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Bill of Complaint.

Filed August 25, 1910.

In Chancery of New Jersey.

Between

FRANCIS J. SWAYZE, as Executor and Trustee, &c.,

Complainant,

and

HARRIET M. HUNTINGTON, *et als,*

Defendants.

On Bill, etc.

To His Honor, Mahlon Pitney, Chancellor of the State of New Jersey:

Humbly complaining shows unto your honor your orator Francis J. Swayze, of the City of Newark, County of Essex and State of New Jersey, as one of the executors and trustees under the last will and testament of Henry W. Merriam, deceased, late of the Town of Newton, County of Sussex and State of New Jersey:

First. That the said Henry W. Merriam died at Newton, New Jersey, October 26, 1900, having first duly made and published his last will and testament and a codicil thereto in writing, in and by which he appointed John J. Merriam, William L. Dutcher, and Francis J. Swayze, executors thereof; that the said executors proved the will and codicil before the then surrogate of the County of Sussex, on November 7th,

1900, that letters testamentary were duly issued to them, and that they took upon themselves the burden of administering the said estate; that they thereafter filed an inventory of the said estate in the office of the surrogate of said County of Sussex as required by law; that they paid all of the debts of the said testator and all of the special legacies except one to the Plot Owners Association of the Newton Cemetery, hereafter mentioned, and that at the expiration of one year from the death of the said testator or shortly thereafter they filed their first account of their administration of the said estate; that subsequently at the September Term, 1905, of the Sussex Orphans' Court, they filed their second account of their administration of the said estate; that both of said accounts have been duly confirmed by the Orphans' Court of the County of Sussex, and that the balance as shown thereby has been duly distributed to those of the residuary legatees who were entitled to receive the same under the said will; that since the filing of the second account considerable sums of money have come to the hands of the said executors most of which has been duly distributed to those of the residuary legatees who were entitled to receive the same, but there still remains in the hands of the said executors a considerable sum for distribution upon the settlement of the account of the said executors.

Second. That William L. Dutcher, one of said executors, died in the year 1908, and letters of administration on his estate were granted to Edward M. Dutcher, that John J. Merriam, another of said executors, is advanced in years and in infirm and feeble health, and that your orator, since the probate of the said will and codicil has been appointed a Justice of the Supreme Court of this State, and is now acting in that capacity; that the said William L. Dutcher, during his lifetime had the active management of the estate owing to the fact that he had been closely

associated in business with the testator and the further fact that it was more convenient that the active management should be in his hands, and that since his death, on account of the infirm health of the said John J. Merriam, the active management has been entirely in the hands of your orator; that the final settlement of the said estate has been necessarily delayed owing to the fact that the testator was possessed of considerable property in the states of Nebraska and Colorado, some of which consisted of real estate which had been taken upon foreclosure of mortgages which had been held by testator, the sale of which at satisfactory prices was in some instances difficult, and that sales of some of said property were necessarily made upon long credit, one property having been sold upon terms which permitted the payment in instalments the last of which does not become due until 1915; that all of the estate has been administered except a balance due for the purchase price of a property in Denver, the payment of which is secured by a trust deed and became due June 27, 1910, but has not yet been paid, and the balance of purchase price on another property in Denver, which as stated was sold on the instalment plan, the last instalment becoming due in 1915, the unpaid balance of the purchase price of this property being also secured by a trust deed, and that all of the real estate of the said testator has been sold except a vacant lot in the Town of Newton, Sussex County, New Jersey, which it has been impossible to sell for a satisfactory price, it not being deemed advisable to sell the same at public sale owing to the lack of a market therefor; that your orator hoped to be able to make a final settlement of the estate but that there is no immediate prospect of doing so, and that he is desirous of settling his account as executor and trustee in this court and of being discharged from the further performance of his duty as trustee under said will and codicil.

Third. That the said testator by his will bequeathed to the Plot Owners Association of the Newton Cemetery, three hundred dollars in trust to keep the same securely invested and apply the income thereof for the maintaining in good order and condition his plot in the Newton Cemetery, but provided that in case the said Plot Owners Association, by reason of its failure to be incorporated or for any other reason, could not receive and hold the same for that purpose, the said sum of three hundred dollars should fall to the residue of the estate, that the said Plot Owners Association never was incorporated, and could not legally receive and hold the said legacy for the purpose for which it was bequeathed, and that it for several years has been dissolved and had no control of the said cemetery, so that the said executors could not pay the said legacy and it fell into the residue in accordance with the directions of the said will.

Fourth. That by said codicil to the said will the testator gave, devised and bequeathed one equal fourth of the residue of his estate to the children of his brother, John J. Merriam, one equal fourth to the children of his deceased brother, Samuel L. Merriam, one equal fourth to the children of William L. Dutcher, and one equal fourth to his executors upon trust to divide the same into three equal shares and to pay the yearly income of one of such shares to each of his three cousins, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, in such manner as might be most effectual for securing to each the personal receipt and enjoyment of the same during his life inalienably, and after his death to pay his share to his children or other descendants him surviving, and if any of his three cousins should not leave any child or other descendants him surviving, to hold the said principal in trust for his said cousins or cousin surviving upon the same trust, and he authorized and empowered his executors in their sole discretion or the discretion of

the survivor, to pay over to any of his said cousins his share of the principal or any part thereof upon the executors or the survivor of them being satisfied that such payment would inure to the individual benefit of his said cousin, and he ordered and directed that the determination of his said executors or the survivor of them, as to such payment should be final and conclusive.

Fifth. That John J. Merriam, the brother of the testator and your orator's co-executor and co-trustee had three children, Edwin W. Merriam, Henry F. Merriam and Helen D. Merriam, all of whom are still living; that the said Helen D. Merriam has married one Lucien J. B. La Coste; that Samuel L. Merriam, the deceased brother of the testator, had three children, Olin L. Merriam, Nellie J. Merriam, and Maybelle F. Buffington, all of whom survived the testator; that Maybelle F. Buffington has since died intestate, to wit, on the twenty-ninth day of August, nineteen hundred and eight, and letters of administration on her estate were, on or about the third day of September, nineteen hundred and eight, duly issued to Ralph H. Buffington; that William L. Dutcher had three children, all of whom are still surviving, Edward Merriam Dutcher, Frances Elizabeth Dutcher and Elnora Hortense Dutcher; that the said Frances Elizabeth Dutcher is married to one Abbott. That Albert I. Lane has died since the death of the testator and has left no child or other descendant him surviving; that by his last will and testament, proved in the County Court for Grant County in the State of Oregon, in which county the said Albert I. Lane resided at the time of his death, he bequeathed all of his estate to his two brothers Carlisle Jones Lane and Charles Randolph Lane to be divided equally between them; that the said Carlisle J. Lane has two children, Albert Merriam Lane and Clara May Lane, both of whom are minors under the

age of fourteen years, and that the said Charles R. Lane has one child, Carlisle R. Lane, who is a minor above the age of fourteen years.

Sixth. That the executors of the said Henry W. Merriam have from time to time as distribution was made of his estate, set apart one-fourth of the residue bequeathed to them in trust as above set forth, and have invested the same in mortgages and municipal bonds as allowed by the statute, and now hold the same so invested except a portion which is deposited in bank, and that they have paid the interest as it has accrued from time to time to the said Carlisle J. Lane, Charles R. Lane, and in his lifetime to Albert I. Lane, and that in pursuance of the discretion reposed in them they have paid to the said Carlisle J. Lane out of the principal the sum of two thousand dollars, and to Charles R. Lane, two thousand nine hundred and fifty dollars.

Seventh. That prior to the death of the said Henry W. Merriam he was the owner of a large amount of the capital stock of the H. W. Merriam Shoe Company, a corporation of this state, having its principal office and place of business at Newton, in the County of Sussex; that at the time of his death the certificates of stock were in certain envelopes in which they had been placed by him as your orator is informed and believes, and that these envelopes were addressed to different persons, with the obvious intent that the stock should be given to the persons to whom the envelopes were addressed; that said envelopes were handed to the said executors with the testator's will and codicil by his sister Harriet M. Huntington, who for some time prior to his death and during his illness had been entrusted with the management of his affairs; that your orator at once questioned whether the gift of the said stock which the testator had intended to make had been completed and perfected in accordance with law, and that in order

to avoid as far as possible controversy in reference thereto and to carry out the intent of the testator, the said Edwin W. Merriam, Henry F. Merriam, Helen D. Merriam, Olin L. Merriman, Nellie J. Merriam, Maybelle F. Buffington, Edward Merriam Dutcher, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, by agreements in writing, all of like tenor, a copy of one of which is hereto annexed and made part hereof, agreed that the envelopes might be delivered to the persons addressed, and that the executors might execute such transfers as might be necessary to perfect the title to the said stock, and that William L. Dutcher, who was then the duly appointed guardian of Frances Elizabeth Dutcher and Elnora Hortense Dutcher, then minors, likewise assented on their behalf so far as he legally could, and that the said Frances Elizabeth Dutcher, who has since that date attained the age of twenty-one years, has assented. That in pursuance of the said assents and in reliance thereon the said executors delivered the said envelopes to the persons addressed, but did not at the time execute any transfers of the said stock, and that as your orator is informed and believes the H. W. Merriam Shoe Company actually transferred the stock without the execution of any transfer by the executors, and that your orator and the said John J. Merriam have since the death of the said William L. Dutcher, duly ratified by instrument under their hands and seals the acts of the said Shoe Company in making the said transfers; that owing to the fact that the children of Carlisle J. Lane and Charles R. Lane were under the age of twenty-one years, and the further fact that children might be subsequently born to them who would be interested in the said estate, the executors required the said Harriet M. Huntington and John J. Merriam, who received the larger portion of the said stock, to indemnify the executors against any claim that might be made by the children of the said Carlisle J. Lane, Albert I. Lane, and

Charles R. Lane on account of the said stock, and required that one-fourth of the said stock as nearly as possible should continue to be held by the said executors, that in pursuance thereof Harriet M. Huntington delivered to the executors certificates for one hundred and fifty-one shares, and John J. Merriam delivered certificates for one hundred and twenty two shares, but without any formal transfer to the executors; that the executors held the said certificates until the second day of June, 1910, when they transferred the same absolutely, one hundred and fifty-one shares to Harriet M. Huntington, receiving cash therefor amounting to the sum of twenty-six thousand two hundred and seventy-four dollars, and one hundred and twenty-two shares to John J. Merriam, receiving cash therefor amounting to the sum of twenty-one thousand two hundred and twenty-eight dollars, amounting in all to forty-seven thousand five hundred and two dollars, which amount they now hold deposited in bank; that in addition thereto they had received cash to the amount of fifteen hundred and ten dollars from the said Harriet M. Huntington and twelve hundred and twenty dollars from John J. Merriam, being the amount of a dividend declared upon the said shares of stock immediately after Henry W. Merriam's death out of earnings prior to his death, which said sums representing said dividend are invested in two bonds of the Town of Newton for one thousand dollars each, which were taken by the said executors at their then market value of eleven hundred dollars per bond, making twenty-two hundred dollars in all, the balance of the sum so received for said dividend having been deposited in the Howard Savings Institution where it still remains; that the income on the said stock and upon the said bonds of the Town of Newton, has all been paid to the said Harriet M. Huntington and John J. Merriam pursuant to the waiver of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, the life tenants who were entitled to the in-

come of the said one-fourth of the residue of the estate; and that the interest accrued upon the deposit in the Howard Savings Institution has either been paid to the said Harriet M. Huntington and John J. Merriam or remains in the said savings institution subject to their order; that the said sum of forty-seven thousand five hundred and two dollars, the two bonds of the Town of Newton, and the balance in the Howard Savings Institution, represent the one-fourth of the stock contained in the said envelopes, and intended to be given by the testator to the persons addressed, that if the said gift was a perfected one the said sum of twenty-six thousand two hundred and seventy-four dollars belongs to said Harriet M. Huntington, and the said sum of twenty-one thousand, two hundred and twenty-eight dollars belongs to said John J. Merriam, and the two bonds of the Town of Newton, and the balance in the Howard Savings Institution belong to the said Harriet M. Huntington and the said John J. Merriam in the proportion of one hundred and fifty-one parts to the former and one hundred and twenty-two parts to the latter; that if the said gift was not perfected the said sum of forty-seven thousand and five hundred and two dollars, the two bonds of the Town of Newton, and the balance in the Howard Savings Institution, except the accrued interest thereon, belong to the trust fund created by the said will, the accrued interest however, belonging to the said Harriet M. Huntington and John J. Merriam in pursuance of the waiver by the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane.

Eighth. That in order that there may be a final settlement of the said estate, and a discharge of your orator as trustee, it must be ascertained whether the executors and trustees of Henry W. Merriam, deceased, were responsible for said stock and for the said sum of forty-seven thousand five hundred and

two dollars, the said Town of Newton bonds, and the said deposit in the Howard Savings Institution, as a part of Henry W. Merriam's estate, and, if so, to what extent; or whether the same should now be transferred and delivered to the said Harriet M. Huntington and John J. Merriam as their individual property in the proportions hereinbefore mentioned, and that it is impossible for your orator to have that question determined by proceedings in the Orphans' Court, and that it can only be determined in this court.

Ninth. That while your orator and co executors acted upon the assent and waiver of all of the residuary legatees who were at the time of an age to assent thereto, it has been suggested that the said executors may have erred in acting thereon, and that your orator is desirous of having it now ascertained whether he or his co-executors are accountable for anything by reason of their action as aforesaid, and that such accountability can be ascertained only in this court.

And your orator further shows, that the said John J. Merriam, departed this life on the fifteenth day of December, nineteen hundred and ten, and that he left a last will and testament; that in and by said last will and testament he gave, bequeathed and devised all his real estate and personal property to his wife, Amelia Elizabeth Merriam and to his three children, Helen Douglas Merriam, Edwin Wilson Merriam and Henry Franklin Merriam, to be held as a trust by his executors, and directed that his homestead should be kept as a family home during the life of his wife and that meanwhile all the income and what might be needed from the personal property of his estate should be jointly used for the comfort and convenience of all his said legatees before mentioned; and in and by his said will he directed that after the death of his wife an equal division of his remaining estate should be made between his three children, or their heirs in direct descent, in case either of them

should have deceased leaving issue; that in and by his said will, the said John J. Merriam appointed his said wife Amelia E. Merriam, and his two sons, Edwin W. Merriam and Henry F. Merriam the executors thereof; that by renunciation in writing, dated on the sixteenth day of January, nineteen hundred and eleven, and duly filed in the office of the Surrogate of the County of Union, New Jersey, pursuant to the statute in such case made and provided, the said Amelia E. Merriam renounced her executorship and refused to take upon herself the burden of the same, and that the said will of the said John J. Merriam was duly admitted to probate on the seventeenth day of January, nineteen hundred and eleven, by the said surrogate and letters testamentary thereon were thereupon issued to the said Edwin W. Merriam and Henry F. Merriam, two of the executors therein named, which letters are now in force and unrevoked; that the said Helen Douglas Merriam since the making of said will has married and her name is now Helen M. LaCoste.

To the end therefore, that the said Harriet M. Huntington, John J. Merriam, individually and as executor and trustee under the last will and testament of Henry W. Merriam, deceased, Edwin W. Merriam, Henry F. Merriam, the said Edwin W. Merriam and Henry F. Merriam as executors of and trustees under the last will and testament of John J. Merriam, deceased, Amelia E. Merriam, Helen M. LaCoste, and Ralph H. Buffington, as administrator of Maybelle F. Buffington, deceased, Olin L. Merriam, Nellie J. Merriam, Edward Merriam Dutcher, individually and as administrator of William L. Dutcher, deceased, Frances Elizabeth Abbott, Elnora Hortense Dutcher, an infant over the age of fourteen, Carlisle J. Lane, Albert Merriam Lane, an infant under the age of fourteen, and Clara May Lane, an infant under the age of fourteen, Charles R. Lane and Carlisle R. Lane, an infant above the age of fourteen, may without oath,

full, true and perfect answer make to all and singular the premises as fully and particularly as if they were here specially interrogated thereto, and that the accounts of your orator and of his co-executor may be taken under the direction of this court, and the balance in their hands ascertained, and that it may be ascertained in particular whether your orator and his co-executor, the said John J. Merriam, and the said Edward Merriam Dutcher, as administrator of William L. Dutcher, their deceased co-executor, or any of them, or the said Edwin W. Merriam and Henry F. Merriam as executors of the will of said John J. Merriam, deceased, are accountable for the value of the stock of the H. W. Merriam Shoe Company which stood in the name of the said testator on the books of the company at the time of his death or any part thereof, and if so what part, and whether or not the attempted gift of the same by the said testator was perfected or not, and that your orator may be discharged as trustee under the will of the said Henry W. Merriam.

Prayer for general relief

Prayer for subpoena.

And your orator as in duty bound, will ever pray, etc.

EDWARD M. COLIE,
Solicitor for Complainant.

EDWARD M. COLIE,
Of Counsel.

ANSWER OF HARRIET M. HUNTINGTON, to Bill.

Filed November 21, 1910.

First. Admits first paragraph, except as to distribution to residuary legatees after first and second accounts and the collection and distribution by executors since such accounts, and the sums now in the hands of the executors for distribution, and requires complainant to prove the same.

Second. Admits second paragraph, except allegations setting out the reasons for the delay in the settlement of said estate by said executors, and requires complainant to prove same.

Third. Admits third paragraph, except allegations as to the failure of said Plot Owners Association to become incorporated, and requires complainant to prove same.

Fourth. Admits fourth paragraph.

Fifth. Admits fifth paragraph.

Sixth. Requires complainant to prove sixth paragraph.

Seventh. Denies the allegations of seventh paragraph, except as the same may be hereinafter admitted and says:

That on or about the 10th day of April, 1897, at the request of her brother, the testator, H. W. Merriam, she became an inmate of his family in Newton, N. J., and at his request took upon herself the general management of all of his business and domestic affairs.

That in the room in his dwelling house in said Newton, then occupied by him as an office, there was at that time a safe in which, from that time until the time of his decease, the testator and this defendant each had a key; that in this safe during said time the

testator had a drawer with a lock thereon in which he kept his will, mortgages and other valuable papers. This drawer was kept locked and the defendant and the testator both had access to the key thereof. That there was in said safe another drawer with a lock, which was occupied solely by the defendant with her own papers and her own property. That the key to said drawer was kept by her in a place known only to her and to which the testator did not have or seek to have any access.

That about six months after the defendant became an inmate of the testator's family, the testator delivered to her a large envelope containing eight envelopes; the other envelopes addressed respectively as follows: H. M. Huntington, J. J. Merriam, Olin L. Merriam, Maybelle Merriam, Nellie J. Merriam, G. L. Dutcher, J. E. Warbasse and John Tozer; that upon the outside of said large envelope appeared in the handwriting of the testator the following statement:

> "Certificates of stock H. W. Merriam Shoe Company. The enclosed envelopes are the property of and belong to the several persons names as per address. H. W. Merriam."

That at the time this large envelope containing the eight other envelopes was delivered to the defendant by the testator, the testator requested the defendant to deliver the envelopes to the parties to whom they were directed; that said large envelope containing said eight other envelopes was placed by the defendant in said private drawer, solely occupied by the defendant, and was locked therein and the key thereof kept in the exclusive possession of the defendant, and that it there remained until about one month after the execution of the codicil to the testator's will, when the testator asked the defendant if she had delivered said stock, to which she replied that she had not.

The testator then requested the defendant to return said envelope and its contents to him, as he desired to make a change in the arrangement of said

stock. That the defendant returned said envelope and its contents in accordance with his request. That within about three weeks thereafter, the testator showed to the defendant another large envelope with a statement thereon in the handwriting of the testator, reading as follows:

> "Certificates of stock H. W. Merriam Shoe Company. The enclosed envelopes are the property of and belong to the several persons named as per address. H. W. Merriam."

Containing nine other sealed envelopes, addressed respectively to the following parties: Mrs. H. W. Huntington, Newton; J. J. Merriam, Summit; Olin L. Merriam, Boston; Nellie J. Merriam, Boston; Mrs. Maybelle F. Buffington, West Brookfield, Mass.; Francis Buffington and Ralph Buffington, both on one envelope; G. L. Dutcher; J. E. Warbasse, and John Tozer. That the said testator then stated to the defendant that he wished her to deliver the same to the several parties to whom they were respectively addressed; that this was a final arrangement; and he stated that the defendant was to deliver said envelopes at any time in the exercise of her discretion, and whenever she saw fit so to do. That the testator did not wish any stir made about it at that time, as he was not then feeling very well and did not care to have their contents made public at that time, and it might be as well not to deliver them at once.

That the defendant saw that one of the envelopes was addressed to her, and she asked the testator if she could look at hers at that time, to which he replied that she could. She then in his presence opened the envelope addressed to her, and found that it contained a certificate for 568 shares of stock of the H. W. Merriam Shoe Company, issued to H. W. Merriam, and that the blank transfer or assignment on the back thereof was signed by said H. W. Merriam. That this defendant looked at the certificate, thanked

the testator for his gift, and the testator said that he was glad that it pleased her, and that he hoped she would live long to enjoy it; and she avers that testator then and there delivered said certificate to the defendant and that the defendant then and there received and accepted the same, and that the said 568 shares of stock then and there became the property of the defendant.

That said large envelope containing said nine other envelopes, was taken by the defendant, locked by her in her private drawer in said safe, and the key thereof was kept by her in her exclusive possession and control.

That said eight other envelopes, beside that addressed to this defendant, were afterwards ascertained to contain certificates of stock as follows, namely:

John J. Merriam,	485	shares	of	stock.
Nellie J. Merriam,	10	"	"	"
Olin L. Merriam,	10	"	"	"
Maybelle Buffington,	7	"	"	"
Francis and Ralph Buffington,	10	"	"	"

That the envelope addressed to G. L. Dutcher, J. Warbasse and John Tozer contained certificates for 30 shares, 30 shares and 50 shares of stock, respectively, of said company, standing in the name of said Dutcher, Warbasse and Tozer, respectively, which certificates, as this defendant is informed and believes, were held by the said H. W. Merriam as collateral security for certain notes given by each of said parties respectively, although said certificates had not been formally assigned by them to said H. W. Merriam. Said envelopes, as the defendant is informed and believes, contained also the notes which the said Dutcher, Warbasse and Tozer respectively had given said H. W. Merriam, and for which said stock was held by him as security.

That the said testator never exercised any control of any kind over said stock thus delivered to her and locked up in her private drawer, and never changed any of his instructions in relation thereto; that all of said stock remained in the sole and exclusive possession and control of the defendant until after the death of the testator.

That on the day of and shortly after the funeral of the testator, the executors sent a messenger to the defendant for the papers of the testator; that the defendant took from the private drawer of the testator, using his key therefor, his will, a number of mortgages and other papers, and inadvertingly, acting without legal advice, ignorant of her legal rights, and with the belief that nothing that she did would in any way effect her legal rights, took from her own private drawer the large envelope containing her own stock certificate of 568 shares and the eight other envelopes above described, and sent them all to the executors, and that upon further reflection and realizing that she had acted hastily and unwarrantedly in delivering said stock to said executors, the first time she saw the executors thereafter, she requested them to return to her her property as aforesaid, and also to return the said other envelopes to her so that she could deliver them to the parties to whom they were addressed; or, that the executors, if they did not consider the defendant a proper person to carry out the instructions of the testator, would deliver said other certificates to the parties to whom they were addressed. All of which the executors declined to do, and raised the question as to whether the gift of said stock to all of said parties had been completed and perfected according to law.

That thereafterwards, all of the parties mentioned in said seventh paragraph of said bill, signed an agreement in writing and delivered the same to said executors, authorizing said executors to carry out the intent of the testator, and to deliver said sealed enve-

lopes to the parties to whom they were addressed, and authorizing them to execute any transfers or assignments necessary to perfect the title of the said stock in the persons to whom said envelopes were addressed or to be delivered; that thereupon, said executors delivered said certificate for 568 shares of stock, the property of the defendant, to defendant, and said eight other envelopes to the persons to whom they were addressed, one of whom, John J. Merriam, received 485 shares of said stock.

That said William L. Dutcher, guardian, assented so far as he legally could, and that since attaining the age of twenty-one years, said Frances Elizabeth Dutcher has also assented. That as to the stock of the defendant, the executors had no occasion to transfer the same or to ratify the transfer thereof, as the testator, in his lifetime had executed the necessary transfer thereof to the defendant, and the said H. W. Merriam Shoe Company actually transferred, as they had a legal right to do, the same without any transfer by the executors.

That the defendant admits that the executors had the transfer of said stock by said Company ratified as alleged, and she says that all of the said stock, thus transferred and delivered, has been treated and recognized by said Company, said executors, and all parties interested in said estate, as the lawful property of the parties respectively to whom the same was delivered, and it was and is their property.

That owing to the fact that the children under the age of twenty-one years, and the further fact that children may be subsequently born to them who would be interested in said estate, the executors required the defendant and John J. Merriam to indemnify them against any claim that might be made by the children of said Carlisle J. and Charles R. Lane born and to be born, and requested, that, in order to indemnify them, said defendant should place in the hands of

said executors 151 shares of the stock thus owned by her and $1,510.00 in cash dividends accruing thereon prior to the death of said testator and that John J. Merriam should place in the hands of said executors 122 shares of the stock thus delivered to and owned by him and $1,220.00 dividends accruing thereon as aforesaid. That an agreement therefor, for the purpose of indemnifying said executors was entered into between the parties, dated March 26, 1901, a copy of which said agreement is hereto annexed and made a part of this answer, and marked Exhibit A.

That said agreement was signed under protest by the defendant and said John J. Merriam on the ground that it was not in accordance with the directions or true intent of the testator. That it was not agreed that said stock "should continue to be held by the said executors;" that it was agreed that the defendant on her part should indemnify said executors by the delivery to them as security said 151 shares of her own stock and said dividend, and said stock after delivery remained and was to remain her own property, subject to its liability to indemnify said executors; and while it is true that said agreement provides that said executors shall hold the stock of the defendant, "or the proceeds, if sold, in trust until such time as she may establish her title thereto by a decree of a court of competent jurisdiction or until such time as she may secure a release to the said executors from the children born or to be born of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane," defendant says that in making said agreement she did so with the full belief on her part that in so doing she was not in any way surrendering, impairing, or transferring her legal rights therein, and that the protest signed by her as aforesaid would preserve to her her full legal rights in the premises. That in order to adequately and properly protect her legal rights, said agreement should have treated and now

should treat the whole of said 568 shares of stock and said dividends and said 485 shares of stock and said dividends of said John J. Merriam, precisely as they stood at the death of said testator, said stock being in the hands of said defendant and said dividend being undeclared, said check being duly endorsed, transferred and delivered to her with all the indicia of ownership by her, so that if any question was raised as to the right of the estate thereto, the burden would be upon the estate to establish its title against this defendant, instead of placing the burden upon the defendant of establishing her title hereto as against the estate, as said agreement as it now stands purports to do; and that she signed said agreement with the full expectation and belief that such would be its effect, and she believes that such was and is the expectation and belief of all of the parties thereto, and that she believes that it was the understanding, expectation and belief of all of the parties thereto that said agreement would not in any way affect the legal rights of the parties thereto so far as their title to said stock was concerned; and she says that the provision of said agreement placing the burden upon the defendant as against the estate is the result of inadvertence and mistake, and she prays that said stock and dividend, and the proceeds thereof may be treated in this proceeding as in the hands and possession of the defendant with the dividend undeclared, precisely as they stood at the time of the death of the testator, with the burden upon the estate of establishing any title that it may claim thereto.

And she prays that said agreement may be reformed and corrected so as to truthfully express the real intent of the parties thereto as aforesaid and so as to place said stock and said dividend and the proceeds thereof with said dividend undeclared, in the hands and possession of the defendant, with the burden upon the complainant of establishing the title of the estate thereto.

That said 568 shares of stock having been her property from the time of the delivery of said certificate of stock to her, in the lifetime of said H. W. Merriam, duly endorsed by said H. W. Merriam, with the intention upon the part of the testator to give the same to her, she then became entitled in her own right to the payment of all dividends that were subsequently declared thereon, and that said sum of $1,510.00 declared upon said stock as a dividend immediately after the death of said H. W. Merriam out of the earnings prior to his death and subsequent to the delivery of said certificate to the defendant was her property and is now held by said executors as such upon the same trust as said stock.

And defendant denies that if said gift was not perfected the said sum of forty-seven thousand five hundred and two dollars and two bonds of the Town of Newton and the balance in the Howard Savings Institution except the accrued interest thereon belong to the trust fund created by the said will, and avers that said sum, said bonds and said balance are not part of said estate, and that they are the property of the defendant and John J. Merriam in the proportions hereinbefore set forth, and that they are now held by the said executors and trustees as individuals by virtue of a contract between said defendant and said John J. Merriam and said executors and trustees as the property of said defendant and said John J. Merriam solely to indemnify said executors and trustees against any liability that they may have assumed as executors in failing to recover said stock as a part of said estate; and she further avers that the only issue involved in said bill of complaint is the resignation of said Swayze and the accounting of said executors and trustees to said estate and to the residuary legatees thereof; that as to said stock of said Shoe Company the only question that can be raised under said bill of complaint is as to whether said executors and trustees are liable to ac-

count to said estate and said residuary legatees for said one thousand and ninety shares of said stock as a part of said estate or to the children born and unborn of Charles R. Lane and Carlisle J. Lane for one-fourth thereof, namely, two hundred and seventy-two and one-half shares, and whether said executors and trustees could have recovered the same from the said defendant, said stock being in the hands and possession of the said defendant as aforesaid at the time of the death of said H. W. Merriam, with the burden upon the executors and trustees to establish the title of the estate thereto; and she further avers that the burden is upon the residuary legatees to establish such liability on the part of said executors and trustees.

That she admits that the said dividends, amounting to $2,750.00 have been invested in two bonds at a cost of $1,100.00 per bond, and that she has received the income of said 151 shares of stock and one of said bonds; that as to the balance of said $1,510.00 and the income thereof she is not informed and will require the complainants to prove the same.

She says that she delivered to the said executors the sum of $26,274.00, and the said executors returned to her said 151 shares of stock, and that said $26,274.00 was and is her own property and was and is to be held by said executors upon the same terms and conditions in trust in the same manner and to the same extent as said 151 shares of stock was theretofore held by them.

Eighth. That as to the allegations contained in the eighth paragraph of said bill the defendant says, that in order that there may be a final settlement of said estate and discharge of said orator as trustee that it must be ascertained whether said executors and trustees are liable for not recovering the said stock from the said defendant, as set forth in the seventh paragraph of the answer to said bill; and

she further says that the responsibility of said executors and trustees for said sum of forty-seven thousand five hundred and two dollars and said Town of Newton bonds and said deposit in the Howard Savings Institution is not a matter to be ascertained as said sum, said bonds and said deposit are the property of said defendant and said John J. Merriam in the proportions hereinbefore set forth and are not a part of said estate, and that they are held by said executors and trustees as the property of said defendant and said John J. Merriam to indemnify the said executors and trustees individually against any liability that they may have assumed in the premises.

Ninth. Admits ninth paragraph.

Prays same advantage of her aforesaid answer as if she had pleaded or demurred where a plea or demurrer would have been proper.

EDWARD S. ATWATER, JR.,
Solicitor for Defendant,
208 Broad Street, Elizabeth, N. J.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF NORFOLK. } *ss.*

HARRIET M. HUNTINGTON, being duly sworn, deposes and says, that she is one of the defendants in this action; that she has read the foregoing answer and knows the contents thereof and that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

HARRIET M. HUNTINGTON.

Subscribed and sworn to before me
this 17th day of November, 1910.

HENRY H. MITON,
Notary Public.

ANSWERS OF RALPH H. BUFFINGTON, Administrator of the goods and estate which were of Maybelle F. Buffington, Olin L. Merriam and Nellie J. Merriam, to Bill.

Filed November 21, 1910.

First. Admit paragraph first but require proof as to distribution, accounts and balance in hand.

Second. Admit second paragraph except allegations setting out the reasons for the delay in the settlement of the said estate, and require proof as to same.

Third. Admit third paragraph except as to the failure of said Plot Owners Association to become incorporated and require proof as to same.

Fourth. Admit paragraph fourth.

Fifth. Admit paragraph fifth.

Sixth. Require proof as to paragraph sixth.

Seventh. Require proof as to allegations in seventh paragraph, except as to those hereinafter admitted, and say they (or their intestate) agreed to said delivery of said envelopes and received the envelopes directed to her and them respectively. That they hereby ratify, confirm and approve said agreement in writing delivered by them (or their intestate) to said executors, authorizing them to deliver said sealed envelopes to the parties to whom they were respectively addressed, and to execute any transfers or assignments necessary to perfect the title of the respective parties thereto. That as they are informed and believe said H. W. Merriam in his lifetime transferred and delivered to said Harriet M. Huntington, 568 shares and to said John J. Merriam 485 shares of the capital stock of the H. W. Merriam Shoe Company and that the same then and there became the property respectively of said Harriet M. Huntington

and John J. Merriam and that they respectfully request the court to so hold; that as they are informed and believe in case of any controversy in the courts over the title thereto said stock should be treated as in the hands and possession of the said Harriet M. Huntington at the time of the death of the said H. W. Merriam, with the burden on the estate of establishing any title it may claim thereto and that it should not be treated as placing the burden upon the said Harriet M. Huntington of establishing her title thereto as against the estate.

That as they are informed and believe said 151 shares of stock and said $1,510.00 dividend delivered by said Harriet M. Huntington to said executors and trustees to indemnify said executors and trustees, and the proceeds thereof, and said 122 shares of stock and said $1,220 dividend delivered by said John J. Merriam to said executors and trustees to indemnify said executors and trustees and the proceeds thereof, not in the hands of said executors and trustees to indemnify them against any liability they have assumed in delivering all of said stock to the parties to whom it was respectively addressed were at the time they were delivered to the said executors and trustees and the proceeds thereof now are the individual property of said Harriet M. Huntington and said John J. Merriam respectively, and said proceeds are now in the hands of said executors and trustees to indemnify them against any liability they have assumed in delivering said stock as aforesaid and not for any other purpose, and that said executors and trustees have not the right to hold the same as a part of said estate, and they say that if said gift was not perfected said proceeds do not belong to the trust fund created by said will, but that subject to said indemnification they belong to said Harriet M. Huntington and John J. Merriam in the proportions hereinbefore set forth; and they further aver that the only issue involved in

said bill of complaint is the resignation of said Swayze and the accounting of said executors and trustees to said estate and to the residuary legatees thereof; that as to said stock of said Shoe Company the only question that can be raised under said bill of complaint is as to whether said executors and trustees are liable to account to said estate and said residuary legatees for said one thousand and ninety shares of said stock as a part of said estate or to the children born and unborn of Charles R. Lane and Carlisle J. Lane for one-fourth thereof, namely, two hundred and seventy-two and one-half shares, and whether said executors and trustees could have recovered the same from the defendant Harriet M. Huntington said stock being in the hands and possession of the said Harriet M. Huntington as aforesaid at the time of the death of said H. W. Merriam, with the burden upon the executors and trustees to establish the title of the estate thereto; and they further aver that the burden is upon the residuary legatees to establish such liability on the part of said executors and trustees.

Eighth. That as to the eighth paragraph the defendants say, that in order that there may be a final settlement of said estate and discharge of said orator as trustee that it must be ascertained whether said executors and trustees are liable for not recovering the said stock from the said Harriet M. Huntington, as set forth in the seventh paragraph of the answer to said bill and further that the responsibility of said executors and trustees for said sum of forty-seven thousand five hundred and two dollars and said Town of Newton bonds and said deposit in the Howard Savings Institution is not a matter to be ascertained as said sum, said bonds and said deposit are the property of said Harriet M. Huntington and said John J. Merriam in the proportions hereinbefore set forth and are not a part of said estate and that they are held

by said executors and trustees as the property of said Harriet M. Huntington and said John J. Merriam to indemnify the said executors and trustees individually against any liability that they may have assumed in the premises.

Ninth. Admit paragraph ninth.

Pray same advantage of aforesaid answers as if they had pleaded or demurred where a plea or demurrer would have been proper, and pray to be dismissed with costs.

EDWARD S. ATWATER, JR.,
Solicitor for Defendant,
208 Broad Street, Elizabeth, N. J.

ANSWER OF CARLISLE J. LANE, to Bill.

Filed November 29, 1910.

First. Admits allegations in paragraph first, except those relating to the distribution to the residuary legatees after the settlement of said first and second accounts, and the collection and distribution of sums by executors since the settlement of said first and second accounts, and the sums now in the hands of the executors for distribution and requires complainant to prove same.

Second. Admits all of the allegations contained in paragraph second, except those setting out the reasons for the delay in the settlement of the said estate, and requires complainant to prove the same.

Third. Admits all of the allegations contained in paragraph third, except as to the failure of said Plot Owners Association to become incorporated and requires complainant to prove the same.

Fourth. Admits paragraph fourth.

Fifth. Admits paragraph fifth.

Sixth. Admits allegation of paragraph sixth that said executors and trustees have paid to this defendant on account of the yearly income of said estate to which this defendant is entitled, in all the sum of four thousand nine hundred fifty-eight and 17/100 dollars ($4,958.17) and two thousand dollars ($2,000) on account of said principal sum, and says that whether said four thousand nine hundred fifty-eight and 17/100 dollars ($4,958.17) is the full sum to which he is entitled as income and as to what sum he is entitled to as the principal sum, and as to how the same is now invested, and as to the other allegations in said paragraph, he is not informed and will require the complainant to prove the same. And the defendant further says that he is entitled to one-

eighth (1/8) of the residue of said estate to be paid over to him in the exercise of the sole discretion of said executors, upon said executors and trustees being satisfied that such payment will inure to the individual benefit of this defendant, and this defendant avers that such payment so made at the present time will and would inure to his individual benefit, and that he is now entitled to have said principal sum paid over to him, all of which is well known to said executors. That as he is informed and believes, said executors are not willing to take the responsibility of turning over said sum to this defendant without the order of a court of competent jurisdiction and that they are willing to submit the question to a Court of Chancery and take its order and decree as to whether they shall deliver said principal sum to this defendant, and the defendant prays that this court will hear and determine the question as to whether this defendant is now entitled to his share of said legacy and will order and decree that said executors and trustees shall forthwith pay over said one-eighth (1/8) of said residue to this defendant.

Seventh. Requires complainant to prove allegations of paragraph seventh, except as to those hereinafter admitted, and says that he agreed to said delivery of said envelopes and received the envelope directed to him. That he hereby ratifies, confirms and approves said agreement in writing delivered by him to said executors, authorizing them to deliver said sealed envelopes to the parties to whom they were respectively addressed, and to execute any transfers or assignments necessary to perfect the title of the respective parties thereto. That as he is informed and believes said H. W. Merriam in his lifetime transferred and delivered to said Harriet M. Huntington, 568 shares and to John J. Merriam 485 shares of the capital stock of the H. W. Merriam Shoe Company, and that the same then and there became the property

respectively of said Harriet M. Huntington and John J. Merriam and that he respectfully requests the court to so hold; that as he is informed and believes in case of any controversy in the courts over the title thereto said stock should be treated as in the hands and possession of the said Harriet M. Huntington at the time of the death of the said H. W. Merriam, with the burden on the estate of establishing any title it may claim thereto and that it should not be treated as placing the burden upon the said Harriet M. Huntington of establishing her title thereto as against the estate.

That as he is informed and believes said 151 shares of stock and said $1,510.00 dividend delivered by said Harriet M. Huntington to said executors and trustees to indemnify said executors and trustees, and the proceeds thereof, and said 122 shares of stock and said $1,220 dividend delivered by John J. Merriam to said executors and trustees to indemnify said executors and trustees and the proceeds thereof, now in the hands of said executors and trustees to indemnify them against any liability they have assumed in delivering all of said stock to the parties to whom it was respectively addressed; were at the time they were delivered to the said executors and trustees and the proceeds thereof now are the individual property of said Harriet M. Huntington and said John J. Merriam respectively, and said proceeds are now in the hands of said executors and trustees to indemnify them against any liability they have assumed in delivering said stock as aforesaid and not for any other purpose, and that said executors and trustees have not the right to hold the same as a part of said estate, and he says that if said gift was not perfected said proceeds do not belong to the trust fund created by said will, but that subject to said indemnification they belong to said Harriet M. Huntington and John J. Merriam in the proportions hereinbefore set forth; and he further avers that the only issue involved in

said bill of complaint is the resignation of said Swayze and the accounting of said executors and trustees to said estate and to the residuary legatees thereof; that as to said stock of said Shoe Company the only question that can be raised under said bill of complaint is as to whether said executors and trustees are liable to account to said estate and said residuary legatees for said one thousand and ninety shares of said stock as a part of said estate or to the children born and unborn of Charles R. Lane and Carlisle J. Lane for one-fourth thereof, namely, two hundred and seventy-two and one-half shares, and whether said executors and trustees could have recovered the same from the defendant Harriet M. Huntington said stock being in the hands and possession of the said Harriet M. Huntington as aforesaid at the time of the death of said H. W. Merriam, with the burden upon the executors and trustees to establish the title of the estate thereto; and he further avers that the burden is upon the residuary legatees to establish such liability on the part of said executors and trustees.

Eighth. That as to the allegations contained in paragraph eighth of said bill the defendant says, that in order there may be a final settlement of said estate and discharge of said orator as trustee that it must be ascertained whether said executors and trustees are liable for not recovering the said stock from the said Harriet M. Huntington, as set forth in the seventh paragraph of the answer to said bill; and he further says that the responsibility of said executors and trustees for said sum of forty-seven thousand five hundred and two dollars and said Town of Newton bonds and said deposit in the Howard Savings Institution is not a matter to be ascertained as said sum, said bonds and said deposit are the property of said Harriet M. Huntington and said John J. Merriam in the proportions hereinbefore set forth and

are not a part of said estate and that they are held by said executors and trustees as the property of said Harriet M. Huntington and said John J. Merriam to indemnify the said executors and trustees individually against any liability that they may have assumed in the premises.

Ninth. Admits paragraph ninth.

Prays same advantage of aforesaid answer as if he had pleaded or demurred where a plea or demurrer would have been proper and prays to be dismissed with costs.

EDWARD S. ATWATER, JR.,
208 Broad St.,
Elizabeth, N. J.

ANSWER OF CHARLES R. LANE, to Bill.

Filed December 15, 1910.

(1) Admits paragraph first, but requires complainant to prove the accounts referred to in the bill and the distribution of the property or moneys of the said estate of Henry W. Merriam.

(2) Admits paragraph second.

(3) Admits paragraph fourth.

(4) Admits paragraph fifth, as to the children and grandchildren of John J. Merriam, Samuel L. Merriam and William L. Dutcher, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, and the proceedings upon the various estates therein referred to.

(5) Requires proof as to investments made by the executors and trustees under Merriam will.

(6) Admits that the said Henry W. Merriam, at the time of his death, was the owner of a large amount of the capital stock of the H. W. Merriam Shoe Company, a corporation of this state, but leaves complainant to make proof as to gifts by the said Henry W. Merriam of certificates of stock in said company, and the deposit of the said certificates of stock with Harriet M. Huntington, as alleged in the seventh paragraph.

(7) Admits signing a paper or writing, a copy of which is annexed to the said bill of complaint, but denies that the said paper or writing, was intended to or has the force and effect claimed in the said bill of complaint; that said paper or writing variously referred to in said bill of compaint, as an agreement, assent or waiver, was signed by this defendant, and procured from him under and by virtue of the representations and statements of fact contained in certain letters forwarded to this defendant by the said executors; one of said letters being referred to in the said

paper or writing attached to the said bill of complaint as bearing date January 19, 1901, and the other bearing date January twenty-first, nineteen hundred and one, of which the following is a copy:

"Newark, N. J., Jan. 21, 1901.

Dear Sir:

We enclose a copy of the will of the late Henry W. Merriam. We have completed the inventory of his personal property. The total amount of the personal property as appraised is $291,211.08. In addition there is valuable real estate, which forms no part of the above named sum. The inventory does not include any stock of the H. W. Merriam Shoe Company for the reason that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother John J. Merriam and his sister Harriet M. Huntington, in pursuance of a natural and long cherished desire of his to retain in his own family the control of the business he had established.

Long prior to his death, he had prepared sealed envelopes addressed to several different persons, which were enclosed in a large envelope endorsed as follows: 'Certificate Stock H. W. M. Shoe Co. The enclosed envelopes are the property of and belong to the several persons named, as per address, H. W. Merriam.' These envelopes were deposited with Mrs. Huntington for delivery to the persons addressed. Mrs. Huntington has handed these envelopes to the executors, who feel that they ought to return them to her, in order that she may carry out the instructions of Mr. Merriam. They are advised, however, that some legal question may be raised as to their right to do so, and before doing so they are desirous of securing the consent of the residuary legatees who are of age. The contents of these envelopes are entirely unknown to the executors, except as

their contents are indicated by Mr. Merriam's endorsement on the large envelope. Of course, the executors are not at liberty to open envelopes addressed to other persons.

If you are willing that the executors should deliver these envelopes and take any other steps necessary to carry out Mr. Merriam's manifest wishes in a strictly legal form, kindly sign and return the enclosed consent to John J. Merriam, Summit, New Jersey.

Yours truly,
John J. Merriam,
William L. Dutcher,
Francis J. Swayze,
Executors,
by F. J. S."

The former letter dated January 19, 1901, this defendant is not able to produce, and calls upon the said complainant, to produce the same; that this defendant, acting upon the statements contained in said letters to the affect, "that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother John J. Merriam, and his sister Harriet M. Huntington, in pursuance of a natural and long cherished desire of his to retain in his own family the control of the business he had established," and that "Mrs. Huntington has handed these envelopes to the executors who feel that they ought to return them to her in order that she may carry out the instructions of Mr. Merriam," and relying thereupon and believing that this defendant had no legal right to the said stock or to the income thereof, and believing that in signing the said paper or writing he was acting solely for the purpose of perfecting a title which he believed from the representations of the said executors already existed in the said John J. Merriam, Harriet M. Huntington and the other persons referred to in the said bill of complaint, and not knowing or be-

lieving that he was in any wise releasing, relinquishing, assigning, transferring or disposing of any rights or title which he then had or might have in or to either the said stock or the income thereof, signed and executed the said paper or writing and forwarded the same to the said executors. And this defendant further says that the said paper or writing was signed and executed without any consideration passing to this defendant, and that he had no knowledge of his rights in the premises or in the said stock or income thereof, nor of the circumstances set forth in the said bill of complaint, in reference thereto, until the filing of the said bill of complaint.

This defendant therefore charges and insists that to give to the said paper or writing any greater effect than is above stated, or to consider the same as assigning, transferring, disposing of, releasing, relinquishing or waiving in any manner any interest of this defendant in the said stock or the income thereof, would be a great wrong and injustice to this defendant.

This defendant further charges and insists that the said Henry W. Merriam now deceased, did not make gifts of the said stock or certificates for said stock, referred to in the "seventh" paragraph of the said bill of complaint, to the persons, referred to in the said bill of complaint, among them Harriet M. Huntington and John J. Merriam, therein named, and further charges and insists that if it should be ascertained by this court, that the said Henry W. Merriam intended to make gifts of the said stock or certificates therefor, to said persons, that the actions and doings of the said Henry W. Merriam, in the premises, did not perfect or complete said intended gifts, and that said stock and the certificates therefor, became and was a part of the estate of the said Henry W. Merriam, deceased, at the time of his death, and passed to the said executors and trustees as among the assets of the said estate, and that this defendant has not assigned,

transferred, disposed of, released, waived or relinquished any right he may have therein or thereto, or to the income therefrom, and is entitled to his proportionate share thereof, and of the other assets of said estate and of the income therefrom in accordance with the provisions of the said last will and testament of the said Henry W. Merriam, and further charges and insists that the title to the said stock or its value could not be legally transferred by the said executors or trustees of the said Henry W. Merriam, to the said persons, so as to divest the rights of the beneficiaries named in the said last will and testament and codicil, of whom this defendant is one, and that if any transfer of said stock or the certificates therefor, has been made, as alleged in said bill of complaint, that the same is illegal and void, and that the present holders thereof should be decreed to hold the same in trust for the said beneficiaries named in the said last will and testament, and codicil thereto, of the said Henry W. Merriam, of whom one is this defendant, in accordance with the terms of the said last will and testament and codicil thereto, and that the proceeds, if any, realized from the sale of the said stock or certificates therefor, should be held in trust in the same manner.

And this defendant prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

THOMAS P. McKENNA,
Solicitor of Defendant, Charles R. Lane.

ANSWER OF CARLISLE R. LANE, an infant over the age of fourteen years, by William A. Smith, his Guardian ad litem, to Bill.

Filed November 27, 1911.

First. Admits first paragraph, excepting the particulars of the inventory therein referred to and the payment of the legacies therein referred to, and of the filing of the accounts by the executors in the Sussex County Orphans' Court and of the confirmation thereof by said court and the distribution to the residuary legatees, and the second accounting thereof and the distribution thereunder, and as to the amounts which the executors have in their hands, and requires complainant to prove the same.

Second. Admits death of William L. Dutcher and administration of his estate; death of John J. Merriam, and proof of his will, but leaves complainant to make proof of the particulars of the will of John J. Merriam and the manner of the distribution of his estate.

Admits appointment of complainant as Justice of the Supreme Court of this State, and that he is now acting in that capacity; that William L. Dutcher during his lifetime had the active management of the estate, and that since the death of said William L. Dutcher the active management has been entirely in the hands of the complainant for the reasons stated by said complainant. Requires complainant to prove all other matters and things set out in paragraph second.

Third. Requires complainant to prove paragraph third.

Fourth. Admits paragraph fourth relative to the codicil to the last will and testament of said Henry W. Merriam.

Fifth. Requires complainant to prove paragraph fifth, except that he admits that he is the only child of Charles R. Lane and is a minor over the age of fourteen years.

Sixth. Requires complainant to prove paragraph sixth.

Seventh. Admits that prior to the death of the said Henry W. Merriam said Henry W. Merriam was the owner of a large amount of the capital stock of H. W. Merriam Shoe Company, a corporation, but requires complainant to prove all other matters and facts set forth in paragraph seventh. Denies that the certificates of stock referred to in said seventh paragraph were placed in envelopes by said testator and that envelopes were addressed to different persons, and that there was any obvious intent that such stock should be given to such persons, and that such envelopes were in the possession of the said Harriet M. Huntington at the time of the death of said Henry W. Merriam; admits that said Harriet M. Huntington was managing the affairs of the said testator during the last illness of said Henry W. Merriam; denies that there was any gift of stock by said testator to the said Harriet M. Huntington or any intention to make such gift or any perfection thereof. And this defendant for further answer says that the said executors of the said Henry W. Merriam were without authority to enter into an agreement in writing such as annexed to the complainant's bill and to turn over the envelopes referred to therein to the parties mentioned, and denies that H. W. Merriam Shoe Company had any right or authority to transfer said stock, and denies that the said John J. Merriam and the said complainant had any authority or right to ratify by instrument under their hands and seals the act of H. W. Merriam Shoe Company in making the transfer of said stock.

Eighth. As to the eighth and ninth paragraphs, says complainant should be held to account for the said stock so delivered to the said Harriet M. Huntington and John J. Merriam; and this defendant charges and insists that the stock referred to in said bill of complaint passed to the executors and trustees among the assets of said estate of Henry W. Merriam, and that this infant defendant, Carlisle R. Lane, is entitled to have his proportionate share of said stock held for him among the other assets of the said estate, in accordance with the provisions of the last will and testament of the said Henry W. Merriam; and he further charges and insists that the title to said stock or its value could not be legally transferred by the said executors or trustees of said Henry W. Merriam to the said persons so as to divest the rights of this defendant under the last will and testament and said codicil, and that if any transfer of said stock or the certificates therefor has been made, as alleged in said bill of complaint, the same is illegal and void, and that the present holders thereof should be decreed to hold the same in trust for the said beneficiaries named in said last will and testament and the codicil thereto of the said Henry W. Merriam, of whom one is this defendant Carlisle R. Lane, in accordance with the terms of the said last will and testament and codicil thereto, and that the said complainant should be charged as trustee to account for the same.

And this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM A. SMITH,
Guardian ad litem for defendant Carlisle R. Lane.

COULT & SMITH,
Solicitors for and of Counsel with said Defendant.

ANSWER OF ALBERT MERRIAM LANE and CLARA MAY LANE, infants under the age of fourteen years by William A. Smith, their guardian *ad litem* to bill (filed July 26, 1911), is the same as foregoing answer of Carlisle R. Lane, by William A. Smith, his guardian *ad litem,* excepting paragraph fifth, wherein they admit that they are the two children of Carlisle J. Lane, and are both minors under the age of fourteen years.

ANSWER OF ELNORA H. DUTCHER, an infant under the age of twenty-one years, by Edward M. Dutcher, her guardian, ad litem, to Bill.

Filed December 23, 1911.

First. Admits allegations in the first paragraph excepting the particulars of the making and filing of the inventory of said estate and the payment of the legacies therein referred to and of the filing of the accounts by said executors in the Sussex County Orphans' Court and of the confirmation thereof by said court and the distribution to the residuary legatees and of the second account thereof and the distribution thereunder and as to the amounts which the executors have in their hands, and requires complainant to prove same.

Second. Admits death of William L. Dutcher, and administration of his estate; death of John J. Merriam and proof of his will, but requires proof by complainant of the particulars of the will and estate of said John J. Merriam.

Admits appointment of complainant as Justice of the Supreme Court, but requires proof by complainant of the facts stated in the second paragraph of bill that William L. Dutcher, during his lifetime, had the active management of the estate.

Requires complainant to prove the other matters and things set out in said second paragraph of bill.

Third. Requires complainant to prove paragraph third.

Fourth. Admits that the said testator, by the codicil added to his said will, gave and bequeathed the one equal fourth of the residue of his estate to the children of his brother, John J. Merriam; the one equal fourth part to the children of his deceased brother, Samuel L. Merriam; the one equal fourth part to the children of William L. Dutcher, the father of this defendant, and the one equal fourth part to his executors as alleged in the fourth paragraph of bill.

Fifth. Requires complainant to prove the allegations in paragraph fifth, excepting that she admits that William L. Dutcher had three children, all of whom are still living, Edward M. Dutcher, Frances E. Dutcher, now Frances E. Abbott, and this defendant, Elnora H. Dutcher.

Sixth. Requires complainant to prove allegations in paragraph sixth.

Seventh. Requires proof of allegations in paragraph seventh except that this defendant is informed that the said Henry W. Merriam, before and at the time of his death, was the owner and possessed

a large amount of the capital stock of the H. W. Merriam Shoe Company, a corporation of this state, having its principal office and place of business at Newton, in the county of Sussex; that the said Henry W. Merriam departed this life, testate, having made and published his last will and testament and codicil thereto annexed, in writing, wherein and whereby he did give, devise and bequeath to the children of William L. Dutcher, the one equal fourth of the residue of his estate, and that said William L. Dutcher left three children mentioned in the complainant's bill of complaint and that this defendant is one of said three children of the said William L. Dutcher; and that said testator did not, by his said will and codicil, dispose of or bequeath specifically any of the capital stock of the H. W. Merriam Shoe Company to any other persons than those mentioned in the residuary clause of his said will and codicil; that this defendant has no knowledge of the alleged gift of said stock by said testator, prior to his death, to the persons named in said seventh paragraph and that she will require proof thereof. And this defendant charges and insists that this defendant's rights and interests in said estate is not bound or prejudiced by the alleged acts and conduct of the several parties, in said premises, therein alleged to have taken place.

Eighth. This defendant, further answering, says that if the said Henry W. Merriam, at the time of his decease, was the owner and possessor of any stock of the H. W. Merriam Shoe Company and if he made no valid gift of the same in his lifetime, then this defendant charges and insists that the said stock passed to the said executors as part of the assets of said estate and that this defendant is entitled to have her proportionate share thereof, in accordance with the provisions of the last will and testament and codicil of the said Henry W. Merriam decreed due to her.

And this defendant being an infant submits herself to the judgment of this honorable court, in said premises, and prays that her interest may be protected and saved to her to the extent of and according to the rights and interests of this defendant in said premises.

EDWARD MERRIAM DUTCHER,
Guardian ad litem of Elnora H. Dutcher, Defendant.

THOMAS M. KAYS,
Solicitor of Defendant, Elnora H. Dutcher.

THE JOINT AND SEVERAL ANSWER OF EDWIN W. MERRIAM and HENRY F. MERRIAM, Executors of the Last Will and Testament of John J. Merriam, Deceased, EDWIN W. MERRIAM and HENRY F. MERRIAM individually, and HELEN M. LaCOSTE and AMELIA E. MERRIAM, defendants, to the Bill of Complaint and Supplement thereto of the complainant filed in the above entitled cause, and Cross-Bill.

Filed December 29, 1911.

1. Admit paragraph one.

2. Admit paragraph two.

3. Admit paragraph three.

4. Admit paragraph four.

5. Admit paragraph five.

6. These defendants believe that the allegations contained in the sixth paragraph of the bill of complaint are true, but as to the exact amount of the one-fourth part of the residue therein referred to, the investment thereof, and the payment of income and on account of principal therein mentioned, these defendants leave the complainant to make such proof thereof as he may be advised is necessary or proper.

7. These defendants admit that prior to the deatn of the said Henry W. Merriam he was the owner of a large amount of the capital stock of the H. W. Merriam Shoe Company, a corporation of this state, having its principal office and place of business at Newton, in the County of Sussex; but these defendants deny that the said Henry W. Merriam was at the time of his death the owner of the shares of stock of said H. W. Merriam Shoe Company in said paragraph and hereinafter referred to, notwithstanding that at the

time of his death such shares stood of record in his name on the books of the said corporation; these defendants admit that at the time of his death the certificates of stock in said paragraph referred to were in certain envelopes in which they had been placed by the said testator, and that said envelopes were addressed to different persons, and these defendants allege and charge the truth to be that the certificates of stock in the said envelopes not only were obviously intended to be given to the persons to whom the envelopes were addressed, but in fact and in law had been actually so given; these defendants admit that said envelopes were handed to the said executors of the said Henry W. Merriam, deceased, with the testator's will and codicil by his sister Harriet M. Huntington, who, for some time prior to his death and during his illness, had been entrusted with the management of his affairs; and these defendants allege and show the truth to be that at the time the said Harriet M. Huntington handed the said envelopes to the said executors the said certificates of stock therein contained had not for some time been and were not then the property of the said Henry W. Merriam or of his estate but were then and for a long time prior thereto had been the property of the persons whose names were written on the several envelopes, the number of shares belonging to the persons so named being within the said envelopes severally addressed to them; these defendants admit that a consent in writing, copy of which is annexed to said bill of complaint, was signed by the persons named in said paragraph, including these defendants Edwin W. Merriam, Henry F. Merriam and Helen M. LaCoste, by her maiden name, Helen D. Merriam; and that William L. Dutcher, the duly appointed guardian of Frances Elizabeth Dutcher and Elnora Hortense Dutcher, then minors, signed such consent in their behalf so far as he legally could, and that the said Frances Elizabeth Dutcher, who has since attained the age of twenty-one years,

has in her own behalf executed such consent; these defendants further admit that after the signing of said consents the said executors delivered the said envelopes to the persons to whom they were severally addressed, and that transfers of the stock therein contained were subsequently made on the books of the H. W. Merriam Shoe Company without the execution of any transfer by the executors; but these defendants show the truth to be that no such transfer was necessary as the said Henry W. Merriam had in his lifetime and before the delivery of said envelopes to the said Harriet M. Huntington, executed transfers of said certificates by endorsements thereon signed by him so far as said certificates stood in his name on the books of the said corporation; and these defendants admit that after the death of said William L. Dutcher the said complainant and the said John J. Merriam duly ratified by instrument under their hands and seals the acts of the said Shoe Company in making the said transfers, but these defendants deny that such ratification was necessary to perfect the title of the several persons whose names appeared upon the said envelopes to the shares of stock represented by the certificates therein contained; these defendants admit that the executors required the said Harriet M. Huntington and John J. Merriam to indemnify the executors against all liability, loss, cost or expense to which they might be put, or which they might incur by reason of any claim that might thereafter be made against them by any of the children born or to be born to the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, their heirs, executors, administrators, or assigns, or by the said Frances Elizabeth Dutcher and Elnora Hortense Dutcher, or either of them, their heirs, executors, administrators or assigns; and that for that purpose an agreement in writing, bearing date the twenty-sixth day of March, one thousand nine hundred and one, between John J.

Merriam and Harriet M. Huntington, parties of the first part, William L. Dutcher, party of the second part, and John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of the estate of Henry W. Merriam, deceased, parties of the third part, was executed and delivered; and these defendants annex to this answer a copy of said agreement last referred to and of the statement appended thereto signed by the said John J. Merriam and Harriet M. Huntington, explaining the reasons and protest of the said John J. Merriam and Harriet M. Huntington; these defendants pray reference to the said agreement and protest appended thereto for the contents thereof; and these defendants further state and admit that the said Harriet M. Huntington delivered to the said executors certificates for one hundred fifty-one (151) shares of the capital stock of said corporation, and that the said John J. Merriam delivered certificates for one hundred twenty-two (122) shares of the stock of said corporation to the said executors; and that the said certificates so delivered were not transferred on the books of said corporation to the said executors but were held by the said executors without such transfer until the second day of June, nineteen hundred and ten, when they transferred the same absolutely—one hundred fifty-one (151) shares to Harriet M. Huntington, receiving cash therefor amounting to the sum of twenty-six thousand two hundred seventy-four ($26,274) dollars and one hundred twenty-two (122) shares to John J. Merriam, receiving cash therefor amounting to the sum of twenty-one thousand two hundred twenty-eight ($21,228) dollars, amounting in all to forty-seven thousand five hundred two ($47,502) dollars, which amount the said complainant, surviving executor, now holds; these defendants further admit that in addition the said executors had received cash to the amount of one thousand five hundred ten ($1,510) dollars from the said Harriet M. Hunting-

ton; one thousand two hundred twenty ($1,220) dollars from the said John J. Merriam, being the amount of the dividend declared upon the said shares of stock immediately after the said Henry W. Merriam's death, out of earnings of said corporation prior to his death, and that said sums representing said dividend are invested in two bonds of the Town of Newton for one thousand ($1,000) dollars each, which were taken by the said executors at their then market value of eleven hundred ($1,100) dollars per bond, making twenty-two hundred ($2,200) dollars in all, and that the balance of the sum so received for said dividend is in the hands of said complainant as surviving executor; these defendants assert that in truth and in fact, under and by reason of the said indemnity agreement and deposit of stock therein referred to, the said complainant as surviving executor holds the monies aforesaid and the bonds of the Town of Newton as indemnity against all liability, loss, cost or expense to which the said executors or the complainant as their survivor may be put, or which they or he may incur by reason of any claim to be hereafter made against them or him by any of the children born or to be born to the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, their heirs, executors, administrators or assigns, or by the said Elnora Hortense Dutcher, her heirs, executors, administrators or assigns, and a financial protection against personal loss to the executors or the said complainant as their survivor in case any claim covered by the said indemnity shall be asserted; and that except in so far as may be necessary for the purposes of said indemnity against personal financial loss, the said monies in the hands of the complainant and the said bonds of the Town of Newton are the property of the said Harriet M. Huntington and of these defendants Edwin W. Merriam and Henry F. Merriam, as executors of John J. Merriam, deceased, in the proportions in which

the said stock and cash were originally contributed to said indemnity fund by the said Harriet M. Huntington and the said John J. Merriam; these defendants further admit that the income on the said stock until its transfer by the said executors in the month of June, nineteen hundred and ten, and on the said bonds of the Town of Newton, and the interest upon the deposit in the Howard Savings Institution in said paragraph referred to, has all been paid to the said Harriet M. Huntington and John J. Merriam or remains subject to their order, as alleged in paragraph seven of said bill of complaint; these defendants further answering say that it may be that the said cash and the two bonds of the Town of Newton represent an equivalent in amount to the one-fourth of the stock of the said corporation contained in the several envelopes hereinabove referred to; these defendants deny that the said cash and bonds of the Town of Newton represent in fact one-fourth of the stock contained in said envelopes in the way set forth in paragraph seven of the said bill of complaint; these defendants allege the truth to be that the said shares of stock in the said envelopes contained were at the time of the death of the said Henry W. Merriam and for a long time prior thereto, the property of the several persons whose names were written upon the said envelopes, and that the said cash and bonds held by the said complainant as surviving executor under the terms of said indemnity agreement are no part of the trust fund created by the said will of Henry W. Merriam, deceased.

And these defendants further answering say that the said envelopes addressed to the several persons whose names appeared thereon were nine in number and were delivered by the said testator to the said Harriet M. Huntington long prior to his death with instructions to the said Harriet M. Huntington to deliver the same to the persons to whom the same were severally addressed, and that from the time of such

delivery the certificates of stock contained in the said envelopes were and continued to be the property of the several persons whose names were endorsed upon the said envelopes, and that thereafter the said Henry W. Merriam had no interest therein or control or dominion thereover; that the said envelopes remained from the time of their delivery to the said Harriet M. Huntington under her exclusive dominion and control, subject to the direction given to her to deliver the same to the several persons whose names appeared thereon, and that they were kept by her separately and apart from the papers and securities under her care belonging to the said Henry W. Merriam; that one of said envelopes was addressed to the said Harriet M. Huntington and contained certificate No. 41 for 568 shares of stock standing on the books of said corporation in the name of Henry W. Merriam, and that said certificate was, prior to its enclosure in the said envelope and its delivery to the said Harriet M. Huntington, endorsed in blank with power to transfer by the said Henry W. Merriam; that another of said envelopes was endorsed in the name of John J. Merriam and contained certificate No. 36 for 455 shares of the capital stock of said corporation standing on its books in the name of said Henry W. Merriam, and that said certificate was, prior to its enclosure in the said envelope and delivery to the said Harriet M. Huntington, endorsed in blank with power to transfer by the said Henry W. Merriam; that the same envelope also contained certificate No. 6 for five shares of stock of said corporation standing on its books in the name of said Henry W. Merriam, endorsed originally with blank power to transfer by the said Henry W. Merriam to Mrs. Fannie G. Merriam, who was the wife of the said Henry W. Merriam and that after her death, prior to the placing of the said certificate in the said envelope and the delivery of said envelope to the said Harriet M. Huntington, the

said Henry W. Merriam further endorsed said certificate with the statement that it was the property of the said John J. Merriam; the said envelope also contained certificate No. 29 for 5 shares of the stock of said corporation standing on its books in the name of the said Henry W. Merriam, which certificate had been originally endorsed by the said Henry W. Merriam with blank power to transfer to Mrs. Fannie G. Merriam, who was the wife of the said Henry W. Merriam, and after her death and prior to placing the same in the said envelope and delivery thereof to the said Harriet M. Huntington, the said Henry W. Merriam further endorsed said certificate with the statement that it was the property of the said John J. Merriam; that said envelope also contained certificate No. 45 for 20 shares of the capital stock of said corporation standing on its books in the name of the said Henry W. Merriam, and that said certificate prior to being placed in said envelope and to the delivery thereof to the said Harriet M. Huntington, had been endorsed with power to transfer by the said Henry W. Merriam to the said John J. Merriam; that another of said envelopes was endorsed in the name of Olin L. Merriam and contained certificate No. 38 for 10 shares of the capital stock of the said corporation standing on its books in the name of the said Henry W. Merriam and that such certificate had been, prior to being placed in said envelope and to the delivery thereof to the said Harriet M. Huntington, endorsed in blank with power to transfer by the said Henry W. Merriam; that another of said envelopes was addressed to Nellie J. Merriam and contained certificate No. 39 for 10 shares of the capital stock of the said corporation standing on its books in the name of the said Henry W. Merriam, which certificate had been, prior to being lodged in said envelope and prior to the delivery thereof to the said Harriet M. Huntington, endorsed in blank with power to transfer by

the said Henry W. Merriam; that another of said envelopes was endorsed in the name of Maybelle F. Buffington and contained certificate No. 48 for 7 shares of the capital stock of said corporation standing on its books in the name of Henry W. Merriam, and that said certificate was, prior to being lodged in said envelope and prior to its delivery to said Harriet M. Huntington, endorsed in blank with power to transfer by the said Henry W. Merriam; that another of said envelopes was endorsed in the names of Francis and Ralph Buffington and contained certificate No. 40 for 10 shares of the capital stock of said corporation standing on its books in the name of the said Henry W. Merriam, and that said certificate had, prior to being placed in said envelope and prior to its delivery to the said Harriet M. Huntington, been endorsed in blank with power to transfer by the said Henry W. Merriam; that another of said envelopes was endorsed in the name of J. E. Warbasse and contained certificate for 30 shares of the capital stock of said corporation standing on the books of the corporation in the name of the said Warbasse, and formerly delivered by the said Warbasse to the said Henry W. Merriam as collateral for a note on which partial payments had been made, and that the note secured by said collateral was also enclosed in said envelope and delivered with it to the said Harriet M. Huntington; that another of said envelopes was endorsed in the name of G. L. Dutcher and contained certificates for 30 shares of the capital stock of said corporation standing on the books of said corporation in the name of the said Dutcher, and had formerly been delivered by the said Dutcher to the said Henry W. Merriam as collateral for a note on which partial payments had been made, and that the note secured by said collateral was also contained in said envelope; that the remaining envelope was endorsed in the name of J. Tozer and contained certificate for 50 shares of

the capital stock of said corporation standing on the books of said corporation in the name of said Tozer, and that said certificate had formerly been delivered by said Tozer to said Henry W. Merriam as collateral for a note on which partial payments had been made, and that said note was also contained in said envelope.

These defendants further say that after the lodging of the said certificates of stock in the said envelopes and the delivery thereof to the said Harriet M. Huntington, the said testator never exercised any control of any kind over the stock therein contained and that the said certificates of stock remained in the possession of the said Harriet M. Huntington with full authority to her to deliver the same to the several persons named on the several envelopes, and that all right, title and interest in said certificates of stock on the part of the said Henry W. Merriam ceased on the delivery of said envelopes to the said Harriet M. Huntington under the conditions aforesaid, and that from the time of such delivery the said certificates of stock contained in the several envelopes were in fact and in law the property of the several persons whose names appeared upon the said envelopes and not the property of the said Henry W. Merriam, and that the delivery of the said envelopes to the executors of the said Henry W. Merriam after his death by the said Harriet M. Huntington did not and could not operate to transfer the title to the shares of stock represented by said certificates to the said executors or to the estate of the said Henry W. Merriam; that the subsequent requirement by the said executors of the said Harriet M. Huntington and of the said John J. Merriam, of indemnity, and the deposit of the shares of stock mentioned in the indemnity agreement hereinbefore referred to, did not, either in fact or in law, constitute any recognition by them of any title to the said shares of stock contained in said envelopes or to

the said shares of stock so deposited under the indemnity agreement in the said executors of the said Henry W. Merriam, deceased, or as any part of his estate.

And these defendants further say that in so far as the seventh paragraph of said bill of complaint contains allegations to the contrary thereof, either directly or by inference, these defendants deny the same.

8. These defendants are desirous that there may be a final settlement of the said estate and that the accountability of the executors and trustees of Henry W. Merriam, deceased, for any part of the estate of the said Henry W. Merriam, deceased, not heretofore accounted for by them, should be ascertained and determined; and these defendants agree with the said complainant that it is impossible for the said complainant to have all questions involved in said accountability determined by proceedings in the Orphans' Court and that they can only be properly determined in this court; but these defendants again deny that the cash and bonds of the Town of Newton, held by the said complainant under the indemnity agreement, are any part of the estate of the said Henry W. Merriam or of the monies for which the executors and trustees of Henry W. Merriam, deceased, are accountable; and these defendants are advised that any liability of the executors and trustees of the said Henry W. Merriam, deceased, or of the said complainant as their survivor, against which indemnity was afforded by the said agreement and the deposit of stock thereby provided for, can be herein ascertained and determined; these defendants deny that there is any liability on the part of the executors of the said Henry W. Merriam, deceased, or on the part of the complainant as the survivor, and allege that the cash and bonds in the hands of the said complainant held under the provisions of the said in-

demnity agreement, should be returned to the said Harriet M. Huntington and to these defendants, Edwin W. Merriam and Henry F. Merriam, as executors of John J. Merriam, deceased, in the proportions of their original contributions thereto.

9. These defendants deny that the executors and trustees of the said Henry W. Merriam, deceased, have erred in any respect in acting upon the consents in writing executed by the residuary legatees who were of age at the time such assents were given, and further deny that any payments made in accordance with such assents can now be questioned by the persons executing such assents, or any of them.

10. These defendants further answering admit that the said John J. Merriam departed this life on the fifteenth day of December, nineteen hundred and ten, and that he left a last will and testament, the purport of which was substantially as set forth in the addition by way of supplement to the original bill of complaint filed herein, and that in and by said will the said John J. Merriam appointed his said wife Amelia E. Merriam, and his two sons, Edwin W. Merriam and Henry F. Merriam, the executors thereof, and that the said Amelia E. Merriam renounced her executorship, and that the said will of the said John J. Merriam was duly admitted to probate on the seventeenth day of January, nineteen hundred and eleven, by the Surrogate of the County of Union and letters testamentary thereon issued to these defendants, Edwin W. Merriam and Henry F. Merriam, two of the executors therein named, and that the said letters are now in force and unrevoked; these defendants further admit that since the making of said will Helen Douglas Merriam, therein named, has married, and that her name is now Helen M. LaCoste, the defendant of that name.

11. These defendants join in the prayer of the said complainant that his accounts may be taken under

the direction of this court and the balance in his hands ascertained, and that the said complainant may be discharged as trustee under the will of said Henry W. Merriam, deceased.

And these defendants by way of cross-bill exhibited against the complainant Francis J. Swayze, surviving executor and trustee under the will of Henry W. Merriam, deceased, and the defendants Harriet M. Huntington, Ralph H. Buffington, administrator of Maybelle F. Buffington, deceased, Olin L. Merriam, Nellie J. Merriam, Edward Merriam Dutcher individually and as administrator of William L. Dutcher, deceased, Frances Elizabeth Abbott, Elnora Hortense Dutcher, Carlisle J. Lane, Albert Merriam Lane, Clara May Lane, Charles R. Lane, and Carlisle R. Lane, say:

1. That Henry W. Merriam died at Newton, New Jersey, on October 26th, 1900, having first duly made and published his last will and testament and a codicil thereto in writing, in and by which he appointed John J. Merriam, William L. Dutcher and Francis J. Swayze executors thereof; that the said executors proved the will and codicil before the then Surrogate of the County of Sussex on November 7th, 1900, and letters testamentary were duly issued to them and that they took upon themselves the burden of administering the said estate; that they thereafter filed an inventory of the said estate in the office of the Surrogate of the said County of Sussex, as required by law; that they paid all of the debts of the said testator and all of the special legacies except one to the Plot Owners Association of the Newton Cemetery, and that at the expiration of one year from the death of the said testator or shortly thereafter, they filed their first account of their administration of the said estate; that subsequently at the September Term 1905, of the Sussex Orphans' Court, they filed their second account of their administration of the said

estate; that both of said accounts have been duly confirmed by the Orphans' Court of the County of Sussex, and that the balance as shown thereby has been duly distributed to those of the residuary legatees who were entitled to receive the same under the said will; that since the filing of the second account considerable sums of money have come to the hands of the said executors most of which has been duly distributed to those of the residuary legatees who were entitled to receive the same; that there still remains in the hands of the said executors a considerable sum for distribution on the settlement of the account.

2. That William L. Dutcher, one of the said executors, died in the year 1908, and letters of administration on his estate were granted to Edward M. Dutcher; that John J. Merriam, another of said executors died in the year 1910, and that he left a last will and testament wherein he named his wife Amelia E. Merriam and his two sons, Edwin W. Merriam and Henry F. Merriam the executors thereof; that the said Amelia E. Merriam renounced her executorship in writing, pursuant to the statute in such case made and provided, and that the said will of the said John J. Merriam was duly admitted to probate on the 17th day of January, 1911, by the Surrogate of the County of Union and letters testamentary thereon were thereupon issued to the said Edwin W. Merriam and Henry F. Merriam, which letters are now in force and unrevoked; that Helen Douglas Merriam, named in said will, has, since the making thereof, married, and her name is now Helen M. LaCoste.

3. That all of the estate of the said Henry W. Merriam has been administered except balances due on sales of land in Denver; that all of the real estate of the said testator has been sold except a vacant lot in the Town of Newton, Sussex County, New Jersey; that authority was conferred upon the said executors by the will of the said Henry W. Merriam to sell said

real estate and the unpaid proceeds of sale remain in the hands of the said executors subject to distribution as part of the residue of his estate when paid; that by a codicil to the said last will and testament of Henry W. Merriam the testator gave, devised and bequeathed one equal fourth part of the residue of his estate to the children of his brother John J. Merriam; one equal fourth part to the children of his deceased brother Samuel L. Merriam; one equal fourth part to the children of William L. Dutcher, and one equal fourth part to his executors upon trust to divide the same into three equal shares and to pay the yearly income of one of such shares to each of his three cousins, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, in such manner as might be most effectual for securing to each the personal receipt and enjoyment of the same during his life inalienably, and after his death to pay his share to his children or other descendants him surviving, and if any of his three cousins should not leave any child or other descendants him surviving, to hold the said principal in trust for his said cousins or cousin surviving upon the same trust, and he authorized and empowered his executors in their sole discretion or the discretion of the survivor, to pay over to any of his said cousins his share of the principal or any part thereof upon the executors or the survivor of them being satisfied that such payment would inure to the individual benefit of his said cousin, and he ordered and directed that the determination of his said executors or the survivor of them, as to such payment should be final and conclusive.

4. That the children of the testator's brother John J. Merriam, who, as hereinabove set forth, is now deceased, are these defendants Edwin W. Merriam, Henry F. Merriam and Helen M. LaCoste, nee Merriam; that the children of the deceased brother Samuel L. Merriam, were Olin L. Merriam, Nellie J.

Merriam and Maybelle F. Buffington, all of whom survived the testator, and that Maybelle F. Buffington has since died intestate and letters of administration on her estate were, on or about the third day of September, 1908, duly issued to Ralph H. Buffington; that the children of William L. Dutcher are Edward Merriam Dutcher, Frances Elizabeth Abbott, and Elnora Hortense Dutcher, the said Elnora Hortense Dutcher being a minor; that Albert I. Lane has died since the death of the testator and has left no child or other descendant him surviving; that by his last will and testament proved in the County Court for Grant County in the State of Oregon, in which county the said Albert I. Lane resided at the time of his death, he bequeathed all of his estate to his two brothers Carlisle Jones Lane and Charles Randolph Lane, to be divided equally between them; that the said Carlisle J. Lane has two children, Albert Merriam Lane and Clara May Lane, both of whom are minors under the age of fourteen years, and that the said Charles R. Lane has one child, Carlisle R. Lane, who is a minor above the age of fourteen years.

5. That the one-fourth interest in said residuary estate in which the said Lanes are interested is held in trust by the said complainant as surviving executor of and trustee under the will of the said Henry W. Merriam, deceased, and that said complainant as such trustee is tenant in common with the other persons interested in the real estate remaining in the residue of said estate and entitled with them to share in the uncollected balances remaining unpaid on the sales of the Denver property; that the residue of the estate of the said Henry W. Merriam cannot be finally settled unless the said complainant continues as trustee under the will of the said Henry W. Merriam or some other person is appointed in his place and stead to administer the trusts thereby raised.

6. That on or about the twenty-sixth day of March, 1901, the said John J. Merriam and Harriet M. Huntington as parties of the first part, William L. Dutcher as party of the second part, and John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of the estate of Henry W. Merriam, deceased, parties of the third part, entered into an agreement in writing, copy of which is annexed to this answer and cross-bill, and to which reference is now made for the contents thereof without here repeating the words and language of the said agreement; that in accordance with said agreement the said Harriet M. Huntington deposited with the said executors 151 shares of the capital stock of the H. W. Merriam Shoe Company and the said John J. Merriam deposited with said executors 122 shares of the capital stock of said H. W. Merriam Shoe Company; that contemporaneously with the execution of said agreement the said John J. Merriam and Harriet M. Huntington signed a protest which was attached to said agreement, declaring that they signed the agreement in order to secure a peaceable and amicable settlement of their brother's estate without further delay; that they did sign under protest because it was not the directions or true intent of H. W. Merriam; that the shoe stock transferred under the agreement was for a financial protection against personal loss to the executors or their heirs in case the Lane heirs ever entered claim, and that they protested against the executors using the property for any other purpose than to save themselves or their heirs from personal loss; that subsequently the said executors received cash to the amount of $1,510, from the said Harriet M. Huntington and $1,220 from John J. Merriam, being the amount of the dividend declared upon the said shares of stock immediately after the said Henry W. Merriam's death, out of earnings prior to his death, which said sums representing said dividend were invested in two bonds of

the Town of Newton for one thousand dollars each, which were taken by the said executors at their then market value of $1,100 per bond, making $2,200 in all, and these defendants are informed that the balance of the sum so received was deposited by said executors in the Howard Savings Institution in the City of Newark, where it still remains; that the shares of stock so transferred by the said John J. Merriam and Harriet M. Huntington to the said executors under the terms of said agreement were retained by the said executors until the second day of June, 1910, when, pursuant to one of the provisions of the said agreement, they transferred the same absolutely—151 shares to Harriet M. Huntington, receiving cash therefor amounting to the sum of $26,274, and 122 shares to John J. Merriam, receiving cash therefor amounting to the sum of $21,228, amounting in all to $47,502, which amount the said complainant, as surviving executor and trustee, still retains; that the income on the said stock and the interest accruing on said deposit has been paid to the said Harriet M. Huntington and John J. Merriam, or remains subject to their order.

7. That long prior to his death the said Henry W. Merriam, being at the time the owner of 1,090 shares of the capital stock of the H. W. Merriam Shoe Company, after executing the blank transfers and powers of attorney endorsed on the back of the certificates for said shares, as hereinafter more particularly referred to, deposited certificates of stock in nine different envelopes, as follows: in one envelope addressed to Harriet M. Huntington certificate No. 41 for 568 shares of stock, endorsed in blank with power to transfer by the said Henry W. Merriam; in another of said envelopes addressed to John J. Merriam certificate No. 36 for 455 shares of the capital stock of said corporation, endorsed in blank with power to transfer by the said Henry W. Merriam, and also certificate No.

6 for five shares of stock of said corporation, endorsed originally with blank power to transfer by the said Henry W. Merriam to Mrs. Fannie G. Merriam, who was the wife of the said Henry W. Merriam, and after her death further endorsed by the said Henry W. Merriam with the statement that the certificate was the property of the said John J. Merriam, and also certificate No. 29, for five shares of the stock of said corporation, originally endorsed to the said Fannie G. Merriam and after her death further endorsed with the statement that it was the property of the said John J. Merriam, and also certificate No. 5 for 20 shares of the captital stock of said corporation, endorsed with power to transfer by the said Henry W. Merriam to the said John J. Merriam; in another of said envelopes addressed to Olin L. Merriam certificate No. 38 for 10 shares of the capital stock of said corporation, endorsed in blank with power to transfer by the said Henry W. Merriam; in another of said envelopes addressed to Nellie J. Merriam, certificate No. 39 for 10 shares of capital stock of the said corporation, endorsed in blank with power to transfer by the said Henry W. Merriam; in another of said envelopes addressed to Maybelle F. Buffington certificate No. 48 for 7 shares of the capital stock of said corporation, endorsed in blank with power to transfer by the said Henry W. Merriam; in another of said envelopes addressed to Francis and Ralph Buffington certificate No. 40 for 10 shares of the capital stock of said corporation, endorsed in blank with power to transfer by the said Henry W. Merriam; in another of said envelopes addressed to J. E. Warbasse, a certificate for 30 shares of the capital stock of said corporation standing on the books of said corporation in the name of the said Warbasse, and once delivered by the said Warbasse to the said Henry W. Merriam as collateral for a note on which partial payments had been made, the note secured by said collateral being also enclosed

in said envelope; in another of said envelopes addressed to W. L. Dutcher, certificates for 30 shares of the capital stock of said corporation standing on the books of the said corporation in the name of the said Dutcher, which had been formerly delivered by the said Dutcher to the said Henry W. Merriam as collateral for a note on which partial payments had been made, the note secured by said collateral being also enclosed in the said envelope; in the remaining envelope addressed to J. Tozer, certificate for 50 shares of the capital stock of said corporation standing on the books of said corporation in the name of said Tozer, formerly delivered by said Tozer to said Henry W. Merriam as collateral for a note on which partial payments had been made, the note being also enclosed in the said envelope.

That all of these envelopes were enclosed by the said Henry W. Merriam in a larger envelope and were at one time and long prior to his death delivered by him to the said Harriet M. Huntington with full authority to her to deliver the same to the several persons named on the several envelopes; that after the lodging of the said certificates of stock in the said envelopes and the delivery thereof to the said Harriet M. Huntington for delivery to the several persons whose names appeared upon the said envelopes, the said testator never exercised any control of any kind over the stock therein contained and the said certificates of stock remained in the possession of the said Harriet M. Huntington as the property of the several persons whose names were endorsed on the several envelopes until after the death of the testator, and that at the time of his death and for a long time prior thereto the said Henry W. Merriam had had no right, title or interest of any kind or description in the shares of stock contained in the several envelopes; that after the death of the said Henry W. Merriam the said Harriet M. Huntington, without the author-

ity of the persons whose names appeared upon the several envelopes (other than herself), delivered the said envelopes with the stock certificates therein contained to the executors of the said Henry W. Merriam, deceased; but these defendants show that the stock represented by said certificates were at the time of such delivery in fact and in law the property of the several persons whose names appeared upon the said envelopes and that the delivery of the same to the executors of the said Henry W. Merriam after his death by the said Harriet M. Huntington did not and could not operate to transfer the title to the shares of stock represented by said certificates to the said executors or to the estate of the said Henry W. Merriam; that upon receiving the envelopes and becoming aware of their contents the said executors, desiring to comply with the evident intent of the said testator, but fearing that some claim might be made that the gift of the shares of stock represented by said certificates to the several persons whose names appeared upon the said envelopes might be attacked as incomplete or otherwise questioned, demanded a waiver or assent from the residuary legatees so far as they were ascertained and of age for the delivery of said envelopes to the several persons to whom they were addressed, and also an execution of an indemnity agreement with deposit of collateral to sustain the same; that subsequently assents were signed in due form, copy of which is annexed to the bill of complaint in this cause, by all persons interested in the residuary fund then capable of executing such an assent, and the indemnity agreement of March 26, 1901, hereinbefore referred to, was executed and delivered and the stock of the said H. W. Merriam Shoe Company deposited by the said Harriet M. Huntington and John J. Merriam with the said executors, as hereinbefore stated; that the subsequent requirement by the said executors from the said Harriet M. Huntington and the said John J. Merriam of indemnity

and the deposit of the shares of stock mentioned in the indemnity agreement, as hereinbefore referred to, did not, either in fact or in law, constitute any recognition by them, or either of them, of any title to the said shares of stock contained in said envelopes in the said executors of the said Henry W. Merriam, deceased, or as any part of his estate.

8. That these individual defendants are interested in the undivided residue of said estate, and these defendants, Edwin W. Merriam and Henry F. Merriam, as executors of said John J. Merriam, deceased, are interested in the cash remaining in the hands of the said complainant, originally paid to the executors of said Henry W. Merriam under the provisions of the said indemnity agreement or realized from the transfer of the stock originally deposited with said executors by the said Harriet M. Huntington and John J. Merriam to the extent that the monies now remaining in the hands of the said complainant arising out of said indemnity agreement were contributed thereto by the said John J. Merriam; and these defendants allege that the certificates of stock contained in said envelopes hereinbefore mentioned were not at any time any part of the estate of the said Henry W. Merriam; that the executors of the said Henry W. Merriam properly omitted the same from the inventory of said estate and that the said executors and the complainant as their survivor have never been and the complainant is not now under any liability whatsoever to account therefor, and that there is no present liability to loss or damage assertable by the said complainant or by anyone representing his deceased co-executors and co-trustees, and that no claim can hereafter be lawfully asserted or established by reason of any interest of any person claiming by or through the will of the said Henry W. Merriam to the shares of stock represented by the certificates contained in the envelopes aforesaid.

9. That these defendants have been informed by the said complainant of his desire to be relieved of his trust and have expressed their willingness to consent thereto; that these defendants by reason of the gift of a fourth of the residue of said estate to the complainant as trustee are advised that a new trustee should be appointed in the place and stead of the said complainant; that the monies now held by the said complainant arising out of the deposit of stock and the payment of cash to the executors of Henry W. Merriam under the terms of the indemnity agreement aforesaid stand only as security against personal loss to the said executors and to the complainant as their survivor by reason of any claim that may be made by the children born or to be born to the said Carlisle J. Lane and Charles R. Lane, and that pursuant to the terms of said agreement the fund in the hands of said complainant as trustee arising out of the deposits made under the said indemnity agreement are payable, so far as they belong to Harriet M. Huntington to her, and so far as they belong to the said John J. Merriam to these defendants, Edwin W. Merriam and Henry F. Merriam, as executors of said John J. Merriam, deceased, upon securing a release to the said executors from the children born or to be born to the said Carlisle J. Lane and Charles R. Lane; that these defendants are advised that there is no necessity for such a release and that the children born or to be born to the said Carlisle J. Lane and Charles R. Lane have and can have no claim against which the said executors of Henry W. Merriam, deceased, or the said complainant as their survivor, can have need to be protected; and these defendants say that the said indemnity agreement should be canceled and the fund in the hands of the said complainant, surviving executor and trustee, arising out of the provisions of the said indemnity agreement, paid ratably to the said Harriet M. Huntington and to these defendants,

Edwin W. Merriam and Henry F. Merriam, as executors of John J. Merriam, deceased.

To the end, therefore, that the said complainant, Francis J. Swayze, as executor and trustee under the will of Henry W. Merriam, deceased, and the defendants, Harriet M. Huntington, Ralph H. Buffington, administrator of Maybelle F. Buffington, deceased, Olin L. Merriam, Nellie J. Merriam, Edward Merriam Dutcher, individually and as administrator of William L. Dutcher, deceased, Frances Elizabeth Abbott, Elnora Hortense Dutcher, Carlisle J. Lane, Albert Merriam Lane, Clara May Lane, Charles R. Lane and Carlisle R. Lane, may without oath (answer or answers under oath being hereby waived) full, true and perfect answer make to the cross-bill hereby exhibited against them as fully and particularly as if they were here specially interrogated thereto, and that if this honorable court shall accept the resignation of the said complainant as trustee under the will of Henry W. Merriam, deceased, a successor or successors may be appointed by this honorable court to administer the said trust under the direction of this honorable court, and that the agreement of March 26th, 1901, between John J. Merriam and Harriet M. Huntington, parties of the first part, William L. Dutcher, party of the second part, and John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of the estate of Henry W. Merriam, deceased, parties of the third part, may be surrendered up and cancelled by the said complainant and that the fund in the hands of the said complainant arising out of the deposits made under the terms of said agreement may be divided between the defendant, Harriet M. Huntington and these defendants, Edwin W. Merriam and Henry F. Merriam, as executors of John J. Merriam, deceased, in the portions in which the contributions to the same were made, and these defendants, Edwin W. Merriam and Henry F. Mer-

riam, as executors of John J. Merriam, deceased, discharged from all further liability or responsibility by reason of the execution by the said John J. Merriam of the agreement aforesaid, and that these defendants may have such other and further relief as may be agreeable to equity and good conscience.

And these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf sustained.

PITNEY, HARDIN & SKINNER,

Solicitors and of Counsel for Defendants, Edwin W. Merriam and Henry F. Merriam, Executors of John J. Merriam, Deceased, and Individually, and Helen M. La Coste and Amelia E. Merriam.

ANSWER OF FRANCIS J. SWAYZE, Surviving Executor and Trustee under the Last Will and Testament of Henry W. Merriam, deceased, Complainant to Cross-Bill.

Filed July 2, 1912.

1. Admits paragraph 1.

2. Admits paragraph 2.

3. Admits paragraph 3, excepting that he now alleges that since the filing of his said bill, he has sold the vacant lot in the Town of Newton, Sussex County, New Jersey, for the sum of five hundred dollars ($500), and has in his possession the proceeds of said sale for distribution among the parties who are entitled thereto.

4. Admits paragraph 4.

5. Admits paragraph 5.

6. Admits that an agreement in writing was entered into, a copy of which is annexed to the cross-bill; that the said Harriet M. Huntington deposited with the said executors 151 shares of the capital stock of the H. W. Merriam Shoe Company, and that the said John J. Merriam deposited with the said executors 122 shares of the capital stock of the said H. W. Merriam Shoe Company; that contemporaneously with the execution of said agreement, said John J. Merriam and Harriet M. Huntington signed a protest, which is attached to said agreement; that as to the reasons why the said Harriet M. Huntington and John J. Merriam signed said agreement and said protest, other than as disclosed by the language of said instruments, this complainant is entirely without knowledge and leaves the parties asserting said reasons, other than those disclosed by the language of said instruments, to make such proof thereof as they may be able, if the same be competent.

He admits that subsequently, the executors received cash as set forth in said paragraph; that they purchased bonds as therein set forth, and the balance of the sum so referred to, is deposited as set forth therein, and that the shares of stock transferred by said John J. Merriam and Harriet M. Huntington, as set forth, have been transferred absolutely to the said Harriet M. Huntington and John J. Merriam for the amount in cash, upon receipt of the amount in cash therein set forth. And this complainant says that the cash so received from the said Harriet M. Huntington and John J. Merriam is now invested in bonds which, by the statutes of this state, are declared to be authorized investments for trust funds.

And this complainant admits that the income of said stock and interest accruing on said deposit have either been paid to said Harriet M. Huntington and said John J. Merriam in his lifetime, or remain subject to the order of the said Harriet M. Huntington and the executors of the said John J. Merriam, deceased.

7. He denies any knowledge of the matters and things set forth in paragraph 7 of said cross-bill, beyond such facts as are set forth at length in paragraph "seventh" of the complainant's bill, and the complainant here reiterates the statements of paragraph "seventh" of said bill, with the same force and effect as if they were here again recited at length, so far as they relate to the matters and things set forth in paragraph 7 of said cross-bill, and leaves the defendants filing said cross-bill to make such proof of the allegations set forth in said paragraph 7 of said cross-bill, not set forth in paragraph "seventh" of the complainant's bill, as they may be able to do, if the same are competent; and this complainant denies that the testator, Henry W. Merriam, never exercised any control of any kind over the stock contained in said envelope, from the time of his delivery of the same to the said Harriet M. Huntington; and on information, charges

that the dividends from time to time declared on said stock, after the delivery of said stock, during the lifetime of said testator, were received by him and appropriated by him to his own use; and this complainant says that the occasion for the making of the agreement, a copy of which is annexed to said cross-bill, was none other than that set forth by the complainant in paragraph "seventh" of the said bill, and that the purpose and effect of said agreement is declared by the language thereof, and that the same has no other or further effect, nor was intended to have any other or further effect.

8. He admits the truth of the allegations in paragraph 8 of the said cross-bill, as to the interest of the individual defendants filing said cross-bill in the undivided residue of the estate of said Henry W. Merriam, and that the defendants, Edwin W. Merriam and Henry F. Merriam, as executors of John J. Merriam, deceased, claim to have an interest in the cash remaining in the hands of complainant originally paid to the executors of said Henry W. Merriam, under the provisions of the said indemnity agreement or realized from the transfer of the stock originally deposited with said executors by the said Harriet M. Huntington and John J. Merriam, to the extent that these moneys now remain in the hands of the complainant, arising out of said agreement or contributed thereto by the said John J. Merriam, and this complainant puts the defendants filing said cross-bill to proof of the allegation that the certificates of stock contained in said envelope were not part of the estate of said Henry W. Merriam; and this complainant further says that the executors of the said Henry W. Merriam omitted the said stock from the inventory of said estate of Henry W. Merriam, deceased, because of the agreement entered into by the said Harriet M. Huntington and John J. Merriam, a copy of which is annexed to said cross-bill; and further says that this complainant filed his bill of complaint in this

cause to determine whether said stock was or was not a part of said estate of Henry W. Merriam, deceased, and whether the complainant is not now under a liability to account therefor, and whether there is not a liability to loss or damage assertable by the said complainant or the representatives of his deceased co-executors and co-trustees, and whether a claim can not hereafter be lawfully asserted or established by reason of the interest of some person claiming, by or through the will of said Henry W. Merriam, deceased, to the shares of stock represented by the certificates contained in the said envelope.

9. He admits that he desires to be relieved from his trust, and that said defendants have expressed their willingness to consent thereto, and that by reason of the gift of a fourth of the residue of said estate to complainant as trustee, it is necessary that a new trustee should be appointed in the place and stead of said complainant. As to the remaining portion of said paragraph 9, he says that he filed his said bill of complaint for the purpose of having settled, among other things, the very questions referred to in the remaining portion of said paragraph; and that he is advised that, under said agreement of March 26th, 1901, the said agreement can not be cancelled, and the said funds in the hands of the complainant, as to which these defendants have filed their cross-bill, cannot be paid over until such time as the title of said Henry W. Merriam to said stock is established by the decree of a court of competent jurisdiction, or until such time as those succeeding to his interest shall secure a release of the complainant from the children born or to be born of the said Carlisle J. Lane and Charles R. Lane.

And this complainant prays that he may hence be dismissed as to said cross-bill, with his reasonable costs and charges in this behalf most wrongfully sustained.

EDWARD M. COLIE,
Solicitor for and of Counsel with Complainant.

ANSWER OF HARRIET M. HUNTINGTON, to Cross-Bill.

Filed January 26, 1912.

1. Admits and affirms paragraph one.

2. Admits and affirms paragraph two.

3. Admits and affirms paragraph three.

4. Admits and affirms paragraph four.

5. Admits and affirms paragraph five.

6. Admits and affirms paragraph six.

7. Admits and affirms paragraph seven.

8. Admits and affirms paragraph eight.

9. Admits and affirms paragraph nine.

10. Admits and affirms paragraph ten.

11. Says by way of answer to said cross-bill, that on or about the 10th day of April, 1897, at the request of her brother, the testator, H. W. Merriam, she became an inmate of his family in Newton, N. J., and at his request took upon herself the general management of all of his business and domestic affairs.

That in the room in his dwelling house in said Newton, then occupied by him as an office, there was at that time a safe to which, from that time until the time of his decease, the testator and this defendant each had a key; that in this safe during said time the testator had a drawer with a lock thereon in which he kept his will, mortgages and other valuable papers. This drawer was kept locked and the defendant and the testator both had access to the key thereof. That there was in said safe another drawer with a lock which was occupied solely by the defendant with her own papers and her own property. That the key to said drawer was kept by her in a place known only to her and to which the testator did not have or seek to have any access.

That about six months after the defendant became an inmate of the testator's family, the testator delivered to her a large envelope containing eight envelopes; the other envelopes addressed respectively as follows: H. M. Huntington, J. J. Merriam, Olin L. Merriam, Maybelle Merriam, Nellie J. Merriam, G. L. Dutcher, J. E. Warbasse and John Tozer; that upon the outside of said large envelope appeared in the handwriting of the testator the following statement:

> "Certificates of stock H. W. Merriam Shoe Company. The enclosed envelopes are the property of and belong to the several persons named as per address. H. W. Merriam."

That at the time this large envelope containing the eight other envelopes was delivered to the defendant by the testator, the testator requested the defendant to deliver the envelopes to the parties to whom they were directed; that said large envelope containing said eight other envelopes was placed by the defendant in said private drawer, solely occupied by the defendant, and was locked therein and the key therefor kept in the exclusive possession of the defendant, and that it there remained until about one month after the execution of the codicil to the testator's will, when the testator asked the defendant if she had delivered said stock, to which she replied that she had not.

The testator then requested the defendant to return said envelope and its contents to him, as he desired to make a change in the arrangement of said stock. That the defendant returned said envelope and its contents in accordance with his request. That within about three weeks thereafter, the testator showed to the defendant another large envelope with a statement thereon in the handwriting of the testator, reading as follows:

> "Certificates of stock H. W. Merriam Shoe Company. The enclosed envelopes are the prop-

erty of and belong to the several persons named as per address. H. W. Merriam." Containing nine other sealed envelopes, addressed respectively to the following parties: Mrs. H. M. Huntington, Newton; J. J. Merriam, Summit; Olin L. Merriam, Boston; Nellie J. Merriam, Boston; Mrs. Maybelle F. Buffington, West Brookfield, Mass.; Francis Buffington and Ralph Buffington, both one envelope; G. L. Dutcher; J. E. Warbasse and John Tozer; that the said testator then stated to the defendant that he wished her to deliver the same to the several parties to whom they were respectively addressed; that this was a final arrangement; and he stated that the defendant was to deliver said envelopes at any time in the exercise of her discretion, and whenever she saw fit so to do. That the testator did not wish any stir made about it at that time, as he was not then feeling very well and did not care to have their contents made public at that time, and it might be as well not to deliver them at once.

That the defendant saw that one of the envelopes was addressed to her, and she asked the testator if she could look at hers at that time, to which he replied that she could. She then in his presence opened the envelope addressed to her, and found that it contained a certificate for 568 shares of stock of the H. W. Merriam Shoe Company, issued to H. W. Merriam, and that the blank transfer or assignment on the back thereof was signed by said H. W. Merriam. That this defendant looked at the certificate, thanked the testator for his gift, and the testator said that he was glad that it pleased her, and that he hoped she would live long to enjoy it; and she avers that testator then and there delivered said certificate to the defendant and that the defendant then and there received and accepted the same, and that the said 568 shares of stock then and there became the property of the defendant.

That said large envelope containing said nine other envelopes, was taken by the defendant, locked by her

in her private drawer in said safe, and the key thereof was kept by her in her exclusive possession and control.

That said eight other envelopes, beside that addressed to this defendant, were afterwards ascertained to contain certificates of stock as follows, namely:

John J. Merriam,	485	shares	of	stock.
Nellie J. Merriam,	10	"	"	"
Olin L. Merriam,	10	"	"	"
Maybelle Buffington,	7	"	"	"
Francis and Ralph Buffington,	10	"	"	"

That the envelopes addressed to G. L. Dutcher, J. E. Warbasse and John Tozer contained certificates for 30 shares, 30 shares and 50 shares of stock, respectively, of said company, standing in the name of said Dutcher, Warbasse and Tozer, respectively, which certificates, as this defendant is informed and believes, were held by the said H. W. Merriam as collateral security for certain notes given by each of said parties respectively, although said certificates had not been formally assigned by them to said H. W. Merriam. Said envelopes, as the defendant is informed and believes, contained also the notes which the said Dutcher, Warbasse and Tozer respectively had given said H. W. Merriam, and for which said stock was held by him as security.

That the said testator never exercised any control of any kind over said stock thus delivered to her and locked up in her private drawer, and never changed any of his instructions in relation thereto; that all of said stock remained in the sole and exclusive possession and control of the defendant until after the death of the testator.

That on the day of and shortly after the funeral of the testator, the executors sent a messenger to the defendant for the papers of the testator; that the de-

fendant took from the private drawer of the testator, using his key therefor, his will, a number of mortgages and other papers and inadvertently, acting without legal advice, ignorant of her legal rights, and with the belief that nothing which she did would in any way affect her legal rights, took from her own private drawer the large envelope containing her own stock certificate of 568 shares and the eight other envelopes above described, and sent them all to the executors, and that upon further reflection and realizing that she had acted hastily and unwarrantably in delivering said stock to said executors, the first time she saw the executors thereafter, she requested them to return to her her property as aforesaid, and also to return the said other envelopes to her so that she could deliver them to the parties to whom they were addressed; or, that the executors, if they did not consider the defendant a proper person to carry out the instructions of the testator, would deliver said other certificates to the parties to whom they were addressed. All of which the executors declined to do, and raised the question as to whether the gift of said stock to all of said parties had been completed and perfected according to law.

That thereafterwards, all of the parties mentioned in the seventh paragraph of the original bill, signed an agreement in writing and delivered the same to said executors, authorizing said executors to carry out the intent of the testator, and to deliver said sealed envelopes to the parties to whom they were addressed, and authorizing them to execute any transfers or assignments necessary to perfect the title of the said stock in the persons to whom said envelopes were addressed or to be delivered; that thereupon, said executors delivered said certificate for 568 shares of stock, the property of the defendant, to defendant, and said eight other envelopes to the persons to whom they were addressed, one of whom, John J. Merriam, received 485 shares of said stock.

That said William L. Dutcher, guardian, assented so far as he legally could, and that since attaining the age of twenty-one years, said Frances Elizabeth Dutcher has also assented. That as to the stock of the defendant, the executors had no occasion to transfer the same or to ratify the transfer thereof, as the testator in his lifetime had executed the necessary transfer thereof to the defendant, and the said H. W. Merriam Shoe Company actually transferred, as they had a legal right to do, the same without any transfer by the executors.

That the defendant admits that the executors had the transfer of said stock by said company ratified as alleged in said original bill, and she says that all of the said stock, thus transferred and delivered, has been treated and recognized by said company, said executors, and all parties interested in said estate as the lawful property of the parties respectively to whom the same was delivered, and it was and is their property, and the defendant says that said ratification of said transfer was entirely unnecessary as said transfer had become complete before said ratification.

That owing to the fact that the children of Carlisle J. and Charles R. Lane were under the age of twenty-one years, and the further fact that children may be subsequently born to them who would be interested in said estate, the executors required the defendant and John J. Merriam to indemnify them against any claim that might be made by the children of said Carlisle J. and Charles R. Lane born and to be born, and requested that, in order to indemnify them, said defendant should place in the hands of said executors 151 shares of the stock thus owned by her and $1,510.00 in cash dividends accruing thereon prior to the death of said testator and that said John J. Merriam should place in the hands of said executors 122 shares of the stock thus delivered to and owned by him and $1,220.00 dividends accruing thereon as aforesaid.

That an agreement therefor, for the purpose of indemnifying said executors was entered into between the parties, dated March 26, 1901, a copy whereof is annexed to said cross-bill and marked Exhibit A.

That said agreement was signed under protest by the defendant and said John J. Merriam on the ground that it was not in accordance with the directions or true intent of the testator. That it was not agreed that said stock "should continue to be held by the said executors"; that it was agreed that the defendant on her part should indemnify said executors by the delivery to them as security said 151 shares of her own stock and said dividend, and said stock after delivery remained and was to remain her own property, subject to its liability to indemnify said executors; and while it is true that said agreement provides that said executors shall hold the stock of the defendant, "or the proceeds, if sold, in trust until such time as she may establish her title thereto by a decree of a court of competent jurisdiction or until such time as she may secure a release to the said executors from the children born or to be born of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane," defendant says that in making said agreement she did so with the full belief on her part that in so doing she was not in any way surrendering, impairing or transferring her legal rights therein, and that the protest signed by her as aforesaid would preserve to her her full legal rights in the premises. That in order to adequately and properly protect her legal rights, said agreement should have treated and should now treat the whole of said 568 shares of stock and said dividends and said 485 shares of stock and said dividends of said John J. Merriam, precisely as they stood at the death of said testator, said stock being in the hands of said defendant and said dividend being undeclared, said stock being duly endorsed, transferred and delivered to her with all the indicia of ownership

by her, so that if any question was raised as to the right of the estate thereto, the burden would be upon the estate to establish its title against this defendant, instead of placing the burden upon the defendant of establishing her title thereto as against the estate, as said agreement as it now stands purports to do; and that she signed said agreement with the full expectation and belief that such would be its effect, and she believes that such was and is the expectation and belief of all of the parties thereto, and that she believes that it was the understanding, expectation and belief of all of the parties thereto that said agreement would not in any way affect the legal rights of the parties thereto, so far as their title to said stock was concerned; and she says that the provision of said agreement placing the burden upon the defendant as against the estate is the result of inadvertence and mistake, and she prays that said stock and dividend, and the proceeds thereof may be treated in this proceeding as in the hands and possession of the defendant with the dividend undeclared, precisely as they stood at the time of the death of the testator, with the burden upon the estate of establishing any title that it may claim thereto. And she prays that said agreement may be reformed and corrected so as to truthfully express the real intent of the parties thereto as aforesaid and so as to place said stock and said dividend and the proceeds thereof with said dividend undeclared, in the hands and possession of the defendant, with the burden upon the complainant of establishing the title of the estate thereto.

That said 568 shares of stock having been her property from the time of the delivery of said certificate of stock to her, in the lifetime of said H. W. Merriam, duly endorsed by said H. W. Merriam, with the intention upon the part of the testator to give the same to her, she then became entitled in her own right to the payment of all dividends that were subsequently de-

clared thereon, and that said sum of $1,510.00 declared upon said stock as a dividend immediately after the death of said H. W. Merriam out of the earnings prior to his death and subsequent to the delivery of said certificate to the defendant was her property and is now held by said executors as such upon the same trust as said stock.

And defendant denies that if said gift was not perfected the said sum of forty-seven thousand five hundred and two dollars, and two bonds of the Town of Newton, and the balance in the Howard Savings Institution except the accrued interest thereon, as alleged in the original bill, belong to the trust fund created by the said will, and avers that said sum, said bonds and said balance are not part of said estate, and that they are the property of the defendant and John J. Merriam in the proportions hereinbefore set forth, and that they are now held by the said executors and trustees as individuals by virtue of a contract between said defendant and said John J. Merriam and said executors and trustees as the property of said defendant and said John J. Merriam solely to indemnify said executors and trustees against any liability that they may have assumed as executors in failing to recover said stock as a part of said estate; and she further avers that the only issue involved in said original bill is the resignation of Francis J. Swayze, and the accounting of said executors and trustees to said estate and to the residuary legatees thereof; that as to said stock of said Shoe Company the only question that can be raised under said original bill is as to whether said executors and trustees are liable to account to said estate and said residuary legatees for said one thousand and ninety shares of said stock as a part of said estate or to the children born and unborn of Charles R. Lane and Carlisle J. Lane for one-fourth thereof, namely, two hundred and seventy-two and one-half shares, and whether said executors and trustees could

have recovered the same from the said defendant, said stock being in the hands and possession of the defendant as aforesaid at the time of the death of said H. W. Merriam, with the burden upon the executors and trustees to establish the title of the estate thereto; and she further avers that the burden is upon the residuary legatees to establish such liability on the part of said executors and trustees.

That she admits that the said dividends, amounting to $2,750.00 have been invested in two bonds at a cost of $1,100.00 per bond, and that she has received the income of said 151 shares of stock and one of said bonds; that as to the balance of said $1,510.00 and the income thereof she is not informed and will require the complainants in said original bill to prove the same.

She says that she delivered to the said executors the sum of $26,274.00, and the said executors returned to her said 151 shares of stock, and that said $26,274.00 was and is her own property and was and is to be held by said executors upon the same terms and conditions in trust in the same manner and to the same extent as said 151 shares of stock was theretofore held by them.

And the said Harriet M. Huntington, the defendant as aforesaid, hereby joins with the said Edwin W. Merriam and others in their prayer for relief in said cross-bill, and prays that if this honorable court shall accept the resignation of the said complainant as trustee under the will of Henry W. Merriam, deceased, a successor or successors may be appointed by this honorable court to administer the said trust under the direction of this honorable court, and that the agreement of March 26th, 1901, between John J. Merriam and Harriet M. Huntington, parties of the first part, William L. Dutcher, party of the second part, and John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of the estate of Henry W. Merriam,

deceased, parties of the third part, may be surrendered up and cancelled by the said complainant and that the fund in the hands of said complainant arising out of the deposits made under the terms of said agreement may be divided between the defendant Harriet M. Huntington and said defendant, Edwin W. Merriam and Henry F. Merriam, as executors of John J. Merriam, deceased, in the proportion in which the contributions to the same were made, and this defendant, and the defendants, Edwin W. Merriam and Henry F. Merriam as executors of John J. Merriam, deceased, be discharged from all further liability or responsibility by reason of the execution by the said John J. Merriam and the defendant Harriet M. Huntington of the agreement aforesaid, and that this defendant may have such other and further relief as may be agreeable to equity and good conscience.

And this defendant prays to be hence dismissed with all reasonable costs and charges in this behalf sustained.

EDWARD S. ATWATER, JR.,
Solicitor of and Counsel for Defendant,
Harriet M. Huntington.

ANSWERS OF RALPH H. BUFFINGTON, Administrator of the Goods and Estate which were of Maybelle F. Buffington, Olin L. Merriam and Nellie J. Merriam, to Cross-Bill.

Filed January 26, 1912.

1. Admit and affirm paragraph one.
2. Admit and affirm paragraph two.
3. Admit and affirm paragraph three.
4. Admit and affirm paragraph four.
5. Admit and affirm paragraph five.
6. Admit and affirm paragraph six.
7. Admit and affirm paragraph seven.
8. Admit and affirm paragraph eight.
9. Admit and affirm paragraph nine.
10. Admit and affirm paragraph ten.

11. Say by way of answer to said cross-bill, that upon information and belief, they affirm all of the allegations of paragraph eleven of the answer of Harriet M. Huntington to said cross-bill and make them a part of this answer.

And hereby join with the said Edwin W. Merriam and others and the said Harriet M. Huntington in their prayer for relief in the said cross-bill of said Edwin W. Merriam and others, and pray that if this honorable court shall accept the resignation of the said complainant as trustee under the will of Henry W. Merriam, deceased, a successor or successors may be appointed by this honorable court to administer the said trust under the direction of this honorable court, and that the agreement of March 26th, 1901, between John J. Merriam and Harriet M. Huntington, parties of the first part, William L. Dutcher, party of the second part, and John J. Merriam, William L.

Dutcher and Francis J. Swayze, executors of the estate of Henry W. Merriam, deceased, parties of the third part, may be surrendered up and cancelled by the said complainant and that the fund in the hands of the said complainant arising out of the deposits made under the terms of said agreement may be divided between the said Harriet M. Huntington, and Edwin W. Merriam and Henry F. Merriam as executors of John J. Merriam, deceased, in the proportion in which the contributions to the same were made by them respectively, and that the said defendant Harriet M. Huntington and the defendants Edwin W. Merriam and Henry F. Merriam as the executors of John J. Merriam, deceased, be discharged from all further liability or responsibility by reason of the execution by the said John J. Merriam and the said Harriet M. Huntington of the agreement aforesaid.

Prayer for general relief.

And this defendant prays to be hence dismissed with all reasonable costs and charges in this behalf sustained.

EDWARD S. ATWATER, JR.,
Solicitor of and Counsel for
Defendants Above Named.

ANSWER OF CARLISLE J. LANE, to Cross-Bill.

Filed January 26, 1912.

1. Admits and affirms paragraph one.
2. Admits and affirms paragraph two.
3. Admits and affirms paragraph three.
4. Admits and affirms paragraph four.
5. Admits and affirms paragraph five.
6. Admits and affirms paragraph six.
7. Admits and affirms paragraph seven.
8. Admits and affirms paragraph eight.
9. Admits and affirms paragraph nine.
10. Admits and affirms paragraph ten.

11. This defendant further says by way of answer to said cross-bill, that upon information and belief, he affirms all of the allegations of paragraph eleven of the answer of Harriet M. Huntington to said cross-bill and makes them a part of this answer.

And hereby joins with the said Edwin W. Merriam and others, and the said Harriet M. Huntington in their prayer for relief in the said cross-bill of said Edwin W. Merriam and others, and prays that if this honorable court shall accept the resignation of the said complainant as trustee under the will of Henry W. Merriam, deceased, a successor or successors may be appointed by this honorable court, to administer the said trust under the direction of this honorable court, and that the agreement of March 26th, 1901, between John J. Merriam and Harriet M. Huntington, parties of the first part, William L. Dutcher, party of the second part, and John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of the estate of Henry W. Merriam, deceased, parties of the third

part, may be surrendered up and cancelled by the said complainant and that the fund in the hands of the said complainant arising out of the deposits made under the terms of said agreement may be divided between the said Harriet M. Huntington, and Edwin W. Merriam and Henry F. Merriam as executors of John J. Merriam, deceased, in the proportion in which the contributions to the same were made by them respectively, and that the said defendant, Harriet M. Huntington and the defendants, Edwin W. Merriam and Henry F. Merriam as the executors of John J. Merriam, deceased, be discharged from all further liability or responsibility by reason of the execution by the said John J. Merriam and the said Harriet M. Huntington of the agreement aforesaid, and that this defendant may have such other and further relief as may be agreeable to equity and good conscience.

And this defendant prays to be hence dismissed with all reasonable costs and charges in this behalf sustained.

EDWARD S. ATWATER, JR.,
Solicitor of and Counsel for Defendant,
Carlisle J. Lane.

ANSWER OF CHARLES R. LANE, to the Cross-Bill.

Filed May 7, 1912.

1. Admits first paragraph of said cross-bill excepting the particulars of the inventory therein referred to and the payments of the legacies therein referred to, and of the filing of the accounts by the executors in the Sussex County Orphans' Court, and of the confirmation thereof by the said court, and the distribution to the residuary legatees, and the second accounting thereof and the distribution thereunder, and as to the amounts which the executors have in their hands, which are unknown to this defendant and requires the defendants to prove the same.

2. Admits paragraph two.

3. Admits that all the real estate of said testator has been sold except a vacant lot in the Town of Newton, Sussex County, New Jersey.

Admits third paragraph relative to the codicil to the last will and testament of Henry W. Merriam, deceased.

4. Requires defendants to prove the facts stated in the fourth paragraph except that he admits that he is the father of Carlisle R. Lane, who is a minor above the age of fourteen years.

5. Admits the fifth paragraph.

6. Requires defendants to prove the sixth paragraph.

7. Admits that prior to the death of the said Henry W. Merriam said Henry W. Merriam was the owner of a large amount of the capital stock of H. W. Merriam Shoe Company, a corporation; requires defendants to prove the facts contained in paragraph seventh; denies that the certificates of stock referred to in said seventh paragraph were placed in envelopes

by said testator, and that envelopes were addressed to different persons, and that there was any obvious intent that said stock should be given to said persons, and that such envelopes were in the possession of the said Harriet M. Huntington at the time of the death of the said Henry W. Merriam. This defendant admits that said Harriet M. Huntington was managing the affairs of the said testator during the last illness of said Henry W. Merriam; denies that there was any gift of stock by said testator to the said Harriet M. Huntington or any intention to make such gift or any perfection thereof, and this defendant, for further answering, says that the said executors of the said Henry W. Merriam were without authority to enter into an agreement in writing such as annexed to the defendants' cross-bill, and to turn over the envelopes referred to therein to the parties mentioned, and denies that H. W. Merriam Shoe Company had any right or authority to transfer said stock, and denies that the said John J. Merriam and the said complainant in the above entitled cause had any authority or right to ratify by an instrument under their hands and seals the act of H. W. Merriam Shoe Company in making the transfer of said stock.

8. Says that as to the eighth and ninth paragraphs the said Francis J. Swayze, as surviving executor of Henry W. Merriam, deceased, should be held to account for the said stock so delivered to the said Harriet M. Huntington and John J. Merriam; and this defendant charges and insists that the stock referred to in said bill of complaint passed to the executors and trustees among the assets of said estate of Henry W. Merriam, and that this defendant is entitled to have his proportionate share of said stock held for him among the other assets of the said estate, in accordance with the provisions of the last will and testament of the said Henry W. Merriam; and he further charges and insists that the title to said stock or its value could not be legally transferred by the said exe-

cutors or trustees of said Henry W. Merriam to the said persons so as to divest the rights of this defendant under the last will and testament and said codicil, and that if any transfer of said stock or the certificates therefor has been made, as alleged in said cross-bill, the same is illegal and void, and that the present holders thereof shall be decreed to hold the same in trust for the beneficiaries named in said last will and testament and the codicil thereto of the said Henry W. Merriam, of whom one is this defendant, in accordance with the terms of the last will and testament and codicil thereto, and that the said Francis J. Swayze, complainant in the above stated cause, should be charged as trustee to account for the same.

And this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

THOMAS P. McKENNA,
Solicitor for Defendant,
Charles R. Lane.

ANSWER OF CARLISLE R. LANE, ALBERT MERRIAM LANE and CLARA MAY LANE, infants, by William A. Smith, Guardian, ad litem, to Cross-Bill.

1. Admit first paragraph excepting that they require proof as to the particulars of the inventory therein referred to and the payments of the legacies therein referred to, and of the filing of the accounts by the executors in the Sussex County Orphans' Court, and of the confirmation thereof by the said court, and the distribution to the residuary legatees, and the second accounting thereof and the distribution thereunder, and as to the amounts which the executors have in their hands.

2. Admit paragraph two.

3. Admit that all the real estate of said testator has been sold except a vacant lot in the Town of Newton, Sussex County, New Jersey.

Admit third paragraph relative to the codicil to the last will and testament of Henry W. Merriam, deceased.

4. Requires defendants to prove the facts stated in the fourth paragraph except that the said Albert Merriam Lane and the said Clara May Lane admit that they are children of Carlisle J. Lane, and that they are minors under the age of fourteen years, and the said Carlisle R. Lane admits that he is a child of the said Charles R. Lane and that he is a minor above the age of fourteen years.

5. Admit paragraph five.

6. Require defendants to prove the facts stated in the sixth paragraph.

7. Admit that prior to the death of the said Henry W. Merriam said Henry W. Merriam was the owner

of a large amount of the capital stock of H. W. Merriam Shoe Company, a corporation; require proof as to the other matters and facts contained in the seventh paragraph; deny that the certificates of stock referred to in said seventh paragraph were placed in envelopes by said testator, and that envelopes were addressed to different persons, and that there was any obvious intent that said stock should be given to said persons, and that such envelopes were in the possession of the said Harriet M. Huntington at the time of the death of the said Henry W. Merriam; admit that said Harriet M. Huntington was managing the affairs of the said testator during the last illness of said Henry W. Merriam. Deny that there was any gift of stock by said testator to the said Harriet M. Huntington or any intention to make such gift or any perfection thereof, and for further answer, say that the said executors of the said Henry W. Merriam were without authority to enter into an agreement in writing such as annexed to the defendants' cross-bill, and to turn over the envelopes referred to therein to the parties mentioned, and deny that H. W. Merriam Shoe Company had any right or authority to transfer said stock, and deny that the said John J. Merriam and the said complainant in the above entitled cause had any authority or right to ratify by an instrument under their hands and seals the act of H. W. Merriam Shoe Company in making the transfer of said stock.

8. Say that as to the eighth and ninth paragraphs of defendants' cross-bill, the said Francis J. Swayze, as surviving executor of Henry W. Merriam, deceased, should be held to account for the said stock so delivered to the said Harriet M. Huntington and John J. Merriam; and these defendants charge and insist that the stock referred to in said bill of complaint passed to the executors and trustees among the assets of said estate of Henry W. Merriam, and that these infant defendants, Carlisle R. Lane, Albert Merriam Lane

and Clara May Lane, are entitled to have their proportionate shares of said stock held for them among the other assets of the said estate, in accordance with the provisions of the last will and testament of the said Henry W. Merriam; and they further charge and insist that the title to said stock or its value could not be legally transferred by the said executors or trustees of said Henry W. Merriam to the said persons so as to divest the rights of these defendants under the last will and testament and said codicil, and that if any transfer of said stock or the certificates therefor has been made, as alleged in said cross-bill, the same is illegal and void, and that the present holders thereof shall be decreed to hold the same in trust for the beneficiaries named in said last will and testament and the codicil thereto of the said Henry W. Merriam, of whom three are these defendants, Carlisle R. Lane, Albert Merriam Lane and Clara May Lane, in accordance with the terms of the last will and testament and codicil thereto, and that the said Francis J. Swayze, complainant in the above stated cause, should be charged as trustee to account for the same.

And these defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WILLIAM A. SMITH,
Guardian ad litem for Defendants, Carlisle R. Lane, Albert Merriam Lane and Clara May Lane.

COULT & SMITH,
Solicitors for and of Counsel with Defendants.

ANSWER OF ELNORA H. DUTCHER, an infant under the age of twenty-one years, by Edward M. Dutcher, her Guardian, ad litem, to Cross-Bill.

First. Admits the allegations in first paragraph, excepting the particulars of the making and filing of the inventory of said estate by the said executors of Henry W. Merriam, deceased, and of the payment of legacies therein referred to, and as to the filing of the accounts by said executors in the Sussex County Orphan's Court, and of the confirmations thereof by said court and the distribution to the residuary legatees, and as to the sums of money that came to the hands of said executors, and requires defendants to prove same.

Second. Admits second parapraph.

Third. Admits allegations of third paragraph that authority was conferred upon the executors by will of Henry W. Merriam, deceased, to sell the real estate and that by a codicil thereto, he gave, devised and bequeathed one equal fourth part of the residue of his estate to the children of William L. Dutcher, one equal fourth part to the children of John J. Merriam, one equal fourth part to the children of his deceased brother, Samuel L. Merriam, and one equal fourth part to his executors in trust, as stated in said paragraph.

Leaves defendants to make proof of other matters and things set out in said paragraph third.

Fourth. Alleges no knowledge of matters set forth in fourth paragraph, excepting that she knows that the children of William L. Dutcher are those named in said paragraph.

Fifth. Alleges no knowledge regarding the allegations contained in fifth paragraph.

Sixth. Alleges no knowledge regarding the allegations contained in sixth paragraph, and requires due proof thereof.

Charges that her rights and interests in said estate are not bound or prejudiced by any of the alleged acts or conduct of any of the several parties in said premises therein alleged to have taken place.

Seventh. Admits and charges that said Henry W. Merriam was, prior to his death, the owner of a large amount of the capital stock of the H. W. Merriam Shoe Company; that he died testate, and made and published his last will and codicil thereto annexed in writing wherein and whereby he did give, devise and bequeath to the children of William L. Dutcher one equal fourth part of the residue of said estate; and that this defendant is one of the three children of the said William L. Dutcher, and that the testator did not, by his said will and codicil, dispose of or bequeath specifically any of the capital stock of the said H. W. Merriam Shoe Company to any other person or persons than those mentioned in the residuary clause of his said will and codicil; that this defendant has no knowledge of the alleged gift of said stock by said testator prior to his death to the persons named in the said seventh paragraph of said answer, and that she will require strict proof thereof, and to that end, denies that the said gift of the said stock was made and completed in accordance with law, and this defendant in fact charges and insists that her rights and interests in said estate are not bound or prejudiced by the alleged assent, acts, agreements and conduct of the several parties in said premises that are alleged in said answer to have taken place.

Eighth. This defendant, in further answering, says that if this court shall determine that the said testator made no valid gift of the stock of the H. W. Merriam Shoe Company, so alleged to have been given, then that the said stock passed to the said executors as

part of the assets of said estate, and that this defendant is entitled to her proportionate share thereof in accordance with the provisions of the said last will and testament and codicil of the said Henry W. Merriam, deceased, decreed due to her and without prejudice, by the alleged acts, agreements and conduct of the several parties alleged to have been made in said premises.

And this defendant, being an infant, submits herself to the judgment of this honorable court in said premises, and hence prays that her interests in said premises may be protected and saved to her to the extent of and according to her rights and interests in said premises, and this defendant prays to be hence dismissed with her reasonable costs and charges in this behalf most wrongfully sustained.

EDWARD M. DUTCHER,
Guardian of Elnora H. Dutcher, Defendant.

THOMAS M. KAYS,
Solicitor of Defendant.

TRANSCRIPT OF SHORTHAND NOTES OF TESTIMONY TAKEN IN THE ABOVE ENTITLED CAUSE ON DECEMBER 10, 1912, AT CHANCERY CHAMBERS, NEWARK, N. J., BEFORE HON. JAMES E. HOWELL, VICE-CHANCELLOR.

Appearances:—

Mr. Edward M. Colie, for the complainant.

Mr. John R. Hardin, for Edwin W. Merriam and Henry F. Merriam, individually and as executors of the last will and testament of John J. Merriam, deceased, Helen M. LaCoste and Amelia E. Merriam.

Mr. Edward S. Atwater, Jr. and Mr. Charles E. Littlefield (of New York bar), for Harriet M. Huntington, Ralph H. Buffington, administrator of Maybelle F. Buffington, deceased; Olin L. Merriam, Nellie J. Merriam and Carlisle J. Lane.

Mr. William A. Smith, guardian, *ad litem* for infant defendants, Carlisle R. Lane, Albert Merriam Lane and Clara May Lane.

Mr. Thomas P. McKenna and Mr. John W. Sheehan (of the Massachusetts bar), for Charles R. Lane.

Mr. Thomas M. Kays, for Mr. Edward M. Dutcher, guardian.

Mr. Colie. I first offer in evidence copy of the last will and testament of Henry W. Merriam and codicil thereto, proved on November 7, 1900, and filed in the Sussex County Surrogate's office, November 7, 1900, and recorded in book M of wills, folio 1, together with letters testamentary granted thereon to John J. Merriam, William L. Dutcher and Francis J. Swayze.

Marked Exhibit C. 1.

FRANCIS J. SWAYZE, sworn.

Direct examination by Mr. Colie.

Q As one of the executors of the will of Henry W. Merriam, deceased, did you file an inventory of the estate, Judge Swayze?

A Yes, sir.

Q Have you a copy of it?

A I have what I think is a copy, one I have constantly used.

Mr. Colie. I offer in evidence what purports to be the inventory of the estate of Henry W. Merriam, appraised on the 12th day of November, 1900.

Marked Exhibit C. 2.

Q It was proved by the appraiser on January 9, 1901 and proved by the executors on January 11, 1901, by the endorsement—

A I suppose it was filed probably the 11th of January; that is a mere endorsement in my handwriting.

Q (*By Mr. Hardin.*) Filed in January is good enough.

A Yes.

Q After the filing of the inventory was an accounting filed by the executor?

A Yes, I filed an accounting a little over a year after, granted letters.

Q Have you copy of that inventory?

A That is copy of the first account; I cannot say that is an exact copy; there is a slight error toward the end as I called it up to Newton, there was an error of a few cents in calculating commissions, of course that disturbed the balance, I think it is an error of forty-three cents; but I have here certified copy of the decree on that accounting.

Q (*By Mr. Littlefield.*) Have there been four accounts?

A There are two accountings as executor and two as trustee; this is the first account as executor.

Q Beginning with an item of November 12, 1900, on the charge side?

A This was confirmed on the 6th day of December, 1901.

Account offered in evidence.

Marked Exhibit C. 3.

Q Have you the second account, Judge Swayze?

A That is the second account as executor.

Mr. Colie. Approved on the 12th day of September, 1905.

Account offered in evidence.

Marked Exhibit C. 4.

Q Have you filed any account as executor since?

A No, sir; I have prepared an account up to a certain time, but none has been filed.

Q Now, at the time of your filing this second account, approved on September 12, 1905, what assets remained in your hands as executor, undisposed of, uncollected?

A In 1905?

Q Yes; let me ask you this. At that time had you paid the Plot Owners Association in the Newton cemetery?

A Not exactly; that legacy proved illegal and fell into the residue. I can tell you pretty generally what there was undisposed of.

Q I wish you would, and what the status of those same things may be now?

A I can tell you pretty nearly what assets there were undisposed of. The Talbot mortgage, the Langan mortgage; the Talbot mortgage we received after that account was filed, but before it was confirmed, $3,551.59; October 6, 1905, we received the Langan mortgage, $4,000 of principal. December 26 we received balance of the Bruenhe mortgage, balance of $1,000. April 20, 1906, we received the purchase price

of 1121 Borden avenue, Denver, Colorado, $5,250. December 26, 1906, a dividend on the claim against the estate of Horace M. Warren, who was an agent of the testator out in Denver for moneys collected by him, $530.32, and exchange 65c., $529.77. June 1, 1907, we received $8.10 cash in lieu of a fractional share of the stock of the Palmer House Company issued to represent the interest of the estate of the Palmer House at Grand Island, Nebraska. June 7, 1907, we received proceeds of the sale of the Ackerson property at Andover; my recollection is that at the testator's death that was a mortgage and that we took a deed from Mr. Ackerson rather than foreclose. March 16, 1908, we received a part payment of the purchase price of 226 Sherman avenue, Denver, $275, less expenses of administration in Colorado, $17.00, leaving a balance of $258. March 16, we received a payment on account of the purchase price of 229 West Eleventh avenue, Denver, $500. I won't go into the detail of these payments. April 1, we received for 864 shares of the Palmer House Company's stock, $4,320, and then we received collections on account of the Denver properties and rents from the Ackerson property; that gives you all of the assets that we realized on up to July 6, 1908. Since then we have sold a vacant lot in Newton for $500; and I think that is all the assets. Nothing is left now excepting some shares of the Bay State Shoe & Leather Company stock which we cannot dispose of and never have had an offer for, and some worthless notes that were marked worthless in the inventory.

Q So far as the assets of this estate have come into your hands you have now converted them into cash as far as they are convertible in your judgment?

A Yes, sir.

Q You have filed besides the two executors' accounts the account as trustees?

A There is the first account as trustee, September Term, 1905, joint account of the three.

Mr. Colie. I offer in evidence joint account of the three executors as trustees, approved on September 12, 1905.

Marked Exhibit C. 5.

A I think there is a slight variance there; I am not sure that is an absolutely true copy, because that seems to have been altered after it was sent up by me.

Q (*By the Court.*) The variance is very inconsiderable?

A Thirty or forty dollars; it comes, I think, from the surrogate's charges; at any rate, on the decree on the next accounting the decree agrees with my balance.

Q Now, you also filed a second accounting as trustees?

A Yes, sir, this is my account after the death of Mr. Dutcher and Mr. Merriam.

Q And this was approved on the 5th of November, 1909?

Account offered in evidence.

Marked Exhibit C. 6.

Mr. Colie. I also now offer in evidence a surrogate's certificate certifying to true copies of the orders allowing the two executors accounts and the two trustees accounts.

Marked Exhibit C. 7.

Q The trustee account brings into the trustee account the items that you had in hand up to what date?

A Well, the date when that account was—I can't tell you without looking at it.

Q The trustee account does not include, of course, the matters that you have realized upon since the filing of your last executors' account?

A The last executors' account was in 1905; the last trustees' account was in 1909.

Q Let me ask you this question. What of the assets that you have now realized upon since, as executors, are not included in the last trustee account?

A I think there is nothing, except the shares of the Palmer House Company of Grand Island, for I saw that in a statement I prepared in 1910; I said $1,512, as principal received for 216 shares of the Palmer House Company.

Q How about the sale of the Newton lot, is that in there?

A That is still in my hands. There is still in my hands, as executor, a considerable sum of cash; $6,572.34 is on deposit in the savings account as executors.

Q That has not been included in any of your trustee accounts?

A No, that has not been included in any account as yet.

Q Your co-executors and trustees, under this will, are they now living?

A No, sir.

Q During their lives, who had the active business management of the estate?

A William L. Dutcher.

Q And can you say, approximately, when William L. Dutcher died?

A My recollection is in January, 1908.

Q And since your acceptance of this trust you have ceased to be a practitioner at the bar and been appointed Justice of the Supreme Court?

A I was a Circuit Court judge before I proved this will; I became a justice of the Supreme Court since that time.

Q Do you know Harriet M. Huntington?

A Yes.

Q After the probate of this will did you receive from Harriet M. Huntington's hands anything in the way of stock of the Merriam Company?

A Not after the probate of the will, as I recollect, but before.

Q After the death of Mr. Merriam?

A After the death of Mr. Merriam.

Q Will you please state your recollection of what took place in relation to Mrs. Huntington, between Mrs. Huntington and yourself in relation to the envelopes referred to in her answer after the death of Henry W. Merriam?

A On the day of his funeral we were at his house; she was there and John J. Merriam and Mr. Dutcher and a relative of theirs, I think from New Hampshire, a cousin, although I never had met him before or since. There may have been other relatives there that I do not recollect. She brought the will and a large envelope into the room in front of the library I should call it, sitting room.

Q (*By the Court.*) This took place at Mr. Merriam's homestead?

A This took place at Mr. Merriam's home in Newton. My recollection is that she handed the will and the envelope to me, that I read the will and that I immediately suggested that the envelope suggested to me that there had been an attempt at a gift which possibly might be an imperfect gift. There seemed to be some surprise on the part of some of them at that position. I recollect particularly the relative who I said I thought came from New Hampshire, he seemed to be somewhat surprised that I had taken that position. Now I really don't know who retained the will and envelope after that. I cannot say whether I did or Mr. Dutcher or Mr. Merriam, but I am quite positive that I insisted that the envelope should be retained by the executors. Now, that is all I recollect now of what took place that night.

Q You speak of an envelope, was it one envelope, separate from the will and codicil?

A Well, I have really no recollection about it; it is quite likely it was, it was separate from the will

and codicil, although they were handed me at the same time; I imagine it was one envelope, but I really haven't any picture of it before my mind.

Q Now, what next took place in relation to this envelope or this stock?

A Well, of course, there was a controversy at once; I do not mean in a sense of—there was a difference of opinion—I said a controversy, perhaps that would say more than I meant, there was a difference of opinion at once. I told Mr. Dutcher and Mr. Merriam, and if I go beyond the rules of evidence you will have to check me, gentlemen, I told Mr. Dutcher and Mr. Merriam that I would—

Mr. Smith. I don't think conversation with Mr. Dutcher ought to be permitted; I object to it.

Q (*By Mr. Littlefield.*) Was it in the presence of Mrs. Huntington?

A I think probably it was, Mr. Littlefield; the matter was a subject of discussion for some time when I went up to prove the will.

The Court. Mr. Smith objects to this. I will take the testimony, Mr. Smith, subject to your objection.

Mr. Smith now enters a formal objection to the admission of any evidence of conversations by or transactions with any deceased person represented in this action.

A I told Mr. Dutcher and Mr. Merriam that I would renounce rather than give up that stock without some further proof. They both insisted, Mr. Dutcher especially, that I should not renounce. We had some discussions with Mrs. Huntington, I cannot fix the date, but I remember one discussion at a time when we transferred the personal property in the house to the Board of Ministerial Relief; of course she insisted that the stock should be returned to her.

Q (*By Mr. Littlefield.*) In the chronology of events, was this after the will was proved and allowed?

A Yes, I think this was after the will was proved. It was a constant subject of discussion, though, for some time. Well, various plans were suggested out of the difficulty.

Mr. Hardin. I don't think you finished that statement.

Q You started to tell about conversation?

A I cannot remember the details of the conversation; the gist of all of our conversations was that I was firm in my position that I would not consent to deliver that stock until I was protected in some way, and Mrs. Huntington was equally firm in insisting that I ought to do it. The result was that we finally hit upon a plan.

Q Is that embodied in the agreement?

A Yes.

Q Have you the agreement there?

A Yes. (Handing counsel paper.)

Q The plan you refer to is that set forth in the agreement, dated the 26th day of March, 1901?

A Yes.

Q Signed by John J. Merriam, Harriet Huntington, William L. Dutcher, John J. Merriam, executor, William L. Dutcher, executor, Francis J. Swayze, executor?

A Yes.

Q And to that I notice is on the last sheet a statement in writing, signed by John J. Merriam, and Harriet M. Huntington, is that part of the agreement?

A It was written about the same time, I suppose the agreement was executed first and that was written on the back.

Q When you got this agreement from them, it was delivered to you, did it have that upon the back?

A It was a contemporaneous transaction.

Q To be taken in connection with it?

A Oh, yes; they signed the agreement; then they said they wanted to protest, and I told them to protest; I think it is in John J. Merriam's handwriting, I am not sure, at any rate that was written on the back and signed.

Q Now, attached to this paper I find a paper signed by Henry F. Merriam, another by Edwin W. Merriam, another by Helen W. Merriam, another by O. L. Merriam, Boston, Mass., February 23, 1901, another by Maybelle F. Buffington, another by Nellie J. Merriam, another by Charles R. Lane, another by Albert I. Lane, another by Carlisle J. Lane and another by E. Merriam Dutcher. I show you those papers attached to this, and ask you whether they were any part of the paper originally?

A Yes, I think they are referred to in it.

Q Are those the original assents referred to in the retained agreement?

A Yes.

Mr. Colie. I now offer in evidence this agreement.

Mr. Smith. I object to it.

The Court. Upon what ground?

Mr. Smith. On the ground it does not bind my client, this agreement.

The Court. That would appear on the face of the paper, I suppose. It is proper evidence in the cause, whether it binds your clients or not is another matter.

Mr. Colie. I offer this in evidence, this paper, that is to say the agreement itself the writing on the back signed by Mrs. Huntington and Mr. Merriam, together with ten assents attached thereto, signed by the several parties whose names I enumerated in my former question.

Marked Exhibit C. 8.

Q These assents, all of them refer to a letter of yours, which letter is stated to be of January 19, 1901; did you write such a letter?

A Yes, but the date is an error or this is an error; I have the letter, a copy of the letter.

Q You have carbon copy of it?

A A carbon copy, to which those assents were response, but I have written at the top of it in my handwriting, January 21, 1901, which is the day I mailed it to the various people, but that is the letter referred to in those assents.

Q (*By Mr. Littlefield.*) What is the actual date, Judge?

A January 19, 1901. A similar letter was sent to every one.

Mr. Colie. I will read it into the record.

The Court. You are reading from the original document produced by Mr. Hardin?

Mr. Colie. Yes, sir. "Newark, N. J., January 19, 1901. Dear Sir:" The letter itself contains no address.

The Court. The paper that Mr. Colie now proposes to read was produced by Mr. Hardin and is stated by him to be the original letter received by Edwin W. Merriam.

"Newark, N. J., January 19, 1901.

Dear Sir: We enclose a copy of the will of the late Henry W. Merriam. We have completed the inventory of his personal property. The total amount of the personal property as appraised is $291,211.08. In addition there is valuable real estate, which forms no part of the above named sum. The inventory does not include any stock of the H. W. Merriam Shoe Company for the reason that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother, John J. Merriam, and his sister,

Harriet M. Huntington, in pursuance of a natural and long cherished desire of his to retain in his own family the control of the business he had established.

Long prior to his death, he had prepared sealed envelopes addressed to several different persons, which were enclosed in a large envelope endorsed as follows: 'Certificate Stock H. W. M. Shoe Co. The enclosed envelopes are the property of and belong to the several persons named, as per address. H. W. Merriam.' These envelopes were deposited with Mrs. Huntington for delivery to the persons addressed. Mrs. Huntington has handed these envelopes to the executors, who feel that they ought to return them to her, in order that she may carry out the instructions of Mr. Merriam. They are advised, however, that some legal question may be raised as to their right to do so, and before doing so they are desirous of securing the consent of the residuary legatees who are of age. The contents of these envelopes are entirely unknown to the executors, except as their contents are indicated by Mr. Merriam's endorsement on the large envelope. Of course, the executors are not at liberty to open envelopes addressed to other persons.

If you are willing that the executors should deliver these envelopes and take any other steps necessary to carry out Mr. Merriam's manifest wishes in a strictly legal form, kindly sign and return the enclosed consent to John J. Merriam, Summit, New Jersey. Yours truly, John J. Merriam, William L. Dutcher, Francis J. Swayze, Executors. By F. J. S."

Q A letter identical in form to that which I have just read was sent to whom?

A To E. W. Merriam, Sonderhausen, Thurengen, Germany; Olin W. Merriam, care Baring Brothers & Company, London, England; Henry F. Merriam,

Sheffield Chemical Laboratory, New Haven, Connecticut; E. Merriam Dutcher, Newton, Sussex County, New Jersey; Charles R. Lane, 325 Main street, Worcester, Massachusetts; Albert I. Lane and Carlisle J. Lane, Saverville, Oregon; Nellie J. Merriam and Maybelle F. Buffington, West Brookfield, Massachusetts. Now that includes everybody excepting Miss Helen Merriam. Now Mrs. LaCoste, she was living at home with her father, so I suppose he gave a copy to her.

Letter read in the record offered in evidence marked Exhibit C. 9.

Q The exhibit, C. 9, just marked and read into the record is the letter by you referred to in the assents attached to Exhibit C. 8?

A Yes, if the numbers of the exhibits are right. Yes, sir.

Q And did all the parties to whom that letter C. 9 was sent sign assents attached to this?

A Yes.

Q And assents were signed by all the parties interested in Henry W. Merriam's estate, excepting whom?

A Excepting this Francis Dutcher and this Elnora Dutcher, who were under twenty-one, and the children of Carlisle J. Lane and the child of Charles R. Lane, all of whom were under twenty-one, as I believe.

Q After the older daughter of Mr. Dutcher became of age what action did she take, if any?

A She ratified in writing our action.

Q Have you got that?

A I don't know whether I have that here or not; yes, I have it.

Mr. Colie. I now offer in evidence paper signed Frances E. Abbott, that was the name of the older daughter of Mr. William L. Dutcher, paper dated November 3, 1908.

Marked Exhibit C. 10.

Q Can you tell us at what date the envelopes that have been referred to as handed to you by Mrs. Huntington, passed out of the hands of the executors?

A The day that agreement was executed, the night that agreement was executed.

Q Did the envelopes pass out of your hands unopened?

A We were all at Mr. Dutcher's house.

Q Who were all?

A Well, Mr. Merriam, Mr. Dutcher, Mrs. Huntington, Mr. John Tozer, Mr. George L. Dutcher, Mr. Joseph E. Warbasse, perhaps others, although that I don't remember. I don't recall exactly how the envelopes got to the persons addressed, but in some way that night Mr. Tozer and Mr. Warbasse and Mr. Dutcher received their envelopes, and Mrs. Huntington received hers and Mr. John J. Merriam received his. Now I cannot account for the envelope for the Buffingtons and Olin Merriam. Olin Merriam I am sure was not there, or I don't know that Mrs. Buffington was, or Nellie J. Merriam; it is probable Mrs. Huntington took those, but I don't know.

Q When these envelopes passed from your hands had they been opened?

A I think nothing was opened until after the agreement was signed, I am very sure of that, and whether they were opened whether in my hands or somebody else's, that I don't know.

Q Or whether they were opened at all you don't know, do you?

A It was all done right there, the large envelope was opened right there.

Q How about the smaller envelopes, they were not opened, were they?

A My recollection is Mr. Tozer and Mr. Dutcher and Mr. Warbasse opened their envelopes, but I am not sure.

Q You don't know about the rest?

A No, I do not; it made no impression on me, it really did not interest me.

Q It passed from your hands?

A It passed from my hands and I had no custody.

Q Nor the other executors, to your knowledge?

A No.

Q The stock that is referred to in the agreement, C. 8, that under its terms were to be delivered by Mr. Merriam and Mrs. Huntington into the custody of the executors, was so delivered?

A Yes, sir.

Q There is also reference in that agreement to certain dividends declared from earnings, Mr. Merriam's earnings made by the company in Mr. Merriam's lifetime, checks for those amounts; from what source did you get those dividends?

A My recollection is that the Shoe Company declared a dividend some time after the execution of this agreement and prior, I should say, to July, and then I understand it was a dividend of $10 a share, and Mrs. Huntington gave us a check or cash for $1,510, and Mr. John J. Merriam cash or check for $1,220 representing that dividend.

Q That money you subsequently invested as trustee, you invested in the bonds of Newton, didn't you?

A We bought two Newton bonds and left the rest in the savings bank.

Q Howard Savings Bank of this city?

A For a long time, and some of it there still.

Q And the stock that you have referred to as having been under this agreement delivered by Mr. Merriam and Mrs. Huntington to the executors, remained in the executors hands as stock until when?

A Well, about two years ago, I can't tell you the date; yes, I can tell by looking, June 2nd, 1910.

Q Then what disposition was made of it?

A We sold 151 shares to Mrs. Huntington, and 122 shares to John J. Merriam.

Q At what price?

A $174 a share.

Q How was that price fixed?

A It was fixed by the book value of the stock at the time of Mr. Merriam's death, according to a statement as of their inventory, November 9, 1900, just prior to the probate of the will, certified to by the president and secretary, which showed a book value of $184 a share; out of that the $10 a share dividend was deducted, leaving $174.

Q Had you knowledge of sales of the Merriam Shoe Company's stock?

A Only as I made inquiry; there had been no sales except amongst themselves; it was not a stock publicly dealt with in any way. I made inquiries of everybody I knew that had bought any stock.

Q (*By the Court.*) No market for it?

A There was no market for it, except amongst themselves.

Q Do you know the highest price that had been paid?

A Well, I think the highest price is $155 a share, which Mr. Joseph E. Warbasse, the secretary or treasurer of the company, paid, no, which he received from Henry F. Merriam and Helen D. Merriam on May 27, 1903; the other sales were for $150 a share, Henry F. Buffington to William L. Dutcher, January 21, 1902, and Nellie Merriam to E. Merriam Dutcher, January 12, 1902, $150 a share. As far as I know those are all the sales, but very likely there may have been others.

Q Now, the cash that you received on the sale of this stock at the figure you have named, what disposition did you make of it after its receipt?

A Well, it was kept in the savings bank, divided between a Newark bank and a Newton bank for some time, and then it was invested in bonds.

Q When was it invested in bonds?

A I was just looking to see if I could tell. Well, I should think it was in the spring of 1911, as near as I can make out from these bank books, from April 5 to May 17.

Q In what bonds was it invested?

A The John J. Merriam share was invested in Essex County bonds and Newark City bonds; the Harriet M. Huntington share was invested in Passaic bonds and Plainfield bonds, and a Camden bond.

Q Municipal bonds?

A Municipal bonds; I ought to be able to give you the exact date.

Q The bonds that you have just enumerated are in your possession now?

A Yes, sir.

Q And they represent the entire proceeds, or is there a balance of cash?

A There is a balance of cash.

Q Where is that?

A $393 of the John J. Merriam share is in the Howard Savings Institution, and $1,216.13 of Mrs. Huntington's share is in the Merchants' National Bank at Newton. Of course there was a premium on all these bonds except the Camden bond, that was bought a little below par.

Certified copy of the letters of administration on the estate of William L. Dutcher, granted to Edwin M. Dutcher, dated January 28, 1908, offered in evidence.

Marked Exhibit C. 11.

Adjourned until tomorrow.

December 11, 1912.

IN CHANCERY OF NEW JERSEY.

Between
FRANCIS J. SWAYZE, as Executor and Trustee, etc.,
Complainant,
and
HARRIET M. HUNTINGTON, and others,
Defendants.

Continuation of examination, pursuant to adjournment, at the place and in the presence of the parties as before, on December 11, 1912.

FRANCIS J. SWAYZE, resumed for

Further direct examination by Mr. Colie.

Q I want to settle some dates. You testified that the first occasion on which you saw these envelopes was the occasion of reading the will at Mr. Merriam's house, the decedent, after the funeral. At that occasion what is your best recollection, was the large envelope opened?

A Mr. Hardin last night showed me a lot of small envelopes, with my name written across the flap, and the date October 29, 1900; I am satisfied that the large envelope must have been opened, and I wrote my name at that time across the flaps of the small envelope.

Q Were the small envelopes opened at that time?

A They were not.

Q You have also testified to an occasion when the small envelopes were produced at a meeting at Mr.

Dutcher's house, at which Mrs. Huntington and Mr. Warbasse and Mr. Dutcher and others were present; what is the date of that meeting?

A It was the time the agreement was executed, I presume the time the agreement bears date, March 26, 1901.

Q At that time the agreement was delivered?

A Yes.

Q And the small envelopes were there on that occasion?

A Yes, sir.

Q In your possession?

A Well, they were in the possession of some of the executors, I can't say that I had them in my custody.

Q And on that occasion, after or contemporaneous with the delivery of that agreement of indemnity, these small envelopes were delivered?

A Yes.

Q And do you know whether any of them were opened?

A Well, I think they were; I am quite sure that Mr. Tozer and Mr. Dutcher and Mr. Warbasse opened theirs, but I might be mistaken about it.

Q But so far as those envelopes were addressed to persons not there, they were opened by nobody present to your knowledge?

A Not to my knowledge, in fact I don't know whether everybody was there or not; I know, of course, that the Buffington children were not there, but I don't think Mrs. Buffington or Mr. Merriam was, and I know that Olin Merriam was not.

Q I will put another thing on the record for completeness sake. Under the will of Mr. Merriam, and codicil, the executors had discretion to advance to Charles R. Lane and Carlisle J. Lane portions of the principal as they saw best in their judgment as serving the interest of those present. Will you please

state whether such advances have been made of the principal, and, if so, how much to each?

Mr. Sheehan. Isn't that a question of law, rather than a conclusion of the executor? If it is the intention to place a construction on that clause of the will, I object.

The Court. I don't suppose the witness would attempt to put a construction on the will.

Mr. Colie. I stated the purpose of it, I said to make the record complete.

The Court. You may answer.

A We have advanced to Carlisle J. Lane of principal $2,000; we have paid to Charles R. Lane of principal at various times prior to December 10, 1910, $2,950, December 20, 1910, $150; January 31, 1911, $75; March 15, 1911, $50; March 22, 1911, $25.00; December 6, 1912, $180.10, and December 12, 1912, $75; making a total of $3,505.10.

Q (*By Mr. Hardin.*) Inclusive of the $2,950?

A Yes, inclusive of the $2,950.

Q (*By Mr. Littlefield.*) As against $2,000 to Carlisle J.?

A $2,000 to Carlisle J.

Cross examination by Mr. Smith.

Q Judge, who handed this package containing these envelopes to you?

A My recollection is Mrs. Huntington did.

Q And do you know where she obtained that package?

A She went out of the room and I think went upstairs, but I don't know.

Q And at the same time she handed other papers of Henry W. Merriam?

A She handed the will, and the package together.

Q And this was handed to you in response to a demand or request either by yourself or your co-executors for Mr. Merriam's papers?

A I presume so, although I have no distinct recollection of it.

Q The date, I think, you have given on the record?

A October 29, 1900, the day of the funeral, I suppose that is right.

Q Did you as executor, or your co-executors, take any stock other than this into your possession?

A Stock of the Shoe Company?

Q Of the Shoe Company?

A No, sir.

Q Did you ascertain, so as to satisfy yourself, that it was true that these envelopes contained certificates of stock in the Shoe Company, standing in Mr. Merriam's name?

A I think I never saw the contents of the envelopes, except perhaps at a distance.

Q I mean subsequent to this agreement?

A At any time, so far as I know, I never saw the contents of those envelopes except as they were in the hands of other people.

Q Do you recall the large envelope?

A No, I don't; do you mean its appearance?

Q Yes?

A No.

Q Do you recall the endorsement upon it?

A Well, I have no doubt that the endorsement stated in that letter of January 19, 1901, is correct; I have no doubt I compared that with the original.

Q Did you believe at that time that that contained stock standing in Mr. Merriam's name in the Merriam Shoe Company?

A Well, I believe it contained exactly what that endorsement said.

Q Didn't you also believe that it was stock, or haven't you believed up to the time that you filed this bill?

A Yes.

Q That it did contain stock which stood in his name?

A Yes, sir.

Mr. Littlefield. I don't know what it may lead to, but I don't suppose the belief of the executor, unless it characterizes some act, would be a competent fact here.

The Court. I don't think the cross examination has exceeded the limit yet.

Mr. Littlefield. I don't think it has either; I say, I don't know what it may lead to, but the mere matter of belief I don't suppose would affect any of us as a matter of law.

The Court. Might say that a man's belief is evidence of his state of mind, where his state of mind is relative to the issues raised by the pleadings; I fancy that is about as far as we can go with it.

Q You testified on your direct that the envelope was opened or was open on this day in which you and your co-executors took possession of it?

A The record will show what I testified to on my direct; I suppose I did, I don't recall.

Q What I am leading up to is this. I want to know if that envelope was opened on that day, the day of the funeral, or whether the individual envelopes were delivered to you in a sealed envelope, and the envelope opened on that day?

A My recollection is that there was a single large envelope delivered to us, and my present recollection, after being refreshed by these small envelopes shown me by Mr. Hardin, is that the large envelope was opened that day.

Q And that it had been sealed previous thereto?

A My recollection is that it was sealed, but I have no distinct recollection about it.

Cross examination by Mr. McKenna.

Q Judge, was there a dividend collected by the executors immediately after the delivery of the envelope to the executors, or shortly thereafter?

A Nothing in the name of dividends; we collected of the shoe company a balance standing on their books to Mr. Merriam's credit, fifteen thousand odd dollars, as shown by the inventory.

Q But beyond the account or the information to be gathered from the account as it stands upon the books of the company have you, as an executor, any personal knowledge of how that balance was made up?

A None at all.

Q And do you know whether there was any payment made to the executors of an accrued dividend?

A Not so far as I know, not under the name of dividends.

Q During your administration?

A No, sir.

Q As to whether accruing during the term of your administration, or having accrued during the lifetime of the testator?

A Nothing except as I stated yesterday, with reference to the fifteen hundred and ten dollars, and the twelve hundred and twenty dollars that came to us from Mrs. Huntington and Mr. Merriam.

Q Have any of the persons which we have referred to in the pleadings as the donees made any demands upon any of the executors, to your knowledge, for the return of moneys alleged to have been dividends upon the stock alleged to be contained in those envelopes?

A I don't know of any such demands.

Cross examination by Mr. Littlefield.

Q You say that your recollection is that the large envelope was opened on the day when it was delivered; do you remember who by?

A I couldn't tell you.

Q Do you have any definite recollection as to the circumstances under which Mrs. Huntington delivered whatever she did deliver to the executors, that is, how she came to deliver it?

A No, I know nothing further than I have already stated; I sat there in the room; she went out and brought in these papers, and I think handed them to me, and I proceeded to read the will.

Q Do you recollect any conversation that occurred prior to her going out?

A No, I do not.

Q That is, you have no memory as to whether anything was said to her, or any inquiry was made of her for any of the papers or matters relating to the estate?

A Well, I should presume there was, but I don't remember.

Q You have no memory of it?

A No.

Q Was Mr. John J. Merriam present?

A Yes.

Q Is your recollection sufficiently distinct that you would be able to say that Mr. Merriam did not call Mrs. Huntington's attention to the matter?

A I could not say he did not; very likely he did.

Q Would you be able to say that he may not have gone from the room to see her in relation to it?

A I can't say that; he may have done so.

Q Was there any conversation between Mrs. Huntington and the executors, in your presence, with reference to the circumstances under which she received the large envelope containing the other nine?

Mr. Smith. I object.

The Court. That question is not objectionable; you may answer yes or no.

A Yes, there was conversation at one time or another.

Q Yes, but do you recollect whether there was any at that time on this 29th of October, 1900?

A I wouldn't undertake to say whether there was or not that night.

Q So that you have no memory as to whether or not when she passed the papers over, whatever they may have been, that she said anything in relation thereto?

A I cannot recall that she said anything; I won't say that she did not.

The Court. You mean anything with relation to the circumstances under which she obtained possession of the envelope?

Q Yes, and anything that was connected with the act of delivering the large envelope to the executors

A I recall nothing.

Q If she did say anything it has escaped your recollection?

A Yes.

Q Now, I show you seven envelopes marked for identification in blue pencil A, B, C, D, E, F, and G, presented by Mrs. Huntington, as follows; and ask you whether or not those are seven of the nine envelopes that were contained in the large envelope handed to you on that day?

A They all have my signature, and the date upon the back; I have no doubt those are the envelopes.

Q And at the time you first saw them you wrote upon the back, across the flap, sealed, your name with the date October 29, 1900?

A Yes, sir.

Q And are you able to state that at that time each of these seven envelopes were sealed up?

A They were.

Q Did Mrs. Huntington shortly after the 29th request the executors to return to her these envelopes that she delivered to you on this occasion?

A Well, substantially she did; I can't say that she said it in so many words, but she insisted upon her right to have them returned.

Q And how soon was that after the 29th, according to your recollection?

A Oh, I should say it was the next time we met, very likely that was the day the will was proved, I think it was the 12th of November; we may have met sooner than that, I am not sure, it was immediate.

Q Your recollection would be that this was the 29th?

A Yes.

Q Though the first time you did meet you learned either from her directly or indirectly that she insisted upon the return of the envelopes to her?

A She certainly insisted upon her right to have them returned.

Q Your recollection would be that at the first time the executors met after the 29th, whatever date that may have been, you knew that she was insisting upon the return of the envelopes?

A Yes, sir.

Q You say that the subject matter of the delivery of the envelopes was a subject of some discussion between the executors and Mrs. Huntington?

A Well, not I think the night of the 29th of October, but it immediately became a subject of discussion after that day; it may have been that night, I wouldn't say it was not, but I think not.

Q Do you remember whether or not at any time Mrs. Huntington undertook to detail the circumstances and conditions under which the envelopes were delivered to her, that is whether she went into that matter in detail?

Mr. Smith. I suppose that answer will be limited to yes or no.

The Court. That is not objectionable.

Q Do you remember whether or not at any time Mrs. Huntington undertook to detail the circumstances and conditions under which she received the envelopes delivered to you on the 29th?

A Yes, she did.

Q Do you recollect her conversation?

A Well, I would not undertake to give that, Mr. Littlefield; she told us quite a good deal about it, but I won't undertake to say what she said.

Q Then you have not now any memory as to the conversation?

A No.

Q Except that there was a conversation?

A She told me the circumstances, and she thought that I ought to be convinced that it was a good gift, that is about all I can say.

Q Your attitude was, as executor, I take it, that a question had arisen and you did not think it proper to assume any responsibility?

A I thought that I ought not to assume responsibility.

Q And that, I take it, is as far as any action you took in the matter is entitled to go?

A Exactly.

Q You did not then, and I don't suppose undertook to express any opinion as to the legal rights?

A No, sir.

Q Have you any objection, Judge, in the determination of matters, so far as you are concerned as executor and a party to the litigation, to having the rights of Mrs. Huntington determined as of the date of the death of Mr. Merriam, upon the assumption, with the knowledge that the certificates were then in her hands, so that so far as you are concerned you are willing to concede that is her proper, legal situation, have you any objection as executor?

Mr. McKenna. I object.

The Court. My feeling about it is that the question that you are putting to Judge Swayze

is either a question which goes to the declaration of what he had in his mind, or, if it is not that, it is a question of law, one or the two, and I would not say that it would be admissible on either ground. What you want is to have the adjudication of her rights take place as of the time immediately preceding the delivery of the envelopes by her to the executors.

Mr. Littlefield. Yes, your honor.

The Court. Isn't that a question of law? Don't that go to a large extent toward a discussion and decision of the rights of the parties? I don't think the question is admissible, Mr. Littlefield, at this stage of the case.

Q You drew the will for Mr. Merriam?

A Yes.

Mr. Smith. I object; I don't think it makes any difference in this case who drew Mr. Merriam's will.

The Court. I wouldn't keep that out; that is proper.

A I drew it.

Q Had you been Mr. Merriam's personal attorney for some time prior to that?

A Well, I had done some business for him; I was in Newark and he was in Newton you know; I don't know whether I was his personal attorney or not.

Q He consulted you privately from time to time prior to the drawing of the will?

A Well, it is possible he may have done so, I don't recall now any instance prior to the drawing of the will.

Q You drew the codicil also?

A Yes.

Q The will specifically disposes of some of the stock in controversy, and the codicil specifically revokes that provision. Do you have any memory whether Mr. Merriam, in connection with the drawing

of the codicil, gave you a memorandum as to what he desired, or whether he communicated his desires to you orally? I don't ask now what he said?

Mr. Smith. I object.

Q This is simply whether a memorandum was given to him by Mr. Merriam or whether Mr. Merriam orally communicated; not what was done.

The Court. I will permit the question.

A My recollection is that it was oral.

Q And where did the conference take place, in your office in Newark or at Newton?

A No, I am quite sure it was not in the office at Newark; it was probably in Newton.

Q Do you remember whether or not he gave any reason for revoking the provision in the will relating to the specific disposition of the H. W. Merriam Shoe Company's stock?

Mr. Sheehan. Answer yes or no.

The Court. The question is proper; answer yes or no.

Q Do you remember whether or not he gave any reason to you at the time you drew the codicil for revoking the specific provision in his will disposing of some of this stock in controversy?

A Well, it is a little difficult to answer the question. I have, I think, a memory on the subject; I will answer it yes, as to the memory.

Q (*By the Court.*) Let me ask a question here to satisfy my inquisitiveness. Did these envelopes contain all the stock that he owned?

A I don't know.

Mr. Littlefield. Yes, they did. All the stock that was then held by Mr. Merriam consisted of ten hundred and ninety shares.

The Court. And your insistment is that it was all contained in these envelopes.

Mr. Littlefield. Yes.

A I never saw the stock books of the company, and knew nothing about it.

Q And you never saw the contents of the nine individual envelopes?

A No.

Q Not all of them, at any rate. You say you have a memory as to instructions in relation to the drawing of the codicil in this regard?

A Well, I said I had a memory as to whether he said anything about it or not.

Q Please state whether or not he did say anything about it?

Mr. McKenna. It seems to me that the questions that are being propounded to the witness are questions that are not in cross examination on the case presented by Mr. Colie. If Mr. Littlefield wants to make his case out by Judge Swayze he should call him in his regular order as witness.

The Court. I will permit this.

Q (Question read.)

A About the stock do you mean?

Q Please state whether or not he did say anything about the stock that was specifically devised. I don't ask you what he said; did he say anything about it?

A I am quite sure he did not.

Q Then is it a fact that there was no conversation, so far as he was concerned, with reference to that specific bequest?

A Nothing that I can recall.

Q What were Mr. Merriam's characteristics with reference to being secretive about his business?

Mr. McKenna. I object.

The Court. I will permit it.

A Well, I think I would say that Mr. Merriam was secretive about the Shoe Company business; I haven't much to base that opinion on, excepting the occurrences in this case.

Q Well, predicated upon your acquaintance with him?

A Yes.

Q And your experience with him as his counsel?

A I don't think he was much inclined to talk about the Shoe Company business.

Q What was his general physical condition at the time the will itself was executed?

A At the time the will was executed—

Mr. McKenna. I object.

The Court. I overrule the objection.

A I think his physical condition was very good at the time of the will; I don't remember the date of the will.

Q 1895.

A Well, I think very good.

Q Do you remember whether or not that was before or after he had the first shock?

A I don't know when he had the first shock; I know he was an invalid for some time before his death, but I have no way of fixing the date.

Mr. Hardin. The will is dated September 16, 1895, and the codicil was dated January 20, 1898.

Q Now, do you recollect what his physical condition was at the time of the execution of the codicil?

Mr. McKenna. I object to that for the same reason.

The Court. I will allow it to be answered.

A I have no particular recollection about it, nothing attracted my attention.

Q That is, you saw nothing that especially attracted your attention to any physical feebleness on his part?

A I saw nothing to attract attention.

Q You have given, Judge, I take it, the names of the persons, so far as you can remember them, who were present when the large envelope containing the superscription was delivered to the executors?

A I think I have, if I haven't I can repeat them.

Q My recollection was, that Mr. Dutcher, Mr. John J. Merriam, Mrs. Huntington, some gentleman from New Hampshire whose name you don't remember, were present?

A That is my recollection, he was from New Hampshire, some cousin or other.

Q And anyone else?

A Well, I would suppose that Miss Nellie Merriam was there, and possibly Mrs. Buffington, but I cannot be sure of that; I am sure that Mr. Dutcher, Mr. Merriam, Mrs. Huntington, this cousin from the east, and that is all I am sure of.

Q You saw the superscription on the large envelope?

A Yes.

Q And it was in the handwriting, was it not, of Mr. Merriam?

A That is my recollection.

Q Did you compare the direction that was found upon the large envelope with the copy of it that was found in the agreement, and also in your letters to the various heirs asking their assents?

A I am sure I did.

Q So that you are prepared to state the quotation that appears on those two documents is an accurate quotation?

A I believe it to be so.

Q Was anything delivered at that time by Mrs. Huntington, except the large envelope and the will?

A Not that I recall.

Q Was anything said about any other papers?

A I can't tell you.

Q Other papers, I take it, came into the possession of the executors?

A Oh, yes.

Q Do you remember whether or not there were quite a large number of mortgages held by Mr. Merriam at his death?

A There were a good many mortgages.

Q When did those come into the possession of the executors?

A Well, I suppose it was at the time we began to take the inventory, but I cannot fix any date; it was not until after we had proved the will.

Q So far as you have any memory, you did not see them until after the will was proved?

A No, I have no recollection of seeing them until after the will was proved; in fact I have no recollection of seeing them then, because Mr. Dutcher had general charge, and after we proved the will we immediately began to take the inventory, and I left it to the appraisers, Mr. Dutcher and Mr. Merriam; I was here in Newark busy every day.

Q In whose hands were the large envelope and nine envelopes left until they were returned to Mrs. Huntington?

A I should think in Mr. Dutcher's hands.

Q Have you a definite recollection on that?

A The only definite recollection I have is that they were not in my hands, and it is altogether probable that I would have objected, under the circumstances, to Mr. John J. Merriam having them, so I think it is altogether probable that Mr. Dutcher had them.

Q Your statement in relation to that is largely a matter of reasoning rather than recollection?

A Yes, it is entirely a matter of inference.

Q Who drew the indemnity agreement?

A Mr. Colie and I drew it.

Q Now, at the time the agreement was drawn, I take it that both you and Mr. Colie must have known of the contents of the envelopes delivered to Mrs. Huntington and Mr. John J. Merriam?

A We had information from somebody about it.

Q Do you know where you got the information, from what source?

A No, I do not.

Q The agreement accurately describes the stock which was contained in the envelopes addressed to them, does it not?

A Yes, I think it does; I don't know that I ever actually saw the contents of those envelopes, but I have no reason to doubt that it accurately describes the contents.

Q Is it your memory at the time the agreement was drawn, these two envelopes were still sealed?

A That would be my recollection.

The Court. What two envelopes?

Q I mean the Huntington envelope and the John J. Merriam envelope. Your recollection would be that the envelope addressed to Mrs. Huntington and the one addressed to John J. Merriam at the time of the drawing of the agreement was still sealed?

A Well, that would be my recollection.

Q Now, refreshing your recollection from that fact, are you able to state from what source either yourself or brother Colie derived the information that enabled you with perfect accuracy to describe the contents of those two envelopes?

A Probably from Mr. Dutcher, I relied upon him; what I was interested in was to be protected for one-fourth of the whole amount of the stock.

Q You haven't any memory on that stock?

A No, I haven't any memory on that point.

Q Do you have any idea where Mr. Dutcher may have acquired such information?

A No.

Q Is it within your knowledge that Mr. Dutcher had any knowledge of the transaction which occurred between Mr. H. W. Merriam and Mrs. Huntington at the time the stock was delivered to her by him in his lifetime?

Mr. McKenna. We object to that.

The Court. The question is whether the witness knows whether Mr. Dutcher had any knowledge.

Mr. Littlefield. I don't ask him what his knowledge was.

The Court. Suppose he says he knows that Mr. Dutcher did have knowledge; what is the effect of it? How is that relevant, how does that help us along any, how is it material? I think it is immaterial.

Mr. Littlefield. I would like to state to your honor our position on it. I am not intimating at all that your honor is not correct in his suggestion, but the way we will undertake to connect that is this, of course we will endeavor to show that Mr. Dutcher never received any information from anyone, so far as we know, outside of Mr. H. W. Merriam; of course it is not a very important fact, but of course it may be of some significance.

The Court. That is a substantative fact that you will be called upon to prove, I suppose.

Mr. Littlefield. We will follow this testimony up by evidence showing that the information did not come from any of our people; the inference then must necessarily follow that it came from Mr. H. W. Merriam in his lifetime.

The Court. If that ever becomes admissible in evidence I think it will be by way of rebuttal.

Q So that then, Judge, so far as your knowledge is concerned, the agreement was drawn in the absence of the knowledge of the contents of any of the envelopes, and while the agreement accurately states and is predicated upon an accurate knowledge of the contents, that knowledge must have come from some source other than the envelopes themselves and their contents.

A I feel quite sure that it must have, so far as I am concerned.

Q Did that knowledge, so far as you know, come from Mrs. Huntington?

A I don't know.

Q Did it come from Mr. John J. Merriam?

A I don't know.

Q Did that information come to the executors from any of the donees of the stock, so far as you know?

A Outside of Mrs. Huntington and Mr. Merriam?

Q That is what I mean, outside of Mrs. Huntington and John J. Merriam?

A I should say it did not.

Q Will you be kind enough to examine again the envelopes marked Exhibit A. to G. inclusive, and state whether or not you can identify the handwriting upon the envelope?

A Exhibit A. looks to me, the "Mrs. H. M. Huntington, Newton" in ink, looks to me like Mr. Merriam's handwriting, but, oh, I don't know, no, I doubt if that is Mr. Merriam's.

Q Just compare it with the others.

A No, I think I am wrong. "John J. Merriam, Summit, N. J." On Exhibit B., I should judge that was Mr. Merriam's handwriting. "O. L. Merriam, Boston, Mass." Exhibit C., that looks to me like Mr. Merriam's handwriting. "Miss Nellie J. Merriam, Boston, Mass." Exhibit D., looks like the same. "Mrs. Maybelle S. Buffington, Westbrookfield, Mass." Exhibit E., that looks to me like his handwriting. "George L. Dutcher, Newton," on Exhibit F., I think that looks like Mr. Merriam's handwriting. "Joseph E. Warbasse, Newton." Exhibit G. looks to me like Mr. Merriam's handwriting. I may be mistaken about it; I do not profess to be a handwriting expert.

Q I notice some pencil memoranda upon some of the envelopes; I will ask you whether or not, according to your recollection there was any pencil memoranda upon the envelopes at the time you first saw them?

A I have no recollection, I can't say it was or not.

Q Would it be your recollection there was nothing upon the envelopes except the addresses?

A That would be my present recollection, Mr. Littlefield.

Q Are you sufficiently familiar with Mrs. Huntington's handwriting so that you are able to express an opinion as to whether her name is in her own handwriting or not?

A Well, at first I said it was Mr. Merriam's, but I rather think it is in Mrs. Huntington's; they wrote something alike; I should judge that was Mrs. Huntington's, but I don't want to commit myself.

Q The endorsement that appeared upon the large envelope, which contained the other nine, was that in the handwriting of Mr. H. W. Merriam, according to your best recollection?

A I think it was; if it had not been I think it would have attracted my attention.

Q So that your recollection is that at the time that impressed you as being a genuine endorsement in the handwriting of Mr. H. W. Merriam?

A I thought so.

Q Was there any request made of Mrs. Huntington as to any papers relating to the estate of H. W. Merriam, other than the papers that she at that time handed the executors on the 29th of October, 1900?

A Well, I have no decided recollection about it; my impression would be that we probably spoke to her about wanting the papers when we made an inventory.

Q I mean on that day on the 29th of October?

A Well, I have no recollection about it.

Q If there was a conversation it has escaped your recollection?

A Yes, sir; my recollection is that there was not, but it is hazy.

Q Now, you have stated there have been no demands made upon you for the dividends which appear to save accrued prior to the death of Mr. H. W. Merriam, and which you found credited to him upon the

books of the company. I will ask you whether or not they were not thus disposed of as the result of an amicable arrangement by virtue of which ultimately the indemnity agreement was given?

A Well, I think nothing was ever said about any dividends prior to H. W. Merriam's death.

Q (*By the Court.*) You mean dividends that had been declared.

A That had been declared; I have no recollection of that question being discussed at all.

Q So far as dividends had not been declared, but had accrued prior to the death, wasn't that a matter that was adjusted in connection with the indemnity agreement?

A Yes, the dividend declared after Mr. Merriam's death of earnings accrued prior to his death was discussed and was adjusted.

Q And it was a part of whatever adjustment was made?

A Yes.

Q And is it not a fact that the indemnity agreement which was entered into was induced by two causes, first the parties were all interested in not having the affairs of the Shoe Company disturbed by any controversy?

A Yes.

Q And, second, was this question raised as to whether or not the gift had been consummated, and a desire of the executors to conservatively protect themselves so that they themselves would not assume the responsibility.

Mr. McKenna. We object.

Q Is it not a fact that those were the two considerations that inspired the making of the agreement known as the indemnity agreement?

The Court. Why, Mr. McKenna, that must be proper cross examination; this is proper cross examination.

A All parties desired to avoid anything that would be detrimental in any way to the Shoe Company; all parties desired to vest the title to this stock in Mrs. Huntington and John J. Merriam and the other donees so far as could probably be done, and the executors were determined to have proper indemnity so far as their conduct was concerned. Those were the motives that inspired that agreement.

Q Those three motives were the motives that inspired the making of the agreement?

A Yes.

Q I will ask you whether anything was said during any of the negotiations that resulted in the agreement, by virtue of which it was understood that any of the legal rights of any of the parties were to be changed or modified as the result of the agreement entered into?

Mr. McKenna. I object to that; that comes back to the question you ruled upon.

Mr Littlefield. I have shown now the three causes which resulted in the indemnity agreement, which evidently must have been the result of the negotiation. The question now is not as to what Judge Swayze's intent was, but whether any of the parties who reached this ultimate conclusion said anything that indicated that they intended to affect the legal rights of any of the parties, simply to preserve the *status quo.*

The Court. This is a question as to negotiations which preceded the execution of the agreement. Are not all those negotiations bound up in the agreement? Why don't the agreement speak for itself as to what was meant and what was done? I do not understand that there is anything in the pleadings which makes it relevant. There is no prayer for reform in the agreement. I do not think the question is admissible.

Examined by Mr. Smith.

Q I forgot to ask Judge Swayze one question on direct examination; I don't ask it for the purpose of getting his opinion to influence the court at all, but I would like to know if he did not form the opinion that this was an invalid gift.

Mr. Hardin. I object.

Mr. Smith. I ask that for the purpose of showing that the executor should have taken this stock into possession, and to justify his taking indemnity in giving it up.

The Court. I think that is the question that I have to answer.

Examined by Mr. McKenna.

Q May I ask you what was the demand made upon the day of the funeral at this meeting at the house when the will was read, what was the form of the demand made of Mrs. Huntington or someone else for the production of the papers?

A I can't remember exactly what was said; it is probable that we asked in the ordinary way for the will; whether we said anything about anything else or not I don't know, probably not because I don't know of anything else, but that is all inference, Mr. McKenna.

Q Did it go to the extent of asking for the testator's tin box or for his papers?

A I should think not, I don't know.

Q You have no recollection upon the form of that request?

A No recollection at all, no.

Q The will and the large envelope were produced at the same time?

A That is my recollection, that they were handed to me together.

Q In the one delivery?

A That is my recollection.

Q (*By Mr. Sheehan.*) Judge, do you remember what became of the large envelope?

A I do not.

Q (*By Mr. Sheehan.*) Whether it remained in the hands of the executors or whether it was delivered over to the—

A I have no recollection at all.

JOSEPH E. WARBASSE, sworn.

Direct examination by Mr. Colie.

Q I show you Exhibit C. 8, and ask you if you signed that as subscribing witness; is that your signature?

A That is my signature, yes.

Q I show you an envelope marked in blue pencil "G." and addressed "Jos. E. Warbasse, Newton"—

Mr. Littlefield. We put in, if your honor please, the envelopes marked A. to G. in blue pencil for identification, we put them in and have them marked as Mrs. Huntington's exhibits, 1 Huntington to Huntington 7.

Q I show you envelope marked exhibit, Huntington 7, addressed "Jos. E. Warbasse, Newton," and ask you when you came into possession in your own hands of that envelope?

A That was handed to me, as I recall, by Judge Swayze at the home of Mr. W. L. Dutcher.

Q Does the fact that you witnessed this agreement, Exhibit C. 8, refresh your memory at all as to when the occasion was at Mr. William L. Dutcher's house that you received that envelope?

A What do you mean, the date?

Q Yes.

A No.

Q Was it at the same time that you witnessed that paper?

A I couldn't say, that is too far back, I couldn't say.

Q Do you recollect being at William L. Dutcher's house on more than one occasion, about the time that you received this envelope?

A Only once that I recall now.

Q Only once?

A Only once.

Q Who do you recall was present at the time that you received this envelope?

A I couldn't say who was present.

Q I don't want you to tell me who all were present, but who do you recollect were present?

A Judge Swayze was present.

Q Yes, who else?

A And I think Mrs. Huntington, now I won't say sure, but I think she was present.

Q What about Mr. Dutcher in his own house?

A I think Mr. Dutcher was present.

Q Do you know who handed you that; you say Judge Swayze handed it to you?

A Judge Swayze, as I remember.

Q At the time he handed it to you was it sealed?

A It was sealed.

Q Did you open it at that time?

A I couldn't say about that.

Q You did open it?

A I did open it, yes.

Q What did you find in it?

A I found in it a certificate of stock of the H. W. Merriam Shoe Company for thirty shares.

Q In whose name?

A My own name.

Mr. McKenna. I object to that; the certificate is in court and has been produced.

Q Was there anything else in this envelope beside the certificate for thirty shares?

A Yes, there was a note.

Q Do you now produce from your possession the certificate that you refer to as being in that envelope?

A Yes, I do.

Mr. Littlefield. How many shares?

Mr. Colie. Certificate No. 32 for 30 shares in the name of Joseph E. Warbasse, dated April 12, 1894. I offer this in evidence.

Marked Exhibit C. 12.

Q Now, in addition to that certificate No. 32, and Exhibit C. 12 you said there was a note?

A Yes.

Q Whose note, made by whom?

A Made by me.

Q Have you that note?

A I have not.

Q What became of it?

A I destroyed it.

Q How soon did you destroy it after it was delivered to you?

A I couldn't say that, I presume right away; I didn't think it was of any account then.

The Court. When the witness says a note does he mean promissory note?

Q Promissory note made by you?

A Yes.

Q To the order of who?

A Order of H. W. Merriam.

Q Will you describe that note, stating as nearly as you recollect its date, the amount of it, terms upon which it was made as to time and interest, and where payable?

A Well, the note was drawn in favor of H. W. Merriam for $3,375, for thirty shares of stock at $112.50 a share.

Q (*By the Court.*) Was that in the note?

A That was in the note—no, that was simply the amount of the note, not in the note, no, sir.

Q State what was in the note?

A What was in the note? All I know, the note was payable to Mr. Merriam, $3,375.

Q Do you know whether it was on demand or time?

A That I couldn't say.

Q Nor where it was payable?

A No, nor where it was payable.

Q Now, that note which you had given to Mr. Merriam, is that right?

A Yes, that is right.

Q If you look at certificate No. 32, Exhibit C. 12, the date of it, does that refresh your memory at all as to the probable date of the note, or the date of the note?

A No, it does not.

Q For what did you give that note to Mr. Merriam?

A For the shares of the H. W. Merriam Shoe Company.

Q Represented by this certificate?

A Represented by that certificate.

Q At a price of $112.50 a share?

A $112.50 a share.

Q At the time that this note and this certificate No. 32 came into your possession as you have described, will you state how much was due upon that note?

A I couldn't say. You mean how much was due on the note when this was handed to me?

Q Yes.

A I don't know.

Q How much was due on the note?

A I haven't figured it up, although I think I have it, I could tell you; Mr. Merriam has that.

Q Where could that fact be ascertained?

A Mr. Merriam, I think, has a paper with the credits.

Q Did it depend upon the books of the H. W. Merriam Shoe Company?

A On the Merriam Shoe Company, yes.

Q Had you made payments on account of the note?

A Made payments on account of the note, endorsed on the note, and Mr. Merriam's account in the Shoe Company's books.

Cross examination by Mr. Smith.

Q You had paid something on account of that note?

A Yes.

Q And you are going to give us the exact amount from the books?

A Well, I guess we have it made up, at least Mr. Merriam has it, which we checked up.

Cross examination by Mr. Littlefield.

Q Was the certificate No. 32 and the note for $3,375 delivered to you in the envelope that was addressed to you?

A Yes.

Q Where was it delivered to you?

A At the home of W. L. Dutcher.

Q Was that at the time of the execution of this agreement?

A I couldn't say about that.

Q Well, was it delivered to you before or after the agreement was executed?

A I couldn't say that.

Q Were the executors there?

A There was two of them, at least, there, I don't know whether John J. Merriam was there.

Q Mr. Dutcher and Judge Swayze?

A Yes.

Q And Mrs. Huntington?

A Mrs. Huntington, I think.

Q You don't remember whether John J. Merriam was there?

A I couldn't say, I don't know.

Q Your attestation as a witness here would indicate that Mr. John J. Merriam, Mrs. Huntington, Mr.

Dutcher and Judge Swayze were at least present; is that in accordance with your recollection?

The Court. Is he the sole witness to the document?

Mr. Littlefield. Yes, he is the sole witness.

Q The fact is that you do appear as a witness there of those signatures?

A Yes.

Q Is it a fact that they all executed this document in your presence, according to your recollection?

A I could not say about that.

Q You have no definite recollection as to whether the envelope which was addressed to you and contained the certificate of stock and your note, was delivered before or after the witnessing of this agreement by you?

A I could not say for sure, I don't recall.

Q Were there other envelopes that were also addressed to various parties, delivered at the same time by the executors to Mrs. Huntington and Mr. Merriam?

A As I recall they were.

Q And were there other parties present who were entitled to the envelopes beside yourself?

A Yes, sir.

Q Who were they, do you remember?

A As I recall, Mrs. Huntington was there, and whether there was any of the others I don't recollect.

Q Miss Nellie Merriam, do you recollect whether she was there or not?

A I don't remember whether she was there or not.

Q What did you do with the envelope that contained the certificate and the stock?

Mr. Colie. He said he destroyed that.

Q No, I don't understand him so; he said he destroyed the note?

A You have it; I had it here.

Q Whose handwriting is that "Joseph E. Warbasse, Newton" in?

A It looks to me like Mr. Merriam's.

Q Which Merriam?

A Mr. Henry W. Merriam.

Q Have you ever paid anything to the executors of the estate on account of the note that was delivered to you at that time?

A No, sir.

Q Did you not receive both the certificate and the note as a gift and without any consideration?

Mr. McKenna. I object to that.

Q Did you ever pay the estate anything on account of the certificate of stock?

A I never did.

Mr. McKenna. Even though he did, it is not binding upon us.

The Court. Let us have the fact; we will find out afterwards who it binds.

Q So that neither for the stock or for the note have you ever rendered to the executors any consideration?

A Never rendered them any.

Q And have the executors ever called on you for any payment on account thereof?

A No, sir.

Q Were you cognizant of the fact at the time this envelope was delivered to you, that the executors had received the written assent of the various parties who were of legal age and qualified to act in connection with the estate?

A I think I had, I think I recall that.

Q Had you ever had any conversation with Mr. H. W. Merriam with reference to the gift of this certificate of stock and this note to you?

The Court. Yes or no.

A No.

Q You never had?

A No.

Q Had you ever had any conversation with Mr. H. W. Merriam with reference to the gift of any of the stock that was included in the nine envelopes which were returned to Mrs. Huntington upon this occasion when you were present, and about which you have testified?

Mr. McKenna. That simply calls for yes or no.

A No.

Q Did you give to the executors, prior to the execution of the agreement of indemnity, as to which you appear as a witness, any information as to the contents of any of these nine envelopes which were delivered by them to Mrs. Huntington sealed?

A I never did.

Q Did you have any knowledge of the contents of any of those nine envelopes prior to the execution of this agreement of indemnity which you appear to have witnessed?

A No, sir.

Q Were you the clerk or bookkeeper of the H. W. Merriam Shoe Company?

A I was.

Q Were you at the time of the execution of this agreement?

A I was.

Q And for how many years had you been?

A I went with the H. W. Merriam Shoe Company on September 12, 1887.

Q And you continued to be its bookkeeper from that time, I don't know, until now?

A I have, part of the time.

Q Up until the time of the execution of this agreement?

A Yes, sir.

Q Do you know of anyone that was in possession of the information showing the contents of these nine

envelopes prior to the execution of this agreement that you witnessed?

A I do not.

Examined by Mr. Smith.

Q Did you have any conversation with Mrs. Huntington prior to Henry W. Merriam's death, with reference to this envelope?

A I never did.

Mr. Colie. The envelope, he means, addressed to Mr. Warbasse.

Q (*By Mr. McKenna.*) Did you have any conversation with Mrs. Huntington with reference to that envelope or any of the nine envelopes, from the date of Mr. Merriam's death down to the date of the execution of the agreement, March 1, 1901?

A I never did.

EDWIN W. MERRIAM, sworn.

Direct examination by Mr. Colie.

Q Are you connected with the H. W. Merriam Shoe Company of Newton?

A Yes.

Q You are now connected with it?

A Yes.

Q Have you the custody here of the books of the company showing any record, which contain any record of the Warbasse note, given by Mr. Warbasse, as he has testified, to Mr. Merriam, in payment for thirty shares of stock of the H. W. Merriam Shoe Company, and the certificate being numbered 32?

A There are records in our company books of payments.

Q Have you the record here?

A Yes.

Q Please get it; have you looked at the record?

A Yes; there is no reference to the number of the certificate; he held but one certificate.

Q Now, how much, according to the books, was due on this note, had Mr. Warbasse paid on account of his note?

A I can only compute that from the entries.

Q Have you computed it from the entries?

A Yes, I have.

Q (*By the Court.*) That statement shows how much was due on the note at what time?

A At the time of my uncle's death.

Q (*By the Court.*) At the time of Mr. Merriam's death?

A Yes, sir.

Q The paper which you hand me shows the statement from the books of the account of Mr. Warbasse as to the purchase of this stock of Mr. H. W. Merriam, is that right?

A As to the purchase.

Q Is a memorandum showing what the books of H. W. Merriam Shoe Company show as to the payment?

A As to the payments, yes.

Q (*By the Court.*) Put it this way: That statement shows the amount due upon the Warbasse note at the time of Mr. Henry W. Merriam's death?

A As compiled from the books of our company.

Q (*By the Court.*) How much was due then?

A $2,011.20.

Q (*By Mr. McKenna.*) Before you pass this paper this paper shows the payments made on account of that note, the amounts and the date correctly, does it not?

A Yes; the dates it doesn't show, the approximate dates only I have taken the date of the dividend; I don't know that the charge to my enclosed account was made on the same date.

Q (*By Mr. McKenna.*) Would you say, approximately, what interval of time you include?

A It might have been a day or two, it might have been a week.

Q (*By Mr. McKenna.*) Within a week?

A Yes.

Q Mr. Merriam, how about the interest on that note, had that been paid? It was paid up to what time at the date of Mr. Merriam's death?

A The books show that the interest was charged at the same time that the payment on the principal was charged to the several accounts and credited to H. W. Merriam's account.

Q And credited to the account at the same time?

A Yes.

The Court. Is all this detail material?

Mr. Colie. I think so, because these notes are items to be charged against the executor; if this is not a good gift they gave up these notes without knowing it; they were in these envelopes.

Mr. Hardin. I doubt that, as a proposition of law.

Q How much interest was due at the date of Mr. Merriam's death, on the Warbasse note?

A I would have to compute that, the interest from the date of the last interest payment; I presume at the date of his death.

Q When was the date of the last interest payment?

A October 27, 1898, was the date of the dividend.

Q (*By Mr. McKenna.*) From that date to the date of Mr. Merriam's death?

A Yes.

Q That interest was paid by crediting the dividend on this stock to Mr. Warbasse, was that the method?

A The dividend was credited direct to Mr. Warbasse's account; the transfer was made from Mr. Warbasse's account to H. W. Merriam's.

Q And the entire dividend was applied first to interest, and then the balance on account of principal?

A That is right.

Q And the interest therefor was paid up to the time of the dividends?

A No, up to the time of October 27, 1898, dividend.

Q Now, I will ask you another question on another matter. Have you got an account likewise with one John Tozer on the books of the H. W. Merriam Shoe Company?

A Yes, sir.

Q Will you tell us whether the books show for what that account—how that account arose, what it was for?

A I don't know that the account was open for the particular purpose of keeping a record of the transactions on account of this note; I think Mr. Tozer's salary was credited to the account, and there may have been other items, I would have to look at the account.

Q At the time of H. W. Merriam's death were there any shares of stock in the H. W. Merriam Company standing in the name of John Tozer?

A Yes.

Q Can you tell the number of the certificate and number of shares?

A Fifty shares, certificate No. 49.

Q I show you certificate No. 49 in the certificate book of the H. W. Merriam Shoe Company; is that the certificate that was outstanding at the date of H. W. Merriam's death?

A That is the certificate.

Q That was outstanding at the date of Henry W. Merriam's death?

A Yes.

Q In whose name does it stand?

A In the name of John Tozer.

Q How many shares?

A Fifty shares.

Q What is the date of it?

A December 5, 1896, issued.

Q Whose assignment is on the back?

The Court. The power to transfer is endorsed on the back and filled up and signed?

A By Mary J. Tozer, sole executrix of John Tozer.

Q What is the date of it?

A July 11, 1911.

Mr. Colie. I offer that certificate in evidence. Marked Exhibit C. 13.

Q Do you know whether Mr. Tozer paid cash for that certificate or gave his note?

A I have heard that he gave his note.

Q Did the account of H. W. Merriam on the books of the H. W. Merriam Shoe Company show that John Tozer owed him any money at the date of Mr. Merriam's death?

A There were charges, there were credits to the account of H. W. Merriam on account of the John Tozer note.

Q Now, according to those credits, and according to that account what was the amount of the Tozer note, and how much was due on it for principal at the date of Henry W. Merriam's death, and to what time was the interest paid to the date of Henry W. Merriam's death?

A I have computed it without verification $1,451.36 had been paid on the note, the amount of which, I suppose, was $5,750, the balance $4,298.54.

Q Principal?

A Yes.

Q Now, that was the date of Henry W. Merriam's death that amount was due, is that right?

A Yes.

Q Now, to what date had the interest been paid at the date of Henry W. Merriam's death?

A To October 27, 1898.

Q At what rate was the interest calculated?

A That is not stated in all cases.

Q I know, but can you tell by the amounts of principal?

A In one or two cases it specifies three per cent.

Q Three?

A Yes, and in other cases I think it is four.

Q By determining the credits of interest, by examining those you can determine at what rate the interest was and calculate it and foot it up, can't you?

A Yes.

Q Did it vary as to the same party?

A Well, as to Mr. Tozer's account, I would have to look at that again; in some of the other accounts I would have to look it up.

Q Will you please look up and see what rate of interest was charged on the Warbasse and on the Tozer. Was there due Mr. Merriam, Henry W. Merriam, at the date of his death, according to the account of H. W. Merriam, kept in the books of the Merriam Shoe Company any sum from Mr. George L. Dutcher?

A The account of what is applied to the J. E. Warbasse account and Tozer account, applies also to the G. L. Dutcher account.

Q What was it?

A The entries are identical with those of J. E. Warbasse.

Q Was there any certificate of stock standing in the name of G. L. Dutcher at the time of Mr. H. W. Merriam's death?

A Yes.

Q According to the account of H. W. Merriam in the books of the H. W. Merriam Shoe Company, how much was due, if anything, from Mr. George L. Dutcher on account of the certificate of stock that you have just referred to?

A The same amount that was due on the J. E. Warbasse note.

Q Was the amount of stock the same?

A Yes.

Q And the payments the same?

A Yes.

Q And the Dutcher account is identical with the Warbasse account?

A Yes.

Q Does this paper which you have used, show the figures that you have testified to in regard to the Warbasse and the Tozer account?

A Yes, unverified, however.

Paper offered in evidence.

Marked Exhibit C. 14.

Cross examination by Mr. McKenna.

Q You tell us that interest was paid by the three parties you have referred to, Mr. Warbasse, Mr. Tozer and Mr. Dutcher, on account of their note to Mr. Merriam during his lifetime; how do you know that to be a fact?

A The interest was charged to the J. E. Warbasse account, for instance, on the books of the company and was credited to the H. W. Merriam account as interest due on note, or principal, payment on account of the principal.

The Court. I understand that this witness's knowledge on the subject is derived entirely from the books.

Q Yes. But of course this note held by Mr. Merriam of Mr. Tozer, we will say, was his personal affair; how does that note transaction come to be in the books of the Shoe Company?

A Well, the present secretary of our company would be able to explain that better than I, probably; those entries were made before I was in the factory; I had no knowledge of it at the time.

Q This was a small corporation?

A Yes.

Q And a close corporation, as it is referred to, and was practically within your knowledge dominated by Mr. H. W. Merriam?

A Yes.

Q And were his personal accounts, to a large extent, in the books of the Shoe Company?

A Yes.

Q And your information as to the payment of interest is from the information you have gathered from those books?

A Entirely.

Q Showing those debits and credits?

A Yes.

Q The books show a distinct entry of the interest paid on account of each of these three notes upon the dates that you have set out upon this paper?

A I have carried out the J. E. Warbasse account only; the G. L. Dutcher account was identical; Mr. Tozer's account was different, because the note was of a later date.

Q Are you an officer of the Shoe Company at the present time?

A Yes.

Q What office do you hold?

A President.

Q And who is the secretary?

A Mr. J. E. Warbasse.

Q Who is the treasurer?

A E. M. Dutcher.

Q You, as president of the company, are familiar with the by-laws of the company?

A Yes, sir.

Q Who is the proper custodian of the stock books?

A Joseph E. Warbasse, secretary.

Q You know of the book, you have personal knowledge of this book?

A Of the stock book?

Q Stock book?

A Yes; that is the certificate book?

Q Yes?

A Yes.

Q And the pasting in on the stubs of the returned certificates?

A Yes.

Q Have you the by-laws of the company?

A Here?

Q Here.

A No, I have not.

Q Who would have those?

A Why, they are up at the office of our company at Newton.

Q Will you bring them tomorrow?

A I will have to send for them; I am not going up. I don't know that I can have them here by to-morrow morning; I will have to rely on the mails.

Q Were there any other assignments or transfers or instrument of assignment and transfer of the certificates of stock which have been returned to the stock book, other than the formal assignment and transfer which is printed upon the back of those certificates?

A In some cases the transfers were noted on the stub of the book, stub of the certificate, original stub.

Q But all the transfers, the documents of transfer are contained in the stock book either by endorsement upon the certificates themselves, or upon the stubs?

A Or upon the special assignments, of which there are a few in the book.

Q Those special assignments are contained in the book?

A Yes.

Q So that the book contains all the information on the subject of transfer and assignment of this stock?

A That is right.

Mr. Hardin. I will interrupt you to say that the minute book is here and in the minute book is the by-laws.

Q I show you book purporting to be minute book of the H. W. Merriam Shoe Company, and ask you what is that book?

A That is minute book of the H. W. Merriam Shoe Company.

Q And does the book that you now identify contain the by-laws of the company?

A The present by-laws?

Q Yes.

A No.

Q The by-laws, then, at the time this happened?

A Yes.

Q Up until Mr. Merriam's death in 1900?

A Yes.

Q Does that book contain those by-laws?

A Yes.

Book marked 1 for identification.

Q What office did you hold in the H. W. Merriam Shoe Company from 1897 until 1901, if any?

A None whatever, no office.

Q Were you connected with the company?

A No.

Q And who was the custodian of the books of account in the company during that period?

The Court He says he was not connected with the company.

Q If you know. I understood him to say he was not an officer?

A The minutes will show that; I am not sure, the old by-laws will show that.

Q (*By the Court.*) Were you employed by the company during that period?

A No, I was not.

Examined by Mr. Littlefield.

Q Where were you in the years 1898, 1899 and 1900?

A I was in Europe.

Q And 1901?

A I was in this country part of the year.

Q Did you have any knowledge of any kind relating to the execution of what is known as the agreement of indemnity?

A None whatever; I was away at that time.

Q And had nothing to do with the affairs of the company prior to that time?

A No.

GEORGE L. DUTCHER, sworn.

Direct examination by Mr. Colie.

Q Mr. Dutcher, do you recall an evening when you were at the house of Mr. William L. Dutcher, and the envelopes, or some of them, marked Exhibits 1 to 7 Huntington were seen by you?

A I do.

Q Among those envelopes that were seen that night was there one addressed to you?

A There was.

Q Have you that envelope now?

A Yes, sir.

Q Have you it with you?

A I have it in my hand.

Q Which one is it?

A This one.

Q Marked Exhibit 6 Huntington?

A Yes, sir.

Q Who were present at that interview or meeting when you received that envelope?

A Those that I recall are Judge Swayze, William L. Dutcher, John Tozer, Joseph E. Warbasse and myself; that is all I recall.

Q Was Mrs. Huntington there?

A I couldn't say.

Q When you received the envelope did you open it at the time you received it?

A My recollection is that I did.

Q What did it contain?

A A certificate of stock of the H. W. Merriam Shoe Company, and a note.

Q Have you the certificate of stock with you?

A I have.

Q (Witness produces certificate No. 33, H. W. Merriam Company, for 30 shares, standing in the name of George L. Dutcher, dated April 12, 1894, with the printed assignment on the back, unfilled out—blank.)

Certificate No. 33 offered in evidence.
Marked Exhibit C. 15.

Q The note, have you the note?

A No, sir.

Q What became of the note?

A I destroyed the note.

Q How long ago?

A The same evening that it came into my possession.

Q Now, having destroyed the note, will you kindly tell us as near as you can the date of the note, the amount of the note and the terms of the note?

A The date of the note was, approximately, the date of this certificate of stock which is April 12, 1894. What was the other question?

Q The amount?

A The amount due at that time?

Q No, the amount of the note?

A Oh, the face of the note was $3,375.

Q That note was given as the purchase price of this stock?

A Yes.

Q At what figure was the stock?

A $112.50 per share.

Q At the date that note was handed to you do you know how much was due on it of principal, and to what date the interest was paid?

A I do not.

Q Do you know the amount that you had prior to Mr. Merriam's death paid on account of the principal of the note?

A I do not.

Q Nor to what date the interest was paid?

A No, sir.

Q On that occasion you spoke of John Tozer being present; did you see any envelope handed to John Tozer?

A Yes.

Q Did you see the contents of the envelope to John Tozer?

A Not to identify it, or examine it particularly.

Q Well, do you know what that envelope contained, I don't mean the details of the contents of the papers that it contained, but do you know what papers it contained, if any?

A Why, the same papers as mine contained, that is the same kind of a transaction; we were all invited there for the same purpose.

Q Did his envelope contain a note and a certificate of stock?

A Yes.

Cross examination by Mr. McKenna.

Q What was the last date that you paid interest to Mr. Merriam upon that note?

A The interest was not paid in cash, you know.

Q In any form?

A I couldn't say that because it was credited by Mr. Merriam himself and the note was not in my possession at any time until the evening referred to.

Q Well, you had some knowledge or recollection of the progress of that note, as to its reduction of principal and interest, did you not?

A Well, in a general way, yes.

Q (*By the Court.*) The dividends on the stock were used to pay on the note?

A Yes.

Q (*By the Court.*) Whenever there was a dividend that was credited somehow or other?

A Yes.

Mr. Colie. First the interest, it was done, he says, like Warbasse, first interest and then the principal.

Q How did you become cognizant of that transaction?

A I haven't said I was cognizant of it, except in a general way.

Q Well, in a general way, what knowledge did you have to form this general way knowledge that you speak of?

A I was informed from time to time that there had been a dividend declared and had been credited to the note and the interest charged against it.

Q Who advised you to that effect?

A By Mr. Merriam, H. W. Merriam.

Cross examination by Mr. Littlefield.

Q As I understand it, the dividends on this stock prior to this delivery to you on this occasion of which you speak, were never paid over to you directly?

A No, sir.

Q The transaction took place upon the books, and the result of the entries upon the books you learned?

A Yes.

Q So that no dividend check ever came to you?

A No, sir.

Q Prior to the delivery at the time that you met the executors?

A No, sir.

Q You are the son of W. L. Dutcher?

A No, sir, nephew.

Q A nephew?

A Yes.

Q And had you, prior to the time of the delivery, or prior to the time of the issue of this certificate of

stock to you, had you been connected with the H. W. Merriam Shoe Company?

A Yes, sir.

Q In what capacity?

A Well, at the time it was issued I was traveling salesman; prior to that I had worked in the shipping rooms, various parts of the factory.

Q Is it or not, the fact that all of the parties who had the control and management of the business of the H. W. Merriam Shoe Company were either members of or connected with the family of H. W. Merriam or your uncle, W. L. Dutcher?

A I think so, yes.

Q All of the people who controlled and managed were related to one of those families?

A With the exception of John Tozer.

Q He was an outsider?

A That was not so in his case.

Q What was Tozer's capacity?

A Superintendent of the factory.

Q Superintendent of the factory?

A Yes.

Q And with that exception, the situation I have described is correct?

A That is the only exception, I think.

Q Did you know what was contained in this envelope prior to the time it was delivered to you on this occasion?

A No, sir; I did not.

Q Then you had received no information from any source as to the contents of either this envelope or any of the other eight envelopes which were delivered to Mrs. Huntington by the executors at this time?

A No, sir.

Q Had you learned from any source what any of those envelopes contained prior to the execution of that agreement?

A No, sir, I had not.

Q Was this agreement which was known as the agreement of indemnity—you are familiar with it, I take it?

A I am not; I was not present, I think, when that was made.

The Court. You have heard of it?

A I heard of it, yes.

Q You knew such an agreement had been given?

A Yes.

Q By Mrs. Huntington and Mr. John J. Merriam?

A Yes, sir.

Q And your uncle, W. L. Dutcher, to the executors?

A Yes, sir.

Q And had that agreement, according to your information, been delivered to the executors prior to the delivery of this envelope to you?

A I think it had, yes, that is what made it possible for these envelopes to be delivered.

Q As you understood the transaction, as I understood, did you know of the fact that there were only nine envelopes all addressed and sealed precisely like the one addressed to you?

A I had no knowledge of that.

Q You had no knowledge of that?

A No, sir.

Q Did you ever pay to the H. W. Merriam Shoe Company, after the delivery of the certificate of stock, and the note contained in the envelope to you, any consideration either for the stock or the note?

A No, sir.

Q So that the delivery of the stock and the note to you was, so far as consideration was concerned on the part of the executors, entirely gratuitous?

Mr. McKenna. I object to that.

Q Entirely without consideration moving from you?

Mr. McKenna. I object to that. Let the facts show for themselves.

The Court. I think that will do it; that calls for a fact.

Q So that the delivery of those envelopes containing this certificate of stock and this note, payable to the order of H. W. Merriam, so far as the executors were concerned, was entirely without any consideration moving from you to them at that time or any other time?

A Yes.

Q Had you learned from any source—this don't ask the information—but had you learned from any source prior to the delivery of this envelope to you, with its contents, the nature of the contents of any of these nine envelopes?

The Court. Yes or no.

A No.

Q Did you at that time know of any person, except possibly Mrs. Huntington, that had any knowledge of the contents of any of these nine envelopes?

A I did not.

It is agreed by counsel on behalf of all the parties appearing and answering in the cause that the envelope delivered to John Tozer contained a certificate for fifty shares of H. W. Merriam Shoe Company's stock, and a note of John Tozer to the order of Henry W. Merriam for the consideration stated in the testimony of Mr. Merriam already sworn, and that the amount due on that note is the amount stated by Mr Merriam in his testimony, and shown upon Exhibit C. 14.

COMPLAINANT RESTS.

HARRIET M. HUNTINGTON, sworn.

Direct examination by Mr. Littlefield.

Q You reside where?

A In Hyde Park, Boston, Massachusetts, now.

Q And was H. W. Merriam, the testator, a brother of yours?

A Yes, sir.

Q Will you be kind enough to state who your father and mother were, and give their children?

A Their names were Elisha J. Merriam and Lucy R. Merriam, and names of the children were Henry W. Merriam, Sarah C. Merriam, Samuel L. Merriam, Edwin E. Merriam and John J. Merriam and myself.

Q Henry W. Merriam was married about when?

A Well, I should say in about 1858.

Q And at that time was living where?

A He was living in New York City.

Mr. Smith. This is taken subject to the objection that was entered at the beginning.

Q What business was he engaged in, was he engaged in the shoe business in New York City?

A Yes, sir.

Q And did he move from New York City afterwards and establish himself at Newton, New Jersey?

A Yes, he did.

Q And was it at Newton, New Jersey, he organized the H. W. Merriam Shoe Company?

A Yes, sir.

Q And was he the principal stockholder of the company?

A He was.

Q Was he the principal stockholder of the H. W. Merriam Shoe Company?

A For a few years it was a private company, that is he owned the whole, and made it a corporation in a few years.

Q Who were the gentlemen who were principally interested with him in carrying on the business of the

H. W. Merriam Shoe Company at Newton, New Jersey?

A In the early years I think it was a Mr. Palmer and Mr. Dutcher.

Q Mr. W. L. Dutcher?

A Yes, sir.

Q And later did Mr. John J. Merriam, his brother, take a part in it?

A No, sir, he had another profession; he was an artist, he was not in that business.

Q Will you state, in a general way, whether or not the business of the H. W. Merriam Shoe Company from, I will say, 1895 on, was relatively profitable?

A I think it was.

Q Did you go to live at one time in the family of Henry W. Merriam?

A Yes.

Q And when was that?

A I was there a good deal after 1895, when my mother died, or 1894, but I made it my home all the time during the last two years and a half, I scarcely left the town.

Q You say during the last two years and a half, do you mean by that during the last two years and a half prior to your brother's death?

A Yes, prior to 1900.

Q When did your brother's wife die, Henry W. Merriam's wife?

A In December, 1897.

Q Were you at that time living with your brother at Newton, New Jersey?

A Yes, sir.

Q In his house?

A Yes, sir.

Q Did your brother leave at his decease any children, your brother, Henry W. Merriam?

A No, sir, he had no children.

Q You have referred to Sarah C. Merriam; did she marry a Mr. William Wheeler?

A Yes, sir.

Q And the husband died before she died, did he not?

A I think he did.

Q And she died something like fifty-eight years ago, leaving no children?

A Well, infant children who soon died.

Q So that there are no survivors of that branch of the family?

A No.

Q Samuel L. Merriam married sometime in 1863?

A Well, a few years before that.

Q He died in 1863?

A Yes, sir.

Q And he left Olin L. Merriam, Maybelle Buffington, Maybelle Merriam, who afterwards married Mr. Buffington?

A Yes.

Q And Nellie J. Merriam?

A Yes, sir.

Q And Maybelle Buffington has since died, leaving children, Frances Buffington, age 18, probably 20 now, and Ralph Buffington, age about 18?

A Yes, sir.

Q Those are all the children left of Samuel L. Merriam?

A Yes, sir.

Q Ralph H. Buffington has, since the death of Maybelle Buffington, been appointed as administrator?

A Yes, sir.

Q Edward Merriam, who was the fourth child, died in 1865 a single man?

A Yes, sir.

Q Mr. John J. Merriam, another brother, died leaving Helen D. Merriam, now Mrs. LaCoste, Mr. Edwin W. Merriam and Mr. Henry F. Merriam?

A Yes, sir.

Q That is a correct statement of the family?

A Yes, sir.

Q The Edwin W. is the gentleman who testified as a witness here this morning, the son of John J., that is right, is it not?

A Yes.

Q When you went to Mr. Henry W. Merriam's house to live, sometime in the early part of 1897, you may state what you did in connection with his and your personal affairs, what duties you discharged, if any?

Mr. Smith. This is subject to the objection, or do you want us to make it again now?

The Court. Now, you object to that, Mr. Smith, upon the ground that it is not permissible under the statute of 1900.

Mr. Smith. As a transaction or conversation with the deceased.

RECESS.

Q (Question read.)

The Court. I suppose that what then happened is not very material to the main issue in the cause, that is a side light thrown on the situation, but perhaps the rule of evidence that you want to talk about applies to that, as much as it does to any other portion of the case, although we shall meet the question in a more acute form later on.

Mr. Littlefield. This will be followed by testimony relating to transactions relating to the gift.

The Court. You might as well fight it out now on this preliminary question.

Mr. Littlefield. I think, perhaps, in order that the record may adequately present the legal status the record should show that in conducting this branch of the examination of Mrs. Hunting-

ton that in the first place I represent Olin L. Merriam, Nellie Merriam and Mr. Buffington, the administrator of Maybelle Buffington; I also represent Mrs. Huntington herself. In addition to that, in this branch of the examination I represent my brother, Hardin, who is here, as the representative of Mr. John J. Merriam; of course he won't travel over the same ground that I am traveling over, and in the direct examination I am now pursuing, I am acting both for him and for myself as counsel for my clients, so that the record will show that the testimony is offered in behalf of his clients, and also in behalf of the Merriam children, and later what the effect may be, so far as Mrs. Huntington is concerned, in my judgment is a subsequent and perhaps an ulterior consideration; so I think the record now discloses exactly the legal attitude.

The Court. That is objected to, and Mr. Smith may state the ground of his objection.

Mr. Smith. I object to it, your honor, on the ground that the executor of Henry W. Merriam, who is a party to this suit, and who appears in a representative capacity, has not taken the stand in his own behalf and testified to a conversation with or transaction with the deceased. Now, the statute, section 4 of the Evidence Act, which is perfectly familiar to your honor—

The Court. I have it before me.

Mr. Smith. The purpose of that statute is also well known to your honor, and is the last of the disabilities, practically the last of the disabilities which are removed of the parties testifying, and there is every reason, I think, for the practical working of that statute in this and every other case where the executor does not see fit to take the stand. I had not in preparation of this case expected that this was going to be the important question in the case, because of the fact that I

thought that the complainant was going to testify to transactions with the deceased; but I can refer your honor to Mathews *vs.* Hoagland which I suppose you have examined in this connection.

The Court. I have not examined it recently. That was under the act of 1880?

Mr. Hardin. Yes, sir.

The Court. I am constrained, gentlemen, to the conclusion that this testimony ought to be admitted in this cause, and I base my judgment upon the opinion of Vice-Chancellor Emery in McKinley *vs.* Coe which I think covers this case completely and entirely, and upon the case of Smith *vs.* Smith in the Court of Appeals, which sheds great light on the view which the Court of Appeals has taken of this statute. I discovered the point of this case very early in its history, and I examined the case of McKinley *vs.* Coe with some care, with the idea that it might apply, and I have come to the conclusion that it does. Vice-Chancellor Emery there held that although a person was a party to a suit, and a party to a suit, nominally in a representative capacity, still, inasmuch as he was not interested in his representative character in the controversy, the other party might testify to conversations by and transactions with the deceased. It was wholly put upon the theory that each real litigant in the cause was standing on his own ground and making his own fight for himself, and that the representative, the person who was in the suit as a representative, had no real interest personally, or in his representative character to defend; he was in the position of a mere stake holder. Then there is the position that was advanced by Mr. Hardin; perhaps it might be useful to refer to that also. If the controversy is as Mr. Hardin suggests, a controversy between the complainant

and Mr. Smith's client wholly, then it would seem to me to be wholly without the statute. I have not studied that proposition very carefully; in fact it just came out this afternoon, but it seemed to me to be useful to refer to it. Then again I think the evidence ought to be put into the cause, whether I think it is admissible or not, considering the fact that it is strenuously insisted upon as proper evidence on one side, and as strenuously objected to on the other, and in view of the uncertainty of the statute, so that when the case gets in the Court of Appeals that court will have the whole situation before it, so that it can be disposed of in one appeal, and may never come back to the Court of Chancery again for any rehearing or the taking of any further testimony. I will admit this testimony. Of course the objections appear on the record, and it would not be necessary for you to take any exceptions.

Mr. Smith. What I want to put on the record is the objections in the order as I take them. First is the general objection of the general case we have been discussing, and which I stated at the beginning. Second, if the court is going to admit the testimony the court ought to sever the issues as between John J. Merriam's estate and this question between Mrs. Huntington and this question, and between the other alleged donees, and this question.

The Court. Isn't that a matter to be discussed after the case is all in?

Mr. Smith. I want to make my objection now so that there will be no question about it, because it seems to me we ought to have the objection now, especially in view of the Supreme Court case, which Mr. Hardin has cited. It will be on the record now what position we took, and I

would also like to ask the court when it comes to apply this testimony to apply it against Mrs. Huntington, that is, to exclude it against Mrs. Huntington's case.

The Court. That is a matter of argument, when the testimony is in, first, whether it binds anybody, and second, whether it can by any possibility favor Mrs. Huntington's claim, whether in case the testimony is admitted and is admissible it is in the case for every purpose whatever. I can see that there is a chance for quite an argument on that point.

Mr. McKenna. Note our objection.

(Witness temporarily withdrawn.)

JOSEPH E. WARBASSE, recalled for

Further cross examination by Mr. McKenna.

Q I understand you are the bookkeeper of the H. W. Merriam Shoe Company?

A Yes, sir.

Q How long have you occupied that position?

A I occupied that position for a little more than twenty-five years.

Q Continuously?

A Yes, sir.

Q Do you occupy any office in the corporation of H. W. Merriam Company?

A I am secretary of the organization, have been since 1901.

Q You have the stock book of the company here, have you not?

A Yes, it is here.

Q And in this stock book are pasted the certificates of the stock which were removed from the nine envelopes in question in this case, as far as those certificates have been returned to the company for the purpose of cancellation and issue of new certificates thereon?

A I believe they are there.

Mr. McKenna. I can shorten this by offering in evidence together all the stock certificates which were included in those envelopes, as far as they are in there; we have examined carefully the cross-bill filed by Mr. Hardin in this case, and the numbers are correctly stated there so that they can be copied into the record from his cross-bill.

Q Has certificate No. 41 been returned to the company?

A Well, I don't know, I will have to see what it says here.

Q (*By Mr. Hardin.*) It is in the envelope?

A Yes.

Q (*By Mr. Hardin.*) It has been returned?

A We left those in the original envelopes, I guess.

Mr. Hardin. There it is.

Q I show witness certificate No. 41, which is the certificate taken from the envelope marked Exhibit Huntington 1, and ask you if that is the certificate taken from that envelope?

A I believe it is, it corresponds with this.

Mr. McKenna. I offer that certificate in evidence.

Q Was this certificate returned to the company for the purpose of cancellation and a new certificate issued therefor?

A It was.

Q And what was the number of the new certificate issued for it?

A The new certificate issued for it was numbered 57 and 58.

Certificate marked Exhibit Lane 1.

A 57, covering 151 shares, and 58 covering 417 shares.

Examination by Mr. Hardin.

Q Can you tell from the stub the date of the new certificates?

A Can I tell from the stub the date of the new certificate? May 6, 1901, 58 and 57; they are issued to Mrs. H. M. Huntington.

Q And does the stock book show her receipt for them? Does the book show her receipt for those certificates?

A For the certificate it does.

Q What date?

A May 10, 1901.

Q And they are still outstanding?

A They are still outstanding.

Further cross examination by Mr. McKenna.

Q I call your attention to certificate No. 36, and ask you whether that certificate has been returned to the company for the purpose of cancellation and new certificate issued therefor?

A That is in the envelopes, I guess.

Mr. Littlefield. How many shares?

Mr. McKenna. 455.

A No. 36 has been returned for cancellation.

Q What was the number of the certificate or certificates issued in place of it?

A 59 was issued in lieu of that certificate.

Q And what was the date of the new certificate?

A May 6, 1901.

Q (*By Mr. Littlefield.*) No. 59, how many shares?

A That was divided up, the new certificates in three different names, the sons of John J. Merriam.

Q There were three different certificates issued, weren't there?

A Yes, sir.

Q (*By Mr. Littlefield.*) No. 36, 455 shares were returned?

A Yes.

Q (*By Mr. Littlefield.*) Does your stock book show you new certificate No. 59 was issued to somebody?

A Yes.

Q (*By Mr. Littlefield.*) Now, for whom and for how much?

A That was issued to John J. Merriam, 122 shares.

Q (*By Mr. Hardin.*) When?

A May 6, 1901.

Q To whom was the balance of certificate No. 36 for 455 shares issued?

A That was No. 60, issued to John J. Merriam for 353 shares.

Q (*By Mr. Littlefield.*) That is twenty shares more than No. 36?

A There was another turned in at the same time in lieu of twenty shares more.

Q Just refer to that in your testimony. I notice that the total for certificates Nos. 59 and 60, exceed 455 shares by twenty shares; where did the difference come from?

A Why, the return of certificate No. 45 for twenty shares.

Q Held by?

A Held by Mr. John J. Merriam; that makes the difference.

Mr. McKenna. I offer in evidence certificate No. 36 and certificates Nos. 57, 58, 59 and 60.

Certificate No. 36, marked Exhibit Lane 2.

Certificate No. 59, marked Exhibit Lane 3.

Certificate No. 60, marked Exhibit Lane 4.

(Certificates 57 and 58 are not in court.)

Q Do you find in the envelope marked Exhibit 2 Huntington, as containing other certificates than certificates No. 45 and 36?

A I find two others, namely, certificate No. 36 and 29, five shares each.

Q Now, were these two certificates Nos. 6 and 29 returned to the company for the purpose of cancellation, and a new certificate issued therefor?

A They were.

Mr. Littlefield. How many shares of stock do they represent?

Mr. Hardin. Five each.

A 51, issued in lieu of 6 and 29.

Q (*By Mr. Hardin.*) To whom?

A John J. Merriam. New certificate No. 51 issued in lieu of certificate No. 6 and 29 for ten shares to John J. Merriam, May 6, 1901.

Q Has this new certificate, No. 51, been returned to the company for the purposes of cancellation and a new certificate issued therefor?

A It has, and 65 was issued in lieu of the same on August 6, 1901, to Helen D. Merriam for ten shares.

Mr. McKenna. Now, I offer in evidence certificates Nos. 6, 29, 45 and 51.

Certificate No. 6 marked Exhibit Lane 5.
Certificate No. 29 marked Exhibit Lane 6.
Certificate No. 45 marked Exhibit Lane 7.
Certificate No. 51, marked Exhibit Lane 8.

Q I now call your attention to certificate No. 38 for ten shares, issued to Henry W. Merriam, and ask you if that certificate has been returned for the purposes of cancellation, and new certificate issued therefor?

A It has been returned for cancellation, and certificate No. 54 issued in lieu of same.

Q (*By Mr. Littlefield.*) Issued to whom?

A Issued to Olin L. Merriam on May 6, 1901, and that was returned.

Q And has that certificate No. 54 been returned to the company for cancellation and new certificate issued therefor?

A No. 54 has been returned, and certificate No. 66 issued in lieu of same to J. E. Warbasse on August 6, 1901.

Q And has certificate No. 66 been returned to the company for the purposes of cancellation, and new certificate issued therefor?

A 66 has been returned and 74 and 75 issued in lieu of same; 74 for five shares on May 27, 1903, to Henry F. Merriam, and 75, five shares, May 27, 1903, to Helen D. Merriam.

Q The last two are outstanding?

A The last two are outstanding.

Q I show you exhibit Huntington No. 3, and ask you what you found contained in that envelope?

A No. 3, certificate No. 38 for ten shares made out to H. W. Merriam.

Mr. McKenna. Now I offer in evidence certificate No. 38.

A 38 returned for cancellation and certificate No. 54 issued in place to Olin L. Merriam on May 6, 1901, for ten shares, and 54 was returned.

Mr. McKenna. I offer 66.

A And 66 was issued on August 6, 1901, to J. E. Warbasse for ten shares.

Certificate No. 38 marked Exhibit Lane 9.
Certificate 54 marked Exhibit Lane 10.
Certificate 66 marked Exhibit Lane 11.

Q Now, you have in your hands envelope marked Huntington 4; what does that envelope contain?

A That contains certificate No. 39 made out to Henry W. Merriam for ten shares.

Q Was that certificate No. 39 returned to the company for the purpose of cancellation and new certificate issued therefor?

A That was returned for cancellation, and certificate No. 55 issued in lieu of the same to Nellie J. Merriam on May 6, 1901, ten shares.

Q And was 55 returned?

A 55 was returned, and certificate No. 67 issued in place thereof.

Q To whom?

A To Edward Merriam Dutcher on January 14, 1902, fifteen shares; that is still outstanding.

Mr. McKenna. I offer in evidence certificate No. 39.

Certificate No. 39 marked Exhibit Lane 12.

Certificate No. 55 marked Exhibit Lane 13.

Q Now you have in your possession Exhibit Huntington 5; what does that envelope contain?

A That contains certificate No. 48 for seven shares made to Henry W. Merriam.

Q Was that certificate No. 48 returned to the company for the purpose of cancellation and new certificate issued therefor?

A That was returned to the company, and certificate No. 56 was issued in lieu of same to Mrs. Maybelle F. Buffington on May 6, 1901.

Q And has certificate No. 56 been returned to the company for the purpose of cancellation?

A 56 has been returned for cancellation, and certificate—it is not on here—issued.

Q Well, another certificate was issued in place of it?

A Another certificate was issued in place of it, yes.

Q Will you supply the stenographer with the number of that certificate?

A I will supply it, yes.

Mr. McKenna. I offer in evidence certificate No. 48 and certificate No. 56.

Certificate No. 48 marked Exhibit Lane 15.

A No. 48 returned for cancellation and 56 issued in lieu of same to Mrs. Maybelle F. Buffington on May 6, 1901, and 56 has been returned. 56 is the one we could not find the certificate.

Certificate 56 marked Exhibit Lane 16.

Q I call your attention to certificate No. 40 for ten shares?

A No. 40, ten shares, has been returned.

Q I ask you if that certificate has been returned to the company for the purpose of cancellation, and new certificate issued therefor?

A It has been returned for cancellation, and certificate 61 issued in lieu of same.

Q Who was certificate 62 issued to?

A Issued to Maybelle F. Buffington, guardian for Francis F. and Ralph Buffington, in lieu of No. 40.

Q On what date?

A On June 24, 1901.

Q Has certificate No. 62 been returned to the company for the purpose of cancellation, and a new certificate issued therefor?

A 62 has been returned for cancellation.

Q And what certificate was issued in place of it?

A I find there was a new certificate issued in place of it, and I will supply the number later.

Certificate No. 40 offered in evidence and marked Exhibit Lane 17.

Certificate No. 62 offered in evidence and marked Exhibit Lane 18.

Q What certificate was contained in the envelope which bore your name on it?

A Certificate 32 for thirty shares, made out to Joseph E. Warbasse.

Q And is that certificate still outstanding?

A Still outstanding, in my possession.

Mr. McKenna. I offer that in evidence; it has already been marked C. 12.

Q Now the certificate contained in the envelope of Mr. Dutcher?

A Mr. G. L. Dutcher.

Q Is still outstanding?

A That is still outstanding.

Q And that is No. 33?

A That is for thirty shares.

Q That has already been offered in evidence and marked Exhibit C. 15?

A Yes, sir.

Q And certificate contained in the envelope to J. Tozer, fifty shares?

A That was returned for cancellation, that is certificate No. 49.

Q Has certificate 49 been returned to the company for the purpose of cancellation and new certificate issued therefor?

A That was returned to the company for cancellation, and certificate No. 88 issued in place of it on July 12, 1911, to Mary J. Tozer, still outstanding.

Mr. McKenna. I offer in evidence certificate No 49. This certificate 49 is already in evidence and marked Exhibit C. 13. Now I offer in evidence the stock book itself.

Stock book marked Exhibit Lane 19.

Q Who had charge of the books of account of this company?

A What do you mean by books of account?

Q Ledger, etc.?

A I had charge of them.

Q Upon those books is there a record of the payment of dividends upon the stock?

A Yes, sir.

Q And in those books is there a private account of H. W. Merriam?

A Yes, sir.

Q And in that account is a credit placed from time to time for the accruing dividends upon the stock which were held by him?

A Yes, sir.

Q And does this refer to the 1090 shares in controversy in this case?

A Does that refer to dividends to his credit?

Q Yes. Accruing upon those shares of stock?

A The last dividend was paid to him, the dividend before his death.

Q But previous to the last dividend does not the account show the application of the previous dividend upon that stock?

A It shows all the dividends that were paid.

Q On that stock?

A Well, on whatever it was, whatever he held at that time.

Q That account will show what dividends were credited upon the stock contained in these envelopes about which you have now testified?

A He held those envelopes.

Mr. Littlefield. I think I will have to enter an objection there; if the books are material we shall have to insist upon the books being used; I cannot quite agree to the contents going in with the conclusion of the witness.

The Court. I think that is admissible; it is merely preliminary to the introduction of the books I fancy.

Mr. McKenna. That is all.

Q You have the books in court, have you not?

A Yes, sir.

Mr. McKenna. Now I offer in evidence those books as far as bearing upon the controversy here.

The Court. You better produce them and cite book and page.

Mr. Littlefield. And entries; I think we better have book, page and entries, and then we will know just exactly what we are directing our attention to.

A We haven't all the books of the company here.

The Court. Whose account do you want?

Mr. McKenna. H. W. Merriam's.

The Court. What book do you refer to, and what page is your attention directed to?

A This ledger is not marked.

Q (*By the Court.*) Well, what is the book?
A It is a ledger.

Mr. McKenna. I now produce ledger marked H. W. M. S. Co., containing an account of H. W. Merriam and commencing on July 19, 1891, and continuing to October 1, 1894.

Marked Exhibit Lane 20.

(Marked on page 304.)

Mr. McKenna. Also ledger A showing the account of H. W. Merriam, beginning October 19, 1894, at page 204 and 205, and continuing on page 214 and 215 and on page 406, 407 and 408 up to the date of June 7, 1899.

Marked Exhibit Lane 21.

Also ledger B showing account of H. W. Merriam at page 102, beginning January 3, 1900, and ending October 22, 1901, offered in evidence and marked Exhibit Lane 22.

Adjourned until to-morrow.

December 12, 1912.

IN CHANCERY OF NEW JERSEY.

Between
FRANCIS J. SWAYZE, as executor and trustee, etc.,
Complainant,
and
HARRIET M. HUNTINGTON and others,
Defendants

Continuation of examination, pursuant to adjournment, at the place and in the presence of the parties as before, on December 12, 1912.

JOSEPH E. WARBASSE, re-called for

Further cross examination by Mr. McKenna.

Mr. McKenna. I would like to add to the offer of the stock book, the assignments of the stock which are attached to the stubs in the stock book.

Q Do the accounts of Henry W. Merriam in these ledgers, from the inception of the books until the time of his death show the crediting of dividends on the stock of the H. W. Merriam Shoe Company to those accounts?

A Yes, it does, all through his own account, Mr. Merriam's account.

Q Held by Mr. Merriam?

A Yes, credited to his account on the books of the company.

Q In 1896 how much stock did Mr. Merriam hold in the H. W. Merriam Shoe Company?

A In 1896 he held eleven hundred and ninety shares.

Mr. Littlefield. I presume this is intended how much did he hold as shown by the stock book, because that is as far as the witness can, of course, go; that is what you mean?

Mr. McKenna. Yes.

A Different items of the memorandum here, 1,190 shares in his own name.

Q Now, during the year 1896 was there a dividend declared on the stock of the Shoe Company?

A There was.

Q And was dividend applied upon the 1,190 shares standing in the name of Mr. H. W. Merriam?

A It was.

Q (*By the Court.*) Applied how?

A And with other shares also.

The Court. Do not all the entries in relation to that matter appear in the ledgers?

Mr. McKenna. It does not appear as to what particular stock the dividends have been applied for; it simply says dividends so much money.

The Court. I understand the object of this line of interrogation is to show how much was due upon the promissory notes that were placed in the envelope. Now is there any other purpose than that?

Mr. McKenna. Yes, there is a further purpose than that, to show that dividends upon the 1,090 shares, 1,090 shares is part of the 1,190 shares he is now testifying to, and the dividend upon the 1,090 shares which would be included in the 1,190 shares was credited to his account in the books of the company.

The Court. Do not the books show that?

Mr. McKenna. No, it does not.

Mr. Littlefield. If they do not show it Mr. Warbasse cannot testify to it.

Mr. McKenna. It is ambiguous in the books; the book says dividend $12,000; nobody knows unless we get an objection on the record.

The Court. What is the object of it all? Isn't the object and purpose of it to eventually ascertain how much was due upon these promissory notes that were placed in the envelopes.

Mr. McKenna. No, it was further than that; the purpose of it is further than that, is that Mr. Merriam exercised a control over this entire stock.

The Court. Notwithstanding the fact that it had been placed in envelope?

Mr. McKenna. Notwithstanding the fact that it had been placed in envelope.

Mr. Littlefield. The only thing that can be proved by the witness, of course, are facts that are within his personal knowledge, and the books that were written up by him. Now with the intimate familiarity that Mr. Warbasse has with the situation, unless the entries are produced, and then he states whatever knowledge he may have independent of the entries, we are quite likely to get in testimony the result of inference and reason rather than knowledge.

The Court. My remarks did not go to that extent. Of course Mr. Warbasse can only testify to things that are within his own knowledge, and he can explain things that are on the books.

Q Now, will you turn in the ledger to the credit for the dividends for the year 1896?

The Court. Have you found the place?

A Yes, sir.

Q (*By the Court.*) Which book is it in and on what page?

Q Now, I specially refer you to page 214, of Exhibit Lane 21, and ask you if that page shows the crediting of dividend for the year 1896?

A It does, yes.

Q At how much?

A Ten per cent. dividend.

Q At the rate of ten per cent.?

A Ten per cent.

Q And what is the total amount of the dividend credit?

A $12,100.

Q Upon how many shares was that the dividend for that year?

A Dividend on 1,210 shares of stock.

Q Now you have examined the stock which was enclosed in the envelopes Exhibit Huntington 1 to 7, and the stock which was in the envelope, together to yourself, Mr. Dutcher and Mr. Tozer. Was the stock enclosed in those envelopes included within the 1,210 shares upon which this dividend for $12,100 was credited?

A They were not.

Q Upon what shares, upon what other shares—

Mr. Littlefield. I wish to call the attention of the witness to this fact; here are the books; I object to the witness stating anything that is the result of his reasoning or inference. Of course he has great familiarity with all these details. If the witness has any personal knowledge as to the basis of any of these entries that goes beyond the entry in the book that of course I have no objection to, but an inference or method of reasoning or construction which he may make by reason of his intimate knowledge of the affairs of the corporation would not be testimony.

The Court. No.

Mr. Littlefield. Mr. Warbasse, of course, is an intelligent witness, but he is so closely connected

with the whole matter I think it is proper to make this objection.

Mr. Sheehan. I suppose Mr. Warbasse is competent to testify without a suggestion also.

Q (*By the Court.*) Did you make those entries?

A I made those entries, yes, sir.

Q Upon what stock was the dividend of $12,100 declared?

Mr. Hardin. I object to that. It appears by the testimony that the witness has already given that a certain number of shares were owned by Mr. Merriam, a less number than 1,210, and unless the witness is able to specify or identify shares he cannot answer that question, and the information has not yet been developed.

The Court. Let us see if you can answer it. Do you know?

A I have a memorandum here of all the shares that the dividends were paid on at that time, 1,210 shares.

Q (*By the Court.*) Memorandum taken from the books?

A Taken right from the books, yes, sir.

Q (*By the Court.*) Memorandum made by yourself?

A Well, myself and Mr. Merriam.

Q (*By the Court.*) You know it is correct?

A I believe it to be correct.

Examined by Mr. Littlefield.

Q Have you the original dividend sheet?

A No, sir.

Q Have you seen it since you have examined these books?

A I have not.

Q And isn't the information that you were now just asked to give, the result of your conclusions from the stock books and the stock certificates, in the ab-

sence of knowing the actual dividend declared, that is true, isn't it?

A That is true, yes.

Mr. Littlefield. I object to the witness, under the circumstances, testifying as to the particular shares, upon which $12,100 dividend was declared.

Mr. Sheehan. This appears to be very irregular, to have Mr. Littlefield stand up there and dictate what the witness shall answer and shall not.

The Court. That is proper practice and the question has been put and answered.

Mr. McKenna. I think you will have to lay a foundation for that question.

Examined by Mr. McKenna.

Q In the year 1896, what was the amount, if you know, of the capital stock of the H. W. Merriam Shoe Company outstanding?

A In 1896?

Q Yes.

A I can't say for sure whether it was 1,800 shares or 2,000 shares.

Q Either one or the other?

A Yes, because there were 200 shares thrown back in the treasury by Mr. Merriam, I don't know whether it was before that date or after.

Q To what record can you refer for that information?

A I could refer to the shares of the stock which we have, or I guess from the minute book.

Q If it is eighteen hundred shares, two hundred shares have been returned by Mr. Merriam to the treasury of the company?

A Yes, sir.

The Court. You mean 200 out of the 1,800?

Q Out of the two thousand?

A Out of the two thousand.

Mr. Hardin. They are talking about dividend in 1896. Isn't it proper that they should fix that?

The Court. He is approaching it.

Q Who were the other stockholders in the H. W. Merriam Shoe Company in the year 1896, besides Mr. H. W. Merriam?

A I couldn't give that from memory at all.

Q Have you the stock book here?

A We didn't keep a stock book at that time.

Q You kept some record from which that could be determined, did you not?

A At that time?

Q Yes.

A No, I wasn't to keep that, I wasn't secretary of the company at that time.

Q But by reference to the stock book yourself you can tell us who are the stockholders in this company, beside Mr. Merriam, can you not, at that time?

A I couldn't do it right away; it would take a long time to work it out.

The Court. We don't work it out.

Mr. Littlefield. I desire to submit an objection.

The Court. There is no question pending.

Mr. Littlefield. I thought there was a question unanswered.

Q How many shares of stock did Mr. H. W. Merriam own in the year 1896?

A I can't tell you.

Mr. Littlefield. That I object to because the books show a dividend declared on October 21, 1896, and if this testimony is entitled to any consideration my proposition is it has to be directed to that date; quite immaterial how many he did or did not hold before that or after that.

The Court. I think that is proper criticism.

Q How many shares of stock did Mr. Merriam own on the 21st day of October, 1896?

A According to the statement made out here he held 1,190 shares.

Q I show you Exhibit Lane No. 1, purporting to be certificate No. 41, for 568 shares, certifying that H. W. Merriam is the owner of that stock, and ask you whether those 568 shares are included in the number of shares which you have testified to that Mr. Merriam was the owner of on October 21, 1896?

A I couldn't tell that from memory.

Q (*By the Court.*) Can you find out readily?

A Well, I don't know where we would find that out to answer it in that way.

Q How long would it take you to find that out?

A Well, I don't know; it would take some time to go over and find out each one of these. Mr. Merriam has a list.

Q You have prepared a dividend statement, have you not, the application of these dividends?

A I have, together with Mr. Merriam.

Q Together with Mr. Merriam?

A Yes, sir.

Q And Mr. Merriam has prepared, to your knowledge, a statement of the application of the dividends upon each of these certificates?

A All I know he has prepared is this; I don't know anything, what he has prepared.

Q He has prepared a statement showing what stock is included in this?

The Court. Now, Mr. McKenna, it don't make any difference what Mr. Merriam has prepared. He can answer it himself; find out what this witness knows.

Q Was this stock, shown by certificate Exhibit Lane No. 1, stock which stood upon the books of the Merriam Shoe Company in the name of H. W. Merriam on October 21, 1896?

A I presume it was.

Q Well, don't you know?

A Why, yes, I can almost say it was.

Q Weren't you the custodian of these books at that time?

A Yes, but I had nothing to do with the number of shares handed to me for credit on this book.

Q But the stock book is here in court and we wish you to tell us whether that stock as shown by Exhibit Lane 1, is that in the name of H. W. Merriam upon that date?

Mr. Littlefield. Just a moment. The book shows for itself, as far as that is concerned, legally speaking the witness cannot testify to that; the book is here; that is the evidence.

The Court. I will overrule the objection and take the answer.

A I believe it was.

Mr. Sheehan. Why don't you look at the books and find out?

Mr. Littlefield. You haven't asked him to do that yet.

Q I have asked him in my previous question.

The Court. He says he couldn't do it now.

Q I call your attention to the stub of certificate 41, being Lane Exhibit No. 1, and ask you if that stock did not stand in the name of H. W. Merriam, October 21, 1896, according to the books in your own possession?

A These books were not in my possession at that time.

Q (*By the Court.*) They are now?

A They are now.

Q You are the proper officer of the company today to have them?

A At what date?

Q October 21, 1896.

A Well, now, I don't see how I can answer that; I think it was.

Q Can you tell us what stock stood in the name of H. W. Merriam on October 21, 1896?

A I cannot now, no; I haven't a record of it here.

Q Where is that record?

A I think Mr. Merriam has it.

Q The stub of certificate No. 41 reads: "568 shares, date November 20, 1894, issued to H. W. Merriam."

The Court. Is that a statement or a question?

Q That is a statement. "And received certificate as above described, H. W. Merriam, November 20, 1894," does it not?

A It does.

Q In whose hand writing is the words under "Received certificate as above described H. W. Merriman?"

A That is Mr. Merriman's own hand writing.

Q Now, does that stub show any change of ownership of that certificate 41?

The Court. Oh, no, how can the stub show it?

Mr. Hardin. We have here a paper which is headed "Stock account, H. W. Merriam, from December 3, 1889"; it has been prepared by E. W. Merriam, the present president of the company, from the stock books, and purports to show the stock holdings of Henry W. Merriam from 1889 down to the date of his death at various dates named on the margin as per the stock book. From this memorandum we believe that the number of shares of stock standing in the name, on the books of the company—standing in the name of Mr. Merriam on the books of the company at each dividend date can be ascertained; I think it is carried out on the margin; and also showing at the same times that these dividends were declared that there were stock certificates standing on the books in the name of Mr. Merriam, but at which time were actually owned by other people, with the stock certificates in the possession of

other people. We are willing, so far as Mr. Littlefield and I are concerned, to let this go in as though Mr. Merriam had made the analysis that it represents in the presence of the court from the books.

The Court. Is that satisfactory?

Mr. Smith. Not to me. I think Mr. Merriam ought to swear that he made this analysis and that is the result of it.

Mr. Sheehan. And also we should have the right of making corrections.

The Court. Certainly.

Mr. Littlefield. We have no objection to that.

EDWIN W. MERRIAM recalled.

Direct examination by Mr. Hardin.

Q Mr. Merriam, you have made a tabulation of the stock holdings of Mr. Henry W. Merriam in the Merriam Shoe Company, from December 3, 1889, to date, from the stock certificate book of the corporation, lately, have you not?

A I have, that is, from this book.

Mr. Hardin. Exhibit Lane 19.

Q (*By the Court.*) What books are there which show the holdings of the stock, beside the stock certificate book which now lies before you?

A None whatever.

Q This statement starts with "Stock holdings prior to the 1889 issue, 545, what does that indicate?

A That indicates the stock holdings prior to that time.

Q Of Henry W. Merriam?

A Of Henry W. Merriam.

Q Did all the subsequent issues of stock certificates standing at any time in the name of Henry W. Merriam, down to the time of his death appear subsequently on this sheet?

A They do.

Q For the purposes of illustration I direct your attention to the date of October 21, 1896, a date upon which a dividend was declared as has already appeared by the testimony of Mr. Warbasse on 1,210 shares of stock in the name of Mr. Merriam, as shown by the entry of October 21 on Mr. Merriam's account in page 214 of the ledger. Can you tell us from this statement of yours how many shares of stock stood in H. W. Merriam's name on October 21, 1896?

A The number of shares as recognized—.

Q Not as recognized, as shown on the books, on this stock certificate book?

A (No answer.)

Q (Question read.)

The Court. Yes or no.

A 1,165.

Q Did that include, that number 1,165 include any stock certificates standing on the books in the name of Henry W. Merriam, but transferred before that date and the certificate delivered to somebody else?

Mr. Smith. Does this witness know of his own knowledge these facts?

The Court. What do the books show about it?

A Ten shares, it included ten shares.

Q (*By Mr. Sheehan.*) Is this from the books or your own knowledge?

A This is from the books; there were ten shares of that 1,165 in the possession of John J. Merriam.

Q Represented by certificate No.—

A No. 46.

Cross examination by Mr. Smith.

Q How do you know that Mr. John J. Merriam had certificate 46 in his possession at this time?

A H. W. Merriam was in the habit of sending the dividends to the different parties, dividends that had been credited to his account belonging to other parties,

he was in the habit of sending those personally, and there is an entry in this book, in the ledger, right after this dividend, of J. J. M. dividend $200 charges to his personal account.

Q So there was a transfer from Henry W. Merriam account to John J. Merriam account of enough money to cover a dividend on certificate 46?

Mr. Hardin. I object; there hasn't been any inference of the transfer.

Q Well, a debit against Mr. Henry W. Merriam, and a credit in favor of J. J. Merriam on the books of the company?

A I don't know whether that was a credit or not.

Q I don't quite understand what you mean when you say there is an entry of $200; there was credited up to Henry W. Merriam a dividend of $12,100 on October 21, is that right?

A That is right.

Q Then on that same day there was debited an item October 21, J. J. M. dividend, $200?

A Probably on account—.

Q I ask you if that is not so?

A That is right.

Q On the same date?

A Yes, sir.

Q Now, is there a credit to Mr. J. J. Merriam of that $200 on his account with the company?

A No, there is not.

Q Mr. John J. Merriam's account with the company begins two years subsequently, does it not, about two years subsequently?

A Yes.

Q And he had no account at that time with the company?

A No.

Q As far as the books show?

A As far as the books show.

Q Then, as far as that dividend shows from the books it merely shows that Mr. Henry W. Merriam's account was drawn down $200 in favor of John J. Merriam by some transaction?

Mr. Hardin. I object; the book speaks for itself.

The Court. I will take the answer.

Q (Question read.)

A Yes.

Q Now, Mr. Merriam, have you gone over the books to ascertain if any other charges against Mr. Henry W. Merriam's account were made to show disbursements of dividends as declared at that time?

The Court. You mean October 21?

Q Yes.

A There were no other charges to H. W. Merriam's account on account of dividends at that time.

Q Well, does it show any charges subsequently thereafter as charged up against this dividend?

A No.

Q Then, as far as the books show, from your examination you have stated that 1,165 shares stood in Mr. Merriam's name on October 21, 1896, and of that number ten shares were owned by Mr. John J. Merriam, and the dividend was paid to Mr. John J. Merriam by a transfer on the books of this company?

A No, including the ten shares there were eleven seventy-five.

Q Oh, there were 1,175?

A Yes.

Q Was there any charge on the books of the company for the difference between the $11,750 and the $12,100 which was credited to Mr. Merriam?

A No, there was not.

Q None that you found?

A None that I found.

Mr. Littlefield. It is understood that the ledgers and the stock certificate books and all other

books in our possession are open to the inspection of the other side at any time, and if it turns out that there is any error in the statement submitted by Mr. Merriam the error shall be corrected.

Mr. Smith. And that this summary only shows facts as taken from the books of the company.

Mr. Littlefield. That is the way we understand it, and if it shows any other fact that fact shall be eliminated.

Mr. Smith. That is perfectly satisfactory to me.

Analysis of stock holdings of H. W. Merriam, made by Edwin W. Merriam offered in evidence and marked Exhibit Merriam 1.

Examined by Mr. McKenna.

Q Showing you Exhibit Merriam No. 1, I ask you if this statement shows the stock holdings in the name of H. W. Merriam on November 20, 1894?

A It does.

Q And what is the aggregate amount of his holdings upon that date?

A 1,263 shares.

Q And this statement marked Exhibit Merriam No. 1 shows the number of the certificates, and the number of shares of each of those certificates standing in his name, does it not, upon that date?

A That list could be compiled from this.

Q The information is upon that statement?

A Yes.

Q Does this statement also show what disposition was subsequently made of the stock which then stood in the name of H. W. Merriam upon the books of the company up until the time of his death?

A It does.

JOSEPH E. WARBASSE resumed.

Further examination by Mr. McKenna.

Q What is the next dividend date of the H. W. Merriam Shoe Company, after October 21, 1896?

A June 4, 1897.

Q What was the rate of dividend declared on that date?

A Ten per cent.

Q According to your records, how many shares of stock stood in the name of H. W. Merriam upon that date?

The Court. Don't that all appear by the statement that just went in?

Mr. McKenna. No, that is only an analysis of the stock book.

A 1,105 according to the statement taken from the books.

Q Was there a payment credited to the account of H. W. Merriam upon the books of the company for the dividend upon the stock standing in his name upon that date?

A There was not.

Q Or thereabouts?

A No, sir.

Q What is the next date upon which a dividend is credited to the account of H. W. Merriam?

A October 21, 1897.

Q When was the dividend declared by the company?

A It was declared on October 21, 1897, the date is entered here.

Q I understood you to say June?

A That was another one; you asked me about another one; I first told you June 4, 1897, then you asked me about the next dividend.

Q And then there was no credit to the account of H. W. Merriam for the dividend declared June 4, 1897, was there?

A There was a credit, yes, dividend to his account on June 4, 1897.

Q Of how much?

A $11,600.

Q And that is a dividend upon how many shares?

A That is a dividend upon 1,160 shares.

Q Now, when is the next dividend date of the H. W. Merriam Shoe Company?

A October 21, 1897.

Q Was there a dividend declared at that time?

A There was.

Q How many shares stood in the name of H. W. Merriam at that time?

Mr. Hardin. You are not referring to the same memorandum.

A That is a different memorandum I guess; this memorandum here is made up partially by Mr. Merriam and partially by me; I put down the dividend and he put down the stock.

Q I am only referring to the stock of the ledgers of the company.

A This was made by him.

Q You have testified that there was a dividend declared on June 4, 1897?

A Yes.

Q When is the next dividend date of the H. W. Merriam Shoe Company?

A October 21, 1897.

Q Was a dividend declared at that time?

A There was.

Q Was a dividend credited on the account of H. W. Merriam in the books of H. W. Merriam Shoe Company about that date?

A On October 21, yes.

Q How much was credited?

A $11,600.

Q What was the rate of the dividend at that time?

A Ten per cent.

Q What was the next dividend paid by the H. W. Merriam Shoe Company?

A On October 27, 1898.

Q What rate of dividend was declared by the company at that time?

A Fifteen per cent.

Q Was the dividend paid by the H. W. Merriam Shoe Company?

A The dividend was credited.

Q I mean the company paid the dividend?

A The company declared the dividend, yes.

Q Declared the dividend?

A Yes.

Q Was there a dividend credit placed to the account of Mr. H. W. Merriam at that time?

A There was.

Q Out of that dividend?

A Yes.

Q How much?

A $17,100.

Q Was there any other dividend declared by the H. W. Merriam Shoe Company from that date until the death of Mr. Merriam?

A Until the death of Mr. Merriam? When did that occur?

Q It occurred in October, 1900?

A No, that was the last one before his death.

Q When was the next dividend date?

A May 18, 1901; it is on the other ledger.

Q Was a dividend declared upon that date?

A It was.

Q And payable by the company?

A Payable by the company.

Q What was the rate of that dividend?

A That dividend was ten per cent. That wasn't payable to H. W. Merriam.

Q I haven't asked you about that. Now, was there an account in the books of the H. W. Merriam

Shoe Company during the years, or from the year 1895 to the present time in the name of Mrs. Huntington?

A There was some time, I couldn't tell when it commenced.

Q John J. Merriam?

A Yes, sir; what are the dates?

Q From 1895 to the present time.

A I couldn't say without referring to the particular accounts here.

Q Well, you have got your index right there.

A This starts October 21, 1896.

Q Is there an account in the name of John J. Merriam?

A Yes.

Q And it commences what year?

A You want to know when Mr. Merriam's commenced?

Q Yes.

A 1898.

Q Is there an account in the name of Joseph E. Warbasse?

The Court. Beginning when?

A Beginning November 1st, 1894, page 206.

Q Continuing to the present time?

A To the present time.

Q Is there account in the name of George L. Dutcher?

A There was.

Q Commencing when?

A Beginning August 5, 1895.

Q Is there an account in the name of Olin L. Merriam?

A No, sir.

Q Account in the name of Maybelle F. Buffington?

A No account.

Q John Tozer?

A Page 210 beginning May 18, 1895.

Q Now, going back to the account of Mr. Henry W. Merriam on October 21, 1896, does your ledger account show the balance standing to the credit of Mr. H. W. Merriam upon the books of the company before the credit of the dividend which was credited upon that date as you have already testified?

A It does show, yes.

Q And does this book show the disbursement of the amount standing to the credit—what was the credit?

A $2,672.00.

Q The last entry prior to October 21, 1896, was October 16, 1896?

A October 16.

Q Then follows the credit of the dividend?

A Follows the credit of the dividend.

Q What is the next date, what is the date of the next balancing of the account of H. W. Merriam upon the books of the company?

A Balance shown October 15, 1897.

Q What was the balance as shown?

A $1,766.07.

Q (*By the Court.*) Debit or credit?

A That is credit.

Q When was the balance again struck on this account?

A On October 25, 1898.

Q And what balance did it show, debit or credit?

A Credit, $6,301.68.

Q When was the balance on this account again struck?

A On October 21, 1899.

Q You testified yesterday I think it was that there was a note contained in the envelope handed to you, your own personal note, payable to H. W. Merriam. When did you pay the interest, what dates did you pay the interest upon that note to Mr. Merriam?

A The dates were credited on account of the note to the dividend dates, charged with the interest and credited with the balance between the interest and the dividend.

Q And by whose direction was that course pursued?

A By Mr. H. W. Merriam.

Q You are the secretary of the company?

A I am.

Q You have the custody of the minute book?

A Yes.

Mr. McKenna. We offer the minute book that was brought in yesterday.

The Court. You may call the attention of counsel to the portion of it that you rely upon.

Mr. McKenna. We offer in evidence the minute book particularly in reference to the minutes of the annual meetings of the company held June 4, 1897, June 21, 1897, December 27, 1897, October 27, 1898, July 18, 1899.

Mr. Hardin. I wish you would read to the court what you find in these minutes.

The Court. No, don't read that now; he gives you the dates.

Marked Exhibit Lane 23.

Examined by Mr. Hardin.

Q Will you turn to the stock certificate book, the stub of certificate 41; I show you in association therewith certificate No. 41; that is the certificate that belongs to that stub?

A It is.

Q That certificate has been turned in cancelled?

A Been cancelled.

Q Will you turn to the issue of the new share in place of it?

A 57 and 58.

Q And those certificates are outstanding still?

A Yes.

Q In the name of Harriet M. Huntington?

A Yes.

Q In whose handwriting is the stub?

A The stub is in my handwriting.

Q Did you attend to the transfer?

A I attended to the transfer.

Q And you recognize this certificate 41 as having been turned in?

A I do.

Q Is it in the condition now that it was at the time the transfer was made?

A It is.

Q Have you ever seen the envelope, Exhibit Huntington 1, before?

A Yes.

Q Where?

A At the office of the company.

Q And has it been there for a good while?

A It has been there in this book ever since it was turned in.

Q And it was turned in at the same time the certificate was?

A Was turned in at the same time the certificate was?

Q Do you know whether it is in the same condition now that it was at the time you first saw it?

A The certificate?

Q Yes.

A It is in the same condition.

Q I show you Exhibit 2 Huntington; have you ever seen that envelope before?

A I have.

Q Where have you seen that?

A At the office of the company.

Q And when did you first see it?

A I first see it when it was returned there with the envelopes or with the certificates inside.

Q Do you recall from whom you received it for the purpose of making the transfers?

A I do not.

Q Are those certificates contained in the envelope Exhibit 2 Huntington as they were when you first saw them, the endorsements?

A They are.

Q And you yourself made out the new certificates issued in lieu thereof, and made the entries on the stubs as appear in the certificate book?

A Yes, I did.

Q When you say they are in the same condition which they were when they were delivered to you for transfer, you mean, I suppose, other than the red ink statement across the face?

A Yes.

Mr. Sheehan. That applies to all the certificates.

Q That also applies to the certificate No. 41?

A Certificate No. 41, yes.

Q I now show you Huntington 3, and will you look at that certificate? Was that envelope received by you at the same time that the certificate was received?

A It was.

Q At the same time as the others that you have already identified?

A It was.

Q And did you make out a new certificate in place of that?

A I did.

Q And is the certificate, other than the red ink across the face, in the condition in which it was when you first saw it?

A The same.

Q I show you Exhibit Huntington 5; did that certificate and envelope come to you together at the same time as the others that you have already identified?

A Yes.

Q And was the stock certificate, when you first saw it, in the same condition as now, except for the red ink across the face?

A Yes, sir.

Q You issued a new certificate in place of that?

A Yes, sir.

Q I show you Huntington 4; did you receive that envelope and the stock certificate No. 39 at the same time?

A I did.

Q And you made the transfer?

A Yes.

Q Is this certificate in the same shape now, except for the red writing on its face, as it was when you first saw it?

A Yes.

Q I show you the envelopes, Huntington 6 and 7; there are no certificates in them; one is in your own name; did you receive that, make that transfer at the same time? I think you testified that you got that stock certificate?

A I have that original certificate.

Q And the Dutcher envelope you also saw at the same time as the others?

A Yes.

Q And all these have been in the company's custody ever since?

A All except Mr. Dutcher's has not.

Q His envelope?

A No, he holds that himself.

Q You lately received that from him?

A Lately receive from him, that is, he held it and turned it in.

Q Are you acquainted with the handwriting of Mr. Henry W. Merriam?

A Yes, sir.

Q Can you tell us whose hand writing it is on these various envelopes?

A George L. Dutcher's I should say was Mr. Merriam's.

Q George L. Dutcher on Exhibit Huntington 6?

A Mr. Merriam's, Joseph E. Warbasse.

Q On Exhibit Huntington 7?

A Miss Nellie J. Merriam on Exhibit Huntington 4 is Mr. Merriam's; Exhibit Huntington 5 Mrs. Maybelle F. Buffington, Mr. Merriam's hand writing; Exhibit Huntington 3, Olin L. Merriam is Mr. Merriam's hand writing; Exhibit 2 Huntington, John J. Merriam is Mr. Henry W. Merriam's hand writing.

Q Do you know whose hand writing it is on Exhibit Huntington 1?

A It is not Mr. Merriam's, I don't think.

Q You don't know whose it is?

A I don't know whose it is, I couldn't tell.

Examined by Mr. Littlefield.

Q I think you testified that you had some instructions from Mr. H. W. Merriam in relation to entries in the books connected with the notes of yourself, Mr. Dutcher and Mr. Warbasse?

A Yes.

Q Am I correct about that?

A Yes, sir.

Q Now I would like to inquire whether or not it is a fact that Mr. H. W. Merriam in 1898 had ceased to have any practical connection with the business in the line of being about the premises and giving practical instructions and directions?

Mr. McKenna. I object to that; he can state the fact, how Mr. Merriam conducted himself about the place of business.

The Court. I think you are asking for a conclusion. What part did he take in the business after 1898?

Q What part, if any, did Mr. Merriam take in the business after 1898?

A Very little active part.

Mr. Sheehan. That is not an answer to the question. I think this is an important question, that is the reason I insist upon the answer.

The Court. I think it is an answer.

Q About how much of the time during the year 1898 was Mr. H. W. Merriam about the factory?

A Well, I couldn't say exactly about that.

Q Well, give your best recollection about it?

A I should say he was there probably on the average—I couldn't say for sure, probably two or three hours a day.

Q Were all these instructions in relation to these entries as to these notes on each occasion given you by Mr. Merriam?

A Not always.

Q How about the entry in 1898, what is your best recollection? If they were not given you by Mr. Merriam, by whom were they given to you?

A By Mr. W. L. Dutcher who was the vice-president at the time.

Q Will you be kind enough to refresh your recollection and state what your best recollection is as to who gave you the instruction in relation to the entries made on October 27, 1898?

Mr. Sheehan. He has testified to that already. Do you wish to have him correct his statement?

Mr. Littlefield. I wish to pursue a cross examination in the way that is open to me; I do not propose to disclose my purpose further than disclosed by the question.

The Court. Proceed; answer it.

Q (Question read.)

A I am under the impression that I received instructions from W. L. Dutcher for that entry.

Q And for the entries in relation to the notes?

A Yes.

Q Who, in the absence of Mr. H. W. Merriam, exercised the actual control of the business of the H. W. Merriam Shoe Company?

A At that time?

Q Yes.

A 1898, well, Mr. Tozer was the superintendent.

Q And Mr. W. L. Dutcher was the vice-president?

A He was the vice-president.

Examined by Mr. McKenna.

Q When you received the envelopes which were just shown you by Mr. Hardin for the purpose of transferring the stock therein contained, were the envelopes then sealed or open?

A Open.

Q All of them?

A All of them.

Q Do you know of your personal knowledge whether the officers of the H. W. Merriam Shoe Company, other than Mr. H. W. Merriam, would confer with Mr. H. W. Merriam relative to the management and direction of that business when he was not personally attending in the office of the company?

A I don't quite understand that.

Q Well, did you, as an officer of the H. W. Merriam Shoe Company, confer and report with Mr. Merriam at his house or elsewhere during the years 1897, 1898, 1899 and 1900 until his death?

A I was not an officer at that time.

Q Well, you were an employee?

A Yes.

Q Did you thus confer with Mr. Merriam?

A With Mr. Merriam?

Q Yes.

A Well, no, I can't say that I did; Mr. Dutcher usually conferred with Mr. Merriam.

Q How often would Mr. Dutcher confer with Mr. Merriam?

A I couldn't say that.

Q Well, within your personal knowledge?

A Well, I couldn't answer that question; often.

Q Within your personal knowledge did Mr. Tozer?

A Mr. Tozer always conferred with all of the members of the firm when necessary.

Q Did he confer with H. W. Merriam?

A Yes.

Q At times when Mr. H. W. Merriam was not at the factory or place of business of the company?

The Court. How does this witness know about that?

Q I am asking within his personal knowledge.

A I couldn't say about that, I couldn't answer that.

Examined by Mr. Colie.

Q You were to supply our side, the complainant, with the rates of interest that were charged on these three notes, your own, Mr. Tozer's and Mr. George M. Dutcher's; have you got them?

A The rate paid on Mr. Dutcher's account is three per cent. interest.

Q On all of them?

A On all three.

Q (*By Mr. McKenna.*) So continued until the time of Mr. Merriam's death?

A I think so, this is the last I looked at, three per cent.

Q (*By Mr. McKenna.*) What year?

A 1898.

Q (*By Mr. Colie.*) Three per cent. all the time?

A Three per cent.

Mr. Littlefield. As I understand it, we are to furnish complete transcripts of the following account, H. W. Merriam, J. J. Merriam, J. E. Warbasse, H. M. Huntington, George Tozer, George L. Dutcher. We will offer any others on suggestion from counsel, I will add the names to the list if counsel want any others.

HARRIET M. HUNTINGTON resumed.

Direct examination by Mr. Littlefield.

Q (Last question read) "When you went to Mr. Henry W. Merriam's house to live some time in the early part of 1897 you may state what you did in connection with his and your personal affairs?

A I assisted him in his home, and business affairs; his wife was rather feeble, so I assisted about the home, and helped him in his accounts and general business.

Mr. McKenna. I object to that answer as not being responsive to the question, and ask to have it stricken out.

The Court. That is responsive.

Q I show you a paper dated January 9, 1895, and ask you whether or not that is a letter that you received from your brother H. W. Merriam?

A It is a letter he wrote to me, I received it.

Letter offered in evidence.

Marked Exhibit Huntington 8.

Q Did you continue to reside in your brother's house after you went there in 1897?

A Yes, sir.

Q Were there any other details to which you attended, in addition to those that you have stated generally in your answer to the previous question?

A Well, I assisted him in looking after his mortgages and help him keep his accounts, and I assisted him in his general work as he asked me.

Q What was the condition in his house as to his having an office that he used for the transaction of business? Just describe the situation?

A Well, he had a small office where he kept his safe up stairs, but he had a large desk in his library where he did a good deal of his writing.

Q Where was this small office located with reference to the room that he occupied, in which this large desk was situated?

A Well, it opened out of an upper hall, it was connected with his wife's room immediately, a door between.

Q Was this small room in which the safe was located, directly connected with the room that he used, and in which the large desk was situated?

A They were both entered from the same hall, on the same floor.

Q Both rooms were entered from the same hall?

A Yes, sir.

Q Was the small room that contained the safe directly connected with the room that Mr. Merriam himself usually occupied?

A No, it was not.

Q It was across the hall, was it?

A Just across.

Q And what was the character of the furniture that was in the room that he himself usually occupied?

A It was simply a suite, a bed room suite; you mean for his sleeping room?

Q Yes, the room that he usually occupied?

A That he slept in?

Q Yes.

A Yes, it had no special—it was just a bureau and bed and two or three other pieces of furniture.

Q In what room was this large desk that you speak of?

A It was downstairs in what we call the library.

Q Was there any desk in this small room in which the safe was located?

A No, sir, it was just the safe and lounge and perhaps a little table.

Q (*By the Court.*) Then the room in which the desk was was on the first floor, and the room in which the safe was was on the second floor?

A Yes, they were separated.

Q (*By the Court.*) Separated by halls and stairways?

A Yes, he didn't care to have the safe right in this public room.

Q Did he use any room in the house as an office, or for the discussion of such business as he did in the house?

A Why, he didn't take them always into that library, but he most always did on business.

Q Was that on the first floor?

A That was the first floor.

Q And is that the room where this large desk was situated?

A Yes, sir.

Q Well, was there any other room in the house that he used as an office for the purpose of doing any business to any amount?

A No, there was in the living room a small desk that he sometimes went to; there was another desk on that lower floor, but he didn't use it very much.

Q You say you did some things in connection with the mortgages?

A Yes.

Q About how many mortgages did your brother at that time hold?

A Well, I should say between forty and fifty.

Q Where did he keep those mortgages?

A He kept them locked up in his safe upstairs.

Q In this small room that you have described?

A In the small office, yes.

Q In what sort of a receptacle in that safe did he keep those mortgages?

A Well, that was in pigeon hole, in a large pigeon hole you might say.

Q Was there a door to the pigeon hole?

A Not for the mortgages.

Q Did he have any facility for locking up the place where the mortgages were?

A The outside door of the safe closed that, had a good strong outside key.

Q Was there another pigeon hole in this safe that you occupied?

A Yes.

Q Where was that, with reference to the one that he used?

A Well, it was in range of it, enclosed with a special, so it looked tight.

Q Was there a key to the pigeon hole that he used?

A Not where he kept the mortgages there was no key.

Q Did he have a pigeon hole to which there was a key?

A He did have one.

Q What did he keep in that?

A Well, he kept some notes, and little stock, and principally he had his will and codicil locked up in there.

Q Were his will and codicil in this pigeon hole to which he held a key?

A Yes, he might have had there select papers, I don't just recall now any other.

Q What was done with this key to the pigeon hole in which he kept his will and these other papers that you have just described?

A Well, he usually had it in a little drawer; there was two or three little drawers in the safe and he kept it there, he could lock it up if he choose, and take the key from the drawer, but he always had a key to that drawer.

Q Was it a combination lock, did this pigeon hole in which he kept his will have a combination lock, or was it an ordinary lock?

A It was a peculiar lock, you wouldn't be likely to open it very readily unless you were told.

Q Did you know how to open it?

A Not until he explained it to me.

Q When did he explain to you the manner in which this pigeon hole, to which he then held the key, could be unlocked, at about what time of your going there?

A Well, it might have been in 1896.

Q I want you to give your best recollection?

A As near as I can say that he explained it to me in 1896.

Q How long were you there in 1896?

A I went there on a visit, and stayed perhaps six weeks, and then I returned to my home in Massachusetts, and went there the next year permanently.

A And about what time the next year, in 1897?

A In the spring, I should judge in April.

Q Now, is it your recollection that he explained the method of locking and unlocking the pigeon hole to which he held the key, in 1896 or in 1897?

A He explained it to me in 1896 when I was on a visit there.

Q Under what circumstances, how did he happen to do it?

A Well, he interested me in his affairs, and seemed to volunteer it.

Q What did he say, if you remember?

A He said that he felt sometimes that life was uncertain, and that someone ought to know where his will was, and he had not told anyone else, and he didn't know how they could get to it.

Q And was it at that time that he explained to you the manner in which this pigeon hole could be unlocked?

A Yes, sir.

Q You had at that time received this letter which has just been introduced, dated January 9, 1895?

A Yes, sir.

Q Had, at that time, in 1896, any compartment or pigeon hole in the safe been set apart for your use, pursuant to that suggestion in the letter?

A Yes, in a month after he sent me that letter I was at his home, and brought the papers, according to his suggestion brought my valuable papers.

Q You took papers of your own?

A My personal papers that I got.

Q Were they the papers referred to by him in the letter?

A That he referred to in that letter, and some others that I had.

Q What did you do with them?

A Well, he gave me the key, he took me to the safe and gave me a compartment, a drawer and a pigeon hole, and the drawer was all locked up, and I kept my papers there afterwards.

Q Was there a key to this drawer?

A Yes.

Q Did you ever get it?

A Oh, he handed me the key to it; he told me that was my personal place to keep my valuable papers.

Q That was sometime, you say, shortly after the receipt of this letter in 1895?

A In 1895, yes.

Q He gave you the key?

A He gave me the key.

Q And did you or not put the valuables referred to in the letter of 1895 and other valuable papers of your own in that compartment to which this was a key, of which he gave you a key?

A Yes, I kept it during his lifetime.

Q Do I understand by that that these papers that you put into this compartment, of which he gave you the key, were put in sometime in 1895 after the receipt of this letter, and that they remained there until after the death of Mr. Merriam?

A Yes.

Q You had your own personal property in this compartment?

A I did.

Q Who had the possession of that key to this compartment in which your private property was situated?

A I had it.

Q State whether or not you continued to keep the key until after the death of Mr. H. W. Merriam?

A I kept it.

Q Where did you keep it?

A Sometimes it was on my person, and in any place I thought was secret from others.

Q Did Mr. H. W. Merriam at any time after he delivered this key to you and gave you permission to occupy this compartment in the safe with your own personal property, did he at any time take from you possession of this key of that compartment?

A No, sir.

Q Did Mr. H. W. Merriam at any time after that have the possession of that key, so far as you know?

A No, sir; I had it.

Q Did he ever at any time ask you for the possession of the key, or the return of the key to him?

A No, sir.

Q Do you recollect of any transaction occurring between yourself and Mr. H. W. Merriam with reference to stock of the H. W. Merriam Shoe Company sometime in the early part of 1897, or sometime in 1897?

A It was sometime in 1897, I remember it because it was before his wife had died, and then he gave me a package, an envelope, a large envelope with eight small ones in, and put on the outside that they were to be delivered to the various parties, and he ask that I take charge of it and deliver it to the parties.

Q Now, where was he when he gave you these eight envelopes?

A He was up in the room where the safe was.

The Court. I suppose it is understood by everybody that Mr. Smith is objecting to every bit of this testimony, and Mr. McKenna also.

Mr. Littlefield. Oh, yes. I do not understand they waive any rights by failing to object from time to time; that is conceded, of course.

Q You say he was in the small room where the safe was located?

A Yes.

Q Now state just exactly the conversation that occurred between him and yourself at that time?

A He had these envelopes in a package, and I remember that there was a small table, and he took them out of this large, unsealed envelope and spread them out before him, and before me.

Q On what?

A On a small table there, and perhaps two or three might have rested on the safe, but that was small; he had a table there, either the safe or the table, and he called my attention to them, and I noticed among them—

Mr. Sheehan. You are asked to give the conversation.

Q Yes; state what he said?

A What he said, not what I said?

Q (*By Mr. Hardin.*) Tell what you both said?

A He said that I was to deliver them to the several parties, but he would like to have it done quietly as he did not feel able to bear a great deal of excitement, and if I would use discretion so as to avoid any public excitement that he might be forced to listen to, or he wanted me to use my discretion as to doing it; just that day or that time he was not quite able to bear any talk that might be brought to him, or any excitement.

Q Where did he get the envelopes, when he showed you them first, where were they, do you know whether they were in the safe or where were they?

A He seemed to have come out of his room with them, but I supposed—

Q No—where were they when you first saw them, were they in his hands?

A They were in his hands while we were in the office.

Q (*By the Court.*) The question was where were they when you first saw them?

A In his hands.

Q I wish to direct the witness's attention to the fact that there was a subsequent occasion.

Mr. Smith. I object.

Q Do you remember there was a subsequent transaction between yourself and Mr. Merriam?

A I do.

Q And that occurred when?

A After the death of his wife.

Q And in what year?

A In 1898.

Q Well now, state what, if anything, appeared upon the large envelope at the first occasion?

A I think it was "This property belongs to—this is the property of and belongs to the several persons as addressed."

Q And was there any signature attached to the statement?

A Yes, Henry W. Merriam, or H. W.

Q How many envelopes were there—what was the condition of the envelopes, as to being sealed or otherwise?

A The large one was open, and the small ones were sealed. It was an open envelope with small ones inside.

Q So far as you remember, how many small envelopes were there?

A Nine.

Q I am calling your attention to the first occasion in 1897?

A There was eight in the first.

Q Do you remember the names of the parties that were upon the sealed envelopes?

Mr. Sheehan. I don't know as she testified there were any names on them.

Q Were there any names on the sealed envelopes?

A Yes, sir.

Q And in whose handwriting were the names?

A Henry W. Merriam's.

Q State, so far as you can remember, the names that appeared on the eight envelopes?

A John J. Merriam and my own, and Olin L. Merriam, Maybelle Buffington, Olin Merriam and Mr. Tozer, and Mr. Warbasse and Mr. Dutcher.

Q What was done with the eight envelopes, that is, who picked them up and gathered them together, if anybody did?

A My brother, Mr. Merriam.

Q And what was done with them?

A He gave them into my care.

Q And what did you do with them?

A I put them into the safe in my compartment.

Q Who put them into the large envelope?

A Why, he did, as he gave them.

Q And you put them where?

A In the safe.

Q Whereabouts?

A He directed me to take charge of them, so I put them.

Q Whereabouts did you put them in the safe?

A In my drawer, my personal drawer.

Q The drawer to which you had the key?

A Yes.

Q Did you lock them in the drawer?

A Yes.

Q Were they afterwards taken out by you?

A They were.

Q And when were they taken out, and under what circumstances?

A They were taken out early, I should say, in March, 1898.

Q Meanwhile, do you remember whether or not his wife had died?

A His wife had died.

Q How did you come to take them out in March, 1898?

A Because he asked for them.

Q What did he say?

A He said "My wife has died, I have no children, and I have just made a codicil which has revoked the terms I have made in the will concerning my H. W. Merriam Shoe Company's stock, and it is released, and I wish them to reorganize."

Q Wished what?

A To change the arrangements of the certificate.

Q What did you do with them?

A I passed them to him.

Q And what did he do with them, so far as you know?

A Well, he took them out of my sight.

Q When did you next see Mr. Merriam, with reference to the envelopes that were finally left with you? When did you next see Mr. Merriam after you delivered the large envelope containing the eight that were sealed and addressed as you have described back to him, when did you next see him with reference to envelopes of a similar character.

A Several weeks later, perhaps two or three.

Q What occurred then?

A We met in the office, and he gave me a large envelope, describing what was within, or stating what might be within and requested that I—he spread them out on the table, the small envelopes, and rather called my attention to the people whose names were on those envelopes, and seeing mine—

Q Before you reach that, what, if anything, did he say as to the delivery of them to you, and as to the purpose?

A Well, he wished me to deliver them.

Q What I want you to state, as well as you can, is, first the exact language that Mr. Merriam used; if you are not able to remember the exact language, state the substance of it as near as you can, not your conclusion from it, but state first, if you can recollect it, exactly what he did say, and if you don't remember exactly what he said, state as nearly as you can the substance of what he said; do I make that clear?

A Yes.

Q Now be kind enough to follow that direction.

A I don't remember the exact words, but I know what he meant; what he told me, the substance was—

Mr. Smith. I object to her stating what he meant.

The Court. She is stating what the substance of the conversation was.

A The substance was that he wished me to take charge of them, and deliver them at my discretion, for the reason that he wished it done rather quietly, and not have a public announcement of different people—that it might bring him excitement to listen to all what the public might bring to him, if I could do it, when I could do it quietly, and he thought I could arrange it.

Q Well, state any other conversation that occurred at that time, anything else that he said that you remember?

A He said, "There is an envelope with your name on, and you can receive it now," and so I opened it, and thanked him for what I found within.

Q What did you find within?

A I found a certificate of stock for five hundred and sixty-eight shares of the H. W. Merriam Shoe Company.

Q State what, if anything, he said at this conversation in relation to the fact of his wife's death, and

as to what his purpose was as to the disposition being final or otherwise, if you recollect anything?

Mr. Sheehan. I object to that as leading.

The Court. That is leading.

Q Strike it out. Please refresh your recollection and state whether he said anything else than you have already testified to; state whether or not any reference was made to the—

Mr. Sheehan. One moment.

The Court. The rule is you must exhaust the witness by general questions as to what was said and what was done and what took place, and after you have exhausted your witness then you may call the witness's attention to particular matters.

Q State whether or not there was any other conversation that you now remember, in addition to that that you have already stated, relating to—

Mr. Sheehan. One moment.

The Court. You better hear the question.

Q (Continuing.) This subject matter. That is the question that I was going to put?

The Court. You can answer that.

A He explained to me that it was a final distribution of his, final arrangement for distributing some stock he had.

Q Well, state what, if anything else was said. State if he said anything else; give your full recollection of the full conversation. What I want is everything that you remember that Mr. Merriam at that time said about this transaction?

A I think I commenced to say about my receiving that and that he said he hoped I would live to enjoy it, when I opened the envelope and saw the amount of the stock he said he hoped I would live to enjoy it, and was pleased to think that I liked it.

Q When did that conversation occur, either before or after you opened the envelope that was addressed to you?

A It was after, and I knew the contents.

Q What did you say?

A I could not know the contents until afterwards, until I had opened it.

Q You have already stated your name was on one envelope?

A Yes.

Q Was your name upon any envelope?

A Upon one of them.

Q In whose handwriting was that name?

A It was in Henry W. Merriam's handwriting.

Q State whether or not you opened that envelope, whether that is the one you refer to as having opened?

A That is the one that I opened.

Q Have you stated now everything that you at present remember of the conversation of Mr. H. W. Merriam relating to this transaction?

A I think I have, the conversation, but I haven't all about the envelopes.

Q I want to take that up a little bit later. What I want now is to exhaust your recollection as to the conversation relating to the transaction or statements relating to the transaction made by Mr. H. W. Merriam. Now have you stated everything that you now recollect about that?

A I think I have included that he gave them into my charge and wished me to take care of them in my separate compartment.

Q Have you stated everything that you now remember as to his conversation?

A I don't remember anything more of the conversation just at this time.

Q Well now, state whether or not during that conversation he said anything about the fact that his wife had died, and, if so, what he said?

A He referred to his wife dying, and that he had no children and no occasion to change his will or disposition, for he had just made a new codicil and he had no change to make, he considered it final.

Q What became of the envelope that was delivered to you, which had your name upon it in the handwriting of Mr. H. W. Merriam?

A I don't know where it is, I didn't save it.

Q What became of it at that time, what did you do with it?

A I left it until I had time to substitute another one, have it sealed, as he said papers that were sealed and had my name on the outside signified that they were mine.

Q I show you envelope marked Exhibit Huntington 1, and ask you in whose handwriting the name, Mrs. H. M. Huntington, is?

A That is what I put on afterwards.

Q Whose handwriting is that name in?

A That is my handwriting.

Q When did you write it?

A Probably that day or the next, that I opened the envelope.

Q Well, what then did you do with the original sealed envelope that you opened when you found the certificate for 568 shares of stock?

A I don't think I considered it.

Q According to your recollection, what did you do with that original envelope?

A Destroyed it, I lost it.

Q You did not save it?

A No.

Q When did you put the certificate of stock for 568 shares into this envelope which contained your name in your handwriting?

A Very soon.

Q You mean by "very soon" when?

A Within a few hours, perhaps the next day, within a day.

Q What did you do with the certificate on that day?

A Well, for a few hours I might have left it with the others.

Mr. Sheehan. Never mind what you might have done.

Q Give your recollection?

A My recollection is that I put it in with the eight.

Q And what did you do with the eight with this certificate for 568 shares?

A Well, he gathered them up and handed the whole nine to me.

Q And what did you do with the whole nine?

A I put them in my private drawer.

Q Did any one put them into the large envelope, in a large envelope?

A Some one did, I think it was my brother.

Q What was done with the large envelope after the night, when you say your brother, you meant H. W. didn't you?

A Of course I meant Henry W. Merriam; John lived in another town, so my brother John was not concerned.

Q Well then, as I understand it, Mr. H. W. Merriam is the brother to whom you refer?

A Yes, sir.

Q And he put the eight envelopes with this certificate for 568 shares into the large envelope?

A Yes, sir.

Q And then what did he do with it?

A Handed it to me.

Q Was there anything on that large envelope, any memorandum?

A Yes, sir, memorandum, certificates of stock of the H. W. Merriam Shoe Company which belonged to the several parties as addressed.

Q And was the memorandum signed?

A It was signed Henry W. or H. W. Merriam.

Q In whose handwriting was that memorandum?

A In Henry W. Merriam's.

Q At the time you opened the sealed envelope that was addressed to you and took out the certificate for 568 shares did you examine the certificate or look at it?

A Yes, sir.

Q I show you now a paper marked Exhibit Lane 1, and ask you whether or not that is the stock certificate that you took out of the envelope addressed to you?

A It is.

Q Do you notice the assignment on the back of the certificate, do you notice what appears on the back of the certificate?

A Yes, sir.

Q Was that on that certificate when you had it first, when you took it out of the envelope?

A Yes.

Q This certificate purports to have upon its back in writing the words "4th December, 1894" and "Henry W. Merriam." I wish to inquire whether that was written on the back of the certificate when you first saw it?

A It was all written.

Q Was it written precisely as you see it now?

A Yes, sir.

Q In whose handwriting is the written part of the assignment, and transfer in blank?

A Henry W. Merriam's.

Q And in whose handwriting is the signature?

A Henry W. Merriam's.

Q Whose signature is it that appears upon the back of the certificate below a blank transfer and assignment, below the printed form, whose signature is that?

A My brother's, Henry W. Merriam.

Q Was that signature that appears below the printed blank transfer and assignment of that cer-

tificate on that certificate when you examined it in the presence of your brother under the circumstances that you have described?

A It was.

Q Did your brother see it, as well as yourself? State whether or not when this certificate was taken by you out of the sealed envelope you laid it upon the table?

Mr. Sheehan. Just a moment.

Q State what you did with it, what is the first thing you did with this certificate of stock when you took it out of that envelope, that was addressed to you and sealed up, in the presence of your brother?

A I looked at the size of it, the number of shares, and then I saw his name on the back, and I knew when anything was assigned—.

Q You saw his name on the blank below the blank transfer and assignment, did you not?

A Yes, sir.

Q Where was your brother at that time?

A He was right at my right hand.

Q About how far from you?

A Oh, two or three feet.

Q Did he see what you were doing?

Mr. Sheehan. I object.

Q Do you know whether he saw what you were doing?

Mr. Sheehan. I object.

Q Do you know whether your brother saw what you were doing when you were looking at this certificate that you had taken out of that envelope?

Mr. Sheehan. How can the witness—

The Court. Yes or no.

A He saw me.

Q (*By the Court.*) How do you know he saw you?

A He told me to open it, he told me I had permission to open it.

Q The question is whether your brother saw you and saw this certificate when you took it out of this sealed envelope, when he was sitting within two or three feet from you?

Mr. Sheehan. That was not the question.

Mr. Littlefield. That is the one I put now.

Mr. Sheehan. Do you withdraw the other question?

Mr. Littlefield. No, I leave it just as it was and put this one.

The Court. Let her answer; this is proper.

A He did, yes.

Q Do you remember the names that appeared on the other eight envelopes? If so, state them?

Mr. Sheehan. I think, your honor please, this is a very important part of this case and I think it ought to be proved strictly; now my brother is suggesting what is on the other envelope.

Q (*By the Court.*) Was there any endorsement on the other eight envelopes, any writing on them at all?

A That was included in the large envelope.

Q (*By the Court.*) On those eight envelopes?

A There was personal names on each one.

The Court. Well, whose?

Q Yes, whose?

A John J. Merriam, Maybelle Buffington, Nellie Merriam, Olin Merriam and my own, Harriet M. Huntington, Mr. Tozer's, Ralph and Frances Buffington, or Frances and Ralph Buffington, and Mr. Warbasse, and G. L. Dutcher.

Q In whose handwriting were those names?

A In Henry W. Merriam's.

Q Will you be kind enough to examine exhibits marked Exhibit 2 Huntington, 2 to 6 inclusive, Huntington, and state whether or not those are the envelopes, or state whether or not those envelopes were

among the nine that were thus delivered to you by Mr. Henry W. Merriam?

A They are; they were delivered to me by Mr. Henry W. Merriam.

Q Those are the envelopes?

A They are.

Q Those were among the envelopes that were delivered?

A Yes, sir.

Q I show you a paper marked Exhibit Huntington 1, which is the envelope containing your own address, and ask you to state, so far as you can remember, when you enclosed the certificate of the stock in that envelope?

A The same day I received the certificate.

Q And what did you do with it after putting it in this envelope?

A I took out the eight envelopes, and I took out the large envelope and put this in with the eight.

Q Whether or not this envelope was sealed up?

A I sealed it because my brother requested to keep my papers—

The Court. You sealed it?

A I sealed it.

Q Did you at any time seal up the large envelope containing the nine?

A No, sir.

Q Where did you put the large envelope containing the nine individual envelopes after you inserted the one that now appears addressed to you?

A In my personal private drawer in the safe.

Q Was that the same drawer or compartment that you had occupied as yours since 1895?

A It was.

Q Was that the same compartment into which you had other property belonging to you?

A Yes, sir.

Q How long did the large envelope containing the other nine remain in this compartment? I will ask you this, did you take out the large envelope containing the other nine prior to the death of Mr. H. W. Merriam?

A No, sir, I left it.

Q Left it where?

A In my drawer, my personal—in the safe where I put it.

Q Did you have the key to this drawer all this while?

A Yes.

Q Was the large envelope containing the other nine in this compartment under your key at the time of the death of Mr. H. W. Merriam?

A It was.

Q Had you up to that time examined the contents of any of the other eight envelopes?

A No, sir.

Q Did you know of the contents of the other eight, up to that time?

A I didn't know it.

Q Except as might be indicated by the endorsement, I suppose?

A I only knew my own.

Q When did you next take from the safe, from this private compartment to which you held the key, the large envelope containing the nine?

A On the day of the funeral of my brother, Henry W. Merriam.

Q About what time in the day?

A About seven o'clock.

Q Forenoon or afternoon?

A In the afternoon.

Q Where did you get the key of this compartment when you took this envelope out containing the other nine?

A Why, I had it on my person.

Q You had the key on your person?

A Yes, sir.

Q Had Mr. H. W. Merriam at any time during his lifetime requested the return to him of any of these certificates since the last delivery in 1898?

A Not since the last delivery.

Q Not since March, 1898?

A No.

Q Had he at any time given you any change in his instructions or directions?

A No, sir.

Q Had he at any time had any conversation with you in relation to these envelopes, after they were delivered to you?

A He mentioned it only once.

Q And what was said then?

A He simply inquired whether they was in my possession.

Q And is that all?

A That was all I remember.

Q And when was that?

A That was about a year before his death.

Q Was there any other conversation?

A No, sir.

Q Did he at that time give any change in his instruction or directions?

A No, sir.

Q How did you happen to take the large envelope containing the other nine out of the safe on the day of the funeral?

RECESS.

A At the request of one of the executors, Mr. John J. Merriam.

Mr. Smith. I also want to make that objection about John J. Merriam, on the question of evidence, as well as to Henry W. Merriam. I move at this time to strike that answer out.

Mr. Sheehan. We also make the same objection.

The Court. John J. Merriam is represented in this suit by a personal representative; I do not see how the situation is any different from the situation in which you found the Henry W. Merriam estate; I think I will put them on the same ground.

Mr. Smith. And with our same objection, and they go in over our objection.

The Court. Yes; and I will deny the motion; and the motion is made on behalf of Mr. Lane, and by Mr. McKenna.

Mr. Smith. And that will apply to future questions?

The Court. Yes, let one objection cover the whole thing.

Q Where were you when Mr. John J. Merriam made this request of you?

A Leaving the dining room.

Q Had you had lunch after the funeral?

A Yes.

Q And was the request made by Mr. Merriam of you while you were in the act of leaving, or after you had left the dining room?

A Well, as he arose from the table he quietly said to me—it was immediately after leaving the dining room.

Q Now, what did he say?

A He said that the gentlemen, Mr. Swayze and Mr. Dutcher, would like to be informed concerning the contents of the safe that I held of any papers con-

nected with H. W. Merriam, and would I produce them for them, as they would soon arrive at the house.

Q Is that all the conversation at that time between yourself and John J.?

A Well, he followed me up.

Q The question is whether that is all the conversation that took place at that time between yourself and Mr. John J. Merriam, is it?

A That is all I remember.

Q Then what did you and Mr. John J. Merriam do?

A I proceeded upstairs to the safe.

Q What did Mr. John J. Merriam do?

A He followed me.

Q You both went upstairs?

A Yes, sir.

Q You went to this small room in which the safe was situated?

A Yes.

Q Did Mr. Merriam go with you?

A He was present, yes.

Q Did he go with you into that small room?

A Yes.

Q Now then, after you and he reached the small room please state what was done and said ?

A I took out the keys to open the safe of my brother's compartment, and I found in that private compartment, which has been described, the will and notes and some other papers, and my brother John said he did not think they needed all the large package of mortgages at that time, so I didn't take those out. Then by a sudden impulse I took out my key and the package of envelopes, the nine envelopes which were contained in the large one and put them together and gave them to my brother John to carry downstairs to the executors.

Q Yes, then what? Where did you and your brother John go, if anywhere, after that was done?

A He went away, and I don't know what happened downstairs.

Q Did you go downstairs afterward?

A I did.

Q How long afterward?

A Perhaps in fifteen or twenty minutes.

Q When did you next see the papers that you gave then into the custody of Mr. John J. Merriam, when and where?

A I received them from Mr. Dutcher.

Q What did you say?

A I received the papers from Mr. Dutcher's hands.

Q Where was it?

A Down in the lower hall.

Q And then what was done, lower hall of the house?

A Yes, sir.

Q On the lower floor?

A On the lower floor.

Q (*By the Court.*) On the same day?

A On the same day.

Q (*By the Court.*) The same evening?

A The same evening.

Q And that was about twenty minutes after you and your brother had been in the small room where the safe was?

A Yes.

Q And after the papers had been handed over to your brother John J. Merriam?

A Yes.

Q Is that right?

A Yes, sir.

Q You met Mr. Dutcher in the hall?

A Yes, sir.

Q Was this Mr. Dutcher one of the men named as executor in the will?

A He was William L. Dutcher.

Q What, if anything, was said to you by Mr. Dutcher, or by you to Mr. Dutcher?

Mr. Smith. I wish to repeat the same objection.

Mr. Littlefield. I understand it is subject to the same objection.

Mr. Smith. We have got to apply it to conversations with Mr. Dutcher, to have that on the record.

The Court. William L. Dutcher is dead, and his personal representative is a party to the suit.

Mr. Littlefield. No, his personal representative is not a party to the suit, is he?

Mr. Hardin. Yes, I think so.

The Court. I will make the same ruling about it.

Mr. Sheehan. And you will note our objection also?

The Court. Your objection appears as you go along.

Mr. Sheehan. I mean to each one of them.

The Court. Yes.

Q What, if anything, was said by Mr. Dutcher to you at the time that you met him in the lower hall when he had the possession of these papers, as I understand it, that you delivered in the upper room to Mr. John J. Merriam?

A He handed them to me saying that it was thought proper as I had been custodian of the papers that I should present them to Mr. Swayze, in the presence of those who were to hear the reading of the will.

Q What did you say?

A I assented, I took them right in without comment.

Q In where?

A Into the room where we were—where Judge Swayze and the relatives were prepared to listen to the reading of the will, the front room.

Q The front room?

A Yes.

Q On the lower floor?

A Yes.

Q Who were present in this room when you carried these papers in, so far as you can remember?

A As far as I recollect, there was Mr. John J. Merriam and his wife and daughter Helen, and Miss Nellie Merriam and Mr. George Merriam, and the executors, of course.

Q Mr. Dutcher and Judge Swayze?

A The executors named in the will.

Q Mr. Dutcher and Judge Swayze?

A Yes, sir.

Q And John J. Merriam?

A Yes.

Q Were there any other persons present?

A I don't remember.

Q What, if anything, did you say to Judge Swayze? No, I will ask you this. What did you do with the papers that were handed to you by Mr. Dutcher in the hall?

A I gave them to the Judge.

Q Gave them to who?

A Mr. Swayze.

Q What, if anything, did you say when you gave him the papers, or didn't you say anything?

A I don't remember that I said a word.

Q Did you have any discussion upon that occasion between yourself and Judge Swayze, or any of the other of the executors as to the circumstances under which the large envelope containing the nine small ones came into your possession? I don't ask you what was said now, but I ask you whether that subject was discussed at that time between you and any of the executors?

A I don't remember that a word was said.

Q Do you recollect some gentleman being there who resided in New Hampshire? The Judge described some man whose name he did not remember.

A A cousin, Reverend George Merriam.

Q Was he one that you mentioned already?

A Yes, sir.

Q What occurred after the delivery of the papers to Judge Swayze?

A He read the will next.

Q Do you remember whether anything was said, or done, with relation to the large envelope that contained the nine sealed envelopes?

A I don't remember, I knew nothing of what was done.

Q Do you remember whether there was any conversation in relation to that package?

A I didn't hear any.

Q What next happened after the Judge read the will?

A We separated; I went up to my room, and I didn't have any conversation with anybody.

Q Did you at any time after that make any demand upon the executors for the return to you of the large envelope containing the other nine?

A I did.

Q When?

A The next day I made inquiry.

Q Of whom did you make it?

A I first asked my brother John J. Merriam if he knew anything about it.

Q Did you then request of him the return of the papers to you?

Mr. Sheehan. I object.

The Court. That won't do.

Mr. Littlefield. Too leading?

The Court. Yes.

Q State what, if anything, you said to him in relation to the papers?

Mr. Smith. I object to that on the ground that she cannot testify as to what she herself said.

Q State what, if anything, you said to him in relation to the papers?

Mr. Smith. I object.

The Court. I will let you ask what conversation took place at that moment.

Q State what conversation occurred at that time between yourself and Mr. John J. Merriam who was one of the executors mentioned in the will?

The Court. What did he say and what did you say?

A I requested him to—

Mr. Sheehan. The conversation is what you are asked for.

The Court. What did you tell him and what did he tell you.

A I told him I desired to have those envelopes returned, to find out what had become of them, and he said he would endeavor to find out where they were and who had them; he didn't have them.

Q Did you after that have any conversation with any one of the executors with reference to the envelopes?

A I did.

Q When?

A Within a few days.

Q And where?

A At the home of Henry W. Merriam.

Q And with which one of the executors did you have the conversation?

A Well, with both—well, with the three.

Q You say that was within how long a time, within two or three days?

A Well, within two or three days.

Q State the conversation that occurred at that time, state what you said to them and what they said

to you, so far as you can remember, relating to the envelopes?

A Mr. Dutcher seemed—

Mr. Sheehan. You are asked to give a conversation.

The Court. What talk did you have?

Q What was said between the four of you, what they said and what you said, what any of them said?

A I inquired what they had done with those envelopes.

Q (*By Mr. Sheehan.*) You inquired of whom?

A I inquired of all the executors, if I would have them soon, or if they wouldn't return them immediately.

Q Well, what was said by them in reply, if anything?

A Justice Swayze said he would like to consider it before he decided, and Mr. Dutcher said he was willing to return them as they were, but he felt they belonged to us and of course my brother was interested and he would like his—John J. Merriam was interested.

Q What did he say, John J., anything; if he did, state what he said?

A He said he wanted them to be returned.

Mr. Sheehan. I ask to have these answers stricken out. The testimony, I believe, as to the possession of the gift or the thing given is not substantative evidence that can be used as evidence in regard to the gift. Now she is testifying, rather indirectly to be sure, but substantially to the effect that she asked to have these returned for a particular purpose, because they belonged to her. Now, that is evidence, indirect evidence of the existence of the gift to her, and that she cannot testify to.

The Court. Oh, no, it is not that at all. On the complainants case Judge Swayze was sworn

as to what took place at this time, and they have a right to give their own version of it, and everybody has a right to have it ascertained whether this lady's recollection of what took place is the same as the recollection of Mr. Justice Swayze, and upon that ground alone it is admissible; but her declarations at that time could not change her legal position, no matter what she said. I will take the evidence and we will consider that question when we come to make the argument.

Mr. Sheehan. Take it subject to our objection?

The Court. Certainly. Your objection is on the record as you go along.

Q (*By the Court.*) Is that all the conversation that took place at that moment?

A There might have been other things, but I don't recollect.

Q You were broken in on on an answer which practically stopped at this point, that you told them you wanted the papers, that one of them was yours, and you were interrupted there—now, complete the answer, please complete the answer you were to make?

The Court. Continue the statement of what conversation took place on that occasion.

A I also wished the eight enevelopes beside to be distributed according to the direction of my brother.

Q (*By the Court.*) That is what you told them?

A Yes.

Q Do you recollect the occasion when what is known as the indemnity agreement was drawn and executed?

A I remember some of the circumstances, a good many of them.

Q You may state whether or not, prior to the execution of that agreement, you made frequent requests of the executors with reference to the return of the envelope?

Mr. McKenna. I object.

The Court. That is too leading.

Q Did you after having made this request in the presence of the three executors of which you speak, within two or three days after the delivery of the papers by you to Judge Swayze, did you subsequently make demands or requests upon the executors, and, if so, how many?

Mr. McKenna. I object.

The Court. That is a proper question; you can answer that yes or no.

A Yes.

Q Whether or not more than once?

A Yes.

Q How many times, so far as you can remember?

A As much as six.

Q What is that?

A Six or more.

Q Can you remember the conversation that took place when you made these subsequent demands. Upon which one of the three executors did you make these subsequent demands, through Judge Swayze, Mr. Dutcher or Mr. John J. Merriam, or all of them, whatever the fact may be?

A All of them, and separately.

Q Now, won't you state, so far as you can remember, the conversation that occurred at the first time after you made the demand in the presence of all three, to which you have already testified? Give the conversation as near as you can remember it?

A Justice Swayze.

The Court. This is the first conversation she had with them after she had the conversation with the three of them on the night the will was read?

Mr. Littlefield. No, the conversation that I refer to as having had with the three, is when she made the demand, to which she has testified,

of the three, two or three days after the will was read, then she made a subsequent demand. About how long after the demand that you made of all three, to which you have testified, was it that you made the next demand?

A Well, two or three weeks, I was asking for them, occasionally when I could get an interview with them.

Q Are we to understand by that that every time you saw the executors you introduced that subject?

A That includes the six times.

Objected to.

The Court. That is leading. Do you have in your mind separate and distinct recollection of what took place on each of these six or more occasions when you made these other demands?

A I think one was perhaps a repetition of the other.

Mr. Sheehan. Not what you think, what you knew.

The Court. She is giving her best recollection.

Q Finish your answer.

The Court. Do you have a distinct recollection of what took place at each one of these six or more interviews?

A I do not remember the distinct point I made at each interview.

Q (*By the Court.*) Well then, you may tell what you remember as to what took place at any one of them, what you said and what the executors said?

A I repeated my desire to have them returned to me each time, and each time they reported that for certain reasons they were not ready to do it, to return them.

Q (*By the Court.*) What reasons did they give?

A Well, the legal—Justice Swayze said there was a legal reason; I didn't understand it and perhaps do not now, just the exact point, said there was a legal reason why he couldn't.

Q Up to that time had you had the assistance or advice of any attorney?

A No, sir.

Mr. Smith. I don't think that is competent at all; I think it should be stricken out.

Mr. Littlefield. We insist on it as being clearly competent.

The Court. I don't know why that is not competent.

Q In the execution of this agreement—you signed the agreement, did you not?

A I did.

Q You know what has been referred to as the indemnity agreement?

A Yes, sir.

Q You executed it?

A Yes, sir.

Q And you and Mr. John J. Merriam signed a protest upon the back of it?

A Yes.

Q Who wrote that protest, do you know?

A John J. Merriam.

Q State whether or not this endorsement that appears in the handwriting of Mr. John J. Merriam, upon the back side of one of the sheets of the agreement was or not written at or before the agreement was executed?

A Before.

Q State whether or not you and Mr. John J. Merriam executed the protest at the same time that you executed the agreement itself?

A At the same time.

Q At the time of the execution of this agreement had you received the advice of any counsel or attorney in connection with your interests involved?

A No, sir, no advice.

Q Have you ever employed counsel or had counsel retained in connection with any of these controversies until you retained my firm in New York something like two or three years ago?

A No, sir.

Q Up to that time you had been acting upon your own responsibility?

A Yes, sir.

Q Was there any intention on your part when you executed this indemnity agreement and the protest annexed thereto, to in any way change or waive any legal rights that you had at that time in the stock that was included in the various nine envelopes which were in the large envelope?

Mr. Colie. I object.

The Court. That is objected to, and it seems to me without argument it is inadmissible. It is objected to and I will sustain the objection.

Q Was anything said between yourself and Judge Swayze then—you need not answer, of course, until opportunity comes for objection—was anything said in the discussion of the preliminary negotiation which resulted in the making of the agreement of indemnity and the protest signed by yourself and John J. Merriam with reference to the title of either yourself or John J. Merriam to the stock that was found in the envelopes addressed to him and to you respectively?

Mr. Sheehan. We object.

The Court. Objection sustained.

Q I show you now this protest written upon the last page of the indemnity agreement, and ask you if that is the signature of Mr. Merriam and yourself to the protest?

A It is.

Q Was Mr. Warbasse present when you and the others executed the indemnity agreement, do you remember?

A He was.

Q Now, this protest states—is that Mr. John J. Merriam's handwriting, the whole protest?

A It is, the whole protest.

Q And written by him at the time and in the presence of all the other parties who executed the agreement, is that right?

A I didn't see him write it, but it was with their consent.

Q You did not see him write it?

A I don't think I did.

Q Did you see Mr. John J. Merriam write the protest?

A I saw him write one, yes.

Q Where did he write it?

A In the presence of all of the parties who were there prepared to execute the agreement, perhaps in the presence of Mr. Warbasse, I don't remember.

Q You are not able to state whether the others were present or not?

A No, I could not.

Q Well, is it your memory that it was written on there and signed by you at the same time that you signed the other side of the sheet?

A I remember that part of it.

Q Now, this states this fact, or reads as follows: "We sign this agreement in order to secure a peaceable and amicable settlement of our brother's estate, without further delay." Can you state to what that referred?

Mr. McKenna. I object. I think the instrument speaks for itself.

A It is explanatory.

Q Can you state to what previous negotiations or previous discussions that referred?

The Court. That calls for her statement of what it means, what it refers to. Upon what ground do you ask that question?

Mr. Littlefield. Upon the ground that the statement itself is ambiguous, as indicating there were some considerations that are not disclosed by the agreement itself, and not disclosed by this.

The Court. That is a patent ambiguity then.

Mr. Littlefield. Yes.

The Court. Don't you have to take the paper itself in explanation of a patent ambiguity? I do not see any legal ground upon which that question can be admitted.

Q For the purposes above indicated I will submit this question. Will you be kind enough to state first whether or not you know to what phase of the discussion this first clause referred to. You need not state what.

The Court. Yes or no.

A Yes.

Q Now, to what phase of the discussion or to what element of the subject matter did this clause relate to, as you understood it, or as you knew it?

Mr. McKenna. We object.

The Court. Objection sustained.

Q To what particular phase of the subject matter referred to by this protest did this clause that I have just read to you refer?

Mr. McKenna. We object.

The Court. The objection is sustained.

Q Were the nine sealed envelopes containing stock of the H. W. Merriam Shoe Company delivered to you after the execution or at the time of the execution of this argeement of indemnity with this protest attached thereto?

A My own was, I wouldn't say—

Q What was done with the others?

A They were distributed to the several parties.

Q At the same time?

A Yes, the same evening, the same time.

Q And were subsequently to that formal transfers executed by the executors of the stock thus delivered and distributed at that time?

Mr McKenna. I object; the transfers speak for themselves.

(Question withdrawn.)

Q How many certificates were delivered to you?

A On what occasion?

Q At the time of the execution of this agreement of indemnity with the protest attached, to you personally I mean?

A One certificate.

Q And for how many shares?

A Well, it wasn't executed that very night, at least these certificates were not given out until May; I think I had my 568 though, but perhaps temporary.

Q Was certificate for 568 shares delivered to you in one certificate?

A It must have been, yes.

Q Was it ever split up into two?

A Yes.

Q When, do you remember?

A A few weeks later.

A A few weeks later, do you mean—

A In May, I think the certificates were made in May, separate.

Q Well, did you deliver any certificates for 151 shares to the executors, pursuant to this indemnity agreement?

A I did.

Q When did you do that?

A Sometime in May, immediately upon my receiving my dividend.

Q And you delivered something like $1,500 in cash?

A Yes, sir.

Q When was the certificate for the balance of the 568 shares delivered to you, that is, 417?

A Sometime in May.

Q At the same time that you delivered to the executors certificate for 151 shares?

A Yes.

Q So that according to your recollection the execution of the indemnity agreement and the delivery of the stock referred to in it were not cotemporaneous acts, that is, performed at the time?

A No, sir.

Q The stock was actually delivered to you, and then the 151 shares delivered to the executors under the agreement after the execution of the indemnity agreement?

A Yes, sir.

Q That is your recollection of it?

A That is my recollection.

Q Since the delivery of 151 shares to the executors under this indemnity agreement, has that certificate come back into your possession?

A It has.

Q And under what circumstances?

A Under purchase.

Q By whom?

A I purchased it.

Q Of whom?

A Of the surviving executor, Justice Swayze.

Q And you paid him how much therefor?

A $26,472, I may be mistaken, but it is twenty-six thousand and some dollars.

Q The stock was figured at how much per share?

A $174.

Cross examination by Mr. Smith.

Q Mrs. Huntington, you used to visit your brother, Henry W. Merriam, at Newton, did you not, during the summer time?

A Yes, sir.

Q Previous to the time you permanently went there?

A Yes.

Q And the first time that you have testified to here is in 1895, is it not?

A Yes, sir.

Q You went up there in 1895?

A Yes, sir.

Q And you stayed the whole summer?

A Not all, a month or two.

Q What was his condition during that summer, as far as attending to business?

A He was very well.

Q He was very well at that time and attended to his own business, did he not?

A Yes, used to go to his factory each day.

Q And was that before or after he had his first stroke?

A Well, I don't remember.

Q Do you remember when he had his first stroke?

A I have no date for it.

Q I mean do you know how long before his death?

A No; it might have been four or five years.

Q Four or five years?

A Yes.

Q But he was doing his business, attending to his business and seemed to be in ordinary health?

A Yes.

Q When did you next return?

A I visited him three or four times a year, so I couldn't specify.

Q Then you went to live there permanently?

A Yes, sir.

Q Was that in response to any communication from him or his family?

A Yes.

Q He wrote you a letter?

A Yes, sir.

Q And in response to that letter you went there to live?

A Yes.

Q And have you got the date on which you went there, or the approximate date?

A Well, I know the season; I haven't the day of the month in memory.

Q Would the letter assist you if you had it?

A I don't think I have the letter now.

Q What season was it that you went there?

A In the spring or early summer of 1897.

Q Spring or summer of 1897? Was his wife then living?

A Yes, sir.

Q And what was her condition of health?

A She was quite feeble.

Q She was quite feeble in what way?

A Well, partially confined to her bed, she might be able to walk.

Q Feeble in body?

A Yes.

Q And her mind?

A Her mind was all right.

Q And what were the relations between Mr. and Mrs. Merriam at that time?

A They were always pleasant.

Q I mean, were they very affectionate toward each other?

A Yes, sir.

Q They got along very well together?

A Yes, sir.

Q And when you went there to the house what arrangement was made about your entrance into the household?

The Court. You mean when she went there permanently?

Mr. Smith. Yes.

A Why, I went there almost as one of the family.

Q As one of the family, not as a visitor, but as one of the family?

A Well, to help him in any way, of course I offered my help and they accepted it.

Q And you had a permanent room there?

A Yes, sir.

Q And did you have any particular duty to perform while you were there?

A Why, a good many general ones.

Q How?

A Some general ones that I was glad to assist in.

Q I mean duty of your own, other than assisting others?

A Only I felt it a duty, he was my brother.

Q Who supervised the household and gave the orders as to the management of the house?

A I took them up as his wife grew more feeble, I took them up and finally carried them along.

Q As she grew more feeble you took her place in the running of the household, is that it?

A Yes.

Q Did you receive any compensation from Mr. Merriam while you were doing this?

A No, sir.

Q And you paid, of course, nothing for your living?

A I paid nothing.

Q What was Mr. Merriam's condition of health when you went there in 1897, was it any different from in 1896?

A He was not quite as strong physically, but able to be out daily.

Q And went back and forth to the factory?

A Yes, sir.

Q During the first year that you were there did you handle any of his business transactions?

A Only in a small way.

Q What do you mean by a small way?

A Why, under his direction, and of correspondence and otherwise; I took no charge.

Q What I am getting at is, did you do clerical work or did you do work which he left you to carry out for him?

A I started on simply clerical work.

Q That is, taking his dictation of letters?

A Yes.

Q And drawing any checks for him?

A He drew the checks.

Q And he signed all his papers that were necessary for signature, did he not, at that time?

A Yes.

Q At that time did you know what stock Mr. Merriam held in the Shoe Company?

The Court. You mean at the time she went there permanently?

Q At the time she went there permanently, in 1897?

A I didn't know definitely what he had.

Q Did you know what the capital of the corporation was?

A Yes.

Q And you also knew that he had the controlling interest in it, did you not?

A Yes.

Q That is, he had enough shares to exceed a majority?

A Yes.

Q And that therefore he could dictate what was done at the factory, if he desired?

A Yes, sir.

Q Did you know whether he was an officer and director at that time?

A Yes, sir, knew he was president.

Q And you knew he was an officer and director from that time down to the date of his death, did you not?

A Yes, sir.

Q Did you know where he kept his certificates of stock in this company in 1897, before these envelopes were delivered to you, first delivered to you?

A I didn't know where they were.

Q Did you at that time have access to the safe?

A I had my compartment.

Q I mean access to the safe itself?

A Yes.

Q How did you obtain that access, if you desired it?

A He gave me permission to get his papers.

Q He gave you the key, did he not?

A Yes, sometimes.

Q And you got your papers or his papers and returned him the keys?

Mr. Hardin. That is not what she said. I object.

The Court. You may ask her if she did that way.

Q Now, what did you do with the key on these occasions when he gave it to you?

A At that date I returned it to him.

Q And this was in 1897?

A And 1898.

Q And during that time if you wanted papers, or if he wanted papers and he didn't get them, why he would give you the key and you would get them and then you would return the key to him?

A Yes.

Q Where did he keep that key, if you know?

A Some of the time I know he had it in his pocket.

Q And you don't know where else, if not in his pocket?

A No, I don't know.

Q Had he talked with you—just give me the date again, if you can, or as near as you can, that this first transaction with regard to these envelopes took place?

A In September, perhaps October of 1897.

Q September or October, 1897?

A Yes.

Q Was there anything said about this transaction before the day that it occurred?

A No, sir.

Q Had Mr. Merriam been talking about making any disposition of his stock?

A Well, I had heard him sometimes discuss it.

Q To whom?

The Court. To whom did he talk?

Q Yes?

A I heard him, yes.

Q To you?

A Yes.

Q You did not hear him talk about it to anybody else?

A No, sir.

Q Mr. Merriam was rather jealous of the affairs of the company, was he not, that is, I mean about letting them be public?

A Yes, he was quite secretive.

Q And he did not discuss these questions about his holdings of stock or his dividends or other matters with other people, did he?

A No, he managed—he liked to act out his own plans.

Q Do you know from him whether he had talked with anybody about this transaction with the envelopes the first time?

A I don't know whether I could remember whether it was the first time or not.

Q I am asking you with reference to the first time?

A I don't remember.

Q You do not remember that he discussed, that he had stated to you that he had discussed this question with anybody else?

A I do not remember.

Q Now, what was the condition of his health, exactly, on that day when the first envelope transaction occurred?

A I don't remember as there was anything unusual, he seemed to be in good health.

Q He seemed to be in the same health he had been previous?

A Yes.

Q Did you know anything at that time with regard to his account with the company, did you know anything about his having an account with the company and business transactions from that account for the payment of his bills?

A I don't remember just how much I knew, of course I knew some facts, but I couldn't say that I knew—of course I didn't know all.

Q Did he have an account that you knew, I mean that you handled for him?

Mr. Hardin. When?

Q At this time, at the time of the first delivery, check book and bank account?

A He handled his own check books.

Q He handled his own?

A Yes.

Q You didn't handle that for him?

A No, I hadn't anything to do with his check books.

Q State just what started the discussion, or the incident of this first transaction of the envelope?

A I don't think there was any discussion; he brought them to me. Perhaps I don't understand the question.

Q I wanted to get what commenced the interview, any incident?

A Concerning the envelopes?

Q Yes.

A That is what I understood.

Q How did it commence, where did it commence?

A Oh, in his office where the safe was.

Q In his office where the safe was?

A Yes.

Q You were not in the habit of being in there with him, were you, that is, I mean it wasn't a general meeting place where you sat or talked?

A No, but it wasn't unusual.

Q You met there?

A Yes.

Q Or did you go in there with him at his request?

A Well, at his request I was with him.

Q You went in that room at his request, didn't you?

A Yes.

Q And what did he say, how did he start the conversation? What did he ask you to go in there for?

A He brought, he had this envelope that he showed me there; I didn't notice where he got it or anything; he introduced the subject by showing it to me, a large envelope.

Q He had not spoken to you about the matter until he showed you the envelope?

A No.

Q And where did he show you the envelope, in the room?

A In the little office where the safe was.

Q And you say you went in the room with him, though?

A Yes; he must have asked me because I wouldn't have gone unless I had been in there first and he gone in.

Q Well, do you recall which?

A I don't seem to remember, I don't remember.

Q And he showed you this envelope, you say?

A Yes.

Q That was the large envelope?

A Yes.

Q And whatever little envelopes there were were in that envelope at that time, were they not?

A Yes.

Q And what did he first say in reference to it?

A I was trying to recall the testimony I gave this morning. Why, he explained to me that he had this large envelope, and that—

Q (*By Mr. Sheehan.*) Are you giving the testimony you gave this morning, or are you giving your recollection of it?

A I can't recollect it, so I am giving it off-hand, I am giving certain facts.

Q (*By the Court.*) Tell what you remember about it now?

A That he brought me the large envelope and showed me that there were eight small ones within, directed to eight different individuals, and that he directed that I take charge of them, put them in my own—

Q I ask you what he first said to start the conversation; he had the envelope there with the smaller ones in the big envelope?

A Yes.

Q Now, what did he say to start that conversation?

A He spoke of his Shoe Company stock, and that he proposed to distribute some among his relatives.

Q He spoke of his Shoe Company stock and that he proposed to distribute some among his relatives?

A And that I was directed to see that they had it.

Q And he directed you to make the distribution, is that it?

A I don't think I have got it—my memory don't —I don't think that is quite the full story, but that is the idea.

The Court. Tell the full story.

Q I am not asking for the full story yet; I am asking you how it started?

A By his explaining that he had a plan about some shoe stock he had, and that he had arranged it in this large envelope with directions, and that I could see who the individuals were, that they were, and distribute it at my discretion.

Q Did he say how much stock he had there?

A No, sir.

Q He said some of his shoe stock?

A Yes.

Q Didn't you know that he had provided for the entire distribution of his shoe stock?

A I didn't know.

Q Didn't he tell you that?

A I don't think he did, on the first occasion.

Q You don't think he did on the first occasion?

A No.

Q Who took the small envelopes out of the big envelope?

A He did.

Q And that was after he had started the conversation?

A Yes.

Q And what did he do with the smaller envelopes?

A He opened them up so I could see who they were.

Q Opened the inside of them?

A Oh, no, just the address.

Q They were sealed?

A They were sealed, the small ones were.

Q And what did he do with them; you said he opened them out; what did he do with them afterwards?

A After, he just showed them to me, he put them back in the larger envelope.

Q Did he lay them down or show them to you in his hand?

A I think he laid them right on the little table so I could count and make sure there was eight.

Q All laid out?

A Yes.

Q And how many were there?

A There were eight.

Q And what endorsements did they have, if any?

A Shall I give the peoples names to whom they were addressed?

Q Yes, please.

A They were John J. Merriam and myself, and Olin L. Merriam, and Miss Nellie J. Merriam, Maybelle Buffington and Warbasse, Tozer and G. L. Dutcher.

Q And did he say to you anything about the contents of them after he laid them out?

A No, sir.

Q Had he before that said anything?

A I don't remember that he did; it didn't make any impression, if he did say anything I have forgotten it.

Q After he laid them out what was done?

A He collected them together again in the large envelope.

Q Put them in the large envelope?

A And gave it to me.

Q Did he seal the large envelope?

A No, sir.

Q What was written on the large envelope?

A Certificates of stock of the H. W. Merriam Shoe Company, they are the property of and belonging to the several persons as addressed. Henry W. Merriam. That may not be the exact words, but that was the import.

Q I would like you to give me, as nearly as you can recollect, the exact words, as I understand this envelope was not preserved, was it, this first envelope?

A. Neither of the large ones.

Q I mean the first one was not preserved, was it?

A I haven't seen it.

Q Now, I would like you to give me, as near as possible, the endorsement; is that as near as you can give it?

A That is, I think, as near.

Q Now, what else did he say after he put these back in the envelope?

A He said he gave them in charge to me, directed that I put them in my drawer and see that they were delivered.

Q Did he say anything else?

A I don't recollect.

Q Did he tell you when to deliver them?

A That has passed my memory.

Q He told you not to deliver them at that time, didn't he?

A I don't know as I asked him the first time, or he said anything.

Q He asked you to deliver them to the persons named on the envelope?

A Oh, in a general way, yes.

Q What did you say to that suggestion?

A He didn't say that I better make an immediate delivery.

Q You said he didn't say anything about it, didn't you?

A Yes; my memory is mixed about that.

Q I don't want to hurry you, take your time in answering these questions. Did you say anything to him about the advisability of doing that, carrying out this idea?

A No, sir.

Q Did you suggest to him that he ought to talk with somebody else before he did it?

A No, sir.

Q Did you suggest to him that his wife ought to be consulted?

A No, sir.

Q Or ask him if he had consulted his wife?

A No, sir.

Q Didn't you think he should?

Mr. Littlefield. I object to that.

The Court. Yes, it is objectionable.

Q What did you do with them after this interview?

A I locked them up in my personal drawer.

Q Did he see you do it, or had he gone out of the room?

A I think he saw me do it.

Q He knew they were in the safe?

A He knew they were there.

Q And he at that time had the general custody of the keys of the safe, did he not?

A Yes, sir.

Q (*By the Court.*) Had the key to the outside door?

A To the outside door, and his private drawer.

Q Now, at that time did you know anything about the contents of his will?

A No, sir.

Q Had he ever discussed his will with you?

A Some parts of it he had.

Q What part?

A Where he donated to charities he spoke of it.

Q Do you recall what charities?

A They are almost too numerous to remember, unless I had them noted down.

Q He told you of a great number of charities that he had provided for?

A A number, yes, sir.

Q Could you give an estimate of the number? It is pretty hard to remember, I suppose?

A Yes, sir.

Q And how long did these stock certificates remain undisturbed in this safe?

A About six months.

Q That would bring it in the early spring of 1898?

A That is correct.

Q In the meantime what had happened?

A His wife had died.

Q She had died?

A Yes.

Q Did you know that he had made any special provision for her in his will before she died, that is, did you have knowledge before she died?

A Yes.

Q You understand what I mean, that before she died did you know anything about the provision for her in his will; I don't mean that you found out the information afterwards, but I mean before she died if you had any knowledge on the subject?

A Not specific, only one or two items.

Q I mean about his wife?

A About his provision for her.

Q What did you know about that provision?

A That he had left some money in trust to be divided to charity after her death.

Q In trust for her during her life?

A Yes, a life interest.

Q Life interest, and to charity after her death?

A That is the way I remember it now.

Q Did you know of any bequest to yourself in that will?

A My brother.

Q That is, before his wife died?

A I don't think I did.

Q After his wife's death, did he make any—do you recall his executing any codicil to his will?

A He did.

Q Did he execute that before the package in the safe was disturbed?

A He did.

Q He executed the codicil before that?

A Yes.

Q And do you recall the occasion of the execution of the codicil?

A I was not present, did not know anything about it until afterward.

Q You were living there at the house, were you not?

A I was living at the house.

Q At the time?

A He told me about it immediately afterward.

Q And the codicil had been executed in the house, had it?

A I don't know where it was executed, but I suppose it was.

Q And he told you about the execution of his codicil?

A Yes.

Q And what did he tell you about that?

A That he had revoked the clause in relation to the shoe company stock and thus released it from any connection with the will, and so it was open for his own purposes, if he wished to give it otherwise he could.

Q Then he gave you to understand that theretofore he had provided in his will in regard to that stock before the execution of the codicil?

A Before the execution of the codicil.

Q Did you understand what stock he had released?

A I don't know what I knew; I don't remember now.

Q Did he at any time down to the time he had this talk to you with reference to his will talk to you, I mean executing the codicil, talk with you in regard to this envelope that was in the safe?

A I don't think I got the first part of that question.

Q (Question read.)

A No, sir.

Q Never mentioned that fact?

A No, sir.

Q Go on and give us the balance of that conversation in regard to the codicil, if there was any—you said he referred to having made the change about the stock?

A And about the death of his wife, and he had no children, and that it was a final, he felt it was final.

Q What conversation was this, at what time, that you have just been talking about?

A You asked what other conversation we had, as I understood it, in relation to this codicil?

Q Yes; when did that occur, when he announced to you that he had made the codicil?

A When did he announce it?

Q When did he tell you that he had made this codicil? You say you were not present but you knew of it?

A I think it was the last of January, early in 1898.

Q Directly after the execution?

A Probably directly after.

Q At that interview did he say anything about the stock in the safe or these envelopes in the safe?

A I think it was at that interview he mentioned about the stock in the safe.

Q And what did he say about that?

A That he asked if I had it in my possession and I said I had; he explained why he would like—

Q (*By Mr. Sheehan.*) Tell what he said?

A He explained that he would like to, he had made this change in his will, that his wife had died, and he had no children and he would like to make final distribution of the Shoe Company stock.

Q He had not made any provision for his wife in this stock, had he, that he gave you, if you know?

Mr. Hardin. I object to that question; I don't know what Mr. Smith means by it.

Mr. Littlefield. I object to that because I don't understand it myself.

Q Did this conversation occur at the time you returned to him the package containing the other envelopes?

A It is pretty hard to say whether it was the same day or not, but it was practically near the time.

Q Was it the time that he asked you to return it to him?

A At the time he asked for it he gave this explanation.

Q And did you return it at that time?

A I did.

Q And as I take it, that was in January?

A Yes, as near as I recollect; it was after the execution of the codicil; I don't know what date that was.

Q (*By the Court.*) There was a conversation between you and Mr. Merriam, in which he asked you if you still retained the stock certificates in your possession; you stated that, didn't you? He asked you at one time if you still had those papers in your possession?

A Yes, at one time, yes.

Q (*By the Court.*) Now I would like to fix a date, or the relative date of that inquiry; do you know whether that was before or after the codicil was executed?

A It was after the codicil was executed.

Q (*By the Court*) She said at one time Mr. Merriam asked her if she, she just testified at one time Mr. Merriam asked her if she still had the papers in her possession; I wanted to locate the time of that inquiry; was that before or after the codicil was executed?

A After.

Q You returned these certificates or this package to Mr. Merriam at his request?

A I did.

Q Why did you return them to him?

A He asked for them and I wanted to accommodate him, as I had them.

Q You felt it your duty to return them, if he asked for them?

Mr. Littlefield. I object.

Q Did you understand that you held those under his direction at that time?

A Subject to his direction at that time.

The Court. You mean at the time she delivered them back?

Q At the time he asked for the return of them, after she first received them.

Mr. Littlefield. I object.

The Court. Yes, that is objectionable. I take it, that in order to prove a delivery in this case we will have to get at the facts and not what people had in their minds.

Q Did you own any stock or hold any stock at that time, I mean not considering the package that you had received from Mr. Merriam; outside of this did you hold any stock in the Merriam Shoe Company?

A I did.

Q At that time?

A Yes, sir.

Q Did you receive dividends on that stock?

A I felt I did, yes, sir.

Q And how did you receive them?

A Through my brother.

Q (*By Mr. Littlefield.*) Which brother, please?

A Henry W. Merriam.

Q You received them from him?

A Yes, sir.

Q How were the checks made payable, if they were paid by check?

Mr. Littlefield. I object to the assumption.

Q How were they paid to you?

A Sometimes by check and sometimes in cash, just as I wished.

Q And these dividends covered how many shares?

A Twenty, I think, at that time.

Q And they were standing in your name?

A I am not positive what date you refer to.

Q I am referring now up to the date when he asked you to return this envelope the first time?

A Yes, twenty shares, as I remember.

Q You held twenty shares?

A Twenty shares.

Q And that was in your name?

A Yes.

Q And where did you have the certificate?

A I had it on my personal, in my personal drawer in the safe.

Q You say you received your dividends upon the twenty shares?

A Yes, sir.

Q From Mr. Merriam?

A Yes, sir.

Q Did you receive any dividends on any other stock from Mr. Merriam up to the time he asked you to return this package?

A Only on the stock I owned.

Q The twenty shares?

A Yes.

Q And did you ask him for any other dividend for any other stock?

A No, sir.

Q You made no claim to him that you owned any other stock?

A No, sir.

Q Now, the package was turned over to Mr. Merriam, as you had received it?

A Yes, sir.

Q And what did he do with it, if you know?

A I know he took it, and I did not investigate what he was doing.

Q Do you know whether or not he put it in the safe?

A I don't know; he had a key, he could; he had a key to the safe.

Q He had the only key, didn't he?

A We each had keys to the outside door.

Q You each had keys all the time?

A Yes.

Q I thought you told me you would go to him to obtain the key sometimes?

A That was to the inside, his personal compartment I was talking about on that occasion.

Q How long did he keep the package?

A Two or three weeks, I think, as near as I can recall.

Q At the time you returned to him did he say anything about what was in it, in the envelope?

A Why, he knew, I could—

Mr. Sheehan. Never mind what he knew.

Q (*By the Court.*) Did he say anything?

A He saw me read it, and he said I would find the different parties.

The Court. She don't understand the question.

Q At the time it was returned by you to Mr. Merriam, the large envelope, did he say anything about its contents, as to what was in it?

The Court. At the time you gave it back to him?

A Yes.

Q What did he say was in that?

A He opened the envelope and showed me nine.

Q Showed you how many envelopes? You received the envelope the first time and put it in the safe.

A Yes.

Q And then after the codicil was executed, you withdrew it from the safe at his request?

A Yes.

Q Now, at the time you handed it to him, when you withdrew it from the safe did he say anything to you with regard to what was contained in the envelope?

A No, sir.

Q Did he mention the fact that it was the stock of the company?

A No, sir.

Q Or talk with regard to the stock?

A He didn't talk about it to me.

Q And what did he say he wanted it for?

A He wanted it because he had made the change in his will, and he would like to make a change in those envelopes.

Q Did he say that this was to act in conjunction with his will, or anything of that kind?

A No, he only mentioned that the death of his wife, and several reasons why he was wishing to make a change.

Q And in effect told you that he was going to make a different disposition of what he had already made in putting the envelopes in there the first time?

A Yes.

Q Now, how long did he keep them, I mean how long was it before he presented this envelope the second time with the smaller ones?

A Two or three weeks.

Q And where was it that this second occasion started, I mean where did the conversation or transaction start?

A In the small office where the safe was.

Q Were you called in?

A I was called in.

Q By him?

A By him.

Q What did he have with him, anything?

A He had a large envelope.

Q In his hand?

A In his hand.

Q And what did he say?

A He opened it and spread it out and said, "These are nine envelopes, instead of eight; in my changes I have added one," and asked me to look at the names, and then said there was one for me.

Q In looking at these names did you notice any changes in the names on the first eight envelopes?

A Why, I think the right was—there was an extra one, it included another party.

Q Did you notice that at that time?

A I think I did; I knew there was nine.

Q That another party was included that was not in the other?

A Yes.

Q Do you know whether or not these were the same envelopes that you had returned to him?

A They must have been, because the eight were sealed, and these were sealed.

Q I mean were any of them the same?

A I don't know whether they were all charged.

Q And did he say anything with regard to the reason for this new envelope, this ninth envelope?

A I don't remember.

Q Now just what did he say to you with reference to them? I think they were spread out, he had laid them out?

A Yes, sir, and he called my attention to them and the attention to my name.

Q Your attention to all of them?

A To all of them, and said that I could open mine then and there.

Q What did he say with regard to all of them when he called your attention to them?

A That they were all in my care, that he would give them all into my hands for distribution.

Q And that was before he mentioned yours?

A I couldn't say whether it was before or when, but it was on that occasion.

Q Now, what did he say, specifically with regard to your envelope?

A He said I could open it, and I did, and thanked him for what I found therein, and he said he hoped I might live to enjoy it.

Q He hoped you might live to enjoy it?

A Yes, and enjoy it.

Q Well now, which, you said first that he said that he hoped you might live to enjoy it, now is that what he said?

A I guess, I think it was, and enjoy it, I don't know the difference.

Q Mrs. Huntington, have you discussed that particular feature of your testimony since you testified this morning, with anybody?

A What about?

Q About what he said in reference to your envelope?

A I may have heard about, someone asked which way it was, I think.

Q During the recess?

A And I didn't understand, and I don't now, what the difference is.

Mr. Sheehan. Were you asked about it during the recess?

Mr. Hardin. One counsel at a time.

The Court. What is your answer?

Q Were you asked about it during the recess, is the question?

The Court. To-day?

A I think I was asked, and I couldn't remember what I had said.

Q You can't remember?

A This is my first occasion on the witness stand, and I get a little confused by the words.

Q Is it a matter of fact that you do not exactly remember which was used?

A Why, I don't know as I would want to testify that I said "and" or whether I said "to."

Q You are in doubt yourself?

A I am in doubt.

Q You are in doubt as to what he said?

A I am in doubt as to what I said this morning.

The Court. The question is what your brother said.

Q Whether he used the word "and" or the word "to"?

A I think, as I remember it, it was "and."

Q Then why did you say "to" this morning?

A I didn't know that I did, until it was suggested that I might.

Q Now, you took out your certificate and examined it, you noted the number of shares it was for?

A Yes, sir.

Q Did you express to your brother any surprise at the large number of shares?

A I expressed pleasure.

Q How?

A I suppose I expressed some pleasure that he had remembered me.

Q And surprise?

A I suppose I was somewhat surprised.

Q Did he say to you at that time or at any other time that he discussed with anyone else this idea of giving you these shares and the delivering of the other envelopes?

A I believe in a general way he had spoken to one or two persons.

Q Did you know of any person he had spoken to about it?

A Mr. W. L. Dutcher knew of it.

Q Who?

A W. L. Dutcher.

Q Had you talked with W. L. Dutcher about it?

A I had not, previous.

Q You had not previous?

A No.

Q And did you suggest to him at that time that he ought to carefully consider what he was doing?

A I made no suggestions to him.

Q And you made no suggestion that he seek independent or other advice?

A No, sir.

Q You gave him no advice on the subject whatever?

A No, he was independent.

Q You obeyed his instruction?

A I obeyed his instruction.

Q And what did he tell you to do with these envelopes that were laid out there or that he had laid out there?

A To deliver them to the parties at my discretion.

Q He left the matter to your discretion as to delivering to the parties named on the envelopes?

A Yes, sir.

Q What did you next do, or he do?

A He collected the envelopes together and put them in a large one, the nine envelopes, and gave them into my hands.

Q And one of these envelopes was addressed in his handwriting with your name, and open, and he put that in the envelope?

A Yes.

Q But the certificate was in the opened envelope, is that right?

A Yes.

Q And on the back of this envelope was what endorsement, the big envelope?

A The certificates of the Shoe Company, the H. W. Merriam Shoe Company, belonged to the various

parties as expressed on the addressed envelope; that is not the exact quotation but that is the thought.

Q And it was signed by him?

A Signed by him.

Q And the envelope left unsealed, the big envelope?

A Yes.

Q And did he at that time say anything in regard to the amount of stock that was in the other envelopes?

A No, sir.

Q Did you ask him?

A I did not ask him.

Q Did you say anything with regard to the fact that it might interfere with the management or control of the company?

A No, sir.

Q He handed this envelope to you?

A Yes, sir.

Q What did he say that you were to do with the envelope when he handed it to you, if anything?

A You mean the large one?

Q Yes, the large one; he gathered them up, as I understand it, and put them in the large envelope?

A He requested that I take them and take charge of them with my things in my drawer and look out for them.

Q He wanted you to take them and look out for them?

A Yes, sir.

Q Did he mention where you were to put them?

A He requested that I deliver them at my discretion.

Q I say, did he tell you where you were to put them, keep them?

A In my personal drawer.

Q He specified that place?

A Yes, sir.

Q Did he say anything about the time of the delivery?

A He suggested that I do it as quietly as possible, as he did not feel able to have public announcement, as people might bring—as he did not feel able to listen to what might be brought to him in the way of excitement.

Q Now, as a matter of fact, he feared a shock, did he not, another shock?

A I don't know what he feared; he did not like to have the public talking over it.

Q Didn't he conduct himself so as to avoid any sudden shock?

A Well, he tried to avoid great excitements I think.

Q And the reason he gave you for not doing anything with the stock at the present time was that he did not want to be personally disturbed?

A That he gave me discretion, if I could do it quietly it was all right, at my discretion to deliver them.

Q Not at that time, though?

A Not at that particular date.

Q I mean, he did not tell you if you could deliver them quietly to do so at once, but he told you to put them in the safe for the present, did he not?

A That day, yes; I was asked that very day to put them in.

Q And in response to that direction you put them in the safe?

A Yes, sir.

Q And you never disturbed them from that time until the time of his death?

A I let them be, except I put my own in a sealed envelope.

Q When did you do that?

A The day I received them, or the next, immediately.

Q Between the day you received them and the time you put yours in a separate envelope, where did you put them?

A It didn't take long to change, I put it right in another envelope.

Q You did it right away then.

A Yes, sir.

Q And you wrote your name on the envelope?

A Yes, sir.

Q And put the certificate in the envelope?

A Yes, sir.

Q And sealed it up?

A And sealed it up.

Q And put it in the big envelope?

A Yes.

Q And then put it in the compartment in the safe?

A Yes, sir.

Q Did he see you put it in the compartment in the safe when you put it in?

A He knew it was there.

Mr Hardin. When, the first or second time?

Q Did you put them in this compartment in the safe more than once, this package?

A Why, probably I put them in and out a half a dozen times or more, with my own papers, to re-arrange.

Q Now the first time you put them in this compartment did you put your own in with them?

A Yes.

Q And you had at that time written out your envelope with your name on it, and put the certificate in that envelope and sealed it in?

A You are asking on the second occasion?

Q On the second occasion?

A Perhaps I didn't catch the first of it.

Q Let me explain again what I want to ask you. After he delivered or handed this package to you your certificate was in an unsealed envelope, it was an envelope that was open?

A Yes.

Q Now, did you put the whole bundle in the safe for the first time before or after you endorsed your separate envelope?

A I put it in before, I think, perhaps in his presence.

Q In his presence?

A Yes, sir.

Q And then subsequent you took it out again?

A Yes. I thought of his direction that my papers should be sealed, and my name outside led me to change and get a whole envelope.

Q And when did you do that, if you recall?

A Well, as I said, very soon, either that day or the next.

Q (*By the Court.*) In the meantime where was your certificate—the certificate bearing your name?

A It was in the open envelope.

Q (*By the Court.*) And in no cover of its own at all?

A In the damaged envelope.

Q (*By the Court.*) It was in the damaged envelope?

A Yes, I slipped it back, or he did, where I had torn off the end.

Q (*By the Court.*) And then a short time afterwards, possibly the next day, you got a new fresh envelope, and you wrote your name on it, and made an endorsement on it, and you took the stock out of the damaged envelope and put it in the new envelope and sealed that, and put the new envelope in the big envelope, and put the big envelope right in the safe, is that right?

A Yes, that is right, that is the right story.

Q Now, after you had done this did you disturb that envelope at all, other than in taking out your own papers, handle it?

A I have no memory that I disturbed it.

Q And it was still there at the time of Mr. Merriam's death?

A Yes, sir.

Q Now, Mr. Merriam died when?

A October 26, 1900.

Q You received a dividend, did you not, in October of that year from the company or from Mr. Merriam?

A Of what year?

Q 1898?

A No, sir, there was no date given.

Q You understand, do you not, or you have testified that this second time that you received this package of envelopes from Mr. Merriam occurred in 1898?

A Yes, sir.

Q Shortly after the execution of his codicil?

A Yes, sir.

Q Now, in the fall of 1898 you received a dividend for the twenty shares of stock which you held in the Shoe Company, did you not?

A Yes, sir.

Q And from whom did you receive that dividend?

A From Henry W. Merriam.

Q And do you remember the amount?

A I have forgotten whether it was ten or fifteen per cent.

Q I mean the amount of money?

The Court. How many dollars did it net you, did it bring you?

A I think $300, I think it did.

Q It was the dividend on the twenty shares, was it not, that you received?

A Yes, sir.

Q Did you receive any dividend on those 568 shares that you had in the safe?

A No, I didn't apply for it.

Q Did you ask your brother for it?

A No, sir.

Q Did he say anything to you about his keeping it?

A He made no comments on it.

Q Did you attend the annual meeting of the company in the fall of 1898?

A I was not there.

Q Did you attend any of the annual meetings of the company?

A No, sir.

ADJOURNED UNTIL TOMORROW.

December 13, 1912.

IN CHANCERY OF NEW JERSEY.

Between
FRANCIS J. SWAYZE, as executor and trustee, etc.,
Complainant,
and
HARRIET M. HUNTINGTON and others,
Defendants.

Continuation of examination, pursuant to adjournment, at the place and in the presence of the parties as before, on December 13, 1912.

HARRIET M. HUNTINGTON, resumed for

Further cross examination by Mr. Smith.

Q Mrs. Huntington, you received a power of attorney from Mr. Merriam, did you not?

A Yes, sir.

Q Is this the power of attorney?

A Yes, sir.

Mr. Smith. I offer that in evidence.

Marked Exhibit Lane Infant 1.

Q Mr. Merriam did not attend the last annual meeting of the Henry W. Merriam Shoe Company, did he, do you know?

A I don't know, I don't remember.

Q Do you remember whether or not you witnessed a proxy for someone to attend that meeting, or to attend a meeting?

A I don't remember.

Q Have you no recollection?

A No recollection.

Q Now I want to ask you if you knew the contents of the will and codicil of Mr. Merriam at the time you handed this envelope containing the nine envelopes to Mr. John J. Merriam, and to Mr. Justice Swayze?

A Partially.

Q Had you examined the will to read it through?

A No, sir.

Q Did you know that provision had been made as to yourself?

A No, sir.

Q In the will or codicil?

A No, sir.

Re-direct examination by Mr. Littlefield.

Q You were asked whether you were present at any meeting of the stockholders of the H. W. Merriam Shoe Company. Did you ever receive any notice of any meeting of the stockholders of that company, so far as you remember?

A I don't remember.

Q Were there ever any notices given of the meeting of the stockholders of the H. W. Merriam Shoe Company so far as you know?

A I never saw any, no, sir.

Q You did have some stock standing in your own name?

A Yes, sir.

Q And you did not receive any notice?

A No, sir.

Q You never knew that any meetings were being held?

Mr Smith. I object.

Q Did you know that any meetings of the stockholders of this company were being held during that period?

A I had heard that they were.

Q Had you any knowledge of it?

A I had not knowledge of it.

Q At one time something like in the neighborhood of a year prior to the death of Mr. Merriam I understand you to say he asked you if you still had the envelopes in your possession?

A Yes, sir.

Q And you told him that you had?

A Yes.

Q In the first place, was anything else said by him at that time?

Mr. Smith. I think she testified that there wasn't anything said.

Mr. Littlefield. Suppose she did; this is re-examination.

The Court. He has got a right to examine on it.

Mr. Smith. This is rebuttal.

Mr. Littlefield. This is re-direct.

Q The question is whether anything else was said. Now just exactly whether I asked her that question on the direct I do not remember.

The Court. Mr. Smith, you opened that question by inquiring of the witness for part of the conversation. The other side has a right to bring it all out.

Mr. Smith. Your honor, they asked on their direct, recurred to this conversation and brought it out on direct, and she said there was nothing else said, except he asked her if she still had it, and that is all she said. Now she has left the stand and is brought back here on re-direct and is asked to give a further conversation.

The Court. I will take the testimony and you may have an opportunity to cross examine on it if you like; that will save everybody's rights.

Q Now, please state what, in addition to what you have already stated, Mr. Merriam said at that time, if anything. You understand the question?

A I think I do.

Q Well, then, if he said anything further at that time please state what he said?

A He requested me to remember that I was to deliver them sure, without fail.

Q You have on several occasions in cross examination, if I remember, referred to a statement of Mr. Merriam's that you were to exercise discretion. Now, I would like to inquire first whether that was the language that Mr. Merriam used, or whether it is your construction of the language?

Mr. Smith I think this is still objectionable on re-direct.

The Court. Let the witness answer the question. You may cross examine on it if you like.

Q (Question read.)

A Use discretion as to the time.

Q No. The first question is, is it your recollection that he used that term in the conversation; did he use that term?

The Court. The word "discretion"?

Q The word "discretion"?

A Sometime in the conversation the word was used.

Q Now, will you be kind enough to state to what phase of the matter the term "discretion" referred, and to what he referred to in his conversation, if I make myself clear.

Mr. Smith. I think she ought to give the conversation again; I don't think that is quite right, to have her construe his language.

The Court. That is not the question. The question is whether Mr. Merriam used the word "discretion," or whether that was merely her interpretation of words that he did use.

Mr. McKenna She has answered that and said that the word "discretion" was used; now he asks her to what phase of the conversation was the word "discretion" addressed.

The Court. No, it wasn't "phase of the conversation," it was phase of the transaction.

Mr. McKenna. Yes, and that part to such a question we object to.

The Court. I think it is a proper question. You may answer.

A Phase as to the date of delivery, I could use my discretion as to when I was to deliver them.

Re-cross examination by Mr. Smith.

Q You knew that dividends were declared at the annual meetings of the company, did you not?

A Sometimes I did and sometimes I was not present to hear any discussion.

Q Were you present at any annual meeting?

A No.

Q But you knew of them?

A Sometimes.

Q And you knew when you got a dividend there had been an annual meeting, didn't you?

A Yes, sir.

Q And you received the dividends on the twenty shares of stock which you held after those meetings?

A Well, not directly.

Q Well, through Mr. Merriam?

A Through Mr. Merriam.

Re-direct by Mr. Littlefield.

Q With reference to the dividends that you received and their connection with an annual meeting, I feel it my duty to call your attention to the fact that the evidence in the case already shows in one year there were at least three dividends. Now do you wish to be understood—

The Court. Be careful about leading her.

Q Well, I will ask you this. Did anybody ever notify you that there was to be, or that there had been an annual meeting?

Mr. Smith. I think she has thoroughly testified to that on both my examination and upon Mr. Littlefield's.

Mr. Littlefield. I propose to eliminate this confusion; it is my purpose to eliminate the confusion which no doubt brother Smith unintentionally has injected into the case in relation to the meetings and annual dividends.

The Court. Your question now relates to dividends and the connection between meetings and dividends.

Mr. Littlefield. Yes.

The Court. Go ahead.

Q Did anybody ever notify you that any meeting of the stockholders was to be held to declare dividends?

A No, sir.

Q Did anybody ever notify you specifically that any meetings had been held at which dividends were declared?

A I frequently heard of such meetings, the result of them.

Q The result—well now, what did you hear?

A Why, I heard the amount of dividend declared.

Q The amount of dividend declared on how many occasions?

A Oh, not on every occasion, just as it happened.

Q From whom did you hear the amount of dividend declared?

A Henry W. Merriam sometimes told that in the family.

The Court. Do you think this is competent testimony?

Mr. Littlefield. I think it has gone beyond the point now of being material; as far as we are concerned we have exhausted the subject.

Q Did you have any knowledge of any meetings at which dividends were to be declared, or at which dividends were declared, except such as you have just stated?

A I don't remember any.

Re-cross examination by Mr. Sheehan.

Q You were not a director of the Merriam company, were you?

A No, sir.

Q And you would not be likely to receive any notice of the declaration of dividends, would you?

Mr. Littlefield. That I object to, what she would be likely to.

The Court. Well, the law of New Jersey declares that directors shall pass dividends and not the stockholders, and the question is a wholly immaterial question anyhow.

Q You went to live with your brother some time in 1897, did you not?

A Yes, sir.

Q That is, when you lived with him permanently?

A Yes.

Q Now, what time did you go there?

A In the spring, probably in April or May.

Q Can't you fix the date?

A Not the day, I didn't have a diary, keep one.

Q You are unable to fix the date?

A Yes.

Q Do you know where counsel obtained the date of the tenth day of April, did you give it to him?

A I may have looked over records.

Q I don't ask you what you may have done; I ask you if you know where he obtained that date?

A I presume from some record.

Q I asked you if you knew?

A No.

Q You don't know where he obtained that date?

A No, I don't know how he obtained it.

New Jersey State Library

The Court. Is it so stated in the pleadings?

Mr. Sheehan. Yes; it is stated on or about the tenth day of April, 1897.

Q Now, when you entered his household he requested you to take the management of his domestic and business affairs, did he?

A To assist him.

Q What is that?

A He requested me to assist him.

Q To assist him in the management of his domestic and business affairs?

A Yes, sir.

Q And you looked after his household affairs from that time on, did you?

A Gradually took it up.

Q And you assisted him in his business affairs?

A Yes, sir.

Q That is, he did not give up entirely his business affairs?

A No, sir.

Q He still maintained his interest in his manufacturing plant?

A He liked to have a helper.

Q Was that the only business with which he was connected?

A The shoe plant, and he had other business.

Q I mean that was his principal business, was it?

A His principal one.

Q And he was president of the company at that time?

A Yes, sir.

Q Well, now, did you do any work in connection with that business with him?

A No, sir.

Q There was nothing to do?

A Nothing to do.

Q Well now, what particular business, outside of the domestic relations, did you do for him?

A He had mortgages, a good many to be looked after, interest collected, and correspondence, and notes to be settled some times.

Q And that was your principal business, looking after his mortgages and notes, and collection interest, etc.?

A Yes.

Q That was principally what you did for him. And your business, I understand you to say, was not in relation to the Shoe Company?

A No, sir.

Q Did you have the entire charge of his mortgages and notes?

A No, sir.

Q There was some that he reserved himself, some part of that he reserved himself?

A He gave directions, he exercised authority.

Q He exercised authority, and you simply obeyed his directions in regard to it?

A Yes.

Q Now, I want to ask you to describe a little more particuarly the safe. Now, I repeat from my memory what I think you testified to yesterday, and I will ask you—I think you said there was an iron safe there in this room upstairs, is that right?

A Yes, sir.

Q And that there were several compartments in the safe?

A Yes, sir.

Q Some of them were open pigeon holes and others were closed by a door or drawer?

A And locked, yes.

Q (*By the Court.*) Was it a drawer or a little box inside the safe that you had?

A It was a drawer.

Q (*By the Court.*) A drawer that pulled out?

A Yes, sir.

Q Now, how many open pigeon holes were there there in the safe?

A I couldn't state the exact number.

Q Could you give us an idea?

A There might have been four or five.

Q And how many drawers were there?

A Two.

Q Two drawers?

A As near as I recollect.

Q And were there any other compartments, in addition to those four or five pigeon holes, and two drawers?

A Yes, sir.

Q What were the other compartments?

A There was one with a sort of a secret lock arrangement, that was not an ordinary key used with it.

Q Was that a drawer or a box, steel box, what was it?

A It was beside pigeon holes, it was quite large, in the nature of a box.

Q Did it have a door, or was it a drawer that pulled out?

A A door.

Q Now, were there any other compartments in that safe?

A No, sir, except quite a large place at the bottom to hold larger articles and papers.

Q Now, you said in your testimony, I believe, that one of the drawers was given to you by your brother to keep your papers in?

A Yes, sir.

Q Now, was there an inner door to the safe, or was there one large door that closed the safe?

A One large door.

Q There were no inside door or doors?

A No, sir, except the drawers and this one large.

Q One large door?

A That I told you.

Q Was that opened by a combination, or opened by a key?

A Both.

Q The outside door?

A There was a peculiar spring, and you had a key.

Q Do you know what a combination lock is?

A No, I don't think I do.

Q One of those that twirl around on numbers or letters?

A No, this don't whirl on letters.

Q (*By the Court.*) Or numbers?

A Opened by a secret spring that you had to know of, I think.

Q Was it opened by a key?

A Yes.

Q And you inserted the key into a key hole, and turned the key, is that the way it was unlocked?

A You had to have a spring first.

Q Something that you touched or moved?

A Yes.

Q About the safe?

A As I recollect it.

Mr. Hardin. This is the outside lock you are describing, the outside door?

Mr. Littlefield. Our impression is that she is speaking about the inside door.

Q Were you speaking about the inside door or the outside door?

A I was speaking about the inside door to this place where he kept his personal papers.

Q Oh, well, I was inquiring about the outside door to the safe.

A Oh, the outside?

Q Yes.

The Court. The big outside door.

A Yes.

Q How was that fastened?

A Well, with a key; there was no special combination.

Q It was fastened with a key?

A With a key.

Q And it was unlocked or unfastened by inserting the key and turning it?

A Yes, sir.

Q And then the door could be opened?

A Yes.

Q Now, how many keys were there to that outside door?

A Two.

Q And who held those keys or where were they kept?

A I held one of them, and he kept the other.

Q So that you each had a key to the outside door?

A Yes, sir.

Q Now, your brother Henry Merriam used this safe for his own purposes?

A Yes, sir.

Q Used it frequently, and frequently had access to it?

A Yes, sir.

Q Of his own accord?

A Yes, sir.

Q And you also had the same?

A The same.

Q Where was the key to your private drawer in the safe kept?

A I took charge of, my key?

Q Yes.

A My drawer?

Q Yes.

A I kept it on my person, or in some place safe for me to know where it was.

Q What place did you keep it in, beside your person?

A Well, sometimes in my trunk in my room, if my trunk was locked, but it was mostly on my person.

Q Where else besides your trunk did you keep it?

A I don't remember that I had any other place.

Q Did your brother know where your key was kept?

A No, sir, I don't think he did, I didn't tell him.

Q Did he ever ask you where you kept it?

A No, sir.

Q Did you ever tell him that you kept it in a place known only to you, and which the testator did not have or seek any access to, did you ever tell him that you kept it in a secret place?

Mr. Hardin. I object. Cross examining counsel is now reading from the pleadings; the language is not such as is proper to a conversation.

The Court. This is proper conversation.

Q Will you answer the question?

A I have forgotten the main point.

Q (Question read.)

A I don't remember that he asked me where.

Q That is not the question. Did you ever tell him that you kept it in a secret place?

A No, sir.

Q What you mean by a secret place is not that you were hiding it from your brother, do you, you don't mean to say you were hiding it from your brother?

A No, sir.

Q You were simply putting it where it would be safe?

A Where it would be safe, where I could find it.

Q And if your brother wanted anything it was where you could get hold of it, and get whatever he wanted from the drawer, is that right?

Objecteed to.

Q Besides assisting your brother in carrying on his affairs you had business affairs of your own?

A Yes, sir.

Q And you had considerable of your own to look after beside?

A Well, something.

Q And you hold stocks and bonds of your own, beside that in the Merriam Company?

A Yes, sir.

Q To quite an extent, didn't you?

Mr. Littlefield. I object.

The Court. That is immaterial, the amount. It is proper to have her say she had business affairs of her own she attended to, besides the business affairs of her brother; the extent of it is another matter.

Q Now your brother delivered to you in about six months after you were to his house, that was in the fall of 1897, he delivered to you a large envelope which you described here, containing eight smaller envelopes?

A Yes, sir.

Q Was that large envelope sealed at the time it was delivered to you?

A No, sir.

Q But the eight other envelopes were sealed?

A Yes, sir.

Q And you have recited the names of the endorsements written upon them, and your testimony was that he requested you at that time to deliver the other eight envelopes?

A I remember it that way.

Q What? He requested you at that time to deliver those eight envelopes, did he not?

A Yes, sir.

Q Then some time after that he informed you that he had made a codicil to his will—in the meantime his wife had died, had she not?

A Yes.

Q He had made a codicil to his will, and he asked you to return him the large envelope containing the other eight smaller envelopes?

A Yes, sir.

Q And you brought them to him?

A Yes.

Q Then he handed you back sometime later another large envelope containing nine smaller envelopes?

A Yes, sir.

Q Now will you state to me again what he said to you in regard to that envelope at the time he delivered it?

Mr. Littlefield. Which envelope is this?

Q The large envelope?

A At what? I don't understand what date.

Q This is the second time that he delivered the large envelope containing the smaller ones, to you, that is in 1898?

A He handed them to me. Did you ask what he said?

Q What he said?

A He directed me to—

Q Give us what he said; what did he say to you?

A He said "I deliver these envelopes."

Q Is that the first word he said to you?

A Not the first; I was going to begin where he laid them out and directed my attention to each one, and then said "There is one in your name, and I give you permission to open it," and I opened it, and I don't know—

Q (*By the Court.*) Just leave that for a moment, and tell what he said, if anything, about the other envelopes?

A He said "I hand you," or "Show you this large envelope, including nine other envelopes, and I want you to look at them and then I am going to hand them to you to deliver to the several parties as addressed."

Q Was that all that he said?

A And he said that I might look into my envelope if I so choose, and I opened it and examined it and saw a certificate for 568 shares in it.

Q Not what you did; what further conversation did he have with you at that time, what further conversation did he have?

Mr. Littlefield. One moment.

The Court. This is proper; don't interrupt. Go on.

A And I opened it and looked at it and saw the size of it.

Q I am not referring to your envelope now. I want to find out what he said to you?

The Court. Tell everything that he said to you on that occasion.

Q Not what you said to him but what he said to you?

A He said to me that to receive my envelope, and he hopes I would enjoy it, and that I was to take it, that I was to take charge of the eight other envelopes and deliver them to the several parties as addressed, that I must not fail to deliver them to those parties, that I could on account, I could use discretion as to the date of delivery, because at that time he was not able to listen to all that might be brought to him in case it was openly published, they might say things to excite him, and he would rather I would plan a way to do it quietly to keep it from the public so that he would not be annoyed too much.

Q He didn't tell you to notify the public of this thing, did he?

A No, sir.

Q What you mean by that is that he didn't want to be disturbed by anything from these parties to whom you were to give the envelopes?

A Public announcement.

Mr Littlefield. One moment.

The Court. It is proper cross examination.

Mr. Littlefield. Will your honor listen to a suggestion?

Mr. Sheehan. I don't want any suggestion.

The Court. It is proper cross examination. Please do not interrupt it.

Q (Question and answer read.)

The Court. What did you mean by that?

A I didn't answer the question.

Q Answer it.

A He wanted the parties to receive it, and to know it, the parties to these envelopes.

Q (*By the Court.*) Is this what he said?

A Yes, sir, that I must not fail to deliver them.

Q You are not answering my question. I wish you would pay attention to the question. (Question read.)

The Court. Is that what you mean to say now?

A He wanted those parties to know it.

Q Now, you are not answering my question. I wish you would kindly answer it if you can?

The Court. Suppose you reframe it and put it to her fresh.

Q He did not mean that you were to announce these gifts to the public, but what you mean to say is this, was it, that he did not want to be disturbed by the announcements to the parties to whom he was giving these envelopes?

A He did not mean that, he did not say that, but he wanted they should know it, and that I must not fail to tell them of it.

Q Well, he didn't want them to know it immediately, did he?

The Court. What did he say?

Q You said that he told you to deliver them in your discretion?

A It was the public, the general public.

Q He didn't tell you to tell it to the general public, did he?

A No, sir, but he was afraid they would in some way announce it themselves and publish it.

Q (*By the Court.*) Did he say that, did Mr. Merriam say that to you?

A He conveyed that impression to me, that I must keep it from the general public.

Q Then what he intended was this, that he did not want you—or what he said was this, was it not, that he did not want you to notify these people immediately because they might convey to the general public?

A He wanted I should devise a way to let them have it quietly so they would not speak out, announce to the public, publish it.

Q He didn't tell you to tell them not to announce it, did he?

A He told me to deliver it quietly.

Q Did he tell you to notify these parties not to announce these gifts to the public?

A Not in so many words.

Q You haven't testified to it before, have you?

A No, sir.

Q In response to any questions from Mr. Littlefield or Mr. Smith?

A I don't think I understand.

Mr Littlefield. I object.

Q You haven't testified to it before, have you?

A I don't know whether I have or not, I don't remember.

Q You don't mean to say now that your brother, Henry W. Merriam, told you to instruct these people not to make public the gift when they received it?

A He gave me no instructions like that.

Q Now, then, I believe you say in your last statement what he did want is, that you should not announce to these parties or deliver to these parties these envelopes at that immediate time, because they might announce it to the public, was that right?

Mr. Hardin. She hasn't said anything of the kind; it isn't fair on cross examination to put words in the witness's mouth.

Q (Question read.)

Mr. Littlefield. I object to that also on the ground that it assumes a fact already in evidence.

The Court. I think it is proper; answer it.

Q Answer that question?

A He didn't—

Q Answer that question?

Mr. Littlefield. She was just going to answer it.

The Court. Please don't interrupt. Let this cross examination proceed; this is very very important.

A He left it to my discretion as to time of delivery.

Q Now, Mrs. Huntington, you are not answering my question; you will save a lot of time if you will pay attention to my question?

A Can't you make it in two questions so as to simplify it.

Q (Question read.)

A He did not say in so—

The Court. He didn't say in what?

A In so full terms, that he wished me to deliver them to those parties, but my discretion was to be used at date of delivery.

Q What is that?

A He asked me to use my discretion as to when I would deliver them, but he did not say anything about those parties announcing it to the public, only he did not want it published in the newspapers and generally announced.

Q Well, now, Mrs. Huntington, which is the correct version of this thing; you have given several statements?

The Court. Well, I don't think it is proper for you to say that to the witness. Put your question.

Q Well, did he say that he did not want it announced to the public, or that he did not want it announced in the newspapers?

A I think they are about alike, the public and newspapers.

Q I don't care about that; I want to know what he said.

The Court. The question is what he said about it.

A That he did not wish it announced in the newspapers.

Q Did he tell you not to announce it in the newspapers?

A He requested me to do it quietly, so he would be saved from listening to what might be brought to him.

Q He didn't tell you to announce it in the newspapers?

A No.

Q Or not to announce it in the newspapers, did he?

A He told me to keep it quiet.

Q And his fear of the announcement in the newspapers he thought might come through a delivery to the other parties, or their influence?

A He looked to me to devise a method to save it from the newspapers.

Q At any rate he did not want you to deliver these papers at that time?

A He did not request me to.

Q He didn't want you to, did he?

A He didn't ask me to; he left me to my discretion.

Q He didn't want you to do it immediately, did he?

A I presume not.

Q (*By the Court.*) Well, did he say to you that he didn't want you to make the deliveries immediately?

A He didn't say that, no.

Q Well, what did he say?

A He said that I was to do it at my discretion, quietly.

Q But didn't you testify yesterday that he told you he didn't want it done immediately?

A I don't remember.

Q But to do it at your discretion, wasn't that what you testified to yesterday?

A I don't remember.

Q Will you say now that he didn't say to you that he did not want them delivered immediately?

A He left that to my judgment and discretion.

Q That is not what I want. Did he give you any directions as to whether or not you were to deliver those immediately?

A He didn't say immediately.

Q When did he say to deliver them?

A At my judgment as to time.

Q Did he tell you that they were not to be delivered that day or the next day?

A He did not name any date.

Q Did he say to you that you were to deliver them at any time in the exercise of your discretion, and whenever you saw fit to do so, did he say that to you?

A I don't remember the last phrase; I don't know as that means any different.

Q What is that?

A I don't understand whether that would add or change the situation, I don't remember that he added—

Q It don't make any difference whether it adds or changes the situation; I am asking you whether he said that to you or not?

A He didn't say when I saw fit, not as I remember.

Q He didn't say that, but he said at any time in the exercise of your discretion?

A Yes, sir.

Q And there he stopped?

A Yes

Q And he didn't say whenever you saw fit to do so?

A I don't remember it.

Q Did he tell you that he didn't want any stir made about it at the time?

A I understood it that way.

Q And that he was not then feeling very well and did not care to have their contents made public at that time, is that what he said?

A In substance.

Q And that you might as well not deliver them at once?

A Yes, that I should use my judgment.

Q I have asked you about the statement—

Mr. Littlefield. I submit that the witness should be allowed to answer fully.

The Court. She has answered fully; the question could be answered by yes or no, and she answered it.

Q Now after you had had this talk with your brother about these envelopes he placed them in the large envelope again and handed them to you?

The Court. Now you are speaking of the occasion of the nine envelopes.

Q Of the nine envelopes, the last occasion, he placed them in the large envelope again and handed them to you?

A Yes, sir.

Q With the statements which you have testified to here?

A Yes, sir.

Q And you took the large envelope containing the nine envelopes and placed it back in this same private drawer?

A In my private drawer.

Q Where it was before?

A Yes, sir.

Q In exactly the same drawer in which it was before, to which you held the key?

A It was not in before, the nine envelopes.

Q No, I mean you placed it in the same drawer where you had placed the envelope containing the eight envelopes?

A Yes.

Q That is, in your private drawer?

A Yes.

Q To which you held the key?

A Yes.

Q And it remained there with the exception of once you took it out to put in the sealed envelope containing your own stock, it remained in that drawer so far as you know up to the time of your brother's death?

A Yes, sir.

Q And never been removed. Now, Mrs. Huntington, your brother was active during the year 1899 in the management and affairs of the shoe company, was he not?

A He didn't give it up, but he was not doing, only three or four times a week attending to it.

Q He was not doing as much as he had been in years gone by, but he still took an active interest in it?

A Kept in touch with it, yes.

Q And I believe you have testified he continued to be president up to the time of his death?

A Yes.

Q You never received any dividends from the 568 shares, did you, up to the time of his death?

A I hadn't claimed any, I hadn't made a claim.

Q You hadn't claimed or received any?

A No, sir.

Q And you never took your certificate down to the office to have it transferred to your name, or anything, did you?

A No, sir.

Q And you never mentioned it to anybody outside of your brother Henry Merriam?

The Court. Mentioned what?

Q Mentioned the fact that you had received that certificate for the 568 shares?

A I don't remember that I had spoken to anybody.

Q Now you came to your brother's house in a friendly manner, you were very friendly with your brother, were you not?

A Yes, sir.

Q And the relations between you and your brother and his wife were very pleasant?

A Yes, sir.

Q During all the time you were there?

A Yes, sir.

Q And you came there not as a servant of your brother, that is, you did not receive any compensation?

A No, sir.

Q And you did not expect it?

A No, sir.

Q He did not offer you any compensation for the services you rendered?

A No, sir.

Q That was entirely voluntary and without hope of compensation, was it not?

A Yes.

Q Now, where did you keep the certificates of the twenty shares of stock after 1896?

A It was in my private drawer in Newton in that safe.

Q Where did you keep the key to the outer door of the safe?

A That was on my person or in my—

Q Was that kept with the key to the inner door?

A Yes.

Q They both were kept together?

A Kept together.

Q They both were kept together?

A The outside key and my personal key I kept together.

Q Were they on a ring?

A I think so, they were connected.

Mr. Smith. I want to move at this time to renew my motion to strike out Mrs. Huntington's testimony on re-direct in reference to the conversation between Mr. Merriam and herself after the last delivery to Mrs. Huntington. I think it is based upon an assumption of what your honor concedes to be the record, and I would like to read it to you, page —: "Q Had he at any time had any conversation with you in relation to these envelopes, after they were delivered to you? A He mentioned it only once. Q And what was said then? A He simply inquired whether they was in my possession. Q And is that all? A That was all I remember. Q And when was that? A That was about a year before his death. Q Was there any other conversation? A No, sir. Q Did he at that time give any change in his instructions or directions? A No, sir." Now it seems to me that she clearly and thoroughly covered that, and after she has left the stand your honor should not permit her to come back here and give a further conversation at that interview.

The Court. I will refuse the motion and let the evidence stand as it is.

Mr. Littlefield. We stop here.

JOSEPH E. WARBASSE, recalled.

Direct examination by Mr. Smith.

Q I call your attention to the annual meeting of the stockholders of July 18, 1899, as contained in the minute book and ask you if you can tell me if Mr. Henry W. Merriam attended that meeting?

A I could not say.

Q Did you keep that minute book?

A At that time?

Q Yes.

A No, sir.

Q You knew of the book, did you not?

A I knew of the book.

Q And you attended that meeting?

A I attended that meeting, as I recall.

Q I call your attention to the fact that it appears as to those present H. W. Merriam, by proxy, and ask you if that refreshes your recollection of it?

A It does not; I couldn't say.

Q Have you any of the proxies that have been used at any of the annual meetings in your custody?

A Previous to this time?

Q At any time?

A Since that time I have.

Q Since that time; have you at that time?

A At that time, no, sir.

Q What was done with the proxies, if you know, at that time?

A I don't know.

Q Have you made a search for them?

A I have.

Q And have failed to find them?

A Have failed to find them.

Examined by Mr. Sheehan.

Q Have you a cash book of the company?

A We have now, yes.

Q Covering the period from 1895 to 1900?

A No, sir.

Q Did you have a cash book at that time?
A We did, yes.
Q Where is it?
A Destroyed with other papers, other books.
Q Who destroyed it?
A That is more than I can say; they were with other papers in the factory accumulation and were all destroyed together.
Q When were they destroyed?
A I should say, I don't know, but probably when we had a sort of house cleaning.
Q When was that?
A Probably some time within the last two or three years, and probably before that, I couldn't say, I couldn't give the date, the old records.
Q Who destroyed them or who removed them from the office?
A They were not in the office, we had them in a separate—
Q Where were they?
A We had them in the upper part of our factory building.
Q You were an officer of the company, were you, at the time they were destroyed?
A At the time they were destroyed I was an officer of the concern, yes.
Q Was the destruction of the cash books talked over by the officers?
A Why, we consulted each other, yes.
Q When was that?
A I couldn't say.
Q Well, give us an idea when it was?
A Before the books were destroyed.
Q Well, was that one, two, three or four years ago?
A Well, I couldn't say that.
Q You can give us an idea when it was?
A I think probably it was three or four years ago.
Q Probably three or four years ago?

A Well, I wouldn't say positive about that.

Q Your cash books up to what time were destroyed?

A I have been unable to find any cash book previous to 1901, in fact I don't think that we have one previous to 1902.

Q Have you a check book covering the period from 1895 to 1900?

A No, sir.

Q Did you have check books at that time?

A We certainly did.

Q What has become of the check books?

A They were destroyed with the other books, accumulation of all kinds of books.

Q And when were the check books destroyed?

A At the same time, I don't know, couldn't give dates.

Q Have you the return checks of the company between 1895 and 1900?

A No, sir.

Q Where are those?

A They were destroyed, we don't keep them longer than—

Q At the same time were they destroyed?

A Not at the same time, no, sir.

Q When were the checks destroyed?

A I couldn't say about that, at different periods we destroyed them, when we get an accumulation in the office we think it isn't necessary to hold them any longer.

Q Wasn't it a fact that these books were destroyed and these papers were destroyed after the commencement of this action?

A After?

Q Yes.

A I couldn't say about that, because I knew nothing about the action, didn't come in connection with it.

Q What is that?

A Didn't come in connection with it.

Q Wasn't it within the last three years that they were destroyed?

A I think it was; now I won't say for sure, three or four years, possibly.

Q Why did you stop at about the death of Henry Merriam? Why didn't you destroy later on?

A We have destroyed some later on; I don't think we have a cash book later than 1902 or 1903, even those were destroyed. I haven't been able to find any, I have searched.

Q And you have no record whatever to show the cash transactions of your company during the period from 1895 to 1900, except what appears upon your ledgers, that is all?

A That is all the records we have kept.

Q And those records upon your ledgers were taken from your cash books, day book?

A From check books to cash books, cash book to ledger.

Q So that the transactions upon the ledgers are in substance the transactions upon your check book and cash book?

A Supposed to be practically the same.

Examined by Mr. Hardin.

Q Are there any original entries in the ledgers?

A No, not original entries, not that I recall.

Q From whence did you post the dividend entry?

A The dividend entries are original entries.

Q Then you are mistaken?

A I am mistaken when I say that; I posted them from memorandums from either Mr. Merriam or Mr. Dutcher, handed to me.

Q And unless there be some reference to page in the column of the ledger where the reference page to the cash book ordinarily appears the ledger shows an original entry?

A Original entry, unless by mistake it should be left out.

Examined by Mr. Sheehan.

Q You say that either Mr. Merriam or Mr. Dutcher handed you directions how the dividends should be posted?

A Yes, they give me the amounts to be posted to the various accounts on slip, memorandum slip.

Q Mr. Merriam or Mr. Dutcher?

A Yes.

Q And that was done after the declaration of the dividends?

A After the declaration of the dividends.

Mr. Smith. I would like to have it appear on the record the age and residence of the infants whom I represent, and I think Mr. Littlefield proved that they were infants.

Mr. Hardin. We will admit it.

Mr. Littlefield. I have no objection.

Mr. Smith. Will someone state it that knows it.

The Court. Under the age of 14, or under the age of 21?

Mr. McKenna. One is under the age of 21, and two under the age of 14. Carlisle R. Lane is 19 years old and is the son of Charles R. Lane, and his residence is Worcester, Massachusetts; and Albert Merriam Lane and Clara May Lane are two children of Carlisle J. Lane and reside at Brush Prairie, Washington.

CHARLES R. LANE, sworn

Direct examination by Mr. Sheehan.

Q What is your name?

A Charles R. Lane.

Q And where do you live?

A New York City.

Q You are one of the parties to this suit, are you, Mr. Lane?

A I am.

Q You are the Charles R. Lane, one of the parties to whom a part of the residuum was left under the will?

A Yes, sir.

Q You received a communication in January, 1901, dated January 21, 1901, and signed by John J. Merriam, William L. Dutcher and Francis J. Swayze, executors, stating that they enclosed a copy of the will of the late Henry W. Merriam, that they had completed the inventory of the personal property, and stated the amount of the inventory, and that in addition there was valuable real estate which forms no part of the above named sum, etc., and stating that they enclosed—

The Court Show him the letter and ask him if he received it.

Q Did you receive a paper similar to that?

A Yes, sir.

The Court. Do you want to offer that in evidence?

Mr. Sheehan. The original is already in.

Q Witness is shown Exhibit C. 9. I call your attention to Exhibit C. 9, and ask you to read it. Did you receive a copy of that communication, that Exhibit C. 9?

A I did.

Q In 1901, January?

A 1901, January.

Q Where were you living at that time?

A Worcester, Massachusetts.

Q And how long before that had you been living there?

A I had been living there several years, I cannot state just the number, but several.

Q Had you been informed before that of the death of your uncle, Henry Merriam?

A I had.

Q And did you have any knowledge as to the status of the affairs of his estate?

A None whatsoever.

Q Did you have any knowledge as to whether or not Mr. Merriam had in his lifetime, did you have any knowledge that he had given away any stock in his lifetime?

A I knew nothing about it whatever.

Q To which you might be entitled?

A No, sir.

Q Did you have any other knowledge in reference to the stock, that is, about the giving away of it, other than was contained in this letter?

A None whatsoever.

Q Did you sign the release? I call your attention to Exhibit C. 8, to a release signed by Charles R. Lane; I will ask you if that is your signature?

A That is my signature, yes.

Q Did you sign that release?

A I did.

Q And mailed it to whom?

A Judge Swayze, if I remember correctly.

Q When you signed that release did you believe that the stock had been given—

Mr. Colie. What he believed is of no consequence.

The Court. What did he know.

Q Did you know whether or not the stock had been given to the various parties named in the letter during the lifetime of Henry Merriam?

A I did not know.

Q That the stock mentioned in the letter had been given during the lifetime of Henry W. Merriam to the parties named in the letter, did you know that?

A I did not.

Mr. Colie. Speaking now of the letter of Judge Swayze?

Mr. Sheehan. Yes.

Q I say, when you signed that document did you know whether or not Henry W. Merriam had given his stock to the parties named in the letter of January 21?

A I did not know only that Judge Swayze said that it had been given.

Q (*By Mr. Colie.*) What?

A I took his word.

Q (*By Mr. Colie.*) You mean in the letter?

A In the letter.

The Court. Let Mr. Sheehan examine his own witness.

Q All the knowledge you had about it was contained in the letter?

A That is all; that is all I knew about it at all.

Q And acting upon the information contained in the letter you signed that release?

A I did.

Q Had you known the executors before that time?

A Yes, sir; I had lived in Newton several years, and while not knowing Judge Swayze personally, I knew about him, I knew him to be a man of high standing and well thought of as a citizen and as a lawyer, and so signed the papers, had the confidence that he would look out for my interests.

Mr. Colie. Strike that out.

The Court. That is incompetent.

Q You knew that Judge Swayze was your trustee?

A I did.

Q And you knew that he was executor?

The Court. Is there any prayer that the paper be set aside, or this gentleman's name be cancelled from it?

Mr. Sheehan. Why, yes.

Mr. Colie. No.

The Court. Otherwise it is not material.

It is admitted that John J. Merriam is deceased, and that he left a last will and testament, which is probated in the County of Union, where he resided at the time of his death, and letters testamentary have been issued to Edwin W. Merriam and Henry F. Merriam as executors, the third executor named in the will, Amelia E. Merriam, having renounced.

Mr. Hardin. I offer by the consent of all the parties, and without objection, a further analysis of the stockholdings of H. W. Merriam in the H. W. Merriam Shoe Company on dividend dates, and ask that it be marked.

Marked Exhibit Merriam 2.

Adjourned for argument to January 21.

Exhibit C. 1.

Exhibits.

EXHIBIT C. 1.

Will of Henry W. Merriam, dated September 16, 1895, and codicil thereto, dated January 20, 1898:

IN THE NAME OF GOD, AMEN.

I, Henry W. Merriam, of the Town of Newton, in the County of Sussex and State of New Jersey, being of sound and disposing mind, memory and understanding, hereby make, publish and declare this to be my last will and testament hereby declaring that I revoke, cancel and annul any and all former wills, testaments and codicils by me at any time heretofore made.

FIRST: I direct my executors hereinafter nominated and appointed to pay all my just debts and funeral and testamentary expenses as soon after my decease as may be practicable.

SECOND: I give, devise and bequeath unto my beloved wife, Fannie G. Merriam, my residence on Main Street and Maple Avenue at Newton aforesaid, including the premises upon which it stands, (but not including the lot purchased of Emma E. Barrett on the southeasterly side of Maple Avenue) and the cottages, greenhouses, stable and other improvements thereon erected with the appurtenances thereto, and all the household furniture, pictures, plate, books, ornaments, horses, coaches, wagons, harnesses, implements and other chattels in, upon or appertaining to the said premises, to have and to hold to my said wife during her natural life, and after her death I give, devise and bequeath the said real estate and such of the said personal property as may then remain to the Presbyterian Board of Relief for disabled ministers and the widows and orphans of Deceased Minis-

ters in fee simple, in trust however for the purpose of maintaining my said residence and the grounds and buildings connected therewith, exclusive of said lot on the southeasterly side of Maple Avenue, as a Home for disabled Presbyterian Ministers, and the widows of Presbyterian Ministers, to be known as the Merriam Home. This devise and bequest as well as the devise and bequest of the fund hereinafter made for the maintenance thereof is made with the full knowledge and approval of my said wife.

THIRD: I give and bequeath unto my executors the sum of Eighty-eight Thousand Dollars in trust, to invest the same as they may deem advisable, and to pay the interest, issues and profits thereof to the absolute use of my said wife Fannie G. Merriam, during her lifetime.

FOURTH: I order and direct my said executors to pay out of my estate the expense of maintaining the household and home at Newton as the same are maintained by me at the time of my death, for the period of one year after my death, including the payment of wages to housekeeper, household servants and other employees about the premises—coachman, gardener and assistants—and all the expenses of the household—coal, gas, groceries, butcher's bill, stable expenses and other necessary supplies, in order that my dear wife may be relieved as far as possible from all care and expense for the said period of one year.

FIFTH: The above provisions for my wife are in lieu of all right of dower.

SIXTH: I give and bequeath to my brother, John J. Merriam, of Summit, N. J., the sum of Twenty Thousand Dollars, to him and to his heirs forever, and in the event of the death of the said John J. Merriam this legacy shall not lapse, but said sum of Twenty Thousand Dollars shall pass to his issue.

Exhibit C. 1.

SEVENTH: I give and bequeath to my sister, Harriet M. Huntington, of Hyde Park, in the State of Massachusetts, the sum of Twenty Thousand Dollars, to her and to her heirs forever, and in the event of her death before me this legacy shall not lapse, but shall pass to her issue; and in the event of her death without issue, the same shall be divided, one half among the children of my brother, John J. Merriam, and one half among the children of my deceased brother, Samuel L. Merriam.

EIGHTH: I give and bequeath to Olin L. Merriam of Taunton, in the State of Massachusetts, Maybelle F. Buffington and Nellie J. Merriam of West Brookfield, in the State of Massachusetts, the children of my deceased brother, Samuel Merriam, the sum of Five Thousand Dollars each.

NINTH: I give and bequeath to my said executors, three hundred shares of the capital stock of the H. W. Merriam Shoe Company, in trust, to pay the income to my wife, Fannie G. Merriam, during her natural life. After her death or in case she dies before me, I give and bequeath one hundred and fifty shares of said three hundred to the H. W. Merriam Shoe Company and one hundred and fifty shares to the children of John J. Merriam. This bequest to my wife is in addition to the fund of eighty-eight thousand dollars hereinbefore provided for.

TENTH: After the death of my said wife I direct my said executors and trustees to distribute and pay over the said sum of eighty-eight thousand dollars, the interest from which I have set apart for my wife during her lifetime as hereinafter provided, to wit:

1. To pay to the Board of Home Missions of the Presbyterian Church in the United States of America, incorporated April 19, 1872, by "Act of the legislature of the State of New York," the sum of Fifteen Thousand Dollars.

Exhibit C. 1.

2. To pay to the Board of Foreign Missions of the Presbyterian Church in the United States of America, the sum of Fifteen Thousand Dollars.

3. To pay to the Board of Church Erection Fund of the General Assembly of the Presbyterian Church in the United States of America, incorporated March 27th, 1871, by the Legislature of the State of New York, the sum of Six Thousand Dollars.

4. To pay to the Board of Missions for Freedmen of the Presbyterian Church in the United States of America the sum of Six Thousand Dollars.

5. To pay to the Presbyterian Board of Relief for disabled ministers and the widows and orphans of deceased ministers the sum of thirty thousand dollars, in trust, to keep the same securely invested, and to apply the income thereof for the maintenance in good condition of the buildings and real estate hereinbefore devised to said Board, and if any surplus shall remain, to apply the said surplus to the expenses of the said Home, or the other objects of said Board, and I urgently request and recommend, but do not enjoin, that the said Board in maintaining the said buildings and real estate in good condition shall entrust the actual oversight and care of the same to a committee to be appointed by the Presbytery of Newton, in the Synod of New Jersey, of which committee the pastor of the First Presbyterian Church of Newton shall be chairman. I make this recommendation for the reason that it will be more convenient for the said Board of Relief to entrust this work to the said committee.

6. To pay to the Presbyterian Board of Aid for Colleges and Academies, the sum of Six Thousand Dollars.

7. To pay to the New York City Mission and Tract Society, instituted in the city of New York, and incorporated by the Legislature of the State of New

Exhibit C. 1.

York the sum of Ten Thousand Dollars, to be applied to the charitable uses and purposes of said society.

ELEVENTH: I bequeath to the Plot Owners' Association of the Newton Cemetery, of which John C. Howell is now president, the sum of three hundred dollars in trust, to keep the same securely invested and apply the income thereof for the maintaining in good order and condition my plot in the Newton cemetery; but in case of the said Plot Owners' Association, by reason of its failure to be incorporated, or for any other reason, cannot receive and hold the same for that purpose, then I order and direct that said sum of three hundred dollars shall fall to the residue of my estate.

TWELFTH: I authorize and empower my executors to continue to hold any investments, stocks or bonds which I may own at my death, without changing the securities, and I authorize them to sell any of my stocks or other securities at public or private sale in their discretion, and my will is that any of my executors may purchase said stocks or securities with the consent of my other executors. I authorize and empower my brother, John J. Merriam, to vote the shares of the capital stock of the H. W. Merriam Shoe Company belonging to my estate, and to vote them for himself as director or other officer of said corporation, as I particularly desire that my said brother shall continue as a director of said company to represent the interest of my estate in the management of the business of said corporation in connection with its other officers.

THIRTEENTH: All the rest, residue and remainder of my estate, real and personal, of any and every description whatever and wheresoever situate, I give, devise and bequeath as follows:

Four-tenths to the children of my brother, John J. Merriam.

Exhibit C. 1.

One-tenth to the children of William L. Dutcher, and

One-tenth to the children of John L. Lane.

The child or children of any of said legatees who may die before me shall take the share of such deceased parent.

FOURTEENTH: I authorize and empower my executors and trustees to sell, convey, mortgage or lease any and all of my real estate, not hereinbefore disposed of at public or private sale, at such time and upon such terms as in their judgment they may deem best, and to make, execute, acknowledge and deliver any and all leases, deeds and other instruments of conveyance in pursuance of such powers hereby granted.

FIFTEENTH: I nominate and appoint John J. Merriam of Summit, in the State of New Jersey, William L. Dutcher, of Newton in the State of New Jersey, and Francis J. Swayze of Newark, in the State of New Jersey, to be executors and trustees of this my last will and testament, and I direct that no security shall be required of either of my executors, either in the State of New Jersey or elsewhere where it may be necessary or advisable to prove this my will.

IN WITNESS WHEREOF I have hereunto set my hand and seal this sixteenth day of September in the year of our Lord One Thousand Eight Hundred and Ninety-five.

HENRY W. MERRIAM, (L. S.)

Signed, sealed, published and declared by the above named testator to be his last will and testament in the presence of us, who in his presence and in the presence of each other, both being present at the same time, at his request, have hereto subscribed our names as witnesses.

WILLIAM FRERE SMITH, Newton, N. J.
GEORGE L. DUTCHER, Newton, N. J.
J. E. WARBASSE, Newton, N. J.

Exhibit C. 1.

This is a Codicil, to be added to the Will of Henry S. Merriam, dated the 16th day of September, 1895:

1. Whereas, my beloved wife has died since the execution of my said will, I now confirm the devise and bequest to the Presbyterian Board of Relief for Disabled Ministers and the widows and orphans of Deceased Ministers, contained in the second item of said will; and I confirm the bequests contained in the tenth item of my said will.

2. I revoke the directions as to the maintenance of my household and all other provisions contained in the fourth paragraph of my will, and I revoke the bequest of three hundred shares of the capital stock of the H. W. Merriam Shoe Company contained in the ninth item of my said will.

3. I revoke the devise and bequest of the residue of my estate contained in the thirteenth item of my said will; and I hereby give, devise and bequeath one equal fourth of the residue of my estate to the children of my brother, John J. Merriam; one equal fourth to the children of my deceased brother, Samuel L. Merriam; one equal fourth to the children of William L. Dutcher; one equal fourth to my executors named in said will, upon trust, to divide the same into three equal shares, and to pay the yearly income of one of such shares to each of my three cousins, Carlisle J. Lane, Albert I. Lane and Charles R. Lane in such manner as may be most effectual for securing to each the personal receipt and enjoyment thereof during his life, inalienably; and after his death to pay his share to his children, or other descendants, him surviving; and if any of my three said cousins shall not leave child or other descendant, him surviving, to hold the said principal, in trust, for my said cousins or cousin surviving, upon the same trust. And I authorize and empower my said executors, in their sole discretion or the discretion of the survivor, to pay

Exhibit C. 1.

over to any of my said cousins his share of the principal, or any part thereof, upon my said executors, or the survivor of them, being satisfied that such payment will inure to the individual benefit of my said cousins. And I order and direct that the determination of my said executors, or the survivor of them, as to such payment shall be final and conclusive.

Lastly, in all other respects I ratify and confirm my said will.

In Witness Whereof I have hereunto set my hand and seal this Twentieth day of January, in the year of our Lord eighteen hundred and ninety-eight.

HENRY W. MERRIAM, (L. S.)

Signed, sealed, published and declared by the above named testator, Henry W. Merriam, to be a codicil to his last will and testament in our presence, who, in his presence and in the presence of each other, all being present at the same time, at his request have hereunto subscribed our names as witnesses:

JNO. TOZER, Main St.
WILLIAM FERRE SMITH, Newton.
J. E. WARBASSE, Newton.

EXHIBIT C. 2.

Inventory dated November, 1900, filed by Executors of Henry W. Merriam in the office of the Surrogate of Sussex County January 1901.

The inventory does not include any shares of stock of the H. W. Merriam Shoe Company. It shows as an asset a credit on the books of the H. W. Merriam Shoe Company of Henry W. Merriam of $15,008.33.

EXHIBIT C. 3.

First account of executors of Henry W. Merriam, approved by the Orphans' Court of Sussex County by decree dated December 6, 1901.

The account contains no reference to stock of H. W. Merriam Shoe Company.

EXHIBIT C. 4.

Second account of the executors of Henry W. Merriam, approved by Sussex Orphans' Court December 12, 1905.

The account contains no reference to any shares of stock of H. W. Merriam Shoe Company.

EXHIBIT C. 5.

First account of trustees under the Will of Henry W. Merriam, allowed by decree of Sussex Orphans' Court September 12, 1905.

The account contains no reference to any shares of stock of H. W. Merriam Shoe Company.

EXHIBIT C. 6.

Second account of trusts under the Will of Henry W. Merriam, filed by Francis J. Swayze, Trustee, only. Approved by decree of Sussex Orphans' Court November 5, 1909.

EXHIBIT C. 7.

Certified copies of four decrees passing the two executors' and two trustees' accounts of the Henry W. Merriam Estate.

EXHIBIT C. 8.

Agreement, dated March 26, 1901, between John J. Merriam and Harriet M. Huntington, of the first part, William L. Dutcher of the second part, and John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of the Estate of Henry W. Merriam, deceased, of the third part:

THIS AGREEMENT made the twenty-sixth day of March, one thousand nine hundred and one, Between JOHN J. MERRIAM and HARRIET M. HUNTINGTON, parties of the First Part; WILLIAM L. DUTCHER, party of the Second Part; and JOHN J. MERRIAM, WILLIAM L. DUTCHER and FRANCES J. SWAYZE, Executors of the Estate of Henry W. Merriam, deceased, parties of the Third Part:

Whereas Henry W. Merriam did by his will, bearing date the sixteenth day of September, eighteen hundred and ninety five, and the codicil thereto, bearing date the twentieth day of January, eighteen hundred and ninety-eight, among other things, devise and be-

queath the residue of his estate estate—one fourth to the children of his brother, John J. Merriam; one fourth to the children of his brother Samuel L. Merriam; one fourth to the children of William L. Dutcher, and one fourth to the executors above named, upon trust, to divide the same into three equal shares, and to pay the yearly income of one of such shares to each of his three cousins, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, in such manner as might be most effectual for securing to each the personal receipt and enjoyment thereof during his life, inalienably; and after his death to pay his share to his children, or other descendants him surviving; and if any of his three said cousins should not leave any child or other descendant him surviving, to hold the said principal in trust for his said cousins or cousin surviving, upon the same trust; and did authorize and empower his said executors or the survivor, in their sole discretion or the discretions of the survivor, to pay over to any of his said cousins his share of the principal, or any part thereof, upon his said executors, or the survivor of them, being satisfied that such payment would inure to the individual benefit of his said cousins; and did order and direct that the determination of his said executors, or the survivor of them, as to such payment should be final and conclusive.

And Whereas the said Henry W. Merriam prior to his death was the owner of ten hundred and eighty shares of the capital stock of the H. W. Merriam Shoe Company, a corporation of the State of New Jersey, having its principal office in Newton, County of Sussex; and was also the owner of ten shares of said capital stock standing in the name of his deceased wife, Fanny G. Merriam, and bequeathed to the said Henry W. Merriam by her will:

And Whereas the said Henry W. Merriam in his life time placed certificates of said stock, representing five hundred and sixty-eight (568) shares thereof,

standing in his name, in an envelope addressed to said Harriett M. Huntington, and certificates of said stock, representing four hundred and seventy-five (475) shares thereof, standing in the name of said Henry W. Merriam, and certificates representing ten (10) shares, standing in the name of said Fanny G. Merriam, in an envelope addressed to said John J. Merriam; and further addressed seven (7) envelopes—one addressed to each of the following named persons: Olin L. Merriam, Maybelle F. Buffington, Nellie J. Merriam, Francis Buffington and Ralph Buffington; John Tozer, George L. Dutcher and Joseph E. Warbasse, which said four envelopes, addressed to Olin L. Merriam, Maybelle F. Buffington, Nellie J. Merriam, Francis Buffington and Ralph Buffington contain, as is believed, certificates for the remaining shares of the said stock standing in the name of the said Henry W. Merriam:

And Whereas said Henry W. Merriam in his life time, delivered all of the aforesaid envelopes sealed, to his sister, Harriett M. Huntington, who had for at least two years prior to his death been entrusted by him with the management of his business affairs, and the same were in her custody continuously thereafter up to the time of the death of said Henry W. Merriam:

And Whereas the said Harriet M. Huntington, after the death of said Henry W. Merriam, delivered the said envelopes sealed, to the above named Executors, who have since had the custody and possession thereof:

And Whereas a question has been raised as to whether the gift of said stock to the persons above named had been perfected by the said Henry W. Merriam in the manner required by law:

And Whereas in order to remove as far as possible all doubt upon that subject, Helen Merriam, Henry W. Merriam and Edwin W. Merriam, being all of the

Exhibit C. 8.

children of said John J. Merriam; Olin L. Merriam, Maybelle F. Buffington and Nellie J. Merriam, being all the children of Samuel L. Merriam, deceased; Edward Merriam Dutcher, being the only child of William L. Dutcher, who is now of full age, and said Carlisle J. Lane, Albert I. Lane and Charles R. Lane have in writing consented to the delivery of the said envelopes to the persons addressed, and have also consented to the said executors executing any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered (the said assents being hereto annexed as a part hereof):

And Whereas the only other person interested in the residuary estate of the said Henry W. Merriam are the children now born or hereafter to be born to said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, and the infant children of William L. Dutcher, namely, Frances Elizabeth Dutcher and Elnora Hortense Dutcher:

And Whereas the said William L. Dutcher has been duly appointed Guardian of said Frances Elizabeth Dutcher and said Elnora Hortense Dutcher and does hereby, in recognition of an obligation so to do, on their behalf, assent to the delivery of the said envelopes, and the execution of any transfers necessary to perfect the title to the said stock in the persons addressed, and has also agreed to indemnify and save harmless the said John J. Merriam and Francis J. Swayze, Executors as aforesaid, of and from all liability, cost and expense that they may be liable to, now or hereafter, by reason of the delivery of said envelopes to the persons to whom the same are respectively addressed and by reason of the execution of the transfers of the said stock so far as concerns any claim that may be hereafter made by or on behalf of his said minor children:

Exhibit C. 8.

And Whereas the said John J. Merriam and Harriett M. Huntington, in order to protect the said executors against any liability to which they may be liable, now or hereafter, by reason of the delivery of said envelopes to the persons to whom the same are respectively addressed and by reason of the execution of said transfers, on the part of the children now born or hereafter to be born to said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, or any of them, have agreed to indemnify and save harmless the said William L. Dutcher and Francis J. Swayze, Executors of Henry W. Merriam, deceased, from all liability cost or expense that they may be liable to, now or hereafter, by reason of the delivery of said envelopes to the persons to whom the same are respectively addressed and by reason of the execution of the transfers of said stock, and for that purpose the said Harriett M. Huntington has agreed and does hereby agree immediately upon the transfer to her of the said five hundred and sixty-eight shares of stock and as a part of the same transaction, to assign, transfer and set over to the said John J. Merriam, William L. Dutcher and Francis J. Swayze, Executors of the said Henry W. Merriam, one hundred and fifty-one shares of the said stock, and the said John J. Merriam, for like purpose, has agreed and does hereby agree, upon the transfer to him of the said four hundred and seventy-five shares of stock standing in the name of the said Henry W. Merriam and the delivery to him of the certificates for the said ten shares of stock standing in the name of Fanny G. Merriam, immediately, and as part of the same transaction, to assign, transfer and set over to the said John J. Merriam, William L. Dutcher and Francis J. Swayze, Executors of Henry W. Merriam, one hundred and twenty-two shares of the said stock:

And Whereas, in pursuance of the said assents signed by the said Carlisle J. Lane, Albert I. Lane and

Charles R. Lane, the said Executors have agreed, and do hereby agree to pay, as long as the said stock remains unsold by the said Executors, to the said Harriett M. Huntington, immediately upon receipt thereof, all dividends that may be hereafter declared upon the stock so assigned by her to them from earnings of the said corporation since the death of the said Henry W. Merriam, to which dividends, but for the said assents, the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane might claim some right.

And Whereas, in pursuance of the said assents signed by the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, the said Executors have agreed, and do hereby agree, to pay, as long as the said stock remains unsold by the said Executors, to the said John J. Merriam, immediately upon receipt thereof, all dividends that may be hereafter declared upon the stock so assigned by him to them from earnings of the said corporation since the death of the said Henry W. Merriam, to which dividends, but for the said assents, the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane might claim some right:

NOW Therefore, This Agreement Witnesseth, That the said Executors agree to deliver the said envelopes at once to the persons addressed, and to execute all transfers necessary to perfect the title to any stock certificates which may be contained in said envelopes in the names of the persons addressed:

And the said Harriett M. Huntington agrees, forthwith, upon the transfer of the said five hundred and sixty-eight (568) shares to her, to assign, transfer and set over to the said Executors one hundred & fifty-one shares, and the said John J. Merriam agrees, forthwith, upon the transfer to him of the said four hundred and seventy-five (475) shares, and delivery of certificates for said ten shares to him, to assign, transfer and set over to the said Executors one hundred & twenty-two (122) shares.

Exhibit C. 8.

And the said Harriett M. Huntington and John J. Merriam, for themselves, their heirs, executors and administrators, jointly and severally, covenant, promise and agree to and with the said William L. Dutcher and Francis J. Swayze, and each of them, that they and each of them will at all times hereafter indemnity and save harmless the said William L. Dutcher and Francis J. Swayze, and each of them, their and every of their heirs, executors and administrators, against all liabilty, loss, cost or expense to which they may be put or which they may incur by reason of any claim to be hereafter made against them, or any of them, by any of the children, born or to be born, of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, their heirs, executors, administrators or assigns.

And the said William L. Dutcher, for himself, his heirs, executors and administrators, covenants, promises and agrees, to and with the said John J. Merriam and Francis J. Swayze, and each of them, that he will indemnify and save harmless the said John J. Merriam and Francis J. Swayze, and each of them, their and every of their heirs, executors and administrators, against all liability, loss, cost or expense to which they may be put or which they may incur by reason of any claim to be hereafter made against them by the said Frances Elizabeth Dutcher and Elnora Hortense Dutcher, or either of them, their heirs, executors, administrators or assigns.

And the said John J. Merriam, William L. Dutcher and Francis J. Swayze, as executors of Henry W. Merriam, deceased, and the survivors and survivor of them, covenant, promise and agree to and with the said Harriett M. Huntington that they will hold said stock so assigned, transferred and set over to them by her, or the proceeds thereof, if sold, in trust until such time as she may establish her title thereto by the decree of a court of competent jurisdiction, or until such time as she may secure a release to the said ex-

ecutors from the children, born or to be born, of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane; and will also hold upon the same trust any dividends that they may receive out of the earnings on said stock prior to the death of the said Henry W. Merriam; and that, so long as the said stock is unsold they will pay to the said Harriett M. Huntington, forthwith, upon the receipt of the same from the said Company, all the dividends from earnings since the death of the said Henry W. Merriam, and, in case of sale of said stock, the income of the proceeds of sale:

And the said John J. Merriam, William L. Dutcher and Francis J. Swayze, as executors of Henry W. Merriam, deceased, and the survivors and survivor of them, covenant, promise and agree to and with the said John J. Merriam that they will hold the said stock so assigned, transferred and set over to them by him, or the proceeds thereof, if sold, in trust until such time as he may establish his title thereto by the decree of a court of competent jurisdiction or until such time as he may secure a release to the said executors from the children born or to be born, of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, and will also hold, upon the same trust, any dividends that they may receive out of earnings on said stock prior to the death of the said Henry W. Merriam; and that so long as the said stock is unsold, they will pay to the said John J. Merriam, forthwith upon the receipt of the same from the said Company, all dividends from earnings since the death of the said Henry W. Merriam, and in case of sale of said stock, the income of the proceeds of sale.

It is expressly understood and agreed, that the said John J. Merriam, William L. Dutcher and Francis J. Swayze, Executors of Henry W. Merriam, deceased, or the survivors and survivor of them, may, in their discretion, sell the said stock and convert the same into cash, at any time, provided that during the life

time of the said Harriett M. Huntington and the said John J. Merriam, and the survivor of them, notice of such intended sale shall be given to the said Harriett M. Huntington, and said John J. Merriam, or the survivor of them, by mailing said notice to their last known post office address, at least sixty days prior to the time of such intended sale, and the said Harriett M. Huntington shall have the right at any time, to purchase of the said executors the one hundred and fifty-one shares assigned, transferred and set over to them by her, or any part thereof, at any price at which they may be willing to sell the same and said John J. Merriam shall have the like right, at any time, to purchase the one hundred and twenty-two shares of stock assigned, transferred and set over by him to the said said executors, or any part thereof, at any price at which they may be willing to sell the same.

And the said John J. Merriam, William L. Dutcher and Francis J. Swayze, as Executors of said Henry W. Merriam, deceased, and the survivors and survivor of them, covenant, promise and agree to and with the said Harriett M. Huntington, her executors and administrators, that upon her establishing her title to the stock so assigned, transferred and set over by her to them, by the decree of a court of competent jurisdiction, or upon her securing a release to the said executors from the children born or to be born of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, they will thereupon re-assign, transfer and set over the said stock to the said Harriett M. Huntington, her executors and administrators, provided the same has not been sold; in which event they will assign, transfer and set over to her the proceeds of the sale in their hands.

And the said John J. Merriam, William L. Dutcher and Francis J. Swayze, as executors of said Henry W. Merriam, deceased, and the survivors and survivor of them, covenant, promise and agree to and

with the said John J. Merriam, his executors and administrators, that upon his establishing his title to the stock so assigned, transferred and set over by him to them by the decree of a court of competent jurisdiction, or upon his securing a release to the said executors from the children born or to be born of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, they will thereupon re-assign, transfer and set over the said stock to the said John J. Merriam, his executors and administrators, provided the same has not been sold; in which event they will assign, transfer and set over to him the proceeds of the sale in their hands.

It is, however, expressly understood that when the trust created in and by said codicil as to one-fourth of the said residuary estate shall determine in whole or in part, that then the executors, or the survivors or survivor of them, shall distribute said stock or the proceeds thereof, if sold, and the dividends from earnings prior to the death of said Henry W. Merriam, to the parties entitled thereto either in whole or in part as the event may be.

In Witness Whereof the parties hereto have set their hands and affixed their seals this 26th day of March, one thousand nine hundred and one.

Signed, sealed and delivered in presence of }

JOHN J. MERRIAM (L. S.)
HARRIETT M. HUNTINGTON (L. S.)
WILLIAM L. DUTCHER (L. S.)

JOHN J. MERRIAM (L. S.)
Executor
Executor
WILLIAM L. DUTCHER (L. S.)
FRANCIS J. SWAYZE (L. S.)
Executor

Exhibit C. 8.

Eight erased over written in line 31 page 2 and interlined in line 1; Joseph written over John erased in line 2; four written over five erased in line 3 at page 3; William L. Dutcher erased line 24 page 4; John J. Merriam erased line 13; the erased line 14 page 5. Under said codicil erased line 1 page 12, all before execution.

J. E. WARBASSE,
Witness.

Protest of John J. Merriam and Harriet M. Huntington indorsed on the back of the last page of the agreement in the handwriting of John J. Merriam:

We sign this agreement in order to secure a peaceable and amicable settlement of our brother's estate without further delay. We do sign it under protest because it is not the directions or true intent of H. W. Merriam. The shoe stock transferred in this agreement is for a financial protection against personal loss to the executors or their heirs in case the Lane heirs ever enter claims. And we protest against the executors using the property for any other purpose than to save themselves or their heirs from personal loss.

JOHN J. MERRIAM
HARRIET M. HUNTINGTON.

Consents signed by Helen Merriam, Henry F. Merriam, Edward W. Merriam, Olin L. Merriam, Maybelle F. Buffington, Nellie J. Merriam, Edward M. Dutcher, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, said consents being separately signed, but all in language following:—

"To John J. Merriam,
William L. Dutcher, and
Francis J. Swayze,
Executors of Henry W. Merriam, deceased.

Referring to your letter of January 19, 1901, I would say that I would consent to your delivering the sealed envelopes left by Mr. Merriam containing stock of the H. W. Merriam Shoe Company to the persons addressed; and I also consent to your executing any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered.

Very truly yours"

EXHIBIT C. 9.

Letter from the Executors of Henry W. Merriam to Edwin W. Merriam and others, referred to in the consents attached to Exhibit C. 8, the letter being dated January 19, 1901. The letter is printed in the testimony of Justice Swayze, page 108.

EXHIBIT C. 10.

Consent by Frances G. Abbott dated November 3, 1908, said Frances G. Abbott being a daughter of William L. Dutcher, a minor at the time of the execution of the agreement of March 26, 1901, and her consent being signed after she attained her majority and after her marriage.

EXHIBIT C. 11.

Letters of administration of the Estate of William L. Dutcher, issued by the Surrogate of Sussex Co. January 28, 1908.

EXHIBIT C. 12.

Stock certificate No. 32, H. W. Merriam Shoe Company, in the name of Jos. E. Warbasse.

EXHIBIT C. 13.

Stock certificate No. 49, H. W. Merriam Shoe Company, in the name of John Tozer.

EXHIBIT C. 14.

Calculation of the amount due at the date of death of Henry W. Merriam on Warbasse, George L. Dutcher and Tozer notes. Balance due on Warbasse and Dutcher notes, each, $2,011.20; balance due on Tozer note $4,298.64.

EXHIBIT C. 15.

Stock certificate No. 33, of H. W. Merriam Shoe Company, in the name of Edward M. Dutcher.

EXHIBIT HUNTINGTON 1.

Envelope addressed on its face to "Mrs. Harriet M. Huntington, Newton," in the handwriting of Harriet M. Huntington and endorsed on the back, across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze; opened on the end and containing stock certificate No. 41 H. W. Merriam Shoe Company, for 568 shares, issued November 20, 1894, to Henry W. Merriam and endorsed in blank December 4, 1894, by Henry W. Merriam in his handwriting.

This stock certificate is independently marked as Exhibit Lane 1.

EXHIBIT HUNTINGTON 2.

Envelope marked on its face "John J. Merriam, Summit, N. J." in the handwriting of Henry W. Merriam, and endorsed on the back, across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze; containing four stock certificates H. W. Merriam Shoe Company, as follows:

No. 6, 5 shares, issued to Henry W. Merriam, December 6, 1882, endorsed as follows: "For value received I hereby sell, assign and transfer to Fannie G. Merriam the 5 shares of stock mentioned and authorize to make the necessary transfer on the books of the Company. Witness my hand and seal this first day of April, 1895. Henry W. Merriam. This certificate is now the property of bro. John J. Merriam. February 1, 1898."

The endorsement, so far as it is in writing, is in the handwriting of Henry W. Merriam.

Exhibit Huntington 2.

Cert. No. 29, 5 shares, issued to Henry W. Merriam, November 24, 1891, endorsed as follows:

For value received I hereby sell, assign and transfer to my beloved wife, Mrs. Fannie G. Merriam, the 5 shares of stock mentioned and authorize the officers of the H. W. Merriam Shoe Company to make the nessessary transfer on the books of the Company. Witness my hand and seal this twenty-fifth day of December, 1894. This certificate is now the property of bro. John J. Merriam. February 21, 1898. Henry W. Merriam."

The written part of the endorsement is in the handwriting of Henry W. Merriam.

Cert. No. 45, 20 shares, issued to Henry W. Merriam February 24, 1896, endorsed as follows:

For value received I hereby sell, assign and transfer to John J. Merriam 20 shares of the shares of stock mentioned and authorize the officers to make the necessary transfer on the books of the Company. Witness my hand and seal this fifth day of March, 1898. Henry W. Merriam."

The written part of the endorsement is in the handwriting of Henry W. Merriam.

Cert. No. 36, 455 shares, issued to Henry W. Merriam April 12, 1894. Endorsed in blank, signed by Henry W. Merriam without date, in his handwriting.

The four stock certificates just mentioned are marked respectively, independently, as Exhibits Lane 5, Lane 6, Lane 7 and Lane 2.

EXHIBIT HUNTINGTON 3.

Envelope addressed on its face "Olin L. Merriam, Boston, Mass." in the handwriting of Henry W. Merriam; endorsed on the back, across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze. Containing stock certificate H. W. Merriam Shoe Company for ten shares, issued November 20, 1894, to Henry W. Merriam; endorsed in blank under date of December 4, 1894, by Henry W. Merriam in his handwriting. This certificate is independently marked as Exhibit Lane 9.

EXHIBIT HUNTINGTON 4.

Envelope addressed on its face "Miss Nellie J. Merriam, Boston, Mass." in the handwriting of Henry W. Merriam; endorsed on the back, across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze. Containing stock certificate H. W. Merriam Shoe Company No. 39, 10 shares, issued to Henry W. Merriam, November 20, 1894, and endorsed in blank under date of December 4, 1894, by Henry W. Merriam in his handwriting.

This certificate is independently marked as Exhibit Lane 12.

EXHIBIT HUNTINGTON 5.

Envelope addressed on its face "Mrs. Maybelle F. Buffington, West Brookfield, Mass." in the handwriting of Henry W. Merriam; endorsed on the back across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze. Containing stock certificate H. W. Merriam Shoe Company No. 48, 7 shares, issued February 24, 1896, to Henry W. Merriam; endorsed in blank by Henry W. Merriam in his handwriting. This certificate is independently marked as Exhibit Lane 15.

EXHIBIT HUNTINGTON 6.

Envelope addressed on its face "George L. Dutcher, Newton," and endorsed on the back across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze.

Mr. George L. Dutcher was sworn as a witness, and produced the certificate of H. W. Merriam Shoe Company originally enclosed in this envelope. It was Exhibit C. 15, and was No. 33 for 30 shares, issued April 12, 1894, to George L. Dutcher.

This envelope also contained note of George L. Dutcher to Henry W. Merriam, which has been destroyed, being the note referred to in Exhibit C. 14. See testimony, p. 157.

EXHIBIT HUNTINGTON 7.

Envelope addressed on its face to "Jos. E. Warbasse, Newton," in the handwriting of Henry W. Merriam, and endorsed on the back, across the flap, "F. J. Swayze, October 29, 1900," in the handwriting of Francis J. Swayze.

Mr. Warbasse was sworn as a witness and produced the stock certificate of the H. W. Merriam Shoe Company originally contained in this envelope. It was Exhibit C. 12, No. 32, for 30 shares, issued April 12, 1894, to Joseph E. Warbasse.

This envelope also contained the note given by Joseph E. Warbasse to Henry W. Merriam, being one of the notes referred to on the Exhibit C. 14.

EXHIBIT HUNTINGTON 8.

Letter from Henry W. Merriam to Harriet M. Huntington, dated January 19, 1895.

H. W. MERRIAM SHOE COMPANY,
Ladies', Misses', Children's and Infants'
Welt, Turn and McKay SHOES.

NEWTON, N. J., Jany 9th, 1895.

Dear Sister Hattie:

Since my hurried letter to you yesterday having looked over your letter, and memorandum of assets left by Mother, I have considered that it will probably be necessary for you to take out letters of Administration—I think it all right that you should receive the two thousand dollars for services, and in regard to the 3 bonds of $500 each, and the Colorado loan you can do as you choose about bringing them to New Jersey as in the settlement they would be due

you to compensate you for money advanced for services. Only you might prefer to have them here with you, unless you have a place there where you would prefer to leave them. I have an iron safe in my house where I keep valuable papers, and unless you have a place where you would prefer to leave them you could have them in a sealed package with your name on outside as belonging to you and put in this safe. I had forgotten that in Mothers Will there was a provision that you, bro John & myself were to have a sum, specified, before the children of bro Samuel came in for a share. I think in view of the small amount there will be to go to the legatees—that it will be best for you, bro John and I to share equal with the children of bro. Samuel & then there can be no cause for *feeling hurt* by the children of bro Samuel & I would quite as soon they would not know of that part of the will at present although probably we will think best after a while to give them a full statement and thus show them that they jointly are made equal to each of mothers children, in the division of her estate after debts and expenses are paid. If you can have the dates corrected on the paper I sent for signature by the legatees & get the matter of your appointment as Administratrix completed without delaying your visit here, of course it would be well to have it done, but is not essential.

We hope it will be but a few days before you can be with us. We are now having a storm—but of course are liable to have them at frequent intervals—during this winter weather. Fanie sends love.

Affectionately,

HENRY W. MERRIAM.

EXHIBIT MERRIAM 1.

Analysis of stockholdings of Henry W. Merriam in the H. W. Merriam Shoe Company.

	STOCK ACCOUNT OF H. W. MERRIAM—From Dec. 3, 1889.	Dr.	Cr.	Bal.
	Stock Holdings prior to 1889 issue		545	545
1889				
Dec. 3	Stock issue		798	1343
	Apr. 25, 1890 Div. crd. on 1355 shares (12 shares L. R. Merriam)			
	May 21, 1890—Assigned by A. I. Lane to H. W. M. Cert No. 5—No. 17—No. 23.			
	Dec. 1, 1890—Div. on 1355 shares (12 shares L. R. Merriam)			
	May 11, 1891 " " " " "			
1891				
Nov. 24	Cert. No. 29 issued to H. W. M. for 5 shares trans. from A. I. Lane		5	1348
	Dec. 7, 1891—Div. on 1360 shares (12 shares L. R. Merriam)			
	May 6, 1892 " " " " "			
	Oct. 3, 1892 " " " " "			
	Oct. 29, 1892 " " " " "			
	May 15, 1893 " " " " "			
	Dec. 29, 1893 " " " " "			
	Nov. 2, 1893 " " " " "			
1894				
Apr. 12	Cert. No. 20 surrendered	535		
	Issued in lieu of same			
	No. 32 J. E. Warbasse 30 sh			
	33 G. L. Dutcher 30 "			
	34 F. G. Merriam 10 "			
	35 J. J. Merriam 10 "			
	36 H. W. Merriam 455 "		455	
1894				
Apr. 4	Stub Transfer Cert. No. 10 H. W. M. to Mrs. H. M. H.	5		1263
	May 19, 1894 Div. on 1300 shares (J. J. M. 10 L. R. M. 12) (H. M. H. 5 F. G. M. 10)			
1894				
Nov. 20	Cert. No. 28 surrendered	798		
	Issued in lieu of same No. 37 H. W. M.		200	
	No. 38 "		10	
	No. 39 "		10	
	No. 40 "		10	
	No. 41 "		568	1263

Exhibit Merriam 1.

			Dr.	Cr.	Bal.
		Dec. 4, 1894—Assigned in blank by H. W. M. Cert. Nos. 38-39-40-41-37			
		No date Assigned in blank by H. W. M. Cert No. 36			
		Dec. 25, 1894—Assigned by H. W. M. to F. G. M. No. 29			
		Mar. 26, 1895—Assigned by Mrs. H. M. H. Exx. to H. W. M. No. 9—No. 22			
		Apr. 1, 1895—Assigned by H. W. M. to F. G. M. No. 6			
		Jun. 12, 1895— " " W. H. Palmer to H. W. M. No. 19—No. 3.			
1895					
Jun.	28	Stub Transfer Mrs. H. M. H. Extx to H. W. M. No. 9		5	
		" " " " " No. 22		7	
		W. H. Palmer to H. W. M. No. 3		20	
		H. W. M. to F. G. Merriam No. 6	5		
		" " " " No. 29	5		
1895					
Aug.	31	Cert. No. 9 Surrendered—No. 42 issued in lieu of same to N. J. Merriam	5		
1895					
Sept.	3	" No. 37 deposited with Shoe Co. (envelope record) Div. paid to Dec. 1, 1895 to be cred. to H. W. M. to be transferred after Oct. inventory	200		
		Sept. 16, 1895—Date of Will of H. W. M.			
1895					
Nov.	2	Assignment & Stub transfer W. H. Palmer to H. W. M. No. 4		15	
		W. H. P. to H. W. M. No. 14		5	
		" " " No. 15		5	
		" " " No. 30		2½	
		" " " No. 24		82½	
		No. date stub transfer W. H. P. to H. W. M. No. 19		10	1200
		Nov. 19, 1895 (J. J. M. 10 N. J. M. 5) Div. on 1440 shares (H. M. H. 5 F. G. M. 20) included that on 200 shares already transfd.			
1896					
Feb.	19	Transfd. to Mrs. Eggleston in lieu of No. 14	5		
		" " John Butts " " " No. 15	5		

Exhibit Merriam 1.

		Dr.	Cr.	Bal.
1896				
Feb. 24	Assigned by H. W. M. to Mrs. H. M. H. Cert. No. 47	15		
	Stub transfer not dated—next div. crd. to Mrs. H. M. H.			
	Cert. No. 3 surrendered—No. 45 issued in lieu of same	20	20	
	" No. 19 " No. 46 " " "	10	10	
	" No. 4 " No. 47 " " "	15	15	
	" No. 22 " No. 48 " " "	7	7	
	No date—Assigned by H. W. M. in blank cert. No. 48			
Mar. 31, 1896	" " " to J. J. M. No. 46	10		1165
	Held by J. J. M. but not transfd. on Co.'s books			
	J. J. M. crd. with dividend 10/27/1898			
Oct. 21, 1896	—Div. on 1210 shares (J. J. M. 20)			
	(N. J. M. 5)			
	(F. G. M. 20)			
1896				
Dec. 5	Issued to Jno. Tozer No. 49-50 shares in lieu of No. 24-82½ shares	82½		
	" " F. G. Merriam No. 50-35 No. 30-2½	2½		1080
June 4, 1897	Div. on 1160 shares (J. J. M. 20)			
	(N. J. M. 5)			
	(F. G. M. 55)			
Oct. 21, 1897	" " " " " "			
1897				
Dec. 16	*Death of Fannie G. Merriam*			
	Stock inherited by H. W. Merriam		55	
Feb. 21, 1898	—Cert. No. 29-5 sh. endorsed as property of J. J. M.			
	" No. 6-5 sh. endorsed as property of J. J. M.			
1898				
Feb. 21	Assignment & Stub transfer H. W. M. to Mrs. H. M. H. No. 50	35		1100
Mar. 5, 1898	—Cert. No. 45-20 shares—Assigned by H. W. M. to J. J. M.			
Mar. 5, 1898	—Endorsed with signature & date			
	Envelope of J. J. M. (Record in note book)			
Oct. 27, 1898	—Div. on 1140 shares			
	(N. J. M. 5)			
	(Mrs. H. M. H.)			
	(35 sh. of her)			
	(total 55)			
	W. L. Dutcher held cert. No. 34 at time of H. W. M.'s death but same had not been transfd. on books of the Co.	10		1090

EXHIBIT MERRIAM 2.

Analysis of the stockholdings of Henry W. Merriam in the H. W. Merriam Shoe Company, with comparison of shares of record in his name, the dividend dates and number of shares on which dividends were actually paid to him; supplementary to Exhibit Merriam 1.

STOCK HOLDINGS OF H. W. MERRIAM
IN THE H. W. MERRIAM SHOE COMPANY.

ON DIVIDEND DATES.

No. of shares on which dividends were credited to H. W. Merriam as per ledger.	As of Date.	Cert. Nos.	No. of shares.	Total shares.
1355	Apr. 25, 1890	20	535	
1355	Dec. 1, 1890	10	5	
1355	May 11, 1891	28	798	
		6	5	1343
1360	Dec. 7, 1891	20	535	
1360	May 6, 1892	10	5	
1360	Oct. 3, 1892	28	798	
1360	Oct. 29, 1892	6	5	
1360	May 5, 1893	29	5	1348
1360	Nov. 2, 1893			
1360	Dec. 29, 1893			
1300	May 19, 1894	28	798	
		6	5	
		29	5	
		36	455	1263
1440	Nov. 19, 1895	36	455	
		24	82½	
		30	2½	
		3	20	
		41	568	
		39	10	
		38	10	
		22	7	
		40	10	
		14	5	
		15	5	
		4	15	
		19	10	1200

Exhibit Merriam 2.

No. of shares on which dividends were credited to H. W. Merriam as per ledger.	As of Date.	Cert. Nos.	No. of shares.	Total shares.
1210	Oct. 21, 1896.....	36	455	
		24	82½	
		30	2½	
		41	568	
		39	10	
		38	10	
		40	10	
		45	20	
		48	7	1165
1160	June 4, 1897.....	36	455	
1160	Oct. 21, 1897.....	41	568	
		39	10	
		38	10	
		40	10	
		45	20	
		48	7	1080
1140	Oct. 27, 1898.....	36	455	
		41	568	
		39	10	
		38	10	
		40	10	
		45	20	
		48	7	
		6	5	
		29	5	
		34	10	1100

EXHIBIT LANE INFANT 1.

Power of Attorney, Henry W. Merriam to Harriet M. Huntington, dated July, 1900.

KNOW ALL MEN BY THESE PRESENTS, That I, HENRY W. MERRIAM, of Newton, Sussex County, New Jersey, have made, constituted and appointed, and by these presents do make, constitute and appoint Harriet M. Huntington my true and lawful attorney for me and in my name, place and stead to receive any and all moneys due or to become due to me for interest, dividends, or rents; to receive any moneys that may be paid for principal on any mortgages or notes and to execute all necessary and proper discharges and acquittances therefor; to endorse in my name any and all checks, drafts or bills of exchange payable to my order and to collect the money thereon; to pay out of any moneys of mine now in her hands or hereafter to come into her hands any and all bills for household expenses or that may be necessary for the maintenance of my household and establishment at Newton, New Jersey in the manner and on the scale I have been accustomed to maintain the same; to pay all insurance premiums, life or fire, necessary to maintain my insurance policies as at present; to pay the expenses at college of my nephew Henry Franklin Merriam, and to pay such amounts for church, charity and benevolence as I have been in the habit of paying, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or her substitute shall lawfully do or cause to be done by virtue hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the twenty-eighth day of July in the year of Our Lord One Thousand Nine Hundred.

HENRY W. MERRIAM. (SEAL)

Signed, Sealed and Delivered in the presence of

JOHN C. HOWELL
MARGARET WARD.

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

JOHN C. HOWELL and MARGARET WARD being duly sworn on their oaths say, that they were present and saw Henry W. Merriam sign and seal the within power of attorney and heard him acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed and that they thereupon signed the same as subscribing witnesses.

JOHN C. HOWELL.
MARGARET WARD.

Subscribed and sworn to before me this 28th day of July A. D., 1900.

F. J. SWAYZE,
Master in Chancery of New Jersey.

EXHIBIT LANE 1.

Certificate No. 41, the H. W. Merriam Shoe Company, being the certificate contained in the envelope Exhibit H. 1.

EXHIBIT LANE 2.

Certificate No. 36, the H. W. Merriam Shoe Company, being one of the certificates contained in the envelopes Exhibit H. 2.

EXHIBIT LANE 3.

Cancelled certificate No. 59 issued to John J. Merriam for 122 shares; attached to stock book.

EXHIBIT LANE 4.

Certificate No. 60, the H. W. Merriam Shoe Company, for 353 shares, issued to John J. Merriam, May 6, 1901; cancelled and attached in stock certificate book.

EXHIBIT LANE 5.

Stock certificate of H. W. Merriam Shoe Company No. 6, for 5 shares, being one of the certificates in the envelopes Exhibit H. 2.

EXHIBIT LANE 6.

Certificate No. 29, for 5 shares, being one of the certificates contained in Exhibit H. 2.

EXHIBIT LANE 7.

Certificate No. 45, H. W. Merriam Shoe Company, 20 shares, being one of the certificates contained in envelope Exhibit H. 2.

EXHIBIT LANE 8.

Certificate No. 51, H. W. Merriam Shoe Company, 10 shares, issued to John J. Merriam, May 6, 1901; cancelled and attached to stock certificate book.

EXHIBIT LANE 9.

Certificate No. 38, for 10 shares, H. W. Merriam Shoe Company, being the certificate contained in envelope Exhibit H. 3.

EXHIBIT LANE 10.

Certificate No. 54, H. W. Merriam Shoe Company, 10 shares, issued to Olin L. Merriam, May 16, 1901; returned for cancellation and attached to the stub of the stock certificate book.

EXHIBIT LANE 11.

Certificate No. 66, H. W. Merriam Shoe Company, 10 shares, issued to Joseph E. Warbasse, August 6. 1901; returned for cancellation and attached to the stock certificate book.

EXHIBIT LANE 12.

Certificate No. 39, 10 shares, H. W. Merriam Shoe Company, issued to Henry W. Merriam, November 20, 1894, and being the certificate contained in the envelope Exhibit H. 4.

EXHIBIT LANE 13.

Certificate No. 55, H. W. Merriam Shoe Company, 10 shares, issued to Nellie J. Merriam, November 6, 1901; returned for cancellation and attached to the stub of the stock certificate book.

EXHIBIT LANE 15.

Certificate No. 48, H. W. Merriam Shoe Company, 7 shares, issued to Henry W. Merriam, February 24, 1896, being the certificate contained in envelope Exhibit H. 5.

EXHIBIT LANE 16.

Certificate No. 56, H. W. Merriam Shoe Company, 7 shares, issued May 6, 1901, to Mrs. Maybelle F. Buffington; returned for cancellation and attached to stub of the stock certificate book.

EXHIBIT LANE 17.

Certificate No. 40, H. W. Merriam Shoe Company, 10 shares, issued to Henry W. Merriam, November 20, 1894; endorsed in blank, December 4, 1894, by Henry W. Merriam in his handwriting and returned for cancellation and attached to the stub of the stock certificate book.

EXHIBIT LANE 18.

Certificate No. 62, H. W. Merriam Shoe Company, 10 shares, issued to Mrs. Maybelle F. Buffington, guardian for Frances and Ralph Buffington, June 24, 1901; returned for cancellation and attached to the stub of the stock certificate book.

EXHIBIT LANE 19.

H. W. Merriam Shoe Company stock certificate book, stubs and certificates attached thereto.

EXHIBIT LANE 20.

Ledger, H. W. Merriam Shoe Company, marked "H. W. M. S. Co." containing account of Henry W. Merriam, commencing July 19, 1891, and continuing to October 1, 1894. Marked on p. 304.

EXHIBIT LANE 21.

Ledger A, H. W. Merriam Shoe Company, showing account of Henry W. Merriam beginning October 19, 1894, p. 204-5, and continuing on pages 214 and 215 and page 406.

EXHIBIT LANE 22.

Ledger B of the H. W. Merriam Shoe Company.

The foregoing Exhibit Lane 20, Exhibit Lane 21, Exhibit Lane 22 contains the accounts of the H. W. Merriam Shoe Company with the following persons. H. W. Merriam, H. M. Huntington, J. J. Merriam, Geo. T. Dutcher, John Tozer and J. E. Warbasse.

Extracts from account of H. W. Merriam including the balance on his death of $15,265.03 paid to his executors.

		Fol.	Debit	Credit	Balance
(1896)	BALANCE			2560.09	2560.09
	Smith Rent Apl, May, June, July, Aug., Sept.			72.	2632.09
Oct.	21 Dividend			12100.	14732.09
	" Trans. from J. E. W. acc't stock			207.28	
	" Trans. from J. E. W. acc't int.			92.72	15032.09
	" Trans. from G. L. D. acc't int.			92.72	
	" Trans. from G. L. D. stock			207.28	15332.09
	" Tiffany & Co.	365	2.50		
	" J. J. M. Dividend		200.		15129.59
	27 Cash Lincoln	364		108.50	15238.09
Nov.	2 " M. F. Ass'n	366		3.50	15241.59
	Balance			15241.59	
Oct.	31 Cash	369	63.50		
Nov.	2 "	"	100.00		15078.09
	4 Library Ass'n	371	34.04		
	4 Life Ins.	371	705.90		14338.15
	6 Alliance, Neb.	370		210.	14548.15
	7 Fredonia	370		120.	14668.15
	" Cash	371	200.		14468.15
	10 Cash Boulder	372		90.	14558.15
	" " Coal	375	119.03		14439.12
	12 " Bulbs	375	32.53		
	13 H. Van B. & A.	375	5000.		9406.59
	14 Cash Prince	375		45.	9451.59
	16 " Cross	377	600.		8851.59
	21 "	379	150.		8701.59
	24 " Boulder	380		54.	8755.59

Exhibit Lane 22.

					Fol.	Debit	Credit	Balance
	Dec.	8	Cash	Horse	389	250.		
		9	"	Voorhees	389	18.		8487.59
		14	"	Huntington	391	50.		
		"	"	Fire Ins.	391	10.		
		15	"	Sullivan	391	25.		
		"	"	Ackerson	391	50.		8352.59
		"	"	Smith Oct.-Nov. Rent			24.	8376.59
10	Dec.	15	N. J. M.		391	50.		
	"	"	Taxes		391	282.60		8043.99
	"	18	Am't chgd. to H. M. Huntington-Bonds				62.50	
	"	"	Am't chgd. F. J. Butt Bonds				37.50	
	"	"	Am't chgd to Mrs. Eggleston-Bonds				25.	8168.99
	"	"	G. J. Bonds		393	362.50		7806.49
	"	19	Cash		393	200.		7606.49
	"	22	"	O. L. M.	395	25.		7581.49
	"	"	"	M. F. B.	395	25.		7556.49
	"	24	"	Xmas Fund	397	5500.		
20	"	"	"	Hahn	"	90.		
	"	"	"	Habens	"	90.		
	"	"	"	Bell	"	90.		
	"	"	"	Atwood a/c		43.80		1742.69
	(1897)							
	June	4	Cash	Prince	476		86.	1147.69
		"	Dividend		477		11600.	12747.69
		"	coal			111.35		12636.34
		"	Trans. from J. Tozer a/c Dividend applied on note				500.	
		"	Trans. G. L. Dutcher a/c note				300.	
30		"	Trans. J. E. Warbasse a/c note				300.	
		5	Cash		477	200.		13536.34
		7	"	Prince	478		36.	13572.34
		11	"	Harris Co.	481	10139.73		3432.61
		14	"	Prince	482		14.	3446.61
		17	"	"	484		23.40	3470.01
		19	"		485	200.		3270.01
		21	"	Denver	486		70.00	3340.01
		23	"	Prince	486		31.50	3371.51
		26	"	L. & L.	489	64.60		
		26	"	J. J. M. Coal	489	57.75		3249.16
		30	"	Denver	490		250.	3499.16
40		29	"	J. J. M.	493	200.		3297.16

Exhibit Lane 22.

			Fol.	Debit	Credit	Balance	
1897		Balance			1766.07		
Oct.	21	Dividend			11600.		
	22	Trans. from J. Tozer a/c applied on note			345.50		
		Int. for 1 year 3%			154.50		
		Trans. from G. L. D. a/c			224.49		
		Int. for 1 yr. 3%			75.51		
		Trans. from J. E. W. a/c			224.49		10
	22	Int. for 1 yr.			75.51		
	26	Cash Prince	54		7.	14473.07	
	28	" Swayze	59	100.		14373.07	
Nov.	1	" J. J. M.	59	200.		14173.07	
	3	" Ins.	61	705.90		13467.17	
	5	" Prince	60		13.00		
	5	" McKay	60		3.50		
	6	" Boulder	60		33.75	13517.42	
	13	"	65	200.		13317.42	
	"	" Prince	67	103.18			
	16	" Harris Co.	67	10503.94		2710.30	
	18	" Hudson	66		120.	2830.30	
	20	Error C. G. July 26	68		10.		20
	22	Cash Hull	68		19.50	2859.80	
	20	Taxes	69	269.		2590.80	
	27	Cash	71	200.		2390.80	
Dec.	1	" Cross	72		42.	2432.80	
				12282.02	14714.82		
		BALANCE	$2432.80				
(1898)							
		Balance			6301.68	6301.68	
Oct.	27	Dividend			17100.	23401.68	
	"	Trans. from J. Tozer a/c					30
		3% Int.		144.14			
		Applied on note		605.86	750.		
		Trans. G. S. Dutcher a/c					
		3% Int.		68.77			
		Applied on Note		381.23	450.		
		Trans. from J. E. W. a/c					
		3% Int.		68.77			
		Applied on Note		381.23	450.	25051.68	
Nov.	7	Cash Ins.	241	705.90		24346.78	
	15	" Alliance	244		140.	24486.78	
	14	" Dft. Detroit	247	10000.		14486.78	40

Exhibit Lane 22.

				Fol.	Debit	Credit	Balance
Nov.	14	Cash	Price	249	6.		14480.78
	25	"	A. & W.	248		134.63	14615.41
	26	"		251	200.		14415.41
	23	"	Mission	253	10.		
	25	"	Taxes	253	325.		
	"	"	"	253	38.40		14042.01
Dec.	7	"	McKay	254		5.40	
	"	"	Prince	254		18.00	
	"	"	Edwards	254		218.13	14283.54
	"	"	Sutton	255	326.27		
	"	"	Coal	255	101.15		13856.12
	9	"	Prince	256		9.10	
	"	"	Cross	256		42.	13907.22
	16	"	Fredonia	260		120.	14020.22
	19	"		263	200.		
	"	"	J. J. M.	263	200.		13620.22
	27	"	Boulder	264		196.75	13816.97
	30	"	Prince	266		111.90	13928.87
1899							
Dec.	29	Cash	Prince	267	200.		13728.87
Jan.	3	"		266		1454.87	15183.74
	11	"	Water	273	9.51		15174.23
	17	"	Prince	272		18.	
	"	"	Middletown	272		60.	15252.23
	21	"		275	200.		
	"	"	Price	279	17.		15035.23
Feb.	7	"	Warbasse	282		94.50	15129.73
	6	"	Mission	283	10.		
	8	"	Coal	283	197.70		14922.03
	13	"	Prince	282		29.90	
	"	"	Talbot	282		105.	15056.93
	18	"	Prince	284		18.	
	18	"	Prince	284		1118.11	16193.04
	"	"		285	100.		
Mch.	6	"	B. & L.	291	12.		16087.04
			Balance			16087.04	
Mch.	6	Cash	Water	290		30.	
	"	"	Prince	290		10.80	
	"	"	Boston	290		250.	
	9	"	Prince	292		157.	
	13	"	Lane	292		81.54	
	18	"	Prince	296		328.83	
	18	"		297	100.		16845.21
Apr.	3	"	U. S. B.	302		370.	
	"	"	A. & W.	302		249.90	
	"	"	McKay	302		5.40	17470.51
	5	"	Lewis Auto Co.	305	115.		17355.51
	"	"	Water	305	7.15		

Exhibit Lane 22.

				Fol.	Debit	Credit	Balance
Apr.	20	Cash	U. S. Mch.	312		4.67	
	"	"	" "	312		2.13	
	"	"	Schofield	312		56.58	
1899							
Apr.	24	Cash	Prince	314		18.	17429.74
	"	"	J. J. M.	317	250.		17179.74
	29	"		317	100.		
May	2	"	A. & W.	318		70.	
	"	"	"	318		70.	
	"	"	Ayres	318		100.	
	"	"	N. & B.	318		600.	
	"	"	Prince	318		35.	17954.74
	4	"	"	320		388.77	18343.51
	3	"	Lane	321	100.		18243.51
	13	"	Coffee	329	6.40		
	"	"	Ogden	335	1.		
June	3	"		337	200.		
	20	"	Ins.	347	4.20		
July	3	"	Water	351	24.75		
	8	"	Wilson	352		82.50	
	8	"	N. Bonds	352		200.	
	8	"	Cash Utica R. R.	352		200.	18389.66
	"	"		353	200.		
	19	"	U. S. Mchy. Co.	360		14.	
	"	"	"	360		6.37	
	"	"	Orange Co. Trust Co.	360		60.	
	18	"	J. J. M.	361	250.		18220.03
	29	"		365	100.		
Aug.	8	"	Ogden		2.		
Sept.	1	"	J. J. M.	383	250.		
	2	"	J. L. L. & Son	383	7.25		
	9	Shoes			2.25		
	5	Cash	B. & L.	385	12.		
	23	"		393	250.		
	19	"	Price	393	7.10		
	28	Coal & Ctg.			93.84		17495.59
1899							
Oct.	3	Cash	Water	397	16.		
	7	"	Ins.	403	705.90		
	9	"	Gas Co.	403	11.90		
	13	"	J. J. M.	407	250.		
	21	"		409	200.		
		Smith Int. 13 mos.				130.	16341.79
Oct.	27	Salary to date				1000.	
		Balance			17341.79		
					20608.53	20608.53	

Exhibit Lane 22.

			Fol.	Debit	Credit	Balance
		Balance			17341.79	
Dec	1	Cash J. J. M.	433	275.		
	4	"	433	250.		
	16	"	439	300.		
	"	" Taxes	441	445.		
May	16	Chks. to R. F. Belchamber		20.		
	25	" " Geo. Emmans		15.		
June	6	" " C. J. Majory		100.		
	7	" " J. J. Merriam		350.		
		Bal. to New Ledger		15586.79		
				17341.79	17341.79	
1900						
		Balance from 6 Ledger			15586.79	
Jan.	3	Water	449	7.15		
	9	Exp. col. Bonds	453	.50		
	17	Coal		96.48		
	16	Carting Coal	459	7.92		
Feb.	24	Cash	471	250.00		
Mch.	5	" Ins.	473	15.00		
	6	" B. & L.	473	12.00		
	12	" Price	479	9.10		
Apr.	2	" Water	485	5.11		
	24	Shoes Butt.		2.50		
		Smith Int. 7 mos. 2 June 1st, 1900			70.00	15251.03
June	14	Cash Ins.	31	4.50		
July	3	" Water	43	16.47		
Sept.	4	" Coal		209.20		
	"	Carting Coal	79	12.00		
Oct.	1	Cash Water	93	30.75		
Nov.	2	" Telegrams		6.49		
		Balance		14953.33		
				15656.79	15656.79	
		Balance			14953.33	
		Smith Int. 5 mos. to Nov. 1st.			50.00	
Aug.	24	Cash No. 284			15000.00	
Sept.	7	" No. 290			10000.00	
Oct.	11	" No. 313	25141.66			
		Interest			141.66	
		Smith Int. 12 mos. to Nov. 1, 1901,			120.	
		By Int. on Bal.			141.70	
	22	Cash No. 319	15265.03			
			40406.69		40406.69	

Exhibit Lane 22.

LEDGER A.

(Entire account of Mrs. Huntington from Oct. 21, 1896, to death of H. W. Merriam.)

H. M. HUNTINGTON

Date	Explanation	Fol.	Debit	Credit
1896				
Oct. 21	Dividend			200.00
Dec. 11	Cash	391	75.	
18	Amt. crd't to H. W. M. a/c Paid for Bonds Aug. 29.		62.50	
18	Cash Bonds		62.50	
			200.00	200.00
1897				
June 4	Dividend			200.00
15	Cash	485	100.	
Oct. 21	Dividend			200.00
Dec. 11	Cash	79	300.	
			400.00	400.00
1898				
Oct. 27				300.
Dec. 29	Cash	267	300.	
			300.	300.

LEDGER A.

(Entire account of J. J. Merriam up to death of H. W. Merriam.)

JOHN J. MERRIAM

Date	Explanation	Fol.	Debit	Credit	Balance
1898					
May 6	Cash	143	200.00		
Oct. 27	Dividend			300.00	
1899					
Mch. 8	Cash	293	200.00		
	Balance to L "B"			100.	
			400.	400.	

EXHIBIT LANE 23.

Minute book of the H. W. Merriam Shoe Company:

June 4th, 1897.

A meeting of the stockholders of the H. W. Merriam Shoe Co. was held at the company's office in Newton on June 4th, 1897. Present: H. W. Merriam, John Tozer, Jos. E. Warbasse and W. L. Dutcher. A resolution was offered by W. L. Dutcher that a cash dividend of 10% be declared on the capital stock of the company to be paid from the undivided profits of said company payable on and after date, which resolution was unanimously carried. There being no further business to consider the meeting then adjourned.

W. L. DUTCHER,
Sec.

Newton, June 4th, 1897.

October 21st, 1897.

A meeting of the stockholders of the H. W. Merriam Shoe Co. was held at the company's office in Newton on Octo. 21st, 1897. Present: H. W. Merriam, John Tozer, Joseph E. Warbasse and W. L. Dutcher. It was agreed that the condition of the finances of said company were such as would justify a dividend being made of 10%. A resolution was offered by W. L. Dutcher that a cash dividend of 10% be declared on the capital stock of the company to be paid from its undivided profits payable on and after date, which resolution was unanimously carried. There being no further business to consider the meeting was adjourned.

Newton, Octo. 21st, 1897.

W. L. DUTCHER,
Secretary.

Exhibit Lane 23.

A meeting of the officers and stockholders of the H. W. Merriam Shoe Co. was held at their office in Newton on December 27th, 1897. Present: H. W. Merriam, John Tozer, Geo. L. Dutcher, Jos. E. Warbasse and W. L. Dutcher.

A resolution was offered that for a consideration of three thousand dollars ($3,000.00) to them duly paid they sell, transfer and convey to W. L. Dutcher all their rights, title and interest in the house and lot opposite this factory with all the appurtenances connected therewith, which resolution was unanimously carried. The meeting was then adjourned.

Newton, Dec. 27, 1897.

W. L. DUTCHER,
Secretary.

October 27th, 1898.

At a meeting of the stockholders of the H. W. Merriam Shoe Co. held at their office in Newton on Octo. 27th, 1898, present: H. W. Merriam, John Tozer, Jos. E. Warbasse and W. L. Dutcher, it was agreed that the finances of said company were such as to justify a dividend of 15% (fifteen per cent.). A resolution was offered to that effect and unanimously carried. Dividend payable on and after date from the undivided profits of said H. W. Merriam Shoe Co. There being no further business to consider the meeting adjourned.

Newton, Octo. 21st, 1898.

W. L. DUTCHER,
Secretary.

Stipulation.

July 18th, 1899.

A meeting of the stockholders of the H. W. Merriam Shoe Co. was held this day at the company's office in Newton. Present: H. W. Merriam by proxy. W. L. Dutcher, John Tozer and Jos. E. Warbasse.

A resolution was offered authorizing the sale of the Chas. Jewett N. E. Quarter Section 1-25-47 in Nebraska Box Butter Co. for the sum of $275, which resolution was unanimously carried. Mr. W. A. Prince to conduct the negotiations and execute the necessary papers.

Sale effected at		275.00
Taxes paid by Prince	18.55	
Commission Prince 5%	13.75	
Balance		
Check W. A. Prince to	242.70	275.00

A resolution was also made and carried authorizing the sale of other property owned by the H. W. Merriam Shoe Co in Nebraska as the opportunity for such sale may develop.

W. L. DUTCHER,
Secretary.

The foregoing State of the Case has been abbreviated by Stipulation of Counsel.

In Chancery of New Jersey.

May 26, 1913.

Between
FRANCIS J. SWAYZE, as executor and trustee, etc.,
Complainant,
and
HARRIET M. HUNTINGTON and others,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled cause at Chancery Chambers, Newark, New Jersey, on May 26, 1913, before Hon. James E. Howell, Vice-Chancellor.

Appearances:

Mr. Edward M. Colie for the complainant.

Mr. Thomas P. McKenna for Charles R. Lane.

FRANCIS J. SWAYZE, recalled.

Direct examination by Mr. Colie.

Mr. Colie. I want to offer in evidence first a consent dated March 19, 1912, of the matter set forth in the stipulation and agreement so dated, signed by solicitor for complainant, Pitney, Hardin & Skinner for the defendants whom they represent, Edward S. Atwater for the defendants whom he represents, William A. Smith, guardian *ad litem* for the defendants, Carlisle R. Lane, Albert Merriam Lane and Clara May Lane, and Thomas M. Kays, solicitor for and counsel with Edward M. Dutcher, guardian. It is at-

tached to the petition to open testimony, dated May 10, 1913, that stipulates into the record on behalf of those people what I am seeking to prove by Judge Swayze.

Marked Exhibit A May 26.

Q You testified to the delivery of the envelopes referred to in Exhibit C. 8. Will you state what led to or induced the delivery of those envelopes?

A Why, the signing of the agreement C. 8, as I recollect the number. I took the position that I would not deliver them or do anything about it without a judicial determination of the rights of the parties, unless the parties agreed.

Q Then you refer to the consents connected with C. 8?

A Yes, consents connected with C. 8.

Q And attached to the original?

A I believe so.

Q Those consents were consents of all the parties who are *sui juris?*

A Yes.

Mr. McKenna. I suppose the consents speak for themselves.

The Court. I suppose he wants to prove they were all of age when they signed the consents.

A Everybody who signed the consents were of age.

Q It was on the reliance of those consents that the envelopes were delivered as far as the adults were concerned?

A Yes.

Q What was the inducement or reliance by reason of which the two Dutcher infants were concerned or the Lane infants were concerned inducing the delivery of those envelopes?

A We took the risk, depending on the indemnity contained in the agreement and security of the stock that was left with us.

Q The dividends and earnings of the stock and the cash which was paid by way of dividend earned during Mr. Merriam's lifetime on the stock deposited by the agreement as to which had been paid was paid to Mr. Merriam during his lifetime, John J., and Mrs. Huntington, up to the point named in your former testimony, December 31 of last year?

A The interest on the $1,510 deposited by Mrs. Huntington, and the $1,220 deposited by John J. Merriam were paid to them in the reliance upon the consent of Carlisle J. Lane, Albert I. Lane and Charles R. Lane; the dividends on the stock of the shoe company, the 151 shares and 122 shares were, I suppose, paid to them by the company; the stock stood in their names on the books and we relied on the consent of the three Lane boys, and allowed them to receive the dividends after the stock was converted into cash, and subsequently invested in bonds I paid the interest on Mrs. Huntington's share to her and on John J. Merriam's share to him or his executors, relying upon these consents, up until December last, 1912, when Mr. Charles R. Lane raised this question; then of course I withheld further payment of interest on his share.

Cross examination by Mr. McKenna.

Q In the consent signed by Mr. Lane, and already in evidence in the case, it recites "Referring to your letter of January 19, 1901." Was there such a letter?

A Well, there was a letter of January 19 or 21; I think the date there is perhaps erroneous; I think the letter sent to him may have been dated 21; there was only one letter sent at that time.

Q I am now about to show you letter dated January 21, 1901, and we may understand that any references to a letter of January 19, 1901, and to a letter of January 21, 1901, referred to the same letter?

A Yes; I don't think there is any trouble about that; of course this is only a copy; I assume this is

all right. That is the letter that was sent to Mr. Charles R. Lane, referring to letter on page 108 and 109 of the record.

Q I presume all of the consents were of the same form?

A Exactly.

Q And prepared by yourself?

A Probably.

Q And this letter dated Newark, New Jersey, January 21, 1901, which is an exact copy in substance of the same letter addressed to the other consentors dated January 21, 1901, is the letter which requested Mr. Lane's consent?

A It is the letter which stated the facts to him; it shows for itself what it requested.

Q Well, it enclosed a consent. I show you a letter purporting to be signed by you dated Supreme Court of New Jersey, &c., April 16, 1909.

A Well, this is what you showed me in the other room.

Q Yes.

A If you let me have that envelope I will get you my own copy of this, which I have no doubt agrees with your copy. April 16, I think that is the one you want.

Q Judge, have you the letter of Mr. Lane's to you dated April 16?

A April 16?

Q Yes, the same date?

A April 16, 1909?

Q 1909?

A I don't believe I have such a letter. I have a letter of April 15.

Q Well, maybe that is it. It says here "In reply to your letter—I am in receipt of your letter of April 15."

A There is his letter of April 15.

Q This letter dated April 15, 1909, was received by you?

A Yes.

Q In reference to this matter, and your reply is dated April 16, 1909?

A Yes.

Mr. McKenna. And I offer those original letters.

The Court. What are they about?

Mr. McKenna. They are about this consent question.

Mr. Colie. In the shape in which these pleadings are I cannot see the relevancy of these papers.

I withdraw objection to both of the letters.

Marked Exhibit B. May 26, and Exhibit C. May 26.

(Exhibit B. May 26.)

"Judge Francis Swayze.

Dear Sir:

Your letter of April 12th with inclosure duly received for which I thank you.

I wrote my signature on the paper signing away my claim to the shares of the H. W. Merriam Shoe Co.

A clause in the will of the late H. W. Merriam states that my share of his property is 'inalienable' which in my mind means that I am not privileged to *transfer* or *sign* away any portion of it in which case my signature on the paper would seem to be *invalid*.

I signed that paper without thoroughly understanding the wording of the will and have but recently become learned of the provision of the word.

Will you kindly give this matter your consideration and state to me your interpretation

of the meaning of that clause also why my signature was asked for when the will provided otherwise.

Thanking you for past favors I am,
Resp. yours,

C. R. LANE."

April 15th, 1909.

(Exhibit C. May 26.)

"Supreme Court of New Jersey
Chambers: 765 High Street
Newark, N. J.

April 16, 1909.

Mr. Charles R. Lane,
415 Main St., Worcester, Mass.

Dear Sir:

I am in receipt of your letter of April 15th.

Of course, your consent could only affect the income to which you are absolutely entitled and could not affect the interest in remainder, to which your children are entitled under the will. It is not necessary to express any opinion as to whether it could affect your possibility of interest in the principal, since that question has not yet arisen. Your signature was asked for at the time because you had an absolute interest in the income of a portion of the residue of the estate, and your consent was, therefore, necessary. You will see that all that has been done with respect to this stock has been to allow Mr. Merriam and Mrs. Huntington to receive the income, the stock itself being held until the title thereto could be finally determined.

Yours truly,

FRANCIS J. SWAYZE."

Letter from C. R. Lane to Judge Swayze dated April 2nd, 1909, offered in evidence and marked Exhibit D. May 26.

(Exhibit D., May 26.)

"Judge Francis Swayze,
Newark, N. J.

Dear Sir:

About a year ago I had the pleasure of calling on you and talking over matters pertaining to the estate of my late cousin, H. W. Merriam. I had rather forgotten some points of our conversation and would like to be refreshed on them.

First:—Kindly tell me how many shares of stock of the H. W. Merriam Shoe Co. are being held by you that was to go to John Merriam and Mrs. Huntington? Did I understand you to say these shares could not be delivered to Mr. Merriam and Mrs. Huntington until the children of my brother and my son arrived at the age of twenty-one and gave their consent. If they should give their consent to the transaction would the shares be divided equally between the two parties above mentioned?

If our children when they do arrive at the required age should not be willing that Mr. Merriam and Mrs. Huntington should have the shares of stock what disposition will be made of them then? Have Mr. Merriam and Mrs. Huntington had the right to vote these shares since my cousin's death? Have they had the right to receive the dividends during these years?

If you will be so kind as to answer these questions I will be very much obliged.

I remain,

Very resp. yours,

C. R. Lane,

415 Main St., Worcester, Mass.

April 2nd, 1909."

Letter from C. R. Lane to Judge Swayze, dated April 9th, 1909, offered in evidence and marked Exhibit E., May 26.

(Exhibit E., May 26.)

"Judge Francis Swayze.

Dear Sir:

Will you kindly send me a copy of the paper that was sent me by you just after my cousin, Henry Merriam, died, and which I signed, in regard to my interest in the shares of stock held by you as trustee.

Will you also send me a copy of your account as trustee.

Thanking you in advance, I remain,

Very resp. yours,

C. R. LANE,

415 Main St., Worcester, Mass.

April 9th, 1909."

Letter from Judge Swayze to Charles R. Lane, dated April 12, 1909, offered in evidence and marked Exhibit F., May 26.

(Exhibit F., May 26.)

"Supreme Court of New Jersey

Chambers: 765 High Street

Newark, N. J.

April 12, 1909.

Mr. Charles R. Lane,

415 Main Street,

Worcester, Mass.

Dear Sir:

I am in receipt of your letter of April 2, but have been obliged to delay my reply until I could get to the bank and get access to my safe deposit box, which I was unable to do until to-day.

The executors hold 373 shares of stock of the H. W. Merriam Shoe Co., 122 shares of which were from John J. Merriam's portion and 151 of which were from Mrs. Huntington's portion. They are to hold them until the right of Mr. Merriam and Mrs. Huntington thereto is established, or until the children of your brother and yourself waive all claim. This cannot be done, of course, until the children are all twenty-one years of age. If your children should be unwilling that Mr. Merriam and Mrs. Huntington should have the stock, the legal title thereto will have to be determined by judicial proceedings. I suppose that Mr. Merriam and Mrs. Huntington have voted their shares since Mr. H. W. Merriam's death, but I know nothing about the internal management of the shoe company, for that I have no concern. They have had the right to receive the dividends for the reason that you and your brothers waived your rights immediately after Mr. H. W. Merriam's death. I enclose you herewith a copy of the paper you signed at that time in response to a letter of the executors explaining the situation. I shall be glad to send you a copy of the account already filed by the trustees with the surrogate of Sussex County and also to send you a statement of the receipts and disbursements since as soon as the same can be prepared, but this is a matter which would require some time, and it is very difficult for me to find any time to draw off the latter part of the account just at present. I expected to file a second account with the surrogate last summer, but the illness of Mr. Merriam has made it impossible for him to swear to it, and I am not in a position to file a separate account, as we have kept the bank account and the securities and

drawn checks always in the name of all the trustees. If there is any further information you desire, kindly let me know.

Yours truly,

FRANCIS J. SWAYZE."

Enclosure.

Q At the time of the writing of your letter of January 21, 1901, which is marked Exhibit C. 9, had you met Mr. Lane, Charles R. Lane?

A Why, I had known Mr. Lane for so many years that I must have met him before that time; it depends on what you mean by met. I knew him as a boy at Newton at one time.

Q Only as an acquaintance?

A That is all, yes.

Q You had not discussed with him the legal effect of the will?

A Oh, no.

Q Nor had you discussed with him the legal effect of the paper referred to as a consent?

A No. No, the papers themselves show everything that took place.

CHARLES R. LANE, recalled.

Direct examination by Mr. McKenna.

Q You are one of the parties interested in this estate?

Q Yes.

Q And shortly after the 21st day of January, 1901, did you receive a letter from Judge Swayze?

A Yes.

Q Which he has referred to in his testimony today, and in the printed book of this case is marked Exhibit C. 9?

A Yes.

Q With this letter was there enclosed a paper which has been referred to in the testimony in this case as a consent?

A Yes.

Q Did you sign that paper?

A I did; yes.

Q Before doing so had you read this letter referred to as C. 9?

A Yes, I did.

Q Did you know Judge Swayze at that time?

A I did, yes.

Q Had you discussed with him the will?

A No, not at all.

Q Had you discussed with him the legal effect of the consent?

A No.

Q And in signing that consent did you rely upon the statements contained in this letter C. 9?

A Yes.

Q On or about April 16, 1909, did you receive a letter from Judge Swayze, marked Exhibit C. of this date?

A Yes.

Cross examination by Mr. Colie.

Q Mr. Lane, before you wrote the letters of April 9 and April 2, 1909, one Exhibit D of May 26 and the other Exhibit E of May 26, it is a fact, isn't it, that you had already consulted with Messrs. Sheehan & Cutting?

A I don't think I had at that time.

Q Well, be sure now.

A Still I am not positive about that.

Q I show you a letter dated May 4, 1909, and ask you whether you recognize that.

A That is right.

The Court. What do you mean by that, who wrote it?

Mr. Colie. Mr. Lane's letter.

The Court. To whom?

A Judge Swayze.

Q You wrote that letter, didn't you?

A I wrote that letter.

Mr. Colie. I offer that letter in evidence.

Letter dated May 4th, 1909, marked Exhibit G., May 26.

(Exhibit G., May 26.)

"Worcester, Mass., May 4th, 1909.

Judge Francis Swayze.

Dear Sir:

Messrs. Sheehan and Cutting have shown me a letter from you stating that you wanted confirmation of their authority to act for me.

In reply I will say that I have engaged them as my attorneys and they have full power and authority to act with you in regard to any interests or rights I have.

Resp. yours,

C. R. LANE."

Q When did you consult Sheehan & Cutting?

A At what time?

Q How long before you wrote those letters?

A Well, I should say about that time.

Q About the time you wrote the letters to Judge Swayze?

A I should say so, about that time.

Q How long before? Let me ask you this question. As a matter of fact those detailed questions that you put to Judge Swayze in your letter of April 2 were queries that arose after you had consulted with Sheehan & Cutting, they told you they wanted that information, isn't that so?

A No; I will tell you how the first thing started; I went to Judge Swayze, I can't remember the year,

and at that time our conversation arose, and he gave me to understand that those shares had not been turned over to these different ones; that was the first I knew that they hadn't.

Q You mean the shares that were up with him under this agreement, that is what you mean, don't you?

A Yes, that they hadn't been given to him.

Q Those had not.

A And he told me at that time they were being held until our children would be twenty-one; that was the first.

Q That was the first, but that was before you wrote these leters?

A That was before this.

Q Now, as a matter of fact, hadn't you made an assignment of your interest in this estate to somebody about this time?

A No.

Q Did not Sheehan & Cutting represent parties who had a claim against you?

A No, sir.

Q Do you know a man named Hurlbert?

A I worked for Hurlbert.

Q Wasn't Sheehan & Cutting Mr. Hurlbert's lawyers?

A I don't know anything about that, but I had nothing to do with Hurlbert, only leaving his employ.

Q I want to know whether you want us to understand that Sheehan & Cutting did not get interested in this matter because they represented some person who had a claim against you and who was looking after your interest in this estate to see whether they could get anything?

A I never knew anything about that, if they did I didn't know anything about it.

Q I want to show you a letter of Sheehan & Cutting, I will read it to you, see if you can tell us

whether you know anything about the transaction. "Worcester, Mass., Feb. 16th, 1903. Mr. W. L. Dutcher, Newton, N. J. Dear Sir: We understand that you are administrator or executor of the estate of the late H. W. Merriam of Newton, which estate is as yet undivided. We hold a note of $3,000 against one Charles R. Lane, one of the heirs of Mr. Merriam, which we have been unable to collect from him. Can you give us any information as to the amount of his interest in Mr. Merriam's estate. Yours truly, Sheehan & Cutting." Do you know anything about that note?

A That is the first I ever heard of it.

Q Never heard of that note?

A Never heard of it.

Q That letter is signed by Sheehan & Cutting?

A Yes; I never heard of it.

Q And Sheehan & Cutting appear as your lawyers in this matter. Now will you carefully think and tell us what that three thousand dollar matter was?

A I couldn't for the life of me; I never knew they had such a claim against me, never.

Q Did Sheehan & Cutting ever notify you of such a claim?

A Never, never mentioned it.

Q How did you come to go to Sheehan & Cutting about this matter?

A Well, through another party, disinterested party entirely.

Q (*By the Court.*) You mean you were recommended to them by some disinterested party?

A Yes, your honor.

Q How did you come to want to go to them at all?

A Simply because I thought there was some mistake there that I should have got.

Q Now do you know a man named Horace Underwood?

A Yes.

Q Didn't you owe Horace Underwood some money, and were not his attorneys, Sheehan & Cutting?

A Not that I was aware of.

Q In the first place, did you owe Horace Underwood any money?

A Yes, I owed him $500; he was my wife's father; that was canceled at his death.

Q Wasn't that matter in Sheehan & Cutting's hands?

A I never knew it was.

Q When did you pay Horace Underwood?

A I didn't pay it, he canceled it; he gave it to me.

Q When did he give it up and cancel it?

A At the time of his death.

Q When was that?

A That was about ten years ago.

Q Did he die ten years ago?

A Just about ten years ago; my wife died eight years ago; he died about two years before she did.

Q When you went to see Judge Swayze at that interview that you speak of before these letters were written, had you at that time consulted any lawyer?

A At that time when he told me about the shares?

Q Yes.

A No, I had not.

Q Now, hadn't you had any lawyer before that?

A Not that I remember of.

Q Now, Mr. Lane, you remember the fact that when Judge Swayze filed an account, the trustees filed an account in 1909 or thereabouts, that you employed counsel to file exceptions to the account?

A I can't tell just the time really.

Q Well, did Sheehan & Cutting do that on their own motion or did you have them do it?

A No, I had them do it.

Q You had them do it?

A Yes, they didn't do it on their own motion.

Q Those exceptions were subsequently withdrawn, weren't they?

A That I couldn't tell.

Q That you couldn't tell?

A No.

Q How does it come that Sheehan & Cutting conducted this thing without your knowing what was done?

A Of course they did know—

Q I am talking about what you know.

A I don't get the point, I guess.

Q You said you did not know it was withdrawn.

A You mean about the $3,000?

Q No, about the exceptions to the account.

A Of course I knew everything that has been going on ever since they started with it.

Q They started right after you came back and told them what Judge Swayze had said at the interview at his house, didn't they?

A Shortly after, I should say; of course I can't say just about the time.

Q You knew exceptions were filed to this account, didn't you, in the Orphans' Court?

A Oh, yes, I knew that.

Q Do you say you didn't know that they were withdrawn?

A No, I don't remember that I did; I may have.

Q Hadn't you asked what was done since 1909 in regard to your matters in this estate until this bill was filed?

A You mean from Sheehan & Cutting?

Q From your lawyers, yes.

A I knew that they had been working on it and knew when it came up.

Q I am talking about the exceptions that were filed years ago, five years ago, in the Orphans Court of Sussex County?

A Possibly I may have, but I can't recall it.

Q You gave them orders to withdraw the exceptions, didn't you?

A That I don't remember.

Q The exceptions you know were filed because Judge Swayze and his co-trustees had not charged themselves with this stock, wasn't it?

A Yes, sir.

Mr. McKenna. The exceptions speak for themselves.

The Court. This is cross examination. This is proper.

Q Now, Mr. Lane, when did you find out that those exceptions were withdrawn?

A I don't remember.

Q But you did find it out, and it was done with your approval, wasn't it?

A Whatever Sheehan & Cutting have done has been with my approval.

Q Who was the lawyer in New Jersey, do you know? Sheehan & Cutting couldn't appear in New Jersey; who was the lawyer in New Jersey?

A I didn't know as I had any.

Q You left the matter of employment then of New Jersey counsel in the matter to Messrs. Sheehan & Cutting, did you?

A Yes.

Q When was it that Sheehan & Cutting advised you that your consent might be questionable in this case, that is your consent attached to C. 8, because the will had in it the words that your share was inalienable, when did they give you that advice?

A Oh, that was about that time, I should say, a little sooner than that.

Q About the time you wrote to Judge Swayze about that point?

A About that time.

Q They were the ones who suggested that question to you, weren't they?

A I had asked before about it.

Q Who had you asked? Had you asked some lawyers before?

A Yes, I think I did; then I asked other parties, not lawyers.

Q You had asked Sheehan & Cutting about it before you wrote to Judge Swayze calling his attention to that language?

A Yes, I think I did.

Q Mr. Lane, I show you a letter dated January 6, 1910, signed by Sheehan & Cutting, to Judge Swayze, in which they say "We received your communication of December 23, and Mr. Lane has had correspondence with Mrs. Huntington in regard to adopting what we believe the right and honorable course to follow in regard to the trust funds which you are holding." Now did you have correspondence about that time with Mrs. Huntington?

A I think very likely.

Q About the facts in regard to the matter, weren't they?

A Yes, I think very likely; I can't remember.

Q Now, then, that being so, why didn't you go on and take proceedings, continue proceedings in the Orphans' Court of Sussex County to determine the question that you had raised there?

A That I couldn't tell you.

Q Nothing was done from the time you filed your exceptions up there excepting the withdrawal of them by you or by instructions of your attorneys until Judge Swayze filed the bill in this case; that is right?

A I think, yes, that is right.

TESTIMONY CLOSED.

Opinion

Filed June 4th, 1913.

In Chancery of New Jersey.

Between

FRANCIS J. SWAYZE, executor, etc.,

Complainant,

and

HARRIET M. HUNTINGTON, *et als.,*

Defendants.

On final hearing.

On bill, answer, replication and proofs.

Mr. Edward M. Colie for the complainant.

Mr. John R. Hardin for the defendant, Edwin W. Merriam and others.

Mr. Edward S. Atwater, Jr., and Mr. Charles E. Littlefield (of the New York Bar) for Harriet M. Huntington and others.

Mr. William A. Smith, guardian *ad litem* of infant defendants, Carlisle R. Lane and others.

Mr. Thomas P. McKenna and Mr. John W. Sheehan (of the Massachusetts Bar) for Charles R. Lane.

Mr. Thomas M. Kays for Edward M. Dutcher, guardian.

Submitted February 8, 1913.

Decided May 6, 1913.

HOWELL, *V. C.*

The bill in this case is in form a bill filed by the complainant as sole surviving executor and trustee

under the will of Henry W. Merriam for a settlement of his accounts and those of his deceased co-executors, and the ascertainment of the balance in his hands; as incidental thereto and part thereof it was prayed that the court might ascertain whether certain persons who were made defendants to the suit were accountable for the value of shares of stock of the H. W. Merriam Shoe Company which stood in the name of the testator on the books of the company at the time of his death, or for any part thereof, and, if so, what part; and whether a certain attempted gift of the same by the testator was perfected or not in his lifetime. There was likewise a prayer for the discharge of the trustee.

The principal question raised by the pleadings and presented by the evidence is whether the testator made a gift *inter vivos* of certain shares of stock of the said shoe company. This question affects the question of the accounting in this respect. If it shall be found that the gift of the shares was perfected then the complainant is exonerated from accounting for them; if, on the other hand, it is found that the gift was not perfected, then the legal title to the shares remains vested in the complainant in his trust capacity, and they must be accounted for as assets of the estate.

The salient facts are these. The testator had a sister who lived in Hyde Park, Mass., who came to Newton, in the State, the home of her brother in 1897, and lived in his family as a member of it until the time of his death. Some time in that year he gave her a large envelope with eight small ones enclosed in it, and directed that the small envelopes should be delivered by her to the various parties to whom the same were addressed. He asked her to take charge of them and deliver them to the parties, but that he would like to have it done quietly, as he did not feel able to bear a great deal of excitement, and that she should

use discretion so as to avoid any public comments that he might be forced to listen to. Mrs. Huntington accepted the package and placed the same in a safe which belonged to Mr. Merriam and which stood in his house in a small room on the second floor, sometimes called the office. This safe was used by both Mr. Merriam and Mrs. Huntington; both had keys to the outside door, and by means thereof had access to the interior of the safe. Mr. Merriam kept his valuable papers, such as bonds and mortgages, &c., in a private compartment in the safe, to which he only had the key. He assigned to Mrs. Huntington another portion of the safe for her private and separate use, to which she only had the key. This assignment to her appears to have been made shortly after she became an inmate of her brother's family. It does not appear that any of the witnesses ever saw the contents of these eight envelopes; the only evidence on that subject is the very alight evidence given by Mrs. Huntington on page 256 of the state of the case, in which she says that on that occasion he spoke of his shoe company's stock and said that he proposed to distribute some among his relatives, and that she was directed to see that they had it, and that it was to be distributed at her discretion.

Several weeks after this first deposit, if it may be so-called, and early in the month of March, 1898, Mr. Merriam remarked to Mrs. Huntington that his wife had died, that he had no children, that he had just made a codicil to his will which had revoked the provisions of that instrument concerning the disposition of his shoe company's stock so that it was "released," as he put it, from the operation of the will, and that he desired to change the arrangement of the certificates. Thereupon, at his request, she delivered to him the large envelope containing the eight small ones, which he took out of her sight. Several weeks later, perhaps two or three, Mr. Merriam and Mrs. Hunt-

ington met in the so-called office at the house, on which occasion he gave her another large envelope, describing orally its contents, which consisted of small envelopes, each containing an endorsement of the name of a person. On the witness stand she stated the substance of her conversation with him at that time. She says that he directed her to take charge of the envelopes and deliver them at her discretion, for the reason that he wished it done rather quietly, and not to have a public announcement of it, which might bring excitement to him or compel him to listen to all the public might say about it, and that he thought she could so arrange it; and, continuing, he said "There is an envelope with your name on, and you can receive it now." And opening it, she found therein a certificate of the shoe company's stock for 568 shares, which he said he hoped she would live to enjoy. The small envelope which had been addressed to Mrs. Huntington was destroyed, and on the same day, or the next, she obtained a new envelope into which she put the certificate for 568 shares, sealed the same, wrote her own name on the address side, placed the same in the large envelope with the others, and then deposited the large envelope in her private drawer in her brother's safe, locked the same and retained the key in her possession from that time forward until the testator's death. She occasionally opened this private drawer between that time and the date of her brother's death, and probably occasionally removed the large envelope therefrom for the purpose of rearranging the contents of the compartment, but she retained the actual custody and possession of the package as she originally received it, and at the date of the death of her brother it was still in her possession. On the day of the funeral, and after the burial, there had assembled at the house a number of relatives of the family, and among the others, decedents's brother, John J. Merriam, William L.

Dutcher, and the complainant, who were the executors of the will; John J. Merriam called upon Mrs. Huntington to produce Mr. Merriam's private papers. She must in some way have obtained the key to the testator's compartment in the safe, because she appears to have produced papers therefrom, and at the same time of their production and delivery to her brother, John J. Merriam, she delivered to him the large envelope containing the nine small ones, including the one addressed to her, all of which he took out of the room with him. Fifteen of twenty minutes later Mrs. Huntington received the envelopes again into her possession from William L. Dutcher, now deceased, who was one of the executors, to whom they had apparently been delivered by John J. Merriam, and who said that it was thought proper, inasmuch as she had been custodian of the paers, that she should present them to Judge Swayze in the presence of those who were to hear the reading of the will. To this she assented, and at the time of the reading of the will she gave them to Judge Swayze, but she does not remember that a word was said by either of them about it at the time. From that time forward the envelopes remained in the possession and custody of the executors of Mr. Merriam's will, until the distribution thereof in accordance with the arrangement made on March 26, 1901, by Exhibit C. 8, called the indemnity agreement.

Down to the date of the indemnity agreement it does not appear that anybody had full knowledge of the contents of all the nine envelopes. They are mentioned in the indemnity agreement as containing certificates of shares of stock of the shoe company, but without mentioning the number of shares in each. It now appears that the envelopes which contained the names of James E. Warbasse, George L. Dutcher and John Tozer contained their several promissory notes which had been long before made to the order of the

testator, with shares of the stock of the shoe company as collateral security for the payment of the notes; and at the hearing it turned out that those represented transactions by which these three men purchased stock in the shoe company from Mr. Merriam, gave their notes therefor, and transferred back the shares so purchased as collateral security for payment of their notes. The other six envelopes contained nothing but certificates of shares in the shoe company.

Under this state of facts were the so-called donees entitled to the shares of stock certificates and notes which were enclosed in their respective envelopes at the time of the death of Henry W. Merriam?

I pause at this point to say a word about the so-called indemnity agreement. In 1901 it seems to have been considered advisable or at least desirable that there should be a distribution of the stock certificates which were contained in the envelopes among the persons who claimed to be entitled thereto. Such distribution was made by consent of all the persons who were of full age, but could not be consented to by the Lane children or the youngest Dutcher child because of their minority. Mrs. Huntington and her brother, John J. Merriam, thereupon indemnified the executors in the manner set out in the indemnity agreement against any loss which might accrue against them by reason of such distribution. I do not find that this agreement has in any respect varied, changed or altered any of the rights of any of the parties to this litigation as those rights stood at the time of the death of the testator. I consider the agreement as one of mere indemnity and as an instrument to which the complainant may resort in case any claim shall be established against him by the infant defendants to this suit. In my opinion the rights of all these parties are to be adjudicated upon as of the date of the testator's death, and I do not find that anything

was done by the agreement which has abrogated any of their rights.

The claims made by the so-called donees of the shoe company's stock rests entirely upon a conversation or conversations had between the testator and Mrs. Huntington, who is one of the claimants. If under the rule of evidence established by section 4 of the act of 1900 her testimony shall be held to be inadmissible, then the whole claim of the so-called donees must fail, for then there would be no evidence of either a donative intention on the part of the testator or of the delivery of the subject matter of the so-called gift. Her evidence was admitted for reasons stated on page 168 of the record. The case upon which reliance was then placed (*McKinley* vs. *Coe*, 21 Dick., 70) seems to have been approved by the Court of Errors and Appeals in the case of *Cowdrey* vs. *Cowdrey*, 1 Buch., 353, aff., 2 Buch., 951, under circumstances which point to the applicability of its principles to this case. I must say, however, that the question of the admissibility of this testimony is very obscure, and I admitted it with a degree of doubt which fully justifies a review by the court of last resort. A well considered case on the other side of the question is *Van Wagener* vs. *Bonnot*, 2 Buch., 143.

But accepting Mrs. Huntington's evidence, and giving it the full force and effect of undoubted admissibility, does it demonstrate the facts necessary to the establishment of a completed gift of the shares in question? The general subject of gifts has been dealt with by the courts of this State, including the court of last resort, so many times and under so many circumstances that there can be no question about the rule which prevails in this jurisdiction. I adopt in its entirety the conclusion reached by Vice Chancellor Bergen in his opinion in *Taylor* vs. *Coriell*, 21 Dick., 262, which holds that in order to establish a gift *inter vivos* the following factors must appear: (1) a dona-

tive intention on the part of the donor; (2) an actual delivery of the subject matter of the gift except in cases where it is a chose in action, like a certificate of shares of stock or evidence of indebtedness, in which case the delivery must be of that variety of which it is most capable (*Matthews* vs. *Hoagland*, 3 Dick., 455); (3) the donor must strip himself of all ownership and dominion over the subject matter of the gift. These requisites appear in all our cases. *Stephenson* vs. *Earl*, 20 Dick., 721 (Court of Errors and Appeals). There is no difficulty in ascertaining what the law is. The ascertainment of the facts and their application to the well settled rules of law constitute the difficulty in this case.

Let us suppose then that Mrs. Huntington's evidence is clearly admissible and that we have it before us as the basis of ascertaining the fact as to the gift. Let us take her testimony and apply to it the ordinary tests which prevail for ascertaining its credibility, truthfulness, good faith and reliability. In other words, admitting her testimony, let us ascertain how it on its merits bears out the claim of the so-called donees. There is one matter, however, which ought to be alluded to before touching the merits. Mrs. Huntington's testimony was given in December, 1912; it relates to the conversations which took place in 1907 and early in 1908. As far as the testimony shows she had no occasion to recall these conversations until after the death of her brother, the testator, which occurred in October, 1900, at which time, or soon thereafter, she did have occasion to notify the executors of Mr. Merriam's will, of the circumstances under which she became possessed of the shares of stock in question. She appeared at the time of the hearing about sixty years of age. She is now called upon to give, in the greatest possible detail, an important conversation had with her brother fifteen years or thereabouts previously, without having made any note or memorandum of it, or having in her possession anything corroborative of these details. She

has a vital interest in stating the conversations in such a manner as to favor her own pecuniary advantage, because upon her statement depends the question whether she shall receive 568 shares of the stock in question. This is not referred to for the purpose of charging Mrs. Huntington with any wilful or intentional variation from the truth, but to demonstrate the care with which her evidence must be examined, and the weight that should be accorded to it.

Again, I do not see how the events which attended the first so-called delivery to Mrs. Huntington in 1897 cut any figure in this cause, except possibly to indicate that Mr. Merriam then had in mind the idea that he could withdraw the gift at any time, arguing therefrom that he might have had subsequently the same idea concerning his right to interfere in the second delivery. But in view of my findings, which will be stated later on, I do not see how anything that was said or done on that first occasion can affect in the slightest degree the real issue made up by the pleadings.

We come now to the discussion of the case upon its merits. I have no doubt of the donative intention which influenced Mr. Merriam in placing the stock in question in the hands of his sister. I think that he undoubtedly meant that the six persons whose names appeared upon the envelopes containing the certificates of stock, and the three persons whose names appeared upon the envelopes containing their several promissory notes, with certificates of stock as collateral, were meant by Mr. Merriam to be his beneficiaries, to the extent indicated by the number of shares and the notes contained in their respective envelopes. This leaves open only the question of delivery and the subsidiary question whether the so-called donor, in case there was a delivery, stripped himself of all control and dominion over the shares in question. I feel no hesitation whatever in declaring that there was

no delivery of the certificates of stock contained in the nine envelopes, either to Mrs. Huntington herself or to the other eight persons whose names appeared upon the envelopes. All the shares of stock contained in the nine envelopes had the proper endorsements for transfer on the books of the company, so that if there had been an actual delivery a valid and legal transfer could have been made without further writings; but such transfers were not made, and the shares of stock continued to stand in the name of Mr. Merriam and did so stand at the time of his death. In my opinion it would have been entirely competent and lawful for Mr. Merriam to have demanded and received back into his possession all the certificates which he had handed to his sister, and to have made sale of the shares and delivery of new certificates therefor, or have made such transfers thereof on the books of the company as he saw fit. The delivery of shares in a corporation is symbolical, for the reason that the shares themselves being intangible are incapable of actual tradition from hand to hand. This symbolical delivery is effected by a tradition of the certificate as a symbol of the shares. I do not think that the delivery of the certificates to Mrs. Huntington, with instructions to deliver them to the parties named, in her discretion as to time, is such a delivery *in presenti* as carried title immediately to the persons whose names were severally endorsed upon the envelopes. If any relation of agency was created by the transaction it was Mrs. Huntington's agency for Mr. Merriam. It could not well have been an agency in favor of the intended donees, because with the exception of Mrs. Huntington they knew nothing of the transaction. Neither do I find in these circumstances the creation of a trust in Mrs. Huntington in favor of the intended donees. The testimony of Mrs. Huntington upon which the so-called donees must rely is explicit on the point of the time of delivery. There

was no direction to make the delivery immediately, or as soon as possible, or in the ordinary round of events, or within any particular period. It was to be done at her discretion, and the reason of confiding such wide discretion in her was apparently the fact that Mr. Merriam's health was not good, and that he did not desire to encounter the comments of the people on his action.

It is well to keep in mind the fact that the whole case on the part of the donees rests upon the recollection of Mrs. Huntington of an important conversation which took place many years ago. A careful examination of her testimony convinces me that while she intended to state the exact facts, her memory of the circumstances is notably defective, and on some important points contradictory and uncertain. It is a kind of testimony which I hesitate to take as the basis of a decree to dispose of property of the approximate value of upwards of eighty thousand dollars.

The case of *Young* vs. *Young,* 80 N. Y., 422, presents a striking parallel to the case at bar. In that case the donor owned municipal coupon bonds which upon his death were found in two packages enclosed in envelopes upon which were endorsed memoranda signed by him describing the bonds enclosed by numbers, and stating that certain of them belonged to his son William and others to his son John. Then followed a statement of which the following is a copy: "But the inst. to become due thereon is owned and reserved by me for so long as I live, at my death they belong absolutely and entirely to them and their heirs," using the phrase "absolutely and entirely" in one case and "wholly and entirely" in the other. The envelopes were placed in a safe which belonged to the donor, to which William H. Young had access, and they were found there at the time of his death. The Court of Appeals held that the donative intention appeared, but that there was no delivery and no inten-

tion to deliver the bonds because it was necessary that he should have them in order to collect the interest which he had reserved. The testimony shows that the donor had cut off the coupons and that on some occasions his son William assisted him in so doing, but that William never asserted any ownership over the bonds as against his father. The court says, "This is the substance of all the testimony by which the delivery to the donee is sought to be established. It shows that the deceased at no time parted with the possession or control, of the bonds, but merely confirms the intention expressed in the memoranda. The change of the position of the bonds in the safe where they were kept, from the pigeon hole to the compartment, might have been significant had William been the only donee and had the intended gift been accompanied by any reservation. But under the existing circumstances it cannot be construed into a delivery of the bonds. * * * The memorandum on each envelope says that the interest to become due on the bonds is owned and reserved' by the donor. This interest up to the dates of its maturity of the bonds respectively was represented by coupons attached to the bonds. It clearly could not have been intended to deliver them, for so many of them as might become due during the life of the donor were reserved from the gift, as the interest was expressly declared to be 'owned' by the donor, and not parted with. The possession of these coupons was necessary to enable him to collect the interest, and he availed himself of it for that purpose from time to time. No intention was manifested to deliver up these vouchers, and look to the donees for the interest. No division of the coupons could be made, for the period of the donor's life was uncertain; and, further, if all the coupons were retained by the donor they might not represent the entire interest reserved by him."

The opinion likewise contains an argument to show that no trust was created. I fail to see any difference between the reservation of the interest in the Young case and the actual taking of the dividends in this case. The action of the donor in each case demonstrates his intention to retain control of the fund until his death, and thus perform a testamentary act without the formalities attending the execution of a will.

But it may be said that Mrs. Huntington's certificate stands on a different basis from that on which the others stand. She testified that when the nine envelopes were laid out before her by her brother, and she found that one was addressed to her, he said to her "there is an envelope with your name on, and you can receive it now," and that she then opened it and thanked him for what she found therein, namely, a certificate of the stock in the shoe company for 568 shares. Perhaps if this fact stood alone, and it were supported by competent legal evidence, it might be sufficient to carry title, upon the ground that there was a delivery to her at that time. She could then have taken the certificate and had the shares transferred on the books of the company and she would have been the undisputed owner. But instead of accepting the intended gift, she treated her own certificate in the same manner in which she treated all the others. Having destroyed the envelope in which Mr. Merriam had enclosed it, she on that day, or on the next day, re-enclosed it in another envelope which she provided herself, endorsed her name on it in her own handwriting, laid it away with the other envelopes, and after Mr. Merriam's death delivered it to the executors without making any special claim for it. These acts seem to me to negative the idea that she considered that there was at that time a delivery to her.

There are, however, other objections which apply to all the certificates and which lead me to the final conclusion that Mr. Merriam did not intend to surrender

his control of the shoe company by means of a gift of his stockholdings until his death should supervene, and that he did not do so. He was the holder and owner of 1,080 shares of the stock; this gave him control. By the scheme of gift which he had projected he had placed all his holdings in these nine envelopes, and he must have known as a business man that if the envelopes were delivered and the stock transferred he would have been ousted of his control of the corporation and of all interest therein. All his actions thereafter negative any such intention. In addition to the non-delivery during his lifetime the circumstances show that he not only intended to but did retain control of the shares in question. He voted on them at the annual meetings of the company; he received the dividends and accounted to no one therefor; he continued in control of the company in the same manner in which he had controlled it for many years previously. Mrs. Huntington owned at the time of this transaction twenty shares of the stock which stood in her name on the books of the company. She received her dividends regularly on these shares, but she neither received nor demanded the dividends on the 568 shares, the certificates for which were contained in the envelope. The account of Mrs. Huntington on the books of the company printed on page 357 of the state of the case shows this to be a fact.

It will therefore be seen that the donor in this case, even though there were a donative intention and a symbolical delivery, did not strip himself of all dominion and control over the subject matter of the gift, nor indeed do I think that he meant to do so. The case of the so-called donees must therefore fail, and the stock in question must be declared to be an asset of the estate, for which the complainant must account.

The complainant for his indemnification can at once apply the securities held by him in pledge to make up the deficiency contemplated by the indemnity agree-

ment. If, however, it should be necessary for him to resort to that agreement after the application of the fund pledged, it may be doubted whether jurisdiction over a cause of action arising thereunder exists in this court. Primarily a suit on such an agreement would lie only in the common law courts, but I do not deem it necessary to decide this point at the present time. It may be reserved in the decree and dealt with when the necessity arises.

There is no objection to permitting the trustee to resign, but a decree to that effect cannot be made until the passage and allowance of his accounts.

I will advise a decree in accordance with these conclusions.

Decree.

Filed July 19th, 1913.

IN CHANCERY OF NEW JERSEY.

Between

FRANCIS J. SWAYZE, surviving executor and trustee under the last will and testament of HENRY W. MERRIAM,

Complainant,

and

HARRIET M. HUNTINGTON, and others,

Defendants.

Decree.

This cause coming on to be heard before the court upon bill, supplemental bill, answers, cross-bill, replications and proofs in the presence of Edward M. Colie, solicitor for and of counsel with the complainant, John R. Hardin, of counsel with the defendants, Edwin W. Merriam and Henry F. Merriam, individually and as executors of the last will and testament of John J. Merriam, deceased, Helen M. LaCoste and Amelia E. Merriam; Edward S. Atwater, Jr., and Charles E. Littlefield, of counsel with the defendants, Harriet M. Huntington, Olin L. Merriam, Nellie J. Merriam, Ralph H. Buffington, administrator of Maybelle F. Buffington, deceased, and Carlisle J. Lane; William A. Smith, guardian *ad litem* of the defendants, Carlisle R. Lane, Albert Merriam Lane and Clara M. Lane; Thomas P. McKenna and John W.

Sheehan of counsel with the defendant, Charles R. Lane, and Thomas M. Kays, of counsel with the defendant, Edward M. Dutcher, guardian of Elnora H. Dutcher; the bill having heretofore been taken as confessed against the defendants, Edward Merriam Dutcher individually and as administrator of William L. Dutcher, deceased, and as against the defendant, Frances E. Abbott (now Frances E. Burnham), and the pleadings and proofs having been read and the arguments of counsel heard and the court having duly considered the same, and it appearing to the court that Henry W. Merriam, by his last will and testament appointed John J. Merriam, William L. Dutcher and Francis J. Swayze, executors thereof; that they proved the will and codicil and took upon themselves the burden of administering the said estate; filed an inventory in the office of the Surrogate of the County of Sussex and their first and second accounts as executors, which were duly confirmed by the Orphans' Court of said county; that the said William L. Dutcher died intestate on the 8th day of January, 1908, and that letters of administration were granted to Edward M. Dutcher; that the said John J. Merriam died testate on the 15th day of December, 1910, and Edwin W. Merriam and Henry F. Merriam were his executors; that considerable sums of money came to the hands of the executors after the filing of their second account; that the special legacies, except one to the Plot Owners Association of the Newton Cemetery which failed, have been paid; that the residue of said estate was bequeathed by the testator, one-fourth to the children of his brother, John J. Merriam, namely, Edwin W. Merriam, Henry F. Merriam, and Helen D. Merriam, now Helen M. LaCoste; one-fourth to the children of his deceased brother, Samuel L. Merriam, namely Olin L. Merriam, Nellie J. Merriam and Maybelle G. Buffington, who has since died intestate and to whom the defendant, Ralph H.

Huntington is administrator; one-fourth to the children of William L. Dutcher, namely Edward Merriam Dutcher, Frances Elizabeth Dutcher, afterward Frances E. Abbott (now Frances E. Burnham), and Elnora Hortense Dutcher; and one-fourth to his said executors upon trust to divide the same into three equal shares and to pay the yearly income of one of such shares to each of his three cousins, Carlisle J. Lane, Albert I. Lane, and Charles R. Lane, in such manner as might be most effectual for securing to each the personal receipt and enjoyment of the same during his life inalienably and after his death to pay his share to his children or other descendants him surviving, and if any of said three cousins should not leave any children or other descendants him surviving, to hold the principal in trust for his said cousin or cousins surviving upon the same trust, and that the testator authorized and empowered his executors in their sole discretion or the discretion of the survivor to pay over to any of his cousins his share of the principal or any part thereof upon the executors or the survivor of them being satisfied that such payment would inure to the individual benefit of the said cousin, the determination of the said executors or the survivor of them as to such payment to be final and conclusive; that Albert I. Lane has died testate since the death of the said testator and has left no child or other descendant him surviving and that by his will he bequeathed all his estate to his two brothers above named, to be divided equally between them; that the said Carlisle J. Lane has two children, Albert Merriam Lane and Clara May Lane, both of whom are minors, and that the said Charles R. Lane has one child, Carlisle R. Lane, who is a minor; and it further appearing that the said testator at the time of his death was the owner of 1090 shares of the capital stock of the H. W. Merriam Shoe Company; that prior to his death the certificates for said stock had

been placed in sealed envelopes addressed to different persons and handed by him to his sister, Harriet M. Huntington, one of the defendants; that the said testator had placed in other sealed envelopes promissory notes held by him against George L. Dutcher, Joseph E. Warbasse and John Tozer, in each of which was a certificate or certificates of stock of the said H. W. Merriam Shoe Company held by the said testator as collateral security for the said notes; that said envelopes, notes and certificates of stock came to the possession of said executors but were not inventoried as a part of the estate because of a question as to the legal ownership thereof; that thereafter in pursuance of and in reliance upon consents signed by the said Edwin W. Merriam, Henry F. Merriam, Helen D. Merriam, now Helen M. LaCoste, Olin L. Merriam, Nellie J. Merriam, Maybelle F. Buffington, Edwin Merriam Dutcher, Carlisle L. Lane, Albert I. Lane, and Charles R. Lane, the said executors delivered the said envelopes to the persons to whom they were addressed, together with the contents thereof and assented to the transfer of the said stock upon the books of the said corporation; and it further appearing that in order to indemnify the said executors an agreement was entered into by which the said John J. Merriam and Harriet M. Huntington agreed to indemnify the said William L. Dutcher and Francis J. Swayze against loss by reason of any claim on the part of the children of Carlisle J. Lane, Albert I. Lane, and Charles R. Lane, and the said William L. Dutcher agreed to indemnify the said John J. Merriam and Francis J. Swayze against all loss by reason of any claim on the part of Frances Elizabeth Dutcher and Elnora Hortense Dutcher and pursuant to said agreement of indemnity the said Harriet M. Huntington thereupon transferred to the said executors one hundred and fifty-one shares of the capital stock of the said H. W. Merriam Shoe Company, and the said

John J. Merriam thereupon transferred one hundred and twenty-two shares of the said capital stock, which stock was held by the said executors until June 2, 1910, when the same were transferred, one hundred and fifty-one shares to Harriet M. Huntington for the sum of twenty-six thousand, two hundred and seventy-four dollars and one hundred and twenty-two shares to John J. Merriam for the sum of twenty-one thousand two hundred and twenty-five dollars; and it further appearing that pursuant to said agreement of indemnity the said executors received from Harriet M. Huntington the further sum of one thousand five hundred and ten dollars, being the amount of a dividend upon the said one hundred and fifty-one shares declared after the testator's death out of earnings prior to his death, and from the said John J. Merriam the sum of one thousand two hundred and twenty dollars, being the dividend upon the said one hundred and twenty-two shares, declared after the testator's death, out of earnings prior to his death, and that the said sums have been in part invested in bonds now held by the complainant as balance in bank;

And the court being of opinion that the complainant is entitled to have the accounts of himslf and his co-executors and trustees, John J. Merriam, deceased, and William L. Dutcher, deceased, taken under the direction of this court, and being further of the opinion that there was no perfected gift of the said certificates of stock and notes contained in said envelopes and that the said John J. Merriam, William L. Dutcher and Francis J. Swayze, executors of said Henry W. Merriam, should have charged themselves with the said stock at its market value at the date of the death of Henry W. Merriam and are accountable for said one thousand and ninety shares of the capital stock of the H. W. Merriam Shoe Company, of which one thousand and eighty stood in the name of the testator at his death upon the books of the company, and

ten shares stood in the name of his deceased wife, Fannie G. Merriam, but were the property of the testator, and also with the amount due upon the note of Joseph E. Warbasse at the time of the testator's death, and the amount due on the note of John Tozer at the time of the testator's death and the amount due on the note of George L. Dutcher at the time of the testator's death; and being further of opinion that by the consents delivered to the said executors and upon which they relied, the said Edwin W. Merriam, Henry F. Merriam, Helen M. La coste, formerly Helen D. Merriam, Olin L. Merriam, Nellie J. Merriam and Maybelle F. Buffington, Edwin Merriam Dutcher, Carlisle J. Lane, Albert I. Lane, now deceased, and Charles R. Lane, residuary legatees and each of them acquiesced in and assented to the said transfers by the executors; and being further of opinion that the said agreement of indemnity executed by the said William L. Dutcher to John J. Merriam, and Francis J. Swayze inures to the benefit of Elnora Hortense Dutcher, and that the defendant Edward Merriam Dutcher, as administrator of William L. Dutcher, to the extent of assets in his hands undistributed, and said Edwin Merriam Dutcher, Frances E. Dutcher (now Frances E. Burnham) and Elnora Hortense Dutcher to the extent that they have received or receive the estate of said William L. Dutcher, are bound by said indemnity to make good and pay over to the complainant the share of the said Elnora Hortense Dutcher in the contents of said envelopes, delivered pursuant to said indemnity; and that the indemnity executed by the said Harriet M. Huntington and the said John J. Merriam inures to the benefit of the children of Carlisle J. Lane and Charles R. Lane, and that the defendants Harriet M. Huntington and Edwin W. Merriam and Henry F. Merriam as executors of John J. Merriam, to the extent of assets in their hands undistributed, and Henry F. Merriam, Edwin W.

Merriam, Amelia E. Merriam, and Helen M. LaCoste, to the extent that they have received or receive the estate of John J. Merriam, are bound by said indemnity to make good and pay over to the complainant the shares of the children of said Carlisle J. Lane and Charles R. Lane in the contents of said envolepes delivered pursuant to said indemnity; and that said agreement of indemnity should not be surrendered up and cancelled as prayed in the cross bill of Edwin W. Merriam and Henry F. Merriam, executors of the last will and testament of Henry W. Merriam, deceased, Edwin W. Merriam, and Henry F. Merriam, individually and Helen M. LaCoste, and Amelia E. Merriam, but that the prayer of the cross bill should be denied.

It is thereupon, on this day of , in the year one thousand nine hundred and thirteen, by his honor Edwin Robert Walker, Chancellor of the State of Nw Jersey, on motion of Edward M. Colie, of counsel with the complainant, ordered, adjudged and decreed, and the said chancellor, by virtue of the authority and power of this court, does hereby order, adjudge and decree—

First. That the accounts of the complainant and of his co-executors, John J. Merriam and William L. Dutcher, both as executors and as trustees, be taken under the direction of this court.

Second. That the complainant and the said John J. Merriam and William L. Dutcher be charged in their accounts as executors with the value of one thousand and ninety shares of the stock of the H. W. Merriam Shoe Company at the date of the testator's death on the 26th day of October, 1900, and with the amount due on the note of Joseph E. Warbasse, the amount due on the note of John Tozer, and the amount due on the note of George L. Dutcher, at the time of the testator's death, the same to be ascertained by the master.

Decree.

Third. That after ascertaining the balance of the estate, the amount to be distributed to the residuary legatees be ascertained, by crediting one-third of one-fourth, being one-twelfth of said balance, to each of the following named residuary legatees, Edwin W. Merriam, Henry F. Merriam, Helen M. LaCoste, Olin L. Merriam, Nellie J. Merriam, and to Ralph H. Buffington, administrator of Maybelle F. Buffington, another residuary legatee, Edward Merriam Dutcher, and Frances E. Abbott, now Frances E. Burnham, and by charging each of said last named residuary legatees and Ralph H. Buffington, administrator of Maybelle G. Buffington, with one-twelfth of the amount charged to the executors on account of the said one thousand and ninety shares of stock, including therein the dividend declared of 10% shortly after the death of the testator, and the said notes of Warbasse, Tozer and Dutcher, which were transferred and delivered by the said executors in reliance upon the consent of said legatees, which transfer and delivery were acquiesced in and assented to by said legatees, and by crediting one-twelfth of said balance to Elnora Hortense Dutcher; and by crediting one-fourth to the said executors as trustees under the residuary clause of the codicil to the testator's will, to be held as part of the principal of the trust therein created.

Fourth. That in stating the account of the said trustees they be charged with the said one-fourth of the balance as shown by the executor's account, but that in stating the account of income due the life tenants, the accountants as trustees be credited with the income on one-fourth of the amount charged against them in their account as executors for the said stock and notes which they delivered and transferred in pursuance of and reliance upon consents signed by Carlisle J. Lane, Albert I. Lane and Charles R. Lane, the life tenants of the said trust fund.

Decree.

Fifth. That the said trustees and the survivor of them and all successors in the trust are free from accountability to the said Carlisle J. Lane during his lifetime and to the said Charles R. Lane during his lifetime, for the income of said trust fund accrued or to accrue so far as it results from the one-fourth of the said stock and notes, but that the said Harriet M. Huntington is entitled to the one hundred fifty-one, two hundred seventy-thirds (151/273) of the income so resulting on the fund held during the lifetime of Carlisle J. Lane and one hundred fifty-one two hundred seventy-thirds (151/273) of the income so resulting during the lifetime of Charles R. Lane; and the said Edwin W. Merriam and Henry F. Merriam, executors of John J. Merriam are entitled to one hundred twenty-two two hundred seventy-thirds (122/273) of the income so resulting on the fund held during the lifetime of Carlisle J. Lane and one hundred twenty-two two hundred seventy-thirds (122/273) of the income so resulting during the lifetime of Charles R. Lane.

Sixth. That the said agreement of indemnity executed by the said William L. Dutcher to John J. Merriam and Francis J. Swayze inures to the benefit of Elnora Hortense Dutcher, and that the defendant Edward Merriam Dutcher, as administrator of William L. Dutcher, to the extent of assets in his hands undistributed, and said Edwin Merriam Dutcher, Frances E. Dutcher (now Frances E. Burnham) and Elnora Hortense Dutcher, to the extent that they have received or receive the estate of said William L. Dutcher, are bound by said indemnity to make good and pay over to the complainant as soon as the amount shall be ascertained on the accounting the share of the said Elnora Hortense Dutcher in the contents of said envelope, delivered pursuant to said indemnity; and that the indemnity executed by the said Harriet M. Huntington and the said John J. Merriam inures to the

benefit of the children of Carlisle J. Lane and Charles R. Lane, and that the defendants Harriet M. Huntington and Edwin W. Merriam and Henry F. Merriam as executors of John J. Merriam, to the extent of assets in their hands undistributed, and Henry F. Merriam, Edwin W. Merriam, Amelia E. Merriam and Helen M. La Coste to the extent that they have received or receive the estate of John J. Merriam are bound by said indemnity to make good and pay over to the complainant as soon as the amount shall be ascertained on the accounting the shares of the children of said Carlisle J. Lane and Charles R. Lane in the contents of said envelopes delivered pursuant to said indemnity; that in order to make good the amount chargeable to the said trustees and the complainant as surviving trustee and to make up the deficiency contemplated by the indemnity agreement, the complainant may at once apply thereto the securities and cash held by him in pledge, being the proceeds of sale of said one hundred and fifty-one shares and the cash dividend deposited with the said executors by Harriet M. Huntington and the one hundred and twenty-two shares and the cash dividend deposited with the said executors by John J. Merriam together with the income now in his hands and to accrue on one-half thereof during the lifetime of Carlisle J. Lane and the income now in his hands and to accrue on one-half thereof during the lifetime of Charles R. Lane.

Seventh. That the relief prayed for in the cross bill of Edwin W. Merriam and Henry F. Merriam, individually and as executors of John J. Merriam, Helen M. La Coste and Amelia E. Merriam except so far as the same may be included in the relief hereby granted, be denied.

Eighth. That it be referred to Frederick Guild, Esq., one of the special masters of this court to audit and state the accounts of the complainant and his co-executors and trustees, and that in stating them the

account up to the eighth day of January, one thousand nine hundred and eight, the date of the death of William L. Dutcher, be stated separately; the account from that date to the fifteenth day of December, one thousand nine hundred and ten, the date of the death of the said John J. Merriam, be stated separately; and that the accounts since that date of Francis J. Swayze, as surviving executor and trustee, be stated separately, and that the master report thereon to this court.

Ninth. That upon filing his accounts and upon the confirmation of the same, the complainant is entitled to be discharged from his trust as trustee, upon paying to a new trustee to be appointed by the court, the balance ascertained to be in his hands, or transferring the securities held for the trust fund.

Tenth. That the question of counsel fees be reserved until after the master's report.

Eleventh. That all further equities are reserved and any party may apply hereafter for further relief or directions on the foot of this decree.

Notice of Appeal.

Filed August 12th, 1913.

IN CHANCERY OF NEW JERSEY.

Between

FRANCIS J. SWAYZE, surviving executor and trustee under the last will and testament of HENRY W. MERRIAM,

Complainant,

and

HARRIET M. HUNTINGTON, and others,

Defendants.

On Bill, &c.

The defendant, Charles R. Lane, appeals from parts of the decree made in this court in the above stated cause on the eleventh day of July, nineteen hundred and thirteen, as follows:

From that part of said decree therein beginning at the ninth line on page four thereof, in words and language following:

"That thereafter in pursuance of and in reliance upon consents signed by the said Edwin W. Merriam, Henry F. Merriam, Helen D. Merriam, now Helen M. LaCoste, Olin L. Merriam, Nellie J. Merriam, Maybelle F. Buffington, Edwin Merriam Dutcher, Carlisle J. Lane, Albert I. Lane, and Charles R. Lane, the said executors delivered the said envelopes to the persons to whom they were addressed, together with the contents thereof and assented to the transfer of the said stock upon the books of the said corporation."

From that part of the said decree in the finding recited therein beginning on the eighth line of page six thereof, in words and language following:

"And being further of opinion that by the consents delivered to the said executors and upon which they relied, the said Edwin W. Merriam, Henry F. Merriam, Helen M. LaCoste, formerly Helen D. Merriam, Olin L. Merriam, Nellie J. Merriam, and Maybelle F. Buffington, Edwin Merriam Dutcher, Carlisle J. Lane, Albert I. Lane, now deceased, and Charles R. Lane, residuary legatees and each of them acquiesced in and assented to the said transfers by the executors."

And from that part of said decree being paragraphs "THIRD," "FOURTH" and "FIFTH," on pages eight and nine, thereof, which orders, adjudges and decrees as follows:

"That after ascertaining the balance of the estate the amount to be distributed to the residuary legatees be ascertained, by crediting one-third of one-fourth, being one-twelfth of said balance, to each of the following named residuary legatees, Edwin W. Merriam, Henry F. Merriam, Helen M. LaCoste, Olin L. Merriam, Nellie J. Merriam, and to Ralph H. Buffington, administrator of Maybelle F. Buffington, another residuary legatee, Edward Merriam Dutcher, and Frances E. Abbott, now Frances E. Burnham, and by charging each of said last named residuary legatees and Ralph H. Buffington, administrator of Maybelle F. Buffington, with one-twelfth of the amount charged to the executors on account of the said one thousand and ninety shares of stock, including therein the dividend of ten per cent. shortly after the death of the testator, and the said notes of Warbasse, Tozer and Dutcher, which were transferred and delivered by the said executors in reliance upon the consent of the said legatees, which transfer and delivery were acquiesced in and assented to by said legatees, and by crediting

one-twelfth of said balance to Elnora Hortense Dutcher; and by crediting one-fourth to the said executors as trustee under the residuary clause of the codicil to the testator's will, to be held as part of the principal of the trust therein created."

"FOURTH. That in stating the account of the said trustees they be charged with the said one-fourth of the balance as shown by the executors' account, but that in stating the account of income due the life tenants, the accountants as trustees be credited with the income on one-fourth of the amount charged against them in their account as executors for the said stock and notes which they delivered and transferred in pursuance of and reliance upon consents signed by Carlisle J. Lane, Albert I. Lane, and Charles R. Lane, the life tenants of the said trust fund."

"FIFTH. That the said trustees and the survivor of them and all successors in the trust are free from accountability to the said Carlisle J. Lane during his lifetime and to the said Charles R. Lane during his lifetime for the income of said trust fund accrued or to accrue so far as it results from the one-fourth of the said stock and notes, but that the said Harriet M. Huntington is entitled to the one hundred fifty-one two hundred seventy-thirds (151/273) of the income so resulting on the fund held during the lifetime of Carlisle J. Lane, and one hundred fifty-one two hundred seventy-thirds (151/273) of the income so resulting during the lifetime of Charles R. Lane; and the said Edwin W. Merriam and Henry F. Merriam, executors of John J. Merriam, are entitled to one hundred twenty-two two hundred seventy-third (122/273) of the income so resulting on the fund held during the lifetime of Carlisle J. Lane and one hundred twenty-two two hundred seventy-thirds (122/273) of the income so resulting during the lifetime of Charles R. Lane."

Notice of Appeal.

And from so much of said decree beginning near the middle of page 10 thereof which orders, adjudges and decrees as set forth in the "SIXTH" paragraph thereof:

"That in order to make good the amount chargeable to the said trustees and the complainant as surviving trustee and to make up the deficiency contemplated by the indemnity agreement, the complainant may at once apply thereto the securities and cash held by him in pledge, being the proceeds of sale of said one hundred and fifty-one shares and the cash dividend deposited with the said executors by Harriet M. Huntington, and the one hundred and twenty-two shares and the cash dividend deposited with the said executors by John J. Merriam together with the income now in his hands and to accrue on one-half thereof during the lifetime of Carlisle J. Lane, and the income now in his hands and to accrue on one-half thereof during the lifetime of Charles R. Lane."

To the Court of Errors and Appeals in the last resort in all causes.

Dated August , 1913.

THOMAS P. McKENNA,
Solicitor of Charles R. Lane, Defendant.

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

THOMAS P. McKENNA,
Counsel for Defendant, Charles R. Lane.

Petition of Appeal.

Filed October 1st, 1913.

New Jersey Court of Errors and Appeals

To the Honorable the Court of Errors and Appeals in the last resort in all causes:

The petition of Charles R. Lane, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date the eleventh day of July, in the year nineteen hundred and thirteen, wherein the said Francis J. Swayze was complainant, and the said Harriet M. Huntington and others were defendants, in this respect, to wit, that the decree recites at the ninth line on page four thereof, in words and language following:

That thereafter in pursuance of and in reliance upon consents signed by the said Edwin W. Merriam, Henry F. Merriam, Helen D. Merriam, now Helen M. LaCoste, Olin L. Merriam, Nellie J. Merriam, Maybelle F. Buffington, Edwin Merriam Dutcher, Carlisle J. Lane, Albert I. Lane, and Charles R. Lane, the said executors delivered the said envelopes to the persons to whom they were addressed, together with the contents thereof and assented to the transfer of the said stock upon the books of the said corporation."

From that part of the said decree in the finding recited therein beginning on the eighth line of page six thereof, in words and language following:

"And being further of opinion that by the consents delivered to the said executors and upon which they relied, the said Edwin W. Merriam, Henry F. Mer-

riam, Helen M. LaCoste, formerly Helen D. Merriam, Olin L. Merriam, Nellie J. Merriam, and Maybelle F. Buffington, Edwin Merriam Dutcher, Carlisle J. Lane, Albert I. Lane, now deceased, and Charles R. Lane, residuary legatees and each of them acquiesced in and assented to the said transfers by the executors."

And from that part of said decree being paragraphs "THIRD," "FOURTH" and "FIFTH," on pages eight and nine, thereof, which orders, adjudges and decrees as follows:

"That after ascertaining the balance of the estate the amount to be distributed to the residuary legatees be ascertained, by crediting one-third of one-fourth, being one-twelfth of said balance, to each of the following named residuary legatees, Edwin W. Merriam, Henry F. Merriam, Helen M. LaCoste, Olin L. Merriam, Nellie J. Merriam, and to Ralph H. Buffington, administrator of Maybelle F. Buffington, another residuary legatee, Edward Merriam Dutcher, and Frances E. Abbott, now Frances E. Burnham, and by charging each of said last named residuary legatees and Ralph H. Buffington, administrator of Maybelle F. Buffington, with one-twelfth of the amount charged to the executors on account of the said one thousand and ninety shares of stock, including therein the dividend of ten per cent., shortly after the death of the testator, and the said notes of Warbasse, Tozer and Dutcher, which were transferred and delivered by the said executors in reliance upon the consent of the said legatees, which transfer and delivery were acquiesced in and assented to by said legatees, and by crediting one-twelfth of said balance to Elnora Hortense Dutcher; and by crediting one-fourth to the said executors as trustee under the residuary clause of the codicil to the testator's will, to be held as part of the principal of the trust therein created."

"FOURTH." That in stating the account of the said trustees they be charged with the said one-fourth of the balance as shown by the executor's account, but that in stating the account of income due the life tenants, the accountants as trustees be credited with the income on one-fourth of the amount charged against them in their account as executors for the said stock and notes which they delivered and transferred in pursuance of and reliance upon consents signed by Carlisle J. Lane, Albert I. Lane, and Charles R. Lane, the life tenants of the said trust fund.

"FIFTH." That the said trustees and the survivor of them and all successors in the trust are free from accountability to the said Carlisle J. Lane during his lifetime and to the said Charles R. Lane during his lifetime for the income of said trust fund accrued or to accrue so far as it results from the one-fourth of the said stock and notes, but that the said Harriet M. Huntington is entitled to the one hundred fifty-one two hundred seventy-thirds (151/273) of the income so resulting on the fund held during the lifetime of Carlisle J. Lane, and one hundred fifty-one two hundred seventy-thirds (151/273) of the income so resulting during the lifetime of Charles R. Lane; and the said Edwin W. Merriam and Henry F. Merriam, executors of John J. Merriam, are entitled to one hundred twenty-two two hundred seventy-thirds (122/273) of the income so resulting on the fund held during the lifetime of Carlisle J. Lane and one hundred twenty-two two hundred seventy-thirds (122/273) of the income so resulting during the lifetime of Charles R. Lane."

And from so much of said decree beginning near the middle of page 10 thereof which orders, adjudges and decrees as set forth in the "SIXTH" paragraph thereof.

"That in order to make good the amount chargeable to the said trustees and the complainant as surviving

trustee and to make up the deficiency contemplated by the indemnity agreement, the complainant may at once apply thereto the securities and cash held by him in pledge, being the proceeds of sale of said one hundred and fifty-one shares and the cash dividend deposited with the said executors by Harriet M. Huntington, and the one hundred and twenty-two shares and the cash dividend deposited with the said executors by John J. Merriam together with the income now in his hands and to accrue on one-half thereof during the lifetime of Carlisle J. Lane, and the income now in his hands and to accure on one-half thereof during the liftime of Charles R. Lane."

And your petitioner humbly appeals from the aforesaid parts of the decree of the chancellor which decrees as aforesaid upon the ground that the same are erroneous, for that the same are contrary to and unsupported by the evidence in the cause, inequitable and are contrary to law.

Your petitioner therefore prays that the said decree of the said chancellor may be in the particulars aforesaid, reversed, set aside and for nothing holden.

And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

THOMAS P. McKENNA,
Solicitor of and
Counsel with Appellant.

Formal answers to petition of appeal filed by Edward M. Colie, solicitor for and of counsel with complainant-respondent.

Edward S. Atwater, Jr., solicitor for and of counsel with Harriet M. Huntington, Olin L. Merriam, Nellie J. Merriam, Ralph H. Buffington, administrator of Maybelle F. Buffington, and Carlisle J. Lane, respondents.

Coult & Smith, solicitors for defendants, Carlisle R. Lane, Albert Merriam Lane and Clare May Lane.

Pitney, Hardin & Skinner, solicitors for and of counsel with defendants, Edwin W. Merriam and Henry F. Merriam, individually and as executors of the last will and testament of John J. Merriam, deceased, Helen M. LaCoste and Amelia E. Merriam.

Thos. M. Kays, solicitor for and of counsel with Edward M. Dutcher, guardian of Elnora H. Dutcher.

New Jersey Court of Errors and Appeals.

FRANCIS J. SWAYZE, as Executor and Trustee of HARRIET M. HUNTINGTON and others,
Respondents,

against

CHARLES R. LANE,
Appellant.

BRIEF FOR HARRIET M. HUNTINGTON, RALPH H. BUFFINGTON, ADMINISTRATOR OF MAYBELLE F. BUFFINGTON, DECEASED, OLIN L. MERRIAM, NELLIE J. MERRIAM AND CARLISLE J. LANE.

Statement.

Upon the death of Henry W. Merriam 1090 shares of the capital stock of the H. W. Merriam Shoe Company and certain notes were found in the possession of Mrs. H. M. Huntington. They were all handed by her to the Executors shortly after the death of H. W. Merriam. The certificates were contained in envelopes directed to the various parties to whom the testator intended to give them and these parties claimed the title there-

to upon the ground that a valid and effective delivery had been made. A question arose as to whether these gifts had been legally consummated and in order to settle all controversy, save litigation and expense and the consequent disturbance to the affairs of the Shoe Company, all of the parties who were legally competent to do so, and among them Charles R. Lane, upon the application of the Executors therefor stating the facts, signed written consents authorizing the executors to carry out the conceded intent of the testator and deliver "the sealed envelopes" and execute "any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered." (p. 333) Pursuant to these consents the Executors entered into a written agreement with Mrs. Huntington and Mr. John J. Merriam (p. 322, Exhibit C-8), transferred and delivered the stock in question to the parties appearing to be entitled thereto and received a conveyance to themselves, pursuant to the agreement, of 151 shares for Mrs. Huntington and 122 shares for Mr. John J. Merriam, and all of the parties have since that time by virtue of such consents and agreement been receiving the dividends upon such stock.

In further pursuance of the agreement, Mrs. Huntington has paid to the Executors $26,274. for the 151 shares of stock transferred under the agreement by her to them and John J. Merriam has paid to the Executors $21,228 for the 122 shares of stock likewise transferred by him to them and they are now entitled to and in receipt of the dividends upon said stock and the income from such fund so far as it results from said stock and notes. There were payments in cash made by them respectively (Mrs. Hunting-

ton $1,510. and Mr. John J. Merriam $1,220.) in order to equalize the sums in the settlement and on these sums they have been receiving the income.

Upon the hearing in the Court below Mrs. Huntington and the Estate of John J. Merriam contended that said gifts had been consummated by an actual delivery, and that the title to said stock and notes was legally vested in the respective donees, and that the conceded intent of the testator had been successfully accomplished. This contention was not sustained by the Chancellor. He did hold however, that as a result of the consents and agreement thus given and made and acted upon by all of the parties to the transaction, that Charles R. Lane and Carlisle J. Lane were not entitled to the income that had accrued or that might accrue upon the one fourth of the estate represented by said stock or proceeds, and notes in controversy. As the result of the consents and agreement Mrs. Huntington and John J. Merriam have assumed the responsibility for the title to the following stock: Nellie J. Merriam, 10 shares, Olin L. Merriam 10 shares, Maybelle Buffington, 7 shares, Francis and Ralph Buffington, 10 shares (p. 16) and the Warbose, Tozier and Dutcher notes and stock. None of these parties are parties to or bound by the agreement entered into as the result of the consents. The book value of this stock is $184. a share (p. 113) and the full value of the stock for which Mrs. Huntington and John J. Merriam have thus assumed the responsibility is $6,808. with all the dividends that have heretofore accrued and been paid thereon and all that may hereafter accrue thereon and the amount of said notes with interest is at least $17,000.

Charles R. Lane appeals from the decision as to the income. Carlisle J. Lane whom we represent and whose interest is identical with that of Charles R. Lane is content with the decision and does not appeal as he feels that so far as possible the conceded intent of the testator should be carried out.

I.

The question of fraud or misrepresentation upon the part of the Executors in procuring the consent from the parties interested in said Estate (p. 333) while raised below, if relied upon on this appeal, is not open to Charles R. Lane.

In order to set aside this consent it would be necessary for the Court to grant affirmative relief to the party seeking to set aside the same. It is a well settled practice in New Jersey that affirmative relief cannot be had by a defendant unless such affirmative relief is sought by a cross bill or by an answer in the nature of a cross bill. Charles R. Lane filed no cross bill and the only prayer so far as Charles R. Lane is concerned is found at the close of his Answer to the Bill (p. 37).

> "And this defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained."

It is also to be said that the attention of counsel for Charles R. Lane was specifically called to the fact that upon this record the question of fraud or misrepresentation could not be raised.

Referring to this consent, at the hearing when this question was being discussed as the testimony was taken out, the Chancellor said:

"*The Court.*—Is there any prayer that the paper be set aside, or this gentleman's name be cancelled from it?

Mr. Sheehan.—Why, yes.

Mr. Colie.—No.

The Court.—Otherwise it is not material."

(p. 312.)

Reference to the prayer in Charles R. Lane's answer shows that the understanding of his counsel was erroneous, and the extract from the record shows that the attention of Mr. Charles R. Lane's counsel was specifically called to the fact that the record, was not such as would allow them to attack the consent, for the reasons indicated.

II.

If it was open to Charles R. Lane to attack the consent upon the ground that it was given as the result of either fraud or misrepresentation, we respectfully submit that there is no foundation in the record to sustain this contention. The Answer of Charles R. Lane does not contain allegations which lay the foundation for such a contention. The only allegations in the answer on that point are:

"and believing that in signing the said paper or writing he was acting solely for the purpose of perfecting a title which he believed from the representations of the said executors already existed in the said John J. Merriam, Harriet M. Huntington and the other persons referred to, etc."

(p. 35—line 35.)

The only other allegation is

"that he had no knowledge of his rights in the premises or in the said stock or income

> thereof, nor of the circumstances set forth in the said bill of complaint in reference thereto, until the filing of the said bill of complaint."
>
> (p. 36—line10.)

The consent was obtained from Mr. Lane by virtue of a letter dated January 19, 1901, written to him and signed by all of the Executors. (pp. 108-109.) This letter enclosed a "copy of the will of the late Henry W. Merriam". This gave to Mr. Lane full information as to the contents of the will. It gave as a reason why the inventory "does not include any of the stock of the H. W. Merriam Shoe Company"

> "that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother, John J. Merriam, and his sister, Harriet M. Huntington, in pursuance of a natural and long cherished desire of his to retain in his own family the control of the business he had established."
>
> (pp. 108-109.)

Then follows a detailed statement of the circumstances under which Mr. Merriam endeavored to accomplish this "long cherished desire". He is distinctly informed that Mrs. Huntington had delivered the envelopes to the Executors and that the Executors felt that they ought to be returned to her "in order that she may carry out the instructions of Mr. Merriam". Here was information to Mr. Lane that the instructions that had been given had not been carried out. The Executors call attention to the fact

> "that some legal question may be raised as to their right to do so, and before doing so they are desirous of securing the consent of the residuary legatees who are of age"

and then after a further statement it is suggested

> "If you are willing that the executors should deliver these envelopes and take any other steps necessary to carry out Mr. Merriam's manifest wishes in a strictly legal form, kindly sign and return the enclosed consent to John J. Merriam, Summit, New Jersey."
>
> (p. 109.)

While every detail involved in the transaction is not specifically set out in the letter, it would be difficult to state the salient facts within the same compass in a more complete and concise and accurate manner. There is certainly no misrepresentation of any kind involved in the letter. By the will he was apprised of the fact that he was one of four residuary legatees and it also disclosed the fact that the stock was not specifically devised, so that he must have understood that upon a settlement of the estate the stock or its proceeds, if the property of the estate, would become a part of the residuary estate and he would be entitled to one-fourth thereof, though in his answer he alleges that

> "he had no knowledge of his rights in the premises or in the said stock or income thereof" (p. 36).

He says:

> "Q. Did you know whether or not the stock had been given to the various parties named in the letter during the lifetime of Henry Merriam?
>
> A. I did not know.
>
> Q. That the stock mentioned in the letter had been given during the lifetime of Henry W. Merriam to the parties named in the letter, did you know that?

A. I did not'' (pp. 310-311).

''Q. I say when you signed that document did you know whether or not Henry W. Merriam had given his stock to the parties named in the letter of January 21?

A. I did not know only that Judge Swayze said that it had been given'' (p. 311).

''Q. All the knowledge you had about it was contained in the letter?

A. That is all; that is all I knew about it at all.

Q. And acting upon the information contained in the letter you signed that release?

A. I did'' (p. 311).

The testimony adds nothing to the letter written by the Executors. Every fact stated in the letter by the Executors is consistent with the facts as developed at the trial. The parties were distinctly advised by the letter

> ''that some legal question may be raised as to their right''

to return the stock to Mrs. Huntington for delivery by her. The endorsement of Mr. Merriam upon the envelopes was quoted in the letter and it was evident from the whole letter to a person of ordinary intelligence that its purpose was to get authority from the parties legally interested and competent to give it, to make effective a transaction as to which there was a question and as to which a controversy might arise. He must have known that without the consents the stock would not have been delivered and the transfers made.

We are unable to discover any fact in the case that is not indicated and sugested by the terms of this letter. We think it hardly necessary to argue that on this record which discloses no intent to conceal or misrepresent, it is hardly to be in-

ferred that either of the executors can be properly criticized as misrepresenting, or endeavoring in any way to defraud any of the parties interested in connection with their rights.

III.

Restraints upon alienation of the freehold, of fee or a life estate, are invalid in New Jersey.

While the consent may be contended to operate as an alienation of the income involved, it is very clearly not an alienation of the income in terms. The language of the residuary clause in the will is as follows:

> "And to pay the yearly income of one of such shares to each of my three cousins, Carlisle J. Lane, Albert I. Lane and Charles R. Lane in such manner as may be most effectual for securing to each the personal receipt and enjoyment thereof during his life, inalienably" (p. 319).

We understand it to be claimed that it was not within the power of Charles R. Lane to execute the consent involved.

As to this proposition, we think it is clear that this restraint was void.

At common law there could be no question about the fact that the restraint at bar would be held invalid. In the leading case of *Brandon* v. *Robinson,* 18 Ves. 429, Lord Eldon, said:

> "It is equally clear generally speaking that if property be given to a man for his life, the donor cannot take away the incidents to a life estate and a disposition to a man until he shall become bankrupt, and after his bankruptcy over is quite different from an attempt to give it to him for his life, with a proviso that he shall not sell or alien it."

This case was decided in 1811 and is cited with a discussion of various other cases involving the same question in *In re Dugdale,* 25 Eng. Ruling Cases 616, (38 Ch. D. 176-183) decided in 1881, which seems to be the last leading case in which the doctrine has been discussed in England. As bearing upon the ancient character of the doctrine held in these cases, the Chancellor in *In re Dugdale* said:

> "There is no doubt that a condition against alienation is void. Co. Lit. 223a.'

This work was published in 1628 and on this point the author said:

> "For it is absurd and repugnant to reason that hee that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien."

In *Rockford* v. *Hackman,* 9 Hare 475, it was held:

> "Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift, and that any mere attempt to restrict the power of alienation whether applied to an absolute interest or to a life estate, is void, as being inconsistent with the interest given".

This case is cited with approval in *Hardenburgh* v. *Blair,* 3 Stew. 42-51 (reversed 3 Stew. 645 on another point).

> "The common law held that legal estates of freehold, whether in fee simple or for life, should not be inalienable, and Chancery held the same of equitable estates of freehold."

Gray's Restraints on Alienation, Sec. 256 quoted with approval in—

Hutchinson v. *Maxwell,* (Va.) 57 L. R. A. 54.

On the contrary, however, it has long been held at common law that restraints upon alienation in cases of "Estates tail and estates for years are valid".

Gray's Restraints on Alienation, Sec. 75 & 101.

As to these propositions we do not understand that there is any difference of opinion either in the English Courts or in the Courts of the United States, and we therefore start with the undisputed position that at common law restraints upon alienation of the freehold, or fee and life estate, are void. That as to estates tail and estates in fee, or estates less than a life estate, they are valid.

In this country in some states the common law rule is sustained; in others, it is denied. The statement of the law in that regard up to 1895 (and there has been no change of any substantial consequence since) is accurately stated by *Professor Gray* in his valuable and exhaustive work on *Restraints on the Alienation of property,* sec. 177a, as follows:

> "Of the twenty-four States in which the question has now been discussed, it has been decided in sixteen; in eight there are only dicta. Of the sixteen States in which decisions have been had, the courts of eight have held restraints against alienation on equitable life estates bad, and in eight states they have been held good. Such restraints have been adjudged bad in Rhode Island, New York, North Carolina, South Carolina, Georgia, Alabama, Ohio and Kentucky; while in Pennsylvania, Massachusetts, Illinois, Maine, Maryland, Mississippi, Vermont and Missouri 'spendthrift trusts' so-called, are allowed. Of the eight states in

> which *dicta* only are to be found, in New Jersey and Arkansas the *dicta* are against the validity of such restraints; in Tennessee, Delaware, Indiana and Virginia they are in favor of them; in Wisconsin and Connecticut the language of the cases is conflicting; that is the decisions and *dicta* in ten states are against the validity, and in twelve states are for it; while in two states they are conflicting."

We respectfully refer the Court to a detailed discussion of these various decisions found in Professor Gray's work. We shall content ourselves with an examination of some of the leadin cases denying the rule of the common law, with respect to the weight to be given to them as authority.

Before discussing any of these cases we desire to call attention first to three cases in New Jersey, the first two of which in the note to *In re Dugdale,* 25 Eng. Ruling Cases, 616, are suggested as opposed to the common law rule, and the third, in a note in the American State Reports, is referred to as indicating the same conclusion. Neither of these cases upon an examination, in our judgment justify the inference attempted to be drawn therefrom by the notes referred to. The cases are:

> *Linn* v. *Davis,* 58 N. J. L. 29.
> *Frazier* v. *Barnum,* 19 N. J. Eq. 316.
> *Arnwine* v. *Carroll,* 8 N. J. Eq. 620.

Linn v. *Davis* was an action by a judgment creditor seeking to reach by supplementary proceedings a fund held in trust for the debtor. The act under which the proceedings were had authorized a discovery of property held in trust

> "provided the trust has been created by, or the property held in trust has proceeded from himself".

The trust in that case was the proceeds of a

> "fund which was created by his wife"

and the Court held, as it was evidently bound to do, that the trust fund in question could not be reached because

> "It is entirely clear from a reading of the Act that the power of such courts over money and things in action, held in trust, was extended no farther than to trusts created by the debtor himself",

the Court evidently contenting itself with a construction of the Statute, upon which the action was predicated, and no undertaking in any way to discuss the power of the testator in creating the trust, which obviously does not reach the question at bar.

In *Frazier* v. *Barnum,* the Court were discussing a trust fund created and held in New York and the difficulty in that case was that the

> "fund proceeded from some other person than the debtor. The act under which these proceedings are had expressly exempts from its operation cases where the trust has been created by, or the fund held in trust has proceeded from, some person other than the debtor himself. This case is within the words and intention of the Statute."

They held, therefore, that the fund could not be reached under that Statute, and as a dictum they did say in commenting upon the New York Statute,

> "And the exception was intended to permit any other person to provide a fund for the support or benefit of the debtor and place it beyond the reach of creditors by placing it in trust"

an expression tending toward the sustaining of the inalienability of the trust. That it was not so intended, however, appears very clearly from an expression in the preceding part of the opinion where they say:

> "But it is a chose in action and assignable both by the laws of this state and of the State of New York."

It is familiar law that the Statute in New York specifically regulates and controls trusts of the kind under discussion, and eliminates, and takes the place of, the common law rule. At the outside as far as the opinion in this case can be held to go, is to hold that as to trusts not within the scope of the statute, the statute is inoperative, and leaves the parties to be governed and controlled, by the law as it obtains in the state where the trust is created. It is too clear for argument, that so far as the Statute is concerned (and that was the only foundation for a proceeding such as the Court was discussing) it could not affect, either directly or indirectly, any disposition that did not come within its scope.

In *Arnwine* v. *Carroll,* the inference that a spendthrift trust could be maintained or that a restraint of alienation would be sustained, is drawn, if drawn at all, from an answer to a hypothesis suggested by the Court upon which the case did not in any event turn. It is clearly dictum, and was not a result of any consideration of the question of the validity of restraints on alienation.

The case of *Hardenburgh* v. *Blair,* 3 Stew. 42 practically asserts the common law rule as the law of New Jersey. The case of *Brandon* v. *Robinson* (supra), and other English cases sustaining the common law rule were all cited with approval by the Court in the opinion, the Court saying after a full discussion of the authorities:

> "Nor does it seem to be questionable whether the income can be reached through proceedings under the act respecting executions".

They also state in the opinion:

> "If the debtor's interest in the income of the fund is alienable, it undoubtedly may be reached by his creditors."

They quote with approval the statement of the Court in *Rockford* v. *Hackman,* 9 Hare 475:

> "Property cannot be given for life any more than absolutely without the power of alienation being incident to the gift."

While upon appeal in this case (3 Stew. 645) the Court held that the fund in question could not be reached by the creditors, it did not criticize the reasoning of the Court below, and did not reach its conclusion, upon the ground that such restraints were valid. Its conclusion was reached upon its construction of the Statute under which the Receiver necessarily claimed, the Court saying :

> "Whatever right Blair as receiver has in the money now in controversy, he must have acquired by force of the Statute under which he was appointed."

and they held that under that Statute, he could not reach the trust fund in question as it was not a case

> "where the trust has been created by or the fund held in trust has proceeded from himself."

In other words the power of the Receiver was limited to the statutory authority under which he was acting, and under that authority, his contentention could not be sustained. The statute of New Jersey on this question now reads as follows:

> *Laws of N. J. 1880, p. 274, Chap. CLXXXIII.*
>
> "A Supplement to an act entitled 'An Act to prevent fraudulent trusts and assignments,' approved March seventh, one thousand eight hundred and fifty.
>
> 1. Be it enacted by the Senate and General Assembly of the State of New Jersey, That the provisions of the Act to which this is a Supplement, and of all supplements thereto, shall apply to the income of all property, or money or things in action held in trust for the debtor, where the trust has been created by, or the fund held in trust has proceeded from, some other person than the debtor himself; provided the income of such trust property shall exceed four thousand dollars.
>
> 2. And be it enacted, That this act shall take effect immediately."

So far then as this case settles the law for New Jersey, it clearly adopts the common law rule and the conclusion of Professor Gray and the remark found in the *American & English Ency. of Law,* 26 p. 138, where it is said:

> "In New Jersey the extent of a creditor's right is provided by Statute, but it would seem that in cases to which the Statute does not apply, the English rule is adopted."

New Jersey is a common law state, and unless adequate and substantial reason to the contrary, can be gathered from well recognized judicial determinations, the common law rule must prevail.

Attention of the Court is now called to the most significant and important American cases which deny the application of the common law rule. Having in mind the well settled common law rule that as to all estates less than a life estate, the common law recognizes the validity of restraints on alienation, it is interesting and instructive to note, that while the common law rule is repudiated by a long line of decisions in Pennsylvania, which have had a pronounced, and perhaps controlling influence, in the rejection of the common law rule elsewhere, that the original case in Pennsylvania *Fisher* v. *Taylor,* 2 Rawle 33, decided in 1829, and upon which all of the succeeding cases are in the main predicated, is in the first place based on an opinion, which does not cite or discuss a single authority upon either side of the question, and contains only the following suggestion by way of reasoning:

> "The intention of the testator ascertained, the only question is whether his disposition is according to law. A man may undoubtedly so dispose of his land as to secure to the object of his bounty and to him exclusively, the annual profits. * * * All this we think has been sufficiently effected in the case under consideration. Nor is such a provision contrary to the policy or to any act of assembly. Creditors cannot complain because they are bound to know the foundation upon which they extend their credit."

This is clearly a very inadequate consideration of the question of public policy. In the premise, without argument when the Court said:

> "A man may undoubtedly so dispose of his land as to secure to the object of his bounty and to him exclusively the annual profits"

the Court apparently assumed the whole question in controversy. No reference in the opinion is made to the fact that this assumption, and the reasoning of the Court, so far as there was reasoning, was in contravention of the well settled common law rule against restraints on alienation, and no attempt is made to answer any of the reasons upon which the common law rule is based. In the second place, the Court held that the estate that they were considering was not a life estate, saying:

> "*He has no life estate in it*" (italics ours) nor any interest which is subject to be sold for payment of his debts"

On these facts under the common law rule, the conclusion of the Court would necessarily have been sustained, as the common law sustains restraints upon estates less than a life estate. The result is, that upon the facts stated by the Court in its opinion, the case of *Fisher* v. *Taylor* is not inconsistent with the common law rule against restraints on alienation of the fee and the life estate, but is in entire harmony therewith and when this fact is observed, it furnishes a very unstable foundation for a long line of cases in Pennsylvania that deny the validity of the common law rule. A case that does not impeach the common law rule but is consistent therewith, certainly does not furnish an adequate foundation, as authority, for any other case that is inconsistent with the common law rule. This case has probably been cited more often, and with greater vigor, than any other case ever decided in the United States, in support of a doctrine that it does not

assert, and as a denial of a doctrine that it is in harmony with.

It is also interesting to note that in citing *Fisher* v. *Taylor* (*supra*) as an authority for the conclusion which he reaches, Mr. Justice Miller in *Nichols* v. *Eaton,* 91 U. S. 716 (23 L. ed. 254) misconceives and misstates the character of the estate being considered in *Fisher* v. *Taylor* (*supra*) when he says:

> "The Supreme Court of Pennsylvania held this *this life estate* (italics ours) was not liable to execution for the debts of the son"

when as we have seen, as a matter of fact, the Court did not hold that a "life estate" was not so liable, but did hold that an estate, which was less than a life estate, was not liable. The fact that the subject of trust estates, and life interests of parties therein, had been made the subject of statutory regulation and control in New York, Tennessee and some other states, and so far as judgment creditors are concerned, in New Jersey, gives rise fairly to the necessary inference, that in the absence of such legislation in those states, the rules of the common law would apply, and that they now apply therein, except in so far as they may be so modified by the provisions of the various statutes.

This is clearly held in *Hallett* v. *Thompson,* 5 Paige 583 (1836) where the Chancellor in the opinion cited the case of *Brandon* v. *Robinson* (*supra*) with approval, and while he recognized the fact, that the Statute controlled the case that was being decided, said:

> "Independent of any statutory provisions, therefore, I have no doubt that it would be competent for this court, and would also *be the imperative duty of the Court* (Italics ours)

> to compel the defendant Thompson to execute this beneficial trust power so as to enable the complainant to obtain payment of the legacy, to be applied in satisfaction of his judgment as far as it would go.
>
> As a general rule it is contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and to be able at the same time to keep it from his honest creditors'' (p. 586).

And again:

> ''On the contrary it was an attempt to give to the legatee an absolute and uncontrollable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property so far as the rights of creditors are concerned. This cannot be done *consistently with public policy or the settled rules of law*'' (italics ours) (p. 587).

Except for the Statute, it is quite clear that the common law rule would at that time have been followed in New York. The denial of the common law rule in *Nichols* v. *Eaton* (*supra*) was clearly a dictum. Mr. Justice Miller stated the ''propositions to be considered'' as follows:

> ''1. Does the true construction of the will bring it within that class of cases, the provisions of which on this point are void under the principle above stated? And 2. If so, is that principle to be the guide of a court of the United States sitting in Chancery?''

There were two provisions of the will being considered. The first standing alone clearly did not ''bring it within that class of cases,'' that is, involving alienation, and on that provision alone it was so clear that the Court said: ''There

would be no difficulty in the case." The second provision without which the case was clearly not "within that class of cases" contained a provision vesting the trustees with a discretion in making the payments involved, and it was urged "that the discretion vested in the trustees is equivalent to a direction, and that it was well known it would be exercised in favor of the bankrupt."

As to this contention the Court said:

> "As a proposition then, unsupported by any adjudged case, it does not commend itself to our judgment on principle" (p. 724).

This decided the case and anything further was a dictum. The Court then proceeded to discuss and decide the question of restraints on alienation, beginning the discussion as follows:

> "But, while we have thus attempted to show that Mrs. Eaton's will is valid in all its parts upon the extremest doctrine of the English Chancery Court, we do not wish to have it understood that we accept the limitations which that court has placed upon the power of testamentary disposition of property by its owner" (p. 725)

that is to say—the case has been decided, but this seems to be a fitting occasion to express our views upon a proposition, that might otherwise have been necessarily involved in its decision. That Mr. Justice Miller clearly recognizes that the discussion was *obiter* appears from his statement at the end of the discussion when he says:

> "We have indicated our views in this matter, *rather to forestall the inference* (italics ours) that we recognize the doctrine relied on by appellants, and not much controverted by opposing counsel, *than because we have felt it necessary to decide it* (italics ours)

> though the judgment of the court may rest equally well on either of the propositions which we have discussed. We think the decree of the court below may be satisfactorily affirmed on both of them'' (p. 729),

and yet no one knew any better than the Justice who drew the Opinion that the first question was the preliminary and necessary question, and that when the decree was affirmed on that ground, the second proposition was eliminated from the case.

An examination of the cases decided in the various states will show, that this conceded dictum is the principal foundation for the denial of the common law rule, in the states where its application has been denied. An examination of Mr. Justice Miller's opinion discloses the fact, that every argument made by him in the opinion, applies with equal force in favor of the validity of the restraints on alienation upon an estate in fee. His first contention is that

> ''If the doctrine is to be sustained at all, it must rest exclusively on the rights of creditors'' (p. 725).

This suggestion is a familiar, though not an original, illustration of that method of argument, which assumes in the premises, a state of facts that necessarily results in the conclusion, when otherwise it might be impossible by the application of the ordinary rules of logic to reach that conclusion. The learned justice evidently mistook the fact that the question is almost always raised in an action by a creditor seeking to appropriate the trust fund to the payment of his debt, for the reason for the rule. It ought to be said, that the assumption is incorrect. Professor Gray very clearly and unanswerably calls attention to the fact, that the rule does not ''rest ex-

clusively upon the rights of creditors'' when he says:

> ''But, with submission, this is not the ground why equitable life estates cannot be made inalienable and free from debts. The true ground is that on which the whole law of property, legal and equitable is based; that inalienable rights of property are opposed to the fundamental principles of the common law; that it is against public policy that a man 'should have an estate to live on, but not an estate to pay his debts with,' *Tillinghast* v. *Bradford*, 5 R. I. 205, 212, sec. 179, *ante,* and should have the benefits of wealth without the responsibilities. The common law has recognized certain classes of persons who may be kept in pupilage, viz. infants, lunatics, married women; but it has held that sane grown men must look out for themselves—that it is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly. It is wholesome doctrine, fit to produce a manly race, based on sound morality and wise philosophy.'' (Sec. 258).

And again:

> ''A. Cannot devise a legal life estate, with a provision that it shall not be subject to the devisee's debts. Why not? *Cujus est dare, ejus est disponere.* The debts are not the debts of the testator. A. cannot devise an equitable fee simple with a provision that it shall not be subject to the devisee's debts. Why not? *Cujus est dare, ejus est disponere.* The debts are not the debts of the testator. Yet it is not disputed that these devises are bad; but they are bad for no other reason than that for which a devise of an equitable life estate with a provision that it shall not be subject to the devisee's debts is bad, namely, that such a provision is against public policy and illegal, just as an executory devise to

> take effect fifty years hence is against public policy and illegal. A testator may give such rights of property as he pleases, provided they are rights which the law sanctions; but inalienable rights of property the law has never sanctioned, for they are inconsistent with that ready transfer of property which is essential to the well being of a civilized community, and especially of a commercial republic'' (Sec. 259).

It is submitted that these suggestions of Professor Gray furnish a very much broader foundation than that within which the Court, for the purpose of the argument that was to follow, undertook to confine the reasons for the rule. His first principal reason, why the rule thus improperly assumed to be predicated upon the rights and interests of creditors only, does not apply in the United States, is because it is the universal policy in the United States, as distinguished from the English policy, to exempt a part of the debtor's property from seizure on execution, but these Statutes, it is obvious, make no distinction whatever between a fee and a life estate, in their operation and in their exceptions, and every reason that can be predicated upon this legislation to sustain restraints upon the alienation of a life estate applies with equal, if not greater force, to a like restraint upon the alienation of a fee. The argument that a creditor is not defrauded or injured because

> ''all wills or other instruments creating such trust estates are recorded in public offices.''

and

> ''that in creating a debt with such person, he has no right to look to that income as a means of discharging it. He is neither misled nor defrauded when the object of the testator is

> carried out by excluding him from any benefit of such a devise'' (p. 726).

is subject to the same criticism. Change the word ''income'' in this quotation to ''property'' in which the devisee held the fee, and you have exactly the same situation, with every consideration applying with equal force, to the fee as to the life estate. So also, as to the final reason as to which it is suggested, that it ''is not readily perceived''

> ''Why a parent or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune and even his own improvidence or incapacity for self protection, should not be permitted to do so.''

It is also obvious that it ''is not readily perceived'' why the same reasoning would not justify sustaining a devise of the fee, with an absolute restraint upon its alienation, and thus give to the devisee a larger, better, and more valuable estate, and thus more effectively provide against the regretable contingencies, suggested as within the contemplation of the testator, the elimination of which appears to be so desirable. We submit that no reason, either in the argument of the Court, or in any of the cases cited, is given for the holding of restraints valid in case of a life estate, that does not apply, with at least equal force, to holding such restraints valid as to the fee.

Attention has already been called to the fact, that the first case cited by Mr. Justice Miller in his opinion, that of *Fisher* v. *Taylor,* is erroneously referred to, as an authority in favor of his conclusion.

It is to be noted that he ''specially'' cites as his last case, *Campbell* v. *Foster,* 35 N. Y. 361, a

case that was decided in a state where this subject had long been regulated by statute, as to which the Court said in *Lampert* v. *Haydel,* 96 Mo. 439 (2 L. R. A. 113)

> "In some states the validity of such trusts, where the fund proceeds from the bounty of another, is sanctioned by express statutes. This is true of New York, New Jersey (the reference as to New Jersey is incorrect as has already appeared) Illinois, and Tennessee. Decisions in those states, therefore, *are of no value in the discussion of the question* where such statutory provisions are not involved" (italics ours) (p. 117).

This would seem to be too obvious for discussion, and if sound, the last case relied upon by Mr. Justice Miller falls to the ground.

We beg leave to suggest that the statement of the learned Justice in the opinion that the common law doctrine is "comparatively of modern origin" is hardly in accordance with the history of that rule. *Nichols* v. *Eaton* was decided in 1875. *Brandon* v. *Robinson* cited by him was decided in 1811 and the Opinion in *In re Dugdale* refers to the rule as originating as early as "Co. Litt. 4" 1628 and if antiquity is esential in order to establish its validity, this would seem to furnish the necessary support in that direction.

The common law made no distinction as to restraints on alienation of a fee and life estates. The rule of the common law as to the fee, is the settled rule of the United States Courts, and of the Courts of all the states, and is the settled law in this country.

In *Potter* v. *Couch,* 141 U. S. 296, decided in 1890, 15 years after *Nichols* v. *Eaton* (*supra*), the Court in the opinion drawn by Mr. Justice Gray, said:

> "But the right of alienation is an inherent and inseparable quality of an estate in fee simple. In a devise of land in fee simple therefore a condition against all alienation is void because repugnant to the estate devised" (p. 315).

and as bearing upon the modern character of this doctrine it may be noted that Mr. Justice Gray cites the following in support of this statement: "Lit. sec. 360; Co. Litt. 206b, 223a; 4 Kent. Com. 131", and upon this same point Mr. Justice Gray cites with approval from *Steib* v. *Whitehead,* 111 Ill. 247, 251.

> "We fully recognize the general proposition that one cannot make an absolute gift or other disposition of property, particularly an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment, as to defeat the object of the gift itself, for that would be in effect to give and not to give in the same breath. Nor do we at all question the general principle that, upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or curtesy, or that it should not descend to the heirs general of the grantee upon his dying intestate, *or that the grantee should have no power of disposition over it* (italics ours) the provision, in either of these cases would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee simple, and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the State by

> mere private contract. This cannot be done."

Mr. Justice Miller does not even undertake, nor does any case that he cites undertake, to either directly or by inference, distinguish between the fee and a life estate in this regard. He gives, and they give, no reason why it should be held void in the one, and valid in the other. We submit that an opinion which only gives reasons for its conclusions, which are equally applicable in each case, and does not even attempt to show, or to indicate, why in case of a life estate a restraint should be sustained, when in the case of a fee it should be overthrown, does not furnish a satisfactory and adequate foundation for the doctrine which it asserts. When a doctrine which originally applied to a fee and a life estate is sustained by the same considerations in each case, justified by the same reasoning, and by the same considerations of public policy, to hold that the restraint in the case of a life estate is valid, and at the same time to hold that the same restraint, sustained by the same considerations, justified by the same reasons, founded upon the same consideration of public policy, when applied to a fee is void, is to develop an inconsistency that if found outside of a law book could be properly characterized as a grotesque absurdity. They must as a matter of legal reason or sound common sense stand or fall together. In any event, so far as the conclusion of the Supreme Court of the United States is concerned, it is not so decided upon the question as a matter of public policy that it would undertake to overrule the Court of a State, that held otherwise, as it says:

> "We are not called upon in this connection to say how far we would feel bound, in a case originating in a State where the doctrine of

> the English courts had been adopted so as to become a rule of property, if such a proposition could be predicated of a rule like this''.
>
> Nichols *v.* Eaton (supra) (p. 729).

In the case of *Steib* v. *Whitehead,* thus cordially approved in *Potter* v. *Couch* (*supra*), it is to be observed that the Court said that the question was ''a new one in this Court'', and the Court in that case did not attempt to distinguish a life estate from a fee in the matter of restraints, and it was not necessary to the decision in that case to hold restraints on alienation in the case of a life estate valid, as the provision in the will then being discussed did not impose any restraint in terms upon alienation, but did provide that the Trustees should pay the income over to the daughter ''in person and not upon any written or verbal order nor upon any assignment or transfer by the daughter''. It was upon this peculiar personal feature that the case turned, as the Court said:

> ''If on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated.''

The case is, in no part of the opinion, put upon the ground that the daughter could not assign or transfer, but solely upon the ground that the income could only be paid to her in person, which obviously prohibited the payment to any other person.

The case of *Hyde* v. *Woods,* 94 U. S. 523 (24 L. ed. 264), cites and approves the dictum in *Nichols* v. *Eaton* without any argument.

In the case of *Smith* v. *Towers,* 69 Md. 77 while the Court sustained the restraint on alienation

of the life estate involved in that case, in the opinion they stated among other things:

> "In other States, however, and it may be said in a majority of the states in which the question has arisen the English rule has been adopted without qualification (p. 86).

In this case there was a very strong dissent by Alvey, C. J., who said upon the point in question:

> "I had supposed that if there was any principle well settled in the law of property it was that upon a gift or grant of a beneficial fee simple or life estate whether legal or equitable, there was an incident pertaining to such estates that could not be severed, and that was the right and power of the donee or grantee to alienate the estate, and to charge it with his debts, and that any attempt to restrain the exercise of such right and power except by way of cessor or limitation over of the estate, would be regarded as repugnant to the estate and therefore without effect."

In *Pace* v. *Pace*, 73 No. Car. 119-124, the Court stated the law as follows:

> "It is settled that by no form of words can property be given to a man or to another in trust for him, so that he shall not have a right to dispose of his estate in it unless there be in the instrument of gift a provision that upon an attempted alienation, it shall go over to some third person."

The case of *Hutchinson* v. *Maxwell,* 57 L. R. A. 384 contains an exhaustive discussion of the whole question, and while that case turned upon the construction of the Virginia statute, which subjected all trust estates to the debts and charges of the person to whose use or whose benefit they are holden or possessed, the Court in the opinion, among other things, said:

> "It is well settled in this country and in England, from which country we derive the principles of our jurisprudence, that a gift or grant, of a beneficial estate, in fee or absolutely, whether legal or equitable, has certain legal incidents of which the estate cannot be devested, and all conditions adopted for that purpose are necessarily repugnant and void. Among those incidents are the donee's or grantee's power of alienating such estate and its liability for his debts. Co. Litt. 223a; *Brandon* v. *Robinson,* 18 Ves. Jr. 429; 2 Minor Inst. 4th ed. 287, 288; Gray, Restraints on Alienation of Property, 2nd Ed. Secs. 105, 134.
>
> The reason of this doctrine or principle is the repugnancy of such restraints upon the ordinary rights of property, and that property would thereby be withdrawn from the ordinary rules and channels of commerce and trade" (p. 387).

The Court will notice that this reason, given by the Virginia Court, 27 years after the decision in *Nichols* v. *Eaton*, is very much broader and more comprehensive, and more significant, than that attempted by Mr. Justice Miller in that case in his premise, and the Court further said:

> "It is also well settled in England that the right of alienation and liability for debts are inseparable incidents of a life estate, whether limited by way of trust or otherwise, except in cases where there is a termination or limitation over of the estate dependent upon attempted alienation or seizure by creditors" (p. 388).

And after referring to statutes in Virginia which controlled the law in that case, they further said:

> "The decisions of the American courts upon this question are conflicting, and the reasoning of the cases which uphold spendthrift

> trust is unsatisfactory, and, as it seems to us, at war with well-settled principles of law as to the incidents of property, whilst the English courts of chancery and the American cases which follow them, even if our statute did not make a debtor's equitable property liable for his debts to the same extent as if he were the legal owner, seem to us to be sustained by the better reason, and in furtherance of a wise public policy'' (p. 389).

This opinion of the Virginia Court appears to have been unanimous, and upon the question of public policy, is entitled we think to weight, notwithstanding the suggestions to the contrary, in the much cited dictum of Mr. Justice Miller in *Nichols* v. *Eaton.*

In *Broadway National Bank* v. *Adams,* 133 Mass. 170, a spendthrift trust in a life estate was first sustained by the Massachusetts Court. The Court in the opinion drawn by Moulton, C. J., discusses with some detail the authorities upon either side of the question and recognizes the existence of the common law rule in its application to the fee and life estates, and the fact that it has been adopted by several courts in this country, and calls attention to the various courts in this country in which the doctrine has been denied, and among others to the case of *Nichols* v. *Eaton.* An examination of the opinion discloses the fact, that no effort is made to distinguish between a life estate and the fee, as to the application of the common law rule, and it is also to be noted that while they cite the case of *Nichols* v. *Eaton,* the Court does not by any means undertake to enforce the proposition that the application of the rule rests ''exclusively on the rights of creditors''. Every reason given for the application of the rule finally sustained by that court to a life estate would sustain the application of the same rule

equally as well to the fee. While they concede that the precise point had not been decided in that State, they apparently predicate their conclusion upon previous decisions which were thought to cover it, saying:

> "The precise point involved in the case at bar has not been adjudicated in this Commonwealth; but the decisions of this court which we have before cited recognize the principle, that, if the intention of the founder of a trust, like the one before us, is to give to the equitable life tenant a qualified and limited, and not an absolute, estate in the income, such life tenant cannot alienate it by anticipation, and his creditors cannot reach it at law or in equity" (p. 173).

An examination of the "decisions" referred to is suggestive and instructive. The cases are as follows :

In *Braman* v. *Stiles,* 2 Pick. 460, restraints on alienation were not discussed or referred to in the opinion and the devise in that case was to the Executors to be

> "dealt out to the said Jonas for his comfort and advantage, according to their best judgment and discretion."

In *Perkins* v. *Hays,* 3 Gray 405, the question involved was the assignment of an annuity bequeathed to a widow. The general question of restraints on alienation was not discussed or referred to in the opinion, and the Court held that under the terms of the will then being considered the assignment could not be sustained, saying:

> "It seems to us equally plain that the power of alienation by anticipation is inconsistent with and would tend directly to defeat this main object and purpose of the will. The power is not given in terms. A power may

> be implied to effect the purposes of the testator, but not to defeat them'' (p. 410).

In *Russell* v. *Grinnell,* 105 Mass. 425, restraints on alienation were not discussed. The Court said in a very brief opinion that

> ''In the exercise of a reasonable discretion they had power to terminate the trust, if they thought proper; and in the exercise of the same discretion they may continue to hold the property not yet expended. They do not seek instructions from the court as to their duty and the plaintiffs have no right to do so.'' (p. 426),

and this is all that Court did hold in that case.

In *Hall* v. *Williams,* 120 Mass. 344, the discretion of the trustees was also involved. The doctrine of restraints on alienation was not even discussed or referred to in deciding the case. The Court said:

> ''As said defendant had no right in this income which he can control, except under the discretion of the trustees, his creditor can have no greater right. To require the trustees to pay the future income to this and to other creditors of said defendant, would convert a contingent into an absolute gift, and defeat the main purpose of the will'' (p. 346).

In *Sparhawk* v. *Cloon,* 125 Mass. 263, the Court held that under the peculiar language of that will the husband, who was the *cestui que trust*

> ''took an equitable fee, which he might alienate, and which equity would apply to the payment of his debts'' (p. 267).

The opinion was drawn by Mr. Justice Gray, afterwards of the Supreme Court of the United States, who discusses the common law rule with

reference to restraints on alienation and cites a number of the American cases which sustain it, and a number of the cases also which deny it. As to that question, however, he said:

> "But we are not required now to determine that question, because we find in this will no expression of intention that the trust estate shall not be alienated by the *cestui que trust* or not be liable to his debts" (p. 267).

As has already been seen they held that it was alienable and that it was liable for the payment of his debts. He made the following reference to three of the cases to which we have just referred:

> "The decisions of this Court cited by the learned counsel for the defendants, are in no wise inconsistent with this conclusion. In *Perkins* v. *Hays* 3 Gray 405, the question was whether the terms of the will by which the annuity was given allowed it to be alienated by anticipation. In *Hall* v. *Williams,* 120 Mass. 344, and in *Russell* v. *Grinnell,* 105 Mass. 425, the will manifested the intention of the testator that his trustees should have discretionary power either to apply or to withhold and accumulate the income" (p. 267-268).

It is submitted that this brief analysis of the decisions thus relied upon by the Court in *Broadway National Bank* v. *Adams,* furnishes a very inadequate foundation, to say the least, for the conclusion that the Court reached. The Court might perhaps well reach it as a matter of original reasoning, but to reach it upon the strength of the decisions to which they refer, seems to have been entirely unauthorized.

In *Roberts* v. *Stevens,* 84 Maine 325, the doctrine was announced for the first time in Maine, and in that case relying therefor somewhat largely upon the case of *Lampert* v. *Haydel,* 96 Mo.

439, the Court in an opinion drawn by Mr. Justice Virgin, discusses with some considerable detail the question, and among other things calls especial attention to the common law rule which sustains restraints upon alienation of the life estate in the case of married women. He accurately states the common law doctrine in that respect when he says as to married women and the validity of restraints of alienation in trust estates held by them:

> "Thus the doctrine was placed upon the long, and well recognized, broad ground that a court of chancery had the inherent power to modify estates of its own creation." (p. 332).

In this respect the opinion is in precise accord with the statement of the law upon this point by Lord Eldon in *Brandon* v. *Robinson,* who says as to the case of married women, that Lord Thurlow established the rule as to married women,

> "reasoning thus—that equity making her the owner of it, and enabling her as a married woman to alien, might limit her power over it, but the case of a disposition to a man, who if he has the property, has the power of alienating, is quite different." (p. 433).

Mr. Justice Virgin then says:

> "In the absence of any statute or decision in this state to the contrary, we have no hesitation in extending the principle to cases like the present" (p. 332).

The case that he was deciding was an ordinary life estate, and not a life estate vested in a married woman. The reason for the application of the rule at common law to a married woman, is expressly predicated upon the fact that equity

created the estate in married women, and having created it, had obviously the power to limit and control it. This reason has no application whatever to an ordinary life estate not thus created, and the statement of Mr. Justice Virgin that he was "extending the principle to cases like the present" is an incorrect statement of what the court in that case did. The court were not "extending" the principle. They were "applying" the principle "to cases like the present", which, we submit, are two entirely different things. To extend the rule to a case would involve the exercise of intellectual power and a demonstration by reasoning that the rule would thus apply, and this could not be done as a mere statement of the rule and the circumstances under which it arose, is an absolute demonstration that no reasoning could apply it to any other state of facts dissimilar thereto, which was the state of facts that the Court were then considering in the Maine case. What the Court did in the Maine case was to exercise the arbitrary power and by main strength, if that term can be properly used, or by force, as it had the power, *applied* the doctrine to the case under consideration, and while the Court had the power to *apply* that principle to the case they were deciding, as their power in that respect was not subject to control, they did not have the power to *extend* the principle, because that involved a demonstration by reason and logic that the doctrine did apply, and this the Court could not do, as a mere statement of the facts demonstrates its impossibility. It does not aid the Court in Maine any, to have it appear that the Court in Missouri did the same thing under the same circumstances, as they were equally without the power to thus violate a principle, and to hold that they were *extending* it

when as a matter of fact they were arbitrarily *applying* it.

We submit that the inconsistent position in which the Courts that sustain spendthrift trusts find themselves, and the inconclusive reasoning with which they sustain their conclusions, are such as would not justify the Court in New Jersey in departing from the plain, simple and well established common law rule based both upon unanswered reason and well settled authority.

IV.

In any event, no matter what rule of law may be established with reference to the validity, or otherwise of the restraint on alienation, we submit that by virtue of the consent signed by Charles R. Lane he is now estopped from setting up in this equitable proceeding any title to the income of the portion of the estate involved. The rights of the parties have been determined in accordance with, and relying upon, these consents. The agreement executed March 26, 1901, between the Executors and Mrs. Huntington and John J. Merriam is specifically predicated upon these consents. Among other things it provides:

> "And Whereas in order to remove as far as possible all doubt upon that subject (the validity of the gift of the stock in question) Helen Merriam * * * and Charles R. Lane have in writing consented to the delivery of the said envelopes to the persons addressed, and have also consented to the said executors executing any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered (the said assets being hereto annexed as a part hereof): (pp. 324-325.)

Under this agreement specifically making the consent signed by Charles R. Lane a part thereof, 151 shares of the stock of the value of $26,274 were delivered to Mrs. Huntington and 122 shares of stock of the value of $21,228. were delivered to Mr. John J. Merriam, under and subject to the provisions of said agreement. This stock has since been bought and paid for by them for the prices above indicated. 37 shares of the stock of the value of $6,808. have been delivered by Mrs. Huntington: To Nellie J. Merriam, 10 shares; to Olin L. Merriam, 10 shares; to Maybelle Buffington, 7 shares and Francis & Ralph Buffington, 10 shares (p. 16) and for the delivery of this they have assumed the legal responsibility. The J. E. Warbasse note (p. 146) accompanied by 30 shares of the stock as collateral security, the John Tozer note (p. 150) acompanied by 50 shares of the stock as collateral security, and the George L. Dutcher note (p. 167) accompanied by 30 shares of the stock as collateral security, upon all of which notes is now due with interest more than $17,000., have also been delivered to Warbasse, Tozer and Dutcher, respectively, and for the delivery and under the decree of the Court, Mrs. Huntington and Mr. John J. Merriam's Estate are now legally responsible to account therefor, the actual responsibility being for one fourth thereof. The delivery of the 37 shares of stock and of the notes thus secured by the stock occurred on or about March 26, 1901, and it is now March, 1914. These deliveries were all made, and this responsibility was all assumed, relying upon the validity of the consent signed by Charles R. Lane and others. If Charles R. Lane is now allowed, in a Court of Equity, to repudiate this consent for any reason, it subjects Mrs. Huntington and the Estate of John J. Mer-

riam to a liability with interest on the income accrued and paid and to accrue of one fourth of more than $17,000. assumed by them as well as on the 273 shares relying upon the good faith of his consent, and it subjects them to that liability under circumstances where it is impossible for them to recoup, or protect themselves, on account of the liability thus assumed, as the Statute of Limitations has long barred any right upon their part, to recover of the various donees to whom the stock and the notes were thus delivered. The executor also has acted upon the consent, distributed the income and made a binding agreement by virtue of which the future income is also to be distributed to Mrs. Huntington and the Estate of John J. Merriam.

Under these circumstances, we submit that a court of equity could not under any circumstances recognize Mr. Charles R. Lane to now contend that his consent thus given was invalid, when it would so clearly change the rights of all of the parties concerned therein, and who have in good faith acted thereupon.

THE BRIEF FOR THE APPELLANT CHARLES R. LANE.

The statement in the brief for the appellant that

> "the purpose was not to authorize them to transfer the title in the trust property to Mrs. Huntington and others, but to so place the control of the Shoe Company that its interests would not be jeopardized until the title to the stock was determined"

and that it was

> "only a temporary arrangement during the pendency of the question of title"

proceeds from an entire misapprehension, and is a complete misstatement, of the indemnity agreement. That provides:

> "And Whereas a question has been raised as to whether *the gift of said stock* to the persons above named *had been perfected* by the said Henry W. Merriam in the manner required by law; And Whereas in order to remove as far as possible all doubt upon *that subject*" (p. 324) (italics ours).
>
> * * * "and Charles R. Lane have in writing consented to the delivery of the said envelopes to the persons addressed and have also consented to the said executors' executing any transfers or assignments necessary to *perfect the title to the said stock* (italics ours) (1090 shares) in the names of the persons to whom the said certificates are addressed or to be delivered" (p. 325).

Because of this delivery and transfer Mrs. Huntington and John J. Merriam "have agreed to indemnify" the executors

> "by reason of the delivery of said envelopes to the persons to whom the same are respectively addressed and by reason of the execution of the transfers of said stock, and *for that purpose*" (italics ours).

Mrs. Huntington transferred 151 shares and John J. Merriam "*for like purpose*" transferred 122 shares of stock to the executors (p. 326) 273 shares in all transferred to the executors being one fourth of the 1090 shares, the title to all of which was involved. The executors on their part "in pursuance of the said assents" agree to pay to Mrs. Huntington and John J. Merriam

> "all dividends that may be hereafter declared upon the stock so assigned" (pp. 326-7).

In addition to the security thus placed in the hands of the executors by virtue of the agreement, Mrs. Huntington and John J. Merriam agree to

> "at all times hereafter indemnify and save harmless'

the executors against any claim of the Lane children (p. 328). The executors in consideration of this agreement agree to pay to Mrs. Huntington and John J. Merriam

> "so long as the said stock is unsold * * * all the dividends from earnings"

and in case of sale

> "the income of the proceeds of sale". (p. 329)

And they also agree to hold the 273 shares of stock

> "in trust until such time as she may establish her title thereto"

or

> "until such time as she may secure a release, etc." (p. 328)

from the Lane children. Mrs. Huntington and John J. Merriam are expressly given as a part of the agreement the

> "right at any time to purchase of the said executors"

the 151 and 122 shares respectively. The fact that they exercised this right and under the agreement the executors were compelled to sell the stock to

them must have been known to counsel when with an evident attempt to reflect upon Judge Swayze they say:

> "And without any necessity, of his own volition, transferred said stock to Mrs. Huntington and John J. Merriam."

Why a sinister aspect is sought to be placed upon a transaction over which Judge Swayze had no control we are at a loss to imagine. There is not a word in the agreement or in the consents that indicates or tends to indicate the existence of this imaginary purpose

> "to so place the control of the Shoe Company that its interests would not be jeopardized until the title to the stock was determined"

or that

> "It was a temporary arrangement during the pendency of the question of title."

273 shares was only one-fourth of the 1090. There was no intent to segregate the 273 shares from the 1090 for a temporary purpose with reference to the 273 shares. On the contrary the declared purpose was to definitely settle the title to the whole 1090 shares.

The 273 shares in question could not, in any event, affect the control of the Shoe Company. In the first place it was only one-fourth of the 1090 shares the title to which was perfected as the result of the agreement. There were at least 1800 shares issued (p. 106) and the 273 shares could never at any time have been an important factor in the "control of the Shoe Company" either temporarily or otherwise, and the suggestion that it was being held for that purpose is wholly without foundation. There is not a word in the record

that shows that there was ever at any time any controversy between any of the stockholders as to the management of the company or as to the circumstances under which the 273 shares should be held by the executors, or as to the importance or lack of importance of the stock being controlled by the members of the Merriam family, and the holding of the 273 shares by the executors had absolutely no significance whatever from that point of view so far as anything in the record discloses.

The consent, itself, distinctly negatives the idea that there was anything temporary or conditional about the title to any part of the stock as it provides "I also consent to your executing any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered" language that is clear, without condition, and intended to finally, definitely, settle the title to all the stock.

The suggestion that

> "That there was an honest misrepresentation on the part of the executors of the facts in relation to this stock"

in the appellant's brief, is, as it seems to us, an unjustifiable impeachment of the intelligence of the executors. It is equivalent to the suggestion that the executors intended to correctly state an important and essential fact but on account of the lack of the necessary intelligence only succeeded in making a deliberate statement, that not only did not omit such fact, but referred thereto, and actually misstated it. As no specific fact is pointed out as to which this fatal "honest misrepresentation" occurred, it does not seem necessary to discuss that suggestion further, especially as under no circumstances can it be raised at bar on ac-

count of the lack of the necessary pleadings therefor.

The appellant in his brief does not rely, as he did before the Chancellor, upon the alleged inalienability of the trust income. He says in his brief:

> "In no instance can the acts of the parties or the agreement or consents be taken as an alienation of the rights of any of the parties."

As to this suggestion we entirely agree. We were not, however, advised that he had abandoned this position, until we were served with a copy of his brief, and as we had then fully prepared our discussion of the question of restraints of alienation, we have decided to let it stand, as a part of the brief, although as it is not raised it is no longer an issue in controversy.

The decree should be affirmed.

EDWARD S. ATWATER, JR.,
Solicitor for and of Counsel with Defendants Harriet M. Huntington, Ralph H. Buffington, Admr., Olin L. Merriam, Nellie J. Merriam and Carlisle J. Lane.

CHARLES E. LITTLEFIELD,
Of the New York Bar, of Counsel.

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New Jersey Court of Errors and Appeals

March Term, 1914, No. 39.

Between

FRANCIS J. SWAYZE, as Executor and Trustee, &c.,
Complainant-Respondent,
and
HARRIET M. HUNTINGTON, *et al.,*
Defendants-Respondents,
and
CHARLES R. LANE,
Defendant-Appellant.

On Bill, &c.
On Appeal
from
Chancery.

Brief of William A. Smith

Guardian ad litem of Carlisle R. Lane, Albert Merriam Lane and Clara May Lane, Defendants-Respondents.

It will be unnecessary in this brief, permission to file which was given on the argument, to discuss the facts, as they are amply covered in the briefs submitted by other counsel in the case. The infants here represented were the successful parties in the court below, as under the decree there made they will be entitled after the accounting to have added to their share of one-fourth of the residuary estate of Henry W. Merriam, a sum over fifty thousand dollars.

That the infants are entitled to have their shares increased is not disputed by the appellant, and their rights under the decree is only affected in one par-

ticular by the appeal here presented, and it is to this point that the argument will be addressed.

The part of the decree in question is as follows:

> "That in order to make good the amount chargeable to the said trustees and the complainant as surviving trustee and to make up the deficiency contemplated by the indemnity agreement, the complainant may at once apply thereto the securities and cash held by him in pledge, being the proceeds of sale of said one hundred an fifty-one shares and the cash dividend deposited with the said executors by Harriet M. Huntington and the one hundred and twenty-two shares and the cash dividend deposited with the said executors by John J. Merriam together with the income now in his hands and to accrue on one-half thereof during the lifetime of Carlisle J. Lane and the income now in his hands and to accrue on one-half thereof during the lifetime of Charles R. Lane." (Page 403, lines 14-30.)

The income referred to is the income on the proceeds of sale of the stock of the Henry W. Merriam Shoe Company which was held as indemnity by Justice Swayze under and by virtue of the indemnity agreement.

The infants are entitled to have this income on this sum held as indemnity by Justice Swayze by virtue of a provision in the same paragraph of the decree which is as follows (pages 402-3):

> "That the indemnity executed by the said Harriet M. Huntington and the said John J. Merriam inures to the benefit of Carlisle J. Lane and Charles R. Lane, and that the defendants Harriet M. Huntington and Edwin W. Merriam and Henry F. Merriam as executors of John J. Merriam, to the extent of assets in their hands undistributed, and Henry F. Merriam, Edwin W. Merriam, Amelia E. Merriam and Helen M.

> LaCoste to the extent that they have received or receive the estate of John J. Merriam are bound by said indemnity to make good and pay over to the complainant as soon as the amount shall be ascertained on the accounting the shares of the children of said Carlisle J. Lane and Charles R. Lane in the contents of said envelopes delivered pursuant to said indemnity."

The proceeds of the sale of the stock held as indemnity by Justice Swayze are insufficient to cover the amount for which he is chargeable, owing to the fact that indemnity in the form of stock was not taken by him to cover the notes of Dutcher, Warbasse and Tozer, but in this regard he took for himself, which inures to the infants as hereinbefore stated, the indemnity agreement of Harriet M. Huntington and John J. Merriam, and the infants are protected in this regard by the right given in the decree to apply the income of the proceeds of sale of the stock held as indemnity to make up the deficiency, and it is this right under the indemnity agreement and the decree thereon, the benefits of which the infants are entitled to assert, that is here urged against the contention of the appellant. The disposition of the balance of this income after the infants are protected is, of course, of no concern to the infants here represented and will not be discussed.

Right to this income against Harriet M. Huntington and the Estate of John J. Merriam.

As against Harriet M. Huntington and the estate of John J. Merriam the infants' right to the income on this indemnity fund in so far as is necessary to make up the principal for which Justice Swayze is liable, is complete by virtue of the fact that both Harriet M. Huntington and John J. Merriam guaranteed Justice Swayze against loss in delivering the securities to themselves and to Warbasse, Tozer and Dutcher.

The court below by that part of the decree quoted (*supra*) directed the application of this income from the proceeds of sale of the indemnity stock for the benefit of the infants. The decree is not questioned by either Mrs. Huntington or those interested in the Merriam estate by an appeal to this court, and they are therefore concluded by the decree.

Appellant's rights subject to the claim of the Lane infants.

It was claimed at the argument, on behalf of the appellant, that his consent to the delivery of the envelopes containing the stock was obtained by misrepresentation, and, further, that Justice Swayze did not deliver the envelopes as contemplated by the consent, but entered into the agreement here before the court and withheld one-fourth of that represented by the alleged gifts, and that the appellant is entitled to income on the assets so withheld or taken back by Justice Swayze or upon the amount represented thereby by virtue of the fact that the court below has held that there was no gift in fact in a litigation in which all of the parties interested are represented.

These two propositions (1) misrepresentation in securing the execution of the consent, and (2) the limitation of the consent, have been ably argued by counsel for the other respondents, and it will be unnecessary to argue at length these points.

It is desired, however, to bring out the distinction between the position of the appellant and the infants here represented in reference to this income.

The executors asked for authority from Charles R. Lane to deliver the envelopes to those addressed and make title to them of the contents thereof. These envelopes were given pursuant to the consent and in reliance thereon, and in so far as Charles R. Lane is concerned it was an absolute, unqualified and irrevocable delivery.

As to these infants the executors had no authority to deliver the envelopes and it may be said that the alleged donees had no authority to accept them dealing as they were with trustees. It became necessary therefore to protect the executors and these infants and therefore the indemnity agreement was taken under the provision of a biliteral contract. Relying on the consents, and in order to protect the infants and themselves, the executors agreed to do certain things on their part, which formed the basis of the indemnity covenants made by Harriet M. Huntington and John J. Merriam in the indemnity agreement.

These were:

To hold the stock in trust subject to the rights under the agreement (page 328):

(a) until a decree could be obtained or

(b) until a release could be obtained from the infants.

And further:

To pay the income on the indemnity either from the stock held as indemnity or the proceeds of sale, to Harriet M. Huntington and John J. Merriam (page 329).

The final clause of the indemnity agreement (page 331) provided for distribution under the will only of the principal of the indemnity fund when the trust created for the residuary estate should determine in whole or in part; this last provision was essential in order to cover the case of the trust determining before the decision on the validity of the alleged gift or before consents might be obtained from the infants to the perfecting of the alleged gift. It will thus be noted that in no part of the agreement did the executors take protection from the claims of the appellant. Should the relief asked for by the appellant be granted the result would be that Justice Swayze, relying upon his consent, would have delivered the

envelopes containing the stock and would now be charged with the obligation to account for the assets thus delivered pursuant to such consent without being able to protect himself by the indemnity agreement.

The executors became contractually bound to carry out this agreement. A consideration of no small amount moved from Mrs. Harriet M. Huntington and John J. Merriam by virtue of the fact that they agreed to pay back not only what they received but what was delivered to others, namely, Dutcher, Warbasse and Tozer, and as to them the executors made a complete delivery without taking indemnity of any kind, and the rights of the executors against them are now barred by statute. The payment of this income to the appellant would result in a failure in the consideration moving to Mrs. Huntington and John J. Merriam under the indemnity agreement. Therefore the delivery of the envelopes containing the stock and the stock itself as to Charles R. Lane was absolute and without any conditions. He is not interested in or entitled to any benefit by virtue of the indemnity agreement as it was not taken by the executors for any protection for or against him, and as to Charles R. Lane the indemnity agreement is purely personal to the executors but as to the infants it is to be enforced for their protection as well.

Validity of the Alleged Gift.

On the argument the point was raised by the Chief Justice that if there was a gift in fact of the envelopes in question, as claimed by the respondents in the court below, then Charles R. Lane would not be entitled to any relief here or any of the income from the proceeds of the sale of the indemnity stock or from the amount which Justice Swayze would be chargeable with.

While this proposition may be true we submit that this question should not be considered at this time for the following reasons:

1. It is unnecessary to consider the question as it clearly appears that the appellant's contention is unfounded, and the case should be decided upon the arguments presented to this court.

2. The question of the validity of the gift alleged in the court below has not been argued or discussed in the briefs or on the argument, and this point is not raised by the respondents.

3. Should the court find it necessary to go into this question in order to pass upon the claim of the appellant a re-argument should be directed and the infant respondents here represented given an opportunity to argue in support of the finding of the decree below that no gift was in fact made.

The finding by this court that no gift had been made would not, of itself, reverse that part of the decree which was made in favor of the infants as to the liability of the executor to account for the principal represented in the envelopes delivered, because, as suggested by the Chief Justice on the argument, no appeal has been taken by the "alleged donees" against the infants, who are the successful parties below; nevertheless, it would be a determination of this Court which would be followed should the "alleged donees," the respondents here, subsequently appeal to this court from the decree of the court below on the question of the validity of the alleged gift.

This might arise in two ways:

1. By a direct appeal taken within one year from July 11, 1913, under the contention that as to the respondents (the alleged donees) the decree below was a final decree.

2. By an appeal from the final decree of distribution following the accounting under the claim that said appeal brought up the entire case for review.

It will thus be seen that it would be unfair to decide without argument the question of gift and the further very important question of the admissability of Mrs. Huntington's evidence under Section 4 of the Evidence Act without first permitting the question to be argued before this court.

It is respectfully submitted that the decree below should be affirmed, and should the court deem it necessary to consider the validity or invalidity of the alleged gift that this court order a re-argument on this question, and that the infants here represented be permitted to have argument presented in support of the finding in their favor in the court below.

March Term, 1914.

WM. A. SMITH,

Guardian ad litem of Infant Defendants Carlisle R. Lane, Albert Merriam Lane and Clara May Lane, Defendants-Respondents.

New Jersey Court of Errors and Appeals

FRANCIS J. SWAYZE, as Executor and Trustee, HARRIET M. HUNTINGTON and others,

Respondents,

vs.

CHARLES R. LANE,

Appellants.

Brief for Francis J. Swayze, Executor and Trustee, Respondent.

The bill is an administration bill filed by the surviving executor of Henry W. Merriam and surviving trustee under his will. He seeks to account finally in the Court of Chancery and to be discharged from his duties as trustee of one-fourth of the residue of the estate the income of which under the will is to be paid to Carlisle J. Lane and Charles R. Lane during their lives, with remainder to their children. Two intermediate accounts of the executors and two of the trustees have been confirmed by the Sussex Orphans' Court. The chief reason for proceeding in Chancery is to have it determined whether certain stock of the H. W. Merriam Shoe Company was a part of the residue of the estate. Most of it was claimed by the testator's brother, John J. Merriam, one of the executors, and by his sister, Harriet M. Huntington by virtue of an alleged gift in the testator's lifetime.

The question arises in this way. The testator at one time owned one thousand and ninety shares of the H. W. Merriam Shoe Company. Prior to his death he attempted to make a gift of these shares, the greater

part of them to his brother John J. Merriam and his sister Harriet M. Huntington. It is unnecessary to mention more specifically the small blocks of the stock which he attempted to give to others. He held notes against three of his business associates, Tozer, George L. Dutcher (not the executor) and Warbasse; these notes had been given to the testator for the purchase price of stock of the shoe company which had been sold by him to the three gentlemen named and they were paying the notes as they could, the testator in the meantime holding the stock as collateral security. The attempted gift to them was made in the same way as the attempted gift of the stock to his brother and sister. The method he adopted was this: he placed the certificates of stock which he intended to give and the notes accompanied by the stock held as collateral therefor in separate envelopes addressed to the donees; he placed these envelopes in a large envelope which he handed to Mrs. Huntington, his sister, with instructions to deliver the small envelopes to the persons addressed at her discretion. After his death the executors questioned the validity of the gifts, and subsequently in order to effectuate as far as possible by a friendly family settlement the testator's manifest wish, an arrangement was entered into between the executors, John J. Merriam, the brother of the testator, Mrs. Huntington, the sister, and all the residuary legatees who were of age, including the life tenants of the trust fund, Carlisle J. Lane, Charles R. Lane and Albert I. Lane, now deceased, to whose interests Carlisle J. Lane and Charles R. Lane have succeeded. The infant residuary legatees could not consent. The method taken by the executors to protect the infants will be dealt with hereafter. For the present it is enough to say that all the residuary legatees who were of age assented in writing to the delivery of the envelopes to the persons addressed and to the taking of such measures

by the executors as were necessary to perfect the title to the stock in the donees. In order to secure the minor children of the Lanes, who were entitled to an interest in remainder in one-fourth of the residue, subject to the life estate of their fathers, 273 shares, one-fourth of all the stock that belonged to the testator, was pledged with the executors and was subsequently sold by them and the proceeds invested in bonds. It is this one-fourth of the testator's holdings, that is the main subject of controversy in this case. If the gift was perfected, that stock belonged to John J. Merriam and to Harriet M. Huntington. If the gift was not perfected, that stock belonged to the trust held for the Lanes.

At the time the residuary legatees assented in writing to the delivery of the envelopes by the executors, the contents were unknown. It turned out that the three envelopes addressed to Tozer, G. L. Dutcher and Warbasse contained notes with shoe company stock in their names as collateral. If the gift was not perfected, these notes formed part of the residue of the estate. One object of the bill is to have it ascertained whether the gift of the stock and the notes was perfected or not, and whether the executors are accountable therefor or not.

All the residuary legatees who were of age, except Charles R. Lane, E. Merriam Dutcher and Frances E. Dutcher (now Frances E. Burnham) answered admitting that the title to the stock and notes had been perfected in the donees with their consent and disclaiming any right thereto. E. Merriam Dutcher and Frances E. Dutcher (afterward Frances E. Abbott and now Frances E. Burnham), did not answer, and a decree went by default against them. Charles R. Lane answered, setting up a claim to the income.

The Vice-Chancellor held that the gift was imperfect, that the executors were accountable for the

stock and the notes, that as to the residuary legatees who had assented to the transfer, including Charles R. Lane and E. Merriam Dutcher and Frances E. Burnham, the executors were entitled to be credited with their shares by reason of their assent and waiver.

From this decree no one has appealed except Charles R. Lane. The situation then is this: the executors are accountable to the infant residuary legatees, they hold securities therefor, and the only question that arises on the appeal is the right of Charles R. Lane, one of the life tenants of the trust fund composed of one-fourth of the residue.

Charles R. Lane, the appellant, like his brothers and the other residuary legatees who were of full age, assented in writing between January 19 and March 26, 1901, to the executors turning over the envelopes and perfecting the title to the stock, and in pursuance of his written assent the executors and trustees turned over the envelopes, perfected the title to the stock and thereafter permitted the testator's brother and sister to receive the dividends and paid to them the interest accruing on the funds in the hands of the trustees. The assent and waiver of Charles R. Lane was never withdrawn, unless by his answer to the complainant's bill filed December 15, 1910.

The question therefore presented by this appeal is whether Charles R. Lane is entitled to repudiate his agreement of 1901. The Vice-Chancellor held that he was not. The agreement was embodied in a letter from the executors and a reply from Mr. Lane and the other residuary legatees. All were of identical tenor, having been prepared by the executors. They are as follows. (Case, pages 34-35; case, page 333):

"Newark, N. J., Jan. 21, 1901.

Dear Sir:

We enclose a copy of the will of the late Henry W. Merriam. We have completed the inventory

of his personal property. The total amount of the personal property as appraised is $291,211.08. In addition there is valuable real estate, which forms no part of the above named sum. The inventory does not include any stock of the H. W. Merriam Shoe Company for the reason that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother John J. Merriam and his sister Harriet M. Huntington, in pursuance of a natural and long cherished desire of his to retain in his own family the control of the business he had established.

Long prior to his death he had prepared sealed envelopes addressed to several different persons, which were enclosed in a large envelope endorsed as follows: 'Certificate Stock H. W. M. Shoe Co. The enclosed envelopes are the property of and belong to the several persons named, as per address, H. W. Merriam.' These envelopes were deposited with Mrs. Huntington for delivery to the persons addressed. Mrs. Huntington has handed these envelopes to the executors, who feel that they ought to return them to her, in order that she may carry out the instructions of Mr. Merriam. They are advised, however, that some legal question may be raised as to their right to do so, and before doing so they are desirous of securing the consent of the residuary legatees who are of age. The contents of these envelopes are entirely unknown to the executors, except as their contents are indicated by Mr. Merriam's endorsement on the large envelope. Of course, the executors are not at liberty to open envelopes addressed to other persons.

If you are willing that the executors should deliver these envelopes and take any other steps necessary to carry out Mr. Merriam's manifest

wishes in a strictly legal form, kindly sign and return the enclosed consent to John J. Merriam, Summit, New Jersey.

Yours truly,

John J. Merriam,
William L. Dutcher,
Francis J. Swayze,
Executors,
by F. J. S."

"To John J. Merriam,
William L. Dutcher, and
Francis J. Swayze,
Executors of Henry W. Merriam, deceased.

Referring to your letter of January 19, 1901, I would say that I would consent to your delivering the sealed envelopes left by Mr. Merriam containing stock of the H. W. Merriam Shoe Company to the persons addressed; and I also consent to your executing any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered.

Very truly yours,

Charles R. Lane."

It will be noticed that the correspondence does not refer specifically to the notes of Tozer, Dutcher and Warbasse. The contents of the envelopes were at the time unknown. The legatees assented to their delivery whatever they might contain, provided only they contained stock of the Merriam Shoe Company. All the envelopes, including those with the notes, contained such stock.

The action of the executors was necessary to perfect the title of the alleged donees in the case of Tozer, Dutcher and Warbasse, as well as in the other cases, since to perfect their title it was necessary to

release the stock from the pledge. We insist therefore that all the envelopes stand upon the same ground. Charles R. Lane admits the signing and delivery of the consent; he has not filed any cross-bill seeking to have it cancelled or declared null and void; he does not say, either in his answer or his testimony, that any other representation was made to him except that contained in the letter of January 19 or 21, 1901; he does not say that there was any fraud or misrepresentation or concealment. It further appears that when the surviving trustee in 1909 filed the second account of the trust, exceptions were filed by Mr. Lane, through Sheehan & Cutting, to the account in the orphans' Court, and that these exceptions were withdrawn and nothing further done until this bill was filed (Case, p. 371 and pp. 375, 376, 377). In his answer he says (page 35) that he relied upon the letter of the executors, and believed that in signing the consent "he was acting wholly for the purpose of perfecting a title which he believed from the representations of the said executors already existed in the said John J. Meriam, Harriet M. Huntington and the other persons referred to in the said bill of complaint, and not knowing or believing that he was in any wise releasing, relinquishing, assigning, transfering or disposing of any rights or title which he then had or might have." He claims that it would be an injustice to him to give the consent "any greater effect than is above stated," or to consider it as relinquishing or waiving his interest (pages 35-36). After most of the testimony had been taken, Mr. Lane was recalled and it then appeared that in April, 1909, he consulted Sheehan & Cutting, counsel in Worcester, Mass., who had written in 1903 to William L. Dutcher, one of the executors, to inquire about the collectibility of a claim for three thousand dollars which they held against Charles R. Lane. In the same month (April, 1909) (case, p. 365), Lane wrote the complainant

making inquiries with reference to the stock and raising a legal question as to the effect of the terms of the trust upon his consent to the transfer—a question to be hereafter dealt with—but not intimating in any other way that his consent was not binding nor making any objection to the payment of the income on the trust fund to Mr. Merriam and Mrs. Huntington, as the executors had been paying it in reliance upon his consent. To this letter the complainant replied stating fully the situation (pages 368-369). Still there was no question raised as to the payment of income to Mr. Merriam and Mrs. Huntington, except the legal question.

The facts then are (1) that in 1901, upon receiving a truthful and accurate statement of the difficulty, Mr. Lane consented knowingly to a delivery of the envelopes and the execution of papers necessary to perfect the title to the contents of all the envelopes; that all the envelopes contained stock of the shoe company, most of which stood in the testator's name, and the remainder was held by him as collateral; (2) that in reliance upon this and the other consents, the trustees acted, and so far as Mr. Lane is concerned paid over the income to which he would otherwise have been entitled to Mrs. Huntington and Mr. Merriam; (3) that in April, 1909, he consulted counsel, raised a legal question as to the effect of his consent, but made no allegation of deceit or fraud or misrepresentation or concealment; (4) that in the same year he had Sheehan & Cutting procure exceptions to be filed to an account of the trustees in the Orphans' Court, which were withdrawn and nothing further done until this bill was filed; (5) that in his answer he admits that he was acting for the purpose of perfecting the title to the stock in others, with no representation except that contained in the letter; (6) that the executors relying upon his acts have paid money to Mrs. Huntington and John J. Merriam.

I.

THE APPELLANT HAVING AUTHORIZED THE EXECUTORS TO PAY OVER TO OTHERS INCOME THAT BUT FOR SUCH AUTHORIZATION WOULD HAVE BEEN HIS ABSOLUTE PROPERTY, CANNOT REPUDIATE THAT AUTHORITY AFTER THE EXECUTORS HAVE ACTED THEREON.

It would be difficult to state a more complete case of estoppel. The question is not whether he had power under the will to assign his interest in the estate but whether he had power to authorize the executors to pay over income which as soon as it reached his hands he could spend as he pleased. It is not an estoppel in *pais* which precludes him from proving the truth; but an estoppel by contract which prevents him from withdrawing his authority after others have acted thereon. It is not a case of what is called a spendthrift's trust; if it were it may be said that even the spendthrift is permitted to spend the money when he has received it; otherwise his rights would be naught. If so, he may direct its expenditure by others, he may authorize the custodians to pay it out, as he might authorize a bank where he had deposited it. His sole excuse is his alleged belief that the title was already in Mrs. Huntington and Mr. Merriam and the others. He says he believed that from the representations of the executors. As his answer is the first notice the executors have had of this belief, and as no representations were ever made by them except those contained in the letter of January, 1901, the letter must be examined. It states the exact facts as to the alleged gift; it says that a legal question may be raised as to their right to deliver the envelopes to Mrs. Huntington, and their desire to secure the consent of the residuary legatees; that the contents of the envelopes

are unknown. It requests his assent to the executors carrying out testator's wishes in a strictly legal form. He was thus warned of the legal difficulty; he chose then, as the others did, to do the honorable thing, to carry out the intent of his benefactor, and waive his legal rights as residuary legatee. He does not question, he cannot question, what is obvious, that the testator's desire was that the brother and sister should have the stock and with it the control of a profitable business. What has led him to depart from the generous instinct that actuated him in 1901 and still actuates his brother and the other residuary legatees, we can only guess. We have the right to insist that he shall not revoke the authority given us in 1901 and on which we acted for years without objection from him. In the brief served upon us, he dwells upon the statement in the letter of January, 1901, that the stock had been given to John J. Merriam and Mrs. Huntington; but this was a mere statement of a conclusion; and the letter immediately proceeds to state that there is a legal question about it, and sets forth the facts fully and acurately. He might if he chose have then taken advice; perhaps he did; if he did not, but chose to rely on a generous impulse, he is still bound by his act. He urges that the executors were then his trustees and he had the right to rely on their statements. In fact they were not then trustees and would not in this state become such until they accepted that burden. In this state the offices of executor and trustee are distinct. (*Brush* vs. *Young*, 4 Dutch., 237, at 239. *Pitney* vs. *Everson*, 15 Stew., 361.) But be that as it may, they could only state the facts known to them. Whether the gift had been perfected or not was a matter resting *in parol* and could only be determined after Mrs. Huntington's testimony had been heard and the court had passed thereon. The consent signed by him on its face showed that the title of the alleged donees was imperfect and he consented in writing to the

executors "executing any transfers or assignments necessary to perfect the title." How can a man be misled when he is told that *transfers* or *assignments* are necessary to perfect the title? He says in his answer that he was acting wholly for the purpose of perfecting a title and asks that no greater effect be given to it. We ask only that so much effect be given to it. He says that he did not know or believe that he was in any wise releasing, relinquishing, assigning, transferring or disposing of any rights or title which he then had or might have. If this is true, he could only have thought that he was signing the consent in order that the executors might add one more to their collection of autographs. We submit his contention is absurd.

It is now argued that the executors still retained the stock until June, 1910. They did, but they held it in a different right. On March 26, 1901, their title as executors ceased; the gift was perfected in accordance with the written consents. Thereafter they held one-fourth of the subject matter of the gift by way of pledge from the donees to secure them and the infant legatees, but not as executors or trustees and not for the benefit of a legatee of full age who had relinquished his right.

The statement repeated in the brief that the purpose of the consents and the indemnity agreement was to have the "stock so placed that the control of the Shoe Company would remain in the hands of the Merriam family until the final determination of the title to the said stock," hardly requires an answer. A reading of the consents and the agreement make it absolutely clear that the purpose was to perfect the gift of the stock and to finally dispose of all question as to the title to the stock. The sole purpose of the indemnity agreement was to protect the infants who could not make such final disposition. The consents authorized the executing of "any trans-

fers or assignments necessary to *perfect the title* to said stock in the names of the persons to whom the said certificates are addressed or to be delivered." The partial quotation from the letter written on April 16, 1909, by the complainant, (R., p. 366) does not fairly state the purport of the letter. When the letter is read in connection with that to which it is a reply (R., p. 365), it is plain that reference is made to the stock held as indemnity for the infants and only to that. It is significant that none of the other residuary legatees ever nor this defendant until now, considered the consents as other than final confirmations of the testator's attempted gift. To the credit of the residuary legatees be it said that they acquiesced, most honorable conduct on their part; to the credit of all but Charles R. Lane, be it said that they stand by their act to this day and affirm it by their answers in this suit.

The brief served upon us abandons the only question that was raised by Mr. Lane in April, 1909, at the time he had retained Sheehan & Cutting, but we nevertheless deal with it in order that no door may be left open; and that is the legal question on the face of the codicil.

It grows out of the provision in the codicil that the income shall be paid to him in such manner as may be most effectual for securing to him the personal receipt and enjoyment thereof during his life inalienably. His claim below rested upon the word "inalienably." This provision, however, only relates to the trust fund after it is ascertained; it cannot relate to assets which have not yet become a part of the trust fund, and may never become so. Mr. Lane's assent was given in 1901, three or four months only after the testator's death. The executors were still acting only as executors; the time had not yet come for them to assume their duties as trustees. The two offices were "distinct and sepa-

rable," to apply the test of Chief Justice Green in *Brush* vs. *Young,* 4 Dutcher, 237, at page 239; a test concurred in by Justice Whelpley and subsequently followed by Chief Justice Beasley, delivering the unanimous opinion of this court in *Pitney* vs. *Everson,* 15 Stew., 361. It was open to the executors to decline to act as trustees. The Orphans' Court Act expressly provides for the case (C. S. 3862, pl. 135), and authorizes that court to appoint a trustee. In view of the careful distinction thus made by the statute and the decisions we submit that the acceptance of the executorship did not, without more, constitute an acceptance of the trusteeship. It was therefore at the time of Mr. Lane's assent open to the executors to decline to act as trustees. Whether they should do so when the time came at the expiration of a year from the testator's death, would depend upon the nature of the task that would confront them in view of the controversy. It was in this situation that Mr. Lane as one of the ultimate beneficiaries in effect said to the executors, "So far as I am concerned, the shoe company stock is not to be regarded as assets of the estate. Execute such transfers as are necessary to perfect the title in the donees." The executors did as he told them, and he cannot now be heard to say that as trustees they should recover what they have parted with. The trustees indeed have in hand the principal which belongs to Mr. Lane's child; this, however, does not alter the case. They must account to the minor for the principal, but not to Charles R. Lane for the income. Mr. Lane's title and right to the income under the will was absolute; the trustees had no discretion as to whether they would pay it to him or not; he was entitled to call upon them to pay the whole each year. As soon as it was paid to him, it became his property as absolutely as any property could be his; but so far as he had waived his rights and authorized the executors to pay it to others, he was bound and could not repudiate his authority

after others had acted thereon. He could not thereafter receive the income except charged with the trust to make good to the trustees what they had paid to others pursuant to his authority. Nor could that authority be revoked so as to make it the duty of the trustees to pay him the income for the future. He had led them to accept the burden of the trusteeship with the idea that their responsibility was that much less; he could not thereafter, by withdrawing his consent, increase their burden. The word "inalienably" in the will cannot deprive him of the right every man has to dispose of his own property and the income as it accrued was his property as absolutely as any property could be his. The word inalienably cannot have the scope Mr. Lane contended for in the court below. If it did he could not spend the income after it had been paid into his hands. The evident intent of the testator was to prevent Lane's creditors from reaching this income by proceedings in *invitum*. It was not to prevent voluntary assignments of income as it accrued by Mr. Lane himself. In England such restraints on anticipation are limited to the case of married women. To what extent the law in New Jersey has been modified, if at all, by the doctrine of spendthrift trusts which enables a man to live in luxury and snap his fingers at his creditors, we consider hereafter.

II.

THE DOCTRINE AS TO SPENDTHRIFT TRUSTS AND RESTRAINTS ON ANTICIPATION IS NOT APPLICABLE TO A CASE OF A FAMILY SETTLEMENT IN ADVANCE OF THE ASCERTAINMENT OF THE AMOUNT OF A TRUST FUND.

In Lane's answer (C., p. 36, l. 8), he says:

> "And this defendant further says that the said paper or writing so signed and executed was

> without any consideration passing to this defendant, and that he had no knowledge of his rights in the premises or in the said stock or income thereof, nor of the circumstances set forth in said bill of complaint in reference thereto until the filing of said bill of complaint."

He has filed no cross-bill to set aside his consent, and therefore cannot challenge the fact that he gave such consent, but can only raise the question of the construction of the consent or its validity under the rules of law. It cannot be claimed that he was misled in the matter. It is quite sufficient to say, that the same letter was sent to all parties interested, and none of them claim to have been misled thereby. All realized the situation.

All excepting Charles R. Lane, who signed this consent, have in this litigation, recognized the binding effect of their respective consents. The brother of Charles R. Lane, Carlisle J. Lane, interested equally with him in this particular trust fund, by his answer (C., p. 29, l. 30) expressly declares that "he is bound by his consent, and ratifies, confirms and approves the same." The conduct of Charles R. Lane, referred to in the foregoing division I of this brief, and the testimony therein referred to, show clearly that he was neither uninformed nor misinformed.

He *next* took in the court below the position that, although he was of full age, he was incapacitated to make a valid and binding consent. This claim is based on the language of paragraph 3 of the codicil of Henry W. Merriam's will, by which the gift is made to the Lanes. It is provided that the three life tenants are to be paid the yearly income "in such manner as may be most effectual for securing to each the personal receipt and enjoyment during his life inalienably." In other words, the claim of Charles R. Lane is that he had no power to alienate the income

of this trust fund; that any attempt to do so was ineffective under the rules of law.

If Charles R. Lane is estopped for the reasons stated in division I of this brief, then the question of his legal rights cannot arise because an estoppel always operates against some right equitable or legal. The estoppel overrides the equitable or legal right because it would be inequitable to permit the assertion of the right. We insist that clearly it would be inequitable in this case, the executors having acted upon these consents, and no attempt having been made to recall them during the ten years which have run between the giving of the consents and the filing of this bill.

The question of his incapacity to give his consent because of the use in the gift of the word "inalienably" does not necessarily have to be passed upon, because if Restraints on Anticipation are valid under the law of this State, except as to married women, the doctrine would not be applicable in this situation. At the time these consents were given, the right to this stock was in controversy. It could only be determined as the result of litigation, the uncertainty as to which was very great. The parties who signed the consents, therefore, were not parties with an ascertained and certain right in the estate, but with an interest which was to be the subject of litigation and as to which their rights were necessarily uncertain. If Restraints on Anticipation are valid as to anyone except married women, the doctrine only applies to interests that are definite and determined, not to those that can only be determined as the result of litigation. The subject-matter to which the Restraint is to be applicable must first come into existence before the Restraint becomes effective, where the law permits Restraints on Anticipation. What the parties consenting did in effect was to consent to a peaceable settlement of a controversy rather than to resort

to litigation, as a means of determining the amount of the residuary estate. Such settlements are favored in the law. No case can be found in which a right which was uncertain as to the chances of a litigation has been held to be subject to the doctrine of Restraints on Anticipation. These consents were not without consideration, the consideration being the avoidance of litigation and of a charge upon the general estate of the costs of that litigation. Each consent was consideration for all the others.

The consents operated practically as a family settlement among the members of the Merriam family, the relatives of Mr. Merriam and of each other. Such settlements are always sustained under the rule in this State, where it is possible to sustain them.

This rule was declared in *Hewitt* vs. *Crane*, 2 Halsted, p. 159, where it was held that "Courts of equity look with favorable eye on agreements made to preserve or maintain the peace of families." The Court of Chancery set aside the settlement in that case on the ground that the agreement was obtained by "concealment and misrepresentation as to the value of the estate." This court, 2 Halsted, 631, unanimously reversed without reported opinion the decision of the Court of Chancery, and the syllabus in the report reads as follows:

> "The father devised his estate to a son and two daughters; the son made an agreement with the daughters for a different settlement and disposition of the estate among them, without apprising them of the value of the estate which was known to him but not to them; the agreement was, notwithstanding, sustained as a family settlement."

No case can be found where such settlements have been held to be subject to the doctrine of Restraints on Anticipation in the few jurisdictions where the doctrine of Restraints on Anticipation is held to exist as to persons *sui juris* other than married women.

III.

THE DOCTRINE AS TO SPENDTHRIFT TRUSTS AND RESTRAINTS ON ANTICIPATION IS APPLICABLE IN NEW JERSEY AS IN ENGLAND ONLY IN THE CASE OF MARRIED WOMEN.

Except as to married women, Restraints on Alienation are invalid, as to parties *sui juris*.

Brandon vs. *Robinson*, 18 Ves., 429, is a leading (if not the leading) case on the subject in England. In that case the testator directed money to be invested in public funds in the names of trustees, and the income, as the same became payable, paid from time to time into A.'s own proper hands, on his proper order and receipt, signed with his own proper hand, to the intent that the same should not be grantable, transferable or otherwise assignable by way of anticipation, with a gift over on A.'s death. A. became a bankrupt, and it was held that his assignees were entitled to his life interest. After a full discussion of the question, the court held that where a vested interest was given in income of trust funds, such a gift carried with it, as an element thereof, the right to transfer it or alienate it, notwithstanding the same was expressly prohibited by the terms of the gift.

The authority of *Brandon* vs. *Robinson* has not been questioned in England, and it is declared the law of England in Jarman on Wills, 2d ed. (Randolph & Talcott's ed., p. 538).

The English Courts and those following them hold that Restraints on Alienation are invalid *wherever there is a gift in terms which, under the rules of law, create an absolute estate.* It makes *no difference* whether words are added *explicitly forbidding alienation,* or provisions are added which would *operate to hamper or prevent alienation.* In only two States

of the United States have such restraints been held legal.

Gray, Restraints on the Alienation of Property, 2d. Ed., Sec. 177.

The English rule is the one recognized in the decisions of New Jersey. In *Feit* vs. *Richards*, 19 Dick., 16, the question before the court was, whether real estate which was devised could not be alienated because of the following provision: "It is my will that none of the real estate shall be sold by any of my children, that I have herein devised to them, without first obtaining a full written consent of all the children or the remainder of them."

Chancellor Magie declared that this clause was evidently intended to impose a restraint upon the alienation by sale of the lands devised by the will, and that the question was whether such restraint was valid. He then proceeded to declare that where an estate is absolutely given, a provision that the same shall not be alienated has always been held void as repugnant to the nature of the estate, citing 2 Jarman on Wills (Randolph & Talcott's Ed. 528) and other authorities. He then cites with approval *In re Macleay*, L. R., 20 Eq. Cas., 186, where Sir George Jessel, *M. R.*, held that a limited or partial restraint was valid while an absolute restraint was not. The M. R. declares the test to be "whether the condition takes away the full power of alienation substantially."

The bill in the case was filed to quiet the title and the Chancellor held that in any event complainant was entitled to a decree that he held an estate in fee simple in the lands in question.

In re *Macleay*, cited in the opinion of *Feit* vs. *Richards*, was subsequently questioned in the English courts in *In re Rosher*, 26 Ch. Div., 801, at p. 818. In the opinion in the latter case, the notion was repudiated that you could create a limited power of aliena-

tion as to time or alienee where the estate given was a vested one.

In *Dugdale* vs. *Dugdale*, L. R. 38 Ch. Div., 176, (in 1888), *Brandon* vs. *Robinson*, *In re Macleay* and *In re Rosher* were all cited, and *In re Rosher* approved, and the doctrine of *Brandon* vs. *Robinson* was fully recognized.

Since *Dugdale* vs. *Dugdale*, we cannot find that the question has been before the English courts. The cases just cited seem to be taken as fully settling the law.

In *Furniss* vs. *Leupp*, 1 Rob. 159 (1904) and in *Wright* vs. *Leupp*, 4 Rob., 130 (1905), Pitney, *V. C.*, held that an assignment of income as it may accrue and become payable did not violate a provision restraining alienation and anticipation. He did not have to pass upon the validity of such restraints, but appears to have assumed their validity. This court, on an appeal in the former case (3 Rob. 831), affirmed the decree below, but added the following significant language on the matter now under consideration:

> "It will appear from an examination of the opinion that the learned Vice-Chancellor concluded that the fund in dispute was not within the scope of the 'anticipation' clause of the trust deed, and in this conclusion we concur. The case, therefore, does not call for a consideration of the question whether or not that clause is valid. It was assumed to be so by the learned Vice Chancellor. As the question is not involved in the determination of the case, we express no opinion upon it."

In passing, we may say that the effect of the consents in this case, as far as this life-tenant is concerned, was to transfer the income on the securities in the envelopes delivered, *as it accrued*, from him to the parties receiving the contents of the envelopes. As we understand the decisions in the cases last cited,

such as an assignment cannot, under any circumstances, violate a provision against alienation.

The later case in the Court of Chancery, *Castree* vs. *Shotwell,* 3 Buch., 590 (1907), involved the validity of Restraints on Alienation as applied to married women. As to this there is no doubt.

The object sought to be accomplished by provisions against alienation, where the same are valid, is to prevent the disposition by sale or mortgage of the trust fund for a lump sum in hand, before the principal or income is due or payable under the terms of trust.

In *Camden Safe Deposit & Trust Company* vs. *Schellenger,* 8 Buch., 138 (1910), Vice-Chancellor Leaming decided that, where a codicil to a will directed the payment semi-annually to a *cestui que* trust, "and to no other person or persons during all the term of his natural life, the same not to be in any way anticipated by him or to be paid to any creditors of his, but to him only," that the beneficiary enjoyed a vested interest in the income as it became due and payable, and that such income as had been earned, and which was payable to the beneficiary at his death, which had not been paid to or disposed of by him, passed to his personal representative. That case did not pass upon the question involved here, but stated the English rule in the following language:

> "When the income of a trust estate is given to any person (other than a married woman) for life, the equitable estate for life is alienable by, and liable in equity to the debts of, the *cestui que* trust, and that this quality is so inseparable from the estate that no provision, however express, which does not operate as a cessor or limitation of the estate itself, can protect it from his debts."

In *Hardenburg* vs. *Blair,* 3 Stew., 42, the Court of Chancery considered *Brandon* vs. *Robinson, supra,* which is recognized as stating the settled law of Eng-

land, and adopted and applied that case to the one then under consideration. It was there held that the trust then before the court was not within the proviso of our statutes exempting trust funds created by others than a judgment debtor from liability to be reached in supplementary proceedings. In the elaborate opinion in this court by Justice Depue, it was held that the trust in question was within the proviso and the opinion is concerned only with demonstrating that property held on a trust not created by the debtor, could not be reached in law or equity except as authorized by statute. The opinion does not question the view of the Chancellor adopting the doctrine of *Brandon* vs. *Robinson*. The final decision in *Hardenburgh* vs. *Blair*, and the many cases in this State following it, have nothing to do with the present question. The statutes apply to all trusts and funds not proceeding from the *cestui que trust*, whether they have clauses against alienation or not.

The opinion in this court in *Hardenburgh* vs. *Blair*, 3 Stew., p. 643, *seq.*, is against the validity of Restraints on Alienation; it distinctly recognizes the right to make a voluntary alienation. Referring to the English cases where such funds have been held to pass in bankruptcy, the opinion says (p. 660 near bottom):

> "Under the insolvent debtor's act the assignment was the voluntary act of the debtor, and as a legal consequence, transferred to the assignee all such rights and interests as were capable of assignment."

The difficulty in *Hardenburg* vs. *Blair* was one of procedure only. It was held that there was no machinery by which the income of a trust fund created by another could be reached by proceeding in *invitum* by judgment creditors. This was very far from holding that the *cestui que* trust could not voluntarily assign his income. The injustice of allowing a man

to enjoy a large income without being obliged to pay his debts was apparent; and immediately after the decision in *Hardenburg* vs. *Blair,* the legislature provided a remedy where the income exceeds $4,000. (C. S., 2254, p. 30a.) This statute does not attempt to protect spendthrifts against their own voluntary acts. So far as it indicates a legislative policy, it is adverse to the modern doctrine of spendthrift trusts. It says in effect, "do with your income what you please just as you could at common law, but if you have more than $4,000 a year, we will force you to pay your debts whether you want to or not."

The existence of this statute, putting within the reach of judgment creditors the income of trusts in excess of $4,000, shows that, under the policy of our State, there is no recognition of the validity of Restraints on Alienation, because all the income in excess of the sum named is *involuntarily* taken away from the debtor without regard to the fact that that income may arise under a trust, which, by the instrument creating it, is declared inalienable. If this is the policy as to involuntary alienation, the doctrine of Restraints on Alienation surely cannot apply to voluntary alienation, under the policy of this State.

Gray on Restraints on Alienation of Property, 2d Ed., Sec. 191, places New Jersey in the list of States which deny the validity of provisions forbidding alienation of a vested estate, however arising, and whether equitable or legal, except in the case of married women.

Perry on Trusts, 6th Ed., Sec. 386 (a), states the law to be as follows:

> "If the absolute equitable interest is in a *cestui que trust,* the incidents of legal ownership attach to it, and it goes to his assignees or creditors in case of insolvency. And it may be said, that, if an absolute equitable interest is given to a *ces-*

tui que trust, no restraints upon alienation can be imposed."

But the question of the validity of Restraints on Alienation is not necessarily involved in this case. It does not arise if it be held that Lane's consent (1) operated as a settlement of an uncertain controversy as to the stock; or (2) that it was in the nature of a family settlement; or (3) that he cannot in equity now recall his consent, the executors having acted thereupon to his knowledge, and that action having been taken without protest or attempted revocation by him.

IV.

THE APPELLANT IS ESTOPPED TO CLAIM INCOME HEREAFTER ACCRUING.

The portion of the decree appealed from by Charles R. Lane, which decrees that neither Charles R. Lane nor his brother, Carlisle J. Lane, have any interest in the past or future income arising from the proceeds of the stock which was placed in the hands of the executors as indemnity against any claim that might be asserted by the Lane infants, is in all particulars correct.

The only appellant is Charles R. Lane. His brother, Carlisle J. Lane, is in precisely the same situation as Charles R. Lane, having received the same information from the executors and having signed an exactly similar consent, but does not appeal.

The position of every one has changed since the family settlement of 1901. The executors and trustees have not only in fact allowed John J. Merriam and Mrs. Huntington to receive the income amounting to many thousands of dollars from 1901 to 1910, when Lane first raised the question; Mr. Merriam and Mrs. Huntington have doubtless spent the income or

gauged their annual expenditures in reliance thereon; the executors have been led to assume the additional burden of trustees in reliance upon the settlement; Mr. Merriam and Mrs. Huntington have entered into an indemnity agreement with the executors, and the executors supposing that Charles R. Lane's claïm was waived, contented themselves with taking indemnity for the rights of the infants only. But for Lane's conduct, the executors would probably have withheld the income; they would at least have required indemnity on that account. He cannot withdraw his consent now that they have changed their positions in reliance thereon.

V.

PART OF THE DECREE NOT APPEALED FROM EXPLAINED.

There are provisions in the decree which are not appealed from, but perhaps ought to be explained. Upon the delivery of the sealed envelopes, the contents of which were unknown, the executors in addition to taking back as security one-fourth of all the shoe company's stock that stood in the testator's name, took also an agreement of indemnity on the part of Mr. Dutcher to indemnify his co-executors against any liability to his minor children, and an agreement of indemnity on the part of John J. Merriam and Mrs. Huntington to indemnify Dutcher and Swayze against any liability to the minor children of the Lanes. These agreements were embodied in the same document. They are important since as it turned out the three envelopes of Tozer, G. L. Dutcher and Warbasse contained notes and certificates of stock which stood in the names of Tozer, G. L. Dutcher and Warbasse. As to these, as well as to the claims of W. L. Dutcher's minor child, the

executors have no security other than the indemnity agreement. Clearly this indemnity agreement not only protects the executors but the minor children who were the *cestuis que* trust, and it was therefore proper to decree that it enures to their benefit. The suit is an administration suit. All the parties are before the court and it was therefore proper for the court in order to dispose of the whole matter to decree that Mr. Dutcher's representative should make good and pay over to the complainant the amount due to his daughter when ascertained and that Mr. Merriam and Mrs. Huntington should make good and pay over to the complainant the amount due to the Lane trust fund when ascertained. It is in effect making a decree subrogating the infants to the security in the hands of the trustee; and is essential to the complete administration of the trust.

The equity of the bill is not merely to have the title to the stock ascertained as between the conflicting claims; it is also a bill to allow the executor to account, to ascertain the balance, to pay it over and secure his discharge, and is in effect a bill to secure the specific performance of the indemnity agreement for the benefit not only of the surviving executor but of the non-assenting minor legatees. As to W. L. Dutcher and John J. Merriam it was of course proper to decree that their estates in the hands of their personal representatives should be held liable for the balance found due; they would be liable to that extent in any event as their testator and intestate were before them, and by virtue of the indemnity agreement the survivor has a right to a decree subordinating his liability to their liability under the indemnity agreement. There can be no objection in fixing the liability of the executors to fix also the order in which they are liable *inter sese*. It is not unlike the case where one executor may be liable although his co-executor is not. As to Mrs. Huntington, she prays

by her answer that the indemnity agreement be reformed, and thereby submits herself to the jurisdiction of the court in that respect; she fails to secure the reformation and the complainant has the right to insist not only that the agreement be established as it stands but that it be enforced in his favor. The devisees and legatees under John J. Merriam's will are in the same position. They file a cross bill praying that the indemnity agreement may be "surrendered up and cancelled by the complainant." They fail in this and the complainant has the right to insist not only that it be established as it stands but that it be enforced in his favor. None of these provisions of the decree injure the appellant, and he does not appeal therefrom. All the parties are therefore satisfied with the decree in this respect, except E. M. Dutcher and Mrs. Burnham, who made default below and have no right to appeal.

The decree therefore should be affirmed.

EDWARD M. & RUNYON COLIE,
Of Counsel with Respondent, Swayze.

March Term, 1914.

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New Jersey Court of Errors and Appeals

Between

FRANCIS J. SWAYZE, as Executor and Trustee, &c.,
Complainant-Respondent,
and
HARRIET M. HUNTINGTON, *et als.,*
Defendants-Respondents,
and
CHARLES R. LANE,
Defendant-Appellant.

On Bill, &c.
On Appeal from Chancery.

Brief for Appellant.

Statement of Facts.

Henry W. Merriam lived in Newton, New Jersey, and owned and controlled the stock of the H. W. Merriam Shoe Company. He died in 1900 leaving a large estate consisting of real and personal property. Among the effects was a large envelope with the following endorsement thereon, "Certificates Stock H. W. M. Shoe Co. The enclosed envelopes are the property of and belong to the several persons named, as per address. H. W. Merriam," and contained several small envelopes on each of which was written a name with address.

This envelope was placed in his safe and the contents, namely the several small envelopes were never delivered to the persons named. After Mr. Merriam's death this large envelope with its contents was delivered by Mr. Merriam's sister, Mrs. Huntington,

one of the respondents, to the executors named in the will of Mr. Merriam.

The question was immediately raised as to the title to this stock and it was questioned by Mr. Justice Swayze, one of the executors, whether there was a perfected gift of the contents of the envelope.

He refused to deliver the large envelope to the persons addressed until the title to the contents could be determined. There then arose a question as to the control and management of the H. W. Merriam Shoe Company. The Merriam family desired the stock contained in the envelopes and after consultation a plan was adopted whereby such control could be obtained until the final determination of the title. Since the qualification of the said executors two have died and Mr. Justice Swayze is the sole surviving executor. He files this bill of complaint to determine the title to the said property and to ascertain whether the said executors and trustees are accountable for the value of the said stock and to have an account taken of said estate and for his discharge from his said trust. A decree was made in the Court of Chancery adjudging that the complainant was entitled to have his account taken after the direction of the court and that there was no perfected gift of the property and that said executors should be charged with the said stock at its market value at the date of the death of Mr. Merriam and that the said executors were not required to account to the appellant, Charles R. Lane, for the income arising from the said property since the death of Mr. Merriam.

The question involved on this appeal is this, is the appellant, Charles R. Lane, entitled to the income from an interest in the principal of the trust fund left under the codicil of the late Henry W. Merriam.

In the consideration of this question the facts seem to subdivide into three lines of proof.

Point I.

The appellant, Charles R. Lane, was living in Massachusetts and had no knowledge of the estate of Henry W. Merriam except such as he had obtained from Mr. Justice Swayze. (See State of Case, page 310.)

He knew Mr. Justice Swayze at the time. (See State of Case, pages 370 and 371.)

He received a letter from the executors written by Mr. Justice Swayze under date of January 19th, 1901. (Exhibit C. 9, State of Case, pages 108 and 370), which letter states "The inventory does not include any stock of the H. W. Merriam Shoe Company for the reason that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother, John J. Merriam, and his sister, Harriet M. Huntington, in pursuance to a natural and long cherished desire of his to retain in his own family the control of the business he had established," and then concludes, "If you are willing that the executors should deliver these envelopes and take any other steps necessary to carry out Mr. Merriam's manifest wishes in a strictly legal form, kindly sign and return the enclosed consent to John J. Merriam, Summit, N. J."

There is a positive representation in this letter that the stock *had been given in his lifetime* in pursuance, etc.

Mr. Justice Swayze testified that before this letter was written he had raised the question as to whether the gift was perfected and refused to deliver the stock to the parties named and stated that he would renounce rather than deliver it. (State of Case, pages 104 and 105.)

The appellant, Charles R. Lane, had no knowledge whatever as to the status of the stock and acted upon the statements of Mr. Justice Swayze whom

he knew to be his trustee. (See State of Case, pages 310 and 311.)

He had not discussed the will with Mr. Justice Swayze nor had he discussed the legal effect of the consent which was forwarded to him by Mr. Justice Swayze for his signature and in signing the consent relied upon the statements contained in this letter (Exhibit C. 9. See State of Case, page 371.)

This testimony is not contradicted or questioned and must be taken as true. assuming, as in all probability was the fact, that there was an honest misrepresentation on the part of the executors of the facts in relation to the title to this stock, they are nevertheless chargeable for the consequences thereof. (Harvard Law Review, Vol. 24, page 415, and cases cited.) See testimony, pages 310 and 311 as follows:

"Q And did you have any knowledge as to the status of the affairs of his estate?

A None whatsoever.

Q Did you have any knowledge as to whether or not Mr. Merriam had in his lifetime, did you have any knowledge that he had given away any stock in his lifetime?

A I knew nothing about it whatever.

Q To which you might be entitled?

A No, sir.

Q Did you have any other knowledge in reference to the stock, that is, about the giving away of it, other than was contained in this letter?

A None whatsoever.

Q Did you sign the release? I call your attention to Exhibit C. 8, to a release signed by Charles R. Lane; I will ask you if that is your signature?

A That is my signature, yes.

Q Did you sign that release?

A I did.

Q And mailed it to whom?

A Justice Swayze, if I remember correctly.

Q Did you know whether or not the stock had been given to the various parties named in the letter during the lifetime of Henry Merriam?

A I did not know.

Q That the stock mentioned in the letter had been given during the lifetime of Henry W. Merriam to the parties named in the letter, did you know that?

A I did not.

Q I say, when you signed that document did you know whether or not Henry W. Merriam had given his stock to the parties named in the letter of January 21?

A I did not know only that Judge Swayze said that it had been given.

Q (*By Mr. Colie.*) What?

A I took his word.

Q (*By Mr. Colie.*) You mean in the letter?

A In the letter.

Q All the knowledge you had about it was contained in the letter?

A That is all; that is all I knew about it at all.

Q And acting upon the information contained in the letter you signed that release?

A I did.

Q You knew that Judge Swayze was your trustee?

A I did."

Also see testimony of Mr. Justice Swayze in State of Case, on page 370 as follows:

"Q At the time of the writing of your letter of January 21st, 1901, which is marked Exhibit C. 9, had you met Mr. Lane, Mr. Charles R. Lane?

A Why, I had known Mr. Lane for so many years that I must have met him before that time;

it depends on what you mean by met. I knew him as a boy at Newton at one time.

Q Only as an acquaintance?

A That is all, yes.

Q You had not discussed with him the legal effect of the will?

A Oh, no.

Q You had not discussed with him the legal effect of the paper referred to as a consent?

A No. No, the papers themselves show everything that took place."

Also see testimony of Charles R. Lane, State of Case, page 371, as follows:

"Q With this letter was there enclosed a paper which has been referred to in the testimony in this case as a consent?

A Yes.

Q Did you sign that paper?

A I did; yes.

Q Before doing so had you read this letter referred to as C. 9?

A Yes, I did.

Q Did you know Judge Swayze at that time?

A I did; yes.

Q Had you discussed with him the will?

A No, not at all.

Q Had you discussed with him the legal effect of the consent?

A No.

Q And in signing that consent did you rely upon the statements contained in this letter C. 9?

A Yes."

Mr. Justice Swayze drew Mr. Merriam's will and codicil. (See State of Case, page 125.)

Point II.

It seems from the facts stated in the evidence and from the documentary evidence that immediately after the death of Henry W. Merriam, a question was raised by the executors as to the title of certain property contained in the envelope which was delivered sealed to the executors. (State of Case, pages 104-105. See bill of complaint, State of Case, page 6.)

It was believed that said envelope contained principally shares of stock in the H. W. Merriam Shoe Company and it was desired by Mr. Merriam's sister, brother and other members of the family that the control and management of the shoe business should remain in the family and should not be disturbed until there was a final determination by the court as to the title to the stock contained in the envelope and therefore a plan was devised by which this purpose could be accomplished. (State of Case, page 106, and also State of Case, pages 135 and 136, as follows):

> "Q And it is not a fact that the indemnity agreement which was entered into was induced by two causes, first the parties were all interested in not having the affairs of the Shoe Company disturbed by any controversy?
>
> A Yes.
>
> Q And, second, was this question raised as to whether or not the gift had been consummated, and a desire of the executors to conservatively protect themselves so that they themselves would not assume the responsibility.
>
> Q Is it not a fact that those were the two considerations that inspired the making of the agreement known as the indemnity agreement?
>
> A All parties desired to avoid anything that would be detrimental in any way to the Shoe Company; all parties desired to vest the title to this stock in Mrs. Huntington and John J. Merriam and the other donees so far as could prob-

ably be done, and the executors were determined to have proper indemnity so far as their conduct was concerned. Those were the motives that inspired that agreement.

Q Those three motives were the motives that inspired the making of the agreement?

A Yes."

This plan hit upon by the executors and the members of the Merriam family was then reduced to writing as appears in the indemnity agreement, Exhibit C 8, State of Case, page 322. (See State of Case, pages 106 and 107.)

By said indemnity agreement it will be seen that the plan devised and the purpose and object of the same was as follows:

"And whereas a question has been raised as to whether the gift of the said stock to the persons above named had been perfected by the said Henry W. Merriam in the manner required by law, etc." Exhibit C. 8, State of Case, page 324, lines 28 to 40, also page 325.

It will be seen from the evidence and from the terms of the indemnity agreement that the object and purpose was to have the said stock so placed that the control and management of the Shoe Company would remain in the hands of the Merriam family until the final determination of the title to the said stock. As all parties who were of full age could consent and save the executors harmless until such determination, the executors then required indemnity from liability from the minors who could not consent and it was agreed that such indemnity should be given by Mrs. Huntington and John J. Merriam and the consent of all others who were of age was obtained and said consents were made a part of the agreement. (Exhibit C. 8, State of Case, page 325, line 14, also lines 35 to 40. See opinion, State of Case, page 384, lines 35 to 40.)

This manifested that the purpose of the executors was to protect themselves from liability to the minors. (Exhibit C. 8, page 325, lines 35 to 40, and opinion, State of Case, page 384, lines 35 to 40.)

The purpose was not to authorize them to transfer the title in the trust property to Mrs. Huntington and others, but to so place the control of the Shoe Company that its interests would not be jeopardized until the title to the stock was determined. (See letter dated April 16th, 1909, of Mr. Justice Swayze to Charles R. Lane, which concludes as follows:

> "You will see that all that has been done with respect to this stock has been to allow Mr. Merriam and Mrs. Huntington to receive the income, the stock itself being held until the title thereto could be finally determined."

As a part of this purpose the consents were obtained from the appellant, Charles R. Lane, and others and these consents were attached to and made a part of the indemnity agreement. (Exhibit C. 8, page 324, lines 38 to 40, and page 325, lines 1 to 10.) In no instance can the acts of the parties or the agreements or the consents be taken as an alienation of the rights of any of the parties but only as a temporary arrangement during the pendency of the question of title. In pursuance of this agreement the contents of the envelope was delivered to the parties named on them, and there was immediately retransferred to the executors a number of shares equivalent to the interests which would go to the trustees, if it was determined that there was no perfected gift by Mr. Merriam of the contents of the envelopes. The stock so transferred was held by the executors until June the 2nd, 1910 (State of Case, page 112, line 36), and not until after the question had been raised by the appellant, Charles R. Lane, by his letter of April 15th, 1909, to Mr. Justice Swayze, was it sold to Mrs. Huntington and Mr. John J. Merriam. (See letter, State

of Case, page 365, Exhibit B.) The surviving executor on June 2nd, 1910, without any further authority or consent and without giving any information to the appellant, Charles R. Lane, and without any necessity, of his own volition, transferred said stock to Mrs. Huntington and John J. Merriam. (State of Case, page 112, lines 32 to 40.)

Thereafter the surviving executor, Mr. Justice Swayze, as a stockholder, filed this bill of complaint among other prayers asking the court to determine the questions as to the title to the property contained in the envelopes. (See bill of complaint, State of Case, page 10, lines 5 to 11.)

On this bill the court has found that there was no perfected gift and that the title to the contents of the envelope became a part of the estate of Henry W. Merriam for which the executors must account. (See opinion, page 392 State of Case, lines 35 to 38.)

The title to the contents of the envelopes having been finally determined, the object and the necessity of the scheme before referred to for protecting the Shoe Company no longer exercised and the property so transferred or delivered or its equivalent must be returned to the executors.

The court having determined the title of the contents of the envelopes as being in the executors as an asset of the estate of Mr. Merriam, they are charged with the conditions of the trust as contained in his will and codicil thereto and they must account to the *cestui qui* trusts for such income as has not been paid them in accordance with the terms of the will.

Point III.

Neither in the letter of January 19th, 1901, Exhibit C. 9, or in the consent (see page 333 State of Case) is any reference made to the income. The only reference is to the title to the stock and the said consent cannot be construed as an assignment of the income due Mr. Lane. Mr. Justice Swayze testified on page 362, State of Case, as follows:

> "Q You testified to the delivery of the envelopes referred to in Exhibit C. 8. Will you state what led to or induced the delivery of those envelopes?
>
> A Why, the signing of the agreement C. 8, as I recollect the number, I took the position that I would not deliver them or do anything about it without a judicial determination of the rights of the parties, unless the parties agreed."

As Mr. Justice Swayze maintains in his letter written eight years after (see letter dated April 16th, 1909, from Mr. Justice Swayze to appellant, State of the Case, page 366):

> "All that has been done with respect to this stock has been to allow Mr. Merriam and Mrs. Huntington to receive the income. The stock itself to be held until the title thereto could be finally determined."

In these documents (the letter of January 19th, 1901, and the consent), there are no words of assignment, no assignee named, and no consideration passed. The executors merely asked of the appellant, in view of the question that has been raised, whether he was willing that they should deliver these envelopes to which Mr. Lane gave his consent, the object of the consent being to authorize the executors to so place the title during the pendency of the question over the

title as to leave the management and control of the Shoe Company in the hands of the Merriam family. The relative position of the parties has not changed as the executors held security for any liability by reason of their action, and there being no consideration, neither the complainant-respondent, nor the defendants-respondents can set up the defense of estoppel.

The decree, therefore should be reversed in accordance with the prayer of appellant's petition of appeal.

THOMAS P. McKENNA,
Solicitor for and of Counsel with Appellant.

(JOHN W. SHEEHAN,
Of the Massachusetts Bar, of Counsel.)

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New Jersey Court of Errors and Appeals

Between

FRANCIS J. SWAYZE, as executor and trustee under the will of HENRY W. MERRIAM, deceased,
Complainant-Respondent,
and
HARRIET M. HUNTINGTON, *et al.*,
Defendants-Respondents,
and
CHARLES R. LANE,
Defendant-Appellant.

On Bill, etc.
On Appeal from Chancery.

Brief of John R. Hardin for Edwin W. Merriam and Henry F. Merriam, individually and as executors of the last will and testament of John J. Merriam, deceased, Helen M. LaCoste and Amelia E. Merriam defendants-respondents.

I.

THE CONTROVERSY PRESENTED BY THIS APPEAL.

The controversy presented by this appeal is without disputed facts and limited by the brief of appellant to the binding effect of documents, unchallenged as to execution, delivery and existence.

The complainant is the surviving executor and trustee of Henry W. Merriam, deceased, who died in Newton, in the County of Sussex, October 26, 1900. The

will was probated November 7, 1900, before the Surrogate of Sussex, and letters testamentary issued to John J. Merriam, William L. Dutcher and Francis J. Swayze, the executors named therein, of whom Justice Swayze is the only present survivor.

The executors filed an inventory (Exhibit C. 2) and two accounts as executors (Exhibits C. 3 and C. 4) and two accounts as trustees (Exhibits C. 5 and C. 6), all of which accounts were passed by the Orphans' Court (Exhibit C. 7). See testimony of Francis J. Swayze (Record, pp. 99 to 102).

None of these included in any way 1,090 shares of the capital stock of the H. W. Merriam Shoe Company, a corporation of New Jersey, standing on the books of that corporation in the name of Henry W. Merriam at the date of his death, or certain promissory notes to his order of Joseph E. Warbasse, John Tozer and George L. Dutcher, secured by other shares of stock of said shoe company, belonging to the makers of the notes respectively.

These shares of stock and these notes enclosed in sealed envelopes, addressed to as many different individuals, had been handed by the testator in March, 1908, to his sister, the defendant, Harriet M. Huntington, in a larger envelope, the contents of which he orally described to her with instructions to deliver to the addresses in her discretion. None of these smaller envelopes, except the one addressed to herself, was opened by her in the testator's lifetime. The one addressed to herself was opened in his presence, and the stock certificates therein contained placed by her in another small envelope, which was sealed and placed in the larger cover with the others. After the testator's death in October, 1900, Mrs. Huntington handed the larger envelope, containing the smaller ones, to the executors of the testator, who retained them under their control until they were delivered to the several addresses of the smaller envelopes on the execu-

tion and delivery of an indemnity agreement, dated March 26, 1901. (Ex. C. 8, Record, pages 322 to 333.)

This indemnity agreement was not accepted until all the beneficiaries under the will who were of full age had executed and delivered to the executors a consent to the delivery of the sealed envelopes to the persons to whom they were addressed, and to the execution, by the executors of any transfers or assignments necessary to perfect the title to said stock in the names of the persons to whom the said certificates were addressed or to be delivered. Such consents were attached to the indemnity agreement and one of them is printed at the top of page 333 of the record.

The letter of January 19, 1901, referred to in the consent, is printed in the testimony of Justice Swayze (Record, page 108).

After this indemnity agreement was executed the executors delivered the envelopes with their contents. Mrs. Huntington deposited with the executors certificates for 151 shares of H. W. Merriam Shoe Company stock and John J. Merriam 122 shares, as collateral to their contract. The executors accepted Mr. Dutcher's contract without collateral. In June, 1910, the shares deposited by the indemnitors were converted into cash, and that cash together with the proceeds of a dividend declared after the death of the testator but out of earnings accrued before his death, the complainant holds, as the indemnity fund, answerable to secure against the liabilities contemplated by the agreement (Record, pages 112-4).

The execution and delivery of the indemnity agreement, or of the consents appended thereto, were not challenged in the Court of Chancery by the present appellant, Charles R. Lane, or by anybody else. Such challenge could have been made only by cross bill, and the appellant filed no cross bill.

His answer (Record, pages 33 to 37) admits the

consent, but denies the effect alleged in the bill of complaint, and sets up that it was signed without consideration and under a misapprehension of fact, and in reliance on the executors' letter referred to in the consent, set forth in the answer under date of January 21, 1901 (instead of January 19, 1901) and in the belief that appellant had no legal right to the stock or any income therefrom. Appellant affirms in his answer "that he had no knowledge of his rights in the premises or in the said stock or income thereof, nor of the circumstances set forth in the said bill of complaint in reference thereto, until the filing of the said bill of complaint." He claims that the transfer by the executors by reason of the indemnity agreement is illegal and void, and that the holders of the stock are trustees for the beneficiaries under the will, and should be so decreed.

It is noteworthy that this answer contains no charge of *fraudulent* misrepresentation or inducement to the appellant by the executors at whose instance he signed the consent, or by anybody else. The answer discloses no attempt at investigation by the appellant and contains no allegation or showing of mutual mistake. The answer of the appellant to the Merriam cross bill was of exactly similar character (Record, page 89).

The testimony taken before the Vice-Chancellor chiefly related (except as to some merely formal matters) to the effort on the part of the indemnitors under the agreement of March 26, 1901, to establish a perfected gift, *inter vivos,* of the contents of the sealed envelopes to their several addresses. On this issue the finding of the Vice-Chancellor was adverse to the claimants and the executors and trustees were held chargeable with the shares of stock and the notes contained in the envelopes. From this finding there is no appeal.

The Vice-Chancellor also found that the delivery

of the envelopes by the executors was with the consent of all the beneficiaries who were of full age, and that the indemnity agreement was to protect the executors against the loss therein referred to that might accrue against them by reason of the distribution; that the agreement was one of mere indemnity to which the complainant might resort in case any claim should be established against him by the infant defendants to the suit. The rights unaffected by this agreement referred to by the Vice-Chancellor, on page 384 of the record, were the matters involved in the controversy over the envelopes, which the court was then discussing, and there was no thought in the mind of the court that in determining those matters he was abrogating the indemnity agreement. This is sufficiently evident from the context; and if not thereby made plain, appears absolutely toward the conclusion of the opinion (Record, page 392, line 30), "It will therefore be seen that the donor in this case, even though there were a donative intention and a symbolical delivery, did not strip himself of all dominion and control over the subject matter of the gift, nor indeed do I think that he meant to do so. The case of the so-called donees must therefore fail, and the stock in question must be declared to be an asset of the estate, for which the complainant must account. *The complainant for his indemnification can at once apply the securities held by him in pledge to make up the deficiency contemplated by the indemnity agreement.*" The court leaves undecided the jurisdictional question as to a suit on the agreement if the pledged securities are insufficient for complete indemnification.

The decree was drawn and presented on the theory of validity and protection to the complainant of the indemnity agreement, and affirms the rights of the complainant to resort to the security thereof for his protection against the necessity of accounting to the

infant defendants for the contents of the envelopes as assets of the estate.

The appellant appeals from the finding of fact recited in the decree (Record, page 397, lines 15 to 25), that in pursuance of and reliance on the consents signed by the beneficiaries under the will, including the appellant, the executors delivered the envelopes to the persons to whom they were addressed, together with the contents thereof and assented to the transfer of the said stock upon the books of the corporation; and also from the finding (Record, page 399, lines 9 to 18), that by the consents the residuary legatees, including the appellant, and each of them, acquiesced in and assented to the said transfers by the executors. He also appeals from the part of the decree, ordering, adjudging and decreeing as provided in paragraphs "Third," "Fourth" and "Fifth" (Record, pages 401 and 402), and in a portion of paragraph "Sixth" as to the right of the complainant to apply the indemnity fund to the deficiency agreement inclusive of the income in his hands and to accrue during the lifetime of the appellant and the other life tenant of one-fourth of the residue, Carlisle J. Lane (who has taken no appeal). See notice and petition of appeal (Record, pages 405 to 412).

The ground of appeal is thus stated (Record, page 412, line 16): "And your petitioner humbly appeals from the aforesaid parts of the decree of the chancellor which decrees as aforesaid upon the ground that the same are erroneous, for that the same are contrary to and unsupported by the evidence in the cause, inequitable and are contrary to law."

The issue presented by the appeal is therefore within a rather narrow compass and *entirely confined to that part of the income of one-fourth of the residuary estate that would have been payable to the appellant, but for the execution and delivery by him of the con-*

sent appended to the indemnity agreement of March 26, 1901.

The residuary clause is found in the codicil to the will of Henry W. Merriam, made January 28, 1898, and printed on page 319 of the Record.

"3. I revoke the devise and bequest of the residue of my estate contained in the thirteenth item of my said will; and I hereby give, devise and bequeath one equal fourth of the residue of my estate to the children of my brother John J. Merriam; one equal fourth to the children of my deceased brother, Samuel L. Merriam; one equal fourth to the children of William L. Dutcher; one equal fourth to my executors named in said will, upon trust, to divide the same into three equal shares, and to pay the yearly income of one of said shares to each of my three cousins, Carlisle J. Lane, Albert I. Lane and Charles R. Lane, in such manner as may be most effectual for securing to each the personal receipt and enjoyment thereof during his life inalienably; and after his death to pay his share to his children, or other descendants him surviving; and if any of my three said cousins shall not leave child, or other descendant, him surviving, to hold the said principal, in trust, for my said cousin or cousins surviving, upon the same trust. And I authorize and empower my said executors, in their sole discretion or the discretion of the survivor, to pay over to my said cousins his share of the principal, or any part thereof, upon my said executor, or the survivor of them, being satisfied that such payment will inure to the individual benefit of my said cousins. And I order and direct that the determination of my said executors, or the survivor of them, as to such payment shall be final and conclusive."

One of the cousins, Albert I. Lane, has deceased, without children or other descendant, leaving a will bequeathing all his property to his brothers Carlisle J. Lane and Charles R. Lane (the appellant). Ad-

vances of principal have been made to some extent by the executors to both Carlisle J. and Charles (Record, page 117).

The decree adjudges that the complainant and his co-executors delivered the contents of the envelopes to the several persons to whom they were addressed and assented to the transfers of stock in pursuance of and in reliance on the consents, and that by the consents the residuary legatees signing them acquiesced in and assented to the transfers by the executors. The consent was that the executors should deliver the sealed envelopes and execute any transfers or assignments necessary to perfect the title to the stock in the names of the persons to whom said certificates are addressed or to be delivered (Record, page 333). The consent followed the letter of the executors in which they set forth that they had not included the stock in the inventory of the H. W. Merriam estate because it had been given by the testator in his lifetime to Mrs. Huntington and others; that some legal question might be raised about the sufficiency of this gift, and that the executors requested the enclosed consent to be signed to enable them to deliver the envelopes and to take any other steps necessary to carry out the testator's manifest wishes in a strictly legal form.

This consent was signed by the appellant and needed no indemnity agreement for the protection of the executors complying with its permission. The indemnity agreement was taken for protection of the Lane and Dutcher infants, as appears by its terms, who were remaindermen, *and not for the protection of the appellant and the other life tenants of the income of the Lane share. The responsibility, as to these life tenants, of the action taken by the executors, they assumed without indemnity on the faith of the consents given by the life tenants.*

The decree relieves the complainant from accountability to the appellant and the other life tenants for

the income of the one-fourth of the residuary trust fund accrued or to accrue, so far as that fund results from one-fourth of the said stock and notes, and affirms the right of the defendant, Mrs. Huntington, and the Merriam defendants to their respective proportions of such income during the lifetime of the appellant and his brothers, by virtue of the assent of the three Lane brothers to the transfer of the stock by the executors and the perfecting of title thereto in the addresses of the several envelopes.

II.

THE APPELLANT, BEING OF FULL AGE, WAS COMPETENT TO EXECUTE AND DELIVER THE CONSENT OF JANUARY 19, 1901, NOTWITHSTANDING THAT HE MIGHT THEREBY DEPRIVE HIMSELF OF SOME PART OF THE INCOME GIVEN HIM BY THE THIRD CODICIL OF THE WILL OF HENRY W. MERRIAM.

In the court below, it was claimed by the present appellant that his consent to the transfer of the Shoe Company stock was invalid and without effect under the third codicil of the will of Henry W. Merriam, as an alienation of income, and that notwithstanding such consent, he was entitled to receive from the executor and trustee 1/12 of the income on the securities in the sealed envelopes up to the death of his brother, Albert I. Lane, and since that time 1/8 of said income, during his own life.

The brief of appellant served in this court makes no mention of such claim, and it must be considered as abandoned. The claim is without foundation in law, but is left unargued in this brief because abandoned by the brief of appellant.

III.

THE CONSENT OF JANUARY 19, 1901, DEPRIVES APPELLANT OF ANY INTEREST IN THE SECURITIES TO WHICH IT APPLIES UNDER THE CODICIL TO THE WILL OF HENRY W. MERRIAM, AND CANNOT NOW BE WITHDRAWN.

The brief of appellant relies solely on misrepresentation in the letter of the executors, Exhibit C. 9, printed on page 108 of the Record, alleging that he was thereby induced by the executors to execute the consent, and to assent to the delivery of the envelopes and the transfer of title of the securities contained therein to the addresses of the several envelopes; and that by reason of such misrepresentation his assent is nugatory and his right to have 1/12 of the income of the securities contained in the envelopes to the date of his brother Albert's death and thereafter 1/8 of such income, during his own life, continues. He therefore objects to the decree which relieves the executor and trustee from accounting to him for such income. The brief of appellant emphasizes what it calls "three lines of proof," but the subdivision is not of importance and supports the one general proposition of misrepresentation. "Assuming, as in all probability was the fact," says the brief of appellant, page 4, "that there was an honest misrepresentation on the part of the executors of the facts in relation to the title to this stock, they are nevertheless chargeable for the consequences thereof. (Harvard Law Review, Vol. 24-415 and cases cited.)"

I have quoted this statement because no assumption of a fraudulent misrepresentation is possible under the pleadings or proofs. The answer of appellant charges no fraud; the evidence offered by the appellant

discloses no fradulent conduct on the part of the executors, or the beneficiaries of the delivery of the envelopes; and the brief points out no fraudulent statements in the documentary evidence in the cause.

It is confidently asserted that the letter of Janaury 19, 1901, contained no misrepresentations of any kind whatever.

It is a very frank and open disclosure of a real situation. It was accompanied by a copy of the will, so that appellant, before he acted on the letter, was completely apprised of his rights. The inventory of the estate was given, with the statement that it did not include any stock of the H. W. Merriam Shoe Company. Appellant lays stress upon the reason given in the letter for omission of the stock; indeed, he builds his whole case on that sentence, "for the reason that all this stock had been given by Mr. Merriam in his lifetime to others, principally to his brother, John J. Merriam, and his sister, Harriet M. Huntington, in pursuance of a natural and long cherished desire of his to retain in his own family the control of the business he had established." This sentence, however, is not the whole letter, and is not to be segregated from its context. Following it is a full relation of the custody of the stock prior to the death of Mr. Merriam, pursuant to delivery by him to Mrs. Huntington, and the unwillingness of the executors, notwithstanding their feeling that they ought to comply with Mr. Merriam's wishes, to deliver the envelopes to the persons to whom they were addressed, *because the executors were advised that some legal question might be raised as to their right to do so, and therefore desired, before doing so, to secure the consent of the residuary legatees who were of age.* Notice was given that the contents of the envelopes were unknown to the executors except as indicated by Mr. Merriam's endorsement on the large envelope. The letter concludes, "If you are willing that the executors should

deliver these envelopes and take any other steps necessary to carry out Mr. Merriam's manifest wishes in a strictly legal form, kindly sign and return the enclosed consent."

This letter notified the appellant that the inventory of the estate did not include any stock of the H. W. Merriam Shoe Company; that the executors had in their control envelopes supposed to contain the stock, which envelopes had been given by Mr. Merriam, in his lifetime, to his sister, Mrs. Huntington; that the executors were advised not to deliver these letters to whom they were addressed because some legal question might be raised as to the right to do so, and they were therefore unwilling to act without the consent of the residuary legatees who were of age.

The copy of the will, enclosed to the appellant with the will, told him just what his own interest in the estate was. The brief of the appellant lays emphasis on the fact that income was not mentioned in this letter. As a matter of fact the appellant received under the will no part of the principal of the estate and was entitled only to the income, for his lifetime, of one-third of one-fourth of the residue. He was apprised that in consenting to the delivery of the envelopes he was agreeing to the exclusion from the inventory of the estate of any part of the stock in the H. W. Merriam Shoe Company owned by the testator, which could mean, so far as he was concerned, nothing more than that the residuary estate, from which he was to derive an income, would be accordingly diminished.

Appellant says, according to the testimony quoted in his brief, that when he received the letter he had no knowledge of the status of the affairs of the estate and that all his knowledge was derived from the letter, and that he signed the consent in reliance upon the statements contained in the letter. So far as appears he made no other inquiry until April, 1909, more than eight years thereafter.

The letter, however, went still further than advising the appellant of his rights and the effect of the delivery of the envelopes on the inventory and the refusal of the executors to deliver without the consent of the residuary legatees. It apprised the appellant that the contents of the envelopes were unknown to the executors except as indicated by Mr. Merriam's endorsement on the large envelope, from which it was believed that the envelopes contained certificates of stock of the H. W. Merriam Shoe Company. The letter asked for action on the part of the appellant, not leaving him to any chance as to the future but requiring positive expression on his part, "if you are willing that the executors should deliver these envelopes and take other steps necessary to carry out Mr. Merriam's wishes in a strictly legal form, kindly sign and return the enclosed consent."

The letter is signed by three executors, but it does not seem to be pretended on the part of the appellant that he was influenced by any other signature than that of Francis J. Swayze. He says he knew Judge Swayze and that he was his trustee. Whatever might be the weight of the suggestion of the trust relation under some circumstances, this letter certainly put the appellant at arm's length and invited him to action on his own responsibility, the very purpose of which, according to the letter, was to relieve the trustees from the responsibility they were unwilling to assume.

The Vice-Chancellor in his opinion has abundantly vindicated the statement in the letter as to the intentions of Mr. Merriam in the disposition of the shares of stock. "I have no doubt," he says, "of the donative intention which influenced Mr. Merriam in placing the stock in question in the hands of his sister. I think that he undoubtedly meant that the six persons whose names appeared upon the envelopes containing the certificates of stock, and the three

persons whose names appeared upon the envelopes containing their several promissory notes with certificates of stock as collateral, were meant by Mr. Merriam to be his beneficiaries to the extent indicated by the number of shares and the notes contained in their respective envelopes."

The gift failed because of the method pursued by the donor in delivering the stock in his lifetime to Mrs. Huntington, and to escape the possibility of the failure of the gift to be in strictly legal form, though according to the manifest intention of the donor, the residuary legatees, who were of age and able to sign, were asked to consent to the delivery in accordance with the testator's manifest intention and to perfect title in the intended donees. There certainly was no misrepresentation of fact or law by the executors to the appellant.

The consent itself, which appellant admits he signed and returned in accordance with the letter (Record, page 333), confirms again the fact of knowledge on the part of the appellant of just what he was doing, and the necessary effect, as against himself, of what he was doing. The consent was not merely a delivering of sealed envolopes left by Mr. Merriam, to the persons to whom they were addressed. It was also a consent to the executing by the executors of "any transfers or assignments necessary to perfect the title to the said stock in the names of the persons to whom the said certificates are addressed or to be delivered."

Taken together the letter and the consent establish beyond peradventure that the appellant joined in authority to the executors to, so far as he was concerned, omit from the inventory all shares of stock of the H. W. Merriam Shoe Company, deliver the envelopes supposed to contain the shares as addressed, and to execute any transfers or assignments necessary to perfect the title to the stock in the names of the persons to whom the same had been supposedly given.

This consent was acted upon by the executors and it is not true, as claimed in appellant's brief, that such action did not change the relative positions of the executors and the residuary legatees.

The executors relied upon the consents as against all the adult beneficiaries under the residuary clause of the will. They protected themselves only against the infant interests, incapable of consenting, and the indemnity agreement, by Harriet M. Huntington and John J. Merriam, is limited to the protection of the executors "against all liability, loss or expense to which they may be put, or which they may incur, by reason of any claim hereafter to be made against them, or any of them, by any of the children, born or to be born, of the said Carlisle J. Lane, Albert I. Lane and Charles R. Lane, their heirs, executors, administrators or assigns"; and, by William L. Dutcher, "against all liability, loss or expense to which they may be put, or which they may incur, by reason of any claim to be hereafter made against them by the said Frances Elizabeth Dutcher and Eleanora Hortense Dutcher, or either of them, their heirs, executors, administrators or assigns."

The decree declares that this indemnity inures, as against Harriet M. Huntington and John J. Merriam, to the benefit of the Lane infants, and, as against William L. Dutcher, to the benefit of the infant defendant Eleanora Hortense Dutcher, the other Dutcher infant named in the indemnity agreement having in the meantime come of age and filed an assent and confirmation.

If the appellant is to be now allowed to withdraw his consent, or to have the same regarded as nugatory from the beginning, the complainant and his deceased co-executors are subject to a liability, as to income claimed by the appellant, which they have never received by reason of the surrender by them of the shares of stock of the Shoe Company—an income

which, in consequence of such surrender, has been enjoyed by others under claim of right for many years.

It is also to be remarked that the appellant seeks not only to profit by the repudiation of his own consent, but also by the repudiation of the consent of his dead brother, Albert I. Lane. All three of the life tenants of the income of the residuary fourth, going in remainder to the Lane children, signed these consents. Albert died years ago and his interest has passed to his two brothers, the appellant and Carlisle J. Lane. Carlisle J. Lane is a party to this suit but offers no objection to this decree and has made no effort to repudiate his consent. Appellant, however, seeks to profit not only to the extent of one-third of one-fourth of the income which would have accrued to the residue from the Shoe Company shares upon his own account, but also, from the death of his brother, Albert I. Lane, for an additional eighth in the right of such brother. This assuming that Albert I. Lane, if alive, would pursue the same course as the appellant.

Even if there had been an honest misrepresentation, as claimed by the appellant, by the letter of the executors and a consequent misapprehension on the part of the appellant in signing the consent, he is not in a position at this time to recall that consent.

It has abundantly appeared in the foregoing discussion that the appellant assented to the solution of a doubtful controversy of fact and law in accordance with the manifest intention of Henry W. Merriam, and that by such solution the executors were induced to change their relation to the appellant and his co-life tenants in a way which, if now changed, would result in personal liability upon the executors.

The appellant made no protest or objection of any kind from January, 1901, until April, 1909, and his objection was not then that he had been deceived into signing the consent but that the consent was

without lawful consequence because, under the will, his interest in the income thereby affected was inalienable. Appellant says that he was advised about this by Messrs. Sheehan & Cutting, his attorneys, shortly before he wrote a letter to Judge Swayze, Ex. B., May 26 (Record, page 377, line 29 *et seq.*). The letter is printed on page 365 and is exclusively confined to the validity of his signature under the language of the will, and in no way refers to the misrepresentation as to the facts surrounding the shares.

Judge Swayze's reply to appellant's letter (Ex. C., May 26) is printed on page 366 of the record, and is entirely incapable of the construction put upon it in the brief of the appellant, and several times repeated that the action of the executors, following the consent, had not affected the title to the stock.

From the earlier letter of the appellant to Judge Swayze, printed on page 367 (Ex. D, May 26), it is apparently to be inferred that about a year prior to the date of the letter (April 2, 1909) appellant had called upon Judge Swayze and talked over matters pertaining to the estate and had then been informed about the Shoe Company stock. On that occasion it is not suggested that he offered any objection to what had been done.

The letter (Ex. B, May 26) refers to Judge Swayze's letter of April 12th. This is Ex. F, May 26, printed beginning on page 368 of the record.

It also appears that on May 4, 1909 (Ex. G, May 26, record, page 372) the appellant confirmed to Judge Swayze the authority of Messrs. Sheehan & Cutting as his attorneys and their full power and authority to act for him in regard to any interests or acts of the appellant.

Shortly after this correspondence Judge Swayze filed an account in the Sussex Orphans' Court, which was approved November 5, 1909 (Record, page 102, line 20).

To this account the appellant filed exceptions through Messrs. Sheehan & Cutting, which exceptions were subsequently withdrawn (Record, page 375, line 31, to page 378). Appellant was expressly asked (Record, page 377, line 4): "Q The exceptions you know were filed because Judge Swayze and his co-trustees had not charged themselves with this stock, wasn't it? A Yes, sir."

It is quite apparent also from the testimony of the appellant (Record, page 378), that these exceptions were withdrawn following some correspondence between the appellant and Mrs. Huntington, but at any rate they were withdrawn by counsel and after the fullest information.

This testimony absolutely negatives the allegation of the appellant in his answer (Record, page 36, line 10), that *he had no knowledge* of his rights in the premises, nor in the stock or income thereof, nor in the circumstances set forth in the bill of complaint in reference thereto, *until the filing of the bill of complaint.* The bill of complaint was filed August 25, 1910. The evidence referred to shows that the appellant was in oral communication with the complainant as early as April, 1908, and had an extended correspondence with the complainant in April and May, 1909; that he subsequently filed exceptions to the account of the complainant, approved in Sussex County in November, 1909, on the ground that the account omitted the shares of stock in question, and through counsel, in part representing him in the present case, withdrew his objections and permitted the account to pass. His answer in the present case was filed on December 15, 1910 (Record, page 33), wherein he reasserts the claim which he had abandoned by the withdrawal of the exceptions.

The only authority cited in the brief for the appellant is 24 Harvard Law Review, page 414, and cases cited. The citation covers an article by Professor

Williston on "Liability for Honest Misrepresentation," in which he examines the present state of the law as to such liability, both as applied in actions of tort for deceit and on contract.

The law of liability for honest misrepresentation, as analyzed by Professor Williston, if at all applicable, affords no ground to the appellant to escape the estoppel with which he is confronted, or to at this time undo what he has done.

The present effort of the appellant, as treated in his brief, seems to be to rescind a completely executed transaction nearly ten years after it happened, not on the ground of actual fraud, which would support an action for deceit, but on what is claimed to be an honest misrepresentation. Accepting the contract likeness the appellant would give the transaction, the distinction between rescission and an action for deceit is pointed out by Mr. Justice Garrison in *Faulkner* vs. *Wassmer,* 77 N. J. Eq., 537-544.

Pursuing the suggestions of appellant's brief still further, the appellant's present effort to withdraw from the action taken by him in 1901 is fatally affected by his conduct. This affords what, in the same case of *Faulkner* vs. *Wassmer,* Justice Garrison terms "conduct evidence." Even in a case of actual fraud the rule, as laid down by this court in *Dennis* vs. *Jones,* 44 N. J. Eq., 513, is "that after the appellants had knowledge of all the substantial features of the said fraud and were fully aware of the deceit which had been practiced upon them, they so acted as to afford plenary evidence of an election to abide by their contract," and that "their election thus made was irrevocable." This rule is not based on the doctrine of laches, and the application of conduct evidence in actual practice is present in all cases involving a reasonable time.

Dennis vs. *Jones,* 44 N. J. Eq., 513.
Clampett vs. *Doyle,* 73 N. J. Eq., 678.
Faulkner vs. *Wassmer,* 77 N. J. Eq., 537.

Accepting, therefore, the appellant's own standards appealed to in his brief, he is precluded from disafirming the consent, given by him in 1901, by his conduct in abandoning the exceptions filed by him, in the Sussex Orphans' Court, to the account of the complainant presented in November, 1909, which exceptions raised the same question of omission from the account of the Shoe Company stock. His election then made to withdraw the exceptions and stand by his earlier consent is irrevocable and would bind him even in a case of actual fraud. If, on the other hand, he should claim that the exceptions then filed were based not on the present theory of misrepresentation contained in the executors' letter of January, 1901, but on the construction of the will referred to in his letter to Judge Swayze of April 15, 1909 (Record, page 365, Exhibit B, May 26), his conduct would be equally conclusively evidential against him because of his failure to promptly thereafter, when completely advised of the facts, repudiate the earlier consent.

On the whole, therefore, it is abundantly shown that the consent of the appellant, to the perfecting of the title of the Shoe Company stock in the addresses of the several envelopes, was freely given with knowledge of the facts and not procured by any misrepresentation, honest or otherwise, and having been acted upon, he ought not now to be permitted to withdraw therefrom; and, further, that even if the consent had been originally given under circumstances which would have permitted its repudiation by the appellant, he has, by his conduct, reaffirmed it, and has no right at this time to be relieved of the consequences of the consent, on the faith of which the executors, to whom it was given, have acted.

IV.

THE CONSENT GIVEN BY THE APPELLANT TO THE PERFECTION OF THE TITLE TO THE STOCK IN THE ADDRESSES, WHEN GIVEN, DEPRIVES THE APPELLANT FOR ALL TIME OF ANY FURTHER INTEREST THEREIN.

One of the portions of the decree appealed from adjudges that the said trustees, and the survivor of them, and all successors in the trust, are free from accountability to the appellant during his lifetime for the income of said trust fund, accrued or to accrue, so far as it results from the securities contained in the envelopes. Even if this decree, so far as it reaches successors in the trust, is wider than necessary, the appellant is not aggrieved thereby and should not be heard to object to it. He is as much estopped to reject his consent as against the successors in the trust as against the complainant trustee, who is now resigning. The appellant cannot object to any possible inaccuracy in the division of the income by the same paragraph of the decree. It does not affect him, and every other possible person concerned therein is a party to the suit and neither appealing nor otherwise objecting to the decree as signed below.

V.

THE DECREE OF THE COURT OF CHANCERY SHOULD BE AFFIRMED WITH COSTS.

JOHN R. HARDIN,

Of Counsel, for Edwin W. Merriam and Henry F. Merriam, individually and as executors of John J. Merriam, deceased; Helen M. LaCoste and Amelia E. Merriam, defendants-appellants.