. (1916 E.) 1246, the Court of Appeals,

although it did not there invalidate the trust, nevertheless (at p. 1250), said:

“If the purpose of the testatrix had been to create a trust *only for the benefit of her own relatives and certain designated friends and their lineal descendants, the trust would not come within the designation of a charitable trust.* (Re Shattuck, 193 N. Y. 446; 86 N. E. 455; Kent v. Dunham, 142 Mass. 216, 56 Am. Rep. 667, 7 N. E. 730) * * *.”

Paragraph “4” of the Will indicates a mandatory—certainly an implicit preference to “*descendants of my brothers and sisters if they are in need of and apply for such assistance.*” (Note the use of the term “always” by the testator in paragraph 4 of the will (S. C., p. 9, l. 24). Consequently, the provision in question perpetuates a fund for needy relatives indefinitely; and, if so, the trust must fall, since in that situation it is purely private. Cf. 51 Harv. Law Rev. 638.

In *Norris, et al. v. Thomson's Ex'rs., et al.*, 19 N. J. E. 307, our Court of Chancery, per ZABRISKIE, CH., after a careful discussion of the doctrine of charitable uses and the jurisdiction of Chancery (p. 312), says that Chancery “has always defined charitable and religious objects according to the enumeration in the preamble of that act; * * *” (Referring to 43 Eliz. Cap 4):

Continuing on p. 312, the Chancellor said:

“That statute is not in force in this state, and therefore cannot limit the authority of this court to enforce charitable gifts not included within it. It was not used for that purpose by the English equity courts; but it was used by them to enlarge their power. The rule of law and in equity before that statute, was, that a gift or devise for a purpose or object so vague and indefinite that

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

* * * * *

(p. 313):

"The same doctrine has been established in the courts of New York, where such gifts are held void, unless the object of the gift is specific. While they hold that there need not be any legally existing institution to receive the gift, they maintain that the object or purpose of the gift must be specified. *Potter v. Chapin*, 6 Paige 650; *Williams v. Williams*, 4 Seld, 547; *Owens v. Miss. Soc.*, 4 Kern. 397; *Beekman v. Bonsor*, 23 N. Y. R. 298.

"And this is stated as the law in such case, in 2 Story's Eq. Jur. §1164 and note; 2 Redfield on Wills 830, §80; 2 Roper on Leg., ch. 19, §§ 1 and 6."

In the case of *Slattery v. Ward, et al.*, 119 Atl. 744, at 756, the Supreme Court of Rhode Island said:

"It is well settled that if the property bequeathed by so indefinite a bequest, can consistently with the will be applied to other than charitable uses, the bequest is invalid."

Pell v. Mercer, 14 R. I. 412, 442; Kelly v. Nicholas, 18 R. I. 62, 25 Atl. 840, 19 L. R. A. 413; Mason v. Perry, 22 R. I. 473, 48 Atl. 671."

Conclusion.

Since, as indicated by the above cited authorities, the trust is determinable by the laws of the situs where the same is to be administered, our Courts should determine its validity in accordance with English law; the trust should be held, as the English Courts would hold, in respect to paragraph "4," that the same is invalid; and, the decree below should accordingly be reversed.

Respectfully submitted,

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GEORGE H. ROSENSTEIN,
On the Brief.



