MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals.

Between ROBERT C. HUTCHINSON, Appellant, and SARA EXTON ET AL., Appellees.	On Bill, &c.

G. D. W. Vroom, of counsel for Appellant.

B. B. Hutchinson, of counsel for Allan McDermott, guardian *ad litem*, Appellee.

James Buchanan, W. M. Lanning, of counsel for the Appellees.

ABRIDGEMENT OF CASE ON APPEAL BY AGREEMENT OF COUNSEL.

The bill was filed on the 23d day of November, 1894, for a partition and division of the estate, real and personal, of Adam Exton, late of the county of Mercer, deceased, under his will. The complainants are Sara Exton, Catherine J. Bamford, Elizabeth Owens and Mary Bainbridge, children of the testator. The defendants are Ann E. Brokaw, a child of the testator, Adam Exton, and William H. Brokaw, her husband, Charles Y. Bamford, Wesley C. Owens, and Stephen A. Bainbridge, the hus-

bands of the complainants Catherine J. Bamford, Elizabeth Owens and Mary Bainbridge respectively, and Robert C. Hutchinson, individually and as administrator of his late wife, Eleanor E. Hutchinson, who was a child of the testator, and who died intestate October 6th, 1888, leaving her said husband, and also, Ida E. Hutchinson, her only child and heir-at-law, and thereupon the said Robert C. Hutchinson was duly appointed and now is the guardian of the person and property of the said Ida E. Hutchinson, still a minor, and administration of the estate of the said Eleanor E. Hutchinson was duly granted to him.

The will of the said Adam Exton, which was duly admitted to probate, is as follows:

"I, Adam Exton, of the city of Trenton, county of Mercer, State of New Jersey, being of sound mind, memory and understanding, but mindful of the uncertainty of the duration of human life, do hereby make, publish and declare this my last will and testament, in manner following, to wit:

First—I do order and direct that all my just debts and funeral expenses be paid and satisfied as soon as conveniently can be done after my decease;

Second—I give and bequeath to each of my six daughters, to wit, Mary Ellen, wife of Stephen A. Bainbridge; Ann, wife of William H. Brokaw; Elizabeth, wife of Wesley C. Owens; Catharine Jane, wife of Charles Y. Bamford; Sarah Exton; and Eleanor, wife of Robert C. Hutchinson, the sum of one thousand dollars to each;

Third—I give and devise to my said beloved daughters certain real estate, situate in Trenton aforesaid, as follows:

To my beloved daughter Mary Ellen, wife of Stephen A. Bainbridge, the buildings and lots of land and premises known as No. 339 and No. 341 Centre street, in said city, to her, her heirs and assigns forever;

To my beloved daughter Ann, wife of William H. Brokaw, the buildings and lots of land and premises known as No. 343 and No. 345 Centre street, in said city, to her, her heirs and assigns forever;

To my beloved daughter Elizabeth, the wife of Wesley C. Owens, the buildings and lots of land and premises known as

No. 36 and No. 38 Cooper street, in said city, to her, her heirs and assigns forever;

To my beloved daughter Catherine Jane, wife of Charles Y. Bamford, the buildings and lots of land and premises known as No. 139 and No. 141 Second street, in said city, to her, her heirs and assigns forever;

To my beloved daughter Sarah Exton, the buildings and lots of land and premises known as No. 143 and No. 145 Second street, in said city, to her, her heirs and assigns forever;

To my beloved daughter Eleanor, wife of Robert C. Hutchinson, the buildings and lots of land and premises known as No. 147 Second street, in said city, and No. 34 Cooper street, in said city, to her, her heirs and assigns forever.

Fourth—Should any of my said daughters not be living at the time of my decease the issue of such deceased daughter shall collectively take the bequest and devise hereinabove given to such daughter.

Fifth—I give and bequeath unto my brother, John Exton, the sum of five thousand dollars to his own sole and separate use forever.

Sixth—I give and bequeath unto my beloved wife, Elizabeth Exton, all my right, title, interest and property as partner in the firm of Adam Exton and Company, and all the remainder and residue of my personal and real estate of whatever kind or wheresoever situated, such bequest and devise being in trust nevertheless for the following uses and purposes:

I. First to reserve enough to yield her, my said wife, an annual income of three thousand dollars for her own sole and individual use.

II. To retain for repairs and unforeseen expenses whatever sum may be necessary to pay and discharge the same.

III. She shall divide the remainder of the annual income thereof between my said children, share and share alike; provided, however, that if, at any time, it shall be, in her judgment, for the best interest of any one of said children to withhold the share of such child in said income, she shall be at liberty to retain such share of said income in her hands, and to pay the same for the benefit of such child at such times and in such manner as shall seem to her best.

IV. She may, from time to time, as shall seem in her judgment best for the interests of herself and our said children, sell, mortgage or otherwise dispose of any real estate hereinbefore devised to her, and good and sufficient deed or deeds therefor to give, and may also, as in her judgment may seem best, sell or dispose of any lands, stocks or other personal property hereby bequeathed to her, except that she shall not sell or dispose of my Washington Market stock nor my Greenwood Cemetery stock.

The proceeds of such sales may be by her reinvested in any good and sufficient form, or she may be at liberty to divide the same proceeds or any portion thereof among my said children, share and share alike, the issue of any deceased child taking collectively the share of such parent, retaining, however, enough property to yield her the said annual income of three thousand dollars.

V. She shall not be accountable to my hereinafter named executors, or any of them, for her disposition of the income or proceeds of sale of said real and personal estate.

Seventh—Whatever of said property may remain at the death of my said wife, of real or personal, or of principal or of interest, or of both, undistributed or unsold by her, shall be divided between my said six daughters, share and share alike, the issue of any deceased child taking collectively the share of the parent.

Eighth—The aforesaid legacy and bequest to my said wife, Elizabeth, is intended to be in lieu of her right of dower in my real estate, and if accepted by her, shall be in lieu of all claims by her of dower and of all other interest in my estate.

Ninth—I hereby appoint as executors of this, my last will and testament, my said wife, Elizabeth Exton, and my said brother, John Exton, and my said daughter, Catherine Jane Bamford.

Tenth—I hereby revoke all former will or wills by me heretofore made.

In witness whereof I have hereunto set my hand and seal, this seventeenth day of December, in the year of our Lord one thousand eight hundred and eighty-one."

On the 22d day of March, 1894, the said Elizabeth Exton, trustee under said will, died, having first executed her last will

and testament in due form of law, thereby appointing the said complainants, and the said defendant Ann E Brokaw, the executrices thereof, and thereby gave to them all her property, which will was afterwards, on the 2d day of April, 1894, duly proved by the executrices therein named, who took upon themselves the burden thereof, and afterwards and in this court and in this cause accounted for the trust estate which passed under the will of said Adam Exton.

On April 9th, 1895, an order was entered in the cause whereby it was referred to S. Meredith Dickinson, Esquire, one of the Special Masters of the Court of Chancery, to ascertain, among other things, the quantum of the estate, real and personal, of the testator, unsold and undistributed, subject to the trusts of the said testator's will, and who are the persons interested therein, and for what estates and interests, and in what shares and proportions.

The Master's report was filed on June 3d, 1895, and is as follows:

Master's Report.

In pursuance of an order of this Court, made in the above-entitled cause, bearing date on the ninth day of April, in the year eighteen hundred and ninety-five, whereby it was (amongst other things) ordered that it be referred to the subscriber, one of the Special Masters of this Court, to take and make the following accounts and inquiries, that is to say:

1. An inquiry of what particulars the right, title, interest and property of Adam Exton, deceased, the testator named in said order as partner in the firm of Adam Exton & Company, and all the remainder and residue of his personal and real estate consisted at the time of his death.

2. An account of the personal estate of the said testator which came to the hands of Elizabeth Exton, deceased, the trustee under his will, and of her executrices since her decease, or any or either of them, or of any other person or persons by her order or for her use or by the order or for the use of her executrices or any or either of them.

3. An account of the income of the testator's said interest in said firm and of the remainder and residue of his personal and

real estate aforesaid received by the said Elizabeth Exton, trustee as aforesaid, and by her executrices aforesaid, since her decease, or any or either of them, or by any other person or persons by the order or for the use of the said Elizabeth Exton, trustee, or her said executrices, or any or either of them, and of all sums of money which have been expended by the said Elizabeth Exton, trustee as aforesaid, and by her said executrices since her death, or any or either of them, in or about the repairs of the said real estate and unforeseen expenses or otherwise in or about the necessary outgoings in respect thereof.

4. An inquiry whether any and what parts of the said residue of the testator's real estate have been sold, mortgaged or otherwise disposed of by the said Elizabeth Exton, trustee as aforesaid, and if so to whom and for what sum or sums of money.

5. An inquiry what sums were received by the said Elizabeth Exton, the testator's widow, as legatee under his will on account of the annuity or annual sum of three thousand dollars provided for her by his will in lieu of her dower, and whether any and what payments or advances have been made or paid by the said Elizabeth Exton, trustee as aforesaid, to or on account of the children of the testator, or the issue of any deceased child, or any and which of them, or any or either of the parties to this suit in respect of their shares in the testator's said residuary estate (distinguishing payments and advances out of principal from those out of income).

6. An inquiry of what the property at the death of the said Elizabeth Exton, real or personal, or of principal or of interest, or of both, undistributed or unsold by her, subject to the trusts of the testator's will consisted, and of what it now consists at the date of the said order, and who are the persons interested therein, and for what estates and interests, and in what shares and proportions, and whether they are parties to this suit, and also whether, in the opinion of the subscriber, the said lands and real estate are so situate that a partition thereof can be made without great prejudice to the owners thereof.

7. And an inquiry what sum should be allowed to the said complainants and defendant, Ann E. Brokaw, executrices of the last will and testament of the late Elizabeth Exton, deceased, as aforesaid, out of the said testator's estate for the pains, trouble and risk of the said Elizabeth Exton, trustee as aforesaid, in

her lifetime in the management of her trust, and also for the services of the said executrices in settling the said trust estate since her death; I, S. Meredith Dickinson, do hereby report to his Honor the Chancellor that I have been attended by James Buchanan, the solicitor of the complainants, and by William M. Lanning, esquire, the solicitor of the defendants Ann E. Brokaw and William H. Brokaw, her husband, and by Barton B. Hutchinson, esquire, the solicitor of the defendant Robert C. Hutchinson, individually and as administrator of the personal estate and effects of the late Eleanor E. Hutchinson, deceased, and solicitor of the said Robert C. Hutchinson, guardian ad litem of the infant defendant Ida E. Hutchinson, and that in the presence of the parties attending me I have taken and made the accounts and inquiries which by the said order I was directed to take and make, having regard to the said final account of the complainants Sarah Exton, Catherine J. Bamford, Mary E. Bainbridge and Elizabeth Owens, and of the defendant Ann E. Brokaw, as executrices of the last will and testament of said Elizabeth Exton, deceased, in the said order mentioned and referred to, and that I have stated the same in schedules hereto annexed, which I pray may be considered as part of this my report.

And I do find and report:

1. That at the time of the death of the said testator, Adam Exton, which occurred on the seventeenth day of August, in the year eighteen hundred and eighty-seven, he, together with John Exton and William H. Brokaw, were engaged as copartners in the business or trade of cracker-bakers, at the city of Trenton, in the county of Mercer and State of New Jersey; that his share in the partnership business of said firm and in the stock in trade, credits and effects thereof consisted of a one-half interest therein, and was then valued at the sum of fifteen thousand dollars ($15,000), and sold for the sum of nineteen thousand and fifty-eight dollars and thirty-four cents ($19,058.34), as appears by the inventory and appraisement of the said testator's personal estate made by his executors, and by their final account of record in the office of the surrogate of the county of Mercer aforesaid; that the remainder and residue of the said testator's personal estate (other than and not being his said share in said firm) at the time of his death consisted of bonds secured by mortgages upon real estate, promissory notes, stocks and money, mentioned

and set forth in said inventory and appraisement and said last-mentioned final account, together with a few other items not embraced therein, but embraced in the said final account of the said executrices of the said Elizabeth Exton, hereinbefore mentioned, and consisted of the particulars set forth in the first schedule hereto, and that the real estate which the said testator was seized of or entitled to at the time of his death consists of the particulars set forth in the second schedule hereto, and also consisted of the particulars set forth in the third schedule hereto.

2. That the late Elizabeth Exton, deceased, the trustee under the said testator's will, in her lifetime, and her executrices, the said complainants Sara Exton, Catherine J. Bamford, Mary E Bainbridge, Elizabeth Owens, and the defendant Ann E. Brokaw, since the decease of the said trustee, have together received in all personal estate of the said testator, Adam Exton, to the amount of two hundred and seven thousand five hundred and sixty-four dollars and ninety-six cents ($207,564.96), and they have paid and are entitled to be allowed on account thereof sums to the amount of eighty-five dollars and seventy-nine cents ($85.79), leaving a balance due from said executrices of two hundred and seven thousand four hundred and seventy-nine dollars and seventeen cents ($207,479.17), on that account, the particulars of which receipts and payments appear in the said final account of said complainants and defendant, Ann E. Brokaw, as executrices as aforesaid, on file in this court in this cause, as amended and stated by me in the fourth schedule hereto.

3. That the said Elizabeth Exton, trustee as aforesaid, in her lifetime, and her said executrices, since her decease, have together received in all from the income of the said testator's interest in said firm and of the remainder of his personal and real estate the sum of ninety-five thousand five hundred and ninety-eight dollars and thirty-six cents ($95,598 36), and they have expended in and about the repairs of the said real estate and unforeseen expenses sums to the amount of sixteen thousand eight hundred and fifty-eight dollars and fifty-seven cents ($16,858.57), leaving a balance due from said executrices of seventy eight thousand seven hundred and thirty nine dollars and seventy-nine cents ($78,739.79) on that account, subject, however, to be reduced by the amounts paid to the legatees under the said testator's will, as

hereinafter set forth. And that the particulars of said last mentioned receipts and expenditures appear in said last mentioned account of said executrices filed in this court in this cause.

4. That the said testator in his lifetime sold a number of town lots which he then owned upon the terms that the purchasers should pay the agreed price thereof in installments, and upon paying the last installment of such purchase price should receive deeds of conveyance therefor, and afterwards the said testator died seized of the legal title thereof, having in the meantime received from such purchasers a considerable portion of the agreed purchase price thereof; and after the death of the said testator the said Elizabeth Exton, trustee as aforesaid, completed the said sales so made as aforesaid, by the said testator in his lifetime, and that the parts of the real estate which the said testator was seized of or entitled to at the time of his death, and which have been sold and disposed of by the said Elizabeth Exton, including the said real estate sold by the said testator in his lifetime in installments as aforesaid, consist of the particulars set forth in the third schedule hereto, the deeds mentioned and set forth in said last mentioned schedule reciting the whole of the consideration, as well the portion received by the said testator in his lifetime as the portion received by his said trustee after his death; and that none of the said testator's real estate whereof he died seized was mortgaged by his said trustees.

5. That the said Elizabeth Exton, the testator's widow, has received as legatee under his will an account of the annuity or annual sum of three thousand dollars ($3,000), provided for by his will in lieu of dower, the sum of nineteen thousand eight hundred and sixty-five dollars and eight cents ($19,865.08), and that she the said Elizabeth Exton, trustee as aforesaid, in her lifetime, paid and advanced to the said Sara Exton, Catherine J. Bamford, Elizabeth Owens, Mary E. Bainbridge and Ann E. Brokaw, children of the said testator, each the several sum of ten thousand and fifty-two dollars ($10,052), in respect of their several shares in the said testator's residuary estate, that on the eighth day of October, in the year eighteen hundred and eighty-eight, Eleanor E. Hutchinson, another child of the said testator, the wife of the defendant, Robert C. Hutchinson, died intestate, leaving her surviving her said husband, Robert C. Hutchinson, and also the defendant Ida E. Hutchinson, her only issue, and

that the said Elizabeth Exton, trustee as aforesaid, in her life time also paid and advanced to the said Robert C. Hutchinson as the guardian of the said Ida E. Hutchinson, on her account, the sum of seven thousand six hundred dollars ($7,600), in respect of the share of the said Ida E. Hutchinson in the said testator's residuary estate; the whole of which said several payments and advances were made and paid out of income, and that the particulars thereof appear in the said final account of the said executrices filed in this court in this cause and in the fourth schedule hereto.

6. That the personal property of the said testator, Adam Exton, both principal and interest, at the time of the death of the said Elizabeth Exton, undistributed and unsold by her, subject to the trusts of his will, consisted and still consists of property amounting to the sum of two hundred and thirteen thousand four hundred and seventy-eight dollars and fifty-six cents ($213,478.56), except that parcel thereof, to wit, the sum of thirteen thousand three hundred and sixty-five dollars and eighty-five cents ($13,365.85), was received by her said executrices after her decease, out of which said last mentioned sum was expended the sum of five hundred and three dollars and twenty five cents ($503.25), by said executrices, and that the particulars thereof are set forth in the fourth schedule hereto; that the real estate which the said testator was seized of or entitled to, at the time of his death remaining unsold by said trustee at the time of her death, subject to the trusts of his will, consisted and still consists of the particulars set forth in the second schedule hereto; that the persons interested therein and their estates and interests therein are as follows, to wit:

1. The said complainants, Sara Exton, Catherine J. Bamford, Mary E. Bainbridge and Elizabeth Owens, and the said defendant Ann E. Brokaw, are each seized in fee of and entitled to the equal undivided one-sixth part of said real estate and personal property.

2. The said defendant Robert C. Hutchinson, administrator of Eleanor E. Hutchinson, is entitled to one equal undivided sixth part of said personal property, and said Ida E. Hutchinson is seized in fee of one equal undivided sixth part of said real estate, subject to the right of curtesy of the said defendant, Robert C. Hutchinson, therein.

3. The said defendant Robert C. Hutchinson is entitled to his curtesy in the said equal undivided sixth part of said real estate of which the said Ida E. Hutchinson is seized as aforesaid; that all of the parties in interest in the said real estate and personal property are parties to this suit; and that the said lands and real estate are, in my opinion, so situate that a partition or division thereof can be made between the parties interested therein without great prejudice to the owners thereof, and that my reasons for this opinion are that the said lands and premises consist of a large number of town lots, for the most part in the immediate vicinity of a large and growing town, and are valuable now and prospectively as town lots and are fast increasing in value; and that when divided among the parties in interest each share will consist of a number of separate town lots of considerable present and rapidly-increasing value, as appears from the depositions hereto annexed.

7. And I further report that the sum of nine thousand five hundred and three dollars and ninety-four cents ($9,503.94) should be allowed to the said complainants and defendant Ann E. Brokaw, executrices as aforesaid, and retained by them out of the testator's estate for the pains, trouble and risk of the said Elizabeth Exton, trustee as aforesaid, in the management of her trust, and also for the services of the said executrices in settling the said trust estate since her death, in reaching which sum I have allowed at the rate of three per cent. upon the amount of three hundred and one thousand eight hundred and eighty-seven dollars and seventy-one cents ($301,887.71), being the amount wherewith the said final account of the said executrices filed in this Court in this cause is debited for the period commencing with the seventeenth day of August, in the year eighteen hundred and eighty-seven, the date of the said testator's death, and ending with the twenty-second day of March, in the year eighteen hundred and ninety-four, the date of the said trustee's death, and at the usual rate of executors' commissions upon other thirteen thousand three hundred and sixty-five dollars and eighty-five cents ($13,365.85), being the amount wherewith the said final account of the said executrices is debited for the period commencing with the date of the death of the said trustee and ending with the time of the filing of said final account of said executrices, being the fourth day of April, in the year eighteen hundred and ninety-five.

All which, as directed in and by the said order, I hereby report to His Honor the Chancellor, at the State House, in Trenton, on this third day of June, in the year eighteen hundred and ninety-five.

S. M. DICKINSON,
Special Master.

On June 19th, 1895, an order was made substituting Allan McDermott, Clerk in Chancery, as guardian *ad li'em* for Ida E. Hutchinson, the infant defendant, in the place and stead of the said Robert C. Hutchinson, her father, who had formerly been appointed her guardian *ad litem* in the cause, and who was, by the said order, discharged from his said guardianship. The newly appointed guardian, in and by the order of his appointment, was directed to cause exceptions to be filed to so much of the Master's report as purported to settle the respective rights and interests of the said Robert C. Hutchinson, individually and in his own right, and as administrator, &c, of Eleanor E. Hutchinson, deceased, and of the said Ida E. Hutchinson.

On the date of his appointment, June 19th, 1895, he, the said Clerk, guardian *ad litem*, filed the following exceptions to the said Master's report.

EXCEPTIONS TO MASTER'S REPORT.

Exceptions by Allan McDermott, guardian *ad li'em* of Ida E. Hutchinson, the infant defendant in this suit, taken to the report made therein on the third day of June, in the year eighteen hundred and ninety five, by S. Meredith Dickinson, Esquire, one of the Masters of this court, to whom was referred the taking and making of certain accounts and inquiries therein set forth.

First Exception.—For that the said Master has reported as follows: "The said defendant, Robert C. Hutchinson, administrator of Eleanor E. Hutchinson, is entitled to one equal undivided sixth part of said personal property, and said Ida E. Hutchinson is seized in fee of one equal undivided sixth part of said real estate, subject to the right of curtesy of the said defendant, Robert C. Hutchinson, therein;" whereas the said Master should have reported that the said defendant, Ida E. Hutchinson, is entitled to said equal undivided sixth part of said

real estate, and that she, the said Ida E. Hutchinson, is seized in fee of said equal undivided sixth part of said real estate, without any right of curtesy of the said defendent, Robert C. Hutchinson, therein.

Second Exception.—For that the said Master has also reported as follows: "The said defendant, Robert C. Hutchinson, is entitled to his curtesy in the said equal undivided sixth part of said real estate, of which the said Ida E. Hutchinson is seiz d as aforesaid," whereas the said Robert C. Hutchinson is not entitled to any curtesy whatsoever in the said equal undivided sixth part of said real estate, of which the said Ida E. Hutchinson is seized as aforesaid.

Third Exception.—For that the said Robert C. Hutchinson, administrator as aforesaid, is not entitled to any part whatever of said personal property, and is not entitled to the right of curtesy in any part of said real estate in his individual capacity.

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

ALLAN MCDERMOTT, *Clk*
Guardian *ad litem.*

B. B. HUTCHINSON,
Solicitor for and of Counsel.

On July 27th, 1889, the following decree, allowing the exceptions to said Master's report, was made and filed:

DECREE ALLOWING EXCEPTIONS TO MASTER'S REPORT, &C.

The exceptions to the Master's report heretofore filed in this cause by Allan McDermott, guardian *ad litem* of Ida E. Hutchinson, the infant defendant herein, coming on to be heard in the presence of Barton B. Hutchinson, Esquire, solicitor for and of counsel with said guardian *ad litem*, and of Garret D. W. Vroom, Esquire, solicitor for and of counsel with the defendant Robert C. Hutchinson, individually and as administrator of the personal estate and effects of the late Eleanor E. Hutchinson, deceased, and of James Buchanan, Esquire, solicitor for and of counsel with the complainants, and of William M. Lanning, Esquire, solicitor for and of counsel with the defendants Ann E. Brokaw and William H. Brokaw, her husband, and the said Master's report and the depositions thereto annexed having been read, and the arguments of the respective counsel having been

heard and considered, it is on this twenty seventh day of July, in the year eighteen hundred and ninety-five, on motion of the said solicitor of said guardian *ad litem*, ordered, that the said exceptions be, and the same are hereby allowed, with costs of the said exceptant to be taxed.

Respectfully advised,

JOHN T. BIRD, *V. C.*

From this decree an appeal has been taken on behalf of the said Robert C. Hutchinson:

NOTICE OF APPEAL FROM DECREE ALLOWING EXCEPTIONS TO MASTER'S REPORT.

Robert C. Hutchinson, one of the defendants in the above entitled cause, hereby appeals from the decree allowing exceptions to the Master's report heretofore filed therein, which said decree was made and dated on the twenty-seventh day of July, eighteen hundred and ninety-five, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, August 6th, 1895.

G. D. W. VROOM,

Solicitor and of Counsel with Appellant.

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

G. D. W. VROOM,

Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN ROBERT C. HUTCHINSON, *Appellant*, and SARA EXTON ET AL., *Appellees.*	On bill, &c. Petition of Appeal.

[Filed August 21st, 1895]

To the Honorable the Court of Errors and Appeals, in the last resort in all causes:

The petition of Robert C. Hutchinson, one of the defendants in the above stated cause and the appellant herein, respectfully

shows that the petitioner herein finds himself aggrieved by the decree allowing exceptions to the Master's report, made in the Court of Chancery by His Honor, Alexander T. McGill, Chancellor of the State of New Jersey, bearing date on the twenty-seventh day of July, eighteen hundred and ninety-five, in the cause wherein Sara Exton and another are complainants and this appellant, Robert C. Hutchinson, and others are defendants, in this respect, to wit: that the said decree adjudges that the said exceptions to said Master's report be, and the same were thereby, allowed with costs to the said exceptant to be taxed.

And your petitioner humbly appeals from the said decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous, for that the said decree should have adjudged and decreed that the said exceptions be over ruled and disallowed, with costs to this appellant to be taxed.

Your petitioner therefore prays that the said decree of the said Chancellor may, in the particulars aforesaid, be reversed, set aside and for nothing holden.

And that your petitioner may have such further relief in the premises as to this honorable court shall seem meet.

G. D. W. VROOM,
Solicitor and of Counsel with Appellant

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN ROBERT C. HUTCHINSON,	*Appellant,*	On Bill, &c. Answer to Petition of Appeal.
AND		
SARA EXTON ET AL.,	*Appellees.*	

(Filed August 30, 1895.)

The answer of the respondent, Allan McDermott, guardian *ad litem* for Ida E. Hutchinson, to the petition of appeal of Robert C. Hutchinson, complainant:

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the twenty-seventh day of July, eighteen hundred and ninety-

five, made and entered in the Court of Chancery of New Jersey, in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

BARTON B. HUTCHINSON,
Solicitor and of Counsel with Respondent.

Like answers to petition of appeal by the other respondents.

Opinion.

EXTON *vs.* HUTCHINSON.

In case of a gift by a testator of all his real and personal estate to an executor and trustee with power to convert the personal estate into money, and if there be any surplus after making certain appropriations of the interest and income, to pay and divide the balance of such income amongst the testator's children at the discretion of the trustee, and in case any child should die leaving children, such children collectively to take the parent's share; and with a like power to sell and convey any of the real estate, and at the death of the executor and trustee directing the whole estate, real and personal, to be equally divided amongst his six children, and in case of the death of any child leaving children, such children to take collectively the parent's share; upon the death of the trustee, one child having died after the death of the testator and in the lifetime of the trustee, leaving a husband and one child her surviving, such child being the person indicated as donee at the period of distribution, takes the whole estate, real and personal, by way of substitution, under the will of the testator, and the husband takes nothing as administrator of his deceased wife, or as her next of kin; nor is he entitled to any interest as tenant by the curtesy, since the wife died during the continuance of the particular estate, never having been seized of the remainder in fee; upon the death of the trustee and tenant for life, the child of the deceased wife became entitled, not as heir to her mother, but as devisee under the will of her grandfather.

Mr. JAMES BUCHANAN, for the complainant.
Mr. B. B. HUTCHINSON, for exceptant.
Mr. G. D. W. VROOM, *contra.*
Mr. WM. M. LANNING, for other defendants.

On bill for partition and accounting.

BIRD, V. C. The questions presented arise on exceptions to Master's report, made in pursuance of an order upon a bill filed to ascertain and settle the rights and interests of legatees and devisees under the last will of Adam Exton, deceased, who at the time of his death was possessed of a large amount of real and personal estate. By the sixth clause of his will he gave to his wife all his interests in his real and personal estate, which he was entitled to in a certain copartnership and all other his real and personal estate, in trust, securing to his wife an income of $3,000, and enough to preserve the estate in proper condition, and to divide the balance of the income between his children, with power to withhold any share and to pay the same according to her judgment, with power to sell or mortgage any of the real estate, or to sell any of his personal estate, excepting only certain stock. "The proceeds of such sales might be by her reinvested in any good and sufficient form, or she might be at liberty to divide the said proceeds, or any portion thereof, among my said children, share and share alike, the issue of any deceased child taking collectively the share of such parent." The seventh and controlling clause is as follows: "Whatever of said property may remain at the death of my said wife of real or personal, or of principal or of interest, or of both undistributed or unsold by her, shall be divided between my said six daughters, share and share alike, the issue of any deceased child taking collectively the share of the parent." Adam Exton, the testator, died on the seventeenth day of August, 1887, leaving six children him surviving. Eleanor Hutchinson, one of said children, died on the sixth day of October, 1888, leaving her husband and one child, Ida, her surviving. Elizabeth, the widow, died on the twenty second day of March, 1894. The Master reports that the five surviving daughters are each entitled to the equal undivided one sixth part of the whole of said estate, and that Robert C. Hutchinson, administrator of Eleanor E. Hutchinson, is entitled to one

equal undivided sixth part of said personal property, and said Ida E. Hutchinson is seized in fee of one equal undivided sixth of the said real estate, subject to the said right of courtesy of the said Robert C. Hutchinson therein. The said defendant Robert C. Hutchinson is entitled to his courtesy in the said equal undivided sixth part of said real estate, of which the said Ida E. Hutchinson is seized as aforesaid."

The said Robert Hutchinson, who is administrator of the said Eleanor, was her husband.

I think that Robert C. Hutchinson is not entitled to any of the personal estate as administrator or otherwise, nor to any interest in the real estate as tenant by the curtesy.

First, as to the personal estate. The title to this is given absolutely to the widow as trustee during her lifetime, except only so much of the income as may be in excess of $3,000, which excess she may distribute amongst the six daughters of the testator, or in case of the death of any daughter leaving children, such children collectively take the parent's share. Nothing whatever of the principal of this personal estate is in any manner given to the children of the testator during the lifetime of his widow, who is trustee. Therefore, at the death of Mrs. Hutchinson she had no right or title whatsoever in any of the principal of her father's personal estate. No part of this could her husband, either as next of kin or as administrator, possibly lay claim to before the death of the widow, who held the title by express directions.

At the death of the trustee came also the period of the distribution of the estate according to law. Each child then living was entitled to an equal share of the personal estate, and in case of the death of any, leaving children, such children were entitled collectively to the share the parent would have taken if living. Here, then, at the period of distribution, express provision is made for the persons who are to take. In case of the death of any child, leaving children, such children are substituted in the place of the parent. I think this case is clearly governed by that of *Crane* vs. *Bolles, 4 Dick. 373; Dawson* vs. *Schaffer, 30 Atl. R. 91*, affirmed at the last term of the Court of Errors. *Wood* vs. *Bullard, 25 N. E. R. 67*. This being so, the exceptions to the Master's report should be sustained.

The qualifications or conditions of the wife's interest in lands necessary to give rise to a tenancy by the courtesy are not presented in this case. *Bouvier L. D., p. 478*, says: "An estate by the courtesy is an estate for life, created by act of law, which is defined as follows: When a man marries a woman, seized at any time during the coverture of an estate of inheritance, in severalty, in coparcenary or in common, and has issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the lands during his life by the courtesy of England." *4 Kent Com. 27.* The second condition in this definition is that of seisin. The wife must be seized of an estate of inheritance. According to the English rule it must be a seisin in deed.

I understand the rule in this country to be that the husband is entitled to his courtesy in lands in which the wife at any time had the right of immediate possession as in case the wife is entitled to a remainder in fee, and the tenant for life should die on the first day of the month, the wife, though dying immediately thereafter, her seisin would be such as to enable the surviving husband to claim courtesy, either a co tenant or lessee being in actual possession. Kent says that the law vests the estate in the husband immediately upon the death of the wife without entry. *4 Kent Com. star p. 29; 1 Wash. R. P. (4th Ed.) 174.* In this case the title to the real estate as well as to the personal was absolutely vested in the trustee during her life. It is very clear that no title whatsoever vested in any of the children of the testator during the lifetime of the trustee. The trustee not only had the power of selling and giving title, but the title itself. It is true it may be said that each child had a contingent interest dependent wholly upon surviving the tenant for life in case the tenant for life did not under the power to sell execute such power. Hence the enjoyment of seisin of the fee was dependent upon the children surviving the tenant for life and also upon the failure of the tenant for life executing the power to sell committed to her.

This condition of survivorship necessary to the seisin of the fee contemplated by the law did not arise in the case of Mrs. Hutchinson, she having died previous to the death of the tenant for life. No estate of inheritance having come to her she never

was seized of any right of possession of any estate whatsoever, either legal or equitable. Consequently she comes not within any definition providing for the right of tenancy by the courtesy. *2 Blac. Com. 126, 127; Co. Litt. 29 b; 8 Co. 34.* In the Johnson edition of *Bacon's Abridgment, 1868, Vol. 2, p. 13,* the principle is thus plainly expressed: "The estate and seisin of the wife ought to begin some time during the coverture so the words of the law import." It was expressly decided in *Somner* vs *Partridge, 2 Atk. 47,* that "Tenancy by the courtesy must come out of the inheritance and not out of the freehold. A tenancy by the courtesy is a continuance of the inheritance in the husband. There can be no tenancy by the courtesy where the children take by virtue of a remainder over and not by descent from their mother. To entitle the husband to be tenant by the courtesy the inheritance must descend upon the children." In *Barker* vs *Barker, 2 Simons 250,* it was decided "a devise to A and her heirs; but if she died leaving issue, then to such issue and their heirs. A died leaving issue. *Held,* that her husband was not entitled to be tenant by the courtesy." In *Stead* vs. *Platt, 18 Beav. 50,* it was decided that "There is no estate by the courtesy issuing out of an estate *Pur autre vie.* The seisin of the wife must be an actual seisin or possession of the lands; not a bare right to possession, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the courtesy of a remainder or reversion."

2 Blac. Com. 127; Gibbon vs. *Eyden, 7 L. R. Eq. 371; 38 L. J. Ch 377.*

In considering this question in the case of *Hearle* vs. *Greenback, 3 Atk 695, 716,* Lord Chancellor Hardwick said: "But considering what is necessary to make a tenant by the courtesy; the wife must have the inheritance, and there must be likewise a seisin in deed in the wife during coverture." As to this seisin in *deed,* referred to in the English law, I should think it should be observed that the rule laid down by Chancellor Kent as above quoted is to be regarded as controlling in this country. *Kent, Vol.* 4, of his *Com. 29,* says: "The wife, according to the English law, must have been seized in fact and in deed, and not merely of a seisin in law of an estate of inheritance, to entitle the husband to his courtesy. The possession of the lessee for

years is the possession of the wife as reversioner; but if there be an outstanding estate for life, the husband cannot be tenant by the courtesy of the wife's estate in reversion or remainder, unless the particular estate be ended during the coverture. This is still the general rule at law, though in equity the letter of it has been relaxed by a free and liberal construction. The circumstances of this country have justly required some qualifications of the strict letter of the rule relative to a seisin in fact by the wife; and if she be owner of waste, uncultivated land, not held adversely, she is deemed seized in fact so as to entitle her husband to his right of courtesy." *1 Wash. Real. Prop. (4 Ed.) 162, 165, 173.*

This view sustains the further exceptions. I will advise accordingly, with costs.

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

Between
ROBERT C. HUTCHINSON,
Appellant,
and
SARA EXTON ET AL.,
Appellees.
} On Appeal, &c.

Brief for Appellant.

The appeal in this cause is from a decree advised by Vice-Chancellor Bird, sustaining the exceptions filed to a report made by S. M. Dickinson, one of the Masters in Chancery of this State, in a case pending in the Court of Chancery of this State upon bill filed for the partition of the estate of Adam Exton, deceased.

Adam Exton died August 17th, 1877, leaving a last will and testament, which was duly admitted to probate by the Surrogate of the county of Mercer, and is to be found at length on pages 3 and 4 of the Printed Case.

The consideration of the exceptions involves the construction of the sixth and seventh paragraphs of said will. These paragraphs are as follows:

"Sixth. I give and bequeath unto my well beloved wife, Elizabeth Exton, all my right, title, interest and property as partner in the firm of Adam Exton and Company, and all the remainder and residue of my personal and real estate, of whatever kind or wheresoever situate, such bequest and devise being in trust, nevertheless, for the following uses and purposes:"

Here follow the uses and purposes which may be abbreviated as follows:

1. To reserve an income of $3,000.00 to his wife.
2. To retain for repairs and unforeseen expenses.
3. To divide the remainder of the annual income between his children, share and share alike.
4. To sell or mortgage, if best for the interest of herself and children; the proceeds of sale to be re-invested or divided among the children.
5. Relieving the trustee from liability to account to executors.

"Seventh. Whatever of said property might remain at the death of my said wife, real or personal, or of principal or of interest, or of both, undistributed or unsold by her, shall be divided between my said six daughters, share and share alike, the issue of any deceased child taking collectively the share of the parent."

Eleanor E. Hutchinson was one of the six daughters of the said Adam Exton, deceased, and the wife of Robert C. Hutchinson, the appellant. She died during the lifetime of Elizabeth Exton, her mother, and on the sixth day of October, eighteen hundred and eighty-eight, leaving her said husband her surviving, and one daughter, Ida E. Hutchinson.

Elizabeth Exton, the widow, died March 22d, 1894.

The Master reported *inter alia*, that "the said Robert C. Hutchinson, administrator of Eleanor E. Hutchinson, is entitled to one equal undivided sixth part of said personal property and said Ida E. Hutchinson is seized in fee of one equal undivided sixth part of said real estate, subject to the right of curtesy of the said Robert C. Hutchinson therein;" and

"The said Robert C. Hutchinson is entitled to his curtesy in the said equal undivided sixth part of said real

estate of which the said Ida E. Hutchinson is seized as aforesaid."

It was to this part of the report in favor of the vesting that exceptions were filed by the guardian *ad litem* of Ida E. Hutchinson, the daughter of Eleanor E. Hutchinson, deceased.

The question underlying the entire controversy is, whether the share of the said Eleanor E. Hutchinson, one of the six daughters of the said Adam Exton, deceased, vested on the death of her father, Adam Exton. The Master's report was based upon the finding that such share vested in her upon the death of her said father, and that hence the appellant is entitled as her administrator to the equal undivided sixth part of said personal property, and that as her husband he is entitled to his curtesy in the equal undivided sixth part of the real estate of the said Adam Exton, deceased.

The Vice Chancellor held that the appellant is not entitled to any of the personal estate, as administrator or otherwise, nor to any interest in the real estate as tenant by the curtesy.

In his opinion, speaking first of the personal estate, he says, that the title to the personal estate is given absolutely to the widow as trustee during her life, except only to so much of the income as may be in excess of $3,000.00, which she may distribute (the will says, "shall divide") amongst the six daughters, and that nothing whatever of the principal of the personal estate is in any manner given to the children of the testator during the lifetime of the widow; and that if the period of the distribution of the estate came at the death of the trustee each child then living was entitled to an equal share of the personal estate, and in case of the death of any, leaving children, such children are substituted for the parent.

The only cases cited for these contentions by the learned Vice-Chancellor, and by which he claims this case is governed, were *Crane* v. *Bolles, 4 Dick. 373,* and *Dawson* v. *Schaefer, 30 Atl. Rep. 91.* But we respectfully submit that neither of the cases, as we shall show, can be made to bear this interpretation.

As to the tenancy by the curtesy, the Vice-Chancellor holds that as the title to this real estate was vested absolutely in the trustees during life, and the enjoyment of seizin of the fee was dependent on the children surviving the tenant for life, and as Mrs. Hutchinson died previous to the tenant for life, she was seized of no right of possession of any estate whatsoever, legally or equitably, therefore the appellant cannot be entitled to be tenant by the curtesy.

I.

We submit that the conclusions of the Vice-Chancellor are erroneous, and that Eleanor E. Hutchinson, having survived her father, Adam Exton, deceased, the share devised to her by his will vested in her at his death.

It is a well-settled rule that the law favors the vesting of estates; the effect of which principle seems to be that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit.

2 Williams on Executors 514.

Or, as stated by Jarman, the law favors the vesting of estates, and it may be stated as a general rule, that when a testator creates a particular estate and then goes on to dispose of the ulterior interest expressly in an event which will determine the prior estate, the words descriptive of such an event occurring in the latter devise, will be construed as referring merely to the period of the determination of the possesssion or enjoyment under the prior gift and not as designed to postpone the vesting.

2 Jarman on Wills, 406, 407.
Thomas v. *Anderson, 6 C. E. Gr. 22.*
Beatty v. *Montgomery, 6 C. E. Gr. 324.*
Van Dyke v. *Vanderpool, 1 McCart. 198.*
Green v. *Howell, 2 Vr. 591.*

No question, we think, will be made to the further rule that where the bequest is in terms immediate, and the payment is alone postponed, the legacy is vested.

2 Williams on Execr. 516, and cases cited.
Herbert v. *Tuthill, Saxton 141.*

So when the postponement appears to be provided for the convenience of the estate.

Potts v. *Herbert, 12 C. E. Gr. 540.*

But in the case before us, it may be insisted that by the terms of the will there is no gift to the six daughters, but merely a direction to pay and divide the estate at a future time or on a given event, and the rule may be invoked that the vesting in such case will be postponed until after that time has arrived or that event has happened.

2 Williams on Execr. 526.

This is evidently the view intended to be taken by the Vice-Chancellor in his opinion, but we submit, that this rule is always controlled by particular circumstances and avails not where a contrary intention is to be collected from the will itself.

2 Williams on Execr. 526.

The cases favoring the postponement of such vesting until after a certain time has arrived, follow the doctrine of the well-known case of *Leake* v. *Robinson, 2 Meriv. 363.* But it is submitted that this case cannot be controlled by it.

Two exceptions are given to the above rule by Mr. Williams, and may be accepted as established. They are—

1. Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit; in such case the legacy is held to be vested.

We insist that this case clearly comes within this exception. True, the entire income was not to be paid to the *cestuis que trust*, but only all in excess of $3,000.00; yet the provisions of the will are mandatory, "she (the trustee) *shall divide* the remainder of the annual income thereof between my said children share and share alike," and not discretionary, as erroneously stated by the Vice-Chancellor in his opinion.

The legacy vests where the income is given meanwhile.

Dupre v. *Thompson, 8 Barb. 537;*
Warner v. *Durant, 76 N. Y. 133.*

In *Fonereau* v. *Fonereau, 3 Atk. 645*, the bequest was of one thousand pounds to Claudius Fonereau, when he should attain the age of 25 years; testator empowered his executors and trustees to place the money at interest, which he directed to be applied at their discretion for the education of Claudius, as also part of the principal to put him apprentice, and the remainder to be paid to him when he attained the age of twenty-five years and not before; Claudius having died under that age, the question was whether his personal representative was entitled to the legacy: which depended upon this, whether he took the vested interest; Lord Hardwicke decided in the affirmative.

See, also, *Hoath* v. *Hoath, 2 Br. C. C. 4;*
Neilson v. *Bishop, 18 Stew. 473.*

A gift to trustees for the benefit of their *cestuis que trust*, is, in equity, equivalent to a direct gift to the *cestuis que trust.*

Cushing v. *Blake, 3 Stew. 689;*
Neilson v. *Bishop, Supra.*

We apprehend that the reservation of part of the income for the benefit of the trustee herself, she being the widow of the testator, will not affect the rule as to the effect of the gift to the *cestuis que trust*, especially as the intent of the testator is so plain, that the trust was created for the ultimate benefit of the children.

This is more clearly evinced by the paragraph in the will relating to the proceeds of sales of either real or personal property (Printed Case, p. 4, line 10), where the testator says, "the proceeds of such sales may be by her re-invested in any good and sufficient form, or she may be at liberty to divide the same proceeds, or any portion thereof among my said children, share and share alike," &c.; this provision rebuts most strongly the assertion of the Vice-Chancellor "that nothing of the principal of this personal estate is in any manner given to the children of the testator during the lifetime of his widow."

We have shown, then, that the remainder of the annual income of the estate, over and above the sum of $3,000, was directed to be paid to the *cestuis que trust*, and that they could have shared in the proceeds of sale of the said estate, prior to the period of distribution named in the seventh

paragraph of the will; and we insist, therefore, that these facts go to prove that the intent of the testator was against any postponement of the vesting.

But there is a second exception to the rule above stated, founded, as we have said, upon the doctrine of the case of *Leake* v. *Robinson, supra*, and it is: That where a person bequeathes a sum of money or other personal estate to one for life, and after his decease to another, the interest of the second legatee is vested.

2 Williams on Executors 533.

The interest of the remainderman is not, in such case, conditioned on his surviving the life-tenant, and may be disposed of by him or go to his representatives in case of his death before the termination of the particular estate.

2 Jarman on Wills 407.
Rhodes v. *Shaw, 16 Stew. 534.*
Beatty v. *Montgomery, 6 C. E. Gr. 324.*
Green v. *Howell, 1 Vr. 326.*
S. C. affirmed, 2 Vr. 571.

In the case of *Thomas' Executor* v. *Anderson, 6. C. E. Gr. 22*, the will of the testator provided as follows:

"I give unto my beloved wife, during her natural life, the yearly interest of $12,000.00, to be paid to her in half-yearly payments by my executors. At her death I give the said $12,000.00 to my and her daughter Abby." The daughter was twelve years old at her father's death, married Richard Anderson, and died in the lifetime of her mother, leaving children who are still living. The Chancellor held the gift to Abby a vested legacy, and directed the payment to her administrator.

"Again, the case of *Beatty* v. *Montgomery, supra.* Here a legacy to A for life, and upon A's death to B, C and D, is a vested legacy, and if B, C and D die in the lifetime of A, their legal representatives are entitled upon A's death to their respective portions. A provision in the will that in case of the death of either of the legatees in the lifetime of A, his share should go to the survivor or survivors, does not prevent the vesting."

To the same effect *Thornton* v. *Roberts, 3 Stew. 473.*

Adams v. *Woolman, 5 Dick. 516.*
Perrine v. *Newe'l, 4 Dick. 457.*

It is immaterial whether the testator uses words of remainder or whether the future gift is expressed in a direction to pay and distribute.

Smith v. *Palmer, 7 Hare 528.*

The case of *Monkhouse* v. *Holme, 1 Br. C. C. 298,* is important. The testator gave eight hundred and thirty pounds to trustees to pay to his wife the interest for life, and from and after her death he disposed of the sum of eight hundred pounds in manner following, &c. Then the testator, after several immediate devises and bequests, gave the legacy upon which the question arose: "I also give to Jonathan Monkhouse, son of my brother George, the sum of one hundred pounds" Jonathan, after surviving the testator, died before the widow; and the question was, Whether he took a vested interest in the legacy which would transmit it to his personal representatives? Lord Rosslyn decided in the affirmative, remarking that the eight hundred pounds was given to the trustees to pay the interest to the wife for life, and then in parts and shares. It showed that the testator intended to give vested interests to the several legatees.

The case before us is not a case of a remainder to "surviving children" after a life estate, so as to make it include only children living at the time of the death of the life tenant, and thus making the gift contingent. Nor can it be affected, we insist, or liable to be defeated, by the words "the issue of any deceased child taking collectively the share of the parent." That there are cases, it is conceded, holding that such a legacy may be regarded as vested, subject to being divested by the death of the child and the substituted issue taking a vested remainder, but the intent of the testator, as shown heretofore, in reference to the vesting, precludes this idea in this case.

In the case of *Gibbens* v. *Gibbens, 140 Mass. 102,* a testator gave by his will to his wife the use of his furniture, pictures and books and provided that "all such articles as are not consumed in use and shall remain in existence at my wife's marriage or decease, shall then go to my children."

The will also gave to his wife all his interest, real and personal, to hold during her widowhood, and further provided as follows: "At the decease of my wife, all my estate, real and personal, shall go to and be equally divided among my children, the issue of a deceased standing in the place of the parent." Held, that under the last clause, the children of the testator took vested interests.

See, also, *Lenz* v. *Prescott, 144 Mass. 505.*
2 Williams on Execr. 536, and cases cited.

We insist that both exceptions to the rule postponing the vesting, as stated hereinbefore, apply to the case under consideration, and that upon the application of either, the share of Mrs. Hutchinson must be considered as having vested in her at the death of her father. And further, that the intention of the testator, as drawn from his will, undoubtedly showed the design that the share of each of his six children should vest at his death.

The intention of the testator indeed is often said to be the polar star to the interpretation of his will.

O'Hara on the Const. of Wills 29.

And a will must be favorably and benignly expounded to pursue, if possible, the intention of the testator. *Touchst. 434.* To interpret this will as we have done, contrevenes no rule of law or rule for the construction of wills.

We have submitted, heretofore, that the cases of *Crane* v. *Bolles* and *Dawson* v. *Schaefer*, cited by the Vice-Chancellor in his opinion, cannot be construed as in any way controlling this case. In the case of *Crane* v. *Bolles, Supra*, under the construction placed upon the will of the testator by the Chancellor, the fee of the real estate went to the executors in trust until they should sell in the mode contemplated by the will. He held, that as to the children, the entire estate of the testator was to be considered as personalty; that the children have no control of the real estate and that it followed that their husbands and wives could not have dower or curtesy in the land. In that case the Chancellor held that the spirit of the whole direction of the will clearly exhibited the intention that his real estate should in all events be converted into money, and that, notwithstanding a discretion given to his children as to the time when the sale should

take place, that the real estate should be considered as converted into money from the testator's death. This conversion into personalty was to be by the trustees before distribution or division.

Again, there is no condition annexed to the gift here as in the case of *Dawson* v. *Schaefer*, or any intention on the part of the testator shown to defeat the vesting at his death.

In the case of *Dawson* v. *Schaefer* the provision was, that the real estate, although bequeathed and devised as a part of the residuary estate by the testator to his six children, should not be sold until the youngest living child should reach the age of 21 years; that pending that period the executor should manage the property for the benefit of the children, they being entitled to the net income in equal shares; and that upon the arrival of the youngest living child at the age of 21 years, then the children should have absolute control of said property, to do with and dispose of as seemed best to them. This clause was immediately followed by this sentence: "If any of my children shall die, leaving heir or heirs, then such heir or heirs shall receive the same proportion as the parent of such heir or heirs would have received," that is, the parents' undivided part. One of the sons, Matthew, died in 1890, leaving him surviving an infant son, Matthew, Jr. In 1892 the testator's youngest child became of age. Held, that Matthew, Jr., took the equal undivided sixth part of the real estate in the place of his father, Matthew; Matthew, Sr., having taken a vested interest subject to divestiture at his death, leaving a child, before the testator's youngest child became 21 years of age.

It is to be noted that in *Dawson* v. *Schaefer* the testator, while devising his estate to his six children in terms that would convey a fee at his death, expressly, as we have seen, subjected that disposition to the provision that the real estate should not be sold until the youngest living child reached the age of 21 years, and gave to his executors the *ad interim* control of the property. The testator then provided that when his youngest child reached the age of twenty-one years his children should have absolute control of his property; then he followed with the clause, "If any

of my children shall die leaving heir or heirs, then such heir or heirs shall receive the same proportion as the parent of such heir or heirs would have received."

This condition, the Chancellor held, in deciding that case, meant to relate to the time when the children were to have complete control of the estate and not to the death of a child before the time when the estate vested in the children, that is, at the death of the testator. In other words, the term "If any of my children shall die," &c., following the provision that the real estate should not be sold until his next living child should reach the age of twenty-one years, was held to be a condition subsequent, and Matthew Sr. took a vested estate subject, to being divested upon his failure to survive the time when his sister became of age.

We submit no construction of the will of Adam Exton, deceased, can lead to this result. The vesting is not qualified by any term or condition. The seventh section of the will merely provides that "Whatever of said property may remain at the death of my said wife * * * shall be divided between my six daughters," &c.; the testator fully appreciating that a great part of the estate might before that time, be divided among the children under the power contained in section six. We feel, therefore, justified in asserting that neither of the two cases before mentioned, and which were cited by the Vice-Chancellor, can be held to apply to the will under consideration in this case.

II.

If, then, it is held that this interest of Eleanor E. Hutchinson became vested in her at the death of her father, she was entitled to a remainder in fee in the one-sixth part of the real estate, and the appellant, as her husband, was entitled to his curtesy in the lands, as reported by the Master. There can be no question, we think, but that the estate of Mrs. Hutchinson was held by the trustee for her benefit, and that under the will of her father she was entitled, at his death, to her share in the rents, issues and profits of the estate, after the payment of the sum of $3,000 to the

widow. As was said in *Cushing* v. *Blake*, *3 Stew. 689*, in equity, equitable estates are considered as legal estates, and are subject to the same interests, properties and consequences as, under like circumstances, belong to similar estates in law; and that the husband is entitled to curtesy in his wife's equitable estate of inheritance. We submit that the decree below, sustaining the exceptions to the Master's report, should be reversed.

GARRET D. W. VROOM,
EDWIN ROBERT WALKER,
Of Counsel for the Appellant.

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

Between
ROBERT C. HUTCHINSON,
Appellant,
and
SARA EXTON ET AL.,
Respondents.
} On Bill, &c.

BRIEF OF BARTON B. HUTCHINSON, OF COUNSEL WITH ALLAN McDERMOTT, GUARDIAN AD LITEM FOR IDA E. HUTCHINSON, AN INFANT DEFENDANT.

In this case the complainants are four of the daughters of Adam Exton, deceased, and the defendants are Ann E. Brokaw, another daughter, and Robert C. Hutchinson (individually and as administrator, &c., of Eleanor Hutchinson, deceased, who was another daughter) and Ida E. Hutchinson, the sole issue of Eleanor E. Hutchinson, who is an infant. The Clerk of this Court has been appointed her guardian *ad litem* in this suit. Her father, Robert C. Hutchinson, who was the husband of Eleanor Hutchinson, is her general guardian.

The Master, Mr. Dickinson, to whom the cause was referred to report upon the respective rights and interests of

the parties to the suit, reported that Robert C. Hutchinson, as administrator of Eleanor Hutchinson, deceased, was entitled to an undivided one-sixth part of the personal property and to a right by curtesy in an undivided one-sixth part of the real estate of which the late Adam Exton died seized; and that the infant defendant, Ida E. Hutchinson, was entitled to an undivided one-sixth interest in the real estate, subject to the right by curtesy, of her father, Robert C. Hutchinson.

Exceptions were filed to this report on behalf of the infant defendant by her guardian, alleging that the report was erroneous, in so far as it attempted to settle the respective rights and interests of Robert C. Hutchinson, individually and as administrator, &c., and of the infant defendant, Ida E. Hutchinson, and it was averred substantially—

1. That the infant defendant was entitled to an undivided one-sixth share and interest in the real estate, free from any supposed right by curtesy of Robert C. Hutchinson, her father.

2. That the infant, and not the administrator, was entitled to the whole of an undivided one-sixth part of the personal property.

It was submitted for the infant defendant that the Master's report should not be confirmed, and Vice-Chancellor Bird, in an opinion which appears in the Printed Case at page 16, decided that all the exceptions to the Master's Report should be allowed, and a decree was entered accordingly.

Adam Exton, in his lifetime, was a large owner of real and personal property, and on the seventeenth day of December, 1881, made his last will and testament. He died August 17th, 1887, leaving surviving him his wife, Elizabeth Exton, and six children, Catharine J. Bamford, Elizabeth Owens, Mary E. Bainbridge and Sara Exton, the complainants, Ann E. Brokaw, one of the defendants, and Eleanor Hutchinson (wife of Robert C. Hutchinson and mother of Ida E. Hutchinson). All the children were of full age and married, except Sara Exton, who is still unmarried. All are now living except Eleanor Hutchinson, who died October 6th, 1888, leaving her husband,

Robert C. Hutchinson, and an only child, Ida E. Hutchinson. Robert C. Hutchinson afterwards took out letters of administration upon the estate of his deceased wife and was also appointed guardian of the person and property of Ida, by the Surrogate of the county of Mercer.

In and by his last will and testament, Adam Exton, after ordering the payment of his debts and funeral expenses, and making bequests of one thousand dollars to each of his daughters, and devises of specific tracts of real estate to each of them, provided as follows:

"Fourth. Should any of my said daughters not be living at the time of my decease, the issue of such deceased daughter shall collectively take the bequest and devise hereinabove given to such daughter."

Then, after bequeathing to his brother, John Exton, the sum of five thousand dollars, provides as follows:

"Sixth. I give and bequeath unto my beloved wife, Elizabeth Exton, all my right, title, interest and property as partner in the firm of Adam Exton and Company, and all the remainder and residue of my personal and real estate of whatever kind or wheresoever situated, such bequest and devise being in trust nevertheless for the following uses and purposes:

"I. First, to reserve enough to yield her, my said wife, an annual income of three thousand dollars, for her own sole and individual use.

"II. To retain for repairs and unforeseen expenses whatever sum may be necessary to pay and discharge the same.

"III. She shall divide the remainder of the annual income thereof between my said children, share and share alike, provided, however, that if at any time it shall be, in her judgment, for the best interest of any one of said children to withhold the share of such child in said income, she shall be at liberty to retain such share of said income in her hands, and to pay the same for the benefit of such child at such times and in such manner as shall seem to her best.

"IV. She may, from time to time, as shall seem in her judgment best for the interests of herself and our said children, sell, mortgage or otherwise dispose of any real estate hereinbefore devised to her, and good and sufficient deed or

deeds therefor to give, and may also, as in her judgment may seem best, sell or dispose of any lands, stocks or other personal property hereby bequeathed to her, except that she shall not sell or dispose of my Washington Market stock nor my Greenwood Cemetery stock."

The proceeds of such sales may be by her re-invested in any good and sufficient form or she may be at liberty to divide the same proceeds or any portion thereof among my said children, share and share alike, the issue of any deceased child taking collectively the share of such parent, retaining, however, enough property to yield her the said annual income of three thousand dollars.

V. She shall not be accountable to my hereinafter-named executors, or any of them, for her disposition of the income or proceeds of sale of said real and personal estate.

"Seventh. Whatever of said property may remain at the death of my said wife of real or personal, or of principal or of interest, or of both undistributed, or unsold by her, shall be divided between my said six daughters, share and share alike, the issue of any deceased child taking collectively the share of the parent.

"Eighth. The aforesaid legacy and bequest to my said wife, Elizabeth, is intended to be in lieu of her right of dower in my real estate, and if accepted by her, shall be in lieu of all claims by her of dower and all other interest in my estate.

"Ninth. I hereby appoint as executors of this, my last will and testament, my said wife, Elizabeth Exton, and my said brother, John Exton, and my said daughter, Catherine Jane Bamford."

In pursuance of the will, Elizabeth Exton, John Exton and Catherine Jane Bamford duly caused said will to be admitted to probate, and took upon themselves the execution thereof, and on the twenty-third day of April, 1889, filed their final account as executrices and executor in the Surrogate's office of Mercer county, which was duly allowed by the Orphans' Court of said county, showing a balance in their hands of one hundred and ninety-two thousand and ninety-four dollars and ninety-six cents as the residue of the

personal estate in their hands, which was delivered over to Elizabeth Exton, as trustee under said will.

Elizabeth Exton then took upon herself the execution of the trust reposed in her and continued to exercise the office of trustee until March 22, 1894, when she died.

During her lifetime she had converted some portion of the real estate into personalty, under the will.

The questions of law arising in this case involve the construction of Adam Exton's will, with relation to both the real and personal property. It is, therefore, necessary for us to inquire what was the intention of the testator as it may be gathered from the language of his will.

That this intention, whatever it may be, must be carried out, if discoverable, goes without saying.

There are several points to be grouped together at the outset:

1. That the testator made specific bequests and devises of real estate to each of his daughters.

2. That he provided in the fourth paragraph, that if any of his daughters should not be living at his decease, the issue of the deceased daughter or daughters should take the specific bequest and devise.

3. That he expressly and directly bequeathed and devised all his property after payment of debts and specific bequests and devises, to Elizabeth Exton, upon certain trusts.

A—To retain an income of $3,000 per annum for herself.

B—To retain sufficient for repairs and unforeseen expenses.

C—To divide the remainder of the annual income between the testator's children, share and share alike.

D—To sell, mortgage or otherwise dispose of real estate and personal property.

4. That the trustee was given power to divide the proceeds of any sale or portion thereof among testator's children, share and share alike, *the issue of any deceased child taking collectively the share of such parent.*

5. That whatever of testator's property should remain at the death of the *trustee*, of real or personal or of principal or of interest, or of both, undistributed or unsold by the trustee, should be distributed between the testator's daughters, share and share alike, *the issue of any deceased child taking collectively the share of the parent.*

We insist that from a general view of the testator's will it must appear to have been his intention that if any child was deceased at any of the periods of distribution, either of income or of proceeds of sale or of the corpus of real or personal property, the issue of that child should take.

Even the specific bequests and devises to his children must be an evidence of this. In those he makes a like provision for the issue. When it comes to a distribution of the proceeds of sale he makes the same provision; and finally, when the time comes, after the death of the wife, for a distribution of the corpus, we find the same provision.

There are practically three points or periods of division contemplated in the will viz.: one of the specific devises and bequests; one of the proceeds of sales, and one of the corpus; and with relation to each the testator uses precisely the same language as to the issue taking the share of the parent.

"A testator's intention is * * * to be collected from the whole will taken together, and not from detached portions alone. For as it is figuratively said, the meaning must be gathered *ex visceribis testamenti*, or to use another familiar expression, from the four corners of the instrument."

Schouler on Wills, p. 468 and cases cited.

We say that a general view of the whole will, taken together, shows a manifest intention on the part of the testator to provide beyond all peradventure for a succession to his property among those who were related and endeared to him by blood, *e. g.* his grandchildren.

But it may be said on the other side, and with force too, that there is another rule of law to the effect that if there are two intentions on the face of a will, one of which is general and consistent with the rules of law, and another special and inconsistent with the rules of law, the latter yields to the former. Even if this be true, yet we say that the general intention which we have before mentioned is consistent with the rules of law. In other words, that the intention to provide for the succession which we have referred to is entirely consistent with the idea that the testator intended to put the immediate and entire fee to his estates in his wife as his trustee. There is nothing whatever in the will that tends to devise or bequeath any immediate interest

in the estate to either the children or grandchildren of the decedent.

In *Post* v. *Herbert's Executor*, *12 C. E. Gr. 540*, *543*, the Chief Justice in his opinion said: "The rule (first stated) that where a legacy is given to a person when a future event happens, the legacy will be contingent until the occurrence of such event, is like all other similar rules applicable to wills, *a mere judicial exposition of the natural meaning of a certain form of expression.* It is not an artificial contrivance, which, when present, is to have a supreme effect, but is a rule simply because the *phrases in question*, considered intrinsically, and without qualification *ab extra*, import a definite testamentary purpose. The phraseology has received its accepted interpretation because it is supposed that such interpretation will carry out the view of the testator. The consequence is, the rule is always subject to be modifiied or *abrogated* by the conditions of the case to which it is applied, and thus a number of admitted exceptions to it have supervened."

In this case the Court held merely that it came within one of the exceptions, which exception cannot possibly apply to the case now in hand. In *Post* v. *Herbert*, there was no language of succession in the will at all. In the Exton will such language is not only used but reiterated.

In the case of *Rhodes* v. *Shaw*, *16 Stew. 430*, *432*, the Court (opinion by V. C. Bird) says: "From the authorities I therefore conclude that where the devise of the intermediate estate is to a life-tenant, or for any other uncertain period, for the benefit of such life-tenant, and for those who take the remainder, with a gift of the whole estate in remainder, the fee vests immediately upon the death of the testator.

In the Exton case there was no such life-estate for the benefit of a life-tenant, or for the benefit of the remainderman, and there was no gift expressly in remainder; hence there was no vested interest in the children of the testator upon his death. Besides, there was no language in the will in question, in *Rhodes* v. *Shaw*, relating to the succession to the child.

The case of *Adams* v. *Woolman*, *5 Dick. 516, 520,* is one which was declared by the Court to be within the same exception as the case of *Post* v. *Herbert, 12 C. E. Gr. 540,* namely, the exception stated by Vice-Chancellor Wigram in *Peckham* v. *Gregory, 4 Hare 398.* This exception has no application to the case in hand. All the three cases last cited are aside from the Exton case, because they all lack one element of the Exton case, viz., the provision for succession, which displays the intention of the testator unmistakably.

But the next question that arrises is, whether or not the language used by Adam Exton in his will regarding the succession means that the child must survive the distributional period.

The case of *Crane* v. *Bolles, 4 Dick. 373,* is a strong case, decided by Chancellor McGill, on the subject.

In this case the learned Chancellor says: "It is observed, upon reading the will, that the testator does not expressly make permanent disposition of his real estate. He does not expressly devise the fee. His will, however, bears upon its face such evidence of thought and deliberation that, upon reading it, the mind is constrained to conclude that intestacy as to any interest in the estate was not thought of."

This is so in the Exton will.

The Chancellor further says:

"Here is a gift over to the issue if the parent shall die. The disposition of the courts is to so construe such a gift that it will interfere as little as possible with the prior gift to the parent, consquently the contingent event—death—is not held to mean death at any time, but death before a particular period, *e. g.*, the period of distribution. Hence, it is the rule that where there is a bequest to one person, and, in case of his death, to another, the gift over is construed to take effect only in event of the death of the prior legatee before the period of payment or distribution, *unless* a contrary intention appears by the will. *Hawk Wills, 254; 2 Roper Leg., 607; 2 Wms. Exrs., 1260; 3 Jarman Wills (R. & T. Ed.), 606; Burdge* v. *Walling, 18 Stew. Eq. 10, 12,* where the New Jersey cases are collected."

The Exton will is exactly in point with this case, and the learned Chancellor resumes:

"The will speaks from the death of the testator, and the paragraph considered refers to death thereafter. There is absolutely nothing to warrant the contention that the death referred to is that which shall happen before the decease of the testator, and that the particular period which shall determine the contingency created is the time when the testator shall die. On the contrary the paragraph expressly refers to the receipt of the parent's share and portion, and therefore emphatically makes the time of disposition the particular period in view."

"The issue will take by *substitution* for the parent, and not a substantive or original gift, because they spring from the parent who would have taken if he or she had survived the period of distribution."

Acker v. *Osborn, 18 Stew. Eq. 377; S. C. on Appeal, 1 Dick. 607.*

It may be urged that in *Crane* v. *Bolles* there was a conversion according to the manifest intention of the testator in that case, but be that as it may, I cannot see how that can affect the proper interpretation of Adam Exton's will according to its words and context, and the circumstances of the case.

"Where a testator directs acts to be done by the executor which belong to the owner of the freehold, and which require a complete dominion over the real estate, a devise to him in fee will be implied."

Crane v. *Bolles, 4 Dick. 373, 381,* citing *1 Lew. Trusts (8th Ed.) 212, 213; Zabriskie* v. *Morris & Essex R. R. Co., 6 Stew. Eq. 22; S. C. on Appeal 7 Stew. Eq. 282; Lindley* v. *O'Reilly, 21 Vroom, 636; Traphagen* v. *Levy, 18 Stew. Eq. 448; Perry on Trusts, 315.*

What more complete dominion could any trustee have than Elizabeth Exton had under her husband's will?

See will of Adam Exton, Printed Case, page 2.

"If land," said Lord Hardwicke, "be devised to a man without the word heirs, and a trust be declared which can be satisfied in no other way but by the trustees taking an inheritance, it has been construed that a fee passes." *1 Lewin on Trusts, 213,* and cases cited.

It may be inquired however, whether this legal estate is to be held to extend further than may be required for the full execution of the trust, *i. e.* whether the trustee took the legal estate in the whole property or only in such portions as she actually sold and exercised control over.

It is held in *Traphagen* v. *Levy*, *18 Stew. 453*, that the legal title to the whole estate passes.

There can be no question that the legal estate in fee passed to Mrs. Exton, the trustee. That this was the deliberate intention is manifest from the fact that he gave her the estate by the unmistakable language for conveyance of the absolute fee; that he gave her absolute dominion over the property without any liability to account; and that he used no formal words of conveyance of a fee to his children or grandchildren.

But there can be no curtesy here, because one of the essential elements and requisites for the creation of a tenancy by the curtesy is lacking, viz., *possession* in the wife.

"A husband is entitled to curtesy in equitable estates of inheritance of the wife *in possession*. *4 Am. & Eng. Enc. of Law* (*"Curtesy"*), *p. 965*, and cases cited.

The case of *Cushing* v. *Blake*, *3 Stew. 689*, I do not consider to affect our position.

The syllabus of this case says:

"The husband's curtesy is one of the legal incidents of the wife's estate of inheritance, and she will not be excluded from rights in property springing from the marital relation, except by words that leave no doubt of the intention."

Is there any doubt of Adam Exton's intention to exclude every one save his children and their issue from participation in his estate?

"In some cases and for certain purposes, a court of equity, where the trust is what is known as an executory trust, will so deal with it as to give effect to the general intent of the creator of it, without adherence to the strict legal effect of the terms in which it is expressed." *Cushing* v. *Blake*, *3 Stew. 689*.

The opinion of the learned Vice-Chancellor Bird in the case in hand, rendered in the court below, is very exhaustive and succinct, and the numerous authorities collated therein

are so distinctly applicable that they cannot fail to convince the court of last resort that the decree appealed from should be affirmed.

We therefore most respectfully insist, in conclusion:

1. That Adam Exton intended that his estate, real and personal, should go to his children and their issue only;

2. That he gave the legal estate to his trustee with full dominion over it, and reposed in her absolute discretion as to the disposition of its avails;

3. That this precludes the idea of any estate in the *cestuis que trust* themselves;

4. That he intended *substitution* of grandchildren for children, if the children should not survive the several periods of distribution;

5. That the children did not take any such estate *in possession*, either legal or equitable, as would be sufficient to support a tenancy by curtesy. There never was any kind of possession or seizin in them. The terms of the will preclude the idea that Eleanor Hutchinson ever had any possession; and

6. That the defendant, Ida E. Hutchinson, is entitled to the share of her mother, absolutely, in the real and personal property, and hence the decree of the Court of Chancery should be affirmed with costs.

Respectfully submitted,

BARTON B. HUTCHINSON,

Of Counsel with Allan McDermott, Guardian ad litem for Ida E. Hutchinson.