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Notice of Appeal.
(Filed April 29, 1930.)

67/320

In Chancery of New Jersey

Between		10
HENRY GRAVES, JR., and GEORGE COE GRAVES, Trustees, etc., Complainants,	}	
and		
EDWARD H. GRAVES, <i>et al.</i> , Defendants.	}	On Bill, &c.

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The defendants Thomas Barber, Guardian *ad litem* for Duncan Graves, Jr., Henry Graves, 2nd, Richard Goff Metcalf, Nan Trimble Fullerton and Manton B. Metcalf, 3rd, Margaret Dickson Hewitt, General Guardian and Guardian *ad litem* of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, hereby appeal from so much of the Final Decree made by the Chancellor, on the advice of Hon. John H. Backes, Vice-Chancellor, dated and filed in the above entitled cause on the 22nd day of April, 1930, as declares:

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1. That the Court is of the opinion that the coal lands and their proceeds, the \$60,000,000 in bonds of the Glen Alden Coal Company, were surplus holdings of the Delaware, Lackawanna & Western Railroad Company, and that the transfer of said bonds to the Lackawanna Securities Company was for convenience, to facilitate distribution, and

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Notice of Appeal.

10 that the distribution of the stock of the Lackawanna Securities Company among the stockholders of the Delaware, Lackawanna & Western Railroad Company was in legal effect an extraordinary dividend from surplus of the Delaware, Lackawanna & Western Railroad Company represented by the \$60,000,000 of bonds of the Glen Alden Company;

20 2. That by the provision of the Settlement Agreement of June 23, 1923, providing "that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the *corpus* of said trust estate shall be considered and distributed as income whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement", it was intended by the creators of said trust that all dividends of corporations declared out of surplus or net profits payable in stocks, bonds or securities of other corporations or in other property should be considered as cash dividends and distributed as income whether the same should be declared out of surplus or profits accruing prior or subsequent to the date of said agreement.

30 3. That the said 6,250 shares of the stock of Lackawanna Securities Company and the said sum of \$18,302.55 and any and all additional sums subsequently received upon said stock by the said Henry Graves, Jr., and George Coe Graves, Trustees under the said Settlement Agreement of June 23, 1923, constitute income within the meaning of the clause of said Settlement Agreement hereinbefore referred to, and that all of said stock and cash should be distributed among the several persons entitled to the income of the said Trust estate

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in the proportions and in accordance with the terms of said Settlement Agreement of June 23, 1923.

Dated, April 25th, 1930.

WALL, HAIGHT, CAREY & HARTPENCE, 10
Solicitors for and of Counsel with De-
fendants, Thomas Barber, Guardian
ad litem for Duncan Graves, Jr., Henry
Graves, 2nd, Richard Goff Metcalf,
Nan Trimble Fullerton and Manton B.
Metcalf, 3rd, Margaret Dickson Hew-
itt, General Guardian and Guardian
ad litem of Mary Dickson Graves,
Florence Barbara Graves and Henry
Dickson Graves. 20

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

ALBERT C. WALL,
Of Counsel.

Service of a copy of within Notice of Appeal is hereby acknowledged this 28 day of April, 1930.

LINDABURY, DEPUE & FAULKS, 30
Solicitors for Complainants.

JOHN M. EMERY,
Solicitor for Defendants, Edward H.
Graves, Daisy B. Smith, Duncan
Graves, Gwendolyn Graves Fuller-
ton, George Coe Graves, 2nd, Isabella
Graves Metcalf, and Edward H.
Graves, Guardian *ad litem* for Jean
Stevenson Graves, and Jean Steven-
son Graves. 40

Petition of Appeal.

(Filed April 30, 1930.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

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HENRY GRAVES, Jr., and GEORGE
COE GRAVES, Trustees, etc.,
Complainants-Appellees,

vs.

EDWARD H. GRAVES, *et als.*,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

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To the Honorable The Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Thomas Barber, Guardian *ad litem* for Duncan Graves, Jr., Henry Graves, 2nd, Richard Goff Metcalf, Nan Trimble Fullerton and Manton B. Metcalf, 3rd, Margaret Dickson Hewitt, General Guardian and Guardian *ad litem* of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, the appellants in the

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above stated cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date April 22nd, 1930, in a certain cause in said Court of Chancery wherein the said Henry Graves, Jr., and George Coe Graves, Trustees, etc., were Complainants and the said Thomas Barber, Guardian *ad litem*

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for Duncan Graves, Jr., Henry Graves, 2nd,

Petition of Appeal.

Richard Goff Metcalf, Nan Trimble Fullerton and Manton B. Metcalf, 3rd, Margaret Dickson Hewitt, General Guardian and Guardian *ad litem* of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, *et als.*, were defendants in this respect, to wit: That the said decree adjudges: 10

That the Court is of the opinion that the coal lands and their proceeds, the \$60,000,000 in bonds of the Glen Alden Coal Company, were surplus holdings of the Delaware, Lackawanna & Western Railroad Company, and that the transfer of said bonds to the Lackawanna Securities Company was for convenience, to facilitate distribution, and that the distribution of the stock of the Lackawanna Securities Company among the stockholders of the Delaware, Lackawanna & Western Railroad Company was in legal effect an extraordinary dividend from surplus of the Delaware, Lackawanna & Western Railroad Company represented by the \$60,000,000 of bonds of the Glen Alden Company; 20

That by the provision of the Settlement Agreement of June 23, 1923, providing "that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate shall be considered and distributed as income whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement", it was intended by the creators of said trust that all dividends of corporations declared out of surplus or net profits payable in stocks, bonds or securities of other corporations or in other property should be considered as cash dividends and distributed as in- 30 40

Petition of Appeal.

come whether the same should be declared out of surplus or profits accruing prior or subsequent to the date of said agreement.

10 That the said 6,250 shares of the stock of Lackawanna Securities Company and the said sum of \$18,302.55 and any and all additional sums subsequently received upon said stock by the said
Henry Graves, Jr., and George Coe Graves, Trustees under the said Settlement Agreement of June 23, 1923, constitute income within the meaning of the clause of said Settlement Agreement hereinbefore referred to, and that all of said stock and cash should be distributed among the several persons entitled to the income of the said Trust estate in the proportions and in accordance with the
20 terms of said Settlement Agreement of June 23, 1923.

And petitioners appeal from the decree of the Chancellor, which decrees as aforesaid upon the ground that the same is erroneous in that:

Said decree should have ordered and decreed that 6,242½ of the shares of the stock of the Lackawanna Securities Company acquired by the Trustees should be held by the Trustees as a part of the corpus of the trust and not distributed as
30 income.

Your petitioners therefore pray that the said decree of the Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden. And that your petitioners may have such

Petition of Appeal.

relief in the premises as to this honorable Court shall seem meet.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Appellants, Thomas Barber, Guardian *ad litem* for Duncan Graves, Jr., Henry Graves, 2nd, Richard Goff Metcalf, Nan Trimble Fullerton and Manton B. Metcalf, 3rd, Margaret Dickson Hewitt, General Guardian and Guardian *ad litem* of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves. 10

ALBERT C. WALL
Of Counsel. 20

Service of a copy of within Petition of Appeal is hereby acknowledged this 28 day of April, 1930.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants-Appellees.

JOHN M. EMERY,
Solicitor for Defendants-Appellees, Edward H. Graves, Daisy B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, 2nd, Isabella Graves Metcalf, and Edward Graves, Guardian *ad litem* for Jean Stevenson Graves, and Jean Stevenson Graves. 30

Bill of Complaint.

(Filed February 25th, 1928.)

IN CHANCERY OF NEW JERSEY.

10 *To the Honorable Edwin Robert Walker, Chan-*
cellor of the State of New Jersey:

The complainants, HENRY GRAVES, JR. and
GEORGE COE GRAVES, individually and as trustees
under a Settlement Agreement entered into be-
tween the widow and all of the children, grand-
children and great-grandchildren of Henry
Graves, deceased, late of the City of Orange,
County of Essex and State of New Jersey, in
being at the time of the execution of said agree-
ment and their legal representatives and bearing
20 date June 23, 1923, respectfully show that:

1. Henry Graves departed this life on the 29th
day of August, 1906, a resident in the County of
Essex in this State, leaving a Last Will and Tes-
tament, a true copy of which is attached hereto
and made a part hereof.

30 2. The said Last Will and Testament of the
said Henry Graves was duly probated before the
Surrogate of the said County of Essex on or about
the 10th day of September, 1906, and the said com-
plainants, Henry Graves, Jr. and George Coe
Graves named and appointed therein as executors
thereof, after qualifying as such executors and
after payment of all the debts and funeral ex-
penses of the said testator and the specific legacies
in the said Will mentioned, filed their final account
in the Orphans' Court of said County, which after
due proceedings thereon was in all things allowed
as reported, and on the 29th day of June, 1907,
40 it was ordered, adjudged and decreed by said

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Honorable Court that the balance of the corpus and income therein stated to be remaining in the hands of the said executors after payment of the executors' commissions and counsel fees by said decree allowed be disposed of according to said Last Will and Testament.

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3. Immediately thereafter, and on or about the said 29th day of June, 1907, said complainants Henry Graves, Jr. and George Coe Graves, as executors of said Last Will and Testament of Henry Graves, deceased, after paying the commissions and counsel fees allowed by said decree in the foregoing paragraph mentioned, turned over the balance of said corpus and income in said estate to themselves as trustees under said Will and continued to administer the same according to the trusts set forth in said Will until on or about May 20, 1922, when, certain questions having arisen in respect to the proper construction thereof, the said Henry Graves, Jr. and George Coe Graves, individually and as trustees thereunder, and Henry Graves, Jr. executor under the Last Will and Testament of Henry Graves, III., deceased, filed their bill of complaint in this Honorable Court praying that said Last Will and Testament of Henry Graves, deceased, be construed by this Honorable Court and the rights of the several persons interested therein, and making claim thereunder, be ascertained, and the powers, rights and duties of the complainants, Henry Graves, Jr. and George Coe Graves, as trustees in the administration of said trust created by said Will, might be ascertained and defined, and that they, as such trustees, might be given proper direction as to the meaning of said Will and as to their duty in the administration of the trust created thereby. All of the persons then in being who were interested

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Bill of Complaint.

in and affected by the disposition of the testator's said estate were made parties to said suit and were duly served with process therein, and Jesse R. Salmon, the Clerk of this Honorable Court, was duly appointed as guardian *ad litem* for all infant defendants therein.

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4. Subsequently after hearing and duly considering the issues raised therein, this Honorable Court decreed that, subject to a trust fund to be carved out of the said trust estate sufficient in amount to produce an annuity of \$20,000 a year, payable in quarterly payments of \$5,000 each, to Harriet Isabella Graves, widow of the said Henry Graves, deceased, during the term of her natural life, the trust attempted to be created by the testator by the Fourth Clause of said Will and every part thereof violated the rule against perpetuities and was void, and as a consequence the corpus of the estate upon the death of the testator vested in Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, the children and only next of kin of the said testator, and the said Henry Graves, Jr., and George Coe Graves, executors of and trustees under the Last Will and Testament of said Henry Graves, deceased, as aforesaid, were directed to make distribution thereof accordingly.

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5. Thereafter appeals to the Court of Errors and Appeals of this State were taken by the said Henry Graves, Jr., and George Coe Graves, individually and as trustees under the Last Will and Testament of Henry Graves, deceased, and Henry Graves, Jr., executor of the Last Will and Testament of Henry Graves III, and each of them, and by Harriet Isabella Graves, Daisey B. Smith, Isabella G. Metcalf and Duncan Graves, and by Jesse

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R. Salmon, Clerk of the Court of Chancery, guardian *ad litem* of Jean Stevenson Graves, Gwendolyn Graves, George Coe Graves II, Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, infants, being all of the parties defendant to said bill, except Edward H. Graves, one of the children of said testator. 10

6. Before said appeal was heard, a Settlement Agreement was negotiated and entered into bearing date June 23, 1923, between the said Harriet Isabella Graves, widow of Henry Graves, deceased, of the first part; the said Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, children of said testator, of the second part; the said Duncan Graves, son of the said Henry Graves, Jr., and Isabella G. Metcalf, daughter of the said Daisey B. Smith, both adults, of the third part; Gwendolyn Graves and George Coe Graves II, minor children of the said Henry Graves, Jr., Jean Stevenson Graves, a minor child of the said Edward H. Graves; Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, minor children of Henry Graves III, a deceased son of the said Henry Graves, Jr., and Manton B. Metcalf III, a minor child of the said Isabella G. Metcalf, by Jesse R. Salmon, their guardian *ad litem*, as aforesaid, of the fourth part; Henry Graves, Jr., as executor under the Last Will and Testament of said Henry Graves III, and Margaret Dickson Graves, as general guardian of the said Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, of the fifth part; and Henry Graves, Jr., and George Coe Graves, as trustees under the Last Will and testament of the said Henry Graves, deceased, of the sixth part; being all the trustees under his said Will, his widow and all of the 20
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children, grandchildren and great-grandchildren of the testator, Henry Graves, deceased, in being at the time of the execution of said agreement and their legal representatives, which said agreement was made subject to the express condition that it should have no binding effect until it should have been submitted to the Chancellor and approved by him, and until the execution thereof by Jesse R. Salmon, guardian *ad litem* of the infant defendants in said suit therein named had been ratified and confirmed by an order of the Chancellor made and filed in said cause.

7. Subsequently said agreement was submitted to this Honorable Court for its approval on behalf of the aforesaid infants interested in said trust created by the Last Will and Testament of said Henry Graves, deceased, and on or about the 27th day of June, 1923, a decree was entered in said suit declaring the said settlement as provided in said agreement to be for the best interest of the said infants and approving said Settlement Agreement and the execution thereof, and ratifying and confirming the execution thereof by the said Jesse R. Salmon, Clerk of the Court of Chancery of the State of New Jersey, guardian *ad litem* of said Gwendolyn Graves, George Coe Graves, II., Jean Stevenson Graves, Mary Dickson Graves, Florence Barbara Graves, Henry Dickson Graves and Manton B. Metcalf, III., all of the infant defendants in said suit, as aforesaid.

8. On the same day, pursuant to the terms of said Settlement Agreement of June 23, 1923, a decree was entered in said cause wherein it was ordered, adjudged and decreed that the account of Henry Graves, Jr., and George Coe Graves, trustees under the Last Will and Testament of Henry

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Graves, deceased, bearing date March 21, 1922, and attached to the bill of complaint filed in said cause, and the account bearing the date December 31, 1922, and attached to the said Settlement Agreement bearing date June 23, 1923, theretofore filed in said cause, be in all things allowed as reported, and that the said Henry Graves, Jr., and George Coe Graves, trustees under the Last Will and Testament of Henry Graves, deceased, be relieved from all further duties of said office as such trustees and released and discharged from all liability arising therefrom. The originals of which said Settlement Agreement of June 23, 1923, account bearing date December 31, 1922, attached to said Agreement, and said decrees, were duly filed in the office of the Clerk of this Honorable Court on June 27, 1923.

9. Immediately upon the execution and delivery of the said Settlement Agreement of June 23, 1923, the said Henry Graves, Jr., and George Coe Graves, trustees therein named, assumed and have ever since continued to perform and are still engaged in the discharge of the duties imposed upon them as trustees thereunder.

By Clause 2 of said Settlement Agreement of June 23, 1923, each of the parties thereto gave, granted, bargained, sold, assigned, transferred and set over unto the said Henry Graves, Jr., and George Coe Graves, and the survivor of them, their executors, administrators, successors and assigns, all of his or her right, title, interest, claim and demand against the undistributed assets of the estate of the said testator in the hands of the said trustees or elsewhere arising out of or based upon any of the provisions of the said Last Will and Testament of the said testator, or the intes-

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tate laws of the State of New Jersey, or the final decree of the Chancellor in the above-entitled cause, or otherwise, but in trust for the uses and purposes following, that is to say:

10 “(a) To divide, transfer or pay all the undistributed extraordinary cash and stock dividends which accrued prior to December 31, 1922, and which have been retained and accumulated by the said Henry Graves, Jr., and George Coe Graves, as trustees under paragraph c, Clause Four of said Will, in so far as the same were declared out of profits or surplus accruing since the death of the testator together with all accretions thereto and income accruing thereon since December 31, 1922, equally among the said Henry Graves, Jr.,
20 Edward H. Graves, George Coe Graves and Daisey B. Smith, children of the testator and/or their legal representatives, respectively, to be theirs absolutely.

30 “(b) To divide, transfer or pay all the undistributed regular income of said estate which accrued prior to December 31, 1922, as shown by the said accounts of the trustees of March 21, 1922, and December 31, 1922, as well as the undistributed income of said estates, including all extraordinary cash and stock dividends, which have accrued since December 31, 1922, and prior to the date of this agreement, to the widow, children, grandchildren and children of deceased grandchildren of the testator and/or their legal representatives, in the manner and proportions provided in Clause Four, paragraphs d, e and f of said Will for the distribution of regular annual income.

40 “(c) To pay out of the corpus of the estate all indebtedness, claims and demands heretofore incurred by the said Henry Graves, Jr., and George

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Coe Graves, as executors and trustees as afore-
 said or which have been or may be imposed by
 law on said trust estate; all costs and expenses of
 this litigation, including counsel fees and dis-
 bursements made in connection therewith by or on
 behalf of any of the parties thereto, to be fixed by
 the Chancellor; all additional assessments for 10
 taxes, penalties and other charges, if any, which
 may be levied against the said estate of the said
 testator or the said Henry Graves, Jr., Edward
 H. Graves, George Coe Graves and Daisey B.
 Smith, their and any of their heirs, executors, ad-
 ministrators, or assigns, by reason or on account
 of the said decree of the Chancellor or the in-
 validity of the trust set up in said Will; and to
 pay unto themselves for their services as trustees 20
 under the Fourth Clause of the said Will, five per
 cent. (5%) on the gross income of the said estate,
 excepting undistributed extraordinary cash and
 stock dividends from the date of the death of the
 testator to the date hereof.

“(d) To have, hold and manage the rest,
 residue and remainder of said trust estate, and
 to sell, exchange, convey, invest and reinvest the
 same at such times, in such manner and on such
 terms as to them shall seem most expedient, and 30
 out of the rents, issues, interest and income
 thereof, to pay unto Harriet Isabella Graves,
 widow of the testator, during her natural life, in
 lieu of all interest which she may have in the
 said trust estate, the sum of \$20,000 each and
 every year, in quarterly payments of \$5,000 each,
 and to divide, transfer, or pay over the rest,
 residue and remainder of said income to and
 among the children and grandchildren of the tes-
 tator, including grandchildren born subsequent to 40
 the date of this agreement *per capita*, during their

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respective natural lives, or until the death of the last survivor of the children and grandchildren of the testator in being at the date of this agreement. In the case of Henry Graves 3d, a grandchild now deceased, and of the death of any other grandchild leaving lawful issue him or her surviving, the share or portion of the income which would have belonged to said grandchild had he or she lived shall be distributed in equal portions to his or her issue. But in case any one of said grandchildren shall die without leaving lawful issue him or her surviving, then the share which had been his or hers in life shall be distributed among the surviving children, grandchildren, and issue of deceased grandchildren of the testator, in the same manner and proportions as it is provided that the balance of said income shall be divided among them respectively. Such payment shall be made semi-annually or at such periods as shall be most convenient to said trustees. Upon the death of the last survivor of the children and grandchildren of the testator in being at the date of this instrument, the said trustees shall divide the principal of said trust estate, with all accumulations and increases thereof, to and among the great-grandchildren of the testator, share and share alike, the issue of any deceased great-grandchild to receive the share its parent would have received if living, provided, however, that any grandchild born after the date of this agreement who shall have no children in being at the time of said distribution shall be considered as a great-grandchild and shall receive the same proportion of the corpus as the other great-grandchildren of the testator. To have and to hold unto her, him, or their heirs, executors, administrators and assigns, forever.

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“The Trustees named herein, their survivor, successor, and successors, are authorized to continue all present investments and in their reinvestments shall not be restricted to investments authorized by statute law, but shall be free to make such investments as in their judgment shall be best for the interests of the trust and the beneficiaries thereof.”

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10. By said agreement it was further provided that said agreement was made under and should be construed according to the laws of the State of New Jersey, except that all extraordinary cash or stock dividends which should be declared on stock then constituting or which might thereafter constitute a part of the corpus of said trust estate, should be considered and distributed as income, whether the same should be declared out of surplus or profits accruing prior or subsequent to the date of said agreement.

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11. At the time of the death of Henry Graves, deceased, on August 29, 1906, he owned 7,500 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, of the par value of \$50 each, all of which said stock was transferred on July 1, 1907, to Henry Graves, Jr., and George Coe Graves, as trustees under said Last Will and Testament of the said Henry Graves, deceased, pursuant to the decree of the Orphans' Court of Essex County entered June 29, 1907, as aforesaid. On May 7, 1908, the said Henry Graves, Jr., and George Coe Graves, pursuant to the authority conferred upon them by the said Last Will and Testament of Henry Graves, deceased, purchased with funds of the corpus of the trust estate then held by them

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10 additional shares of the capital stock of the said Delaware, Lackawanna & Western Railroad Company, and on May 11, 1908, with similar funds, 200 additional shares of said stock. On August 2, 1909, the said Delaware, Lackawanna & Western Railroad Company declared a 15% stock dividend on its then outstanding stock of which they, the said Henry Graves, Jr., and George Coe Graves, trustees under the Last Will and Testament of the said Henry Graves, deceased, as owners of 7,900 shares of said stock, as aforesaid, received 1,185 shares. On December 23, 1909, they, as trustees as aforesaid, purchased with funds of the corpus of the trust estate then held by them, 15 additional shares of the capital stock of said Delaware, Lackawanna & Western Railroad Company. On December 29, 20 1914, through the exercise of subscription rights granted by said Delaware, Lackawanna & Western Railroad Company, they, as trustees as aforesaid, acquired with funds of the corpus of the trust estate then held by them 3,640 additional shares of the capital stock of the said Company. And on December 31, 1921, they, by way of a 100% stock dividend on the 12,740 shares then held by them as trustees as aforesaid, acquired 30 12,740 additional shares, making a total of 25,480 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company then held by them as trustees under the Last Will and Testament of Henry Graves, deceased, all of which said shares they continued to hold and which shares were the only shares of said Delaware, Lackawanna & Western Railroad Company held by them as such trustees at the time of the execution and delivery of the Settlement Agreement of 40 June 23, 1923, as aforesaid.

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12. Of the said 25,840 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company acquired by said Henry Graves, Jr., and George Coe Graves, as trustees as aforesaid, 12,995 shares thereof had been acquired by way of stock dividends out of the profits or surplus of the Company accruing subsequent to the death of said Henry Graves and prior to December 31, 1922, and had been retained and accumulated by them as directed by paragraph c, Clause Four, of said Last Will and Testament of the said Henry Graves, deceased, and consequently pursuant to the terms and provisions of Clause 2 (a) of said Settlement Agreement of June 23, 1923, were divided, together with all accretions thereto and income accruing thereon subsequent to December 31, 1922, equally among the said Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, children of the said Henry Graves, deceased, to be theirs absolutely.

That on or about the 15th day of March, 1926, the said Henry Graves, Jr., and George Coe Graves, as trustees under the said Settlement Agreement of June 23, 1923, filed an account showing the administration of said trust for the period from December 31, 1922, to December 31, 1925, including said distribution of the said 12,995 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company together with all accretions thereto and income accruing thereon subsequent to December 31, 1922, equally among the said Henry Graves, Jr., Edward H. Graves, George Coe Graves, and Daisey B. Smith, children of the said Henry Graves, deceased, which after notice to all parties interested was duly approved, ratified and confirmed by a decree

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of this Honorable Court bearing date the 7th day of June, 1926.

10 13. The remaining 12,485 shares of the said 25,480 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company ac-
quired by the said Henry Graves, Jr., and George
Coe Graves, as trustees under the said Last Will
and Testament of Henry Graves, deceased, prior
to December 31, 1922, were retained and have
since continued to be held and are now held, and
are the only shares of the said Delaware, Lacka-
wanna & Western Railroad Company now held
by the said Henry Graves, Jr., and George Coe
Graves, as trustees under the said Settlement
20 Agreement of June 23, 1923, as a part of the
corpus of the said trust estate.

30 14. The said Delaware, Lackawanna & Western
Railroad Company was organized under a num-
ber of special acts of the Legislature of the State
of Pennsylvania during the years from 1840 to
1870. Special charters were granted for various
railroad and coal companies, which companies
were subsequently merged into the present Dela-
ware, Lackawanna & Western Railroad Company,
a corporation of the State of Pennsylvania, in or
about the year 1870, since which time and until
the sale of the coal properties as hereinafter men-
tioned, said Company operated both the coal prop-
erties and railroads. The books of the Company
do not show the capital expenditures made in the
acquisition of the coal properties, but it is esti-
mated that the cost of the coal properties acquired
by the Company in fee was approximately
\$10,000,000. During the last twenty years prior
40 to the sale of the coal properties as hereinafter
mentioned, approximately \$1,000,000 a year was

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expended thereon chargeable to capital account. The said Delaware, Lackawanna & Western Railroad Company has no complete record of its other capital expenditures on the coal properties made prior to said last mentioned period but such additional capital expenditures are estimated to have been between \$5,000,000 and \$10,000,000. Under the laws of Pennsylvania taxes must be paid on the coal as real estate from year to year although the coal may not be mined for years thereafter. The said Delaware, Lackawanna & Western Railroad Company had paid approximately \$20,000,000 in taxes on the coal prior to the sale of said coal properties hereinafter mentioned, three-fourths at least of which said coal had not been mined at the time of said sale. There were also many other matters which arose such as advance payments of royalties which makes it impossible to determine what the books costs of the coal properties were at the time of such sale. Prior to the year 1907 as a matter of bookkeeping, the Delaware, Lackawanna & Western Railroad Company had written off on its depletion account the value of all of the coal properties then owned and the same were carried upon its books as of no value whatever. Between the year 1907 and the date of the sale of said coal properties hereinafter mentioned, the said Delaware, Lackawanna & Western Railroad Company acquired out of profits and surplus some additional coal mining property which appeared on its books as a net asset at the date of the sale at \$1,363,923.76.

15. Subsequently the said Delaware, Lackawanna & Western Railroad Company having determined that the coal properties should be segregated from the railroad properties owned by it,

Bill of Complaint.

all of the said coal properties then owned by the said Delaware, Lackawanna & Western Railroad Company were with the approval of its stockholders sold and transferred by it to the Glen Alden Coal Company, a corporation of the State of Pennsylvania, on September 1, 1921, for \$60,-
10 000,000. payable at the rate of \$1,500,000. per annum commencing on September 1, 1926. The amount of the purchase price was to bear interest at the rate of Four Per Centum (4%) per annum payable semi-annually. In consummation of said sale the said Glen Alden Coal Company gave to the said Delaware, Lackawanna & Western Railroad Company its bonds for \$60,000,000. bearing interest at the rate of Four Per Cent. (4%) payable semi-annually on the first day of March and
20 of September and which said bonds were payable at the rate of \$1,500,000. each year commencing September 1, 1926. The Glen Alden Coal Company secured the payment of these bonds by a mortgage given to the said Delaware, Lackawanna & Western Railroad Company upon all of the property of the said Glen Alden Coal Company. Upon receipt of said bonds by the Delaware, Lackawanna & Western Railroad Company the principal amount thereof was credited to its
30 surplus account.

16. On or about the 15th day of August, 1921, the stock of the said Glen Alden Coal Company was offered to the stockholders of the Delaware, Lackawanna & Western Railroad Company at \$5. per share on the basis of one share of new Glen Alden stock for one share of stock of the Delaware, Lackawanna & Western Railroad Company. The said stock of the said Glen Alden Coal Company was all subscribed for on that basis by the
40 stockholders of the said Delaware, Lackawanna

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& Western Railroad Company. The said Henry Graves, Jr. and George Coe Graves, as trustees under the Last Will and Testament of the said Henry Graves, deceased, then holding 12,740 shares of the capital stock of the said Delaware, Lackawanna & Western Railroad Company subscribed for and purchased with funds of corpus of the trust estate then held by them as aforesaid 12,740 shares of the stock of the said Glen Alden Coal Company, all of which said stock has since been and now is held by them as trustees under the said Settlement Agreement of June 23, 1923, as aforesaid as a part of the corpus of said trust estate. 10

17. Subsequently and until September 1, 1926, the Glen Alden Coal Company paid to the said Delaware, Lackawanna & Western Railroad Company the interest on the said \$60,000,000. of its bonds acquired by it as aforesaid, as the same fell due. On September 1, 1926, the said Glen Alden Coal Company paid to the said Delaware, Lackawanna & Western Railroad Company \$1,500,000., the principal amount of said bonds falling due on said date. On or about March 1, 1927, the said Glen Alden Coal Company paid to the said Delaware, Lackawanna & Western Railroad Company the interest on the remaining \$58,500,000. of said bonds, falling due on said last mentioned date. 20 30

18. Thereafter and on or about March 23, 1927, the said Delaware, Lackawanna & Western Railroad Company caused to be incorporated under the laws of the State of Delaware a corporation known as the Lackawanna Securities Company, and on August 25, 1927, transferred to the said Lackawanna Securities Company the said remaining \$58,500,000. of said bonds with accrued interest to that date from March 1, 1927, amounting to 40

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\$1,141,848. in consideration of the issuance of the entire capital stock of that Company, consisting of 844,411 shares of no par value, to the stockholders of the said Delaware, Lackawanna & Western Railroad Company in the proportion of one share of said Lackawanna Securities Company stock to each two shares of Delaware, Lackawanna & Western Railroad Company stock then owned by its stockholders, equitable provision being made for fractional interests. The distribution of assets of the Delaware, Lackawanna & Western Railroad Company thus made by the issuance of the entire capital stock of the Lackawanna Securities Company to the stockholders of the said Delaware, Lackawanna & Western Railroad Company was charged to the profit and loss account of the Delaware, Lackawanna & Western Railroad Company, thereby reducing its surplus. The said Henry Graves, Jr., and George Coe Graves, as trustees under the Settlement Agreement of June 23, 1923, then holding as such trustees 12,485 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company, received 6242 shares of stock of the Lackawanna Securities Company and a scrip certificate for one-half share.

19. On or about September 1, 1927, the Lackawanna Securities Company received from the Glen Alden Coal Company \$1,500,000., representing the annual payment of principal on the bonds of the Glen Alden Coal Company falling due September 1, 1927, held by said Lackawanna Securities Company, and \$1,170,000. interest, which had accrued on said bonds from March 1, 1927, to September 1, 1927, amounting in all to \$2,670,000. charging to capital account the sum of \$2,641,848. consisting of the payments of \$1,500,000. on account of

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principal of said bonds and \$1,141,848. interest on the \$58,500,000. principal amount of said bonds accrued to August 25, 1927, the date of transfer of said \$58,500,000. of bonds of the Glen Alden Coal Company to the Lackawanna Securities Company by the said Delaware, Lackawanna and Western Railroad Company as aforesaid, and to surplus the sum of \$28,152., representing interest on said bonds from August 25, 1927, to September 1, 1927. 10

20. On or about the first day of October, 1927, the said Lackawanna Securities Company distributed to its stockholders out of the said sum of \$2,670,000, received by it from the Glen Alden Coal Company on September 1, 1927, as aforesaid, the sum of \$2,533,233, and charged the same wholly to capital account, each stockholder receiving \$3 per share for each share of the stock held by him or her. The said Henry Graves, Jr., and George Coe Graves, trustees under the Settlement Agreement of June 23, 1923, then holding 6,242½ shares of the stock of the Lackawanna Securities Company, acquired by them as aforesaid, received the sum of \$18,727.50. On or about November 29, 1927, said Henry Graves, Jr., and George Coe Graves, as trustees under the Settlement Agreement of June 23, 1923, took from the said sum of \$18,727.50, received by them as aforesaid, the sum of \$424.95 and purchased therewith 7½ shares of the said stock of the Lackawanna Securities Company, making a total of 6,250 shares of said stock acquired by them as aforesaid and all of which stock has since continued to be and now is held by them. Of the said sum of \$18,727.50 they now hold, after deducting the sum of \$424.95 paid for said last mentioned stock, the sum of \$18,302.55. 20
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Bill of Complaint.

21. Complainants are in doubt as to what disposition should be made of the said 6,250 shares of stock of the Lackawanna Securities Company and of the said sum of \$18,302.55 received by them as trustees under the said Settlement Agreement of June 23, 1923, from the said Lackawanna Securities Company, as aforesaid, and are advised by counsel that as trustees under said Settlement Agreement of June 23, 1923, they cannot safely either continue to hold as a part of the corpus or distribute as income to life beneficiaries said stock or money received by them as aforesaid without a construction of the said Settlement Agreement of June 23, 1923, by this Honorable Court, and its instructions as to their duties in reference to said shares and said fund.

22. At the time of the execution and delivery of the said Settlement Agreement of June 23, 1923, there were then surviving the testator Henry Graves, deceased, his widow, Harriet Isabella Graves, his children, Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, and his grandchildren, as follows:

Duncan Graves, Gwendolyn Graves, now Gwendolyn Graves Fullerton, and George Coe Graves, II., children of Henry Graves, Jr.; Jean Stevenson Graves, daughter of Edward H. Graves, and Isabella Graves Metcalf, daughter of said Daisey B. Smith; and his great-grandchildren as follows:

Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, children of Henry Graves, III., a deceased son of Henry Graves, Jr., and Manton B. Metcalf, III., son of the said Isabella G. Metcalf.

On the 24th day of May, 1923, Margaret Dickson Graves, now Margaret Dickson Hewitt, mother of the said Mary Dickson Graves, Florence Bar-

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bara Graves and Henry Dickson Graves, was by an order of the Surrogate's Court of Westchester County, of the State of New York, duly appointed General Guardian of the said Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, and immediately qualified and has ever since and is now acting as General Guardian of the said Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves by authority of said appointment of said Court. 10

Since the date of the said agreement no other grandchildren have been born. Other great-grandchildren have been born as follows: Richard Goff Metcalf, son of the said Isabella G. Metcalf; Henry Graves, 2d., and Duncan Graves, Jr., children of said Duncan Graves; Nan Trimble Fullerton, daughter of the said Gwendolyn Graves Fullerton. 20

The said Harriet Isabella Graves died on the 23rd day of February, 1926. The other parties in this paragraph named are all living at this time and all are of full age excepting Jean Stevenson Graves, born March 17, 1908; Mary Dickson Graves, born April 25, 1919; Florence Barbara Graves, born July 22, 1920; Henry Dickson Graves, born September 17, 1921; Manton B. Metcalf III, born October 15, 1922; Henry Graves 2d, born December 17, 1924; Richard Goff Metcalf, born February 14, 1925; Nan Trimble Fullerton, born April 8, 1927, and the said Duncan Graves, Jr., born April 22, 1927, and constitute all of the persons in being interested as cestuis que trustent or otherwise in the said trust and who may be affected by the distribution of the said shares of stock of the Lackawanna Securities Company and moneys received by the said Henry Graves, Jr., and George Coe Graves as trustees as aforesaid 30 40

Bill of Complaint.

from the said Delaware, Lackawanna & Western Railroad Company and the said Lackawanna Securities Company respectively and now held by them as trustees under the said Settlement Agreement of June 23, 1923.

1) Complainants are without adequate remedy in the Courts of law and therefore pray:

1. That the said Edward H. Graves, Daisey B. Smith, Duncan Graves, Isabella G. Metcalf, Gwendolyn Graves Fullerton, George Coe Graves II, Jean Stevenson Graves, Mary Dickson Graves, Florence Barbara Graves, Henry Dickson Graves, Margaret Dickson Hewitt, General Guardian of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, Manton B. Metcalf
20 III, Richard Goff Metcalf, Henry Graves 2d, Duncan Graves, Jr., and Nan Trimble Fullerton, defendants in this suit may answer the bill of complaint and each statement made therein.

2. That the said Settlement Agreement of June 23, 1923 may be construed by this Honorable Court and the rights of the several persons interested therein, and making claim thereunder to the said shares of stock of the Lackawanna Securities Company and said moneys received by the said
30 Henry Graves, Jr., and George Coe Graves, as trustees under the said Settlement Agreement of June 23, 1923, from the said Delaware Lackawanna & Western Railroad Company and the said Lackawanna Securities Company as aforesaid, may be ascertained, and the powers, rights and duties of the complainants, Henry Graves, Jr., and George Coe Graves, as trustees under said Settlement Agreement of June 23, 1923, in the
40 administration of the said trust estate held by them thereunder may be ascertained and defined.

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3. That said Henry Graves, Jr., and George Coe Graves, as trustees under said Settlement Agreement of June 23, 1923, may be given proper direction as to the meaning of the said Trust Agreement and as to their duty in the administration of the trusts created thereby and particularly as to what distribution, if any, they shall make of the said shares of stock of the said Lackawanna Securities Company and the said moneys received by them from the said Delaware, Lackawanna & Western Railroad Company and the said Lackawanna Securities Company respectively, as aforesaid. 10

4. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises. 20

LINDABURY, DEPUE & FAULKES,
Solicitors for Complainants.

J. EDWARD ASHMEAD,
of Counsel.

Last Will, Annexed to Bill of Complaint. 30

I, HENRY GRAVES, of the City of Orange, in the County of Essex and State of New Jersey, do make, publish, declare and pronounce my last will and testament, to be in manner and form following, that is to say:

FIRST: I order and direct my executors to pay and satisfy all my just debts and funeral expenses as soon after my decease as conveniently may be. 40

Last Will, Annexed to Bill of Complaint.

SECOND: I give and bequeath unto my two sons HENRY GRAVES, JUNIOR, and GEORGE COE GRAVES, all my porcelain, engravings, paintings, bronzes and works of art, to be divided between them, by my executors, into parts as nearly equal in value as may be.

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THIRD: I give and bequeath unto my wife, HARRIET ISABELLA GRAVES, all my horses, carriages, silver, plate, bedding, household furniture and books.

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FOURTH: Inasmuch as my sons have already received from me sufficient capital to make them independent during their lifetime, it is my wish that the principal of my estate should remain intact, without depletion or distribution, for the benefit of my grandchildren and their families, and to that end, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, and wheresoever situate, unto my two sons, HENRY GRAVES, JUNIOR, and GEORGE COE GRAVES, their heirs and assigns forever, in trust, nevertheless, to and for the following uses and purposes, that is to say:

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a. To have, hold, manage, sell, convey and dispose of the same, at such time, in such manner, and on such terms, as to them shall seem expedient, and to invest and re-invest the proceeds thereof and any and all accumulations of principal in their discretion, and I hereby expressly authorize and permit the retention and continuance of any investments by me heretofore made; it being my wish that the said trustees shall not be restricted to investments authorized by statute law, but shall be free to make such investments as in their judgment shall be best for the interest of my said estate.

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Last Will, Annexed to Bill of Complaint.

b. Upon the death, or incapacity to act of either one of my said trustees or their successors in the trust, I authorize the survivor or acting trustee to appoint a trustee in the place and stead of the trustee so deceased or incapacitated. And it is my wish that such appointments shall be made with the consent and approval of a majority of those grandchildren, if any, who have attained the age of twenty-one years. I further direct that upon the appointment and acceptance of a new trustee, a certificate of such appointment and acceptance shall be filed with the clerk of such court where this will shall have been originally probated. 10

c. All the increase in shares of stock, special and stock dividends, and other increases in value, or accumulations to principal, I direct my trustees to add to the principal in their hands, and the regular yearly income or dividends only, shall be used for distribution in the manner hereinafter provided. 20

d. Out of the rents, issues, interest and income of my said principal estate, I direct my said trustees to pay unto my said wife, HARRIET ISABELLA GRAVES, during her natural life, in lieu of all dower or further interest of any kind in my real estate, or claims upon my personal estate, the sum of Twenty Thousand Dollars, each and every year, in quarterly payments of Five Thousand Dollars each. 30

e. To divide the remaining income from time to time, into as many parts as there may then be children and grandchildren me surviving, and to pay one of such parts unto each of my said children and grandchildren during their natural life, 40

Last Will, Annexed to Bill of Complaint.

annually, or at such period as shall be most convenient to my said trustees, and in the event of any of my grandchildren, being under the age of twenty-one years, to pay the share of the income which would have been such grandchild's to its guardian.

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f. In the event of there being other children of my said children (that is, grandchildren), born subsequent to my decease, I direct my trustees to divide the annual income in such proportions that each child and grandchild shall receive equal shares.

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g. In the event of the decease of any one of my said grandchildren leaving lawful issue, them, her or him surviving, I direct my trustees to pay the share or portion of the income which would have belonged to the said grandchild in equal shares, to his or her issue; and in the event of the decease of any one of the grandchildren, without leaving such issue him or her surviving then the share which had been his or hers, in life, shall be divided in equal shares among my other children and grandchildren them surviving.

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h. Upon the death of my last surviving grandchild, to divide the principal of my said estate with all accumulations and increase thereof, to and among the issue of my said grandchildren, that is to say, among my great grandchildren, share and share alike, the issue of any deceased great grandchild to receive the share its parent would have received, if living; to have and to hold unto them, their heirs and assigns forever.

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LASTLY: I nominate and appoint my said sons HENRY GRAVES, JUNIOR, and GEORGE COE GRAVES, and the survivor of them, as and to be the execu-

Last Will, Annexed to Bill of Complaint.

tors and executor hereof, with full power and authority for the purpose of carrying into effect the terms of this will, to sell and convey the whole, or any part of my real estate, in such manner, on such terms, and at such times as to them or him shall seem expedient; and I direct that no bond or other security shall be required of my said sons either as executors or trustees, or either of them in any place, at any time, for the faithful performance of any duty or trust provided by this, my will. 10

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of December, A. D. Nineteen Hundred and Four, hereby revoking and making void any other or former will or testament by me made. 20

HENRY GRAVES (L. S.)

Signed, sealed, published, declared and pronounced by the said HENRY GRAVES as and to be his last will and testament, in the presence of us, present at the same time, who at his request and in his presence as well as in the presence of each other have hereunto set our names as witnesses. 30

WM. READ HOWE, West Orange, N. J.

THOMAS A. DAVIS, Orange, N. J.

**Answer of Margaret Dickson Hewitt,
Guardian *ad litem*, &c.**

(Filed July 11th, 1928.)

IN CHANCERY OF NEW JERSEY.

10	Between HENRY GRAVES, JR. and GEORGE COE GRAVES, individually and as Trustees under a Settlement Agreement dated June 23, 1923, <p style="text-align: center;">Complainants,</p> <p style="text-align: center;"><i>and</i></p> EDWARD H. GRAVES, <i>et al.</i> , Defendants.
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The answer of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, infants under the age of twenty-one (21) years, by their mother and Guardian *ad litem* Margaret Dickson Hewitt, and also of Margaret Dickson Hewitt, General Guardian of said Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves.

30 These defendants answering the Bill of Complaint, say: That they join in the prayers of the Bill of Complaint herein for instructions to the trustees.

WALL, HAIGHT, CAREY & HARTPENCE,
per ALBERT C. WALL,
Solicitors for Margaret Dickson
Hewitt, *et als.*

40 We consent that within answer be filed as of time.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants.

Affidavit of Margaret Dickson Hewitt.

IN CHANCERY OF NEW JERSEY.

Between

HENRY GRAVES, JR. and GEORGE
COE GRAVES, individually and
as Trustees under a Settlement
Agreement dated June 23,
1923,

Complainants,

and

EDWARD H. GRAVES, *et al.*,
Defendants.

Affidavit.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

MARGARET DICKSON HEWITT, of full age, being
duly sworn according to law upon her oath, de-
poses and says: I am the Guardian *ad litem* of
the said infant defendants in the foregoing an-
swer named; I have read the said answer and the
matters and things therein contained are true to
the best of my knowledge, information and belief. 30

MARGARET DICKSON HEWITT.

Sworn to before me July 6, 1928, at N. Y. }
City in the State of New York, as wit- }
ness my hand and official seal.

GEO. C. SCHMITTBERGEN,
Notary Public.

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**Answer of Defendants Edward H.
Graves, et als.**

(Filed March 23, 1928.)

IN CHANCERY OF NEW JERSEY.

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Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually and
as trustees under a Settlement
Agreement dated June 23, 1923,

Complainants,

} On Bill, etc.

and

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EDWARD H. GRAVES, and others,
Defendants.

The joint and several answer of the defendants Edward H. Graves, Daisey B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, II, and Isabella Graves Metcalf to the bill of complaint of the complainants filed herein says that:

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1. Except as herein set forth, these defendants admit the allegations of paragraphs 1 to 10, inclusive, of the bill of complaint. These defendants admit that the last will and testament of Henry Graves is substantially in manner and form as set forth in said bill of complaint, and that the same was duly admitted to probate, and that the complainants, as executors thereof, accounted in the Orphans' Court of Essex County, and that a decree was made therein directing that

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the balance of the estate be disposed of according

Answer of Defendants Edwards H. Graves, et als.

to said will, all substantially as alleged in the bill of complaint. They admit that said complainants, individually and as trustees under said will of Henry Graves, filed their bill of complaint in this Court, and that proceedings were had in said cause, a decree and order made, appeals taken, a settlement agreement executed and entered into under date of June 23, 1923, and that the same was confirmed by order of this Court, all substantially as alleged and set forth in the said bill of complaint here; but these defendants refer to the said proceedings, orders and decrees, or to certified copies thereof, for the particulars and details of the same. And these defendants further refer to the original of the said Settlement Agreement of June 23, 1923, or a certified copy thereof, for the fuller particulars and details of said agreement.

2. These defendants admit the allegations of paragraphs 11, 12 and 13 of the said bill of complaint.

3. These defendants have no knowledge or information sufficient to form a belief as to truth of the allegations of paragraphs 14, 15, 16, 17, 18, 19 and 20 of the said bill of complaint, and leave the complainants to make such proof thereof as they may be advised.

4. Except as herein set forth, these defendants have no knowledge or information sufficient to form a belief as to truth of the allegations of paragraph 21 of the bill of complaint, and leave the complainants to make such proof thereof as they may be advised. These defendants admit that the complainants, as trustees aforesaid, hold 6,250 shares of stock of the Lackawanna Securities

Answer of Defendants Edward H. Graves, et als.

Company, and that complainants, as stockholders of said company, have received moneys from said company. These defendants contend and allege that not only under the provisions of the said Settlement Agreement of June 23, 1923, but otherwise, the said shares of stock and the said moneys so received by the complainants, as trustees aforesaid, are to be considered and distributed as income to these defendants and to the other persons entitled to the income of the trust estate, in the manner and proportions fixed and defined by said Settlement Agreement, and that these defendants are entitled to have their proportionate shares, as so fixed and defined, of the said stock and moneys distributed and paid to them by the complainants.

5. These defendants join in the prayer of the complainants that the said Settlement Agreement may be construed by this court, and that complainants be instructed as to its meaning and as to their duty in the administration of the trusts, and that this court instruct them as to the distribution to be made of the said shares of stock and moneys, and defendants pray that a decree be entered directing a distribution thereof in accordance with the allegations of this answer, and for the payment of the costs and counsel fees of these defendants, and for such other and further relief as the nature of the case may require, and as may be agreeable to equity and good conscience.

JOHN M. EMERY,
Solicitor and of counsel for defendants, Edward H. Graves, Daisey B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves II and Isabella Graves Metcalf.

Answer of Henry Graves, 2d.

(Filed March 14, 1928.)

IN CHANCERY OF NEW JERSEY.

10 HENRY GRAVES, JR. and GEORGE
COE GRAVES individually and as
trustees under a Settlement
Agreement dated June 23,
1923,

Complainants,

and

20 EDWARD H. GRAVES, *et al.*,
Defendants.

On Bill, &c.
Infant's Answer.

30 The answer of Henry Graves 2d, infant defend-
ant, by Thomas Barber, Clerk, guardian *ad litem*.
This defendant, answering by his said guardian
says that he is a stranger to all and singular the
matters and things in the said bill of complaint
contained, otherwise than that this defendant is
informed that he has some interest therein; and
this defendant being an infant of tender years,
submits himself to the judgment of this honorable
court, prays that his interest may be protected and
saved to him.

THOMAS BARBER,
Clerk,
Guardian *ad litem*.

Answer of Nan Trimble Fullerton.

(Filed March 14, 1928.)

IN CHANCERY OF NEW JERSEY.

10 HENRY GRAVES, JR. and GEORGE
COE GRAVES individually and as
trustees under a Settlement
Agreement dated June 23,
1923,

Complainants,

*and*EDWARD H. GRAVES, *et al.*,

20 Defendants.

On Bill, &c.
Infant's Answer.

30 The answer of Nan Trimble Fullerton infant de-
fendant, by Thomas Barber, Clerk, guardian *ad*
litem. This defendant, answering by her said
guardian says that she is a stranger to all and
singular the matters and things in the said bill
of complaint contained, otherwise than that this
defendant is informed that she has some interest
therein; and this defendant being an infant of
tender years, submits herself to the judgment of
this honorable court, prays that her interest may
be protected and saved to her.

THOMAS BARBER,
Clerk,
Guardian *ad litem*.

Answer of Manton B. Metcalf, III.

(Filed March 14, 1928.)

IN CHANCERY OF NEW JERSEY.

HENRY GRAVES, JR. and GEORGE
COE GRAVES individually and as
trustees under a Settlement
Agreement dated June 23,
1923,

Complainants,

*and*EDWARD H. GRAVES, *et al.*,

Defendants.

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On Bill, &c.
Infant's Answer.

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The answer of Manton B. Metcalf, III., infant defendant, by Thomas Barber, Clerk, guardian *ad litem*. This defendant, answering by his said guardian says that he is a stranger to all and singular the matters and things in the said bill of complaint contained, otherwise than that this defendant is informed that he has some interest therein; and this defendant being an infant of tender years, submits himself to the judgment of this honorable court, prays that his interest may be protected and saved to him.

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THOMAS BARBER,
Clerk,
Guardian *ad litem*.

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Replication.

(Filed April 2, 1928.)

IN CHANCERY OF NEW JERSEY.

10

Between

HENRY GRAVES, JR. and GEORGE
COE GRAVES, individually and
as trustees under a Settlement
Agreement dated June 23, 1923,
Complainants,

and

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EDWARD H. GRAVES, *et al.*,
Defendants.

On Bill, etc.
Replication.

The complainants join issue on the answer of the defendants, Edward H. Graves, Daisey B. Smith, Duncan Graves, Gwendolen Graves Fullerton, George Coe Graves 2d and Isabella Graves Metcalf.

LINDABURY, DEPUE & FAULKES,
Solicitors for Complainants.

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Replication.

(Filed April 22, 1928.)

IN CHANCERY OF NEW JERSEY.

Between	}	On Bill, etc. Replication.	10
HENRY GRAVES, JR. and GEORGE COE GRAVES, individually and as trustees under a Settlement Agreement dated June 23, 1923, Complainants,			
<i>and</i>	}		
EDWARD H. GRAVES, <i>et al.</i> , Defendants.			20

The complainants join issue on the answer of the defendant, Jean Stevenson Graves, infant, by Edward H. Graves, her guardian *ad litem*.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants.

I consent to the filing of the above as in time. 30

JOHN M. EMERY,
Solicitor of Defendants,
Edward H. Graves, *et als*.

Replication.

(Filed November 20th, 1928.)

IN CHANCERY OF NEW JERSEY.

Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually and
as trustees under a Settlement
Agreement dated June 23, 1923,

Complainants,

*and*EDWARD H. GRAVES, *et al.*,
Defendants.

On Bill, &c.

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The complainants join issue on the answer of the defendants, Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, infants, by Margaret Dickson Hewitt, their guardian *ad litem*, and Margaret Dickson Hewitt, general guardian of the said Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves.

LINDABURY, DEPUE & FAULKES,
Solicitors for Complainants.

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We consent to the filing of the above as in time.

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for Defendants, Mary
Dickson Graves, Florence Barbara
Graves and Henry Dickson Graves,
infants, by Margaret Dickson
Hewitt, their guardian *ad litem*,
and Margaret Dickson Hewitt,
general guardian of the said Mary
Dickson Graves, Florence Bar-
bara Graves and Henry Dickson
Graves.

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**Order Assigning Counsel to Thomas Barber,
Clerk of the Court of Chancery,
Guardian *ad litem*.**

(Filed December 10th, 1928.)

IN CHANCERY OF NEW JERSEY.

10

Between

HENRY GRAVES, JR. and GEORGE
COE GRAVES, individually and
as trustees under a Settlement
Agreement dated June 23,
1923,

Complainants,

20

and

EDWARD H. GRAVES, *et al.*,
Defendants.

On Bill, &c.
Order Assigning
Counsel to
Thomas Barber,
Clerk of the Court
of Chancery,
Guardian *Ad*
Litem.

30

It appearing to the Court that the above stated cause is one for the construction of a Settlement Agreement entered into between the widow and all of the children, grandchildren and great grand-children of Henry Graves, deceased, in being at the time of the execution of said Agreement and their legal representatives, bearing date June 23, 1923, under and by virtue of the terms of which Manton B. Metcalf III., Richard Goff Metcalf, Henry Dickson Graves 2d, Duncan Graves Jr., and Nan Trimble Fullerton, infant defendants, have a substantial interest, and for whom Thomas Barber, Clerk of this Court, is guardian *ad litem*; and no cause appearing to the contrary;

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*Order Assigning Counsel to Thomas Barber, Clerk
of the Court of Chancery, Guardian Ad Litem.*

It is on this 10 day of December, 1928, of the Court's own motion ORDERED that Albert C. Wall, Esq., one of the Solicitors and Counsellors of this Court, be and he hereby is assigned as counsel for Thomas Barber, Clerk of the Court of Chancery, guardian *ad litem* of said infant defendants, to the end that arguments may be heard on behalf of said infant defendants for the saving to them of their interests under this Settlement Agreement aforesaid. 10

Respectfully advised,

E. R. WALKER,
C.

JOHN H. BACKES,
V. C. 20

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Testimony.

IN CHANCERY OF NEW JERSEY.

January 11, 1929.

10 Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually, and
as trustees under the Settle-
ment Agreement dated June
23, 1923,

Complainants,

and

20

EDWARD H. GRAVES, *et als.*,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled matter before his Honor, John H. Backes, Vice Chancellor, at the office of Lindabury, Depue & Faulks, Prudential Building, Newark, New Jersey, in the presence of LINDABURY, DEPUE & FAULKS (Mr. ASHMEAD), for complainants as trustees and individually;

30 Mr. JOHN R. EMERY, for defendant Edward H. Graves, Daisy B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, 2nd, Isabella Graves Metcalf and Jean Stevenson Graves, an infant, appearing by Edward H. Graves, guardian *ad litem*; MESSRS. WALL, HAIGHT, CAREY & HARTPENCE (Mr. ALFRED F. CONWAY), for Mary Dickson Graves, Florence Graves and Henry Dickson Graves, infants, appearing by

40 their guardian *ad litem* Margaret Dickson Hewitt, and Margaret Dickson Hewitt, general guardian

Philip D. Jonas, for Complainant—Direct.

of said parties; ALBERT C. WALL, Esq., solicitor for Thomas Barber, Clerk of the Court of Chancery, guardian *ad litem* of Manton B. Metcalf, 3rd, Richard Goff Metcalf, Henry Graves, 2nd, Duncan Graves, Jr., and Nan Trimble Fullerton.

10

PHILIP D. JONAS, sworn for complainant.

Direct examination by Mr. Ashmead:

Q. Mr. Jonas, where do you reside? A. Jamaica, New York.

Q. What are your business connections? A. Statistician of the D., L. & W. Railroad Company.

Q. How long have you been employed by that company? A. Seventeen years. 20

Q. In what capacity? A. Nine years in the capacity of statistician.

Q. Are you familiar with the records of the D. L. & W. Railroad Company? A. Yes, sir.

Q. And has your occupation called you to examine their records in reference to the history of the company, and particularly with respect to the properties that were held by it and subsequently segregated from the D. L. & W. Company by transfer to other companies? A. Yes, sir. 30

Q. Now, what was the early history of the D. L. & W. Railroad Company? A. I will be brief. The Liggetts Gap Railroad Company, authorized by special statute in 1832, was organized and open for operation in 1850 and 1851; the Delaware & Cobbs Gap Railroad Company was organized in 1849 and open for operation in 1853. The Liggetts Gap Railroad Company was authorized to own coal lands and mine coal. These roads were 40

Philip D. Jonas, for Complainant—Direct.

consolidated and merged into the Delaware, Lackawanna & Western Railroad Company in 1853. Subsequently, and between 1865 and 1870, the following railroad and mining companies were acquired and merged into the Delaware, Lackawanna & Western Railroad Company, Northwestern Coal & Iron Company, Buffalo Coal & Iron Company, Keyser Valley Railroad Company, Scranton Coal Company, Stueben Coal Company, Nanticoke Coal & Iron Company, Grandy Coal Company—these properties consisting in part of coal lands and coal mining facilities and in part of railroads, which are still owned by the Lackawanna Railroad Company, were paid for in stock or bonds of the Lackawanna Railroad Company; and, by more or less arbitrary methods and deductions, the cost has been assigned to them in certain compilations made by the company.

Q. From April 1870 on, how did the railroad company operate its coal properties? A. As a separate department of the railroad company, with a vice president and general manager of the railroad company in charge of the mining operations.

Q. As part of the railroad company's business? A. Separate department.

30 Q. How much was expended in the acquisition of the coal property by the railroad company? A. We can only approximate the amount expended in the acquisition of the coal properties. The amount expended in the coal lands exclusive of plant and equipment was approximately \$11,000,000.

40 Q. Were these coal properties so acquired chargeable to the capital or surplus account of the railroad company? A. Chargeable to capital investment account.

Philip D. Jonas, for Complainant—Direct.

Q. What additional sum chargeable to the capital account was expended on the coal properties by the railroad company? A. Approximately \$43,000,000; chargeable to capital account although it was not charged there. It is chargeable to capital account, but not necessarily charged to it. 10

Q. What account was it actually charged to? A. Surplus.

Q. How was that? A. That was the policy of the railroad company to charge additions and betterments, developments, plant and equipment, to operating expenses.

Q. For what were these expenditures made? A. Development, plant and equipment, additions and betterment. 20

Q. Now, were there any further sums expended by the railroad company for these properties by way of taxes or what not, or are taxes included in the forty three million? A. The taxes are not included in the forty three million.

Q. How were they dealt with? A. They were charged to operating expenses—charged against the income of the mining properties each year.

Q. Now where are these lands located, these coal lands? A. In the State of Pennsylvania.

Q. And under the law of Pennsylvania how is the tax on coal—are you acquainted with that situation? How is the tax on the coal levied? Is it levied whether it is mined or not? A. It is levied whether it is mined or not, and it is based on a value of a foot-acre. 30

Q. And how much taxes were paid by the company prior to the segregation of the coal lands from the railroad, can you tell that? A. I could approximate the amount at about a million dollars a year for ten years preceding the segregation. 40

Philip D. Jonas, for Complainant—Direct.

Q. Now, was that mostly on coal that had not been mined? A. Mostly on coal that had not been mined.

Q. Practically all of it? A. Practically three-quarters of it.

10 Q. Were there any expenditures by way of royalties? A. There were expenditures in the way of advanced royalties, so-called, on various leases.

Q. Have you any idea what amounts they were or how they were handled? A. They were handled as charges against income rather than as a capital asset.

Q. Now, this railroad company, did it set up on its books any reserve on account of depletion of its coal properties? A. It did not at any time.

20 Q. How did they handle that? A. The railroad company wrote off from time to time the original cost of the coal lands by charge to profit and loss and credit to the capital investment account, thereby reducing the assets.

Q. How long did the railroad company continue to write off the cost of the coal properties in that way? A. The railroad company commenced writing off the value of the coal lands in 1863 and continued that practice down to 1907.

30 Q. How completely had they written them off beginning in 1907? A. They wrote the entire cost of that coal land off by 1907.

Q. By 1907, at which time you say the railroad considered they had completely written off the cost of this coal property, what was the total amount which had been transferred from capital investment account to profit and loss? A. \$11,005,576.40.

40 Q. That is the cost of the coal property? A. The approximate cost.

Philip D. Jonas, for Complainant—Direct.

Q. Approximate cost of the coal property. A. The approximate cost of the coal lands.

Q. Now subsequent to 1907 how did the railroad company handle these properties on the books, particularly as to the value of the property? A. For income tax purposes the railroad company set up on its books a value of the coal lands; this value was set up for the purpose of obtaining a depletion deduction from gross income. The entry was to charge an asset account called "Value of Coal Lands" and to concurrently credit an account, "Accrued value of coal lands." The amount set up was the approximate number of tons in the ground multiplied by twenty-five cents per ton. 10

Q. Now, in 1907, how were the coal properties carried on the books of the railroad company? A. At zero, excepting for materials and supplies. 20

Q. Which were chargeable to operating expense? A. No; material and supplies was an asset.

Q. How much, do you know? A. Approximately a million dollars.

Q. Now, in 1907, after the coal properties had been written off, did the railroad company have a surplus? A. Yes, sir.

Q. For, say, how much? A. \$29,244,911.66. 30

Q. Using the word "capital" solely to represent the consideration for which capital stock is issued, did the railroad company by completely rubbing off the cost of its coal property reduce its capital? A. No; the railroad company reduced the investment account.

Q. What do you mean? Is your capital investment account the same as your capital stock account? A. No; the capital investment account is an asset. The capital stock account is a liability to the stockholders. 40

Philip D. Jonas, for Complainant—Direct.

Q. So that when you say that the capital investment account was reduced, that is this asset account you refer to as reduced. A. That is right.

Q. Not the capital stock account. A. Not the liability to the stockholders.

10 Q. That remains the same? A. That remains the same throughout the whole time.

Q. What was the relative value of your capital investment account as compared with the capital stock account during this period? A. You must bear in mind that the railroad company owned a railroad in addition to the coal mining properties and taking the two together the capital investment account always exceeded the capital stock account.

20 Q. By a very wide margin? A. It increased from time to time. The railroad company always had a surplus.

Q. Now in reference to this account you set up for income tax purposes, has any part of that been written off? A. Yes, sir.

Q. In what way? A. Since 1909 the railroad company wrote off an amount equivalent to twenty five cents a ton for each ton of coal mined by reducing the asset account and concurrently reducing the surplus account.

30 Mr. Emery: That is called "depletion".

Witness: Depletion based on value.

Mr. Emery: Is it called "depletion"?

Witness: Yes, sir; it is called "depletion".

Q. That was the purpose of it? A. That was the purpose of it.

40 Q. You say that was done at the rate of twenty five cents a ton. Do you know what the total amount of the depletion account has been? A.

Philip D. Jonas, for Complainant—Direct.

The original set up amounted to about \$114,000,000.

Q. And how much has that been written off?

A. About \$15,000,000 up to 1921.

Q. Has been written off up to 1921. That is the time of the separation of the coal properties. A. That is right. 10

Q. Now, did the coal company acquire any coal properties subsequent to 1907? A. Yes, sir.

Q. What were they? A. Small purchases, especially those that it was operating under a lease.

Q. Were these acquired from capital or surplus earnings of the railroad company? A. Surplus earnings.

Q. Do you know approximately the value of such properties, the cost of them? A. September 1st, 1921, the recorded cost on the books of the railroad company was \$1,831,383.30, and that represented the cost in 1907 when there was no recorded cost of the coal lands. 20

Mr. Emery: Those were all bought since then, you say.

Witness: That is right.

Q. Were they operated during that period from 1907 to 1921, these additional lands you bought—were they in operation? A. Yes, sir. 30

Q. And were they handled similar to the others you testified to and charged to as operating expense? A. You refer to the plant and equipment?

Q. Yes. A. Yes, sir; excepting that in 1918 we, for the first time in history, set up some capital items as an asset account, but at the same time we set up a depreciation reserve. I say we started that in 1918 and only continued it for three years. Prior to 1918 all of these expenditures had been charged to operating expense. 40

Philip D. Jonas, for Complainant—Direct.

Q. What was the amount of the reserve that you speak of from 1918 to 1921? A. The reserve for depreciation?

Q. Yes. A. \$3,774,604.52. And I might add that the cost capitalized on the books was \$3,373,260.12; almost an offset.

10 Q. Now, when were the coal properties separated from the railroad properties? A. September 1st, 1921.

Q. And what was the occasion and how was it done? What was the occasion of that and how was it done? A. The coal properties were sold to the Glen Alden Coal Company on that date, and the Glen Alden Coal Company invited the stockholders of the D. L. & W. Railroad Company to subscribe to their no par value stock at five
20 dollars a share,

Q. What was the occasion of that? Did the Government insist on a separation of the coal properties from the railroad properties? A. I am not certain as to the legal features connected with the sale, but I think—I do not believe it was the Government, but I think it was the State of Pennsylvania.

Q. Now, were all the properties segregated and sold to the Glen Alden Coal Company? A. Practically all.
30

Q. And what were the terms of the transfer? How was that carried out? A. The Glen Alden paid the railroad company \$60,000,000 in four percent bonds and other considerations for the coal properties.

Q. And the stock was sold to the share holders of the D., L. & W. Railroad Company at five dollars a share, is that right? A. That is right. There was no agreement. There was no agreement
40 between the Glen Alden Coal Company and

Philip D. Jonas, for Complainant—Direct.

the railroad company to offer this stock to the railroad company stockholders.

Mr. Emery: But it did offer it.

Witness: It did offer it.

Q. So that as a result of this disposition of the property the D., L. & W. Railroad Company received \$60,000,000 worth of bonds, is that it? A. The Glen Alden Coal Company assumed certain liabilities of the railroad company. 10

Q. In connection with the coal properties? A. In connection with the coal properties.

Q. In other words, the coal properties were sold subject to liabilities? A. Yes, sir. The only reason I mention that is that the sixty million dollars was not the sole consideration. 20

Q. Do you know, approximately, what those liabilities were? A. Some of them were contingent liabilities which could not be estimated. Some of them were recorded liabilities, such as compensation liabilities for injured employees in the mines, and under the Pennsylvania Compensation Laws we knew approximately our liability for those injured employees.

Q. How much was the approximate amount of the liabilities of which you knew? A. For the compensation liability approximately \$800,000. There was a small mortgage on the coal properties amounting to \$24,000. Those were recorded liabilities. The unrecorded liabilities would be those arising out of old leases, which could not be estimated. 30

Mr. Emery: Possible default of leases?

Witness: That is right.

Q. What provision was made for the payment of interest and principal of these bonds of the 40

Philip D. Jonas, for Complainant—Direct.

10 Glen Alden Coal Company? A. Interest was to be paid twice a year on March 1st and September 1st at the rate of four percent per annum. The principal was to be paid at the rate of a million and a half dollars a year commencing September 1st, 1926, excepting that if the Glen Alden Coal Company should mine twelve million or more tons a year the payment would be two million dollars a year.

Q. Using the word "capital" solely to represent the consideration for which capital stock is issued, were these sixty million dollars Glen Alden Coal Company bonds or any part of them ever considered by the railroad company as capital? A. They were not.

20 Q. How were they treated? A. They were treated as capital assets.

Q. And charged to capital asset accounts? A. And charged to capital asset accounts.

30 Q. When and under what circumstances was the Lackawanna Securities Company formed? A. In 1927, under a plan of reorganization, the railroad company transferred to the Lackawanna Securities Company \$58,500,000 of Glen Alden bonds with accrued interest from March 1st, 1927, to August 25, 1927, in consideration for which the Lackawanna Securities Company issued its capital stock to the stockholders of the railroad company on the basis of one share of Lackawanna Securities Company stock to two shares of D., L. & W. Railroad Company stock.

Q. What was the amount of the accrued interest? A. \$1,131,848.

40 Q. Now, why was this—you mentioned \$58,500,000. I suppose that was one payment that had been made to the D. L. & W. Railroad Company. A. On September 1st, 1926.

Philip D. Jonas, for Complainant—Direct.

Q. What account of the railroad company was charged with \$58,500,000 Glen Alden bonds when they were transferred to the Lackawanna Securities Company? A. Profit and loss. I might add that the interest was also charged to profit and loss.

Q. Now, would this charge to profit and loss surplus account have been the same had the railroad company chosen to convert the bonds into cash and distributed the \$58,500,000 proceeds directly to its stockholders as an extraordinary cash dividend? A. Yes, sir.

Q. Would the charge to profit and loss surplus account have been the same if the railroad company had chosen to increase its capital stock by \$58,500,000 and distributed the \$58,500,000 of new capital stock to its stockholders as a stock dividend? A. Yes, sir.

Q. What distribution to its stockholders has been made by the Lackawanna Securities Company since its organization and what has been the source of such distribution? A. Three dollars per share distributed October 1st, 1927, out of capital; one dollar per share distributed March 1st, 1928, out of income; three dollars per share distributed September 1st, 1928, of which \$1.65 and 7 mills was distributed out of the capital and \$1.343 distributed out of income.

Q. And that is all the distribution that has been made to date? A. That is all.

Q. When you say the first payment was made out of capital do you include the amount that was received with interest? A. Yes, sir; that was capital. Part of the capital of the Lackawanna Securities Company.

Q. Because the interest had accrued? A. Because interest had accrued.

Philip D. Jonas, for Complainant—Direct.

Q. Before the transfer was made? A. Before the transfer was made.

Q. Now, in the third payment you speak of the payment of \$1.657 out of capital. When you say "out of capital" do you mean out of the \$1,500,000 that was paid on account of the principal of the bonds? A. That is right.

Q. And when you speak of \$1.343 that was out of the interest that had accrued. A. That is correct.

Q. What was the surplus of the Delaware, Lackawanna & Western Railroad on June 23, 1923? A. I haven't got the surplus at that exact date. I have the annual reports and I can give you the surplus at the end of 1922 or the end of 1923.

Q. Suppose you give us the surplus from the end of 1922 right on down to date. A. December 31, 1922, \$121,141,954.90; December 31, 1923, \$123,911,281.73; December 31, 1924, \$126,779,229.81; December 31, 1925, \$129,601,819.05; December 31, 1926, \$136,034,252.40; December 31, 1927, \$78,742,613.78.

Mr. Emery: The 1928 figures, I suppose, aren't ready yet?

Witness: I haven't them with me. The December account has not been closed.

Mr. Emery: But they increase over the seventy-eight million of the year 1927.

Witness: Slightly.

Q. And the surplus for 1927 was after these bonds that were received had been charged out of surplus. A. That is right.

Q. That is, the bonds that had been received from the Glen Alden Coal Company and transferred to the Lackawanna Securities Company had been charged to surplus? A. Yes, sir; that is right.

Philip D. Jonas, for Complainant—Direct.

Q. Can you give us the amount outstanding of capital stock of the D. L. & W. for the same years as you have given the surplus? A. There was no change in the amount outstanding of capital stock during those years, that being 1,688,822 shares, par value \$50 or \$84,441,100, total value.

Q. Now, can you give us the market value of D. L. & W. stock for the same period? A. I haven't got the market values in mind. The market value in 1923 was about the same as it is now. On June 23, 1923, the bid and ask prices were a hundred and fifteen and a half and a hundred and sixteen and a half. 10

Q. What were they on December 31st, 1922? A. I do not remember.

Q. What was the high and low of last year, 1928, do you know? A. A hundred and fifty was high and about a hundred and thirty was the low. 20

Q. And what is the value today? A. A hundred and twenty-seven, approximately.

Q. Selling off just at present? A. Just a trifle.

Q. Now, this Glen Alden stock was issued at five dollars a share to the shareholders of the D. L. & W. Railroad. Did that go on the market immediately after? A. It went on the curb market.

Q. And what was the original price of that when it went on the curb? A. The original price was between twenty-five and thirty dollars a share for the rights. 30

Q. Do you know what the value of that was on June 23, 1923? A. That stock was quoted on the curb June 22, 1923, at sixty-six dollars a share.

Q. And what is its present value—market value? A. Yesterday's market value was \$138 a share.

Philip D. Jonas, for Complainant—Cross.

Cross-examination by Mr. Emery:

Q. Mr. Jonas, what were the total number of shares of the Lackawanna Securities Company stock that were issued? A. 844,411 shares.

10 Q. And they went in the ratio of one share of the Securities Company for two shares of the D. L. & W. Railroad Company. A. That is right.

Q. Now, I would like to go back a minute to the early history of the company. As I understand it the forty-three million dollars spent for plant and equipment, did not actually go into capital investment account. A. Excepting for just a small portion that I explained was capitalized commencing with 1918, but it was offset by a reserve for accrued depreciation.

20 Q. I am speaking of the time prior to 1907. A. Of course, the forty-three million included all the expenses up to September 1st, 1921.

Q. I see. The writing off of the books of the original cost of the coal mines was done, I suppose, by an annual—a regular annual charge? A. Not quite that.

Q. Or was it done periodically. A. The charge off of the original cost of the coal lands was at the rate of ten cents a ton mined, as mined.

30 Q. And the amount charged off, of course, would be deducted from your surplus earnings. A. That is right.

Q. So that when the original approximate cost of that eleven million dollars had been charged off that amount had come out of surplus earnings made during that time. A. That is correct.

40 Q. In other words, if the charge off had not been made your net surplus earnings or profit would appear on your books at eleven million dollars higher. A. I do not think so for this reason, that assuming that the coal cost eleven million,

Philip D. Jonas, for Complainant—Cross.

dollars a certain amount of that coal was mined during the period up to 1907 and it would be proper to charge off at least the cost of the coal mined, but it may be improper to have charged off the entire original cost.

Q. Well, I was not regarding it as improper at all, but simply as to whether or not a large part, if not all of that eleven million dollars, had actually, on your books, so to speak, been taken from earnings. A. I should say two thirds. 10

Q. And the same would apply to the forty million dollars which was paid on plant and equipment and which was actually charged and paid for out of your net surplus earnings. A. That is partially correct. It must be understood that during this period we did not set up any depreciation reserve for these coal properties, yet we know that there is a loss from this investment which should be written off. Now, we took care of that depreciation by charging the renewals and betterments direct to operating expenses rather than capitalize those renewals and betterments and set up out of surplus a depreciation reserve. 20

Q. When you speak of capital stock I suppose where an item is capitalized it appears as a credit on your capital investment account. A. I should say "charge" rather than "credit." 30

Q. As a charge, yes. And as I understand it the capital investment account has no direct relation to the capital stock account. A. Excepting that the moneys paid in by the stock holders may be invested in just those capital assets and then there would be a direct relation.

Q. But, as a matter of fact, the company had invested during this course of years under the account that you carry as a capital investment ac- 40

Henry Graves, Jr., for Complainant—Direct.

count a great deal more than the amount which has been paid in by the stockholders for capital stock. A. That is correct.

10 Q. So that at no time has there been any encroachment on the amount of capital as represented by the face amounts—par value of the capital stock account. A. That is right.

Q. And this writing off of the original cost of the coal lands was not carried by your company under a separate depletion account. A. No; it was credited to the capital asset account, thereby reducing it to zero.

Q. But it was not a separate depletion reserve or depletion account. A. No, it was not.

20 Q. Just so much charged off periodically and credited periodically to your investment account in reduction of that account. A. That is correct.

Q. Then at the time of the segregation of the coal properties in 1921 there was no encroachment on the capital stock of the company as represented by capital assets. A. That is correct.

Q. And at the time of the distribution of the stock of the Lackawanna Securities Company there was no such encroachment. A. That is correct.

30

HENRY GRAVES, JR., SWORN for complainants.

Direct examination by Mr. Ashmead:

Q. Mr. Graves, where do you reside? A. 420 Park Avenue, New York City.

Q. Are you the son of the testator, Henry Graves? A. I am.

40 Q. Mentioned in the bill of complaint. When did your father die? A. August 26, 1926.

Henry Graves, Jr., for Complainant—Direct.

Q. A resident of what county? A. Orange, Essex County, New Jersey.

Q. Did he leave a last will and testament? A. He did.

Q. And who were appointed executors under that? A. Henry Graves, Jr. and George Coe Graves. 10

Q. Henry Graves, Jr. being yourself. A. Correct.

Q. And you, as the executors settled that estate. A. We did.

Q. And the accounts were allowed by the Essex County Orphans Court. A. Yes, sir.

Q. And there was a provision in the will that after the settlement of the estate that the residue should be turned over to certain trustees. A. Right. 20

Q. Who were those trustees? A. Henry Graves, Jr., and George Coe Graves.

Q. And that was done? A. That was done.

Q. Now afterwards did a question arise as to the construction of that will? A. Yes, sir.

Q. And what was done with respect to that? A. A trust agreement under date (interrupted)——

Q. Let me change the question. A question arose as to the construction of the will. A. Yes, sir. 30

Q. And was a suit started in New Jersey to ask for instructions by you and your brother as trustees under the will? A. Yes, sir.

Q. And what was the result of that suit? A. We entered into (interrupted)——

Q. The Court of Chancery declared the will to be a violation of the rule against perpetuity, did it not? A. Yes, sir.

Q. And declared the property had descended to you and your brother and sisters. A. Subject 40

Henry Graves, Jr., for Complainant—Direct.

to an annuity to my mother of twenty thousand dollars a year.

Q. Now in—when that situation arose, what was done? A. Why, we went into an agreement under date of June 23, 1923.

10 Q. That is, you and your brothers and sisters. Who were they? A. Edward H. Graves, Henry Graves, Jr., George Coe Graves and Daisy B. Smith.

Q. And when you say Henry Graves, Jr., you mean yourself? A. I mean myself.

Q. Now that agreement was presented—there were infants interested in the estate under the will of your father. A. Yes, sir.

20 Q. And this agreement was submitted to our Chancery Court for its approval? A. Yes, sir.

Q. Now at the time that the agreement was made was there an account submitted by the executors of the administration of the estate? A. Under date of December 31, 1922.

30 Q. I show you a paper—certified copy—entitled “Estate of Henry Graves, deceased, settlement agreement, trustees’ accounts and decrees of the Court.” Does that contain the decrees of the Court made in this proceeding instituted by you and your brother as trustees under your father’s will for instructions, the account that you submitted at the time and the agreement that was entered into and approved by the Chancery Court? A. It does.

Mr. Ashmead: I offer it in evidence.

(Paper marked Exhibit C-1.)

40 Mr. Ashmead: I offer in evidence the files of the Chancery Court of New Jersey in the suit mentioned by the witness entitled “In Chancery of New Jersey, be-

Henry Graves, Jr., for Complainant—Direct.

tween Henry Graves, Jr., and George Coe Graves, individually and as trustees, complainants, and Harriet Isabelle Graves, defendant; Docket number 51, page 738.”

Q. Now, as a matter of history, Mr. Graves, I should like you to state how many shares of the D. L. & W. Railroad Company was in the estate received by you and your brother as trustees under your father’s will. A. Seventy-five hundred shares. 10

Q. Now, will you give as closely as you can, the subsequent acquisitions of stock growing out of the ownership of this seventy-five hundred shares of D. L. & W. stock that was in the trust estate as received by you. A. We originally had seventy-five hundred shares. Through purchases in the market (interrupted)— 20

Q. Give the dates. Have you got a memorandum of it there? A. You want the date or month or year? Is the year good enough? In 1907 we had 7500 shares; in 1908 we purchased 400 shares; in 1909 (interrupted)—

Q. Just a moment, Mr. Graves. You have got a memorandum there, haven’t you? A. Yes, sir. I got it in my head, too.

Q. The dates and amounts of purchases. A. Exact dates? 30

Q. Yes. I think you might put that on. That will be all right. In other words, I want to follow this bill as closely as possible so that the Vice Chancellor can understand it. A. May 7, 1908, bought 200 shares; May 11 (interrupted)—

Q. Can you give the price? A. I haven’t got the price. May 11, bought 200 shares; August 2, 1909, 15 percent stock dividend 1185 shares; December 23, 1923, bought 15 shares; December 29, 40

Henry Graves, Jr., for Complainant—Direct.

14, subscription rights of 40 percent on our holdings, 3,640 shares; December 31, 1921, 100 percent stock dividend, 12,740 shares.

Q. Now these purchases you have mentioned, were they purchased out of the corpus of the trust estate? A. Corpus.

10 Q. Under your father's will? A. Correct.

Q. That was subsequently declared to be void. A. Right.

Q. Then what was the situation at the time of this agreement of June 23, 1923 was made? Hadn't you finished? A. That would not show the amount that we had in trust because under the trust agreement—under the terms of this trust agreement we divided among the four children of Henry Graves 12,995 shares. We held a total of
20 25,480 shares, which left us in the trust at the time the trust became operative 12,485 shares.

Q. Now that is the item (interrupted)— A. Under Schedule D you will find that, under "Cash and other securities".

Q. As the first item under "Cash and other securities"? A. Right.

Q. So that at the time of the trust agreement the trust estate had— Oh, we have not mentioned the Glen Alden yet. Now you have given the situation in respect to the D. L. & W. shares from
30 the date that you received the trust property under your father's will down to the date of the trust agreement, is that it? A. Correct.

Q. Now, as the owners of those shares did you receive any other rights? A. In August, 1927—
40 1921, at which time we held 12,740 shares of the D. L. & W. Railroad Company stock, we were given the right to subscribe for Glen Alden Coal company stock share for share of our holdings in D. L. & W. Railroad Company stock at a price of five dollars a share.

Henry Graves, Jr., for Complainant—Direct.

Q. And did you so subscribe? A. We availed ourselves of the opportunity.

Q. And how many shares of stock did you own at the time of your father's death? A. 12,740 shares.

Q. Was that subscription made out of the capital of the trust? A. That was made out of the capital. 10

Q. Then that was the situation at the time of the making of this agreement? A. Yes, sir.

Q. As you have described it. Who were the trustees under this agreement, this settlement agreement? A. Henry Graves, Jr. and George Coe Graves.

Q. And you have continued to hold the property as trustees under the settlement agreement from that time on? A. Yes, sir. 20

Q. Now what have you received by way of dividends on the D. L. & W. Railroad Company stock since the execution of the settlement agreement? A. We receive cash dividends regularly and also on September 14, 1927, we received 6,242 and a half shares of Lackawanna Securities Company, the half a share being represented by a scrip-certificate.

Q. Now, can you give me the exact cash dividends you received? A. On Lackawanna? 30

Q. Yes. A. No, sir; I cannot. I can on Lackawanna Securities Company, if that is material.

Q. What have you received in respect to the Glen Alden stock in cash dividends? A. Nothing more.

Q. No stock dividends? A. No.

Q. And both, the dividends—cash dividends on the D., L. & W. stock and the Glen Alden stock that you have received has been distributed according to the terms of this agreement? A. Yes, sir. 40

Henry Graves, Jr., for Complainant—Direct.

Q. Now, you have mentioned a dividend that you received in the Lackawanna Securities Company stock. Will you give a little more detail about that? A. Well, that was a distribution by the Delaware, Lackawanna & Western Railroad Company of one share of Lackawanna Securities Company stock for each two shares of the D., L. & W. Railroad Company stock owned.

10 Q. And how many shares of that stock did you receive? A. We received 6,242 and a half shares.

Q. And you still have those shares? A. We subsequently got seven and a half shares to even up the amount in case we had to distribute and also we—the scrip-certificate did not carry interest and we wanted to buy an additional scrip-certificate to make our amount an even amount.

20 Q. And from what source did you buy those shares? A. On October 1st, 1927, we received \$18,722.50 from a distribution of the Lackawanna Securities Company. We bought out of that money seven and a half shares of Lackawanna Securities Company stock for which we paid \$424.95, leaving us \$18,302.55 out of that amount which we received.

Q. And which you still hold. A. Still hold.

30 Q. And you also hold all of the shares of the Lackawanna Securities Company that you mentioned, received and purchased. A. We hold 6,250 shares now.

Q. That is including those that you purchased. A. Right.

Q. So that the situation today is that you have 6,250 shares of the Lackawanna Securities Company stock and \$18,000. A. Subsequent to October 1st, 1927, we received two other distributions on the Lackawanna Securities Company stock. 40 On April 2nd, 1928, we received \$6,250 and Sep-

Henry Graves, Jr., for Complainant—Direct.

tember 1st, 1928, we received \$18,750, making a total amount of cash which we have of \$43,302.55 and 6,250 shares of Lackawanna Securities Company stock.

Q. And the object of this suit is to get the direction of the Court as to what distribution should be made of that cash and shares of stock? A. Yes, sir. 10

Q. And you have been advised that you should get the direct instructions of the Court with respect to the distribution of those items? A. Yes, sir.

Q. Now, Mr. Graves, your father, Henry Graves, when he died—who survived him, his widow, Harriet Isabella Graves? A. Harriet Isabella Graves, his widow. Children, Edward H. Graves, Henry Graves, Jr., George Coe Graves and Daisy B. Smith. 20

Q. Now, were there any children of deceased children? A. No.

Q. How many children have you had? A. I am the father of four children. My wife had them. Henry Graves, 3rd, Duncan Graves, Gwendolyn G. Fullerton and George Coe Graves, 2nd.

Q. Are all these children living? A. Henry Graves, 3rd, is deceased. 30

Q. He is the only one that has died? A. Yes, sir.

Q. When did he die? A. March 21, 1922.

Q. Did all your children reach full age? A. Yes, sir.

Q. Was your son Henry married? A. He was.

Q. To whom was he married? A. Margaret Dickson Graves.

Q. When he died whom did he leave? A. Mary Dickson Graves, born April 23, 1919; Florence 40

Henry Graves, Jr., for Complainant—Direct.

Barbara Graves, born July 22, 1920; Henry Dickson Graves, born September 17, 1921.

Q. They still survive? A. Yes, sir.

Q. Did he have any other children? A. No.

Q. What—does his widow still survive? A. Yes, sir.

10 Q. Has she since remarried? A. Yes, sir; her name now is Mrs. Hewitt.

Q. Now, is your son Duncan married? A. Yes, sir.

Q. Has he any children? A. Henry Graves, 2nd, born December 17, 1924; Duncan Graves, Jr., born April 22, 1927.

Q. Are they the only children he has had? A. Yes, sir.

20 Q. Is your daughter Gwendolyn married? A. Yes, sir.

Q. Has she had any children? A. Nan Trimble Fullerton, born April 8, 1927.

Q. Is that the only child she has had? A. Yes, sir.

Q. And is your son George married? A. No.

Q. He never married? A. No.

Q. Now what children has your brother Edward H. Graves? A. Jean Stevenson Graves, born March 17, 1908.

30 Q. Has she ever been married? A. No.

Q. She still survives? A. Yes, sir.

Q. And your brother still lives? A. Yes, sir.

Q. Now your brother, George Coe Graves. A. Never married.

Q. Your sister, Daisy B. Smith, is she married and had any children? A. Isabella G. Metcalf. The date of her birth I cannot give you. It is in the bill there, but I haven't got it here.

40 Q. She is of full age and married? A. Yes, sir.

Henry Graves, Jr., for Complainant—Cross.

Q. Has she any children? A. Nancy G. Metcalf, 3rd, born October 15, 1922; Richard Goff Metcalf, born February 14, 1925.

Q. All of them are— Are they all the children she has had? A. Yes, sir.

Q. Now, are those all the children and the grandchildren and the great grandchildren that have been born? A. Yes, sir. 10

Cross-examination by Mr. Emery:

Q. Mr. Graves, when your father's will was declared null and void, except as to the annuity of twenty thousand dollars to your mother, the result was that his four children became entitled to all the corpus of the estate and also became entitled to one quarter each of the income of the estate from the time of his death, isn't that so? A. Yes, sir. 20

Q. And when the four children entered into this agreement, the result was that they gave up all their claims to the one quarter each of the back income and also gave up a considerable part, if not all of the corpus of the estate, did they not? A. Yes, sir.

Q. They, however, under the agreement, were entitled to divide among the four children of Henry Graves, the undistributed extraordinary cash dividends which accrued before December 31, 1922, insofar as the same were declared out of profits or surplus accruing since the death of the testator with all accretions thereto and accruing thereunder since December 31, 1922. A. Yes, sir. 30

Q. And the distribution of the Delaware, Lackawanna & Western Railroad Company stock which you have referred to in your direct testimony was an apportionment under that clause of the agreement, was it not? A. Yes, sir. 40

Henry Graves, Jr., for Complainant—Cross.

Q. And that was approved by the Court in the accounting? A. Yes, sir.

Q. Now, was there a similar apportionment made to the four children and the corpus of the trust estate under the agreement as to the stock of the Lackawanna Railroad Company of New Jersey? A. Yes, sir.

Q. Do you know how much of that is now held by the corpus of the estate under the trust agreement? A. No, sir; it is all distributed.

Q. Oh, that all went to—(interrupted) A. Yes, sir.

Q. Now, that all represented earnings made since the testator's death? A. Yes, sir.

Q. How about the Delaware, Lackawanna & Western Coal Company stock received as a stock dividend on the D. L. & W. Railroad Company stock. A. Well, there was part of that under the distribution to the four children of Henry Graves and part was retained in the estate.

Q. Do you know how much remained in the corpus of the estate? A. Two thousand shares.

Q. As I understand it, all the Glen Alden Company stock is held in the corpus of the trust estate. A. All of the 12,740 shares.

Q. And that is the stock which Mr. Jonas has testified has a present market value of \$138. A. Yesterday, yes, sir.

Q. Mr. Graves, during the period prior to December 31st, 1922, there have been certain stock dividends declared on the stock by the Atlas Portland Cement Company, has there not? A. Yes, sir.

Q. And were those stock dividends apportioned between the four children and the corpus of the estate under the trust agreement? A. Yes, sir.

Q. Can you tell me how much—how many shares of the stock dividends went to the four

Henry Graves, Jr., for Complainant—Re-direct.

children and how much to—and how many went to and now remain in the corpus? A. received 5,440 shares. 4,544 shares were distributed among the four children of Henry Graves and 896 shares went to the corpus.

Q. And is so held now as corpus. A. Yes, sir. 10

Re-direct examination:

Q. Mr. Graves, I show you a notice from the president of the Delaware, Lackawanna & Western Railroad Company bearing date August 25, 1927. Did you receive that in connection with this matter? A. Yes, sir.

Q. As a stockholder of the D. L. & W.? A. Yes, sir.

Mr. Ashmead: I offer it in evidence. 20

(Paper marked Exhibit C-2.)

Q. I show you notice from the Lackawanna Securities Company bearing date September 14, 1927. Did you receive that from the Lackawanna Securities Company in connection with this matter? A. I did.

Mr. Ashmead: I offer it in evidence.

(Paper Marked Exhibit C-3.) 30

TESTIMONY CLOSED.

Exhibit C-1.

ESTATE OF HENRY GRAVES, DECEASED.

Settlement Agreement, Trustees Account
and Decrees of Court.

10

IN CHANCERY OF NEW JERSEY

Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually and
as Trustees, etc.,

20

Complainants,

and

HARRIET ISABELLA GRAVES, *et al.*,
Defendants.

On Bill, Etc.
Settlement
Agreement.

30

MEMORANDUM OF AGREEMENT made the twenty-third day of June, 1923, between Harriet Isabella Graves, widow of Henry Graves, deceased (hereinafter called the "Testator"), late of the City of Orange, County of Essex and State of New Jersey, of the first part; Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, children of said Testator, of the second part; Duncan Graves, son of said Henry Graves, Jr., and Isabella G. Metcalf, daughter of said Daisey B. Smith, both adults, of the third part; Gwendolyn Graves and George Coe Graves, 2d, minor children of said Henry Graves, Jr.;

40

Jean Stevenson Graves, a minor child of said

Exhibit C-1.

Edward H. Graves; Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, minor children of Henry Graves, 3d, a deceased son of said Henry Graves, Jr., and Manton B. Metcalf, 3d, a minor child of said Isabella G. Metcalf, by Jesse R. Salmon, their guardian *ad litem* duly appointed in the above-entitled cause, of the fourth part; Henry Graves, Jr., as executor under the last will and testament of said Henry Graves, 3d, and Margaret Dickson Graves, as general guardian of the said Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, of the fifth part; and Henry Graves, Jr., and George Coe Graves, as trustees under the last will and testament of said Testator, of the sixth part; being all of the children, grandchildren and great-grandchildren of the Testator in being at the time of the execution of this agreement and their legal representatives. 10
20

WITNESSETH :

WHEREAS by the final decree of the Chancellor in the above-entitled cause the trust created in and by the last will and testament of Testator for the benefit of his grandchildren and their descendants was declared to be in violation of the rule against perpetuities and void, and the trustees of the said trust, consisting wholly of personal property, were directed to make distribution of the funds held thereunder to and among the children and next of kin of the said deceased; and 30

WHEREAS appeals were taken to the Court of Errors and Appeals from the said final decree by various of the parties to said cause, which appeals at the suggestion of the parties of the second part have been dismissed without prejudice, 40

Exhibit C-1.

to the end that the record in said cause might be remitted to the Chancellor for his consideration of a proposal to adjust and settle the matters in dispute in said litigation along the lines hereinafter set forth; and

10 WHEREAS litigation over the matters involved in said suit is highly distasteful to the parties hereto and the parties of the second part are willing and anxious to carry out the scheme of their father's will in so far as the same may be practicable and in particular to make provision for his grandchildren and great-grandchildren in the manner and to the extent hereinafter set forth;

20 NOW, THEREFORE, in order to bring said litigation to an end and to carry out as far as may be the wishes of the said Testator as indicated by his will and to make reasonable provision for the said grandchildren and great-grandchildren, and as a family settlement, the parties hereto have consented and agreed, and do hereby consent and agree, for themselves, their heirs, executors and administrators, and for the various classes they severally or collectively represent as follows:

30 1. All acts heretofore done by the said Henry Graves, Jr., and George Coe Graves as executors and trustees under the last will and testament of the said Testator shall be and they hereby are ratified and confirmed, and consent is given to the settlement of the accounts of the said trustees as stated in their account bearing date March 21, 1922, attached to the bill of complaint in the above-entitled cause, and in their account bearing date December 31, 1922, attached hereto. All
40 further or other accounting under the final decree in this cause or otherwise is waived by each and all of the parties hereto and the said trustees are released and discharged, individually and as ex-

Exhibit C-1.

ecutors and trustees, from any and all liability arising out of any acts done or attempted to be done by them or either of them with relation to the corpus or income of the estate of the said Testator, and all moneys or property heretofore paid or transferred by the trustees to the children and/or grandchildren of the said Testator as income of the trust attempted to be created by the said will shall be and remain the absolute property of such children, grandchildren and/or their legal representatives, free and clear from any and all claims or demands, either in law or in equity, which the parties hereto, or any of them, ever had, now have, or which they, their heirs, executors, administrators or assigns hereafter can, shall or may have, to recover the same or any part thereof. 10 20

2. Each of the parties hereto gives, grants, bargains, sells, assigns, transfers and sets over unto the said Henry Graves, Jr., and George Coe Graves, and the survivor of them, their executors, administrators, successors and assigns, all of his or her right, title, interest, claim and demand against the undistributed assets of the estate of the said Testator in the hands of the said trustees or elsewhere arising out of or based upon any of the provisions of the said last will and testament of the said Testator, or the intestate laws of the State of New Jersey, or the final decree of the Chancellor in the above-entitled cause, or otherwise, but in trust for the uses and purposes following, that is to say: 30

(a) To divide, transfer or pay all the undistributed extraordinary cash and stock dividends which accrued prior to December 31, 1922, and which have been retained and accumulated by the said Henry Graves, Jr., and George Coe Graves, as trustees under paragraph c, Clause 40

Exhibit C-1.

Four of said will, in so far as the same were declared out of profits or surplus accruing since the death of the Testator together with all accretions thereto and income accruing thereon since December 31, 1922, equally among the said Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, children of the Testator and/or their legal representatives, respectively, to be theirs absolutely.

(b) To divide, transfer or pay all the undistributed regular income of said estate which accrued prior to December 31, 1922, as shown by the said accounts of the trustees of March 21, 1922, and December 31, 1922, as well as the undistributed income of said estate, including all extraordinary cash and stock dividends, which have accrued since December 31, 1922, and prior to the date of this agreement, to the widow, children, grandchildren and children of deceased grandchildren of the Testator and/or their legal representatives, in the manner and proportions provided in Clause Four, paragraphs d, e and f of said will for the distribution of regular annual income.

(c) To pay out of the corpus of the estate all indebtedness, claims and demands heretofore incurred by the said Henry Graves, Jr., and George Coe Graves, as executors and trustees as aforesaid or which have been or may be imposed by law on said trust estate; all costs and expenses of this litigation, including counsel fees and disbursements made in connection therewith by or on behalf of any of the parties thereto, to be fixed by the Chancellor; all additional assessments for taxes, penalties and other charges, if any, which may be levied against the said estate of the said Testator or the said Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B.

Exhibit C-1.

Smith, their and any of their heirs, executors, administrators or assigns, by reason or on account of the said decree of the Chancellor or the invalidity of the trust set up in said will; and to pay unto themselves for their services as trustees under the Fourth Clause of the said will, five per cent. on the gross income of the said estate, excepting undistributed extraordinary cash and stock dividends from the date of the death of the Testator to the date hereof. 10

(d) To have, hold and manage the rest, residue and remainder of said trust estate, and to sell, exchange, convey, invest and reinvest the same at such times, in such manner and on such terms as to them shall seem most expedient, and out of the rents, issues, interest and income thereof, to pay unto Harriet Isabella Graves, widow of the Testator, during her natural life, in lieu of all interest which she may have in the said trust estate, the sum of \$20,000 each and every year, in quarterly payments of \$5,000 each, and to divide, transfer, or pay over the rest, residue and remainder of said income to and among the children and grandchildren of the testator, including grandchildren born subsequent to the date of this agreement *per capita*, during their respective natural lives, or until the death of the last survivor of the children and grandchildren of the Testator in being at the date of this agreement. In the case of Henry Graves, 3d, a grandchild now deceased, and of the death of any other grandchild leaving lawful issue him or her surviving, the share or portion of the income which would have belonged to said grandchild had he or she lived shall be distributed in equal portions to his or her issue. But in case any one of said grandchildren shall die without leaving lawful issue him or her surviving, then the share which had been his or 20 30 40

Exhibit C-1.

10 hers in life shall be distributed among the surviving children, grandchildren, and issue of deceased grandchildren of the Testator, in the same manner and proportions as it is provided that the balance of said income shall be divided among them respectively. Such payment shall be made semi-annually or at such periods as shall be most convenient to said trustees. Upon the death of the last survivor of the children and grandchildren of the Testator in being at the date of this instrument, the said trustees shall divide the principal of said trust estate, with all accumulations and increases thereof, to and among the great-grandchildren of the Testator, share and share alike, the issue of any deceased great-grandchild to receive the share its parent would have received if living, provided, however, that any grandchild born after the date of this agreement who shall have no children in being at the time of said distribution shall be considered as a great-grandchild and shall receive the same proportion of the corpus as the other great-grandchildren of the Testator. To have and to hold unto her, him, or their heirs, executors, administrators and assigns, forever.

20
30 The trustees named herein, their survivor, successor, and successors, are authorized to continue all present investments and in their reinvestments shall not be restricted to investments authorized by statute law, but shall be free to make such investments as in their judgment shall be best for the interests of the trust and the beneficiaries thereof, and the said Henry Graves, Jr., and George Coe Graves, or either of them, shall not be required to give any bond or other security of any kind whatsoever for the performance of any duty or trust hereby imposed upon them, or either
40 of them.

Exhibit C-1.

Upon the death, removal, resignation, refusal, incapacity or inability to act of either of the trustees herein named, the remaining trustee shall continue to act as trustee hereunder, with all of the powers of the two trustees herein named. Upon the death, removal, resignation, refusal, incapacity or inability to act of both of the trustees herein named, or their successor or successors, some duly qualified trust company of the State of New Jersey shall be appointed trustee hereunder by the written consent and approval of a majority of the then beneficiaries of said trust who have attained the age of twenty-one years, such consent and approval to be evidenced by a certificate of such appointment and acceptance filed with the Clerk of the Court of Chancery of New Jersey in the above-entitled cause. If for any reason such appointment shall not be made by said beneficiaries in the manner aforesaid within two months from the date of a written demand made by or on behalf of any one of the beneficiaries of said trust upon such of said beneficiaries as may be above the age of twenty-one years, then application may be made by or on behalf of any one of the beneficiaries of said trust to the said Court of Chancery or such other court of the State of New Jersey as may have jurisdiction for the appointment of a new trustee, which substituted trustee shall always be some duly qualified trust company of the State of New Jersey.

The compensation for the services of the said Henry Graves, Jr., and George Coe Graves, and their survivor, as trustees of the trust hereby created, shall be five per cent. on the income collected and distributed by them.

This agreement shall have no binding force or effect until the same shall have been submitted to the Chancellor and approved by him, and until the

Exhibit C-1.

10 execution thereof by Jesse R. Salmon, as guardian *ad litem* on behalf of the infant defendants within named, has been ratified and confirmed by an order of the Chancellor made and filed in this cause, provided, however, that in case of the death of any of the parties hereto, such approval and order may be made and filed *nunc pro tunc* as of the date of this agreement.

20 This agreement is made under, and shall be construed according to, the laws of the State of New Jersey, except that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement. The terms "grandchildren" and "great-grandchildren" as used in this agreement are understood to include and do include only the lawful issue of the children and grandchildren of the testator.

30 If, for any reason whatsoever, any provisions of this agreement shall be held to be void and of no effect, the valid provisions shall nevertheless be carried out, and in case the gift to any beneficiary herein named shall terminate or fail for any reason whatsoever, such gift shall remain subject to the trust, and shall be distributed among the remaining beneficiaries in accordance with the provisions hereof to the full extent permitted by law.

40 The original of this agreement shall be filed in the above-entitled cause and certified copies delivered to each of the interested parties. The said Henry Graves, Jr., and George Coe Graves by joining in this agreement shall be held and taken to have signified their acceptance of the trust hereby created.

Exhibit C-1.

IN WITNESS WHEREOF, the parties hereto have signed and sealed these presents, the day and year first above written.

Signed, sealed and delivered in the presence of—	HARRIET ISABELLA GRAVES [SEAL] HENRY GRAVES, JR. [SEAL] EDWARD H. GRAVES [SEAL] GEORGE COE GRAVES [SEAL] DAISEY B. SMITH [SEAL] DUNCAN GRAVES [SEAL] ISABELLA G. METCALF [SEAL]	10
Burtis S. Horner as to all parties except Jesse R. Salmon, Guardian <i>ad litem</i> .	GWENDOLYN GRAVES [SEAL] GEORGE COE GRAVES, 2ND. [SEAL] JEAN STEVENSON GRAVES [SEAL] MARY DICKSON GRAVES [SEAL] FLORENCE BARBARA GRAVES [SEAL] HENRY DICKSON GRAVES [SEAL] MANTON B. METCALF, 3RD [SEAL] By JESSE R. SALMON [SEAL] Guardian <i>ad litem</i> .	20
As to Jesse R. Salmon, Clk. Gdn <i>ad litem</i> E. R. Walker.	HENRY GRAVES, JR. [SEAL] As Executor of the last will and testament of Henry Graves, 3rd, deceased.	
	MARGARET DICKSON GRAVES [SEAL] General Guardian of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves.	30
	HENRY GRAVES, JR. [SEAL] and GEORGE COE GRAVES [SEAL] As Trustees under the last will and testament of Henry Graves, deceased.	40

Exhibit C-1.

STATE OF MASSACHUSETTS, }
 COUNTY OF BARNSTABLE. } ss.:

10 BE IT REMEMBERED, That on this twenty-third day of June, in the year of our Lord One thousand nine hundred and twenty-three, before me, the subscriber, a Master in Chancery of the State of New Jersey, personally appeared HARRIET ISABELLA GRAVES, who, I am satisfied, is one of the grantors mentioned in the within Agreement, and to whom I first made known the contents thereof, and thereupon she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

20 BURTIS S. HORNER,
*Master in Chancery of the State of
 New Jersey.*

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

30 BE IT REMEMBERED, That on this twenty-fifth day of June, in the year of our Lord One thousand nine hundred and twenty-three, before me, the subscriber, a Master in Chancery of the State of New Jersey, personally appeared EDWARD H. GRAVES, DAISEY B. SMITH, DUNCAN GRAVES and ISABELLA G. METCALF, who, I am satisfied, are four of the grantors mentioned in the within Agreement, and to whom I first made known the contents thereof, and thereupon they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

40 BURTIS S. HORNER,
*Master in Chancery of the State of
 New Jersey.*

Exhibit C-1.

STATE OF NEW JERSEY, }
 COUNTY OF , } SS.:

BE IT REMEMBERED, That on this 27th day of June, in the year of our Lord One thousand nine hundred and twenty-three, before me, the subscriber, the Chancellor of New Jersey, personally appeared JESSE R. SALMON, Clerk of the Court of Chancery, guardian *ad litem* of Gwendolyn Graves, George Coe Graves, 2d, Jean Stevenson Graves, Mary Dickson Graves, Florence Barbara Graves, Henry Dickson Graves and Manton B. Metcalf, 3d, who, I am satisfied, is one of the grantors mentioned in the within Agreement, and to whom I first made known the contents thereof, and thereupon he did acknowledge that he signed, sealed and delivered the same pursuant to the order of this court and as his voluntary act and deed as guardian *ad litem* of the said Gwendolyn Graves, George Coe Graves, 2d, Jean Stevenson Graves, Mary Dickson Graves, Florence Barbara Graves, Henry Dickson Graves and Manton B. Metcalf, 3d, for the uses and purposes therein expressed.

E. R. WALKER,
 Chancellor of New Jersey. 30

Exhibit C-1.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

10 BE IT REMEMBERED, That on this twenty-fifth
 day of June, in the year of our Lord One thousand
 nine hundred and twenty-three, before me, the sub-
 scriber, a Master in Chancery of the State of New
 Jersey, personally appeared HENRY GRAVES, JR.,
 as executor under the last will and testament of
 Henry Graves, 3d, and MARGARET DICKSON GRAVES,
 as general guardian of Mary Dickson Graves,
 Florence Barbara Graves and Henry Dickson
 Graves, who, I am satisfied, are two of the
 grantors mentioned in the within Agreement, and
 to whom I first made known the contents thereof,
 20 and thereupon they did each acknowledge that
 they signed, sealed and delivered the same as their
 voluntary act and deed as executor under the last
 will and testament of Henry Graves, 3d, and as
 general guardian of Mary Dickson Graves, Flor-
 ence Barbara Graves and Henry Dickson Graves,
 respectively, for the uses and purposes therein
 expressed.

30

BURTIS S. HORNER,
 Master in Chancery of the
 State of New Jersey.

40

Exhibit C-1.

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

BE IT REMEMBERED, That on this twenty-sixth day of June, in the year of our Lord One thousand nine hundred and twenty-three, before me, the subscriber, a Master in Chancery of the State of New Jersey, personally appeared HENRY GRAVES, JR., and GEORGE COE GRAVES, individually and as trustees under the last will and testament of Henry Graves, deceased, who, I am satisfied, are two of the grantors mentioned in the within Agreement, and to whom I first made known the contents thereof, and thereupon they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, individually and as trustees under the last will and testament of Henry Graves, deceased, for the uses and purposes therein expressed.

BURTIS S. HORNER,
 Master in Chancery of the
 State of New Jersey.

30

40

Exhibit C-1.

IN CHANCERY OF NEW JERSEY.

Between

10 HENRY GRAVES, JR., and GEORGE COE
GRAVES, Trustees, etc.,
Complainants,

and

HARRIET ISABELLA GRAVES, *et al.*,
Defendants.

On Bill, etc.
Trustees'
Account.

20 ***Final account of Henry Graves, Jr., and George Coe
Graves, Trustees under the last will and testament of
Henry Graves, deceased, bearing date December 31,
1922.***

WE, HENRY GRAVES, JR., and GEORGE COE GRAVES, as Trustees of the Trust Estate created by and under the Last Will and Testament of HENRY GRAVES, deceased, hereby render the following account of our proceedings as Trustees, as aforesaid, covering the period from March 21, 1922, the date of our last account, down to December 31, 1922, inclusive.

30

*FIRST: AS TO PRINCIPAL**The Trustees Charge themselves with:*

Values of Securities and Cash comprising Principal of the Trust Estate at March 21, 1922, date of last account, at Market Valuations at that date, as per Schedule "A".... \$6,212,513.50

40

Exhibit C-1.

Amount of extra 5% cash dividend received from Delaware, Lackawanna & Western Railroad Co. on January 23, 1922, included in balance of income on previous account of March 21, 1922, transferred from income account	63,700.00	10
Increases to Principal of Trust Estate resulting from actual transactions by Trustees, as per Schedule "B".....	124,180.00	

O. K.

H. G. Jr.

Increases to Principal of Trust Estate arising from excess of Market Values of Securities, at December 31, 1922, over Market Values of same March 21, 1922, date of last account, as per Schedule "C".....	893,712.50	20
Total	\$7,294,106.00	

The Trustees Credit themselves with:

Oct. 4, 1922—Payment to Lord & Lord for services in preparing account of March 21, 1922	1,500.00	
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· <i>Leaving</i> , Value of Securities and Cash comprising Principal of Trust Estate in hands of Trustees at December 31, 1922, at Market Valuations at that date, as per Schedule "D"	\$7,292,606.00	30
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*Exhibit C-1.**SECOND: AS TO INCOME**The Trustees Charge themselves with:*

Balance in their hands account Income at date of last account, March 21, 1922, consisting of:

10	Cash	\$140,032.29	
	Accrued Interest.....	1,490.96	\$ 141,523.25

Receipts account Income covering period from March 21, 1922, date of last account, to December 31, 1922, as per Schedule "E"....

247,724.28

Total

\$ 389,247.53

20 *The Trustees Credit themselves with:*

Amount of extra 5% cash dividend received from Delaware, Lackawanna & Western R. R. Co., on January 23, 1922, included in foregoing balance of income on previous account of March 31, 1922, and transferred to Principal account.....

\$ 63,700.00

30 Payments made for Expenses and chargeable against Income, covering period from March 21, 1922, to December 31, 1922, as per Schedule "F".....

1,180.00

Payments made to beneficiaries and chargeable against Income, covering period from March 21, 1922, to December 31, 1922, as per Schedule "G".....

58,888.89

Total

\$ 123,768.89

O. K.

H. G. Jr.

Exhibit C-1.

Leaving, a balance of undistributed Income in hands of Trustees on December 31, 1922, as per Schedule "H"..... \$ 265,478.64

Dated—December 31, 1922.

HENRY GRAVES, JR.,
 GEORGE COE GRAVES, 10
 Trustees under the Last Will
 and Testament of Henry
 Graves, deceased.

O. K.
 H. G. Jr.

SCHEDULE "A."

Statement of Securities and Cash Comprising Principal of the Trust Estate, in Hands of the Trustees at Date of Last Account, March 21, 1922, at Market Valuations at that Date. 20

SHARES		STOCKS:		
25,480	Delaware, Lackawanna & Western R. R. Company,	at 115	\$2,930,200.00	
4,000	Central Railroad of New Jersey,	at 189	756,000.00	
1,200	New York Trust Company,	at 312	374,400.00	
10,200	Atlas Portland Cement Company, Common,	at 50	510,000.00	
3,500	Delaware, Lackawanna & Western Coal Company,	at 87	304,500.00	
1,593	Lackawanna Railroad Company of New Jersey,	at 77-½	123,457.50	
1,000	New York & Honduras Rosario Mining Company,	at 5-½	5,500.00	
12,740	Glen Alden Coal Company,	at 43-½	554,190.00	30
300	Liberty Industrial Corporation, Preferred,	at 101	30,300.00	
23	Chicago City & Connecting Railway, Common,	at 1	23.00	
39	Do. Do. Preferred,	at 7-½	292.50	
PAR VALUE		BONDS:		
\$100,000.00	Atlas Portland Cement Company, First Mortgage 6% due April 1925,	at 98	98,000.00	
1,000.00	Carteret Academy, 25 year 5% Refunding and Construction Mortgage,	at 50	500.00	
250,000.00	New York State 4% due March 1967,	at 101	252,500.00	
100,000.00	New York City 4¼% due March 1964,	at 100-½	100,500.00	
155,000.00	Do Do. 1960,	at 100-½	155,775.00	
	CASH, on Deposit, Brooklyn Trust Company,		16,375.50	
			<u>\$6,212,513.50</u>	40

O. K.
 H. G. Jr.
 Schedule "A"

Exhibit C-1.

SCHEDULE "B."

**Statement of Increases to Principal of the Trust Estates
Resulting from Actual Transactions by the Trustees,
Covering Period from March 21, 1922, Date
of Last Account, to December 31, 1922.**

10

Central Railroad of New Jersey Stock:

SHARES	PROCEEDS OF SALE:		
100	October 9, 1922, at 203, less comm. and Tax,		\$20,272.00
200	October 9, 1922, at 204,	Do.	40,744.00
200	October 13, 1922, at 205,	Do.	40,944.00
100	October 16, 1922, at 208,	Do.	20,772.00
200	October 16, 1922, at 209,	Do.	41,744.00
200	October 16, 1922, at 210,	Do.	41,944.00
100	October 16, 1922, at 215,	Do.	21,472.00
200	October 23, 1922, at 214,	Do.	42,744.00
100	October 23, 1922, at 215,	Do.	21,472.00
200	October 23, 1922, at 216,	Do.	43,144.00
200	October 23, 1922, at 218,	Do.	43,544.00
200	October 23, 1922, at 220,	Do.	43,944.00
200	October 24, 1922, at 240,	Do.	47,944.00
200	October 24, 1922, at 241,	Do.	48,144.00
200	October 24, 1922, at 242,	Do.	48,344.00
300	October 26, 1922, at 238,	Do.	71,316.00
100	October 26, 1922, at 239,	Do.	23,872.00
300	November 9, 1922, at 228,	Do.	68,316.00
300	November 15, 1922, at 215,	Do.	64,416.00
100	November 20, 1922, at 210,	Do.	20,972.00
200	November 21, 1922, at 210,	Do.	41,944.00
100	November 27, 1922, at 210,	Do.	20,972.00
4,000	Total Proceeds of Sale:		\$878,980.00
4,000	On Hand at March 21, 1922, date of last account, at Market Value, 189,		756,000.00

20

Increase:

\$122,980.00

30

Liberty Industrial Corporation, Preferred:

300	Surrendered to Company on call July 1, 1922, at 105,	\$31,500.00
300	On Hand at March 21, 1922, date of last account, at Market Value, 101,	30,300.00
	Increase:	1,200.00

TOTAL:

\$124,180.00

O. K.
H. G. Jr.
Schedule "B"

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Exhibit C-1.

SCHEDULE "C."

Statement of Increases to Principal of Trust Estate Arising from Excess of the Market Values of Securities at December 31, 1922, Over Market Values of Same March 21, 1922, as per Last Account.

<i>Delaware, Lackawanna & Western R. R. Company:</i>		10
SHARES	STOCKS:	
25,480	On Hand at December 31, 1922, at Market Value, 127	\$3,235,960.00
25,480	On Hand at March 21, 1922, at Market Value, 115	2,930,200.00
	<i>Increase:</i>	\$305,760.00
<i>New York Trust Company:</i>		
1,200	On Hand at December 31, 1922, at Market Value, 350,	\$420,000.00
1,200	On Hand at March 21, 1922, at Market Value, 312,	374,400.00
	<i>Increase:</i>	45,600.00 20
<i>Atlas Portland Cement Company, Common:</i>		
12,240	On Hand at December 31, 1922, at Market Value, 62,	\$758,880.00
10,200	On Hand at March 21, 1922, at Market Value, 50,	510,000.00
2,040	Received December 15, 1922, as Stock Dividend on 20% on 10,200 shares then held by Trustees,
	<i>Increase:</i>	248,880.00
<i>Delaware, Lackawanna & Western Coal Company:</i>		
4,900	On Hand at December 31, 1922, at Market Value, 83,	\$406,700.00
3,500	On Hand at March 21, 1922, at Market Value, 87,	304,500.00
1,400	Received December 19, 1922, as Stock Dividend of 40% on 3,500 shares then held by Trustees,
	<i>Increase:</i>	102,200.00
<i>Lackawanna Railroad of New Jersey:</i>		
1,593	On Hand December 31, 1922, at Market Value, 80,	\$127,440.00
1,593	On Hand at March 21, 1922, at Market Value 77-1/2,	123,457.50
	<i>Increase:</i>	3,982.50
	Carried forward:	\$706,422.50 40
O. K.		
H. G. Jr.		
Schedule "C"		

Exhibit C-1.

New York & Honduras Rosario Mining Company:

	Brought forward:	\$706,422.50
1,000	On Hand at December 31, 1922, at Market Value, 7-½,	\$7,500.00
1,000	On Hand at March 21, 1922, at Market Value, 5-½,	5,500.00
	<i>Increase:</i>	2,000.00

10

Glen Alden Coal Company:

12,740	On Hand at December 31, 1922, at Market Value, 57,	\$726,180.00
12,740	On Hand at March 21, 1922, at Market Value, 43-½,	554,190.00
	<i>Increase:</i>	171,990.00

PAR VALUE

BONDS:

*Atlas Portland Cement Co. 1st Mtge. 6%**Due April, 1925:*

\$100,000.00	On Hand at December 31, 1922, at Market Value, 100,	\$100,000.00
100,000.00	On Hand at March 21, 1922, at Market Value, 98,	98,000.00
	<i>Increase:</i>	2,000.00

20

New York State 4%, Due March, 1967:

\$250,000.00	On Hand at December 31, 1922, at Market Value, 104-½,	\$261,250.00
250,000.00	On Hand at March 21, 1922, at Market Value, 101,	252,500.00
	<i>Increase:</i>	8,750.00

New York City 4¼%, Due March, 1964:

\$100,000.00	On Hand at December 31, 1922, at Market Value, 101-½,	\$101,500.00
100,000.00	On Hand at March 21, 1922, at Market Value, 100-½,	100,500.00
	<i>Increase:</i>	1,000.00

30

New York City 4¼%, Due March, 1960:

\$155,000.00	On Hand at December 31, 1922, at Market Value, 101-½,	\$157,325.00
155,000.00	On Hand at March 21, 1922, at Market Value, 100-½,	155,775.00
	<i>Increase:</i>	1,550.00

TOTAL:

\$893,712.50

O. K.

H. G. Jr.

40 Schedule "C" (Concluded)

*Exhibit C-1.***SCHEDULE "D."*****Statement of Securities and Cash Comprising Principal of the Trust Estate Remaining in Hands of the Trustees, at December 31, 1922, at Market Valuations at that Date.***

Extraordinary cash and stock dividends which accrued prior to December 31, 1922, and which have been retained and accumulated under Paragraph C, Clause Four, of the Last Will and Testament of Henry Graves, deceased, in so far as the same were declared out of profits or surplus accruing since the death of said Testator. 10

STOCKS:

Delaware, Lackawanna & Western R. R. Company:

SHARES			20
255	Being part of 1,185 shares received August 2, 1909, as a 15% Stock Dividend on 7,900 shares then held.		
12,740	Being entire Stock Dividend of 100%, received August 20, 1921, on 12,740 shares then held.		
<hr/> 12,995	At Market Value, 127,	\$1,650,365.00	

Lackawanna Railroad Company of New Jersey:

1,592- $\frac{1}{2}$	Being entire Stock Dividend received November 21, 1911, representing an extra dividend of 35% on 9,100 shares Delaware, Lackawanna and Western R. R. Company Stock, payable in Stock of Lackawanna R. R. Company of New Jersey, par value \$100.00 per share,		
$\frac{1}{2}$	Purchased November 21, 1911, by Trustees to equalize holdings.		30
<hr/> 1,593	At Market Value, 80,	127,440.00	

Delaware, Lackawanna & Western Coal Company:

1,500	Being entire Stock Dividend of 75% received December 22, 1920, on 2,000 shares then held.		
1,400	Being entire Stock Dividend of 40% received December 19, 1922, on 3,500 shares then held.		
<hr/> 2,900	At Market Value, 83,	240,700.00	

*Exhibit C-1.**Atlas Portland Cement Company, Common:*

2,504	Being part of 3,400 shares received December 17, 1920, as a 50% Stock Dividend on 6,800 shares then held.	
2,040	Being 20% Stock Dividend received December 15, 1922, on 10,200 shares then held.	
<u>4,544</u>	At Market Value, 62,	281,728.00
10	Cash, Delaware, Lackawanna & Western R. R. Co., being one-half extra dividend of 50% on 7,900 shares, received in cash July 23, 1909, \$98,750.00	
	O. K. H. G. Jr.	
	<i>Deduct:</i> Market Value of 1/2 share Lackawanna R. R. of New Jersey, purchased by Trustees November 21, 1911, to equalize holdings, at 80,	40.00
		<u>98,710.00</u>
	Cash, Delaware, Lackawanna & Western R. R. Co. extra dividend of 5% on 25,480 shares received January 23, 1922,	63,700.00
		<u>\$2,462,643.00</u>
	TOTAL,	

20

OTHER CASH AND SECURITIES

SHARES	STOCKS:		
12,485	Delaware, Lackawanna & Western R. R. Company,	at 127,	1,585,595.00
1,200	New York Trust Company,	at 350,	420,000.00
7,696	Atlas Portland Cement Company, Common,	at 62,	477,152.00
2,000	Delaware, Lackawanna & Western Coal Company,	at 83,	166,000.00
1,000	New York & Honduras Rosario Mining Co.	at 7-1/2,	7,500.00
12,740	Glen Alden Coal Company,	at 57,	726,180.00
23	Chicago City & Connecting Railway, Common,	at 1,	23.00
39	do. do. Preferred,	at 7-1/2,	292.50

30

PAR VALUE	BONDS:		
\$100,000.00	Atlas Portland Cement Co., 1st mtge. 6%, due April 1925,	at 100,	100,000.00
1,000.00	Carteret Academy 25 yr. 5% Refund. & Cons. Mtge.,	at 50,	500.00
250,000.00	New York State, 4- % due March, 1967	at 104-1/2,	261,250.00
100,000.00	New York City, 4-1/4% due March, 1964,	at 101-1/2,	101,500.00
155,000.00	New York City, 4-1/4% do 1960,	at 101-1/2,	157,325.00

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Exhibit C-1.

REINVESTMENTS BY TRUSTEES, SINCE DATE
OF LAST ACCOUNT, MARCH 21, 1922:

Purchased November 17, 1922:

\$425,000.00	City of Buffalo, N. Y., 4- $\frac{1}{4}$ %, due October, 1952,	at 103- $\frac{3}{4}$	440,937.50	
6,000.00	New York State, 4% due March, 1960,	at 104- $\frac{1}{2}$	6,270.00	
6,000.00	do. 4% due July, 1960,	at 104- $\frac{1}{2}$	6,270.00	10
3,000.00	do. 4% due March, 1961,	at 104- $\frac{1}{2}$	3,135.00	
14,000.00	do. 4% due Jan., 1962,	at 104- $\frac{1}{2}$	14,630.00	
11,000.00	do. 4% due March, 1962,	at 104- $\frac{1}{2}$	11,495.00	

Purchased November 20, 1922:

20,000.00	New York State, 4% due March 1, 1961,	at 104- $\frac{1}{2}$	20,900.00
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Purchased November 28, 1922:

\$245,000.00	City of New York, 4- $\frac{1}{4}$ % due April 15, 1972,	at 101- $\frac{1}{2}$	248,675.00	
	CASH,		74,333.00	20
	TOTAL,		\$4,829,963.00	

SUMMARY:

Extraordinary Cash and Stock Dividends retained,	\$2,462,643.00
Other Cash and Securities,	4,829,963.00
Total Balance of Principal,	\$7,292,606.00

O. K.
H. G. Jr.

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*Exhibit C-1.***SCHEDULE "E."****Statement of Receipts by Trustees Account Income,
Covering Period from March 21, 1922, Date of
Last Account, to December 31, 1922.**10 **DIVIDENDS ON STOCKS:***Delaware, Lackawanna & Western R. R. Company:*

Apr. 20—	Quarterly dividend on 25,480 shares,	\$38,220.00	
July 20—	do. do. on 25,480 do.	38,220.00	
Oct. 20—	do. do. on 25,480 do.	38,220.00	
			<u>\$114,660.00</u>

Central Railroad of New Jersey:

	May 15—	Dividend on 4,000 shares,	\$ 8,000.00	
	July 15—	do. on 4,000 do.	8,000.00	
	Aug. 15—	do. on 4,000 do.	8,000.00	
		(3,300 Shares sold during October and to November 9, 1922.)		
20	Nov. 15—	Dividend on 700 shares, (700 Shares sold November 15 to 27, 1922.)	1,400.00	
				<u>25,400.00</u>

New York Trust Company:

	Mar. 31—	Quarterly dividend on 1,200 shares,	\$ 6,000.00	
	June 30—	do. do. on 1,200 do.	6,000.00	
	Sept. 30—	do. do. on 1,200 do.	6,000.00	
				<u>18,000.00</u>

Atlas Portland Cement Company, Common:

	June 1—	Quarterly dividend on 10,200 shares,	\$10,200.00	
30	Sept. 1—	do. do. on 10,200 do.	10,200.00	
	Dec. 1—	do. do. on 10,200 do.	10,200.00	
				<u>30,600.00</u>

Delaware, Lackawanna & Western Coal Company:

	Apr. 15—	Quarterly dividend on 3,500 shares,	\$ 4,375.00	
	July 15—	do. do. on 3,500 do.	4,375.00	
	Oct. 15—	do. do. on 3,500 do.	4,375.00	
				<u>13,125.00</u>

Lackawanna Railroad of New Jersey:

	Apr. 1—	Quarterly dividend on 1,593 shares,	\$ 1,593.00	
40	July 1—	do. do. on 1,593 do.	1,593.00	
	Oct. 1—	do. do. on 1,593 do.	1,593.00	
				<u>4,779.00</u>

*Exhibit C-1.**New York & Honduras Rosario Mining Company:*

Apr. 26—	Quarterly dividend on 1,000 shares,	\$	250.00	
Aug. 16—	do. do. on 1,000 do.		250.00	
Nov. 3—	do. do. on 1,000 do.		250.00	
				750.00

Glen Alden Coal Company:

Dec. 20—	Dividend on 12,740 shares,	19,110.00	10
	Carried forward:	<u>\$226,424.00</u>	
O. K.			
H. G. Jr.			
Schedule "E"			

Brought forward: \$226,424.00

DIVIDENDS ON STOCKS (Continued)

Liberty Industrial Corporation, Preferred:

Apr. 1—	Quarterly dividend on 300 shares,	\$	600.00	
July 1—	do. do. on 300 do.		600.00	
	(300 shares surrendered July 1, 1922.)			
			<u>1,200.00</u>	20
	TOTAL DIVIDENDS:		<u><u>\$227,624.00</u></u>	

INTEREST RECEIVED:

Atlas Portland Cement Company 1st Mtge. 6% Bonds:

Sept. 1—Interest from March 21, 1922, to date, on 100M Par Value, \$ 2,666.67

New York State, 4%, Due March, 1967: 30

Sept. 1—Interest from March 21, 1922, to date, on 250M Par Value, 4,444.45

New York City 4¼%, Due March, 1964:

Sept. 1—Interest from March 31, 1922, to date, on 100M Par Value, 1,889.00

New York City 4¼%, Due March, 1960:

Sept. 1—Interest from March 21, 1922, to date, on 155M Par Value, 2,927.67

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*Exhibit C-1.**Brooklyn Trust Company:*

Interest on deposits from March 21, 1922, to April 30, 1922,	\$ 581.28	
Interest on deposits from May 1, 1922, to October 31, 1922,	4,106.80	
Interest on deposits from November 1, 1922, to December 31, 1922,	<u>3,322.07</u>	8,010.15

10

J. W. Davis & Company:

Oct. 13—Interest on balance,	\$ 23.73	
Oct. 30— do. do.	<u>138.61</u>	162.34
TOTAL INTEREST RECEIVED:		<u><u>\$ 20,100.28</u></u>

SUMMARY:

Dividends Received,	\$227,624.00
Interest Received,	<u>20,100.28</u>
	<u><u>\$247,724.28</u></u>

20

O. K.
H. G. Jr.
Schedule "E" (Concluded)

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*Exhibit C-1.***SCHEDULE "F."****Statement of Payments Made by Trustees and Chargeable Against Income, Covering Period from March 21, 1921, to December 31, 1922.****EXPENSES OF ADMINISTRATION:**

				10
1922				
Apr. 4—	Trinity Bldg Corp.,	Office Rent, month April,	\$50.00	
May 2—	do.	Office Rent, month May,	50.00	
May 31—	do.	Office Rent, month June,	50.00	
July 1—	do.	Office Rent, month July,	50.00	
Aug. 2—	do.	Office Rent, month August	50.00	
Sept. 11—	do.	Office Rent, month September,	50.00	
Oct. 11—	do.	Office Rent, month November,	50.00	
Dec. 1—	do.	Office Rent, month December,	50.00	
			• ————— \$450.00	
Aug. 2—	Standard Safe Deposit Company,	Rent of Vault to August 1, 1923,	80.00	
June 23—	E. T. Magowan,	Services from April 1, to July 1, 1922,	\$200.00	
Sept. 26—	do.	Services from July 1, to October 1, 1922,	200.00	20
Dec. 18—	do.	Services from October 1, to December 31, 1922,	200.00	
			————— 600.00	
Dec. 18—	Miss M. K. Strader,	Services, Stenographer,	50.00	
			————— \$1,180.00	
O. K.				
H. G. Jr.				
Schedule "F"				

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*Exhibit C-1.***SCHEDULE "H."*****Statement of Cash Balance of Income Remaining in Hands
of Trustees, on December 31, 1922.***

Cash	\$265,478.64	
O. K.		
H. G. Jr.		
Schedule "H."		10

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

HENRY GRAVES, JR., and GEORGE COE GRAVES, trustees under the last will and testament of Henry Graves, deceased, being duly sworn according to law, upon their respective oaths depose and say that the foregoing account is in all things just and true both as to charges and discharges thereof, according to the best of their knowledge and belief. 20

HENRY GRAVES, JR.,
 GEORGE COE GRAVES.

Sworn to and subscribed this 25th
 day of June, 1923, at Newark,
 New Jersey, before me 30
 BURTIS S. HORNER,
 Master in Chancery of the State of New Jersey.

*Exhibit C-1.***GENERAL SUMMARY OF ESTATE OF
HENRY GRAVES, DECEASED.**

	Market Value of Principal of Estate at Date of decedent's death	\$4,659,048.47
10	Market Value of Principal of Estate at December 31, 1922.....	\$7,292,606.00
	Market Value at December 31, 1922, of extraordinary cash and stock dividends to be distributed among Edward H. Graves, Henry Graves, Jr., George Coe Graves and Daisey B. Smith.....	\$2,462,643.00
20	Market value at December 31, 1922, of remaining Principal of Estate	*\$4,829,963.00

* Note: Indebtedness of Estate, cost of litigation, Taxes, if any, and other expenses to be deducted.

O. K.
H. G. Jr.

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Exhibit C-1.

IN CHANCERY OF NEW JERSEY.

Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually and
as Trustees, etc.,

Complainants,

and

HARRIET ISABELLA GRAVES, *et al.*,
Defendants.

On Bill, etc.

On Petition of
Guardian*Ad Litem*, etc.Decree Directing
Guardian*Ad Litem*, to
Enter Into Settle-
ment Agreement.

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This matter being opened to the Court by Norman Grey, solicitor for and of counsel with Jesse R. Salmon, Clerk of the Court of Chancery of the State of New Jersey, Guardian *ad litem* of Gwendolyn Graves, George Coe Graves, 2d, Jean Stevenson Graves, Mary Dickson Graves, Florence Barbara Graves, Henry Dickson Graves and Manton B. Metcalf, 3d, infants, and the Court having read and considered the petition of said Jesse R. Salmon, Clerk of the Court of Chancery of the State of New Jersey, Guardian *ad litem*, as aforesaid, reciting that the parties in the above-entitled cause desire to bring said litigation to an end and to accomplish that result have presented to said petitioner a form of settlement agreement under which the infants for whom said petitioner is Guardian *ad litem* will receive substantial and material benefits, and reciting that said petitioner and his counsel are of the opinion, after a thorough examination of all the matters and questions involved, that it would be to the best interests of said infants to enter into said settlement agreement, rather than to continue said litigation in

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Exhibit C-1.

10 this Court and in the Court of Errors and Appeals, and the Court having read and considered the form of settlement agreement annexed to said petitioner's petition and being of the opinion that said settlement agreement makes just provision for said infants, and that it would better serve the interests of said infants to enter into said agreement rather than continue said litigation in this Court and in the Court of Errors and Appeals, and the solicitors for the complainants having presented to the Court the original of said settlement agreement duly executed by all of the parties to this cause excepting said petitioner as Guardian *ad litem* of said infants, and said petitioner, Jesse R. Salmon, Clerk of this Court and
20 Guardian *ad litem* as aforesaid, being now before the Court, and having signed and executed the said agreement in the presence of the Court, and said petition having been filed,

IT IS, on this twenty-seventh day of June, A. D. 1923, on motion of Norman Grey, solicitor as aforesaid, ORDERED, ADJUDGED AND DECREED, and the Chancellor does by virtue of the power and authority of this Court hereby ORDER, ADJUDGE AND DECREE that the said settlement as provided
30 in said settlement agreement is hereby declared to be for the best interests of the said infants, and said settlement agreement is hereby approved, and the execution thereof by the said Jesse R. Salmon, Clerk of the Court of Chancery of the State of New Jersey, Guardian *ad litem* of Gwendolyn Graves, George Coe Graves, 2d, Jean Stevenson Graves, Mary Dickson Graves, Florence Barbara Graves, Henry Dickson Graves and Manton B. Metcalf, 3d, infants, is hereby ratified and
40 confirmed.

E. R. WALKER,
C.

Exhibit C-1.

IN CHANCERY OF NEW JERSEY.

Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually and
as Trustees, under the Last
Will and Testament of Henry
Graves, deceased,

Complainants,

and

HARRIET ISABELLA GRAVES, *et al.*,
Defendants.

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On Bill, &c.
Decree on Trus-
tees' Accounting.

This matter having been opened to the Court
by Lindabury, Depue & Faulks, solicitors for and
of counsel with the complainants, and it appear-
ing by memorandum of agreement bearing date
June twenty-third, one thousand nine hundred
and twenty-three, and heretofore filed in this
cause, that the parties hereto have ratified and
confirmed all acts heretofore done by Henry
Graves, Jr., and George Coe Graves, as executors
and trustees under the last will and testament of
Henry Graves, deceased, and have consented to
the settlement of the accounts of said trustees as
stated in their account bearing date March twenty-
first, one thousand nine hundred and twenty-two,
attached to the bill of complaint filed in this cause,
and in their account bearing date December thirty-
first, one thousand nine hundred and twenty-two,
attached to said memorandum of agreement bear-
ing date June twenty-third, one thousand nine
hundred and twenty-three, and filed in this cause
as aforesaid, and have agreed that the said trus-

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Exhibit C-1.

tees shall be relieved from all further duties of their said office and shall be released and discharged from any and all liability arising therefrom;

10 IT IS THEREUPON ON this 27th day of June, in the year one thousand nine hundred and twenty-three, ordered, adjudged and decreed that the account of Henry Graves, Jr., and George Coe Graves, trustees under the last will and testament of Henry Graves, deceased, bearing date March twenty-first, one thousand nine hundred and twenty-two, and attached to the bill of complaint filed in this cause and the account bearing date
20 December thirty-first, one thousand nine hundred and twenty-two, and attached to the said memorandum of agreement, bearing date June twenty-third, one thousand nine hundred and twenty-three, heretofore filed in this cause, be in all things allowed as reported, and that the said Henry Graves, Jr., and George Coe Graves, trustees under the last will and testament of Henry Graves, deceased, be and they hereby are relieved from all further duties of their said office as such trustees and released and discharged from any and all liability arising therefrom.

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E. R. WALKER,
C.

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Exhibit C-1.

**CERTIFICATE OF THE CLERK OF THE
COURT OF CHANCERY OF THE
STATE OF NEW JERSEY.**

I, JESSE R. SALMON, Clerk of the Court of Chancery of the State of New Jersey, the same being a Court of Record, do hereby certify that the foregoing from pages 1 to 41, both inclusive, is a true copy of (a) Settlement Agreement, (b) Account of Henry Graves, Jr., and George Coe Graves, Trustees under the Last Will and Testament of Henry Graves, Deceased, bearing date December 31, 1922; (c) Decree Approving Settlement Agreement and Ratifying and Confirming the Execution Thereof by Jesse R. Salmon, Clerk of the Court of Chancery, Guardian *ad litem* of Gwendolyn Graves, *et al.*; (d) Decree Approving Account of Henry Graves, Jr., and George Coe Graves, Trustees under the Last Will and Testament of Henry Graves, Deceased, and Discharging said Trustees, as the same are taken from and compared with the original filed June 27, 1923, in the cause wherein Henry Graves, Jr., and George Coe Graves, individually and as trustees, etc., *et al.*, are complainants and Harriet Isabella Graves, *et al.*, are defendants, and now remain on file in my office in said cause.

IN TESTIMONY WHEREOF I have here-
unto set my hand and affixed the seal
(SEAL) of said Court, at Trenton, this
day of _____, A. D. 1923.

Clerk of the Court of Chancery
of the State of New Jersey.

Exhibit C-2.

THE DELAWARE, LACKAWANNA AND WESTERN
RAILROAD COMPANY
Office of the President
90 West Street
New York

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August 25th, 1927.

To the Stockholders of
The Delaware, Lackawanna and Western
Railroad Company:

At a special meeting of the Board of Managers held March 23rd, 1927, a resolution was adopted directing the organization of the Lackawanna Securities Company under the Laws of the State of Delaware, with a capital stock of 844,411 shares of no par value, which will be distributed to you on the basis of one share of the new Company's stock for each two shares of the stock of this Company. To stockholders entitled to a half share of stock a scrip certificate will be issued therefor.

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To the new Company will be transferred from the treasury of your Company \$58,500,000 Glen Alden Coal Company bonds, payable \$1,500,000 per year, on September 1st, with interest at 4%. The Interstate Commerce Commission having refused its assent thereto, we cannot transfer to the Securities Company other issues of The Morris and Essex Railroad Company and The New York, Lackawanna and Western Railway Company Bonds held in the treasury of your Company as was proposed.*

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Pursuant to such resolution the Lackawanna Securities Company has been organized (the members of the Board of Managers of your Com-

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Exhibit C-2

pany and the President constituting its Board of Directors) and they have elected the following officers to manage such Company:

President.....	J. M. Davis	
Vice President and Secretary.....	J. G. Enderlin	
Treasurer and Assistant Secretary.....	G. W. Wildey	
Assistant Treasurer.....	C. L. Nicholl	10
Auditor	R. B. Ferguson	

At a meeting of the Board of Managers of your Company, held this day a resolution was adopted that September 6th, 1927, be the record date for the transfer by this Company to its stockholders of such date of the stock of the Lackawanna Securities Company. Certificates for such stock, with scrip certificates for fractional shares, on the basis above named, will thereafter be mailed to all stockholders of record on such date by registered letter, unless directions are received by the Treasurer of this Company from any stockholder to hold the same for personal delivery.

Respectfully submitted,

J. M. DAVIS,
President

* 9,871,000 3½% The Morris and Essex Railroad Company First Refunding Bonds due 2000. \$10,000,000 The Morris and Essex Railroad Company Construction Mortgage 5% Bonds due 1955. \$13,635,000 5% The New York, Lackawanna and Western Railway Company, First Refunding Bonds due 1973, Series A.

Exhibit C-3.

LACKAWANNA SECURITIES COMPANY
Office of the President
90 West Street
New York

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September 14th, 1927

TO THE STOCKHOLDERS OF THE
LACKAWANNA SECURITIES COMPANY:

We enclose herewith certificate of stock of this Company to which you are entitled under the reorganization plan adopted by the Board of Managers of The Delaware, Lackawanna and Western Railroad Company.

20 Scrip certificates for fractional shares must be exchanged for permanent stock certificates in share units on or before December 15th, 1927.

The assets of the Lackawanna Securities Company consist of \$58,500,000.00 First Mortgage 4% Gold Bonds of the Glen Alden Coal Company, payable serially, \$1,500,000.00 each year, on September first, interest payable semi-annually on March and September first. \$1,500,000.00 of the Glen Alden Bonds received by the Company were paid on September first.

30 The Board of Directors request your authority to sell the capital assets, or any part thereof, from time to time and to hold, reinvest or distribute the proceeds to the stockholders as liquidating dividends as in its judgment may seem advisable. A Special Meeting of Stockholders to grant such authority will be held at the office of the Company in the City of Hoboken, on the 14th day of October, 1927, at 11 o'clock A. M. A proxy therefor, which it is requested that you sign and mail in
40 the enclosed envelope, is enclosed herewith.

Exhibit C-3.

The Legal Department of the Company has advised your Directors that the distribution of the principal moneys received by the Company in payment of the aforesaid Glen Alden Bonds will not be taxable as income to its stockholders under either Federal or New York State laws until approximately fifty per cent (50%) or more of the same shall have been so distributed, depending in the case of each stockholder upon the amount paid for his Delaware, Lackawanna and Western Railroad Company stock. Such advices are approved, as to the law and method of computation, by written opinion of the Honorable Charles E. Hughes, and, as to the correctness of the computation, by Messrs. Lybrand, Ross Brothers & Montgomery, Certified Public Accountants.

Respectfully submitted,

J. M. DAVIS,
President.

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Stipulation.

(Filed July 22nd, 1929.)

IN CHANCERY OF NEW JERSEY.

10	Between HENRY GRAVES, JR., <i>et als</i> , Complainants, <i>and</i> EDWARD H. GRAVES, <i>et als</i> , Defendants.	}	On Bill, etc.
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20 Certain errors and discrepancies having appeared in the stenographer's minutes of the testimony taken in the above entitled matter before His Honor John H. Backes, Vice Chancellor, on January 11, 1929,

30 It is hereby stipulated and agreed by and between Messrs. Lindabury, Depue & Faulks, Solicitors for the Complainants, Henry Graves, Jr. and George Coe Graves, individually, and as trustee under the settlement agreement of June 23, 1923; John M. Emery, Esq., Solicitor for Defendants, Edward H. Graves, Daisy B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, 2nd, Isabella Graves Metcalf and Jean Stevenson Graves, an infant, appearing by
 40 Edward H. Graves, guardian *ad litem*; Messrs Wall, Haight, Carey & Hartpence, Solicitors for Defendants, Mary Dickson Graves, Florence Graves and Henry Dickson Graves, infants, appearing by their guardian *ad litem* Margaret Dickson Hewitt, and Margaret Dickson Hewitt, general guardian of said parties; and Albert C. Wall, Esq., Solicitor for Thomas Barber, Clerk of the Court of Chancery, guardian *ad litem* of Manton B. Metcalf, 3rd, Richard Goff Metcalf, Henry Graves, 2nd, Duncan Graves, Jr., and Nan Trimble Fullerton, that the said stenographer's minutes be amended as follows:

Stipulation.

Page 10, 7th line "\$114,000,000." should be changed to read "\$124,000,000."; 9th line \$15,000,000." should be changed to read "25,000,000."

Page 29, 4th line, the words "your father's death" should be changed to read "the settlement agreement."

Page 35, 3rd line, between the words "cash" and "dividends" should be inserted the words "and stock." 10

Dated

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants Henry
Graves, Jr. and George Coe Graves,
individually and as trustee under the
settlement agreement of June 23,
1923. 20

JOHN M. EMERY,
Solicitor for Defendants, Edward H.
Graves, Daisy B. Smith, Duncan
Graves, Gwendolyn Graves Fullerton,
George Coe Graves, 2nd, Isabella
Graves Metcalf and Jean
Stevenson Graves, an infant, appearing
by Edward H. Graves, guardian
ad litem.

WALL, HAIGHT, CAREY & HARTPENCE, 30
Solicitors for Defendants, Mary Dickson
Graves, Florence Graves and
Henry Dickson Graves, infants, appearing
by their guardian *ad litem*
Margaret Dickson Hewitt, and Margaret
Dickson Hewitt, general guardian
of said parties.

ALBERT C. WALL, 40
Solicitor for Thomas Barber, Clerk
of the Court of Chancery, guardian
ad litem of Manton B. Metcalf, 3rd,
Richard Goff Metcalf, Henry Graves,
2nd, Duncan Graves, Jr. and Nan
Trimble Fullerton.

Opinion.

(Filed April 19th, 1930.)

IN CHANCERY OF NEW JERSEY.

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Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, Trustees,

Complainants,

*and*EDWARD H. GRAVES, *et als.*,

Defendants.

Opinion.

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On Final Hearings.

A corporation dividend, declared and paid in stock of another company, is deemed a cash dividend.

For complainants, MESSRS. LINDABURY, DEPUE AND FAULKS (Mr. ASHMEAD).

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For defendants, Mr. JOHN M. EMERY, and MESSRS. WALL, HAIGHT, CAREY & HART-PENCE.

BACKES, Vice Chancellor:

The complainants, trustees, ask for a ruling whether a corporation dividend in stocks of another company should be treated as income or corpus.

Henry Graves tried to tie up the principal of his six million dollar estate for the benefit of his great

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Opinion.

grandchildren. By his testament he gave it to his executors in trust to pay it over to them upon the death of his last surviving grandchild; the meantime income to go to his descendants after paying his widow \$20,000 a year. The Chancellor declared the trust violated the rule against perpetuities and invalid because the estate might not vest within one and twenty years after lives in being; due to the possibility of birth of a grandchild after testator's death, which may not die within the period limited. *Graves v. Graves*, 94 N. J. Eq. 268. 10

His family, however, decided to carry out his wishes to some extent and to that end conveyed the estate to the trustees to hold the principal until the death of the last surviving grandchild *then living* and then to pay it over to the great grandchildren; the meanwhile income to go to the testator's descendants after an annuity of \$20,000 to the widow. The trust agreement varies from the invalid trust under the will in this respect: Under the latter, only the normal net income was to go to the descendants, while under the trust agreement all extraordinary cash or stock dividends declared prior to December 31, 1922, out of profits and surplus which had accrued after the testator's death (1906) were to be divided among testator's four children, and those declared after December 31, 1922, and up to the date of the trust agreement (June 23, 1923) were to be paid to the testator's descendants and it was further stipulated that, 20
 "All extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement." 30
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Opinion.

Concisely, the members of the family reserved to themselves all future extraordinary cash and stock dividends out of profit and surplus regardless of when the profits or surplus accrued, contrary to the testator's intentions that they should go to the great grandchildren. That was their privilege.

10 The estate was theirs and the trust was voluntary. The right to the dividends are governed by the agreement. The reservation being of all extraordinary dividends out of profits or surplus, past or future, the doctrine of apportionment between surplus and income is not involved.

The estate held a large block of stock of the Delaware, Lackawanna & Western Railroad Company. The railroad company sold its coal lands to the Glen Alden Coal Company, received in payment *inter alia* \$60,000,000 of its bonds. The railroad company transferred the bonds to a subsidiary, Lackawanna Securities Company, for all of the subsidiary's capital stock and thereupon divided the shares among its stockholders, one share for every two shares of stock of the railroad company. Some of the bonds had been liquidated and the proceeds divided. It is established, and not controverted, that the coal lands and their proceeds, the \$60,000,000 of bonds, were surplus holdings of the railroad company, and that the transfer of the bonds to the securities company was for convenience, to facilitate distribution, and, we are told, to minimize income tax. That the dividend was extraordinary, is obvious; and that the divisions of the shares of the securities company, representing the \$60,000,000 of bonds, is deemed a cash dividend is well settled. *Union & New Haven Trust Company v. Taintor*, 85 Conn. 452; *Old Colony Trust Co. v. Jameson*, 256 Mass. 179, 50 A. L.

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40 R. 372. Had the railroad company divided the

Opinion.

bonds immediately among its share holders or had cashed them and divided the money there could and in all probability there would have been no question as to the division falling precisely within the definition of "extraordinary cash or stock dividends", reserved to the family under the trust agreement.

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It is argued that the provision of the trust agreement above quoted applies only to stock dividends of corporations whose stock constitutes a part of the corpus of the estate. True, but this was a dividend on stock, not a stock dividend; *i. e.*, a division of \$60,000,000 of the surplus of the railroad company whose stock constituted a part of the corpus of the estate.

The trustees are instructed that the dividend belongs to income.

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Final Decree.

having duly considered the said pleadings, proofs and arguments of counsel;

And it appearing that on or about September 1, 1921, the Delaware, Lackawanna & Western Railroad Company, a corporation of the State of Pennsylvania, with the approval of its stockholders, sold and transferred all of its coal properties to the Glen Alden Coal Company, a corporation of the State of Pennsylvania, in consideration of the issuance and delivery to it of \$60,000,000 of the first mortgage bonds of the Glen Alden Coal Company, payable at the rate of \$1,500,000 each year commencing September 1, 1926, and bearing interest at the rate of four per centum (4%) payable semi-annually; that thereafter and on or about March 23, 1927, the said Delaware, Lackawanna & Western Railroad Company caused to be incorporated under the laws of the State of Delaware a corporation known as the Lackawanna Securities Company, and on August 25, 1927, transferred to the said Lackawanna Securities Company the \$58,500,000 of said bonds with accrued interest from March 1, 1927, amounting to \$1,141,848 then remaining unpaid in consideration of the issuance of the entire capital stock of the Lackawanna Securities Company, consisting of 844,411 shares of no par value, to the stockholders of the said Delaware, Lackawanna & Western Railroad Company in the proportion of one share of said Lackawanna Securities Company stock to each two shares of Delaware, Lackawanna & Western Railroad Company stock then owned by its stockholders, equitable provisions being made for fractional interests;

And it appearing that complainants, the said Henry Graves, Jr., and George Coe Graves, as Trustees under the Settlement Agreement of June

Final Decree.

23, 1923, mentioned in the bill of complaint, then holding as such Trustees 12,485 shares of the capital stock of the Delaware, Lackawanna & Western Railroad Company, received 6,242 shares of stock of the Lackawanna Securities Company and scrip certificate for one-half share; that on
10 or about September 1, 1927, the Lackawanna Securities Company received from the Glen Alden Coal Company \$1,500,000, representing the annual payment of principal on the bonds of the Glen Alden Coal Company falling due September 1, 1927, held by said Lackawanna Securities Company, and \$1,170,000 interest, which had accrued on said bonds from March 1, 1927, to September 1, 1927, amounting in all to \$2,670,000; that on
20 or about the first day of October, 1927, the said Lackawanna Securities Company distributed to its stockholders out of the said sum of \$2,670,000 received by it from the Glen Alden Coal Company on September 1, 1927, as aforesaid, the sum of \$2,533,233, each stockholder receiving \$3 per share for each share of the stock held by him or her, of which the said Henry Graves, Jr., and George Coe Graves, Trustees under the Settlement Agreement of June 23, 1923, then holding
30 6,242½ shares of the stock of the Lackawanna Securities Company acquired by them as aforesaid, received the sum of \$18,727.50; that on or about November 29, 1927, said Henry Graves, Jr., and George Coe Graves, as Trustees under the Settlement Agreement of June 23, 1923, took from the said sum of \$18,727.50, received by them as aforesaid, the sum of \$424.95 and purchased therewith 7½ shares of the said stock of the Lackawanna Securities Company, making a total of
40 6,250 shares of said stock acquired by them as aforesaid and all of which stock has since con-

Final Decree.

tinued to be and now is held by them; and that after deducting the sum of \$424.95 paid for said last mentioned stock, of the said sum of \$18,727.50 they now hold the sum of \$18,302.55; and have since received other dividends in cash upon said stock;

And it further appearing that the said Henry Graves, Jr., and George Coe Graves, Trustees under the said Settlement Agreement of June 23, 1923, pray instructions as to the true intent and meaning of the provision of the said Settlement Agreement of June 23, 1923, providing "that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement," and as to what disposition should be made of the said 6,250 shares of stock of the Lackawanna Securities Company and of the said sum of \$18,302.55 held by them as Trustees under the said Settlement Agreement of June 23, 1923, as aforesaid; and the Court being of the opinion that the coal lands and their proceeds, the \$60,000,000 in bonds of the Glen Alden Coal Company, were surplus holding of the Delaware, Lackawanna & Western Railroad Company, and that the transfer of said bonds to the Lackawanna Securities Company was for convenience, to facilitate distribution, and that the distribution of the stock of the Lackawanna Securities Company among the stockholders of the Delaware, Lackawanna & Western Railroad Company was in legal effect an extraordinary dividend from surplus of the Delaware, Lackawanna & Western Railroad Company represented by the

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Final Decree.

\$60,000,000 of bonds of the Glen Alden Coal Company.

It is, on this twenty-second day of April, 1930,

10 ORDERED, ADJUDGED AND DECREED, that by the provision of the Settlement Agreement of June 23, 1923, providing "that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate shall be considered and distributed as income whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement," it was intended by the creators of said Trust that all dividends of corporations declared out of surplus or net profits payable in
20 stocks, bonds or securities of other corporations or in other property, should be considered as cash dividends and distributed as income whether the same should be declared out of surplus or profits accruing prior or subsequent to the date of said agreement; and it is further

ORDERED, ADJUDGED AND DECREED, that the said 6,250 shares of the stock of Lackawanna Securities Company and the said sum of \$18,302.55 and any and all additional sums subsequently received
30 upon said stock by the said Henry Graves, Jr., and George Coe Graves, Trustees under the said Settlement Agreement of June 23, 1923, constitute income within the meaning of the clause of said Settlement Agreement hereinbefore referred to, and that all of said stock and cash should be distributed among the several persons entitled to the income of the said Trust estate in the proportions and in accordance with the terms of said Settlement Agreement of June 23, 1923;
40 and it is further

Final Decree.

ORDERED, ADJUDGED AND DECREED, that out of the income of said Trust created by the said Settlement Agreement of June 23, 1923, the said Henry Graves, Jr., and George Coe Graves, Trustees thereunder, do forthwith pay the costs of the complainants and of the answering defendants herein to be taxed by the Clerk of this Court, together with a counsel fee of \$5,000 and disbursements of \$143.23 to Messrs. Lindabury, Depue & Faulks, solicitors for and of counsel with the complainants; a counsel fee of \$3,000 and disbursements of \$26.85 to John M. Emery, Esq., solicitor for and of counsel with the defendants, Edward H. Graves, Daisy B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, 2nd, Isabella Graves Metcalf and Edward H. Graves, guardian *ad litem* for Jean Stevenson Graves and Jean Stevenson Graves, individually; a counsel fee of \$2,000 and disbursements of \$29.70 to Albert C. Wall, Esq., solicitor for and of counsel with Thomas Barber, guardian *ad litem* for the defendants, Duncan Graves, Jr., Henry Graves, 2nd, Richard Goff Metcalf, Nan Trimble Fullerton and Manton B. Metcalf, 3rd; and Messrs. Wall, Haight, Carey & Hartpence, solicitors for and of counsel with Margaret Dickson Hewitt, general guardian and guardian *ad litem* of the defendants, Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves.

Respectfully advised,

E. R. WALKER,
C.

JOHN H. BACKES,
V. C.

No. 92 MAY TERM, 1930.

New Jersey Court of Errors and Appeals

Between

HENRY GRAVES, JR., and GEORGE
COE GRAVES, individually and
as Trustees under a settlement
agreement dated June 23rd,
1923,

Complainants-Appellees,

and

EDWARD H. GRAVES and others,
Defendants-Appellants.

On Bill, &c.

Appeal from the
Court of
Chancery.

Brief on Behalf of Defendants, Thomas Barber, Clerk of the Court of Chancery, as Guardian *Ad Litem* of Manton B. Metcalf, II, Richard Goff Metcalf, Henry Dickson Graves, 2d, Duncan Graves, Jr., and Nan Trimble Fullerton, Infant Defendants; and Margaret Dickson Hewitt, Guardian *Ad Litem* and General Guardian of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves, Infants.

The question for decision is whether certain shares of Lackawanna Securities Company received by way of dividend on shares of Delaware,

Lackawanna & Western Railroad Company should be distributed as income to the life tenants under the Settlement Agreement of June 23rd, 1923 (Exhibit C-1; Case, p. 78), or whether these shares should be held by the trustees as a part of the corpus of the trust as this brief contends.

The opinion of BACKES, V. C., put the question as follows:

“The complainants, trustees, ask for a ruling whether a corporation dividend in stock of another company should be treated as income or corpus” (Case, p. 120, lines 36-39).

The will (Case, p. 29) of Henry Graves tried to tie up the principal of his six million dollar estate for the benefit of his great-grandchildren.

The Chancellor declared the trust violated the rule against perpetuities (*Graves v. Graves*, 94 N. J. Eq. 268).

The scheme and intent of the testator are clear and are settled conclusively by the opinion of the Chancellor in *Graves v. Graves*, 94 N. J. E. 268-275, where the Court says:

“These provisions, to my mind, evince a clear purpose of the testator to provide for grand and great-grandchildren and for the termination of the trust and distribution of the corpus on the death of his last surviving grandchild whenever born, whether before or after his death; for, having expressed the wish that the principal of his estate should remain intact for the benefit of his grandchildren and their families, and having provided that after-born grandchildren be let in to enjoy the income of the estate during the continuance of the trust, he proceeds, as I view it, to direct that upon the death of the last surviving grandchild, not surviving him, but surviving in any event, distribution be made of the corpus among his great-grandchildren. Thus he created by one class of grandchildren, namely, a

class including all of them, whenever born, equality among them being apparently of first importance and solicitude with him."

And on page 276 the Court says:

"In my opinion the meaning of the testator as to accumulations on the one hand, and payment out of income on the other, is plain. A stock dividend is not in the ordinary sense a dividend, the latter being a cash distribution of profits to stockholders as income from their investments. A stock dividend is an increase in the number of shares declared out of profits, the increased number representing exactly the same property as was represented by the smaller number of shares. *Kaufman v. Charlottesville W. M. Co.*, 93 Va. 673. The testator, therefore, meant that stock dividends should be added to the principal. He as clearly meant that special—that is, extraordinary, dividends should be added to principal. The words 'and other increase in value and accumulations to principal' must, I think, be considered as meaning no more than stock or special dividends. As the words are general in character and specify no particular sort of value or accumulation, they must be limited to the specific kind of increase, namely, stock and special dividends, and can have no application to regular yearly income or dividends. And this view is strengthened by his direction that regular yearly income or dividends only are to be distributed. Among the assets of testator's estate are shares of stock of the Delaware, Lackawanna and Western Railroad Company and the Atlas Portland Cement Company. On July 1st, 1909, the Delaware, Lackawanna and Western Railroad Company declared an extra dividend of fifty per cent. to its stockholders. This is clearly a special dividend and went to increase the corpus of testator's estate. On July 15th, 1909, a stock dividend of fifteen per cent. was declared, payable in shares of the capital stock of the company. This, of course, went to increase the cor-

pus. On October 26th, 1911, an extra dividend of thirty-five per cent, payable by distribution of stock of the company, was declared. This likewise went to increase the corpus. Another one hundred per cent. stock dividend was declared on July 28th, 1921, and went to increase the corpus. The regular yearly dividends on this stock have been twenty per cent. and these, according to the terms of the will, have been distributed to the life tenants. In December, 1920, a stock dividend of fifty per cent. was declared by the Atlas Portland Cement Company. This went to increase the corpus. The regular dividends of this company during the continuation of the trust have varied from two and one-half per cent. to eight per cent. and were distributed to the life tenants upon the long-entertained theory of the trustees that the trust was valid."

The pertinent provisions of the will of Henry Graves are (Case, p. 30, line 5):

"FOURTH.—Inasmuch as my sons have already received from me sufficient capital to make them independent during their lifetime, it is my wish that the principal of my estate should remain intact, without depletion or distribution, for the benefit of my grandchildren and their families, and to that end, I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, and wheresoever situate, unto my two sons, Henry Graves, Jr., and George Coe Graves, their heirs and assigns forever, in trust, nevertheless, to and for the following uses and purposes, that is to say";

then follow lettered clauses (a) and (b). (c) is as follows:

"All the increase in shares of stock special and stock dividends, and other increases in value or accumulations to principal, I direct my trustees to add to the principal in their hands and the regular yearly income or divi-

dends only shall be used for distribution in the manner hereinafter provided" (Case, p. 31, line 19).

then follow clauses (d), (e), (f), (g) and (h).

The testator's scheme was overthrown by the Chancellor because it violated the rule against perpetuities in that the vesting of the corpus possibly might occur beyond the time permitted by the rule, and his opinion (p. 277) said:

"In leaving the questions, I desire to express my regret that I have been unable to reach the conclusion that this trust in favor of grandchildren and great-grandchildren, so clearly, expressed by the testator, must be defeated because of the inexorable operation of a rule of construction firmly established in the law. And it is all the more regrettable because it compels a decision against the interest of infant defendants."

In the light of the testator's will and the opinion of the Chancellor referred to above, the agreement of June 23rd, 1923, was drawn (Case, p. 78, Exhibit C-1).

That agreement was brought about by the desire to carry out the scheme of the will of Henry Graves, deceased. The third "Whereas" of the agreement is:

"WHEREAS litigation over the matters involved in said suit is highly distasteful to the parties hereto and the parties of the second part are willing and anxious to carry out the scheme of their father's will insofar as the same may be practicable and in particular to make provision for his grandchildren and great-grandchildren in the manner and to the extent hereinafter set forth" (Case, p. 80, line 10);

and at Case, page 80, line 18, is this provision:

"Now, THEREFORE, in order to bring said litigation to an end and to carry out as far as

may be the wishes of the said testator as indicated by his will and to make reasonable provision for the said grandchildren and great-grandchildren, and as a family settlement, the parties hereto have consented and agreed, and do hereby consent and agree, for themselves, their heirs, executors and administrators, and for the various classes they severally or collectively represent, as follows:"

2 (a) of that agreement provided that the trustees should pay all undistributed extraordinary cash and stock dividends which accrued *prior* to December 31st, 1922, and which had been retained and accumulated by the trustees under Paragraph (c), Clause Fourth of the Will of Henry Graves insofar as the same were declared out of profits or surplus accruing since his death, together with all accretions thereto and income accruing thereon since December 31st, 1922, equally to the four children of the testator (Case, p. 81, line 37).

2 (b) provided that the trustees should pay all undistributed regular income of the estate which accrued prior to December 31st, 1922, as well as the undistributed income of said estate, including all the extraordinary cash and stock dividends accruing *since* December 31st, 1922, and prior to the date of the agreement to the widow, children, grandchildren and children of deceased grandchildren of the testator in the manner and proportions provided in Clause Fourth, Paragraphs (d), (e) and (f) of the testator's will for the distribution of regular annual income (Case, p. 82, line 13).

Clause (d) of the agreement dealt with the residue out of which, after paying the amount set aside for the widow, the trustees were to pay the income to the children and grandchildren of the testator, including grandchildren born subsequent

to the date of the agreement, during their respective lives or until the death of the last survivor of the children and grandchildren of the testator in being June 23rd, 1923. Upon the death of the last survivor, *the principal with all accumulations and increases thereof was to be paid to the great-grandchildren of the testator equally* (Case, p. 83, line 14).

Then there follow various clauses in the agreement. A clause authorizing the continuance of investments. A clause providing for the appointment of a new trustee in case of death, etc. A clause providing for compensation of the trustees. A clause requiring submission of the agreement to the Chancellor and execution by the guardian *ad litem* of the infant defendants, and then (p. 86, lines 12-25 of Case) there follows this clause:

“This agreement is made under, and shall be construed according to, the laws of the State of New Jersey, except that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be construed and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement. The terms ‘grandchildren’ and ‘great-grandchildren’ as used in this agreement are understood to include and do include only the lawful issue of the children and grandchildren of the testator.”

POINT I.

The Settlement Agreement of June 23rd, 1923 (C-1, Case, p. 78), and not the adjudged cases on apportionment of corpus and income, governs the solution of the question before the Court.

If the Settlement Agreement did not cover the disposition of stock dividends, extraordinary dividends and special dividends, a discussion of the authorities would be apposite; but it does cover such dividends just as the will of Henry Graves (Article Fourth, subdivision (c), Case, p. 31, line 19) covered them, and it was this will which the Settlement Agreement was, by express terms, endeavoring to carry out insofar as was "practicable" (Case, p. 80, line 14). Consequently, the Settlement Agreement is the standard which the parties set up, not substantive law nor the financial history of the Delaware, Lackawanna & Western Railroad Company. The agreement is explicit. It gave to the four children of testator all undistributed extraordinary and stock dividends accrued prior to December 31st, 1922, retained and accumulated under Paragraph (c), Clause Fourth of the will set out *supra*. It gave to the widow, the four children, the grandchildren and children of deceased grandchildren of testator all undistributed regular income accruing prior to December 31st, 1922, and all undistributed income, including all extraordinary cash and stock dividends accruing since December 31st, 1922, up to the date of the agreement in the manner provided in Clause Fourth, Paragraphs (d), (e) and (f) of testator's will. These two clauses of the agreement, *i. e.*, 2 (a) and 2 (b), took care of the situation up to the date of the agreement.

Clause (d) of the agreement provided for the future. It gave the rest of the estate as follows:

The income for life (omitting the widow's \$20,000 per year) went to the four children, the grandchildren of testator, including grandchildren born after the date of the agreement.

On the death of the last survivor of the children and grandchildren alive at the date of the agreement, *the principal with all accumulations and increases thereof* is to go to the great-grandchildren of the testator.

The language (Case, p. 84, lines 11-29) is:

"Upon the death of the last survivor of the children and grandchildren of the testator in being at the date of this instrument, the said trustees shall divide the principal of said trust estate, with all accumulations and increases thereof, to and among the great-grandchildren of the testator, share and share alike, the issue of any deceased great-grandchild to receive the share its parent would have received if living, provided, however, that any grandchild born after the date of this agreement who shall have no children in being at the time of said distribution shall be considered as a great-grandchild and shall receive the same proportion of the corpus as the other great-grandchildren of the testator, To have and to hold unto her, him or their heirs, executors, administrators and assigns forever."

Thus, it is clear that Clauses 2 (a), (b) and (d) of the agreement provided:

To the children of the testator all undistributed extraordinary cash and stock dividends which accrued *prior* to December 31st, 1922, retained and accumulated by Henry and George as trustees under Clause 4 of the will insofar as the same were declared out of profits since death of testator—

August 29th, 1906 (Case, p. 8, line 22), and also all accretions thereto and income accruing thereon since December 31st, 1922.

2 (a) (Case, p. 81, line 36; to p. 82, line 13).

To the widow, children, grandchildren and children of deceased grandchildren of testator all undistributed regular income accruing *prior* to December 31st, 1922, as well as the undistributed income, including all extraordinary cash and stock dividends accrued *since* December 31st, 1922, up to date of agreement (June 23rd, 1923).

2 (b) (Case, p. 82, line 14 to 28).

To the children and grandchildren of testator, including grandchildren born subsequent to June 23rd, 1923, during life or until the death of the last survivor of the children and grandchildren of testator alive on June 23rd, 1923, the rest of the income on the residue. Upon the death of such last survivor the trustees are to divide *the principal of said trust estate with all accumulations and increases thereof* among the great-grandchildren.

2 (d) (Case, p. 83, lines 15-33).

There should be no question that the phrase the *principal "with all accumulations and increases thereof"* included extraordinary dividends.

The opinion of the Chancellor in *Graves v. Graves*, 94 N. J. Eq., pages 268-276, so held: "He (the testator) as clearly meant that special—that is, extraordinary dividends, should be added to principal. The words 'and other increases in value and accumulations to principal' must, I think, be considered as meaning no more than stock or special dividends."

The agreement was drawn in the light of this definition. The lawyer who drew it used the identical words of the will and the Chancellor's opinion. The appeals were dismissed so that the record could be remitted to the Chancellor to pass on the provisions of the agreement (Case, bottom of p. 79 and top of p. 80).

Can any one doubt that the Chancellor concluded, as he had a right to conclude, that Clause 2 (d) of the agreement (p. 84 of Case, line 11) safeguarded special dividends for the grandchildren as "accumulations and increases" of principal?

Can any one doubt that the Chancellor would have considered that the dividend at bar was such a special dividend as he described on page 276 of 94 N. J. Equity?

He dealt in his opinion with this very D. L. & W. stock, the dividend on which goes to income if the decree appealed from is right.

The Chancellor said (p. 276 of 94 Equity):

"Among the assets of testator's estate are shares of stock of the Delaware, Lackawanna and Western Railroad Company and the Atlas Portland Cement Company. On July 1st, 1909, the Delaware, Lackawanna and Western Railroad Company declared an extra dividend of fifty per cent. to its stockholders. This is clearly a special dividend and went to increase the corpus of testator's estate. On July 15th, 1909, a stock dividend of fifteen per cent. was declared payable in shares of the capital stock of the company. This, of course, went to increase the corpus. On October 26th, 1911, an extra dividend of thirty-five per cent., payable by distribution of stock of the company, was declared. This likewise went to increase the corpus. Another one hundred per cent. stock dividend was declared on July 28th, 1921, and went to increase the corpus. The regular yearly dividends on this stock have been twenty per cent. and these, according to the

terms of the will, have been distributed to the life tenants. In December, 1920, a stock dividend of fifty per cent. was declared by the Atlas Portland Cement Company. This went to increase the corpus. The regular dividends of this company during the continuation of the trust have varied from two and one-half per cent. to eight per cent. and were distributed to the life tenants upon the long-entertained theory of the trustees that the trust was valid."

Let us abandon for a moment textual construction and consider the larger elements of the situation.

The Chancellor had regretfully reached the conclusion that the inexorable rule of law against perpetuities forced him to overthrow the will. He says (p. 277 of 94 Equity):

"In leaving the questions I desire to express my regret that I have been unable to reach the conclusion that this trust in favor of grandchildren and great-grandchildren so clearly expressed by the testator must be defeated because of the inexorable operation of a rule of construction firmly established in the law. And it is all the more regrettable because it compels a decision against the interest of infant defendants."

The agreement shows that the widow and children and the parties interested (and in being) agreed with the Chancellor. Here was no scramble of factions. The purpose was to revere and carry out the plain intention of the testator "so far as practicable."

It violates common sense to say that this purpose was served by a construction of the agreement which gives all extraordinary cash and stock dividends accruing between death of testator, August 29th, 1906, and December 31st, 1922—sixteen years—to the children (Clause 2a) and all such dividends accruing between December 31st, 1922,

and June 23rd, 1923,—less than six months—to the widow, the children, grandchildren and children of deceased grandchildren (2b); and deprives the great-grandchildren and the issue of deceased grandchildren of any special dividend representing accumulations and increases of the principal secured to them by 2 (d)

Today we are dealing only with the Lackawanna Securities shares declared as a dividend on the D., L. & W. stock; but if the decree below is affirmed, no man can say what depletions of the principal belonging to the great-grandchildren will take place by reason of future stock and extraordinary dividends being turned over as income.

Let us look again at the will of the testator which the agreement asserted it was carrying out so far as “practicable.”

The opening sentence of the Fourth Clause of the will is:

“FOURTH: Inasmuch as my sons have already received from me sufficient capital to make them independent during their lifetime, it is my wish that the principal of my estate should remain intact without depletion or distribution for the benefit of my grandchildren and their families, and to that end I give, devise and bequeath.” &c.

Clause (e) of the testator’s will was in respect of the residue—“to divide the remaining income from time to time into as many parts as there may then be children and grandchildren me surviving, and to pay one of such parts unto each of my said children and grandchildren during their natural life, annually or at such period as shall be most convenient to my said trustees, and in the event of any of my grandchildren being under the age of twenty-one years, to pay the share of the income which would have been such grandchild’s, to its guardian.”

In view of the comprehensive provisions of the agreement and its avowed purpose, surely it is an unwarrantable extension of the whole spirit of the document and its reverence for the intention of the testator to hold:

“Concisely, the members of the family reserved to themselves all future extraordinary cash and stock dividends out of profit and surplus regardless of when the profits or surplus accrued, contrary to the testator’s intentions that they should go to the great-grandchildren. That was their privilege. The estate was theirs and the trust was voluntary. The right to the dividends are governed by the agreement. The reservation being of all extraordinary dividends out of profits or surplus, past or future, the doctrine of apportionment between surplus and income is not involved” (Case, p. 122, lines 1-16).

We respectfully submit that under the adjudicated language of the agreement, the dividend in question, as well as all future extraordinary cash and stock dividends, go to the principal of the Trust estate.

POINT II.

The clause quoted just before Point I of this brief (and on p. 86, lines 12-22 of Case) was not intended to and does not overrule the provision that special dividends were to be a part of the great-grandchildren’s principal under Clause 2d of the agreement (Case, p. 54, lines 11-29).

The evident intent of the draughtsman of the clause was to avoid any question as to the law of

New Jersey in respect of the apportionment of income and corpus, and to set up the preceding provisions of the agreement as the sole standard governing the parties.

This is borne out—

1. By the fact that the clause says “whether the same (*i. e.*, all extraordinary cash or stock dividends) shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement.”

This provision is in direct conflict with the provision of 2b (p. 82, line 13) disposing of extraordinary cash and stock dividends for the period between December 31st, 1922, to June 23rd, 1923, for those dividends were declared out of surplus or profits accruing prior to the date of the agreement.

2. The clause is also in conflict with the provision of 2d (p. 84, lines 11-29) for the reasons pointed out in Point I.

3. Clauses 2a, 2b and 2d comprise a comprehensive scheme for the disposition of all extraordinary or special dividends past, present and future.

4. The position of the clause on page 86, lines 12-22 far removed from the carefully drawn complete scheme in 2a, 2b and 2d, enforces the evident fact that the clause as to construction of the agreement under the laws of New Jersey was not meant to conflict with the complete scheme of allocation of special dividends.

POINT III.

**Under the agreement of June 23rd, 1923
(Case, p. 78), the shares of Lackawanna
Securities Company should be treated as a
part of the corpus of the trust.**

Respectfully submitted,

WALL, HAIGHT, CAREY & HARTPENCE,
Solicitors for the parties named
at the head of this brief.

ALBERT C. WALL,
Of Counsel.

New Jersey Court of Errors and Appeals

HENRY GRAVES, JR. and GEORGE
COE GRAVES, Trustees under a
Settlement Agreement dated
June 23, 1923,

Complainants-Appellees,

vs.

EDWARD H. GRAVES and others,
Defendants-Appellees,

and

THOMAS BARBER, Guardian *ad*
litem, and others,
Defendants-Appellants.

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES Edward H. Graves, Daisey B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, 2d, Isabella Graves Metcalf and Jean Stevenson Graves.

This appeal is taken from a final decree of the Court of Chancery advised by Vice-Chancellor Backes on April 22, 1930.

a.

Parties.

The parties to the appeal are:

1. As appellants—the defendants Thomas Barber, guardian *ad litem* for Duncan Graves, Jr., Henry Graves, 2nd, Richard Goff Metcalf, Nan Trimble Fullerton and Manton B. Metcalf, 3d, and Margaret Dickson Hewitt, general guar-

dian and guardian *ad litem* of Mary Dickson Graves, Florence Barbara Graves and Henry Dickson Graves.

The appellants are infants who defend by their said guardians.

2. As appellees—the defendants Edward H. Graves, Daisey B. Smith, Duncan Graves, Gwendolyn Graves Fullerton, George Coe Graves, 2d, Isabella Graves Metcalf and Jean Stevenson Graves; and

The complainants, Henry Graves, Jr., and George Coe Graves, Trustees under a Settlement Agreement dated June 23, 1923.

b.

Questions Involved.

The complainants, Trustees under the Settlement Agreement of June 23, 1923, hold as part of the trust corpus a number of shares of stock of the Delaware, Lackawanna & Western Railroad Company.

1. The primary question involved is whether, under the provisions of that Agreement, a dividend to stockholders of said Railroad Company paid in stock of another company (the Lackawanna Securities Company) is distributable to those entitled to income, or whether it is to be retained as part of the trust corpus.

The opinion and decree of the Chancery Court adjudged that under the provisions of the agreement the Securities Company stock received by the Trustees constituted income and not corpus. These appellees are beneficiaries of the trust income, and they contend that the decree should be affirmed.

2. A secondary question, really depending on the decision of the first question, is whether or not subsequent distributions made by the Lackawanna Securities Company to its stockholders are income or corpus.

STATEMENT OF THE CASE.

1.

Circumstances leading up to the execution of the Agreement of Settlement of June 23, 1923.

Henry Graves, Sr., died testate on August 26, 1906, resident in Essex County. He appointed two of his sons, Henry Graves, Jr., and George Coe Graves, the executors and trustees of his will.

The testator left surviving him a widow, Harriet Isabella Graves, and four children, Henry Graves, Jr., George Coe Graves, Edward H. Graves and Daisey B. Smith. Five grandchildren survived him. Another grandchild, Jean Stevenson Graves, was born after his death. The infant appellants are great-grandchildren of the testator.

Testator, expressing a desire to preserve the corpus of his estate intact for the benefit of his great-grandchildren, postponed the vesting and payment of the principal until the death of his last surviving grandchild. He further directed that all the increase in shares of stock, special and stock dividends, and other increase in value or accumulations to principal, be added to the principal; and upon the death of the last surviving grandchild, he directed the trustees to divide the principal of the estate with all accumulations and increases thereof among his great-grandchildren. Subject to an annuity of \$20,000

to his widow, he gave the regular yearly income to his children and grandchildren in equal parts (Will; Case, pp. 29-33).

The executors and trustees of the will administered the estate in accordance with its directions until 1922, when Henry Graves, 3d, one of the grandchildren, died. They then filed a bill in Chancery for a construction of the will. The Chancellor held that the will violated the rule against perpetuities and that the trusts were void, except as to the annual payment to the widow. *Graves v. Graves*, 94 N. J. Eq. 268.

The whole corpus of the estate (subject to a fund required to produce \$20,000 per annum for the widow) devolved upon and vested in the four children, Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, in equal shares. The trusts being void, it also followed that the four children were legally entitled to the entire income (except \$20,000 per annum) from the date of the testator's death. The executors or trustees had paid, from 1906 to 1922, more than one-half of that income to the grandchildren. Six grandchildren were living in 1922, only one of whom was born after testator's death.

Shortly after the Chancellor's decision was rendered and decree entered, the testator's family entered into the Agreement of Settlement of June 23, 1923, which the Chancellor approved on behalf of the infants (Exh. C. 1; Case, pp. 78-87). That Agreement created new trusts, in some respects similar to the old. Testator's four children relinquished any claim for income paid to the grandchildren in the past, amounting to approximately \$2,000,000. They also released their interests in the corpus proper of the estate,

with the reservation hereinafter noted. The market value of such corpus, exclusive of extraordinary cash and stock dividends declared out of corporate profits or surplus earned after the death of the testator in 1906, was \$4,829,963 (Case, p. 101, l. 26). The children retained so much of those extraordinary dividends as represented earnings after the testator's death (Agreement, Clause 2 (a); Case, pp. 81-82).

The interest in corpus and claim for income, which each child released, amounted roughly to somewhat more than \$1,700,000. Provision was made in the Settlement Agreement to compensate them in some degree for what they were giving up. The children reserved the right to share equally with grandchildren in the income payable during the life of the trust; and there was a clause preserving their fair share in extraordinary corporate distributions declared out of surplus or profits.

The provision as to income—Clause 2, Par. (d)—after providing for the payment of \$20,000 to the widow annually, reads:

“and to divide, transfer, or pay over the rest, residue and remainder of said income to and among the children and grandchildren of the testator, including grandchildren born subsequent to the date of this agreement per capita, during their respective natural lives, or until the death of the last survivor of the children and grandchildren of the Testator in being at the date of this agreement. In the case of Henry Graves, 3d, a grandchild now deceased, and of the death of any other grandchild leaving lawful issue him or her surviving, the share or portion of the income which would have belonged to said grandchild had he or she lived shall be distributed in equal portions to his or her issue” (Exh. C. 1; Case, p. 83).

The paragraph preserving their interests in extraordinary distributions is as follows:

“This agreement is made under, and shall be construed according to, the laws of the State of New Jersey, except that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement” (Case, p. 86).

The trusts established by the Settlement Agreement terminate “upon the death of the last survivor of the children and grandchildren in being at the date of this instrument,” when the trustees shall divide the corpus in equal shares among the great-grandchildren, the issue of a deceased great-grandchild to represent the parent (Case, p. 84).

The dividends in question here consist in 6242½ shares of stock of the Lackawanna Securities Company, received by the complainants as Trustees under the Settlement Agreement about August 25, 1927. They purchased 7½ shares later. The Trustees received the sum of \$43,302.55 as dividends upon the stock of the Securities Company before their bill of complaint was filed herein. Other dividends have been received since.

The dividend in stock of the Lackawanna Securities Company was paid by the Delaware, Lackawanna & Western Railroad Company, the Trustees holding 12,485 shares of the Railroad stock. The Securities Company was formed by the Railroad Company some years after the Railroad disposed of its coal properties to the Glen Alden Coal Company, for \$60,000,000 of bonds of the latter company and certain other consideration, in the manner hereafter shown.

The history of the Delaware, Lackawanna and Western Railroad Company, of the sale of its coal properties to the Glen Alden Coal Company, and of the formation of the Lackawanna Securities Company.

The testimony given by Mr. P. D. Jonas, who is the statistician of the Delaware, Lackawanna and Western Railroad Company, briefly told of the Railroad's history—the original acquisition of its railroad and coal properties, the cost of the coal lands, their transfer to the Glen Alden Coal Company in 1921, and the organization of the Lackawanna Securities Company in 1927 (Testimony of Jonas, Case, pp. 51-66).

The Delaware, Lackawanna and Western Railroad Company was formed in 1853, under the laws of Pennsylvania, by the consolidation of two other corporations of that State, the Liggett's Gap Railroad Company, organized under a special act, and the Delaware and Cobbs Gap Railroad. A number of other companies were merged with it in the years 1865 to 1870. The properties merged consisted partly of coal lands and coal mining facilities, and partly of railroad properties. They were acquired with stock or bonds of the Delaware, Lackawanna and Western Railroad Company. The Railroad still owns the railroad properties. During the period that it owned the coal lands, it operated them as a separate department (Case, pp. 51-52).

The original cost of the coal lands, as nearly as can be arrived at, was about \$11,000,000, exclusive of plant and equipment. The coal lands were charged at cost on the Railroad's books to "capital investment account." Thereafter the Railroad Company made extensive improvements

to those coal lands, spending for that purpose some \$43,000,000 from 1870 to 1921. Although that sum might have been charged to "capital investment account" as giving additional value to the properties, Mr. Jonas said that the expenditures were not so charged in fact, but were treated as operating expenses and charged to surplus. It was the policy of the Railroad Company to charge payments for additions, betterments, developments, plant and equipment to operating expenses (Case, pp. 52-53). As the cost of those improvements were currently charged to operating expenses, no depreciation reserve was set up (Case, pp. 54, 65).

Depletion through mining of coal was taken care of on the railroad's books, not by setting up a separate depletion account or reserve, but by a charge of 10c per ton mined to the "profit and loss" account, and a concurrent credit of like amount to the "capital investment account" in reduction of the assets. That procedure was followed until 1907, at which time the entire original cost of the coal lands had been written off the books. The total amount written off was \$11,005,576.40 (Case, pp. 54, 64-66).

It appears that the Railroad Company's books showed a surplus of \$29,244,911.66 on December 31, 1907, notwithstanding the writing off of the coal lands (Case, p. 55).

The operation of the income tax law made it advisable, about 1909, to set up the coal properties on the books as an asset, in order to obtain the benefit of a deduction from gross income on account of depletion. The lands were given a book value of \$124,000,000 and an asset account called "Value of Coal Lands" was

opened and charged with that amount. Another account called "Accrued Value of Coal Lands" was opened and concurrently credited with a like amount. After that the Railroad wrote off 25c for each ton of coal mined, and concurrently reduced the asset and surplus account by the amount of such depletion. A total of \$25,000,000 was written off in this way up to 1921, when the coal properties were segregated (Case, pp. 55, 56-57; 119, ll. 1-3).

The Railroad Company also purchased a few other coal properties between 1907 and 1921, at a cost of \$1,831,383.30. Those properties were purchased with its surplus earnings (Case, p. 57).

Pennsylvania State taxes were levied annually on the coal lands, based upon the value of a foot-acre of mining lands, irrespective of whether the coal had been mined or not. About three-fourths of the tax fell upon coal in the ground. Those taxes amounted to approximately \$1,000,000 a year for the ten years preceding 1921. The amounts paid for taxes were charged to operating expenses against the income of the mining properties each year (Case, pp. 53-54).

The Railroad also paid advanced royalties on certain leases, which were also charged against income (Case, p. 54).

The Glen Alden Coal Company.

The Delaware, Lackawanna and Western Railroad Company divested itself of its coal properties about September 1, 1921, in the following manner:

The Glen Alden Coal Company was organized about September 1, 1921, and it invited the stockholders of the Railroad Company to subscribe (share for share) to its no par value stock at \$5. per share.

That offer was accepted by the Railroad stockholders. The Railroad Company then sold all its coal properties to the Glen Alden Coal Company, which the Coal Company paid for by giving a purchase money mortgage to secure \$60,000,000 of 4% bonds, and by assuming certain small obligations and certain contingent liabilities which might arise upon possible default on old leases (Case, pp. 58-59).

The principal of the Glen Alden bonds was payable in installments of \$1,500,000.00 annually from September 1, 1926, with a provision for an increase in the event that more than a fixed amount of coal was mined. Interest was payable semi-annually (Case, pp. 59-60).

Mr. Jonas testified that in the sense of "capital" as representing the consideration for which capital stock was issued, the Railroad Company did not consider the \$60,000,000 of bonds as capital. It treated those bonds as capital assets and charged them to "capital asset account" (Case, p. 60).

Lackawanna Securities Company.

In August, 1927, the Delaware, Lackawanna & Western Railroad Company organized the Lackawanna Securities Company. The Railroad Company transferred to the Securities Company \$58,500,000 Glen Alden bonds, with accrued interest. In consideration the Securities Company issued its capital stock (no par) to the stockholders of the Railroad Company, one share of Securities Company stock for each two shares of Railroad Company stock (Case, pp. 60-61; Exh. C. 2 and C. 3, pp. 114-115).

Upon making the transfer, the Railroad charged the \$58,500,000 of principal and accrued interest to its "profit and loss account." That

charge, as Mr. Jonas testified, would have been the same had the Railroad chosen to dispose of the bonds for cash and to distribute the proceeds directly to the stockholders as an extraordinary cash dividend; and would have been the same if the Railroad had chosen to increase its capital stock in like amount and to distribute the new capital stock to its stockholders as a stock dividend (Case, p. 61).

The Lackawanna Securities Company received installments of both principal and interest on the Glen Alden bonds, and in turn it paid dividends therefrom to its stockholders. Insofar as its dividends to stockholders were paid out of receipts from installments of principal, they constituted capital of the Securities Company. Such portion as was derived from interest represented income.

The Securities Company, up to the time of the filing of the bill of complaint herein, had distributed to its stockholders the following amounts per share:

October 1, 1927—\$3 out of capital.

March 1, 1928—\$1 out of income.

Sept. 1, 1928—\$3 (\$1.657 capital; \$1.343 income) (Case, p. 61, ll. 22-31).

Jonas further testified that using the word "capital" as representing the consideration for which capital stock is issued, the Railroad Company did not reduce its capital by completely writing off the original cost of its coal property. It merely reduced its "capital investment account" *pro tanto*. The Railroad Company owned railroads as well as coal lands, and taking both together the "capital investment account" always exceeded the "capital stock account." There was always a surplus, which increased from time to time (Case, pp. 55-56).

The witness further said that the Railroad invested under the account carried as "capital investment account" a great deal more than the amount of its outstanding stock. At no time was there any encroachment on the capital stock as represented by capital assets (Case, pp. 65-66). A large surplus existed, even after the coal properties were segregated (1921) and after the Glen Alden bonds were transferred to the Lackawanna Securities Company (1927). Those transactions did not encroach upon the capital stock as represented by capital assets.

3.

Capital stock and surplus of the Delaware, Lackawanna and Western Railroad Company and of the Glen Alden Coal Company.

As above noted, for each ton of coal mined the railroad charged off 10c against its capital investment account. Having regard to the fact that at least the cost of the coal mined should be deducted from surplus, Jonas said that about two-thirds of the total of \$11,000,000 was taken in fact from surplus earnings. In the same way the \$43,000,000 spent for improvements on the coal lands, less such depreciation as these improvements suffered, likewise came from surplus earnings (Case, pp. 64-65).

The capital stock outstanding of the Railroad Company consists of 1,688,820 shares of the par value of \$50 each, or a total of \$84,441,000.

The railroad company's surplus over and above the amount of capital stock outstanding was, on the dates given below:

Dec. 31, 1907	\$ 29,244,911.66
“ 1922	121,141,254.90
“ 1923	123,911,281.73
“ 1924	126,779,229.81
“ 1925	129,601,819.05
“ 1926	136,034,252.04
“ 1927	78,742,613.78

(Case, pp. 55, 62.)

The surplus for 1928 was somewhat larger than for 1927. The books had not been closed at the time Jonas testified, so that he could not give the exact figure. The drop in 1927 is accounted for by the disposal of \$58,500,000 of Glen Alden bonds.

The market value of the stock of the Delaware, Lackawanna and Western Railroad Company is higher now than it was on the date of the Settlement Agreement, June 23, 1923. It was \$116 a share then. At the time testimony was taken (January 11, 1929) it was \$127 per share, an increase of \$11. In 1928 the market value ranged from \$130 to \$150.

The corpus of the Graves Trust has 12,485 shares of Railroad stock. $12,485 \times \$11 = \$137,335$; the increase in value of corpus represented by Railroad stock from the date of the agreement to the time of the hearing.

The Glen Alden Coal Company stock was subscribed for at \$5 per share and was allocated wholly to trust corpus. It was quoted at \$66 on June 23, 1923, and had a market value at the time of hearing of \$138 per share.

The Glen Alden stock has increased in value about \$133 per share since it was issued. (\$138-\$5.)

12,470 shares x \$133=\$1,694,480; which represents the increase to trust corpus since the Coal Company was organized.

The coal stock has increased about \$72 per share since June 23, 1923 (\$138-\$66).

12,740 x \$72=\$877,280; which represents the increased value of corpus since the date of the Trust Agreement.

There was no decrease in market value of Graves Trust corpus following the dividend in stock of the Lackawanna Securities Company.

4.

Lackawanna stockholdings of the Estate of Henry Graves, Sr., and of the Trustees under the Settlement Agreement.

Henry Graves, Sr. owned 7,500 shares of the stock of the Delaware, Lackawanna and Western Railroad Company at the time of his death. His estate later acquired additional stock by purchase, stock dividends or exercise of subscription rights. On June 23, 1923, the estate held 25,480 shares.

Through ownership of the Railroad Company stock, the trustees of the testator's will acquired stock of the Glen Alden Coal Company, and the trustees under the Settlement Agreement received the stock of the Lackawanna Securities Company.

The following schedule shows the time and manner of acquisition, and method of allocation of those stocks.

1. *Delaware, Lackawanna & Western Railroad Co. stock.*

<i>Date.</i>	<i>Manner of Acquisition.</i>	<i>No. of Shares.</i>
Aug. 29, 1906	Owned by Henry Graves, Sr.....	7500
May 7, 1908	Trustees purchased	200
May 11, 1908	Trustees purchased	200
Aug. 2, 1909	15% stock dividend	1185
Dec. 23, 1909	Trustees purchased	15
Dec. 29, 1914	Purchased thru subscription rights (40%)	3640
Dec. 31, 1921	Stock dividend of 100%.....	12740
		25480

Under the terms of the Settlement Agreement, Clause 2 (a) (Case, pp. 81-82) 12,995 shares representing surplus or profits earned since the testator's death (1906) were allocated to the four children, and 12,485 shares were allocated to corpus of the Graves Trust.

2. *Glen Alden Coal Company.*

<i>Date.</i>	<i>Manner of Acquisition.</i>	<i>No. of Shares.</i>
Aug. 5, 1921	Subscribed to at \$5. per share (no par). All allocated to trust corpus..	12740

3. *Lackawanna Securities Company.*

<i>Date.</i>	<i>Manner of Acquisition.</i>	<i>No. of Shares.</i>
Aug. 25, 1927	Received as dividend on shares of D., L. & W. R. R. Co.....	6242½
Nov. 29, 1927	Trustees purchased	7½
		6250

The Securities Company stock is the subject of this suit, and has not been allocated.

The foregoing appears from the testimony of the complainant, Henry Graves, Jr. (Case, pp. 69-72).

ARGUMENT.**POINT I.**

The dividend paid by the Delaware, Lackawanna and Western Railroad Company in stock of the Lackawanna Securities Company was declared out of the railroad's surplus or profits.

The testimony in the case, which is outlined in the foregoing part of this brief, established clearly that the dividend in stock of the Securities Company was declared out of the Railroad's surplus or profits. As the Vice-Chancellor said:

“* * * It is established, and not controverted, that the coal lands and their proceeds, the \$60,000,000 of bonds, were surplus holdings of the railroad company, and that the transfer of the bonds to the securities company was for convenience, to facilitate distribution, and, we are told, to minimize income tax” (Case, p. 122).

Perhaps it would be sufficient to let this phase of the case rest on that finding of the Chancery Court, if it were not for the appellants' apparent suggestion that the dividend was not from surplus. That leads to some consideration of the facts proven, and of the conclusions following from them:

The Delaware, Lackawanna & Western Railroad Company was efficiently and profitably managed. It increased its capital stock from time to time—sometimes by rights to subscribe, and sometimes by stock dividends. Stock dividends alone aggregated 115% after the year 1906. The railroad's policy was conservative. A large proportion of its net earnings were “ploughed back” into its properties. The railroad wrote down the value of coal lands as coal was mined, and charged to operating expenses the extensive improvements made on its railroad and coal prop-

erties. The real net earnings and surplus were much greater than were shown on its books. The surplus continued to increase. In time the value of the capital assets represented by the original cost of the coal lands was written off *in toto*, but the amount written off was far more than replaced either by the value of improvements to railroad properties paid for from earnings or by other assets paid for in like manner. The railroad lines were built up substantially; but the effect was to withhold from stockholders earnings which otherwise might have been availed of for payment of dividends. Stockholders were deprived *pro tanto* of the enjoyment of the current profits.

Even though it be said that the source of the distributions of the Glen Alden Coal Company stock and of its bonds through the dividend in stock of the Securities Company originally was a capital asset, nevertheless it appears that other amounts were allocated to capital assets, from surplus earnings, more than sufficient to replace the amount so taken away. In substance and effect the dividend or distribution came from surplus earnings and not from capital. And so, if there was a fortunate appreciation in the value of the coal properties over original cost, that increase, when realized by sale, bore all the characteristics of distributable surplus or profits.

The corpus of the Graves Trust obtained the main benefit of the appreciation in value of the coal lands, because the Glen Alden Coal Company stock was allocated *in toto* to corpus. The stock held by the Trustees, subscribed for at \$5.00 per share, rose greatly in value. The stock of the Railroad Company, itself, held by corpus, showed an increase of \$11 per share over its value on June 23, 1923, and that increase came

about notwithstanding the Railroad had disposed of the Glen Alden bonds. The dividend in stock of the Lackawanna Securities Company therefore involved no diminution in value of the Trust corpus.

The proposition that corporate "surplus" means the excess of assets, fixed or liquid, over the liabilities and capital stock, is firmly settled in the law.

14 C. J. "*Corporations*," p. 802, Sec. 1215;

Hyams v. Old Dominion Copper Mining Co., 82 N. J. Eq. 507, 513; affirmed 83 N. J. Eq. 705;

Stevens v. United States Steel Corporation, 68 N. J. Eq. 373, 386;

Goodnow v. American Writing Paper Co., 72 N. J. Eq. 645, 650; affirmed 73 N. J. Eq. 692.

In the *Goodnow* case (72 Eq., at p. 650) the Court said that

"if all of the assets for which the stock was issued still remain in the possession of the company, or such of them as may have been exhausted replaced, either in kind or with money, to the extent of their real value, a dividend ascertained by reserving for capital the actual cost of the assets for which the stock was issued, they being still in possession, is not a dividing of the capital of the corporation, forbidden by our act."

In *Bank of Commerce v. Tennessee*, 161 U. S. 134, the Court distinguished between capital stock and surplus, saying at page 147:

"The very name of surplus implies a difference. There is capital stock and there is a surplus over, above and beyond the capital stock, which surplus is the property of the bank until it is divided among stockholders. * * *

“No individual shareholder has any legal right to claim any portion of this surplus; until divided by the board of directors it remains the property of the corporation itself, and in the sense in which the words ‘capital stock’ are used in the exemption clause the surplus does not form any part thereof.”

The amount of undistributed earnings is perceived readily. There was a large surplus on December 31, 1907. It was much larger on December 31, 1927. In each case that surplus was exclusive of the coal properties. For they had been written off the books by the end of 1907; and both the coal properties and the \$60,000,000 of bonds had been disposed of prior to December 31, 1927.

Dec. 31, 1927 surplus	\$78,742,613.78
Dec. 31, 1907 surplus	29,244,911.66

Increase of surplus	<u>\$49,497,702.12</u>
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Earnings amounting to \$49,497,702.12 were withheld from stockholders during those years.

In addition thereto, improvements were made to railroad properties, which were charged to operating expenses. Of the total of \$43,000,000 spent on improvements to coal lands, much of the expenditure came between 1907 and 1927. Taxes on unmined coal were paid. Additional coal properties were purchased at a cost of \$1,831,383.80. All those expenditures were met out of earnings.

The improvements and additions to coal lands of course went with those lands in 1921, and enured to the benefit of corpus of the Graves trust, for corpus received all the Glen Alden Coal Company stock.

It therefore appears that since the testator's death (1906) a tremendous amount of income and profits were earned but not distributed. Much of the earnings withheld went back into the railroad lines by way of improvements.

It is held that earnings of a corporation do not lose their character as distributable income by the mere fact that they are invested in permanent improvements; and that where part of the assets in which the original capital was invested are later disposed of at a profit and the proceeds distributed to stockholders, the corporation still having a surplus, the dividend is from profits.

Smith v. Dana, (Conn.) 60 Atl. 117, 119-122;

Bryan v. Aiken, (Del.) 86 Atl. 674, 679.

When the proceeds of the sale of an original capital asset are divided, if there has been allocated to capital from surplus earnings an amount equal to the capital asset disposed of, so as to replace the value of the asset sold and to leave the original capital intact, the dividend is one from surplus or profits.

Bouch v. Sproule, 12 App. Cas. 385, 402-3;

Lubbock v. British Bank of South America, (1892) 2 Ch. 198;

Smith v. Dana, *supra*;

In re Bates, (1928) 1 Ch. 682.

In the *Bates* case it was held that a profit derived "from a fortunate appreciation in value of some or other of its capital assets" sold, remained surplus available for a dividend or special division to shareholders.

The \$58,500,000 of Glen Alden bonds, which represented proceeds of the sale of the Railroad's coal properties, clearly constituted surplus or

profits available for payment of dividends to the Railroad's stockholders.

And the clause in the Settlement Agreement, providing that extraordinary cash and stock dividends declared out of surplus or profits, whenever accrued, shall be distributed as income, was designed to protect those who were entitled to income of the Graves trust. The children thereby reserved a share in the equivalent of the profits and surplus undistributed. This matter is discussed further in the point following:

POINT II.

The dividend paid in stock of the Lackawanna Securities Company is an "extraordinary cash dividend" and is to be distributed as income.

The pertinent clause of the Settlement Agreement, above-mentioned, is as follows (Case, p. 86):

"This agreement is made under, and shall be construed according to, the laws of the State of New Jersey, except that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement."

The objects of that provision are obvious. The four children released interests in corpus worth nearly \$5,000,000. The donors of the trust reserved a pro rata share in future income. They reserved also a like interest in corporate distributions or dividends made from surplus or profits, *irrespective of the time when the surplus or profits accrued*. Those reservations were de-

signed partially to compensate the donors for the large interests released, and to preserve to them a fair share in distributions which were equivalent to other profits withheld. The only limitation imposed upon their right to share in such distributions, was that the dividend should be from surplus or profits, and not encroach on the original capital stock of the corporation.

Speaking of the provision in question, the Vice-Chancellor said:

“Concisely, the members of the family reserved to themselves all future extraordinary cash and stock dividends out of profit and surplus regardless of when the profits or surplus accrued, contrary to the testator’s intentions that they should go to the great grandchildren. That was their privilege. The estate was theirs and the trust was voluntary. The right to the dividends are governed by the agreement. The reservation being of all extraordinary dividends out of profits or surplus, past or future, the doctrine of apportionment between surplus and income is not involved” (Case, p. 122).

The dividend to the stockholders of the Delaware, Lackawanna & Western Railroad Company, paid in the stock of the Lackawanna Securities Company, fell within the meaning of “an extraordinary cash dividend” and is to be treated as income.

The authorities hold that distributions made by a corporation in stock of another company are “cash dividends.”

Old Colony Trust Co. v. Jameson, (Mass.) 150 N. E. 52.

Union & New Haven Trust Co. v. Taintor, (Conn.) 83 Atl. 697, 699.

Gray v. Hemenway, (Mass.) 98 N. E. 789.

- Gray v. Hemenway*, (Mass.) 111 N. E. 713.
Hemenway v. Hemenway, (Mass.) 63 N. E. 919.
Green v. Bissell, (Conn.) 65 Atl. 1056-1057.
Krug v. Mercantile Trust & Deposit Co., (Md.) 104 Atl. 414.
Smith v. Cotting, (Mass.) 120 N. E. 177.
Lamb v. Lehman, (Ohio) 143 N. E. 276.
In re Thomas, (1916) 2 Ch. 331; affirming (1916) 1 Ch. 383.

The case of *Old Colony Trust Co. v. Jameson*, *supra*, is specially apt, for in that case the General Electric Co. distributed part of its surplus through the formation of a new securities company in exactly the same manner and form in which the distributions of Glen Alden bonds and of Lackawanna Securities Company stock were effected in the present case.

In that case the Court said:

“These dividends of the stock in another corporation were not a distribution of property in dissolution of the corporation, as in *Brownell v. Anthony*, 189 Mass. 442, 75 N. E. 746; neither does the principle established in *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025, apply. The transaction by which the stock of the Securities Corporation was distributed is to be treated as a cash dividend payable to the life tenant. *Leland v. Hayden*, 102 Mass. 542; *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Gray v. Hemenway*, 223 Mass. 293, 111 N. E. 713; *Smith v. Cotting*, 231 Mass. 43, 120 N. E. 177.

The form adopted by the directors of the General Electric Company did not make the distribution of the capital of the General Electric Company.”

The case of *Union & New Haven Trust Co. v. Taintor*, *supra*, involved a dividend of 35% paid

by the Delaware, Lackawanna & Western Railroad Company in stock of the Lackawanna Railroad Company of New Jersey.

The Court there said:

“The fact that the distribution was made of the stock held as an asset rather than in cash procured from its sale does not affect its character. ‘Cash dividends include all distributions of surplus assets whether in the form of cash or property taken from the body of the assets to become the property of the shareholder’.”

Gray v. Hemenway, 98 N. E. 789, involved the same 35% dividend. In *Gray v. Hemenway*, 111 N. E. 713, the dividend was paid by the Union Pacific Railway Company in stock of the Baltimore & Ohio Railroad Company.

In the present case, the Court is called upon to construe an agreement executed under special circumstances. The intention of the creators of the trust, as expressed in the instrument, controls the question whether extraordinary corporate distributions from surplus or profits are to be considered as income or corpus.

To ascertain that intention the rule is, as said by Chief Justice Marshall in *Church v. Hubbard*, 2 Cranch 187, 233,

“and wherever words admit of a more extensive or more restricted signification, they must be taken in that sense which is required by the subject-matter, and which will best effectuate what it is reasonable to suppose was the real intention of the parties.”

It is apparent that the words “extraordinary cash dividend” will admit of a significance extending to dividends in stock of another company, for the cases above-cited uniformly hold the latter to be cash dividends.

The object of the specific reservation of "extraordinary cash and stock dividends" has been mentioned. It is, therefore, more than reasonable to suppose that the real intention of the parties was that dividends in stock of other corporations should come likewise within the meaning of "extraordinary cash dividends."

As the Vice-Chancellor held, the dividend was extraordinary; and

"Had the railroad company divided the bonds immediately among its shareholders or had cashed them and divided the money there could and in all probability there would have been no question as to the division falling precisely within the definition of 'extraordinary cash or stock dividends,' reserved to the family under the trust agreement" (Case, pp 122-123).

No substantial difference exists between an outright sale of the Glen Alden bonds and a special dividend of the proceeds to the railroad's stockholders, and the distribution of those bonds through the medium of the dividend paid in stock of the Lackawanna Securities Company.

POINT III.

The dividend in question is not an accumulation and increase of principal of the trust within the contemplation of the Settlement Agreement.

The appellants contend that the provision contained in the agreement that at the expiration of the trust, "the said trustees shall divide the principal of the estate, with all accumulations and increases thereof, to and among the great-grandchildren of the Testator," includes the dividend in stock of the Securities Company. (See Mr. Wall's brief, Point I.)

The phrase "accumulations and increases," so referred to, cannot include the dividend here in question. That phrase contemplates casual and incidental increases to trust corpus, such as the normal appreciation in value of bonds or stocks caused by favorable economic conditions or the like. Perhaps it may cover also a similar appreciation of stocks, caused by the accumulations of corporate profits which, prior to the termination of the trust, have not yet been distributed in the form of declared dividends.

"Accumulations and increases," however, are the very opposite of dividends or distributions. By the dividend in stock of the Securities Company, the Railroad Company effected a *distribution*, not an accumulation. If the clause of the Settlement Agreement in question here, expressly providing for the distribution of "extraordinary cash and stock dividends" as income, was not intended to cover special divisions of corporate surplus or profits, then it would be meaningless.

The clause in question (Case, p. 86) is not referable to the expressions contained in the Chancellor's former opinion, nor can it be tied up therewith in the manner argued in the appellants' brief. (See their Point I, pp. 10-11.)

The special circumstances under which the donors established the new trusts preclude any construction of the agreement founded on the language of the will of Henry Graves, Sr., which had become inoperative.

Keeping in mind that the Settlement Agreement contemplated making provision for great-grandchildren only "in the manner and *to the extent* hereinafter set forth" (Case, p. 80, ll. 15-17), and that the reservation to income of ex-

traordinary corporate distributions was compensatory and protective of the children's interests, it follows that the words "accumulations and increases thereof" contained in the agreement were used in contradistinction to "extraordinary cash and stock dividends."

Nor does the clause of the Settlement Agreement treating "extraordinary cash and stock dividends" as income (Case, p. 86, ll. 12-22) conflict with the provision for payment of principal at the termination of the trust, as argued in Point II of the appellants' brief.

When the children created the trust, they expressly reserved to themselves extraordinary dividends so far as the same were declared out of profits or surplus accruing since the testator's death (Clause 2, par. (a); Case, pp. 81-82). Likewise by Clause 2, par. (b) extraordinary dividends accrued between December 31, 1922 and June 23, 1923, were allocated to income. Those two paragraphs, (a) and (b), disposed of extraordinary dividends *already declared* before the date of the agreement.

The clause in question (Case, p. 86) relates to the future, as stated by the appellants' counsel. (See his brief, p. 9, ll. 1-2.) But there is no such conflict with Clause 2, par. (b) as he contends for (Brief, p. 15). For the provision in question (Case, p. 86) covers *future* dividends, *i. e.*, those which "*shall be declared* out of surplus or profits, etc." Clause 2 (b) disposed of special dividends declared in the past *prior* to June 23, 1923, and after December 31, 1922.

Clause 2, pars. (a) and (b) referred to what had already occurred. The provision here in question (Case, p. 86) applies to dividends *thereafter* declared. There is no room for confusion between the two.

Clause 2, par. (d) providing for the future distribution of income must be read in the light of the express provision that extraordinary dividends "shall be considered and distributed as income, whether the same shall be declared out of surplus accruing prior or subsequent to the date of this agreement." Unless interpreted together, the agreement fails to make disposition of all dividends of corporate profits. It was the clear intent of the creators of the trust to provide for a complete distribution as income of all dividends representing corporate surplus or profits, whether ordinary or extraordinary. Distribution by the corporation in the form of a declared dividend is all that is required to give effect to its disposition as income.

POINT IV.

The dividend in question constitutes income, and the decree of the Chancellor should be affirmed.

Respectfully submitted,

JOHN M. EMERY,

Of Counsel with Defendants-Appellees
Edward H. Graves and others.

New Jersey Court of Errors and Appeals

HENRY GRAVES, JR. and GEORGE COE
GRAVES, individually and as Trus-
tees under a Settlement Agreement
dated June 23, 1923,

Complainants-Appellees,

vs.

EDWARD H. GRAVES, *et als.*,
Defendants-Appellees,

and

THOMAS BARBER, guardian *ad litem* for
Duncan Graves, Jr., *et als.*,
Defendants-Appellants.

On Appeal From
the Court of
Chancery.

BRIEF ON BEHALF OF COMPLAINANTS- APPELLEES, HENRY GRAVES, JR., AND GEORGE COE GRAVES, INDIVIDUALLY, AND AS TRUSTEES UNDER A SETTLE- MENT AGREEMENT DATED JUNE 23, 1923.

This is an appeal from a Final Decree advised by Vice Chancellor Backes bearing date April 22, 1930.

The said Final Decree adjudges that certain shares of stock of the Lackawanna Securities Company received as a dividend on shares of stock of the Delaware Lackawanna and Western Railroad Company held by complainants-appellees as Trustees under a certain Settlement Agreement of June 23, 1923 constitute income within the meaning of the provisions of said Settlement Agreement and that all of said stock, together with certain cash distributions received thereon, should be distributed among the several persons

entitled to the income under the provisions of said Settlement Agreement in the proportion and in accordance with the terms thereof (Case, pp. 124, 126).

This appeal has been taken by the defendants-appellants who are those entitled to the corpus of the Trust estate created by the said Settlement Agreement of June 23, 1923 upon distribution thereof after the termination of the life estates created thereby.

The complainants-appellees are the Trustees named in said Settlement Agreement of June 23, 1923 and each, in his individual capacity is entitled to a share of the income therefrom during his life.

The defendants-appellees are all of the other persons who, for their respective lives, are each entitled to a share of the income of the Trust estate created in said Settlement Agreement of June 23, 1923.

Statement of Facts.

The Testator, Henry Graves, died on August 29, 1906. By his Last Will and Testament, bearing date September 20, 1904, he, after making sundry special bequests to his wife and children, devised and bequeathed all the rest, residue and remainder of his estate to two of his sons, Henry Graves, Jr., and George Coe Graves, to be held in trust by them without depletion or distribution for the benefit of his grandchildren and their families until the death of the last surviving grandchild. To this end he directed that all the increase in shares of stock, special and stock dividends and other increase in value or accumulations of principal, should be added to the principal in their hands and the regular yearly income or dividends only should be used for distribution.

(Last Will of Henry Graves, annexed to Bill of Complaint, paragraph Four C., Case, p. 31.)

The Will directed that of the income to be derived from his estate \$20,000.00 per annum should be paid to his widow, Harriet Isabella Graves, during her lifetime, and the balance divided annually equally among his children and grandchildren, including any grandchild born after his decease; the lawful issue of any grandchildren who should die to take their parent's share, and if any of such grandchildren should die without leaving issue surviving them, then to divide his or her share in equal parts among the other children and grandchildren of the Testator then surviving (Last Will of Henry Graves, paragraph Fourth, e, f, g, Case, pp. 31, 32).

The Will further provided that upon the death of the last surviving grandchild of the Testator the principal of the rest, residue and remainder of his estate should be divided among his great-grandchildren, share and share alike, the issue of any deceased great-grandchild to receive the share which the parent would have received if living (Last Will of Henry Graves, paragraph Fourth, h, Case, p. 32).

He appointed his said two sons, Henry Graves, Jr. and George Coe Graves, his Executors (Last Will of Henry Graves, Case, pp. 32, 33).

The Testator died a resident of Essex County. His Will was probated before the Surrogate of Essex County on September 10, 1906. The Executors qualified and proceeded to administer the estate, and after paying the debts and specific legacies filed their final account and on or about the 29th day of June, 1907, turned the rest, residue and remainder of the estate over to themselves, as Trustees of the trusts thereby created and hereinbefore mentioned. They continued to administer the estate as such Trustees and divided

the income among the children and grandchildren of the testator in accordance with the provisions of the Will until some time in the year 1922 (Case, pp. 66, 67).

On March 21, 1922, Henry Graves, 3rd, son of one of the complainants, died leaving three children, great-grandchildren of the Testator (Case, p. 73). At this time the Trustees sought the advice of counsel and upon submitting the Will to such counsel were advised that there was great doubt as to whether its provisions, or some of them, did not transgress the rule against perpetuities. As a consequence a suit was instituted in the Court of Chancery of this State for the purpose of construing the Will. The case was heard before the Chancellor. Subsequently he adjudged and decreed that, subject to a trust fund to be carved out of the said trust estate sufficient in amount to produce an annuity of \$20,000.00 a year, payable in quarterly payments of \$5,000.00 each, to Harriet Isabella Graves, widow of the said Henry Graves, deceased, during the term of her natural life, the trust attempted to be created by the Testator by the Fourth clause of said Will and every part thereof violated the rule against perpetuities and was void, and as a consequence the corpus of the estate upon the death of the Testator vested in Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, the children and only next of kin of the said Testator, and the said Henry Graves, Jr. and George Coe Graves, Executors of and Trustees under the Last Will and Testament of said Henry Graves, deceased, were directed to make distribution thereof accordingly. *Graves v. Graves* (Ct. of Ch. 1923), 94 N. J. Eq. 268.

This result was a very great disappointment to the children of Henry Graves, deceased, although entirely to their advantage. Appeals were taken

by all of the parties in interest excepting Edward H. Graves, who had volunteered to raise the issues of the rule against perpetuities in the Court of Chancery. All of the children, including the said Edward H. Graves, consulted counsel to see if they might not voluntarily re-create a trust for the benefit of the grandchildren and great-grandchildren along the lines of the trust created by their father's will, and as a consequence the Settlement Agreement of June 23, 1923, now before the Court, was drafted. The appeals which had been taken were dismissed without prejudice to the end that the record in the cause might be remitted to the Chancellor for his consideration of the agreement on behalf of the infants represented by the Clerk of the Court of Chancery as Guardian *ad litem* and the special counsel he had appointed to represent them in the Chancery suit. The result was that the said Settlement Agreement was executed by all of the adults in interest and by Jesse R. Salmon, Clerk of the Court of Chancery as Guardian *ad litem* for all the infants, and the execution thereof by him ratified and confirmed by a decree of the Court of Chancery entered on June 27, 1923 (Exhibit C-1, Case, pp. 78-113).

By paragraph 2, subdivisions (a), (b) and (c), of the Settlement Agreement all the undistributed extraordinary cash and stock dividends which had accrued prior to December 31, 1922, and which had been retained and accumulated by the Trustees under paragraph Four, subdivision c, of the Testator's Will, in so far as the same were declared out of profits or surplus accruing since the death of the Testator, together with all accretions thereto and income accruing thereon since December 31, 1922, were divided equally among Henry Graves, Jr., Edward H. Graves, George Coe Graves and Daisey B. Smith, children of the Testator (Exhibit C-1, Paragraph 2, a, Case, p. 81).

All the undistributed income of the estate of Henry Graves, deceased, which had accrued prior to December 31, 1922, as shown by the said accounts of the Trustees of March 21, 1922, and December 31, 1922, as well as the undistributed income of said estate, including all extraordinary cash and stock dividends, which had accrued since December 31, 1922, and prior to the date of the Settlement Agreement, were divided among the widow, children, grandchildren and deceased grandchildren of the Testator, in the manner and proportions provided in paragraph Four, subdivisions d, e and f of the Testator's Will for the distribution of regular annual income (Exhibit C-1, Paragraph 2, b, Case, p. 82).

All claims and demands incurred by the Trustees prior to the making of the agreement and all costs and expenses of the litigation, taxes and other charges that might be imposed by reason of the decree of the Chancery Court declaring the Will void, together with the Trustees' commissions, were directed to be paid out of the corpus of the estate (Exhibit C-1, Paragraph 2, c, Case, pp. 81, 82).

These payments and distributions were subsequently made and set forth in the later account of the Trustees bearing date December 31, 1925, which was submitted to and ratified and confirmed by the Court of Chancery by decree bearing date June 7, 1926 (*Graves v. Graves*, Court of Chancery Docket 51, p. 679, Case, pp. 68, 69).

The instant suit, therefore, does not involve any of these distributions but is concerned only with the construction of paragraph 2, subdivision (d), of the Settlement Agreement of June 23, 1923, in so far as same is pertinent hereto, which reads as follows:

“(d) To have, hold and manage the rest, residue and remainder of said trust estate,

and to sell, exchange, convey, invest and re-invest the same at such times, in such manner and on such terms as to them shall seem most expedient, and out of the rents, issues, interest and income thereof, to pay unto Harriet Isabella Graves, widow of the Testator, during her natural life, in lieu of all interest which she may have in the said trust estate, the sum of \$20,000 each and every year, in quarterly payments of \$5,000 each, and to divide, transfer, or pay over the rest, residue and remainder of said income to and among the children and grandchildren of the Testator, including grandchildren born subsequent to the date of this agreement *per capita*, during their respective natural lives, or until the death of the last survivor of the children and grandchildren of the Testator in being at the date of this agreement. In the case of Henry Graves, 3d, a grandchild now deceased, and of the death of any other grandchild leaving lawful issue him or her surviving, the share or portion of the income which would have belonged to said grandchild had he or she lived shall be distributed in equal portions to his or her issue. But in case any one of said grandchildren shall die without leaving lawful issue him or her surviving, then the share which had been his or hers in life shall be distributed among the surviving children, grandchildren, and issue of deceased grandchildren of the Testator, in the same manner and proportions as it is provided that the balance of said income shall be divided among them respectively. Such payment shall be made semi-annually or at such periods as shall be most convenient to said trustees. Upon the death of the last survivor of the children and grandchildren of the Testator in being at the date of this instrument, the said trustees shall divide the principal of said trust estate, with all accumulations and increases thereof, to and among the great-grandchildren of the Testator, share and share alike, the issue of any deceased great-grandchild to receive the share its parent

would have received if living, provided, however, that any grandchild born after the date of this agreement who shall have no children in being at the time of said distribution shall be considered as a great-grandchild and shall receive the same proportion of the corpus as the other great-grandchildren of the Testator. To have and to hold unto her, him, or their heirs, executors, administrators and assigns, forever" (Exhibit C-1, Paragraph 2, d, Case, pp. 83, 84).

The Settlement Agreement also contains a specific clause as to the manner in which it shall be construed, which reads as follows:

"This agreement is made under, and shall be construed according to, the laws of the State of New Jersey, *except that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement.* The terms 'grandchildren' and 'great-grandchildren' as used in this agreement are understood to include and do include only the lawful issue of the children and grandchildren of the Testator" (Italics ours) (Exhibit C-1, Case, p. 86).

In the present proceedings, the complainants-appellees, as Trustees under the said Settlement Agreement of June 23, 1923 have sought the advice of the Court of Chancery with respect to the proper disposition, under the terms of said Settlement Agreement, of 6,250 shares of stock of the Lackawanna Securities Company and certain cash dividends and distributions received thereon, which stock was received as a dividend on 12,485 shares of stock of the Delaware, Lackawanna and Western Railroad Company held by them as a

part of the corpus of the Trust estate created by the said Settlement Agreement. The acquisition of this stock of the Lackawanna Securities Company came about in this way:

As a result of the passage of certain laws of the State of Pennsylvania the Delaware, Lackawanna and Western Railroad Company (hereinafter referred to as the "Railroad Company") in 1921 decided to separate its coal properties from its railroad properties and acquired the charter of the Glen Alden Coal Company, a corporation of the State of Pennsylvania (hereinafter called the "Coal Company"), and on September 1, 1921 transferred its coal properties to said Coal Company, in consideration of the assumption by the Coal Company of certain obligations that existed in connection with the coal properties and of \$60,000,000.00 of bonds of the Coal Company, bearing interest at the rate of 4% per annum, payable semi-annually on the 1st day of March and September in each year. The principal of said bonds was payable \$1,500,000.00 a year beginning September 1, 1926, unless the Coal Company should mine in excess of 12,000,000 tons of coal in any year, in which case there would be payable \$2,000,000.00 of the bonds per year. The shareholders of the Railroad Company were given the opportunity to purchase two shares of the Coal Company stock for each share of the stock of the Railroad Company held by them at \$5.00 a share (Case, pp. 58-60).

The Trustees under the Will of Henry Graves, deceased, on September 1, 1921, held 25,480 shares of Railroad Company stock and by exercising their right to purchase the Coal Company's stock on the basis of one share of the Coal Company stock for each two shares of stock of the Railroad Company then held by them at \$5.00 a share, acquired in this way by expenditure from the corpus of the

trust estate 12,740 shares of the Coal Company stock (Case, pp. 70, 71). All of these shares became a part of the corpus of the trust estate under the Settlement Agreement of June 23, 1923 (Exhibit C-1, Schedule "D", Case p. 100), and they still hold all of them as a part of the corpus of the said trust (Case, p. 71).

Of the said 25,480 shares of Railroad Company stock, 12,995 shares were subsequently distributed among Henry Graves, Jr., Edward H. Graves, Daisey B. Smith and George Coe Graves, children of the testator, Henry Graves, pursuant to the terms of said Settlement Agreement of June 23, 1923; the same having been received by the executors and trustees under the last Will and Testament of Henry Graves as stock dividends; and only the remaining 12,485 shares of Railroad Company stock became a part of the corpus of the trust estate under the terms of the said Settlement Agreement of June 23, 1923 (Case, p. 70, Exhibit C-1, Schedule D, Case, p. 100). The Trustees under the said Settlement Agreement still continue to hold all of these shares of Railroad Company stock. There is, therefore, no question involved in the present case concerning either the shares of the Railroad Company or of the Coal Company.

On September 1, 1926, the Railroad Company received from the Coal Company the installment of interest then falling due, as well as \$1,500,000.00 on account of the principal of the \$60,000,000.00 of bonds of the Coal Company it had received for its coal properties. It continued to hold the remaining \$58,500,000.00 of said bonds until the early part of 1927, when it decided to distribute said bonds among its shareholders (Case, p. 60).

A question arose as to the way this could be accomplished so as to impose upon the stockholders the least liability for Federal Income

Taxes, and the Railroad Company consulted the Honorable Charles E. Hughes, who advised them that it might best be done by forming a new Company and transferring the bonds then held by them to the new Company for the stock of the new Company and declaring a dividend of the stock of the new Company to the shareholders of the Railroad Company (Exhibit C-3, Case, pp. 116, 117).

As a result, the Railroad Company formed the Lackawanna Securities Company, a corporation of the State of Delaware (hereinafter referred to as the "Securities Company"), and on August 25, 1927, transferred to it the balance of the bonds of the Coal Company then held by the Railroad Company amounting to \$58,500,000.00 par value, on which the accrued interest from March 1, 1927, at that time amounted to \$1,131,848.00, in consideration of the issuance by the Securities Company of its entire capital stock consisting of 844,411 shares of no par value to the shareholders of the Railroad Company in the proportion of one share of Securities Company stock for every two shares of stock of the Railroad Company held by them (Case, pp. 60, 64).

On September 1, 1927, the Securities Company received \$1,170,000.00 interest on said \$58,500,000.00 of the said bonds and \$1,500,000.00 on account of the principal thereof; on March 1, 1928, \$1,140,000.00 interest on the remaining \$57,000,000.00 of said bonds then outstanding, and on September 1, 1928, \$1,140,000.00 interest and \$1,500,000.00 on account of the principal of said bonds (Case, pp. 61, 62). All these moneys had been received by the Securities Company at the time the testimony was taken on January 11, 1929. Since then presumably the Securities Company has also received additional installments in amortization of principal and interest on the remaining bonds.

As already stated, at the time the Securities Company stock was issued to the shareholders of the Railroad Company, the Trustees under the Settlement Agreement of June 23, 1923, held 12,485 shares of the Railroad Company stock as a part of the corpus of the Trust estate and consequently on September 14, 1927, received 6,242½ shares of the Securities Company stock. Since then the Securities Company has paid and the Trustees under the Settlement Agreement of June 23, 1923, have received dividends as follows: On October 1, 1927, \$18,727.50 (Case, p. 72). This was paid entirely from the capital of the Securities Company, that is to say, from that portion of the interest which had accrued on the bonds prior to August 25, 1927, the date of their transfer to the Securities Company, and the amortization payment of \$1,500,000.00 of principal, received by it from the Coal Company on September 1, 1927, as aforesaid (Case, p. 61). On November 29, 1927, out of this dividend of \$18,727.50 the Trustees under the Settlement Agreement of June 23, 1923, purchased 7½ additional shares of the Securities Company stock for \$424.95 in order to give them a block of 6,250 shares, leaving a balance of the said dividend of \$18,727.50 amounting to \$18,302.55. On April 2, 1928, the Trustees received a dividend of \$6,250.00 (Case, pp. 72, 73). This was paid entirely from the semi-annual interest payment of \$1,140,000.00 received by the Securities Company on March 1, 1928 (Case, p. 61). On September 28, 1928, the Trustees received another dividend of \$18,750.00 (Case, p. 73), of which \$1.657 per share was a distribution from the \$1,500,000.00 amortization payment of the principal of said bonds, and \$1.343 per share from the interest payment of \$1,140,000.00 received by the Securities Company on September 1, 1928 (Case, p. 61). The Trus-

tees, therefore at the time the testimony was taken, held 6,250 shares of Securities Company stock and a cash total of \$43,302.55 distributed thereon, as aforesaid (Case, p. 73).

Vice Chancellor Backes held that the disposition of the dividend of 6,250 shares of Securities Company stock was governed exclusively by the provision of the Settlement Agreement of June 23, 1923 that "all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this Agreement"; that the dividend in question, though paid in stock of the Securities Company, constituted income upon the stock of the Railroad Company within the meaning of the foregoing provision of the Settlement Agreement; and hence that all the Securities Company stock together with the cash dividends received thereon were properly distributable as income under the terms of the said Settlement Agreement (Opinion, Case, pp. 120-123).

The Final Decree, from which this appeal has been taken was entered on April 22, 1930 and merely carries into effect the opinion filed by Vice Chancellor Backes (Case, pp. 124-129).

I.

The bonds of the Coal Company represented by the stock of the Securities Company constituted surplus of the Railroad Company.

Of course, if the stock of the Securities Company represented a distribution of capital of the Railroad Company the stock of the Securities

Company in the hands of the Trustees under the Settlement Agreement of June 23, 1923, would still be capital, but there can be no question that this is not the fact.

While, for the information of the Court, complainants-appellees produced evidence concerning the original acquisition of the coal lands and their subsequent development and handling by the Railroad Company, there is very little of this evidence pertinent to the present case. It appears that the coal lands were purchased out of capital but, as the years went by and the surplus of the Company increased, the value of these lands were written off so that as early as 1907 they were carried on the books of the Company without valuation (Case, p. 51). The cost of all of the coal properties purchased subsequent to that time was paid out of surplus (Case, pp. 54-57). All expenditures thereon by way of additions, betterments, development, plant, equipment, royalties and taxes were charged to operating expenses (Case, pp. 53, 54). Since the year 1907 whatever value these coal properties have had in fact constituted an item of surplus in addition to the surplus actually carried on the books (Case, p. 55). The bonds of the Coal Company which the Railroad Company received for these lands, thus held as a part of its surplus, likewise constituted surplus. The shares of the Securities Company received in exchange for the bonds of the Coal Company likewise constituted surplus of the Railroad Company. The fact that the coal lands originally represented a capital investment is of no consequence. The manner of the utilization of a corporation's assets may be changed, investments altered, permanent property sold and turned into cash, all at the direction of the Board of Directors. Any excess in the value of a corporation's assets over its lia-

bilities and paid up nominal or share capital, whether due to earnings or to an appreciation in the value of property, may be treated as profits or surplus available for dividends. Machen "Modern Law of Corporations," Vol. II, p. 1902, Sec. 1314.

Under the decisions of this State it is perfectly well settled that the term "surplus" in its application to stock companies refers to the fund they may have in excess of their capital, their debts and fixed liabilities. *Mutual Benefit Life Ins. Co. v. Utter* (Ct. of E. & A. 1869), 34 N. J. L. 489, 493; *Peoples Fire Ins. Co. v. Parker* (Ct. of E. & A. 1871), 35 N. J. L. 575; *Trenton Iron Co. v. Yard* (N. J. Sup. Ct. 1880), 42 N. J. L. 357; *Trenton v. Standard Fire Ins. Co.* (Ct. of E. & A. 1909), 77 N. J. L. 757; *Stevens v. U. S. Steel Corp.* (Ct. of Ch. 1904), 68 N. J. Eq. 375; *Hymans v. Old Dominion Copper Co.* (Ct. of Ch. 1913), 82 N. J. Eq. 507, 513.

There is no allegation or suggestion of fraud, or other special circumstances that renders the action of the Railroad Company subject to the slightest suspicion, and no other basis than its books on which the Court could proceed to determine the present case.

As was said by Vice Chancellor Stevens in *Balantine v. Young* (Ct. of Ch., 1911), 79 N. J. Eq. 70, which involved an extraordinary cash dividend of the Delaware, Lackawanna & Western Railroad Company, the same Company involved in this case:

"I think in the absence of fraud, or some very special circumstances, the apportionment should be made on the basis of the company's accounts. To apportion them according to the judgment of an expert or of the court as to whether the various items of disbursements are chargeable to current or capital would be practically impossible."

The Railroad Company could not have legally distributed its capital in any way other than by reduction of its capital or by way of liquidation, which it did not do. When a dividend has been declared and paid there is always a presumption that the action of the Company was lawful and that there were sufficient surplus or profits to justify the declaration. Machen "Modern Law of Corporations", Vol. II, p. 1110, Section 1344.

In the instant case, however, it affirmatively appears from the books of the Company that the dividend of the Railroad Company was paid out of the surplus of the Company and in fact charged to such surplus. On December 31, 1922, the surplus of the Company was \$121,141,954.90; on December 31, 1923, \$123,911,281.73; on December 31, 1924, \$126,779,229.81; on December 31, 1925, \$129,601,819.05; on December 31, 1926, \$136,034,252.40; on December 31, 1927, \$78,742,613.78. The diminution in the amount of surplus as of December 31, 1927, was caused by charging against the surplus of the Railroad Company the withdrawal of the \$58,500,000.00 of bonds and \$1,131,848.00, accrued interest thereon, as a result of the transfer by the Railroad Company of these Coal Company bonds to the Securities Company. These are the indisputable pertinent facts taken from the books of the Railroad Company (Case, p. 62).

As Vice Chancellor Backes stated in his opinion filed in this cause, "It is established, *and not* controverted, that the coal lands and their proceeds, the \$60,000,000 of bonds, were *surplus holdings of the railroad company * * **" (Opinion, Case, p. 122).

We submit, therefore, that all of the shares of the Securities Company stock, issued to stockholders of the Railroad Company upon the transfer of these bonds, were a distribution of the surplus of the Railroad Company to its stockholders.

II.

The learned Vice Chancellor correctly determined that all of the shares of the Securities Company and the dividends and distributions thereon constituted income within the meaning of the Settlement Agreement of June 23, 1923, and should be distributed by the trustees as income in accordance with the provisions of said Settlement Agreement.

At the outset it should be noted that the rules laid down in the cases of *VanDoren v. Olden* (Ct. of Ch., 1868), 19 N. J. Eq. 176; *Ashurst v. Field* (Ct. of Ch., 1875), 26 N. J. Eq. 1, aff'd (Ct. of E. & A., 1878), 29 N. J. Eq. 625; *Lang v. Lang* (Ct. of Ch., 1898), 56 N. J. Eq. 603, aff'd (Ct. of E. & A., 1898), 57 N. J. Eq. 325; *Brown v. Brown* (Ct. of Ch., 1907), 72 N. J. Eq. 667; *Balantine v. Young* (Ct. of Ch., 1911), 79 N. J. Eq. 70; *Day v. Faulks* (Ct. of Ch. 1911), 79 N. J. Eq. 66, aff'd (Ct. of E. & A., 1912), 81 N. J. Eq. 173; *McCracken v. Gulick* (Ct. of E. & A., 1920), 92 N. J. Eq. 214; *McCoy v. McCloskey* (Ct. of Ch., 1922), 94 N. J. Eq. 61; *Koehler v. Koehler* (Ct. of Ch. 1926), 99 N. J. Eq. 141, have no relevancy or bearing upon the present case. They all involved instances in which the creators of the trusts merely provided that "income" should be paid to life tenants, and the rules laid down are but expressions of the Courts' endeavors to ascertain the presumed intention of the testator in such situations.

In every case where questions of apportionment of extraordinary cash or stock dividends between income and corpus of a trust estate have arisen it is universally recognized and conceded by the authorities that when the intent of the testator or creator of the trust is manifestly clear from

the instrument creating the respective trust estates such intent will prevail over the rules of law otherwise applicable.

Cook on Corporations (8th Ed.), Vol. II, p. 1950, says:

“In all cases, however, the intent of the grantor or testator is the pole star and will be carried out by the Courts.”

Mr. Justice Gray in *Gibbons v. Mahon* (1899), 136 U. S. 549, 559, said:

“In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must, of course, control; * * *”

Mr. Justice Swayze in *McCracken v. Gulick* (Ct. of E. & A., 1920), 92 N. J. Eq. 214, said:

“The fundamental principle is to carry out the intent of the testator.”

And see 24 A. L. R. 9, 17; 42 A. L. R. 448, 449, and the numerous authorities there cited.

None of the cases pretend to limit the right of the donor or creator of a trust to dispose of the income or principal of his estate to whomsoever he chooses. No one of them suggests that the donor or creator of the trust cannot provide that all extraordinary cash and stock dividends or dividends in shares of other companies, even though declared out of surplus which had been accumulated prior to the creation of the trust, cannot be directed by the donor or creator of the trust to be distributed as income to the life tenants of the trust.

In the present case there is no question as to what the creators of the Trust under the Settlement Agreement of June 23, 1923, intended to do, namely, to provide that all distributions on any stock of corporations held by the Trustees, whether

they should be cash or stock of the Company which should declare them or of stock of other corporations, should be distributed as income among the life tenants and this irrespective of whether the same should be declared out of surplus or profits accruing prior or subsequent to the date of the Settlement Agreement.

In order to carry out this intent and well knowing the rules enunciated in the above mentioned cases of the Courts of New Jersey, the Settlement Agreement of June 23, 1923, expressly provided:

“This agreement is made under, and shall be construed according to, the laws of the State of New Jersey, except that all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement” (Exhibit C-1, Case, p. 86).

If, therefore, the Railroad Company had sold the \$58,500,000.00 of bonds of the Coal Company which it transferred to the Securities Company and had divided the cash received therefrom among its stockholders by way of dividends, there could not be the slightest doubt that such dividends received by the Trustees under the Settlement Agreement of June 23, 1923, would have been distributable as income to the life tenants under said Settlement Agreement (Case, p. 61).

Likewise, if instead of doing this the Railroad Company had chosen to sell said bonds and capitalize the amount received therefrom by increasing its authorized capital stock and declaring a stock dividend, there could not be the slightest doubt that such stock dividends received by the Trustees under the Settlement Agreement of

June 23, 1923, would have been distributable as income to the life tenants under said Settlement Agreement (Case, p. 61).

In each case such dividends would have come within the literal wording of the clause of the Settlement Agreement of June 23, 1923, above quoted. Without question such dividends would have been either "extraordinary cash" or "stock dividends," and by the express provisions of the said Settlement Agreement, above quoted, distributable as income to the life tenants, and *this would have been true whether the same should have been declared out of surplus or profits accruing prior or subsequent to the date of the agreement.*

The occasion of this suit arises out of the fact that the dividends declared by the Railroad Company were not declared in cash nor in stock of the Railroad Company but in other property, to-wit, stock of the Securities Company, which, however, indisputably represented the same surplus out of which an extraordinary cash dividend or a stock dividend of the Railroad Company would have been declared had the Railroad Company chosen to sell the bonds of the Railroad Company and distribute its surplus represented by the proceeds of said sale in either of the mentioned ways and which distribution of surplus, if it had occurred in either of such ways, would have indisputably been distributable under the Settlement Agreement of June 23, 1923, as income to the life tenants named therein.

In its fundamental aspect the only question involved in the present case, therefore, is whether Vice Chancellor Backes correctly held that a dividend paid in stock of another Company fell within the term "all extraordinary cash or stock dividends" as provided in the said Settlement Agreement. We submit that such holding was

correct and is fully sustained by all of the authorities which uniformly hold that a dividend paid in property is the same in legal effect as if the property had been sold and the dividend paid in cash out of the proceeds thereof, or, in other words, a cash dividend.

In *Van Doren v. Olden* (Ct. of Ch. 1868), 19 N. J. Eq. 176, the earliest case laying down the New Jersey apportionment rule, one of the extraordinary distributions involved was a dividend of the New Jersey Railroad and Transportation Company paid in stock of the Camden & Amboy Railroad Company. The distribution was apportioned by the Court in the same manner as were other extraordinary cash dividends involved in the case.

In *Union & New Haven Trust Co. v. Taintor* (Conn. Sup. Ct. of Errors 1912), 83 Atl. 697, the Delaware, Lackawanna and Western Railroad Company had formed a subsidiary and exchanged its surplus for the stock of the subsidiary, which stock was then distributed to the stockholders of the Railroad Company. The Connecticut rule of apportionment is that all cash dividends are regarded as income passing to the life tenants, while stock dividends belong to the corpus of the trust unless the corporation expressly declares such dividend to be from earnings accumulated after the creation of the trust. The question thus presented was whether this dividend in kind was a "cash dividend" and income payable to life tenants, or a stock dividend to be held as corpus. The Court *held* that it was a "cash dividend," saying at page 699:

"Such a dividend has all of the characteristics of a cash dividend. The fact that the distribution was made of the stock held as an asset rather than in cash procured from its sale does not affect its character."

In an earlier apportionment case, *Bishop v. Bishop* (Sup. Ct. of Er., Conn. 1909), 71 Atl. 583, the Court has said, page 590:

“* * * ‘Cash dividends’, as that term is applied in this connection, include all distributions of the surplus assets of a corporation, whether the same be in the form of cash or property which are made to shareholders pro rata, through the medium of dividend declarations in such manner that the assets so distributed are aperted from the body of the assets of the corporation to become the property of the shareholders and thus pass out of the dominion and control of the corporation into that of the shareowners.”

In another apportionment case, *Green v. Bissell* (Sup. Ct. of Er., Conn. 1907), 65 Atl. 1056, the corporation had distributed its own shares which had been transferred to it by a former stockholder in payment of a debt. The directors designated it as a “stock dividend.” The Court held that the distribution was a cash rather than a stock dividend, and so went to income. On page 1057 after discussing the nature of a stock dividend, the Court said:

“The underlying idea of a cash dividend on the other hand is the distribution to the shareholders as the rewards of the corporate enterprise, of a portion of the profits or surplus assets of the corporation. Usually, the assets thus divided are in the form of cash, and the distribution a cash one. This, however, is not necessarily so and there is no departure in principle or essence if the distributed assets chance to be in some other form of property * * *. Whatever form the distribution takes, the result always is the reduction of both corporate assets and surplus by just the amount of the distribution. Something is taken from the corporation and given to the shareholders; that which is distributed

becomes released of all corporate control and comes under the dominion of the shareholder.”

In *Krug v. American Trust & Deposit Company* (Md. Ct. of Appeals 1918), 104 Atl. 414, the Court said at page 416:

“Dividends of profit consisting of shares of stock in another corporation are income and belong to the life tenant, and between a dividend paid in cash and one paid in property, that is, in stock of another corporation owned by the distributing corporation, there is no substantial difference.”

In the case of *Gray v. Hemenway* (Sup. Ct. Mass. 1912), 98 N. E. 789, the action arose from the same distribution by the Delaware, Lackawanna & Western Railroad Company as was concerned in *Union & New Haven Trust Company v. Taintor* (*supra*). The Massachusetts rule of apportionment is the same as Connecticut's and the Court reached the same result, holding that this distribution, though in stock of another corporation, was in reality a cash dividend and so distributable as income to the life tenant.

In all of these cases cited the dividend was of stock of a corporation that had actually been transferred to the Company declaring the dividend.

In the present case while the bonds of the Coal Company were delivered to the Securities Company in consideration for the issuance of its capital stock, the formality of first issuing the stock of the Securities Company to the Railroad Company for distribution to its stockholders was eliminated, evidently for the purpose of decreasing the amount of the stamp tax on the issuance and transfer of stock, the stock of the Securities Company being issued by the Securities Company

directly to the shareholders of the Railroad Company. Obviously this difference in mechanics is without significance in the principle involved.

In fact, in the case of *Old Colony Trust Co. v. Jameson* (Mass. Sup. Ct. 1925), 152 N. E. 52, the situation was exactly the same as in the present case. In that case the General Electric Company had transferred 250,000 shares of common stock and 300 shares of preferred stock of the Electric Bond & Share Company to a newly organized corporation known as the Electric Bond & Share Securities Corporation, in consideration of which transfer the Electric Bond & Share Securities Corporation agreed and did issue all of its capital stock to the stockholders of the General Electric Company in the proportion of one share of its common stock for one share of common stock of the General Electric Company. The Court held that the distribution in stock of the new Company was income for the life tenants. The Court said:

“These dividends of the stock in another corporation were not a distribution of property in dissolution of the corporation, as in *Brownell v. Anthony*, 189 Mass. 442, 75 N. E. 746; neither does the principle established in *D'Ooge v. Leeds*, 176 Mass. 558, 57 N. E. 1025, apply. The transaction by which the stock of the Securities Corporation was distributed is to be treated as a cash dividend payable to the life tenant. *Leland v. Hayden*, 102 Mass. 542; *Gray v. Hemenway*, 223 Mass. 293, 111 N. E. 713; *Smith v. Cotting*, 231 Mass. 42, 120 N. E. 177.”

It is perfectly clear, therefore, that the 6242½ shares of the Securities Company stock received by way of dividend on the Railroad Company stock held by the Trustees as a part of the corpus of the trust estate should be distributed as income to the life tenants under the terms of the Settlement

Agreement of June 23, 1923. This being so, the 7½ shares purchased from the first dividend received on said 6242½ shares of Securities Company stock should likewise be distributed to them, as well as the remainder of the first cash dividend, and all subsequent cash dividends received thereon. The fact that these cash dividends were in part declared out of capital of the Securities Company is entirely immaterial. These life tenants being entitled to the shares themselves, obviously are entitled to all distributions made on account thereof whether such distributions were made made from corpus or income.

III.

In any event, we submit that the dividends on the Securities Company stock, in so far as they were paid out of interest which accrued on the Coal Company's bonds after the acquisition of such bonds by the Securities Company, should be distributed as income.

As above stated, \$58,500,000.00 of the bonds of the Coal Company with accrued interest thereon to August 25, 1927, were received by the Securities Company in consideration for its stock, and constituted all of the capital assets of the Securities Company (Case, p. 60). On September 1, 1927, the Securities Company received payment of \$1,500,000.00 on account of the principal of the bonds and \$1,170,000.00 as interest on the bonds from the preceding March 1, 1927. The interest which had accrued from March 1, 1927, to August 25, 1927, amounted to \$1,131,848.00. The balance of \$38,152.00 of said interest constituted income of the Securities Company available for current expenses and dividends. On March 1, 1928, the Securities Company received an additional \$1,140,-

000.00 as interest on the bonds of the Coal Company from September 1, 1927, to March 1, 1928. This likewise constituted income of the Securities Company available for current expenses and dividends, and again on September 1, 1928, the Securities Company received \$1,500,000.00 on account of the principal of the bonds and \$1,140,000.00 as interest on said bonds from March 1, 1928, to September 1, 1928. This latter sum of \$1,140,000.00 likewise constituted income of the Securities Company available for current expenses and dividends (Case, p. 61).

On April 2, 1928, the Trustees under the Settlement Agreement of June 23, 1923, received \$6,250.00 as a dividend (Case, p. 72) which had been declared definitely out of the interest theretofore collected by the Securities Company on the bonds of the Coal Company (Case, p. 61), and again on September 1, 1928, received a dividend of \$18,750.00 (Case, p. 73) of which \$8,393.75 was a dividend which had been declared out of the interest theretofore collected by the Securities Company on the bonds of the Coal Company (Case, p. 61). Even though the 6,242½ shares of stock of the Securities Company received by the Trustees under the Settlement Agreement of June 23, 1923, as well as the liquidation cash dividends received thereon on October 1, 1927, and the 7½ additional shares purchased from the first of such liquidation dividends (Case, pp. 72, 61), should be held to constitute a part of the corpus of the trust estate, nevertheless, it is perfectly clear that the dividends which were definitely declared and paid out of the interest on the bonds held by the Securities Company, to-wit, the \$6,250.00 received by the Trustees on April 1, 1928, and the \$8,393.75 received on October 1, 1928, together amounting to the sum of \$14,643.75, constituted income of the trust and should be distributed among the life tenants.

IV.

The argument of appellants is without foundation.

The brief submitted on behalf of the appellants is based upon the obviously erroneous premise that the construction of the Settlement Agreement of June 23, 1923, is to be determined by the terms of the Last Will and Testament of Henry Graves, deceased. The provisions of this Will were declared to be illegal and a void disposition of his property. *Graves v. Graves* (Ct. of Ch. 1923) 94 N. J. Eq. 268. While it is true that it was the purpose of the Settlement Agreement of June 23, 1923, to carry out to some degree the provisions made by the testator for his grandchildren, as stated in that agreement, this was to be done only "*in the manner and to the extent hereinafter set forth*" ("Whereas" clause, Exhibit C-1, Case, p. 80).

The disposition of the property under the Settlement Agreement of June 23, 1923, is substantially different from that made in the Will and in no respect is there more difference than in the matter of the disposition that should be made of extraordinary dividends that might be received on stock which constituted the corpus of the trust estate at the time the testator died or that subsequently became or should become a part thereof.

Under the Will "All the increase in shares of stock special and stock dividends, and other increase in value, or accumulations to principal," were expressly directed to be added to principal and the regular yearly income only was to be distributed (Will of Henry Graves, paragraph Four, subdivision c, Case, p. 31). Whereas, under the Settlement Agreement of June 23, 1923, all such distributions which had been retained and

accumulated by the Trustees under paragraph Four, subdivision c, of the Will, just quoted, in so far as the same had been declared out of surplus or profits that had accrued subsequent to the date of the death of the testator and prior to December 31, 1922 (the date of the last previous accounting), were given to the children of the testator (Exhibit C-1, paragraph 2(a), Case, p. 81). All such distributions which had accrued subsequent to December 31, 1922, and prior to the date of the Settlement Agreement were directed to be distributed as income (Exhibit C-1, paragraph 2(b), Case, p. 82).

These two provisions took care of the situation up to the date of the Settlement Agreement, and subdivision d of paragraph 2 thereof, provided for the future. It is equally explicit.

After providing for the allowance to the widow, subdivision d, paragraph 2 of the Settlement Agreement directs that the remainder of the income should be divided among the children and grandchildren of the testator *per capita*, and in order to carry out the same scheme for the future as was provided by subdivisions (a) and (b), paragraph 2, of the said Settlement Agreement, it expressly provides that "all extraordinary cash or stock dividends which shall be declared on stock now constituting or which may hereafter constitute a part of the corpus of said trust estate, shall be considered and distributed as income, whether the same shall be declared out of surplus or profits accruing prior or subsequent to the date of this agreement" (Settlement Agreement, Exhibit C-1, paragraph 2, Case, pp. 83-86). The Settlement Agreement is complete and comprehensive in itself.

Counsel for defendants-appellants also contends that the clause in the Settlement Agreement providing that at the expiration of the trust

“the said trustees shall divide the principal of said trust estate, with all accumulations and increases thereof, to and among the great grandchildren of the Testator” (Exhibit C-1, Case, p. 84) includes extraordinary dividends (Appellant’s Brief, p. 10). This clause, by its express terms refers to the division of “*the principal* of said trust estate and all accumulations and increases *thereof*.” “All accumulations and increases thereof” indisputably refers to accumulations and increases of “*principal*”. The phrase has no relation whatever to income. What shall constitute income and the disposition that shall be made thereof are expressly defined and directed by the specific clauses of the Settlement Agreement referred to in the preceding paragraph of this brief, and these clauses are so definite that, we submit, there cannot be the slightest doubt in respect thereto.

Vice Chancellor Backes aptly stated the true effect of these provisions of the Settlement Agreement:

“Concisely, the members of the family reserved to themselves all future extraordinary cash and stock dividends out of profit and surplus regardless of when the profits or surplus accrued, contrary to the testator’s intentions that they should go to the great grandchildren. That was their privilege. The estate was theirs and the trust was voluntary. The right to the dividends is governed by the agreement” (Opinion Case, p. 122).

For the reasons above stated, we submit that the decree of the Court below should be affirmed.

LINDABURY, DEPUE & FAULKES,
Solicitors for Complainants-Appellees.

J. EDWARD ASHMEAD,
Of Counsel.

