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NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *Complainants*, and ELIZA GUERIN, *et als.*, *Defendants*.	ON APPEAL. NOTICE OF APPEAL.

Take Notice, that the defendants, Hannah Ebert, James Blair Cuthbert, Edgar G. Cuthbert, Broadway Trust Company, T. Percival Cuthbert, Louisa G. Hopkins and Marguerite Ray Nickerson (formerly Marguerite Ray Cuthbert) hereby appeal from so much of the final decree entered in the above cause as:

(1) Decrees the validity of certain life estates under the will of Joseph Ogden Cuthbert, deceased, to wit, those of James Blair Cuthbert, Elizabeth G. Bowden, T. Percival Cuthbert, Hannah Ebert, Louisa G. Hopkins, Edgar C. Cuthbert, Elizabeth C. Gillespie, George C. Gillespie, Anna G. Boyd, and the children of Mary Rue living at the time of her death; and directs a payment of income to the said life tenants; and fails to direct a division among the persons entitled to take under the Intestate Laws of

this state of a certain portion of the corpus of the whole of said estate, to wit, two-thirds of the said estate.

(2) Directs, with regard to the one-fifth part of the corpus of said estate, the income on which was originally payable to Allen Cuthbert, that a one-fourth part thereof shall remain in the hands of the trustees as part of the estate of which said Joseph Ogden Cuthbert died intestate, and shall accumulate with its accretions until said estate is distributable; and fails to direct either a payment of the income accruing upon the said one-fourth of one-fifth of the whole estate, or a distribution of the same as principal, among those entitled to take under the Intestate Laws of this state.

(3) Directs, with regard to the one-fifth part of the corpus of said estate, the income on which was originally payable to Joseph O. Cuthbert, Jr., that two-thirds of said one-fifth of the estate shall presently, and the one-third of the said one-fifth on which income was payable to Eliza Guerin during her natural life, shall after her decease, remain in the hands of said trustees as part of the estate of which said Joseph Ogden Cuthbert died intestate, and shall accumulate with its accretions until said estate is distributable; and fails to direct either a payment of income accruing upon said two-thirds of one-fifth of the whole estate, and the one-third of one-fifth after the decease of Eliza Guerin, or a distribution of the same as principal among those entitled to take under the Intestate Laws of this state.

(4) Fails to direct a payment to the equitable owners of the remainder of the said estate of all in-

come accruing upon such portion or portions of the whole estate as have ceased or shall cease to support any valid estate created or attempted to be created by the will of Joseph Ogden Cuthbert, deceased.

(5) Denies the prayer of the cross-bill or counter-claim of the defendants, James Blair Cuthbert, Edgar G. Cuthbert, and Broadway Trust Company.

And the defendants appeal from so much of the said final decree as is set forth above unto the Court of Errors and Appeals in the last resort in all causes.

HARVEY F. CARR,
LOUIS B. LEDUC,
Solicitors for Defendants-Appellants.

Dated the 18th day of January, 1918.

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

LOUIS B. LEDUC,
Of Counsel with Defendants-Appellants.

AMENDMENT OF NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *Complainants,* and ELIZA GUERIN, *et als.*, *Defendants.*	ON APPEAL. AMENDMENT OF NOTICE OF APPEAL.

The defendants, Hannah Ebert, James Blair Cuthbert, Edgar G. Cuthbert, Broadway Trust Company, T. Percival Cuthbert, Louisa G. Hopkins and Marguerite Ray Nickerson (formerly Marguerite Ray Cuthbert), hereby amend the notice of appeal filed by them in the above-entitled cause by adding thereto as appellants, the names of Anna G. Boyd, and Fidelity Trust Co., Guardian of Elizabeth C. Gillespie, defendants in this cause.

HARVEY F. CARR,
LOUIS B. LEDUC,
Solicitors of Defendants.

Dated, January 30, 1918.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c.,
Complainant-Respondent,

and

ELIZA GUERIN, *et als.*,
Defendants-Appellants.

ON APPEAL.
PETITION OF APPEAL.

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

The petition of Hannah Ebert, James Blair Cuthbert, Edgar G. Cuthbert, Broadway Trust Company, T. Percival Cuthbert, Louisa G. Hopkins and Marguerite Ray Nickerson (formerly Marguerite Ray Cuthbert), Anna G. Boyd and Fidelity Trust Co., Guardian of Elizabeth C. Gillespie, defendants and appellants in the above-stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 24th day of January, 1917, in a cause wherein the said Hannah Ebert, James Blair Cuthbert, Edgar G. Cuth-

bert, Broadway Trust Company, T. Percival Cuthbert, Louisa G. Hopkins and Marguerite Ray Nickerson (formerly Marguerite Ray Cuthbert), were defendants and Camden Safe Deposit and Trust Company was complainant, in this respect, to wit:

(a) That said decree orders and decrees the validity of certain life estates under the will of Joseph Ogden Cuthbert, deceased, to wit: those of James Blair Cuthbert, Elizabeth G. Bowden, T. Percival Cuthbert, Hannah Ebert, Louisa G. Hopkins, Edgar G. Cuthbert, Elizabeth C. Gillespie, George C. Gillespie, Anna G. Boyd, and the children of Mary Rue living at the time of her death; and directs a payment of income to the said life tenants; and fails to direct a division among the persons entitled to take under the Intestate Laws of this state of a certain portion of the corpus of the whole of said estate, to wit, two-thirds of the said estate.

(b) That said decree orders and directs, with regard to the one-fifth part of the corpus of said estate, the income on which was originally payable to Allen Cuthbert, that a one-fourth part thereof shall remain in the hands of the trustees as part of the estate of which said Joseph Ogden Cuthbert died intestate, and shall accumulate with its accretions until said estate is distributable; and fails to direct either a payment of the income accruing upon the said one-fourth of one-fifth of the whole estate, or a distribution of the same as principal, among those entitled to take under the Intestate Laws of this state.

(c) That the said decree orders and directs, with regard to the one-fifth part of the corpus of said estate, the income on which was originally payable to

Joseph Ogden Cuthbert, Jr., that two-thirds of said one-fifth of the estate shall presently, and the one-third of the said one-fifth on which income was payable to Eliza Guerin during her natural life, shall after her decease, remain in the hands of said trustees as part of the estate of which said Joseph Ogden Cuthbert died intestate, and shall accumulate with its accretions until said estate is distributable; and fails to direct either a payment of income accruing upon said two-thirds of one-fifth of the whole estate, and the one-third of one-fifth after the decease of Eliza Guerin, or a distribution of the same as principal, among those entitled to take under the Intestate Laws of this state.

(d) That the said decree fails to direct a payment to the equitable owners of the remainder of the said estate of all income accruing upon such portion or portions of the whole estate as have ceased or shall cease to support any valid estate created or attempted to be created by the will of Joseph Ogden Cuthbert, deceased.

(e) That the said decree denies the prayer of the cross-bill or counter-claim of the defendants, James Blair Cuthbert, Edgar G. Cuthbert and Broadway Trust Company.

And your petitioners appeal from the said decree for the following reasons:

(a) Because the life estates mentioned in paragraph A above have merged in the estate in fee of the said life tenants.

(b-1) Because, the one-fourth of the one-fifth part

of the corpus of said estate mentioned in paragraph B above, is intestate property and it is inequitable and unlawful for the trustees to retain and withhold the said corpus from distribution among those entitled to the same under the intestacy laws of this state.

(b-2) Because, the one-fourth of the one-fifth part of the corpus of said estate mentioned in paragraph B above, is intestate property and it is inequitable and unlawful for the trustees to retain and withhold the income accruing upon the said corpus from distribution among those entitled to take under the intestacy laws of this state.

(c-1) Because the two-thirds of one-fifth of the corpus of said estate mentioned in paragraph C above, is intestate property and it is inequitable and unlawful for the trustees to retain and withhold the said corpus from distribution among those entitled to the same under the intestacy laws of this state.

(c-2) Because the two-thirds of one-fifth of the corpus of said estate mentioned in paragraph C above is intestate property and it is inequitable and unlawful for the trustees to retain and withhold the income accruing upon the said corpus from distribution among those entitled to take under the intestacy laws of this state.

(d) Because, on the termination of life estates presently existing under the will of Joseph Ogden Cuthbert, it is inequitable and unlawful that such portions of the corpus as supported the income paid to such life tenants shall be retained and withheld by the trustees from distribution—either as to principal

or income—among those entitled to take under the intestacy laws of this state.

Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

HARVEY F. CARR,
LOUIS B. LEDUC,
Solicitors for and of Counsel with Defendants-Appellants.

ANSWER.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *et als.*, *Complainants-Respondents*,

and

ELIZA GUERIN, *et als.*, *Defendants-Appellants.*

ANSWER.

The answer of the above-named respondents, T. Sherman Borden and Rebecca Borden, to the petition of appeal of the above-named appellants.

These respondents, not acknowledging any or all of the matters, which in said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that a decree was made and entered, as in said petition of appeal stated, but, as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be confirmed, with costs to be paid.

JOHN G. HORNER,
Solicitor for and of Counsel with Answering Respondents.

ANSWER.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *et als.*, *Complainants-Respondents*,

and

ELIZA GUERIN, *et als.*, *Defendants-Appellants.*

ANSWER.

The answer of the above-named respondents, Mary C. Rue and John Reeves Rue, her husband, to the petition of appeal of the above-named appellants.

These respondents, not acknowledging any or all of the matters, which in said petition of appeal are contained, to be true, for answer thereto, nevertheless, say and admit that a decree was made and entered, as in said petition of appeal stated, but, as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced.

And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be confirmed, with costs to be paid.

GASKILL & GASKILL,
Solicitors for and of Counsel with Answering Respondents.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, ETC., *Complainant-Respondent,* and ELIZA GUERIN, *et als.*, *Defendants-Appellants.*	ON APPEAL. ANSWER TO PETITION OF APPEAL.

The answer of the Camden Safe Deposit and Trust Company, trustee, etc., the above-named respondent, to the petition of appeal of the above-named appellants.

The respondent, Camden Safe Deposit and Trust Company, trustee, etc., 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-fourth day of January, 1917, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to 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 prays that the same may be affirmed, with costs to be adjudged to this respondent.

GEO J. BERGEN,
Solicitor and of Counsel with Camden Safe Deposit and Trust Company, Trustee, etc., Respondent.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

Complaining shows unto your Honor, your orator, Camden Safe Deposit and Trust Company, a corporation of the State of New Jersey:

1. That one Joseph Ogden Cuthbert departed this life on or about the 30th day of November, 1887, having first duly made, published and declared his last will and testament bearing date the 15th day of July, 1887, which said last will and testament, having been duly proved before the Surrogate of the County of Camden on the 13th day of December, 1887, was recorded in his office in Book V of Wills, page 213, to which will your orator begs leave to refer if necessity therefor should arise.

2. That in and by said will and testament, said testator did among other things provide as follows:

> "First: I nominate and appoint Jacob Stokes Coles of the Township of Haddon aforesaid, nephew of my late wife, my son-in-law Thomas L. Gillespie of the City of Philadelphia and Charles Rhoads of Haddonfield, New Jersey, and the survivors of them or such of them as shall accept of the said offices to be the executors of this my will, and trustees of my estate as hereinafter provided. And in case any of them, my said executors and trustees, should reside out of the State of New Jersey at the time of my death,

I hereby direct that such shall not be required to give any security on that account by the Surrogate of Camden County. And I also direct that no Executor or Trustee under this my will shall be required to give any security in the State of Pennsylvania in order to qualify him to act in such offices.

Sixth: All the rest and residue of my estate real and personal, I give, devise and bequeath to my executors and trustees above named and the survivors of them and their successors in office, their heirs and assigns In Trust nevertheless for the following uses, intents and purposes, to wit: In Trust to rent and lease the real estate for such terms and rents as they may deem best, and to collect and receive the said rents and all income derived therefrom until the property shall be sold or divided as hereinafter mentioned. Said rents and income shall then be applied to paying the interest on my bonds or obligations, the taxes, repairs and insurance on the property and other legal expenses attending the care and management of my estate. The balance of income if any, shall then be equally distributed among my said children and granddaughter Mary Rue, and her mother Lucy C. Cuthbert, in such proportions that each of my children shall receive one-fifth part and the said Mary Rue and Lucy C. Cuthbert shall each receive one-tenth part of said net balance of income in quarterly portions and during their respective lives. Provided however, that in renting my farms in Delaware Township, Camden County, New Jersey, and the adjoining land in Burlington County, New Jersey, I wish my trustees to give my sons Joseph and Allen the first option to lease them or such

parts of them as they may desire and my trustees may deem best at such an annual sum as will pay the taxes assessed against them and the interest on the mortgages now existing on them. Also that each farm shall have a lot of the woodland rented with it of sufficient size to supply the tenant with wood for firewood, building purposes and fencing timber.

Also that my son Henry shall be allowed to lease the farm I now occupy in Haddon Township, Camden County, New Jersey, or such parts of it as may not be sold by the Trustees, with the mansion house and out-buildings, at such a rent as may be agreed upon between the Trustees and my son Henry in case he desires it, until the said land and mansion house shall be sold by the Trustees. When such sale takes place, or when so much land shall be sold off the last mentioned place as to render it undesirable for farming by my son Henry, and he shall signify his wish to the Trustees of my estate to rent a part of the land I own in Delaware Township and Burlington County aforesaid, I request my trustees to divide the land in that tract and the adjoining land in Burlington County into three or more farms at their discretion so as to accommodate each of my three sons, Joseph, Allen and Henry with a farm, and sufficient woodland for firewood and fencing timber; also to build on one of them which shall have no buildings on it such a dwelling house, barn and other necessary out-buildings for farming purposes as may be suitable, not exceeding three thousand dollars in cost. My son Henry shall then be allowed to rent and occupy the new buildings and farm so set apart for him at a rental sufficient but not greater than

enough to cover the taxes thereon, and the proportion of interest on the mortgage now existing against my said farms. It shall also be the duty of my sons in renting my land of the Trustees to keep the buildings and fences in order and to manure the land at their own expense.

The Trustees may in their discretion sell the wood off the balance of the land which is in timber, and which is not required to supply the farms with firewood and fencing. In case the mortgages now on the farms in Delaware Township and Burlington County, New Jersey, amounting to Twelve Thousand Two Hundred Dollars, or any part of them are paid off by my trustees while my sons occupy them, the rent they are required to pay to the trustees shall not abate on that account, but each farm, if the whole tract is divided into three or four farms, shall be charged as a rental with its fair proportion of the taxes on the whole tract, and the interest at five per cent. per annum on the sum of Twelve Thousand Two Hundred Dollars to be adjusted by the Trustees according to the relative amount of land in each farm, and its quality.

Seventh: I direct my Trustees to sell all my real estate at such times and in such parts and portions and for such price or prices and either at public or private sale as they or a majority of them may deem most conducive to the best interests of all my children and grandchildren. And for this purpose I give to them my said Trustees and the majority of them and their successors in office full power and authority to execute and deliver all such deeds, conveyances and assurance in the law as may be requisite to vest a perfect title in fee simple to the land and estate so sold

in the purchasers thereof clear of all the trusts and limitations in this my will, and also clear of all encumbrances, so that no purchaser shall be responsible for the application of the purchase money after payment thereof to the said Trustees.

I recommend to my trustees to withhold from sale the ground belonging to me on the north side of Market Street west of Forty-ninth Street in the City of Philadelphia extending north as far as Filbert Street, for the period of five years from my death, as I am of the opinion that it may increase considerably in value in that time. Nevertheless if a good price is offered for it prior to that period, I leave my trustees at liberty to accept it in their discretion.

It is also my will that in regard to selling my farms in Delaware Township, Camden County, New Jersey, and the adjoining land in Burlington County, the consent of my sons who may occupy them respectively shall be first given to such sale or sales during their lives. Provided however that if my Trustees should see proper to lay off four farms out of the whole of said land they may sell one of them without consultation with my sons. Also in case any one or more of my three sons should prefer to relinquish farming, then the land reserved for such may be sold by my trustees at their discretion and without consultation with my sons.

Eighth: Upon the receipt of any purchase monies I direct my trustees to apply the same to the payment and discharge of my mortgage and other debts as rapidly as they can be paid off so as to release my estate from all encumbrances. The mortgages on the land in Philadelphia and

that in Haddon Township, Camden County, New Jersey, to be first paid. And all surplus funds after payment of said debts shall be invested by my trustees in good first bonds and mortgages on real estate either in New Jersey or Pennsylvania or in the state loans of either of said states or the United States to be held upon the trusts of this my will. The net income arising from such investments to be paid over to my said children Mary C. Gillespie, Joseph O. Cuthbert, Jr., Allen Cuthbert and Henry C. Cuthbert in equal fifth parts and to my granddaughter Mary Rue and my daughter-in-law Lucy C. Cuthbert in equal tenth parts during all the term of their natural lives respectively and so that neither the principal or income of my estate shall be liable to attachment for the debts or engagements of any of my said children or said grandchild or daughter-in-law or their descendants.

Ninth: Upon the death of my daughter-in-law Lucy C. Cuthbert, her share of income in my estate shall go to my granddaughter Mary Rue for her life under the same trusts and conditions as aforesaid.

Upon the death of any of my sons or daughter or granddaughter Mary Rue leaving a wife or husband surviving them, one-third of the income so as aforesaid made payable to said descendant shall thereafter be paid to such surviving wife or husband for life, and the remainder of said income shall be paid to the child or children of such descendant if any during the life of such children's surviving parent. In case such son or daughter or granddaughter Mary Rue so dying should leave no wife or husband to survive them; also after the death of any such surviving wife

or husband, I give, devise and bequeath that fifth part of the share of the income of my estate so as aforesaid held in trust for such son, daughter or granddaughter Mary Rue for life, to all and every the child or children of such deceased son, daughter or granddaughter Mary Rue who may be living at the time of the death of such parent in equal parts and shares, during their respective lives to be paid to them by my said trustees upon their own receipts only and so that the said capital and income shall not be subject to the debts, control or engagement of my grandchildren. Provided however, that in case any of my said children or grand daughter Mary Rue should die without leaving any child to survive them, then upon the death of the surviving husband or wife, if any, that share or fifth part of the income of my estate which was so held in trust for the life of such decedent shall be paid by my Trustees to my surviving children, and the issue of any of my children who may be then dead leaving issue, in such parts and shares and for such estates that the number of surviving children shall be added to the number of those then dead leaving issue, and those living shall each take one fractional share of income corresponding to the whole number thus formed and the issue of my deceased children shall together take the fractional share of income that would have appertained to their deceased parent if then living, for and during their respective lives. My intention being to give an equitable life estate in one-fifth part of the income of all my residuary estate to each of my sons Joseph O. Cuthbert Jr., Allen Cuthbert and Henry C. Cuthbert and to my daughter Mary C. Gillespie and

my granddaughter Mary Rue subject to the trusts and conditions above set forth with remainders over after their death as above limited to my grandchildren for life, Mary Rue's share of income to be divided equally with her mother so long as the latter may live.

Tenth: Upon the death of all my sons and daughter and granddaughter Mary Rue above named and their surviving husbands and wives; also after the death of all the children of the first generation of my said sons, daughter and granddaughter Mary Rue, the trusts thereby created shall cease, and the Trustees of this my will or their successors in office, shall part, divide and distribute all the residue of the capital of my estate to and among the lawful grandchildren of my said sons, (i. e. testator's great grandchildren) daughter, (i. e. testator's great grandchildren) and granddaughter Mary Rue (i. e. testator's great-great-grandchildren) absolutely in the shares and proportions above directed respecting the income clear of further trusts, per-stirpes and not per capita.

Eleventh: In case my Trustees shall find it necessary to mortgage any part of my estate in order to raise money and pay off and discharge any mortgages already thereon and which may be called in before sufficient sales of real estate can be made to pay them, they may give and execute any such mortgages and bonds on any of my real estate in their discretion as may be so required, and with like effect to secure the lender of such monies as I could do in my lifetime.

Twelfth: My said Trustees may also lay out any tracts or pieces of land that I may own with such streets, alleys or avenues as they may find

desirable to develop town or village sites or plots and to facilitate sales of lots therein, with power to them to dedicate such streets to public use and to grade and lay down sidewalks upon them, to square and adjust lines of property with adjoining owners and make exchanges of lots or parts in order to improve the value of my estate at their discretion.

Thirteenth: In case any one or more of my said executors and trustees should die, resign their offices, or decline to accept the same, then I request my remaining and continuing Trustees or Trustee to join with my children and grandchildren who are at that time entitled to receive the income of my estate in selecting a new Executor and Trustee to fill the place or places of such who may so die, resign or decline said office, as often as the same shall happen; so as to keep up the number of three trustees at all times. And such appointment by them or a majority of them the said continuing Trustees added to a majority of my said children and grandchildren then entitled to receive the income of my estate when made in writing duly signed and filed in the offices of the Surrogate of Camden County, New Jersey, and the Register of Wills in Philadelphia, attested by a Certificate of their acknowledgement before a Notary Public or Master in Chancery of New Jersey, shall constitute a sufficient and valid investment of the Executors and Trustees so appointed with the title, estate and powers herein given to my original Executors and Trustees.

Fourteenth: As I am very averse to litigation, and greatly desire that my children and descendants who may be interested in my estate

under this my will shall fully acquiesce in its provisions for their benefit without any contest at law or otherwise respecting their rights in my estate now I hereby declare that it is my will and intention that if any person named in this my will or designed to take any portion of my estate under it shall dispute or contest at law the interpretation of its provisions made by the majority of my trustees, or shall attempt to set my will aside or any part of it, such person or persons shall forfeit and lose all claims to such part of my estate as they may sue for and recover.

Fifteenth: It is my will and I do direct that no claim shall be made by my executors against any of my children for monies advanced by me to them in my lifetime and I hereby cancel all such debts and obligations held by or owing to me by my children. Provided however, that any notes which may be endorsed by me as an accommodation to my sons in my lifetime, and which by reason of such endorsement my executors may be obliged to pay, shall be a charge against the share of such sons or son and be refunded out of his share of the income of my estate.

Sixteenth: Upon the decease of all the children or any one of them, my sons Joseph O. Cuthbert Junior, Allen Cuthbert and Henry C. Cuthbert, also of my daughter Mary C. Gillespie and of my granddaughter Mary Rue leaving issue to survive them my said grandchildren, I authorize my trustees to set apart the proper share of the capital of my estate which may appertain to the children of such deceased grandchildren of mine, and to assign and convey the said share of capital to them absolutely. And so on as often as the same case shall happen."

3. That the said Jacob Stokes Coles, Thomas L. Gillespie and Charles Rhoads the executors and trustees named in said will, duly qualified as such and took upon themselves the burden of said executorship and trusteeship in accordance with said last will and testament.

4. That afterwards, to wit, on or about the 4th day of May, 1890, said Jacob Stokes Coles departed this life and that by letters of appointment in accordance with said will bearing date June 20th, 1890, and recorded in the Surrogate's office of Camden County on the 23rd day of July, 1890, in Book A of Surrogate's Orders, page 4 &c., Allen Cuthbert was duly appointed as executor and trustee under said will in place and stead of the said Jacob Stokes Coles, deceased.

5. That afterwards, the said Charles Rhoads resigned his office as such executor and trustee to take effect on January 1st, 1901, and by letters of appointment dated December 21st, 1900, and recorded in the Surrogate's office of Camden County on December 28th, 1900, in Book A of Partitions, Requests, &c., page 354, Camden Safe Deposit and Trust Company (your orator) was duly appointed executor and trustee in place and stead of the said Charles Rhoads, resigned.

6. That afterwards, the said Allen Cuthbert departed this life and by letters of appointment dated November 17th, 1904, and recorded in the Surrogate's office of Camden County in Book B of Partitions, Requests, &c., page 17, on the 1st day of February, 1905, J. Blair Cuthbert was duly appointed executor and trustee in place and stead of the said Allen Cuthbert, deceased.

7. That afterwards, the said Thomas L. Gillespie on or about the 6th day of September, 1906, departed this life and by letters of appointment dated October 27th, 1906, and recorded in the Surrogate's office of Camden County on the same day in Book B of Requests, &c., page 87, George C. Gillespie was duly appointed executor and trustee in place and stead of the said Thomas L. Gillespie, deceased.

8. That by virtue of said last will and testament of said Joseph Ogden Cuthbert and the various successive appointments and other deeds and instruments in writing, your orator and the said George C. Gillespie and J. Blair Cuthbert are now the trustees under the will of the said Joseph Ogden Cuthbert, deceased, and are acting as such.

9. That the said Joseph Ogden Cuthbert left him surviving the following children, viz.:

Mary C. Gillespie (daughter)
Joseph O. Cuthbert, Jr., (son)
Allen Cuthbert (son)
Henry C. Cuthbert (son)

and a granddaughter Mary C. Rue, daughter of a deceased son, Anthony Cuthbert, who were his heirs at law.

10. That the said Mary C. Gillespie departed this life on or about the 7th day of November, 1906, a widow, leaving her surviving three children, viz.: Elizabeth C. Gillespie, George C. Gillespie and Anna G. Boyd.

11. That said Mary C. Gillespie left a will dated October 29, 1906, probated in the City of Philadelphia, Pennsylvania and recorded in Book 279 of

Wills, page 355, wherein she devised all her estate to said three children, and appointed them executors thereof and that they duly qualified and acted as such.

12. That the said George C. Gillespie is now married and that his wife's name is Mary B. Gillespie.

13. That the said Anna G. Boyd is now married and that her husband's name is George M. Boyd.

14. That Elizabeth C. Gillespie is a single woman.

15. That said George C. Gillespie has the following children: Katharine Gillespie, a minor of the age of fifteen years; Eleanor Cuthbert Gillespie, a minor of the age of twelve years; Alberta Elizabeth Gillespie, a minor of the age of eleven years.

16. That Anna G. Boyd has the following children: George Boyd, 3rd, single; Mary Cuthbert Boyd, single; Elizabeth Livingston Boyd, single, a minor of the age of fourteen years.

17. That Anthony Cuthbert, (a son of said testator) predeceased his father, the said Joseph Ogden Cuthbert, and left him surviving his widow, Lucy C. Cuthbert and daughter Mary C. Rue.

18. That the said Lucy C. Cuthbert is now deceased.

19. That the said Mary C. Rue is married to John R. Rue.

20. That said Mary C. Rue has the following children: Rebecca C. Borden, who is intermarried with

one T. Thurman Borden; Clara J. Sypherd who is intermarried with one J. Harry Sypherd; M. Estelle Branson who is intermarried with one William S. Branson; Eleanor R. Miller who is intermarried with one Ellsworth H. Miller; W. Harry Rue who is intermarried with Ethel W. Rue; J. Reeves Rue who is intermarried with Mary D. Rue; Norman A. C. Rue, a minor of the age of twenty years; Lucy A. B. Rue, a minor of the age of eighteen years, Florence G. Rue, a minor of the age of sixteen years.

20 A. That said Rebecca C. Borden has one child, to wit: Reeves DeCamp Borden, aged 7 years.

20 B. That said Clara J. Sypherd has the following children, to wit: Laura Cuthbert Sypherd, aged 5 years and Joseph Henry Sypherd aged 4 years.

20 C. That said M. Estelle Branson has one child to wit: William Cuthbert Branson, aged 5 years.

20 D. That said Eleanor R. Miller has one child to wit: Mary Cuthbert Miller, aged 10 months.

20 E. That said W. Harry Rue has two children, to wit: Alice Wells Rue, aged 9 years and Elizabeth Cuthbert Rue, aged 9 months.

20 F. That said J. Reeves Rue has no children.

21. That the said Joseph Ogden Cuthbert, Jr., (son of said testator) departed this life on or about the 13th day of January, 1899, intestate, without issue, leaving him surviving his widow, Eliza Cuthbert, and that no administrator has ever been appointed of his estate.

22. That the said Eliza Cuthbert is now married to Maximillian Guerin.

23. That the said Allen Cuthbert (a son of said testator) departed this life on or about November

10th, 1903, intestate, leaving him surviving four children, viz.: Hannah G. Ebert, Louisa G. Hopkins, Edgar G. Cuthbert and Joseph O. Cuthbert, 3rd, the latter of whom was duly appointed his administrator by the Surrogate of Camden County, New Jersey, and has since died, and no substituted administrator has ever been appointed for his estate.

24. That the said Hannah G. Ebert is married to Alvin T. Ebert.

25. That said Louisa G. Hopkins is married to E. Gerald Hopkins.

26. That the said Edgar G. Cuthbert is married to Daisey Cuthbert.

27. That Hannah G. Ebert has one child, Alan Cuthbert Ebert, single and a minor of the age of eighteen years.

28. That Louisa G. Hopkins has the following children: John Estaugh Hopkins, a minor of the age of eleven years; Francis Brognard Hopkins, a minor of the age of nine years, Kendal Cole Hopkins, a minor of the age of seven years; Anthony Cuthbert Hopkins, a minor of the age of six years and Thomas Smith Hopkins, a minor of the age of four years.

29. That Edgar G. Cuthbert has the following children: Elizabeth LeH. Cuthbert, a minor of the age of thirteen years; Joseph O. Cuthbert, a minor of the age of eleven years; Allen S. Cuthbert, a minor of the age of five years and Nicholas LeH. Cuthbert, a minor of the age of fifteen months.

30. That the said Joseph O. Cuthbert, 3rd, departed this life on or about January 12th, 1907, intestate, leaving him surviving his widow, Mary C. Cuthbert, and four children, all of whom are minors, viz.: Marguerite Ray Cuthbert, of the age of 18 years; Charles Walden Cuthbert of the age of 15 years; Gladys Josephine Cuthbert of the age of 12 years; Edgar Gibbs Cuthbert born May 26th, 1905, but who departed this life on or about October 7th, 1908, and that no administrator has ever been appointed for his estate.

31. That the said Mary C. Cuthbert is now married to Dr. Willam S. E. Raines.

32. That the said Mary C. Raines was on the 30th day of August, 1907, as Mary C. Cuthbert, by letter of appointment of that date, apointed by the Surrogate of the County of Camden, guardian of the person and property of the said minor children as by the record in said Surrogate's office will more fully appear.

33. That the said Henry C. Cuthbert (a son of said testator) departed this life on or about the 18th day of April, 1902, intestate, leaving him surviving his widow, Katharine B. Cuthbert, and three children, viz.: Joseph Blair Cuthbert, Elizabeth C. Bowden (single) and T. Percival Cuthbert, the latter of whom was duly appointed his administrator by the Surrogate of Camden County.

34. That the said Joseph Blair Cuthbert is married to Susan W. Cuthbert.

35. That the said T. Percival Cuthbert is married to Emma C. Cuthbert.

36. That Joseph Blair Cuthbert has the following children: Ada B. Cuthbert, single; Ogden Cuthbert, single, a minor of the age of seventeen years.

37. That T. Percival Cuthbert has one child: Katharine Blair Cuthbert, a minor of the age of six months.

38. That Elizabeth C. Bowden has one child, Flora Katharine Bowden, a minor of the age of twenty years.

39. That the said George M. Boyd is the husband of said Anna H. Boyd and claims or may claim to have an estate by the courtesy or some other interest in said estate.

39 A. That the said Mary B. Gillespie is the wife of George C. Gillespie and claims or may claim to have an inchoate right of dower or some other interest in said estate.

40. That the said John R. Rue is the husband of the said Mary C. Rue and claims or may claim to have an estate by the courtesy or some other interest in said estate.

41. That the said T. Thurman Borden is the husband of said Rebecca C. Borden, daughter of said Mary C. Rue and claims or may claim to have an estate by the courtesy or some other interest in said estate.

42. That the said J. Harry Sypherd is the husband of said Clara J. Sypherd, daughter of said Mary C. Rue, and claims or may claim to have an estate by the courtesy or some other interest in said estate.

43. That the said William S. Branson is the husband of said M. Estella Branson, daughter of said Mary C. Rue, and claims or may claim to have an estate by the courtesy of some other interest in said estate.

44. That the said Ellsworth H. Miller is the husband of said Eleanora R. Miller, daughter of said Mary C. Rue, and claims or may claim to have an estate by the courtesy or some other interest in said estate.

45. That the said Ethel W. Rue is the wife of said W. Harry Rue, son of said Mary C. Rue, and claims or may claim to have an estate of dower or some other interest in said estate.

46. That the said Mary D. Rue is the wife of said J. Reeves Rue, son of said Mary C. Rue, and claims or may claim to have an estate of dower or some other interest in said estate.

47. That the said Alvin T. Ebert is the husband of said Hannah G. Ebert and claims or may claim to have an estate by the courtesy of some other interest in said estate.

48. That the said E. Gerald Hopkins is the husband of said Louisa G. Hopkins and claims or may claim to have an estate by the courtesy or some other interest in said estate.

49. That the said Daisey Cuthbert is intermarried with the said Edgar G. Cuthbert and claims or may claim to have an inchoate right of dower or some other interest in said estate.

50. That the said Susan W. Cuthbert is intermarried with the said Joseph Blair Cuthbert and claims or may claim to have an inchoate right of dower or some other interest in said estate.

51. That the said Emma C. Cuthbert is intermarried with the said T. Percival Cuthbert and claims or may claim to have an inchoate right of dower or some other interest in said estate.

52. That the said J. Blair Cuthbert on or about the 22nd day of March, 1915, assigned to Broadway Trust Company, a corporation of New Jersey, all his estate, right, title and interest in and to said estate whether said interest be vested or contingent, and appointed said company his attorney to receive and give acquittance for the same, and that notice of said assignment has been given to your orator and said other trustees. By virtue whereof said Trust Company claims some interest in said estate.

53. That by virtue of the foregoing facts, all the estate of said testator constituting said trust estate is vested in your orator and said George C. Gillespie and J. Blair Cuthbert as trustees under the will of said Joseph Ogden Cuthbert, deceased, in some way or manner or in the following persons, which includes the persons above named who are all of the persons *in esse* who are the issue of said Joseph Ogden Cuthbert, deceased, and their respective spouses, to wit:

54. All of the children of said testator are dead, and their wives or husbands, except Eliza Guerin, widow of Joseph Ogden Cuthbert, Jr., (testator's son); Katharine B. Cuthbert, widow of Henry C. Cuthbert (testator's son).

55. Grandchildren, as follows:

Children of Mary C. Gillespie, deceased, (testator's daughter), to wit:

Elizabeth C. Gillespie, (single);
George C. Gillespie, (married to Mary B. Gillespie); Anna G. Boyd, (married to George M. Boyd); Elizabeth C. Gillespie, George C. Gillespie and Anna G. Boyd, executors under the will of Mary C. Gillespie, deceased.

Child of Anthony Cuthbert, deceased, (testator's son) to wit:

Mary C. Rue, (married to John R. Rue).

No children or issue of Joseph Ogden Cuthbert, Jr., deceased, (testator's son).

Children of Allen Cuthbert, deceased, (testator's son) to wit:

Hannah G. Ebert, (married to Alvin T. Ebert). Louisa G. Hopkins, (married to E. Gerald Hopkins); Edgar G. Cuthbert, (married to Daisey Cuthbert); Joseph G. Cuthbert 3rd, now deceased, leaving widow, now Mary C. Raines.

Children of Henry C. Cuthbert, deceased, (testator's son) to wit:

Joseph Blair Cuthbert (married to Susan W. Cuthbert); Broadway Trust Company, assignee of Joseph Blair Cuthbert; T. Percival Cuthbert (married to Emma C. Cuthbert); Elizabeth C. Bowden, (single); T. Percival Cuthbert, administrator of the estate of Henry C. Cuthbert, deceased.

56. Great-grandchildren as follows:

Children of George C. Gillespie:

Katharine Gillespie, Eleanor Cuthbert Gillespie, and Alberta Elizabeth Gillespie.

Children of Anna G. Boyd:

George Boyd, 3rd; Mary Cuthbert Boyd; Elizabeth Livingston Boyd.

Children of Mary C. Rue:

Rebecca C. Borden (married to T. Thurman Borden); Clara J. Sypherd (married to J. Harry Sypherd); W. Harry Rue (married to Ethel W. Rue); M. Estella Branson (married to William S. Branson); J. Reeves Rue (married to Mary D. Rue); Eleanora R. Miller (married to Ellsworth H. Miller); Norman A. C. Rue; Lucy A. B. Rue and Florence G. Rue.

Child of Hannah G. Ebert:

Alan Cuthbert Ebert.

Children of Louisa G. Hopkins:

John Estaugh Hopkins; Francis Brognard Hopkins; Kendal Cole Hopkins; Anthony Cuthbert Hopkins and Thomas Smith Hopkins.

Children of Edgar G. Cuthbert:

Elizabeth LeH. Cuthbert; Joseph O. Cuthbert; Allen S. Cuthbert; Nicholas LeH. Cuthbert.

Children of Joseph O. Cuthbert, 3rd.:

Marguerite Ray Cuthbert; Charles Walden Cuthbert; Gladys Josephine Cuthbert.

Children of Joseph Blair Cuthbert:

Ada B. Cuthbert and Ogden Cuthbert.

Child of T. Percival Cuthbert:
Katharine Blair Cuthbert.
Child of Elizabeth C. Bowden:
Flora Katharine Bowden.

57. Great-great grandchildren as follows:
Child of Rebecca C. Borden, to wit:
Reeves DeCamp Borden.
Children of Clara J. Sypherd, to wit:
Laura Cuthbert Sypherd and Joseph Henry Sypherd.
Child of M. Estella Branson, to wit:
William Cuthbert Branson.
Child of Eleanora R. Miller, to wit:
Mary Cuthbert Miller.
Children of W. Harry Rue, to wit:
Alice Wells Rue and Elizabeth Cuthbert Rue.

58. And your orator further shows that it is alleged and claimed on the part of some of said beneficiaries or persons in interest that three of the gifts attempted by the will of Joseph Ogden Cuthbert, deceased, are defective as offending the rule against perpetuities. These gifts are, to wit:

(a) The gift of income to the child or children or issue of testator's sons, daughter or granddaughter, Mary Rue, during the life of such surviving spouse, under paragraph 9 of said will.

(b) The gift of income to the child, children or issue of deceased children of testator under paragraph 9 of said will.

(c) The gift of principal of said estate to the grandchildren of testator's sons, daughter and granddaughter, Mary Rue, under paragraph 10 of said will.

59. And your orator further shows that it is therefore claimed that there should be an immediate distribution of such portion of said estate as would be now vested in the next of kin or heirs at law of said Joseph Ogden Cuthbert, or those who represent them, if said claims are valid, that in view of said claims your orator and the other trustees under said will are uncertain as to their duties and cannot safely act in the premises.

In consideration whereof and for as much as your orator is without adequate remedy in the premises at and by the strict rules of the common law and can only obtain relief in this Honorable Court where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said defendants may to the best and utmost of their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid but without oath and that as fully and particularly as if the same were here repeated and they and every of them distinctly interrogated thereto.

And your orator, therefore, prays that the will of the said Joseph Ogden Cuthbert, deceased, may be properly interpreted and construed by this Honorable Court; and that your orator and the other trustees under said will may be advised to whom they should pay the incomes of said estate, and whether or not any of the principal thereof should now be distributed and if not now, then at what time the same should be distributed and to whom and whether or not any of the provisions of said will are invalid and if so to what extent, and the practical application thereof to the duties of said trustees; and that your orator may have such other relief as the nature of the case requires and as may be agreeable to equity.

May it please your Honor, the premises considered, to grant unto your orator the state's writ or writs of subpoena issuing out of and under the seal of this Honorable Court, to be directed to the said Eliza Guerin, Katharine B. Cuthbert, Elizabeth C. Gillespie, George C. Gillespie and Mary B. Gillespie, his wife, Anna G. Boyd and George M. Boyd, her husband, Elizabeth C. Gillespie, George C. Gillespie and Anna G. Boyd, executors under the will of Mary C. Gillespie, deceased, Mary C. Rue and John R. Rue, her husband, Hannah G. Ebert and Alvin T. Ebert, her husband, Louisa G. Hopkins and E. Gerald Hopkins, her husband, Edgar G. Cuthbert and Daisey Cuthbert, his wife, Mary C. Raines, Joseph Blair Cuthbert and Susan W. Cuthbert, his wife, Broadway Trust Company, T. Percival Cuthbert and Emma C. Cuthbert, his wife, Elizabeth C. Bowden, T. Percival Cuthbert, administrator of the estate of Henry C. Cuthbert, deceased, Katharine Gillespie, Eleanor Cuthbert Gillespie, Alberta Elizabeth Gillespie, George Boyd, 3rd., Mary Cuthbert Boyd, Elizabeth Livingston Boyd, Rebecca C. Borden and T. Thurman Borden, her husband, Clara J. Sypherd and J. Harry Sypherd, her husband, W. Harry Rue and Ethel W. Rue, his wife, M. Estella Branson and William S. Branson, her husband, J. Reeves Rue and Mary D. Rue, his wife, Eleanor R. Miller and Ellsworth H. Miller, her husband, Norman A. C. Rue, Lucy A. B. Rue, Florence G. Rue, Alan Cuthbert Ebert, John Estaugh Hopkins, Francis Brognard Hopkins, Kendal Cole Hopkins, Anthony Cuthbert Hopkins, Thomas Smith Hopkins, Elizabeth LeH. Cuthbert, Joseph O. Cuthbert, Allen S. Cuthbert, Nicholas LeH. Cuthbert, Marguerite Ray Cuthbert, Charles Walden Cuthbert, Gladys Jo-

sephine Cuthbert, Ada B. Cuthbert, Ogden Cuthbert, Katharine Blair Cuthbert, Flora Katharine Bowden, Reeves DeCamp Borden, Laura Cuthbert Sypherd, Joseph Henry Sypherd, William Cuthbert Branson, Mary Cuthbert Miller, Alice Wells Rue, Elizabeth Cuthbert Rue, Joseph Blair Cuthbert and George C. Gillespie, trustees under the will of Joseph Ogden Cuthbert, deceased, commanding them and each of them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and as shall be agreeable to equity and good conscience.

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

GEO. J. BERGEN,
Sol'r for and of Counsel with Complainant.

ORDER TO AMEND BILL.

IN CHANCERY OF NEW JERSEY

Between
CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c.,
Complainants,
and
ELIZA GUERIN, *et als.,*
Defendants.

ON BILL, &c.
ORDER TO AMEND BILL.

It is on this 23rd day of September, A. D. nineteen hundred and fifteen, on motion of George J. Bergen, solicitor for and of counsel with complainant, ordered that the bill of complaint in this cause be and the same is hereby amended as follows: By changing paragraph 58 of said bill so that the same shall read as follows:

"58. And your orator further shows that it is alleged and claimed on the part of some of said beneficiaries or persons in interest that three of the gifts attempted by the will of Joseph Ogden Cuthbert, deceased, are defective as offending the rule against perpetuities. These gifts are, to wit:

"A. The gift of income on the death of any of testator's sons, daughter or granddaughter Mary Rue to the child or children of such de-

cedent during the life of any surviving spouse, under paragraph 9 of said will.

"B. The gift of income in case any son, daughter or granddaughter Mary Rue should die leaving no surviving wife or husband *or after* the death of any such surviving wife or husband to the child or children of such deceased son, daughter or granddaughter Mary Rue, living at the death *of such parent* as appears in paragraph 9 of said will.

"C. The gift of income to the surviving children and issue of deceased children of the testator, as appears in the *proviso* of paragraph 9 of said will.

"D. The gift of principal of said estate to the grandchildren of testator's sons, daughter and granddaughter Mary Rue, under paragraph 10 of said will."

E. R. WALKER,
C.

ANSWER OF DEFENDANTS.

IN CHANCERY OF NEW JERSEY.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *Complainants,* and ELIZA GUERIN, *et als.*, *Defendants.*	ON BILL, ETC. ANSWER OF DEFENDANTS, JAMES BLAIR CUTHBERT, EDGAR G. CUTHBERT, AND BROADWAY TRUST COMPANY.

The answer of the defendants, James Blair Cuthbert, Edgar G. Cuthbert, and Broadway Trust Company, against the Camden Safe Deposit Trust Company, *et als.*

These defendants, James Blair Cuthbert, Edgar G. Cuthbert, and Broadway Trust Company, answering the bill of complaint, say that:

1. The defendants admit the truth of the allegations contained in paragraphs 1-10, inclusive.

2. In answer to the 11th paragraph of the bill of complaint, the defendants have no knowledge or belief as to the facts therein set forth and leave the complainants to prove the same.

3. The defendants admit the truth of the allegations contained in paragraphs 12-57, inclusive, except

that by T. Thurman Borden is intended T. Sherman Borden, by Joseph Blair Cuthbert is intended James Blair Cuthbert, and by Anna H. Boyd is intended Anna G. Boyd.

4. In answer to paragraph 58 of the bill of complaint, these defendants have no knowledge or belief as to any claim on the part of beneficiaries or persons in interest, other than these defendants, with regard to any invalidity existing in the will of Joseph Ogden Cuthbert, deceased. They admit that they have claimed and do now claim that certain gifts contained in the testament of the said Joseph Ogden Cuthbert are invalid and of no effect, and that these gifts are in part those specified in paragraphs A, B, C, and D of said paragraph 58 of the bill of complaint as amended.

By way of counter-claim against the said complainants, these defendants, James Blair Cuthbert, Edgar G. Cuthbert, and Broadway Trust Company, say:

1. That the life estates in the income of the corpus of the estate of Joseph Ogden Cuthbert, the testator, given by his will to the children of his sons, daughter and granddaughter, Mary Rue, are invalid and of no effect at law whatsoever, and particularly that the life estates in said income, now being enjoyed by the defendants, James Blair Cuthbert and Edgar G. Cuthbert, are invalid and of no effect at law whatsoever.

2. That by reason of the invalidities in the gifts specified in the 58th paragraph of the bill of complaint as amended, and in the preceding paragraph of this counter-claim all of the corpus of the said es-

tate is now ripe and ready for distribution among the next of kin of the aforesaid testator, except so much of said corpus as is required to support the following life estates now being enjoyed, to wit, the life estate of Mary C. Rue in one-fifth of the income of the said estate, the life estate of Eliza Guerin in one-third of one-fifth of the income of the said estate and the life estate of Kathryn B. Cuthbert in one-third of one-fifth of the income of the said estate, making a total of one-third of the corpus of the entire estate; there remain thereafter two-thirds of the corpus of the entire estate, ripe and ready for distribution among the next of kin of the testator as aforesaid.

3. That by reason of the invalidity in the gifts limited immediately after the death of the surviving wife or husband of any son, daughter or granddaughter, Mary C. Rue, of the testator, those portions of the corpus of the estate of the testator, the income upon which is now being paid to Eliza Guerin and Kathryn B. Cuthbert will at the deaths respectively of the said Eliza Guerin and Kathryn B. Cuthbert be ripe and ready for distribution among the next of kin of the testator and their lawful assigns and legal representatives.

4. That by reason of the invalidity in the gifts specified in the 58th paragraph of the bill of complaint as amended there is an ultimate failure of distribution of the one-fifth of the corpus of the estate of Joseph Ogden Cuthbert, the testator, the income upon which is now being enjoyed by Mary C. Rue; that the right and title to the said one-fifth of the corpus of said estate is presently vested in the next of kin of the said testator but that the en-

joyment of said one-fifth of the corpus of said estate is indefinitely postponed dependent upon events.

5. That the next of kin presently entitled to the distribution of the two-thirds of the estate of Joseph Ogden Cuthbert are, Elizabeth C. Gillespie, Anna G. Boyd, George C. Gillespie, Mary C. Rue, Hannah Ebert, Louisa Hopkins, the defendant, Edgar G. Cuthbert, Marguerite Ray Cuthbert, Charles Waldon Cuthbert, Gladys Josephine Cuthbert, the defendant, James Blair Cuthbert, Elizabeth Bowden and T. Percival Cuthbert.

These defendants therefore pray that two-thirds of the corpus of the estate of Joseph Ogden Cuthbert, the testator, be declared subject to immediate division and distribution among the aforesaid next of kin of the testator, to wit, Elizabeth C. Gillespie, Anna G. Boyd, George C. Gillespie, Mary C. Rue, Hanna Ebert, Louisa Hopkins, the defendant, Edgar G. Cuthbert, Marguerite Ray Cuthbert, Charles Waldon Cuthbert, Gladys Josephine Cuthbert, the defendant, James Blair Cuthbert, Elizabeth Bowden and T. Percival Cuthbert, in their proper shares according to the law of distribution, and that the complainant, the Camden Safe Deposit and Trust Company, be required to make such immediate division and distribution among the aforesaid next of kin of the testator.

And these defendants further pray that upon the deaths, respectively, of Eliza Guerin and Kathryn B. Cuthbert, the proper portions of the corpus of the entire estate from which income has been paid the aforesaid life tenants, respectively, during their lives, be declared subject to immediate division and distribution among the next of kin of the testator Joseph Ogden Cuthbert, to wit, Elizabeth C. Gilles-

pie, Anna G. Boyd, George C. Gillespie, Mary C. Rue, Hanna Ebert, Louisa Hopkins, the defendant, Edgar G. Cuthbert, Marguerite Ray Cuthbert, Charles Waldon Cuthbert, Gladys Josephine Cuthbert, Edgar Gibbs Cuthbert, the defendant, James Blair Cuthbert, Elizabeth Bowden and T. Percival Cuthbert, and their lawful assigns and legal representatives, in their proper shares according to the law of distribution.

And these defendants further pray that their right and title as next of kin in the one-fifth of the corpus of the estate of the said testator, Joseph Ogden Cuthbert, the income upon which is now being enjoyed by Mary Rue, and their right to a distribution of the said one-fifth part of the corpus of said estate, when such distribution shall become necessary by reason of any invalidity found by this Court to exist in any gift attempted by the said will, be declared and decreed by this Court.

And defendants pray that such other relief may be granted to them as the nature of the case requires and as it may be agreeable to equity.

WILSON & CARR,
Solicitors for the Defendants, James Blair Cuthbert, Edgar G. Cuthbert, and Broadway Trust Company.

ANSWER OF ELIZABETH C. BOWDEN, T. PERCIVAL CUTHBERT, AND HANNAH C. EBERT, DEFENDANTS.

IN CHANCERY OF NEW JERSEY.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *Complainants,* and ELIZA GUERIN, *et als.*, *Defendants.*	ON BILL, &c. ANSWERS OF ELIZABETH C. BOWDEN, T. PERCIVAL CUTHBERT, AND HANNAH C. EBERT, DEFENDANTS.

The answer of the defendants, Elizabeth C. Bowden, T. Percival Cuthbert and Hannah C. Ebert.

These defendants answering the bill of complaint of the complainant herein, say:

1st. That in making answer to the allegations, charges and statements contained in the said bill of complaint, these answering defendants expressly deny and disclaim any intention of contesting the interpretation of the said last will and testament of the said Joseph Ogden Cuthbert, deceased, as made by a majority of the trustees appointed or qualifying under the provisions of the said will, or of attempting to set aside any part of the said last will and

testament; but expressly charge and say that they have each been brought into this Honorable Court in accordance with the prayer in the said bill of complaint as defendants through and by the state's writ of subpoena, and solemnly called upon to respond thereto, and that they are therefore simply so responding to the said writ as required by law, and the rules and practice of this Court.

2d. That they admit the truth of the allegations and statements contained in paragraphs one to ten inclusive of the said bill of complaint.

3d. That as to paragraph eleven in the said bill of complaint they have no knowledge and leave the complainant to his own proper proof.

4th. That they admit generally the statements, charges and allegations and relationships set forth and contained in paragraphs eleven to fifty-seven of the said bill of complaint, excepting that they are informed and believe that the orthography of several of the defendants' names is incorrect.

5th. That they have no knowledge of the claims or charges made by any of the defendants herein, other than themselves.

6th. That answering the fifty-eighth paragraph of the said bill of complaint these answering defendants further say that either they, each or all of them, or their counsel and solicitors, have frequently advised and conferred with the complainant and the other trustees under the said last will and testament

of Joseph Ogden Cuthbert, deceased, and from time to time heretofore expressed the opinion that certain gifts and legacies contained in the said last will and testament might offend the rule against perpetuities, and expressly charge that to the best of their knowledge and belief the said trustees were unable to agree upon the proper and lawful meaning of some of the provisions of the said will, and whether the same are or are not legal, in that they offend the said rule.

7th. That further answering paragraph fifty-eight of the said bill of complaint these defendants say that inasmuch as the said trustees, and a majority of them, are unable to agree upon an interpretation of the said will, and the gifts, legacies and provisions therein contained, that they, the said answering defendants, admit and say that they have been advised that certain legacies, gifts, etc., contained in the said will do so offend the rule against perpetuities, and that the same are, in the judgment of these answering defendants, unlawful; and that the gifts and legacies so offending the said rule against perpetuities are those enumerated specifically in the said bill of complaint in subdivisions "a," "b," "c," and "d" of said paragraph number fifty-eight.

8th. That further answering the fifty-eighth paragraph of the said bill of complaint, these answering defendants say and charge that by reason of the death without issue of Joseph Ogden Cuthbert, Junior, one of the children of the said testator, Joseph Ogden Cuthbert, deceased, which said death took place about the thirteenth day of January, A. D. nineteen hundred and ninety-nine, as set forth in

twenty-first paragraph of the said bill of complaint, these answering defendants, together with others of the defendants herein, became each entitled to distributive shares in two-fifteenths of the said estate of the said testator so held in trust by the complainant and its co-trustees; that by the terms of the said last will and testament of the said Joseph Ogden Cuthbert, deceased, one-fifth part of the said estate so held in trust as aforesaid was set apart for the use of the said son Joseph O. Cuthbert, Jr., the interest to be paid to him during his life, and at his death one-third of the said income was to be paid to his widow, and the other two-thirds was to be paid to his children; that having as aforesaid died without children or the issue of children two-thirds of the said fund so set apart for the use of the said Joseph O. Cuthbert, deceased, became at once thereupon ripe for distribution; whereupon these answering defendants charge and allege that they should receive at once from the complainant and its co-trustees the following distributive shares in the said estate so becoming distributable by reason of the death of the said Joseph O. Cuthbert, Jr., deceased, to wit,—the defendant, Hannah C. Ebert, the one-quarter of one-quarter of the said two-fifteenths, or to one one-hundred and twentieth of the said estate; Elizabeth C. Bowden and T. Percival Cuthbert to each, the one-third of one-fourth of the said two-fifteenths, or one ninetieth each of the said estate together with such interest as may have accumulated on the said several distributive shares.

9th. And these defendants further answering the said bill say and expressly charge that the gifts of income in the said will given to the children of testa-

tor's sons, daughter and Mary Rue, and which gifts of income are presently enjoyed by them, are invalid and unlawful, including the gifts of income to these answering defendants; and that by reason of the said illegal and unlawful gifts of income, that the corpus from which the said income is derived should be forthwith distributed in accordance with the laws of distribution, the said testator having died intestate as to the same.

ADAM R. SLOAN,
Solicitor for and of Counsel with Elizabeth C. Bowden, T. Percival Cuthbert and Hannah C. Ebert, Defendants.

ANSWER OF T. SHERMAN BORDEN AND REBECCA C. BORDEN, HIS WIFE.

IN CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c.,
Complainants,
and
ELIZA GUERIN, *et als.,*
Defendants.

ON BILL, ETC.
ANSWER OF T. SHERMAN BORDEN AND REBECCA C. BORDEN, HIS WIFE.

The joint answer of T. Sherman Borden and Rebecca C. Borden, his wife, defendants, to the bill of complaint of Camden Safe Deposit and Trust Company, and others, trustees, etc.

These defendants, T. Sherman Borden and Rebecca C. Borden, his wife, answering the bill of complaint, say that:

1. These defendants admit the truth of the allegations contained in paragraphs 1 to 57, both inclusive, except by "J. Thurman Borden" is intended "T. Sherman Borden."

2. In answer to paragraph 58 of the bill of complaint, these defendants have no knowledge or belief, as to any claim on the part of any beneficiaries or persons in interest, other than these defendants,

with regard to any invalidity existing in the will of Joseph Ogden Cuthbert, deceased. They claim and contend that certain gifts contained in the last will and testament of the said Joseph Ogden Cuthbert, deceased, are invalid and of no effect, and these gifts are, in part, those specified in Sections A, B, C and D of said paragraph 58 of the bill of complaint, as amended.

3. These defendants say that they are advised and believe, and therefore say, claim and contend, with respect to the gifts particularly specified in Sections A, B, C and D of paragraph 58 of the bill of complaint, as amended as follows:

(a) The gift of income, on the death of testator's sons, daughter or granddaughter, Mary Rue, to the child or children of such decedent during the life of any surviving spouse, under paragraph 9 of said will, is not void or invalid, but is good.

(b) The gift of income, in case any son, daughter or granddaughter, Mary Rue, should die, leaving no surviving wife or husband, or, after the death of said surviving wife or husband, to the child or children of such deceased son, daughter, or granddaughter, Mary Rue, living at the time of the death of such parent as appears in paragraph 9 of said will, is void and invalid and of no effect.

(c) The gift of income to the surviving children and issue of deceased children of the testator, as appears in the proviso of paragraph 9 of said will, is not void or invalid but is good.

(d) The gift of principal of said estate to the grandchildren of testator's sons, daughter and granddaughter, Mary Rue, under paragraph 10 of said will, is invalid and of no effect.

By the way of counter-claim against said complaint, these defendants, T. Sherman Borden and Rebecca C. Borden, his wife, say:

1. That by reason of the invalidities in certain of the gifts specified in the 58th paragraph of the bill of complaint as amended, and of parts of the will of said Joseph Ogden Cuthbert, deceased, certain of the corpus of said estate is now ripe and ready for distribution, and that the same should be decreed by this Honorable Court to be distributed forthwith, and that all of the estate of the said Joseph Ogden Cuthbert, deceased, now in the hands of the complainant trustees, should be decree to be distributed or held in trust and hereafter distributed as follows:

(a) A one-fifth part of the corpus should forthwith be distributed to the issue of Mary C. Gillespie, deceased.

(b) A one-fifth part of the corpus should forthwith be distributed to the issue of Allen Cuthbert, deceased.

(c) A one-fifth part of the corpus should be held in trust during the life of Eliza Guerin, widow of Joseph Ogden Cuthbert, Jr., deceased, and one-third of the income paid to said Eliza Guerin for life and the remaining two-thirds of the income paid

as follows: One-fourth thereof to Mary Rue for life, and if she predecease said Eliza Guerin said one-fourth of the income paid to the issue of Mary Rue; one-fourth thereof to the lawful issue of Mary C. Gillespie, deceased; one-fourth thereof to the issue of Allen Cuthbert, deceased; one-fourth thereof to the issue of Henry C. Cuthbert, deceased; and after the death of the said Eliza Guerin, the corpus should be distributed between the issue of Mary C. Gillespie, Allen Cuthbert, Henry C. Cuthbert, deceased, and the issue of Mary Rue *per stirpes* and not per capita; but if the said Mary Rue should be then living a one-fourth part of the corpus should be added to the corpus otherwise held in trust for her benefit during life.

(d) A one-fifth part of the corpus should be held in trust during the life of Katherine B. Cuthbert, widow of Henry C. Cuthbert, deceased, and one-third of the income paid to Katherine B. Cuthbert for life; and the remaining two-thirds of the income paid to the issue of the said Henry C. Cuthbert, deceased; and at the death of the said Katherine B. Cuthbert, the corpus thereof should be distributed to the issue of the said Henry C. Cuthbert, deceased.

(e) A one-fifth part of the corpus should be held in trust, and the income therefrom paid to Mary Rue during her life; and at her death, if she is survived by her husband, to pay to him for life one-third of the income thereof; the remaining two-thirds of the income to be paid to the issue of the said Mary Rue, and at the death of the said Mary Rue, and her husband, to distribute the corpus to the issue of the said Mary Rue.

And this defendant, Rebecca C. Borden, prays that her right, title and interest, as one of the issue of Mary Rue, sometimes called Mary C. Rue, in both the corpus and income of the estate of the said Joseph Ogden Cuthbert, as it may now be or shall hereafter be, may be declared and decreed by this Honorable Court; and these defendants pray that such other relief may be granted to them as the nature of the case requires, and as shall be agreeable to equity.

JOHN G. HORNER,
Solicitor for and of Counsel with T. Sherman Borden and Rebecca C. Borden, Defendants.

ANSWER OF MARY C. RUE AND JOHN REEVES RUE, HER HUSBAND.

IN CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &C.,
Complainants,
and
ELIZA GUERIN, *et als.*,
Defendants.

ON BILL, ETC.
ANSWER OF MARY C. RUE AND JOHN REEVES RUE, HER HUSBAND.

The answer of the defendants, Mary C. Rue and John Reeves Rue, her husband:

1. Answering the first paragraph, these defendants admit the death of Joseph Ogden Cuthbert and the making and publication of his will as set out in complainant's said bill.

2. Answering the second paragraph, these defendants admit that said will is of the purport and effect as set out in complainant's said bill, but for greater certainty, beg leave to refer to a certified copy thereof when produced.

3-8. Answering the 3rd, 4th, 5th, 6th, 7th and 8th paragraphs of said will, these defendants admit the qualification of the executors named in said will,

their death and resignation, as set out in complainant's said bill, and the substitution of the Camden Safe Deposit & Trust Co., as one of the executors and trustees in January of 1901 and J. Blair Cuthbert as one of the executors and trustees in February of 1905 and George C. Gillespie as one of the executors and trustees in October of 1906, and that the said Camden Safe Deposit & Trust Co., J. Blair Cuthbert and George C. Gillespie are now acting as trustees under said will.

9. Answering the ninth paragraph, these defendants admit that the said Joseph Ogden Cuthbert left him surviving his daughter Mary C. Gillespie, his three sons, Joseph O. Cuthbert, Jr., Allen Cuthbert and Henry C. Cuthbert, and his granddaughter, Mary C. Rue (this defendant) daughter of a deceased son, Anthony Cuthbert.

10-57. Answering paragraphs 10 to 57, inclusive, these defendants say that their knowledge and information concerning the family matters therein recited, is so indefinite that they can neither admit nor deny the statements made in said paragraphs and leave the complainants to their proof, with the exception, however, that paragraphs 19 and 20 correctly set out the marriage of these defendants and their children, their marriage and their children, with the following changes and corrections and some slight changes as to the ages of the children and grandchildren of these defendants; T. Thurman Borden should be T. Sherman Borden; Clara J. Sypherd should be Clara Irene Sypherd; W. Harry Rue should be William Henry Rue, and J. Reeves Rue should be John Reeves Rue, Jr.

58. Answering the 58th paragraph, these defendants say that they have no knowledge and therefore can neither admit nor deny that any of the beneficiaries or persons in interest under said will have alleged or claimed that any of the gifts attempted by said will are defective or as offending the rule against perpetuities as set out in said bill, and therefore leave the complainant to its proof as to the beneficiaries or person or persons who have presented any such claim or allegation.

Further answering, these defendants say that if any of the beneficiaries or persons in interest under said will have made any such claim, as set out in said bill of complaint, that they are not entitled to be heard, nor is the complainant bound to proceed on such complaint by reason of the fact that such beneficiaries or persons in interest have forfeited all of their rights under said will, by reason of said allegation or claim and of the attempt on their part to set aside the provisions of said will, or any of them; these defendants aver that any such beneficiary or person interested in said will is barred from taking anything under said will by virtue of the 14th paragraph of said will, to which these defendants refer and these defendants claim the same benefit of this answer in this respect as though the same were interposed by way of demurrer.

Further answering, these defendants say that said will was admitted to probate twenty-eight years ago and that during all the time since the probate of said will, there has been no difficulty in carrying out its provisions, and that said executors and trustees now acting, as set out in said will, have served as such for fifteen years, eleven years and ten years, respectively, during which time they have administered

said estate and carried out the provisions of the will in accordance with the terms thereof.

Further answering, these defendants say that no suit has been brought or threatened to be brought against said executors and trustees by any of the beneficiaries under said will for any share or portion thereof, nor has any claim or demand been made upon said executors and trustees for any share or portion of the estate in their hands so far as these defendants are informed.

Further answering, these defendants say they have been advised that the provisions of said will can be carried out and that the same are not contrary to the provisions of the law respecting such matters; that in any event, no distribution or division of the corpus of the estate can be made during the lifetime of this defendant, Mary C. Rue, and John R. Rue, who is entitled to one-fifth of the income of the entire estate in the hands of said executors and trustees, and that any question concerning the distribution of said estate is prematurely raised by said bill.

59. Further answering the allegations, charges and statements contained in the said bill of complaint, these defendants expressly deny and disclaim any intention of contesting the interpretation of the said last will and testament of the said Joseph Ogden Cuthbert, deceased, as made by a majority of the trustees appointed or qualifying under the provisions of the said will, or of attempting to set aside any part of the said last will and testament; but expressly aver that they have been brought into this Honorable Court in accordance with the prayer in the said bill of complaint as defendants through

and by the state's writ of subpoena, and solemnly called upon to respond thereto, and that they are therefore simply so responding to the said writ as required by law, and the rules and practice of this Court.

All of which matters and things these defendants are ready to verify, prove and maintain as this Honorable Court may direct and pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

JOSEPH H. GASKILL,
Solicitor and of Counsel with the defendants, Mary C. Rue and John Reeves Rue.

AMENDED ANSWER.

IN CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c.,
Complainants,
and
ELIZA GUERIN, *et als.*,
Defendants.

AMENDED ANSWER.

The amended answer of the defendants, T. Sherman Borden and Rebecca C. Borden, his wife.

These defendants, by this answer:

1. Admit the allegations contained in paragraphs one to fifty-six in said bill of complaint, both inclusive, except that the name of one of these answering defendants is T. Sherman Borden, and not T. Thurman Borden, as set forth in said bill.

2. Aver that these defendants have no knowledge, information or belief as to any claim on the part of any beneficiaries or persons in interest other than these defendants, with regard to any invalidity existing in the will of J. Ogden Cuthbert, deceased.

3. Aver that certain gifts, contained in the last will and testament of J. Ogden Cuthbert, deceased,

are invalid and of no effect, which invalid gifts are, in part, those specified in Sections A, B, C and D of paragraph fifty-eight of the bill of complaint as amended.

4. Aver that they are advised and believe, and, therefore, say, claim and contend with respect to the gifts particularly specified in Sections A, B, C and D of paragraph fifty-eight of the bill of complaint as amended, as follows:

A. The gift of income, one death of the testator's sons, daughter or granddaughter, Mary Rue, to the child or children of such deceased son, daughter or granddaughter, during the life of any surviving spouse, under paragraph nine of said will, is invalid, because it violates the rule against perpetuities.

B. The gift of income in case any son, daughter or granddaughter, Mary Rue, should die, leaving no surviving wife or husband, or, after the death of such surviving wife or husband, to the child or children of such deceased son, daughter or granddaughter, Mary Rue, living at the time of the death of such parent, as set forth in paragraph nine of said will, is void and invalid and of no effect, because it violates the rule against perpetuities.

C. The gift of income to the surviving children, and issue of deceased children of the testator, as appears in the proviso of paragraph nine of said will, is invalid and void, because it violates the rule against perpetuities.

D. The gift of principal of said estate to the grandchildren of testator's sons, daughter and

granddaughter, Mary Rue, as provided by paragraph ten of said will, is invalid and of no effect, because it violates the rule against perpetuities.

5. Aver that they are not advised as to whether or not the trustees, or a majority of them, have attempted in any way to interpret or construe the provisions of said will.

6. Aver that these defendants have never, in any way, disputed the interpretation of said will made by a majority of the said trustees, but are willing to abide by and acquiesce in any proper interpretation which may be made by them.

7. Aver that a proper interpretation of said will requires the trusts provided therein to be continued, and no distribution of the corpus of said estate made until after the death of said Mary Rue and the husband or wife of any of the children of the said J. Ogden Cuthbert, who are entitled to be paid the income under the terms of said will.

8. Aver that inasmuch as no distribution of the principal of said estate can be made until the death of the persons mentioned in the last paragraph, the Court cannot properly determine the questions raised by said bill of complaint, as to what the ultimate disposition of said principal should be.

JOHN G. HORNER,
Solicitor for and of Counsel with T. Sherman Borden and Rebecca C. Borden, his wife.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT and TRUST COMPANY,
Complainant,
and
ELIZA GUERIN, *et als.*,
Defendants.

ON BILL, &C.
REPLICATION.

The complainant joins issue on the answer of the defendants, James Blair Cuthbert, Edgar G. Cuthbert and Broadway Trust Company.

GEORGE J. BERGEN,
Solicitor for Complainant.

Similar replications filed to the answers of Mary C. Rue and John Reeves Rue and to T. Sherman Borden and Rebecca C. Borden.

PETITION FOR REHEARING.

IN CHANCERY OF NEW JERSEY.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, *Complainant*, and ELIZA GUERIN, *et als.*, *Defendants*.		ON BILL, &c. PETITION FOR REHEARING.

The petition of the Camden Safe Deposit and Trust Company, the complainant in the above-stated cause, respectfully shows:

1. That the final hearing and argument in this cause have been had and the conclusions of the Court have been filed but that the final decree, however, has not been signed or entered.

2. That prior to the filing of said bill of complaint, your petitioner made careful inquiry concerning the heirs of the late J. Ogden Cuthbert with the view of determining definitely and accurately to whom and in what manner the distribution of said estate, if any, should be made and also to determine the rights of the parties in the same.

3. That your petitioner, to that end communicated with Mrs. Maxmilian Guerin (the widow of Joseph Ogden Cuthbert, Jr., a son of said testator), as follows:

"July 13, 1915.

Mrs. Maxmilian Guerin,
138 W. 143rd St.,
New York City.

Dear Madam:

The Camden Safe Deposit and Trust Company, one of the trustees under the will of J. Ogden Cuthbert, is about to file a bill in the Court of Chancery to have the will of Jos. Ogden Cuthbert construed by the Court. We desire to ascertain whether Joseph Ogden Cuthbert, Jr. left a will. We are informed that he did not. If he did not, can you tell us whether there was any administrator appointed and if so, who and when and by whom the appointment was made. We would be greatly obliged if you would let us have this information by return mail if possible.

Thanking you in advance, we are

Yours truly,

George J. Bergen
Sol'r Camden Safe Dep. and
Trust Co.

B/A"

4. That said Mrs. Maxmilian Guerin replied as follows:

"New York City. July 19th.

Bergen & Richman,
428 Market St.,
Camden, N. J.

Dear Sir:

In answer to your letter of the 13th would say they were no administrator appointed by Joseph

Ogden Cuthbert Jr., Hoping this will prove satisfactory, I am

Respectfully,
Mrs. Maxmilian Guerin."

5. That your petitioner also made other inquiries with regard to the heirs of the said Joseph Ogden Cuthbert, Jr., and as to his intestacy and was informed by J. Blair Cuthbert, one of its cotrustees and one of the descendents of the said testator, and that the said Joseph Ogden Cuthbert, Jr., died intestate and thereupon your petitioner filed the bill of complaint in this cause wherein it alleged as follows (paragraph 21):

> "That the said Joseph Ogden Cuthbert, Jr., (son of said testator) departed this life on or about the 13th day of January, 1899, intestate without issue, leaving him surviving his widow, Eliza Cuthbert, and that no administrator has ever been appointed of his estate."

And your petitioner further shows that at the hearing of the said cause the said J. Blair Cuthbert was a witness and testified that the said Joseph Ogden Cuthbert, Jr., died intestate, although he had left a memorandum which had not been probated and which could not be probated as a will.

6. That since the hearing of said cause and the filing of the opinion in this court the said J. Blair Cuthbert has interviewed your petitioner and informed your petitioner that he had just discovered that the information given by him to your petitioner and the testimony given by him at the hearing and the allegation contained in paragraph 21 of the bill of complaint wherein it is alleged that the said

Joseph Ogden Cuthbert, Jr., died intestate, was erroneous and incorrect.

7. That the said J. Blair Cuthbert at the same time informed your petitioner that in fact the said Joseph Ogden Cuthbert, Jr., died leaving a will bearing date October 1st, 1896, duly proved before the surrogate of the County of Camden on January 24th, 1899, and recorded in said surrogate's office in Book V of Wills, page 19, in and by which will, said testator did among other things provide as follows:

> "2. I give and bequeath to my wife Lizzie Cuthbert, all that I may be possessed with at my death,—household furniture, books, silverware, goldware, pictures and all money in bank, all money in my possession at my death and all money due me in bills and accounts, for her individual use absolutely."

8. That your petitioner has examined the records above mentioned as to the will of the said Joseph Ogden Cuthbert, Jr., and finds the information given to it by said J. Blair Cuthbert is correct and, therefore, alleges that the said Joseph Ogden Cuthbert, Jr., died leaving a will as set forth in paragraph 7 of this petition.

Your petitioner, therefore, prays that this case may be opened and a rehearing granted and your petitioner be permitted to submit such further proofs as may be necessary to correct the proofs in this respect and such other order as may be necessary in the premises.

And your petitioner will ever pray, &c.

GEO. J. BERGEN,
Solicitor for Complainant.

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

EPHRAIM TOMLINSON, alleging himself conscientiously scrupulous of taking an oath and being duly affirmed according to law, upon his affirmation says that he is the trust officer of the Camden Safe Deposit & Trust Company, the petitioner in the foregoing petition named; that he has read the said petition; that the same is true to the best of his knowledge and belief.

EPHRAIM TOMLINSON.

Affirmed and subscribed this 18th day of December, A. D. 1916, before me.

J. V. MCADAMS,
Attorney at Law of N. J.

ORDER GRANTING REHEARING.

IN CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT and TRUST COMPANY,
Complainant,
and
ELIZA GUERIN, *et als.*,
Defendants.

ORDER GRANTING REHEARING.

On reading the petition of Camden Safe Deposit and Trust Company, the complainant, filed in the above-stated cause praying that this case may be opened and a rehearing granted so that the proofs may be corrected in certain particulars and for such other relief as may be necessary in the premises.

And it further appearing that the parties in interest have consented hereto, it is on this twentieth day of December, A. D. 1916, on motion of George J. Bergen, solicitor for the complainant, ordered that this case be opened and a rehearing of said cause be granted and that the said petitioner and all parties in interest be permitted to submit such further proofs as may be necessary to supplement and correct the proofs in respect to the matters in said petition set forth.

It is further ordered that said cause be set down for rehearing on the 21st day of December, A. D.

1916, at the Chancery Chambers in the Court House in the City of Camden at the hour of nine o'clock in the forenoon or as soon thereafter as counsel can be heard.

E. B. LEAMING,
V. C.

We consent to the making of the above order and hereby waive further notice of hearing on the 21st day of December, 1916.

WILSON & CARR,
Sol'r for James Blair Cuthbert, Edgar G. Cuthbert and Broadway Trust Company, Defendants.

JOHN G. HORNER,
Sol'r for T. Sherman Borden and Rebecca C. Borden, Defendants.

GASKILL & GASKILL,
Solr's for Mary C. Rue and John Reeves Rue, Defendants.

ADAM R. SLOAN,
Sol'r for Elizabeth C. Bowden, T. Percival Cuthbert and Hannah C. Ebert, Defendants.

ROBERT H. MCADAMS,
Guardian ad litem of Katharine Gillespie, Eleanor Cuthbert Gillespie, Albert Elizabeth Gillespie, Elizabeth Livingston Boyd, Norman A. C. Rue, Lucy A. B. Rue, Florence G. Rue, Alan Cuthbert Ebert, John Estaugh Hopkins, Francis Brognard Hopkins, Kendal Cole Hopkins, Anthony Cuthbert Hopkins, Thomas Smith Hopkins, Elizabeth LeH. Cuthbert, Joseph O. Cuthbert, Allen S. Cuthbert, Nicholas

LeH. Cuthbert, Marguerite Ray Cuthbert, Charles Walden Cuthbert, Gladys Josephine Cuthbert, Ogden Cuthbert, Katharine Blair Cuthbert, Flora Katharine Bowden, Reeves DeCamp Borden, Laura Cuthbert Sypherd, Joseph Henry Sypherd, William Cuthbert Branson, Mary Cuthbert Miller, Alice Wells Rue, Elizabeth Cuthbert Rue.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between CAMDEN SAFE DEPOSIT and TRUST COMPANY, TRUSTEE, &c., *Complainants,* and ELIZA GUERIN, *et als.*, *Defendants.*	ON BILL, &c. FINAL DECREE.

This cause coming on to be heard in the presence of George J. Bergen, of counsel with the complainant, and Wilson and Carr, Esquires, of counsel with the defendants, James Blair Cuthbert, Edgar G. Cuthbert and Broadway Trust Company; Hon. John G. Horner and Hon. Lewis Starr, of counsel with the defendants, T. Sherman Borden and Rebecca C. Borden, his wife; Adam R. Sloan, Esquire, of counsel with the defendants, Elizabeth C. Bowden, T. Percival Cuthbert and Hannah G. Ebert; Gaskill and Gaskill, Esquires, of counsel with the defendants, Mary C. Rue and John Reeves Rue, her husband.

And it further appearing that Robert H. McAdams, clerk of this court, has been appointed guardian *ad litem* for the infant defendants, Katharine Gillespie, Eleanor Cuthbert Gillespie, Alberta Elizabeth Gillespie, Elizabeth Livingston Boyd, Norman A. C. Rue, Lucy A. B. Rue, Florence G. Rue, Alan Cuthbert Ebert, John Estaugh Hopkins, Francis Brognard Hopkins, Kendal Cole Hopkins, Anthony Cuthbert Hopkins, Thomas Smith Hopkins, Eliza-

beth LeH. Cuthbert, Joseph O. Cuthbert, Allen S. Cuthbert, Nicholas LeH. Cuthbert Marguerite Ray Cuthbert, Charles Walden Cuthbert, Gladys Josephine Cuthbert, Ogden Cuthbert, Katharine Blair Cuthbert, Flora Katharine Bowden, Reeves DeCamp Borden, Laura Cuthbert Sypherd, Joseph Henry Sypherd, William Cuthbert Branson, Mary Cuthbert Miller, Alice Wells Rue and Elizabeth Cuthbert Rue and has entered an appearance for them in this suit and that the complainant's bill has been heretofore taken as confessed against the other defendants, and the pleadings having been read and the testimony taken and the arguments of the respective counsel having been heard and considered and the Court having duly considered said pleadings and testimony and arguments.

And it appearing to the Court that the complainant and George C. Gillespie and J. Blair Cuthbert, trustees under the will of Joseph Ogden Cuthbert, deceased, are entitled to instructions from this Court as to their duties and to the relief sought and prayed for in the bill of complaint in this cause.

It is on this 24th day of January, 1917, by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor by virtue of the power and authority of this Court doth hereby order, adjudge and decree that the respective rights and interests of the parties to this suit in the lands, real estate and personal property constituting the principal of the estate in the hands of said trustees, and in the income hereof and therefrom are as hereinafter set forth, and the principal and income of said estate shall be hereafter paid and distributed by said trustees and said trustees are instructed as follows, to wit:

Said trustees shall pay the one-fifth share of income which under said will was distributable to Mary C. Rue for life (after the death of Lucy C. Cuthbert, her mother, said mother being now deceased) to said Mary C. Rue for and during the term of her natural life.

In the event of the decease of said Mary C. Rue leaving child or children and no husband surviving her, to her children who may be living at the time of her death in equal parts or shares during their respective lives.

In the event of the decease of said Mary C. Rue leaving a surviving husband and child or children, one-third part of said one-fifth to said surviving husband during his life and the remaining two-thirds thereof to her children who may be living at the time of her death in equal parts or shares during the life of her surviving husband.

That the gift attempted in said will that at the death of a surviving husband of said Mary C. Rue, her entire one-fifth share of the income should be paid to "All and every the child or children of such deceased son, daughter or granddaughter Mary Rue who may be living at the death of such parent in equal parts and shares during their respective lives" is void.

That Henry C. Cuthbert, a son of said testator died April 18, 1902, intestate leaving him surviving his widow Katharine B. Cuthbert and three children, to wit: James Blair Cuthbert, Elizabeth C. Bowden (nee Cuthbert) and T. Percival Cuthbert.

Said trustees shall pay one-third of the one-fifth part of income of said estate which during his lifetime was payable to said Henry C. Cuthbert, to his widow Katharine B. Cuthbert for and during the term of her natural life and the remaining two-thirds

thereof as follows: One-third part thereof to said James Blair Cuthbert, one-third part thereof to Elizabeth C. Bowden, and one-third part thereof to T. Percival Cuthbert during the life of said Katharine B. Cuthbert.

That the gift attempted in said will that at the death of said Katharine B. Cuthbert, widow of said Henry C. Cuthbert, the entire one-fifth share of the income which during his lifetime was payable to said Henry C. Cuthbert should be paid "to all and every the child or children of such deceased son, daughter or granddaughter Mary Rue who may be living at the death of such parent in equal parts and shares during their respective lives," is void.

That Allen Cuthbert, a son of said testator, died November 10, 1903, intestate leaving him surviving no widow, but four children, to wit: Hannah C. Ebert, Louisa G. Hopkins, Edgar G. Cuthbert and Joseph O. Cuthbert III, the latter of whom died January 12, 1907, intestate leaving his widow, now Mary C. Cuthbert Raines, and four children Marguerite Ray Cuthbert, Charles Walden Cuthbert, Gladys Josephine Cuthbert and Edgar Gibbs Cuthbert the latter of whom has since died intestate.

Said trustees shall pay of said one-fifth part of income of said estate which during his lifetime was payable to said Allen Cuthbert, as follows:

One-fourth part thereof to Hannah G. Ebert during the term of her natural life.

One-fourth part thereof to Louisa G. Hopkins during the term of her natural life.

One-fourth part thereof to Edgar C. Cuthbert during the term of his natural life.

The other fourth part thereof shall remain in the hands of said trustees as part of the estate of which said Joseph Ogden Cuthbert died intestate and shall

accumulate with its accretions until said estate is distributable.

That Mary C. Gillespie, a daughter of testator, died November 7, 1906, a widow, leaving her surviving three children, to wit, Elizabeth C. Gillespie, George C. Gillespie and Anna G. Boyd to whom by her will dated October 29, 1906, and probated in the City of Philadelphia, Pennsylvania, and recorded in Book 279 of Wills, page 355, she devised and bequeathed her estate and appointed them executors thereof.

Said trustees shall pay said one-fifth part of income of said estate which during her lifetime was payable to said Mary C. Gillespie, as follows:

One-third part thereof to said Elizabeth C. Gillespie during the term of her natural life.

One-third part thereof to said George C. Gillespie during the term of his natural life.

One-third part thereof to said Anna G. Boyd during the term of her natural life.

That Joseph O. Cuthbert, Jr., a son of testator, died January 13, 1899, without issue, leaving his widow, Eliza Cuthbert, now Eliza Guerin, him surviving, and also having made a last will dated October 1st, 1896, which was duly admitted to probate on January 24, 1899, before the surrogate of Camden County, and letters testamentary thereon were granted to said Eliza Cuthbert. Said will is recorded in said surrogate's office in Book V of Wills, pages 19 &c.

That said trustees shall pay of the one-fifth part of income of said estate which during his lifetime was payable to said Joseph O. Cuthbert, Jr., one-third part to said Eliza Guerin during the term of her natural life.

The other two-thirds parts of said one-fifth of income and the one-third of one-fifth thereof payable

to the said Eliza Guerin during her natural life, after her decease shall remain in the hands of said trustees as a part of the estate of which said Joseph Ogden Cuthbert died intestate and shall accumulate with its accretions until said estate is distributable.

And it is further ordered that in making the payments aforesaid the provisions of said will regulating the manner thereof shall be observed by said trustees.

It is further ordered, adjudged and decreed that the foregoing mentioned life estates are all of the unexpired valid life estates created under and by virtue of the will of the said Joseph Ogden Cuthbert, deceased, and that with the exception thereof said testator died intestate as to all of the residuary estate in the hands of said trustees under said will.

It is further ordered, adjudged and decreed and said trustees are instructed that the corpus of the estate in the hands of said trustees is to be treated as personal property of which the said Joseph Ogden Cuthbert died possessed, and to be distributed to his next of kin, and their executors, administrators and assigns as such.

And it is further ordered, adjudged and decreed that the said Mary C. Rue is the equitable owner of an equal undivided one-fifth part or share of the estate in the hands of said trustees, subject to the life estates aforesaid in said share.

That the said Henry C. Cuthbert was in his lifetime and T. Percival Cuthbert as his administrator now is the equitable owner of an equal undivided one-fifth part or share of the estate in the hands of said trustees, subject to the life estates aforesaid in said share.

That the said Allen Cuthbert was in his lifetime and his substituted administrator to be appointed in place and stead of said Joseph O. Cuthbert III

deceased, will be the equitable owner of an equal undivided one-fifth part or share of the estate in the hands of said trustees, subject to the life estates aforesaid in said share.

That said Mary C. Gillespie was in her lifetime and her executors Elizabeth C. Gillespie, George C. Gillespie and Anna G. Boyd now are the equitable owners of an equal undivided one-fifth part or share of the estate in the hands of said trustees subject to the life estates aforesaid in said share.

That said Joseph O. Cuthbert, Jr., was in his lifetime and Eliza Cuthbert, now Guerin, as his executor, is the equitable owner of an equal undivided one-fifth part or share of the estate in the hands of said trustees subject to the life estate aforesaid of said Eliza Guerin in said share.

And it is further ordered that said trustees do pay out of the estate in their hands to George J. Bergen, Esquire, of counsel with the complainant, a counsel fee of $1250.00; and to Messrs. Wilson and Carr, of counsel with the defendants aforesaid, a counsel fee of $1500.00; and to Hon. John G. Horner and Hon. Lewis Starr, of counsel with the defendants aforesaid, a counsel fee of $1500.00; and to Adam R. Sloan, Esquire, of counsel with the defendants aforesaid, a counsel fee of $1500.00; and to Messrs. aforesaid, a counsel fee of $1500.00 and also the Gaskill and Gaskill, of counsel with the defendants taxed costs of the complainant.

And the prayer of the said cross-bill exhibited by James Blair Cuthbert, Edgar G. Cuthbert and Broadway Trust Company for distribution of the corpus of the said estate as indicated therein, be and the same is hereby denied.

E. R. Walker, C.

Respectfully advised.

E. B. Leaming.

OPINION.

COURT OF CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT & TRUST CO.,
Complainant,
and
ELIZA GUERIN, *et als.*,
Defendants.

OPINION.

Bill by the Camden Safe Deposit & Trust Company against Eliza Guerin and others for the construction of the will of Joseph Ogden Cuthbert, deceased, with cross-bill for partial distribution of trust estate. On final hearing decree advised.

George J. Bergen, of Camden, for complainant, John G. Horner, and Lewis Starr, both of Camden, for defendants, T. Sherman Borden and Rebecca Borden. Wilson and Carr of Camden, for defendants, James Blair Cuthbert, Edgar G. Cuthbert, and Broadway Trust Co., Adam R. Sloan of Camden, and defendants, Hannah Ebert and others.

LEAMING, V. C.

The bill of complaint in this suit has been filed by trustees under the will of Joseph Ogden Cuthbert, deceased, and seeks directions from this Court touching the administration of the trust. All per-

sons interested in the estate have been made defendants.

Testator died November 30, 1887. After certain specific bequests testator devised and bequeathed the residue of his estate to certain designated persons and to their heirs and assigns and successors in office in trust, and specifically defined the nature and extent of the trust.

The trust which is declared by the will first has reference to the disposition which the trustees are directed to make of the net income of the residuary estate during the continuance of the trust, and deals with various contingencies which are to determine the persons to whom the net income shall be payable from time to time. It is then provided that upon the happening of certain contingencies the trustees shall distribute the corpus of the residuary estate in manner therein specifically set forth.

At the date of the will, as well as at testator's death, he had three sons, a daughter, and a granddaughter, the daughter of a deceased son,—who in absence of a will would have been his heirs at law as well as his next of kin.

The provisions of the will for the termination of the trust and distribution of the corpus of the residuary estate are as follows:

> "Upon the death of all my sons and daughter and granddaughter Mary Rue and their surviving husbands and wives; also after the death of all the children of the first generation of my said sons, daughter and granddaughter Mary Rue, the trusts hereby created shall cease, and the trustees of this my will, or their successors in office, shall part, divide and distribute all the residue of the capital of my estate to and among the lawful grandchildren of my said sons,

daughter and granddaughter Mary Rue, absolutely in the shares and proportions above directed respecting the income, clear of further trusts, per stirpes and not per capita."

The corpus of the residuary estate is thus given to vest at the death of persons who are not necessarily in being at the decease of testator. The well defined rule of law against the creation of perpetuities forbids a gift which is to vest on a contingency of that nature. Husbands and wives of the children and grandchildren of testator, and also children of testator's children and grandchild, could come into being after the death of the testator, and no gift could be lawfully made to vest at their death. It results that the gift of the corpus of the residuary estate wholly failed, and that estate at the death of the testator passed to his heirs at law and next of kin under our intestacy laws, subject to the operation of all lawful provisions of the trust, relating to the management of the estate and distribution of the income during such period as the trust could continue. The circumstances that the residuary estate was part personal property and part real estate is here immaterial, as the heirs at law and next of kin of testator were identical at his decease. At the death of testator the equitable title to the corpus of his residuary estate accordingly passed to his four children and grandchild in equal shares, subject to the operation of all lawful provisions of the will relating to the trust for the management of the estate and distribution of the net income therefrom.

Joseph O. Cuthbert, Jr., one of the sons of the testator, has since died without issue. His equitable title to the one-fifth share of the corpus of the residuary estate then vested in the three remaining

children and the granddaughter of testator, thus constituted each the equitable owner of one-fourth of the corpus, subject to the trust relating to the management of the corpus and distribution of the income. Each of these three remaining children of testator have since died, leaving issue who have inherited their parents' respective shares of the corpus, subject to the operation of the trust; the granddaughter of testator is still alive. The legal title to the corpus of the residuary estate is still in the trustees for the purposes of the trust.

The trust created by the will for the management of the residuary estate and the distribution of the net income therefrom is also in conflict with the rule against perpetuities in some of the provisions of the trust; in other respects its provisions are valid and will be enforced.

One-fifth of the net income is directed to be paid by the trustees to each of the four children of testator during their respective lives; one-half of the remaining one-fifth to be paid to the grandchild of testator for life and the other half to her mother for life. These are valid provisions of the trust, and conferred upon each of these six beneficiaries a right to the shares of the income named during their respective lives. As already stated, the granddaughter of testator is still alive; all the children of testator are now deceased.

The trust next provided that upon the decease of the mother of the granddaughter her one-tenth share of the income should be paid to the granddaughter for life. The mother of the granddaughter is now deceased, and the granddaughter is now deceased, and the granddaughter has thus become entitled to one-fifth of the net income.

The trust then provides as follows:

> "Upon the death of any of my sons or daughter or granddaughter Mary Rue leaving a wife or husband surviving them, one-third of the income so as aforesaid made payable to said decedent shall thereafter be paid to such surviving wife or husband for life, the remainder of said income shall be paid to the child or children of such decedent, if any, during the life of such son or daughter or granddaughter Mary Rue so dying should leave no wife or husband to surviving them; also after the death of any such surviving wife or husband: I give, devise and bequeath that fifth part of the share of the income of my estate so as aforesaid held in trust for such son, daughter or granddaughter Mary Rue for life, to all and every child or children of such deceased son, daughter or granddaughter Mary Rue who may be living at the time of the death of such parent in equal parts and shares during their respective lives to be paid to them by my said trustees upon their own receipts only and so that the said capital and income shall not be subject to the debts, control or engagement of my grandchildren."

These provisions of the trust may be best considered in their application to the beneficiaries severally. As the granddaughter, Mary A. Rue, is still alive and has a husband and children living at this time, the several contingencies may be advantageously applied to her share of the income for purposes of illustration.

It will be observed that in the event of her decease, leaving children and no husband surviving her, her one-fifth share of the income is made payable to her

surviving children during their respective lives. This is a valid provision of the trust, as the rights of the surviving children are made to vest at the decease of a granddaughter specifically named in the will. It is also provided that in the event of her leaving a surviving husband and child or children one-third of her share of the income is to be paid to the surviving husband during his life and the remaining two-thirds to her surviving child or children during the life of her surviving husband. These are also valid provisions of the trust for the reasons above stated. It is next provided that at the death of such surviving husband her entire one-fifth share of the income shall be paid to her children who survive at that time. This attempted gift over is void for the reason that it is made to vest at the death of a surviving husband of Mrs. Rue, who is not identified. At the death of testator it was possible that Mrs. Rue's husband might be the person not in being at that time. It is immaterial that Mrs. Rue may have had a husband living at the decease of testator, for he is not specified in the will as the husband to which the contingency solely relates. The possibility of his death and of Mrs. Rue's remarriage renders the vesting of the bequest dependent upon the death of a person who is not necessarily in being at the time of the testator's decease, and violates the rule requiring it to vest within 21 years after the death of a person in being at the decease of the testator. It follows in the event of Mrs. Rue leaving a surviving husband her share of the income at the decease of such husband is undisposed of and will necessarily fall into and become a part of the corpus of the residuary estate. The gift over to the children of Mrs. Rue in the event that she leaves no surviving husband is not impaired by the circumstance that alter-

native contingencies are contemplated by testator at her decease; an estate is made to vest at her decease in either event.

As already stated, the four children of testator are now deceased. The trust provisions above applied to the granddaughter, Mary A. Rue, will apply in like manner to the three children of testator who left children surviving them.

The son Henry C. Cuthbert left him surviving a widow who is still alive, and also left surviving children. At his death two-thirds of the one-fifth of the income became payable to his children during the life of the surviving parent, and the remaining one-third to the widow during the same period. At her death this one-fifth of the income will fall into the corpus of the estate for the reasons already stated.

The son Allen Cuthbert died leaving children and no husband surviving her. Her one-fifth share of the income then became payable to his children for their respective lives.

The daughter Mary C. Gillespie died leaving children and no husband surviving her. Her one-fifth shares of the income then became payable to her children during their respective lives.

As already stated, the son Joseph O. Cuthbert, Jr., died without leaving a child or children, but left a widow, who is still alive. One-third of the one-fifth share of the income then became payable to his widow for life.

The only provision of the trust touching the payment of the share of the income payable to the sons or the daughter or the granddaughter of testator at the death of such son, daughter, or granddaughter childless is found in the concluding part of the ninth item of the will. That provision is as follows:

"Provided, however, that in case any of my

said children or granddaughter Mary Rue should die without leaving any child to survive them, then upon the death of the surviving husband or wife, if any, that share or fifth part of the income of my estate which was so held in trust for the life of such decedent shall be paid by my trustees to my surviving children, and the issue of any of my children who may be then dead leaving issue, in such parts and shares and for such estates that the number of surviving children shall be added to the number of those then dead leaving issue, and those of those then dead leaving issue, and those living shall each take one fractional share of income corresponding to the whole number thus formed and the issue of my deceased children shall together take the fractional share of income that would have appertained to their deceased parent if then living, for and during their respective lives. My intention being to give an equitable life estate of one-fifth part of the income of all my residuary estate to each of my sons Joseph O. Cuthbert and Allen Cuthbert, and Henry C. Cuthbert and to my daughter Mary C. Gillespie and my granddaughter Mary A. Rue subject to trust and conditions above set forth with remainders over after their death as above limited to my grandchildren for life, Mary Rue's share of income to be divided equally with her mother so long as the latter may live."

Touching the above-noted provision, it will be observed that the gift over of the income to surviving children of testator or their issue in the event of the death of a child or the granddaughter of testator without leaving issue would be a valid gift if made

to vest at the time of the decease of such child or the granddaughter. But by the language above quoted no interest is declared to vest in the surviving children of their issue until the decease of a surviving husband or wife of the child or the granddaughter dying without issue. This postpones the vesting until the death of a person who may not be in being at the death of testator. The evidence also discloses that all the children of testator are now deceased, and that all left issue except the son Joseph, last above referred to, who left a widow him surviving, who is still living and who has become entitled for her life to one-third of the one-fifth share of income which was payable to her husband. It follows that no lawful provision of the trust exists to authorize the payment to any one of the remaining two-thirds of the income which was payable to Joseph during his lifetime. That part of the income necessarily falls into the corpus *so long as the trust continues*, and the same will be true as to the one-third of the one-fifth at the decease of the widow of Joseph.

By the sixteenth paragraph of the will provision is made for distribution of parts of the corpus of the residuary estate to great grandchildren of testator in certain events; but those provisions are clearly invalid as contemplating an estate vesting after the decease of persons not necessarily in being at the death of testator.

The foregoing sufficiently defines the scope and operation of the lawful provisions of the trust.

A cross-bill has been filed in behalf of certain children of deceased children of testator, demanding that the trustees be required to make partial distribution to them at this time of the corpus of the estate. Partial distribution is resisted by other beneficiaries.

It is pointed out in behalf of the beneficiaries seek-

ing partial distribution of the corpus that they enjoy a reversionary equitable title to undivided shares of the corpus, and are also entitled to receive under the trust the net income for their respective lives of shares less in proportionate extent than their reversionary rights in the corpus; it is accordingly urged that these life rights to the income necessarily merge in the larger equitable reversionary rights in the corpus and entitle them to present complete enjoyment of those proportionate parts of the corpus on which they respectively receive the income.

I am unable to adopt that view. The legal title of the corpus is vested in the trustees for all lawful purposes of the trust. That intervening legal estate is operative to prevent the merger which is here suggested so long as the lawful purposes sustain its operation. That legal title of the entire corpus has been vested in the trustees by testator for purposes of active management of the entire corpus, and the distribution of the proceeds therefrom in manner specifically directed by testator. In order to effectuate these lawful purposes of testator to their fullest possible extent, that management must continue at this time, and the reversionary equitable estates in the corpus must remain in subservience to the legal title.

The suggestion has also been made that the rule against perpetuities will be violated because the trust will be continued as to some of the beneficiaries of the income for a period exceeding 21 years after the termination of the lives of the persons at whose decease, and because of whose decease, they become entitled to shares of the income is entenable. The period of a trust may lawfully extend to the decease of any designated person, or survivor of any number of designated persons, in being at the death of a

testator, and, if so directed, 21 years thereafter. The life of Mary R. Rue accordingly supports the continuance of this trust for the management of the entire corpus and the distribution of the income therefrom.

Where trust duties under a naked power of sale involve solely the conversion of real estate into personal property and the distribution of the proceeds, and the whole beneficial interest in the land thus directed to be converted belongs to the person for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the *cestui que* trust, but will permit him to take the land if he elect to do so before the conversion has actually been made. But even in such case, where there are several *cestuis que* trust while one may take an election which will be operative to effect a legal conversion of his interest he cannot, against the will of the others, exercise an election which will be effective to entitle him to receive his undivided share in specie. The reason appears to be that the remaining undivided shares may not sell so beneficially in proportion as if the estate were entire. It is in like manner impossible to say that, with a considerable portion of the corpus of this estate removed from the management of the trustees, the net income of the remaining portion will be as beneficial to the remaining beneficiaries as is the lesser, but proportionate, fractional, part of the net income of the whole.

I will advise a decree in accordance with the views herein expressed.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
CAMDEN SAFE DEPOSIT and
TRUST COMPANY, TRUSTEE, *et als.*,
Complainants,
and
ELIZA GUERIN, *et als.*,
Defendants.

ON BILL, &c.
FINAL HEARING.

Before his Honor, E. B. LEAMING, Vice-Chancellor, at the Chancery Chambers, Camden, New Jersey, on Tuesday, May 16th, 1916.

APPEARANCES:

BERGEN & RICHMAN, ESQS., for complainants.

HON. JOSEPH H. GASKILL, for Mary Rue and husband, defendants.

HON. LEWIS STARR, for HON. JOHN G. HORNER, Solicitor of T. Sherman Borden and Rebecca C. Borden, defendants.

WILSON & CARR, ESQS., for J. Blair Cuthbert, Edgar G. Cuthbert and Broadway Trust Company, defendants.

ADAM R. SLOAN, ESQ., for Hannah Ebert, Eliza C. Bowden and T. Percival Cuthbert.

Mr. Starr: I appear for Judge Horner who filed an answer on behalf of T. Sherman Borden. Judge Horner is today engaged in trying a case before Judge Lloyd and yesterday he asked me if I wouldn't represent him so that there would be no delay in the determination of the cause, and in going over the answer which he filed I concluded that the position which he assumed with reference to the application on the part of Mr. Carr's client that there should be immediate distribution of the principal is not well-founded under the terms of the will, and I prepared an amended answer which sets up the claim that there can be no distribution of the corpus of the estate, the trust must be kept intact until the death of Mary Rue, the granddaughter of the testator, and also the death of either the husband or wife of the children who are now living and are enjoying the income under the trust provision. I ask leave to substitute this amended answer for the answer which Judge Horner has already filed.

Mr. Gaskill: That is the same character of answer that I have filed, that there can be no disposition of this matter at this time.

Mr. Sloan: At this time will it be in order for me to inquire of Judge Starr whether in referring to the corpus of the estate he refers to the one-fifth of the corpus to Mary Rue or the whole five-fifths?

Mr. Starr: My contention is that the provision of the trust under the will must remain intact and kept in effect until after her death.

Mr. Gaskill: My position is that Mary Rue is entitled to one-fifth of the income of the whole estate,

not the income of one-fifth of the estate. The whole estate must be invested during the whole of the lifetime of Mary Rue and she is entitled to one-fifth of that.

The Vice-Chancellor: Do the answers place any facts in issue?

Mr. Carr: No, sir, I don't think they do. One or two answers say that they don't know or are uncertain of the family connections. It is simply a matter, as I see it, of proving the family tree.

Mr. Starr: It seems to me there ought to be proof as to when the grandchildren were born, whether they were living at the death of the testator.

The Vice-Chancellor: That is the only point I have seen in the whole case.

Mr. Starr: That is the only question of fact that I see.

The Vice-Chancellor: Well, it is the only question of law that I have seen in the case at first glance.

Mr. Starr: That is the point that I have in mind, whether the gift of income to the grandchildren fails as against the whole or whether that should be sustained.

The Vice-Chancellor: I understand the bequest which might be void as violating the rule against perpetuities is not void if there is some one in being at the time.

Mr. Gaskill: In speaking of grandchildren I think that my client, Mary Rue, is to be eliminated from that class, that under the terms of the will she is practically spoken of as a child, as an immediate descendant.

The Vice-Chancellor: Yes, she has apparently been given the place of a child in the will.

Mr. Gaskill: Yes.

Mr. Sloan: Classified here as a first taker with the sons and daughters.

The Vice-Chancellor: Do you know of any fact, Mr. Bergen, that is not fully established by the pleadings excepting the single fact that Judge Starr suggests—which, I confess, impresses me as the key to the whole case, controlling me—as to what children have come into being since the devise was made to the grandchildren?

Mr. Bergen: As I take it, there are parties to this bill who are minor children, not children but minors, and, of course, I have no desire to magnify technicalities, nevertheless, I presume that formal proof of facts must be given under those circumstances.

The Vice-Chancellor: Well, I apprehend any decree in this case simply wants to be a guide as to matters not in dispute. We do not want to take up a lot of time with useless proof. Will not the whole controversy be controlled by the single question of the determination of a rule to guide the executors in their future conduct? This court cannot be very

much interested now in trying to find out accurately who all the minors are or who all of the various defendants are; all you want is to have a proper guide for future conduct touching the law.

Mr. Bergen: Yes, that is very true, but nevertheless I apprehend that I ought to establish by formal proof the facts set forth in the bill, for the reason that I do not believe there can be any admission on the record binding infant defendants. Now, of course, this rule we want ought to be established so that it is binding on all persons in being who are interested in this estate, otherwise it is not established in such a way that it can be acted on with certainty.

Mr. Gaskill: I had suggested, either to Mr. Bergen or some one else in connection with this matter, that a great deal of unnecessary time might be saved the Court and counsel if we just met in some office and, with one or two members of the family, just prepared a family tree or genealogical table showing all parties in existence now and when they were born with reference to the death of the testator.

Mr. LeDuc (Of Wilson & Carr): If your Honor please, we have here just such a table as Judge Gaskill describes. We have had it verified by members of the family and are ready to offer it as an exhibit.

Mr. Gaskill: That we have had no opportunity of going over and know nothing about at all.

Mr. LeDuc: True, but we have had it checked up by members of the family.

The Vice-Chancellor: The only point I made or intended to make was that it seems to me that all the necessities of the case that are presented is the judicial determination of a rule which shall guide future conduct. Now, there will be no difficulty in arranging that rule within the facts if it is definitely prescribed, will there?

Mr. LeDuc: Well, may it please your Honor, our claim is of a more affirmative nature than those of any other parties in this controversy except Mr. Sloan, who agrees with us. We contend that two-thirds of this whole estate is presently distributable and must be distributed by operation of law,—rule of law.

The Vice-Chancellor: That is the rule of law that you want declared, isn't it?

Mr. LeDuc: Yes, and we also ask in our answer the immediate distribution of this portion of the estate.

The Vice-Chancellor: Supposing your view is sustained, there is no trouble about its application, is there?

Mr. LeDuc: There might be, yes,—I think so. I think it is dependent upon the facts in the family history. It seems to me the family history is important and essential to a proper decree in this case.

Mr. Bergen: It strikes me, if your Honor please, that we can prove the facts in the length of time that it would take us to decide whether we were going to prove them or not.

The Vice-Chancellor: Go ahead, prove them. If you are going to make proofs, though, I want them made properly.

Mr. Starr: May I make a suggestion? Mr. LeDuc, is it important in your view to have any other facts shown except that the persons who are now entitled to this estate were living at the time of the death of the testator?

Mr. LeDuc: Yes, I think it is important to show the deaths of some parties.

Mr. Starr: That is the only question of importance, as I view the case.

The Vice-Chancellor: If the only question is whether the rule of perpetuities has been violated it seems to me that is the only important fact.

Ephraim Tomlinson, alleging himself conscientiously scrupulous of taking an oath, being duly affirmed according to law, on his solemn affirmation saith:

By Mr. Bergen:

Q. Mr. Tomlinson, you are the trust officer and vice-president of the Camden Safe Deposit & Trust Company?

A. I am.

Q. And it is one of the trustees now acting under the will of Joseph Ogden Cuthbert?

A. It is.

Q. Who are the other trustees at the present time?

A. Mr. George C. Gillespie and J. Blair Cuthbert.

Mr. Bergen: I offer in evidence a ecrtified copy of the will of Joseph Ogden Cuthbert, which will is dated July 15th, 1887, and is proved before the surrogate of Camden County and recorded in his office, in Book V of Wills, page 213.

(Said paper marked Exhibit C1.)

Mr. Bergen: I also offer in evidence a certified copy of the appointment of Allen Cuthbert to take the place of one of the trustees named in the will. This appointment is recorded in the surrogate's office of Camden County in Book A of Surrogate's Orders, page 4, and is dated June 20th, 1890.

(Said paper marked Exhibit C2.)

Mr. Bergen: I now offer in evidence certified copy of the appointment of Camden Safe Deposit & Trust Company to take the place of one of the previously acting trustees. This appointment is dated December 21st, 1900, and is recorded in the surrogate's office of Camden County in Book A of Petitions, Requests, &c., page 354.

(Said paper marked Exhibit C3.)

Mr. Bergen: I now offer in evidence a certified copy of the appointment of George C. Gillespie to succeed one of the previously acting trustees. This appointment is dated October 27th, 1906, and is recorded in the surrogate's office of Camden County in Book B of Requests, page 87.

(Said paper marked Exhibit C4.)

Mr. Bergen: I now offer in evidence certified copy of the appointment of J. Blair Cuthbert, dated the 7th day of November, 1904, recorded in the surrogate's office of Camden County, in Book V of Requests, &c., page

(Said paper marked Exhibit C5.)

By Mr. Bergen:

Q. That chain of appointments, Mr. Tomlinson, in addition to the will, resulted in the acting at the present time as trustees of the Camden Safe Deposit & Trust Company, Mr. George C. Gillespie and Mr. J. Blair Cuthbert?

A. Yes.

Q. As trustees?

A. Yes.

Q. About how much is the principal fund of this estate?

A. The principal fund, according to the books today, is $217,971.85.

The Vice-Chancellor: Is Mary Rue still alive?

Mr. Gaskill: Yes, sir; she and her husband both are alive.

Mr. Bergen: I think, if your Honor please, that the probabilities are that Mr. Cuthbert can verify the relationship better than Mr. Tomlinson can and I will withdraw him for the present.

Mr. Gaskill: I find in typewriting my answer that there is an omission here of a matter that was brought to my attention at the time I drew the answer. I want to add on the third page, after "Mary C. Rue," the words "or John Reeves Rue, her husband, if he survives," making it read "that no distribution or division of the corpus of the estate can be made during the lifetime of this defendant, Mary C. Rue, or John Reeves Rue, her husband, if he survives."

Mr. LeDuc: You mean page 4, Judge, I think.

Mr. Gaskill: Well, it is on page 3 of my copy. It is just preceding my answer to paragraph 59. It is in the third line: "or John Reeves Rue, her husband, if he survives." I want to add that. I will draw an order to that effect.

Mr. Bergen: Now, I offer in evidence the appointments of Mary C. Cuthbert as guardian of Edgar G. Cuthbert, Charles W. Cuthbert, Gladys J. Cuthbert and Marguerite R. Cuthbert, all of which are dated August 30th, 1907, and made by the surrogate of Camden County.

(Said papers marked Exhibits C6, 7, 8 and 9.)

Mr. Bergen: For information on the record I will state that Mary C. Cuthbert—it is alleged in the bill—has since remarried and that her present name is Mary C. Raines. I also offer in evidence the appointment of Eliza Cuthbert as executrix of the will of J. Ogden Cuthbert, deceased, issued by the surrogate's office of Camden County, which appointment was made on January 24th, 1899.

(Said paper marked Exhibit C10.)

J. Blair Cuthbert, a witness produced in behalf of the complainants, being duly sworn according to law, on his oath says:

By Mr. Bergen:

Q. Mr. Cuthbert, where do you reside?
A. Camden, 429 Pearl.
Q. And are you one of the trustees under the will of J. Ogden Cuthbert?
A. Yes, sir.
Q. Mr. Cuthbert,—and you are now acting as such?
A. Yes, sir.
Q. Are you familiar with the family relationships and the facts with regard to the persons who now are living descendants of J. Ogden Cuthbert?
A. Yes, sir.
Q. What relation was he of yours?
A. Grandfather.
Q. He was your grandfather?
A. Yes, sir.
Q. Have you made any study of the relationships as set forth in the bill of complaint in this cause?
A. Yes, sir, I have read it over.
Q. Have you read it over in such a way that you can say whether or not the relationships as set forth there are correct?
A. Down to the grandchildren, yes, sir.
Q. Down to the grandchildren?
A. Yes, sir.
Q. Have you looked over and compared this chart which I hold in my hand?
A. Yes, sir. The only point that I would hesitate on would be—being sworn here, would be on the names of the great-grandchildren.

Q. Well, have you made inquiries in your family and things of that kind to ascertain and verify the names of not only the children but the grandchildren and the great-grandchildren of your grandfather?

A. Yes, sir, with Mrs. Rue here this morning.

Q. I call your attention to this chart and ask you whether or not the family relationships as shown on that chart are correct?

A. I would say that they are.

Q. That corresponds with the best information that you can get throughout your whole family, does it?

A. Yes, sir; and any point that I am weak on can be verified by Mrs. Rue or Mr. Gillespie, and with their help and my own I am sure we could verify this chart.

Q. Well, so far as your information goes that chart is absolutely correct?

A. Yes, sir.

Q. Down to the great-grandchildren?

A. Yes, sir.

Q. And as to them you believe it to be correct,—is that correct?

A. Yes, sir, and Mrs. Rue can verify those.

Q. And that also is true with regard to the relationships and facts set forth in the bill, is it?

A. Yes, sir.

Q. Now, I call your attention to the dates, certain dates which are placed on this chart, of the death of persons: Have you also verified those dates?

A. You mean, Mr. Bergen, compared them with positive facts to verify them as being the truth?

Q. Well, when did Mary C. Gillespie die?

A. It is in here as November 7th, 1906.

Q. Well, when did she die?

A. I believe that to be the correct date. Her son is here, he could verify it.

By Mr. Gaskill:

Q. You refer to the Mary C. Gillespie that is mentioned in the will as one of the children of the testator?

A. First child of the testator.

Q. She died when?

A. November 7th, 1906.

By Mr. Bergen:

Q. When did your grandfather die,—Joseph Ogden Cuthbert?

A. 1887.

Q. What month and day?

A. November 30th, 1887.

Q. How many children survived him?

A. All his children.

Q. How many of his children survived him?

A. All except Anthony.

Q. And what are their names?

A. Joseph O., and Allen, Henry C. and Mary C. Gillespie.

Q. The will speaks of Mary C. Rue, a granddaughter. Did she survive him?

A. Yes, sir.

Q. Is she still living or not?

A. Yes, sir.

By the Vice-Chancellor:

Q. And also her husband, John?

A. John is living.

By Mr. Bergen:

Q. John, her husband, is living?
A. Yes, sir.
Q. Who was her father?
A. Anthony.
Q. And he was a son of the testator?
A. The oldest child, died before his father.

By the Vice-Chancellor:

Q. He died before your grandfather's will was made, did he not?
A. I couldn't say that, because I don't know how long before the death of the testator that the will was made.

By Mr. Bergen:

Q. Well, do you know the date of the death of Anthony?
A. No, but his daughter, Mrs. Rue, is here, she could tell you.

The Vice-Chancellor: Well, it doesn't matter. I take for granted that it was so because he treats the granddaughter as having taken the place of the deceased son.

Mr. Starr: The will was dated in July and the testator died in November of the same year.

Mr. Bergen: The bill sets forth in detail, one after the other, the children and grandchildren and great-grandchildren, we can go over them in detail, it seems to me, however, ——

The Vice-Chancellor: It is up to you, Mr. Bergen, you are making these proofs at your own instance; your suggestion was that there are minors here and that you have got to bind them. Now, go ahead, it is up to you; I don't care anything about it. I thought you were going to make strict proofs in order to bind the minors.

Mr. Bergen: I want to make strict proofs but I was merely asking for information as to whether your Honor thought that that was sufficient to be called strict proofs. It seems to me it is.

The Vice-Chancellor: Well, I don't know, I wouldn't like to say.

By Mr. Bergen:

Q. Now, are the facts, Mr. Cuthbert, as set forth in that chart, on that chart, with regard to the dates of death of various persons and various issue, &c., with the exception as you stated before,—of the great-grandchildren, was it?

A. Yes, sir; the grandchildren of Mary Rue, their christian names are—may be a little weak in my mind but she is here, she could verify them; the rest of the grandchildren I am all very well acquainted with.

Q. Then the grandchildren of J. Ogden Cuthbert and all the facts up to that are correct?

A. Yes, sir.

Q. And the only exception about which you are weak is what?

A. Is the children of May Rue.

Q. Is as to the children of Mary Rue?

A. Yes.

Q. All right. With that exception you know that chart to be correct?

A. Yes, sir, I would accept it as correct.

Cross-examination.

By Mr. Gaskill:

Q. Mr. Cuthbert, we have the date of the death of Mary C. Gillespie. Now, when did Joseph C. Cuthbert, Jr., one of the children of the testator, die?

A. January 12th, 1907. That is Joseph O., 3d, grandson of the testator.

Q. No, I am not talking about the grandson, I asked you about the son of the testator. In the will it is Joseph C. Cuthbert, Jr., or in my copy of it.

The Vice-Chancellor: Joseph O.

A. J. Ogden Cuthbert, 2d, the son of the testator, died January 13th, 1899.

Q. Joseph Ogden?

A. Joseph Ogden is right.

Q. Now, what did you say the date of his death was?

A. January 13th, 1889.

By the Vice-Chancellor:

Q. 1899?

A. I beg your pardon. 1899.

By Mr. Gaskill:

Q. January 13th, 1899?

A. Right.

Mr. Bergen: Judge, you said in your copy of the bill——

Mr. Gaskill: In my copy of the will.

Q. Now, when did Allen Cuthbert, one of the children of the testator, die?

A. November 10th, 1903.

Q. And when did Henry C. Cuthbert, one of the children of the testator, die?

A. April 18th, 1902.

By Mr. Starr:

Q. I understand, Mr. Cuthbert, that you are the son of Henry C. Cuthbert?

A. Yes, sir.

Q. When were you born?

A. November 5th, 1868.

Q. November 5th, 1868?

A. Yes, sir.

Q. And your sister, Eliza Bowden, was born when?

A. I can't give you the date of that birth; she is younger than I am. I am the oldest child; she is the second child.

Q. Was she living on November 30th, 1887, when your grandfather died?

A. Yes, sir; so was all of his grandchildren.

Q. Now, your brother, F. P. Cuthbert, was he living at the time your grandfather died?

A. Yes, sir; he is younger than Mrs. Bowden.

Q. Now, take the descendants of Mary Gillespie: There are three children, as I understand. George?

A. Yes, sir.

Q. Eliza and Anna?

A. Yes, sir.

Q. Were they all living at the time?

A. Of the death of the testator?

Q. Yes.

A. Yes, sir.

The Vice-Chancellor: Well, just a moment, Judge Starr. You were examining touching the three children of Henry C. Cuthbert.

Mr. Starr: Yes.

By the Vice-Chancellor:

Q. How about the great-grandchildren? Were any of them born at the time of the death of your grandfather?

A. No, sir.

Q. Then so far as Henry is concerned all of the children were alive at the date of the death of the testator and none of the grandchildren?

A. Yes, sir,—and none of them were married at the death of the testator, not old enough.

By Mr. Starr:

Q. Now, as to the three children of Mary Gillespie, George, Eliza and Anna?

A. Yes, sir.

Q. Were they all living at the time of the death of your grandfather?

A. Yes, sir.

Q. And their children, who would be the great-grandchildren of your grandfather, were they living or not at the time of the testator's death?

A. You mean were they born at the time?

Q. Were they born at the time of the death of the grandfather?

A. I can't answer that. Mr. Gillespie can answer that question for you.

Q. Now, as to J. Ogden Cuthbert,—he died without any children, as I understand it?

A. Yes, sir.

Q. And his widow still survives him?

A. Yes, sir, a widow that he married after the death of the testator. Joseph Ogden Cuthbert, Jr., was not married to Eliza Moore, now Eliza Guerin, at the death of the testator.

Q. Now, as to Allen Cuthbert, there was four children, Joseph, Edgar, Hannah and Louisa: Were they all living ——

A. Yes, sir.

Q. —at the time of the testator's death?

A. Yes, sir.

Q. Now, as to their children, the great-grandchildren of the testator, do you know whether they were born at the time of his death?

A. I am of the opinion that they were not.

Q. Now, as to the children of Mary Rue, who would be the great-grandchildren of the testator, were they living at the time of the testator's death? Had they been born?

A. Mrs. Rue is in the room. It is in my mind that the oldest child may have been born prior to 1887. She can answer that for you positively.

Q. You have no knowledge on the subject?

A. No, sir.

By Mr. Gaskill:

Q. I omitted to get a memorandum that I want. When Mary C. Gillespie died in November of 1906 did she leave surviving a husband?

A. No, sir, her husband predeceased her in the same year.

Q. Now, Joseph Ogden Cuthbert, you said what with reference to him?

A. The son of the testator?

Q. Yes. Now, let me put the question this way: When he died did he leave a widow surviving him?

A. Yes, sir.

Q. What was her name?

A. Her name then was Eliza Cuthbert, now Eliza Guerin. She has since married Maximillian Guerin.

Q. She is still living?

A. Yes, sir.

Q. Now, Allen Cuthbert, when he died in November, 1903, did he leave a widow surviving?

A. No, sir; his wife preceded him in death.

Q. Henry C. Cuthbert, when he died in April of 1902 did he leave a widow surviving?

A. Yes, sir, still living.

Q. That shows four of the original takers, to use Mr. Sloan's expression, living: Mary C. Rue and her husband, John, and the widow Eliza Cuthbert, widow of Joseph, and the widow of Henry C. Cuthbert,—that is right, isn't it?

A. Yes, sir.

By Mr. Bergen:

Q. Mr. Cuthbert, who did you say could speak with regard to the dates of birth of the children of George C. Gillespie and Anna G. Boyd?

A. I didn't say.

Q. Didn't you state that Mr. Gillespie was in the room and he could answer that?

A. Yes, sir.

Q. Now, as to the descendants of Mary C. Rue.

The Vice-Chancellor: He said he did not know.

A. She is in the room.

Q. You said you thought the oldest one might have been born at the time ——

A. She can speak for herself, she is here.

Q. Now, as to the descendants of Allen Cuthbert, you yourself are informed and have so testified?

A. Sir?

Q. As to the descendants of Allen Cuthbert, you yourself are informed and have so testified,—that is right, isn't it?

A. Yes, sir.

By the Vice-Chancellor:

Q. You said all four children were born before November 30th, 1887, and none of the grandchildren were born until after November 30th, 1887?

A. Yes, sir, because the grandchildren weren't that old; Mary C. Rue is the only grandchild who might have possibly had an offspring born before the death of the testator.

By Mr. Gaskill:

Q. You haven't on that table the dates of birth?

A. No, sir; we haven't the dates of birth, only the dates of death are here on this.

By Mr. Bergen:

Q. Mr. Cuthbert, Eliza Cuthbert, now Eliza Guerin, has no children, I understand?

A. No, sir.

Q. Now, then, the children of Allen Cuthbert, Hannah G. Ebert, Louisa G. Hopkins, Edgar G. Cuthbert and ——

A. Yes, sir.

Q. And Joseph O. Cuthbert, the 3d?

A. Yes, sir; he is dead.

Q. Who is deceased?

A. Yes.

Q. Hannah Ebert has how many children?
A. One son.
Q. Do you know how old he is?
A. About twenty-one or two, or in that neighborhood, maybe twenty, a young man.
Q. Was he born before or after your grandfather died?
A. After.

By the Vice-Chancellor:

Q. All of the grandchildren of Allen were?
A. Yes.

Mr. Bergen: That is a great-grandson.

Q. All of the grandchildren of Allen were born after the death of the testator?
A. Yes, sir. I can clear that point about the great-grandchildren for you in a moment, with your permission.

By Mr. Bergen:

Q. Well, clear it.
A. Mrs. Rue, was Reba born before 1887?
Q. Oh, well, I will prove by Mrs. Rue whatever happened in that respect.
A. Because I think that is the only great-grandchild born before the death of the testator, that is my opinion.
Q. So with a possible exception of one grandchild in the Rue family ——
A. Yes, sir.
Q. All of the great-grandchildren ——
A. Were born after the date of the death of the testator.

By Mr. Starr:

Q. What was the date of the birth of your sister, Eliza Bowden?

A. I don't know.

Q. Or your brother, T. P. Cuthbert?

A. I can't call those days or dates.

Q. They are both younger than you?

A. Oh, yes.

Q. Now, your cousins, the children of Allen Cuthbert: Joseph,—what was the date of his birth? Do you know that?

A. No, sir, I can't give you those birth dates.

Q. Or the date of the births of his brothers and sisters?

A. No, sir.

Q. Were they younger or older than you?

A. Joseph and Hannah Ebert are older than I am, Louisa Hopkins and Edgar G. are younger than I am.

Q. Joseph and Louisa are younger?

A. No, sir; Joseph and Hannah are older, Edgar and Louisa are younger.

GEORGE C. GILLESPIE, a witness produced in behalf of the complainants, being duly sworn according to law, on his oath says:

By Mr. Bergen:

Q. Mr. Gillespie, you are one of the trustees under this will?

A. Yes, sir.

Q. And your mother was Mary S. Gillespie, a

daughter of Joseph Ogden Cuthbert, who was the testator?

A. She was.

Q. Is that right?

A. Yes.

Q. When did she die?

A. 1906.

Q. What month?

A. November.

Q. Did her husband survive her or not?

A. No, she survived my father, her husband.

Q. Now, how many brothers and sisters have you?

A. Two sisters only.

Q. No brothers?

A. No brothers.

Q. What are their names?

A. Elizabeth Cuthbert and Anna G. Boyd.

Q. When you say Elizabeth Cuthbert you mean Elizabeth Cuthbert Gillespie?

A. Yes, sir.

Q. Cuthbert is a middle name?

A. Yes, sir.

Q. Is she married?

A. A spinster, single.

Q. You are married?

A. Yes, sir.

Q. Your wife's name is Mary B.?

A. Yes.

Q. How many children have you?

A. Three.

Q. Are they Katharine, Eleanor Cuthbert and Alberta Elizabeth?

A. That is right. Alberta Elizabeth Mary.

Q. Alberta Elizabeth Mary?

A. Yes.

Q. Were they living at the death of your grandfather, Joseph Ogden Cuthbert?

A. No, they were not.

Q. Do you remember their ages?

A. Oh, I can tell approximately. Katharine is sixteen.

Q. How old is the oldest one?

A. They are all under seventeen.

Q. All are under seventeen?

A. Yes, sir.

Q. Now, your sister, Anna G. Boyd, is married?

A. Yes.

Q. And her husband living?

A. Yes.

Q. His name is what?

A. George M. Boyd.

Q. How many children have they?

A. Three.

Q. What are their names?

A. George, Mary Cuthbert and Elizabeth Livingston Boyd.

Q. George Boyd is George Boyd the third, isn't he?

A. Yes.

Q. How old is he?

A. Why, he is approximately twenty-seven—oh, he is certainly under twenty-nine, I should say about twenty-seven.

Q. Were any of them living at the time your grandfather died, the testator?

A. No, they were not.

Q. Are any of them married?

A. No.

Q. And none of your children are married?

A. No.

Q. So that that is the end of that line?

A. Yes.

Cross-examination.

By Mr. Starr:

Q. Now, Mr. Gillespie, when were you born?
A. September 14th, 1858. I am very young for my age, though.
Q. And what about your sister, Elizabeth: When was she born?
A. I can't recall exactly, it was December 10th, 9th or 10th, about five years—just about five years earlier than I was.
Q. That was about 1853?
A. About '53, I think that is just about right.
Q. And your sister Anna was born when?
A. She is about two years younger than I am.
Q. That was about 1860?
A. About 1860, December.

By Mr. Bergen:

Q. By-the-way, Mr. Gillespie, your mother left a will, didn't she?
A. Yes.
Q. And she devised all her estate to her three children and appointed them the executors?
A. Yes.
Q. And they qualified and acted?
A. Yes.

MARY CUTHBERT RUE, a witness produced in behalf of the complainants, being duly sworn according to law, on her oath says:

By Mr. Bergen:

Q. Mrs. Rue, what was your father's name?
A. Anthony Cuthbert.
Q. And he was a son of the testator, Joseph Ogden Cuthbert?
A. Yes.
Q. And when did he die,—before or after your grandfather?
A. Why, before my grandfather, I forget the year.
Q. He died before the testator?
A. Yes.
Q. Now, when he died he left your mother surviving him?
A. Yes.
Q. And what was her name?
A. Lucy Ann Cuthbert.

Mr. Gaskill: And not Lucy C.?

Mr. Bergen: She seems to be known throughout these papers as Lucy C.

Q. She is now dead, is she not?
A. Yes.
Q. When did she die?
A. She has been dead several years. I don't remember the dates; I gave them all once.
Q. Eh?
A. I gave all the dates once but I don't remember them all now.
Q. Mrs. Rue, how many children have you?
A. Nine.

Q. Nine?
A. Yes.
Q. Is your husband living?
A. Yes.
Q. And what is his name?
A. John Reeves Rue.
Q. John Reeves Rue?
A. Yes.
Q. You would recognize your own memorandums, would you not?
A. Yes.
Q. (Handing paper to witness.) Now, what are your children's names?
A. Rebecca Cuthbert Borden.
Q. Is she married?
A. Yes.
Q. And what is her husband's name?
A. T. Sherman Borden.
Q. Has she any children?
A. One, Reeves D. Borden.
Q. What?
A. Reeves.
Q. Reeves what?
A. D. Reeves DeCamp.
Q. And how old is he?
A. He is seven, I think.
Q. Seven?
A. Yes.
Q. That is the only child they have?
A. Yes.
Q. Now, what is your next child?
A. Clara I. Sypherd.
Q. What is her husband's name?
A. J. Harry Sypherd.
Q. Have they any children?
A. Two.

Q. How old are they?
A. Laura is ten, ten or eleven, and Joseph is three.
Q. Joseph is three. Laura Cuthbert Sypherd,—is that the first one you mentioned?
A. Yes.
Q. And Joseph Henry Sypherd?
A. Yes, sir.
Q. Have they any other children?
A. No.
Q. Now, what is your next child?
A. W. Harry.
Q. W. Harry Rue?
A. Yes.
Q. Is he married?
A. Yes.
Q. What is his wife's name?
A. Ethel W. Rue.
Q. Have they any children?
A. Two.
Q. What are their names?
A. Alice Wells.
Q. Alice Wells Rue?
A. Yes.
Q. And what is the other one?
A. Elizabeth Cuthbert Rue.
Q. How old are those children?
A. Alice is eleven,—ten, and Elizabeth is one.
Q. One?
A. Yes.
Q. Now, what is your next child?
A. Mary Estella Branson.
Q. Is she married?
A. Yes.
Q. What is her husband's name?
A. William S. Branson.
Q. And have they any children?
A. One.

Q. What is that child's name?
A. William Cuthbert.
Q. How old is he?
A. He is six.
Q. They have no other children?
A. No.
Q. What is your next child?
A. J. Reeves Rue.
Q. Is he married?
A. Yes.
Q. What is his wife's name?
A. Mary DuRose.
Q. Mary DuRose?
A. Yes.
Q. Have they any children?
A. No.
Q. What is your next child's name?
A. Eleanor Reeves.
Q. Eleanor?
A. Yes.
Q. Or Eleanora?
A. Eleanora.
Q. R. What is her last name?
A. Miller.
Q. Eleanora R. Miller?
A. Yes, sir.
Q. What is her husband's name?
A. Ellsworth Miller.
Q. Has he a middle letter? Is it H.?
A. Yes. His first is H. Yes, it is H. I don't know whether it comes before Ellsworth or afterwards. I guess it comes afterwards.
Q. Have they any children?
A. One.
Q. And what is her name?
A. Mary Cuthbert Miller.

Q. And how old is she?
A. She is one year old.
Q. Have you any other children?
A. No.
Q. Have you any other children?
A. Yes.
Q. What are their names?
A. Norman Anthony Cuthbert Rue.
Q. That is the first one, is it?
A. Yes.
Q. Now, what is another one?

By the Vice-Chancellor:

Q. These are minors?
A. Yes.

By Mr. Bergen:

Q. How old is he?
A. He is twenty-one now, but when this was written he was not twenty-one; and the next is ——
Q. When did he become twenty-one?
A. Last November.
Q. And you have another child?
A. Yes; Lucy Ann Burr Rue.
Q. And how old is she?
A. Eighteen.
Q. And another?
A. Florence Gladius Rue.
Q. Now, are either Norman, Lucy or Florence married?
A. No.

Cross-examination.

By Mr. Gaskill:

Q. When was your daughter Rebecca, wife of Mr. Borden, born?
A. July, 1876.
Q. What day in July?
A. 15th.
Q. July 15th, 1876?
A. Yes.
Q. When was your daughter Clara, wife of Harry Sypherd, born?
A. September 8th, 1878.

The Vice-Chancellor: The first one was what date?

Mr. Gaskill: July 15th, 1876.

Q. Now, when was your daughter Estella Branson born?
A. I don't know that I remember all the dates.
Q. Well, you can look at those papers that you have there that you wrote out for Mr. Bergen. The year is the most important thing.
A. I gave them all once.

By the Vice-Chancellor:

Q. Can you tell which of them were born before your father died?
A. My father?
Q. Yes,—before your grandfather died?
A. Yes.
Q. Your grandfather died November 30th, 1887?
A. There were five.

Q. Five of them born before he died?
A. Yes.

By Mr. Gaskill:

Q. Now, give us the other three of those five, then, Mrs. Rue. You have given us Mrs. Sherman Borden and you have given us Mrs. Sypherd. Now, which other of your children were born before your grandfather died?
A. W. Harry.
Q. When was he born?
A. 1888.

A Voice: 1880.

Q. 1880?
A. Yes.
Q. Can you give the month?
A. June.
Q. June, 1880?
A. Yes.
Q. Now, which of the others?
A. Then there was Estella, November.
Q. What year?
A. I can't remember all the dates. 1880, was it?

A Voice: 1886.

Q. 1886?
A. Yes.
Q. Who was the other one?
A. Then J. Reeves, that was October, 1884, I think.
Q. J. Reeves was October, 1884?
A. Yes. Then the rest were born after he died.

Q. Those five were born before your grandfather died?

A. Yes.

Q. And the others were born after your grandfather died?

A. Yes.

By the Vice-Chancellor:

Q. And all of your grandchildren were born after your grandfather died?

A. Yes.

By Mr. Gaskill:

Q. Have you made a mistake in saying that your son J. Reeves Rue was born in 1884, before your grandfather died?

A. Yes, he was born before he died.

Q. He was born before he died?

A. Yes.

Mr. Bergen: I think, if your Honor please, that completes our proofs, unless we have overlooked something.

The Vice-Chancellor: I will hear any evidence for the defence.

Mr. LeDuc: Nothing for the parties we represent, your Honor.

Mr. Sloan: I have nothing, if your Honor please.

Mr. Bergen: I would like to recall Mr. Cuthbert, if your Honor please.

J. Blair Cuthbert, recalled.

By Mr. Bergen:

Q. Mr. Cuthbert, you have heard Mrs. Rue's testimony and the testimony of Mr. Gillespie?

A. Yes, sir.

Q. In the light of that testimony—does it confirm the accuracy of that chart?

A. It does.

Q. So that the chart is correct in all respects, is it?

A. Yes, sir.

Mr. Bergen: I offer the chart in evidence.

(Said paper marked Exhibit C11.)

No cross-examination.

Ephraim Tomlinson, recalled.

By Mr. Bergen:

Q. Mr. Tomlinson, will you please state to the Court in what manner the trust company, one of the trustees under this will, has been distributing the income of this estate?

A. At the time of our appointment in 1901 Joseph O. Cuthbert, Jr., one of the original beneficiaries, had died. With that exception the original income was divided between Mary C. Gillespie, one-fifth; Allen Cuthbert, one-fifth; Henry C. Cuthbert, one-fifth,

and Mary Rue, one-fifth, she taking the full share which her mother had previously enjoyed with her. The Joseph O. Cuthbert, Jr., one-fifth was and has since been paid as follows: One-third to his widow and the remaining part of the one-fifth to the respective families, divided between the four families.

Q. Representing his four children?

A. Representing his four children, Katharine B. Cuthbert, the widow of Henry C. Cuthbert, taking one-third of the income which her husband was enjoying at the time of his death.

Q. What became of the other two-thirds of that one-fifth?

A. The other two-thirds was divided between the four families.

Q. The other four?

A. The four families, the Henry C. Cuthbert family, Allen Cuthbert family, Mary Rue family and Mary C. Gillespie family.

Cross-examination.

By Mr. Sloan:

Q. Per stirpes?

A. By representation; as the respective children of the original testator died their income has since been divided between their children.

By Mr. Gaskill:

Q. That is, the grandchildren of the testator?

A. The grandchildren of the testator; one of those grandchildren, Joseph O. Cuthbert, second, Allen Cuthbert's son's income having gone to their guardian—to his children through their guardian.

By Mr. Sloan:

Q. Mr. Tomlinson, then I understand you to say that two-thirds of the one-fifth originally set apart for Joseph Cuthbert, the first taker, is the only money which you have been distributing?

A. No; each family have been taking their original one-fifth, and, in addition to their original one-fifth, two-thirds of one-fifth, Joseph O. Cuthbert, Junior's, share, has been divided between the four families.

By Mr. Starr:

Q. Has that method of distribution or division of income received the sanction of all three trustees?

A. Yes.

By Mr. Bergen:

Q. Mr. Tomlinson, the allegation contained in the bill is that J. Blair Cuthbert, on or about March 22d, 1915, assigned to the Broadway Trust Company his interest in this estate: Is that correct?

A. We received notice to that effect.

Q. You haven't got a copy of it?

A. I didn't bring a copy of it with me.

Mr. Bergen: I will ask leave to supply the proof by offering in evidence that copy of which we received notice to the effect that this interest has been assigned, and ask leave to have that marked as an exhibit so I can use it in evidence.

J. Blair Cuthbert, recalled.

By Mr. Bergen:

Q. Mr. Cuthbert, it is alleged in the bill that you made an assignment of your interest to the Broadway Trust Company. I understand it was as collateral to a loan?

A. Yes, sir, it was.

Q. Is that a copy of the assignment (exhibiting paper to witness)?

A. Yes, sir.

Q. To the Broadway Trust Company?

A. Yes, sir.

Mr. Bergen: I offer that in evidence.

(Said paper marked Exhibit C12.)

Q. Now, it is alleged in the bill, Mr. Cuthbert, that Joseph Ogden Cuthbert, Jr., departed this life in 1899. Do you know whether he had a will?

A. He left a paper we might call a will which distributed his personal effects, bric-a-brac.

Q. Was it ever proven as a will? Has ever any administrator been appointed of his estate?

A. I am not sure about that. I don't think so.

Q. You know of none?

A. I don't think so, no. He authorized his widow to distribute certain silver plate and family heirlooms and keepsakes, which was done to the satisfaction of every one. He didn't have much to leave outside of his income which he enjoyed from the estate.

Q. Now, did Allen Cuthbert, son of the testator, leave a will?

A. I think so, appointing his son, Joseph O. Cuthbert, the third, who is now dead. He acted as his administrator and distributed his family keepsakes, &c. He had no estate other than personal effects.

Q. Well, Mr. Joseph O. Cuthbert, the third, is now dead?

A. Dead, and no administrator was ever appointed.

Q. Has any substituted administrator been appointed in his place?

A. No, sir.

Q. Now, Joseph O. Cuthbert, the third, is dead, is he not?

A. Yes, sir.

Q. He died intestate?

A. Without a will; yes, sir.

Q. And has any administrator ever been appointed for his estate?

A. No, sir.

Q. Mary C. Cuthbert was his widow, was she not?

A. His widow.

Q. And she subsequently married Dr. William S. E. Raines?

A. Right.

Q. Now, Henry C. Cuthbert, a son of the testator, who died in 1902, died intestate, did he not?

A. Yes, sir. The surrogate appointed my brother to collect his personal effects.

Q. That was T. Percival Cuthbert?

A. Yes, sir.

Q. He was appointed the administrator?

A. Yes, sir.

DAVID BAIRD ROBINSON, a witness produced in behalf of the complainants, being duly sworn according to law, on his oath says:

By Mr. Bergen:

Q. Mr. Robinson, where are you employed?
A. The surrogate's office, Camden County.
Q. Have you the book in which the appointment of the administrator of Allen Cuthbert is entered?
A. Yes, sir.
Q. And can you testify about it?
A. Yes, sir.
Q. Will you produce the record of the appointment of the administrator of Allen Cuthbert?
A. (Witness complies.)
Q. What book is that that you produce, Mr. Robinson?
A. This book is administrations, F.
Q. Book F of Administrations, page what?
A. Page 108.
Q. And you find there the appointment of the administrator of Allen Cuthbert estate?
A. Yes, sir.
Q. Who was appointed?
A. Joseph O. Cuthbert.
Q. When was the appointment made?
A. On the 20th day of January, 1904.
Q. By the surrogate of Camden County?
A. Yes, sir.
Q. Now, do you find the record of an appointment of the administrator of Henry C. Cuthbert?
A. I do.
Q. When was that administrator appointed?
A. The 29th day of April, 1902.
Q. Who was appointed administrator?

A. T. Percival Cuthbert.
Q. And where is that appointment recorded?
A. Book F of Administrations, page 13.

Mr. Bergen: I offer those appointments in evidence.

The Vice-Chancellor: Have you got everything in there you want?

Mr. Bergen: I think so.

No cross-examination.

Mr. Gaskill: If your Honor please, Mrs. Rue called my attention to the fact that she had made a mistake with reference to the year when J. Reeves Rue was born, it don't affect the result at all, because his birth is before the death of her grandfather, but instead of it being October, 1884, she wishes to correct it to October, 1887. That is right, Mrs. Rue?

Mrs. Rue: Yes.

Mr. Gaskill: May the stenographer make that correction?

The Vice-Chancellor: Yes.

Supplemental hearing, before his Honor, E. B. Leaming, Vice-Chancellor, at the Chancery Chambers, Camden, New Jersey, on Thursday, December 21st, 1916.

APPEARANCES:

BERGEN & RICHMAN, ESQS., for complainants.

HON. JOSEPH H. GASKILL, for Mary Rue and husband, defendants.

HON. JOHN G. HORNER, for T. Sherman Borden and Rebecca C. Borden, defendants.

ADAM R. SLOAN, ESQ., for Hannah Ebert, Eliza C. Bowden and T. Percival Cuthbert.

The Vice-Chancellor: Let the record show that the final hearing, which has been concluded, has been opened, by order of the court, for the purpose of admitting additional proofs covering certain matters which were overlooked in the proofs at the prior hearing.

Mr. Bergen: I offer in evidence a certified copy of the will of J. Ogden Cuthbert, which bears date October 1st, 1896, and is admitted to probate in the County of Camden, and the person named as executrix therein qualified and letters were issued to her under the name of Eliza Cuthbert January 24th, 1899; the will is filed January 24th, 1899, recorded in the surrogate's office of the County of Camden in Book V of Wills, page 19.

(Said paper marked Exhibit C15.)

Mr. Bergen: The letters granted under this will are to Eliza Cuthbert, she is named in the will as Lizzie Cuthbert; that is Elizabeth Guerin, one of the defendants, she having since been married. If your Honor please, this is such a short will, would it not be well to have it spread on the record?

The Vice-Chancellor: I do not think it makes any particular difference; it might be a convenient method of reference. Are there any other proofs to be offered in behalf of any litigant?

Mr. Bergen: I think that is all the proofs we have.

Mr. Gaskill: We have nothing.

Mr. Sloan: We have nothing.

The Vice-Chancellor: Then the re-hearing will be considered closed.

(Said will, Exhibit C15, reads as follows):

Be it remembered, that I, J. Ogden Cuthbert of the Township of Haddon, in the county of Camden and state of New Jersey, do hereby make and publish this my last will and testament as follows:—

To-wit

First:—I nominate and appoint my wife *Lizzie* Cuthbert Executrix of this my Will.

Second:—I give & *Bequeath* to my wife *Lizzie* Cuthbert all that I may be *possesed* with at my death.

Household furniture, books, silver ware, gold ware, pictures, and all monies, in bank, and monies in my *posession* at my death and all monies due me in bill and accounts, for her individual use absolutely.

In testimony I have *sett* my hand and seal *hereonto-*

J. Ogden Cuthbert.

Witnesses.
Wm. S. Doughty.
Wm. H. Oakley.

EXHIBIT C1.

BE IT REMEMBERED that I, JOSEPH OGDEN CUTHBERT of the township of Haddon in the County of Camden and State of New Jersey do hereby make and publish this my last will and testament as follows, to-wit:

FIRST. I nominate and appoint Jacob Stokes Coles of the Township of Haddon aforesaid nephew of my late wife, my son-in-law Thomas L. Gillespie of the City of Philadelphia and Charles Rhoads of Haddonfield New Jersey and the survivors of them or such of them as shall accept of the said offices to be the Executors of this my will and Trustees of my estate as hereinafter provided. And in case any of them my said Executors and Trustees should reside out of the State of New Jersey at the time of my death, I hereby direct that such shall not be required to give any security on that account by the Surrogate of Camden County. And I also direct that no Executor or Trustee under this my will shall be required to give any security in the State of Pennsylvania in order to qualify him to act in such offices.

SECOND. I give and bequeth to my son Henry, all the household furniture and goods necessary for housekeeping that may be in my residence at the time of my death excepting such things as I may give to others by this my will or by a memorandum herein alluded to. Also that stock and farming implements and things connected with the farming that may be on or about the premises at my present residence.

THIRD. I give and bequeth to my grandson Joseph Ogden Cuthbert the third, the son of my son Allen Cuthbert a share in the stock of the Philadel-

phia Library Company which I have owned for seventy-four years.

FOURTH. I direct that any other articles or things that I may own at my decease shall be distributed by my Executors among such of my children as I intend to specify in a written memorandum placed with my will and signed by me. In case however, I should fail to take and sign such a memorandum, or any such articles should be omitted from it, then and in such case I give and bequeth to my daughter Mary C. Gillespie, my sons Joseph O. Cuthbert Jr, Allen Cuthbert, Henry C. Cuthbert and my granddaughter Mary Rue, all my books, silver plate, manuscripts, old relics, objects of curiosity, pictures and all other goods and articles that may be in my residence at the time of my death not herein or by said memorandum specifically bequeathed, excepting only title deeds and papers belonging to my real estate or securities for money and account books, which shall be kept in the hands of my Executors and Trustees. The said personal property is to be nearly equally divided among my said children and granddaughter as may be possible by my Executors; they distributing to each one such articles as my children may choose respectively. And in case my children cannot agree upon such distributions, then lots shall be cast by my Executors for first choice and successive right to choose any articles by my said children.

FIFTH. I give and bequeath to my daughter Mary C. Gillespie the sum of Five thousand dollars to be paid to her by my Executors and Trustees after my mortgage debts are paid off and as soon as they can realize that sum by the sale of any of my real estate, with interest thereon to be computed from the period of one year from my decease, at five

per cent., per annum. This gift to my daughter being made to compensate her in some measure for the fact that I have favored my sons heretofore with much pecuniary assistance from my estate, whereas I have given my daughter but little in comparison with them.

SIXTH. All the rest and residue of my estate real and personal, I give, devise and bequeath to my Executors and Trustees above named and the survivors of them and their successors in office their heirs and assigns IN TRUST nevertheless for the following uses, intents and purposes, to wit; IN TRUST to rent and lease the real estate for such terms and rents as they may deem best, and to collect and receive the said rents and all income derived therefrom until the property shall be sold or divided as hereinafter mentioned. Said rents and income shall then be applied to paying the interest on my bonds or obligations, and taxes, repairs, and insurance on the property and other legal expenses attending the care and management of my estate. The balance of income if any, shall then be equally distributed among my said children and granddaughter Mary Rue, and her Mother Lucy C. Cuthbert, in such proportions that each of my children shall receive one-fifth part and the said Mary Rue and Lucy C. Cuthbert shall each receive one-tenth part of said net balance of income in quarterly portions and during their respective lives. Providing however that in renting my farms in Delaware Township Camden County, New Jersey, and the adjoining land in Burlington County, New Jersey, I wish my Trustees to give my sons Joseph and Allen the first option to lease them or such parts of them as they may desire and my Trustees may deem best at such an annual sum as will pay the taxes assessed against them and

the interest on the mortgages now existing on them. ALSO that each farm shall have a lot of the woodland rented with it of sufficient size to supply the tenant with wood for firewood, building purposes and fencing timber.

ALSO that my son Henry shall be allowed to lease the farm I now occupy in Haddon Township, Camden County, New Jersey, or such parts of it as may not be sold by the Trustees with the mansion house and out-buildings, at such a rent as may be agreed upon between the Trustees and my son Henry in case he desires it, until the said land and mansion house shall be sold by the Trustees. When such sale takes place, or when so much land shall be sold off the last mentioned place as to render it undesirable for farming by my son Henry, and he shall signify his wish to the Trustees of my estate to rent a part of the land I own in Delaware Township and Burlington County aforesaid, I request my Trustees to divide the land in that tract and the adjoining land in Burlington County into three or more farms at their discretion so as to accommodate each of my three sons Joseph, Allen and Henry with a farm, and sufficient woodland for firewood and fencing timber, also to build on one of them which shall have no buildings on it such a dwelling house, barn and other necessary out-buildings for farming purposes as may be suitable, not exceeding Three Thousand Dollars in cost. My son Henry shall then be allowed to rent and occupy the new buildings and farm so set apart for him at a rental sufficient but not greater than enough to cover the taxes thereon, and the proportion of interest on the mortgages now existing against my said farms. It shall also be the duty of my sons in renting my land of the Trustees to keep the buildings and fences in order and to manure the land at their own expense.

The Trustees may in their discretion sell the wood off the balance of the land which is in timber and which is not required to supply the farms with firewood and fencing. In case the mortgages now on the farms in Delaware Township and Burlington County, New Jersey, amounting to Twelve thousand two hundred dollars, or any part of them are paid off by my Trustees while my sons occupy them, the rent they are required to pay to the Trustees shall not abate on that account, but each farm, if the whole tract is divided into three or four farms shall be charged as a rental with its fair proportion of the taxes on the whole tract, and the interest at five per cent per annum on the sum of Twelve Thousand two hundred dollars to be adjusted by the Trustees according to the relative amount of land in each farm and its quality.

SEVENTH. I direct my trustees to sell all my real estate at such times and in such parts and portions and for such price or prices and either at public or private sale as they or a majority of them may deem most conducive to the best interests of all my children and grandchildren. And for this purpose I give to them my said Trustees and the majority of them and their successors in office full power and authority to execute and deliver all such deeds, conveyances and assurances in the law as may be requisite to vest a perfect title in fee simple to the land and estate so sold in the purchasers thereof clear of all the trusts and limitations in this my will, and also clear of all incumbrances, so that no purchaser shall be responsible for the application of the purchase money after payment thereof to the said Trustees.

I recommend to my Trustees to withhold from sale the ground belonging to me on the north side of

Market street west of Forty-ninth street in the City of Philadelphia extending north as far as Filbert street, for the period of five years from my death; as I am of the opinion that it may increase considerably in value in that time. Nevertheless if a good price is offered for it prior to that period, I leave my Trustees at liberty to accept it in their discretion.

It is also my will that in regard to selling my farms in Delaware Township, Camden County, New Jersey and the adjoining land in the Burlington County, the consent of my sons who may occupy them respectively shall be first given to such sale or sales during their lives. PROVIDED however that if my Trustees should see proper to lay off four farms out of the whole of said land they may sell one of them without consultation with my sons. ALSO in case any one or more of my three sons should prefer to relinquish farming, then the land reserved for such may be sold by my Trustees at their discretion and without consultation with my sons.

EIGHTH. Upon the receipt of any purchase monies I direct my Trustees to apply the same to the payment and discharge of my mortgage and other debts as rapidly as they can be paid off so as to release my estate from all incumbrances. The mortgages on the land in Philadelphia and that in Haddon Township, Camden County, New Jersey to be first paid. And all surplus funds after payment of said debts shall be invested by my Trustees in good first bonds and mortgages on real estate either in New Jersey or Pennsylvania or in the State loans of either of said States or the United States to be held upon the trusts of this my will. The net income arising from such investments to be paid over to my said children Mary C. Gillespie, Joseph O.

Cuthbert Jr., Allen Cuthbert and Henry C. Cuthbert in equal fifth parts and to my granddaughter Mary Rue and my daughter-in-law Lucy C. Cuthbert in equal tenth parts during all the terms of their natural lives respectively, and so that neither the principal or income of my estate shall be liable to attachment for the debts or engagements of any of my said children or said grandchild or daughter-in-law, or their descendants.

NINTH. Upon the death of my daughter-in-law Lucy C. Cuthbert, her share of income in my estate shall go to my granddaughter Mary Rue for her life under the same trusts and conditions as aforesaid.

Upon the death of any of my sons or daughter or granddaughter Mary Rue leaving a wife or husband surviving them, one-third of the income so as aforesaid made payable to said descendant shall thereafter be paid to such surviving wife or husband for life, and the remainder of said income shall be paid to the child or children of such descendant, if any, during the life of such children's surviving parent. In case such son or daughter or granddaughter Mary Rue so dying should leave no wife or husband to survive them, also after the death of any such surviving wife or husband, I give, devise and bequeath that fifth part of the share of the income of my estate so as aforesaid held in trust for such son, daughter or granddaughter, Mary Rue for life, to all and every the child or children of such deceased son, daughter or granddaughter Mary Rue who may be living at the time of the death of such parent in equal parts and shares, during their respective lives to be paid to them by my said Trustees upon their own receipts only and so that the said capital and income shall not be subject to the debts, control or

engagements of my grandchildren. PROVIDED however, that in case any of my said children or granddaughter Mary Rue should die without leaving any child to survive them, then upon the death of the surviving husband or wife, if any, that share or fifth part of the income of my estate which was so held in trust for the life of such decedent shall be paid by my Trustees to my surviving children, and the issue of any of my children who may be then dead leaving issue, in such parts and shares and for such estates that the number of surviving children shall be added to the number of those then dead leaving issue, and those living shall each take one fractional share of income corresponding to the whole nummer thus formed and the issue of my deceased children shall together take the fractional share of income that would have appertained to their deceased parent if then living, for and during their respective lives. My intention being to give an equitable life estate in one-fifth part of the income of all my residuary estate to each of my sons Joseph O. Cuthbert Jr, Allen Cuthbert and Henry C. Cuthbert and to my daughter Mary C. Gillespie and my granddaughter Mary Rue subject to the trusts and conditions above set forth with remainders over after their death as above limited to my grandchildren for life Mary Rue's share of income to be divided equally with her mother so long as the latter may live.

TENTH. Upon the death of all my sons and daughter and granddaughter Mary Rue above named and their surviving husbands and wives, also after the death of all the children of the first generation of my said sons, daughter and granddaughter Mary Rue, the trusts hereby created shall cease, and the Trustees of this my will or their successors in office, shall part, divide and distribute all the residue of the

capital of my estate to and among the lawful grandchildren of my said sons, daughter and granddaughter Mary Rue absolutely in the shares and proportions above directed respecting the income clear of further trusts, per stirpes and not per capita.

ELEVENTH. In case my Trustees shall find it necessary to mortgage any part of my estate in order to raise money and pay off and discharge any mortgages already thereon and which may be called in before sufficient sales of real estate can be made to pay them, they may give and execute any such mortgages and bonds on any of my real estate in their discretion as may be so required, and with like effect to secure the lender of such monies as I could do in my lifetime.

TWELFTH. My said Trustees may also lay out any tracts or pieces of land that I may own with such streets, alleys or avenues as they may find desirable to develop town or village sites or plots and to facilitate sales of lots therein, with power to them to dedicate such streets to public use and to grade and lay down sidewalks upon them; to square and adjust lines of property with adjoining owners and make exchanges of lots or parts of lots in order to improve the value of my estate at their discretion.

THIRTEENTH. In case any one or more of my said Executors and Trustees should die, resign their offices, or decline to accept the same, then I request my remaining and continuing Trustees or Trustee to join with my children and grandchildren who are at that time entitled to receive the income of my estate in selecting a new Executor and Trustee to fill the place or places of such who may die, resign or decline said office, as often as the same shall happen; so as to keep up the number of three Trustees at all times. And such appointment by

them or a majority of them the said continuing Trustees added to a majority of my said children and grandchildren then entitled to receive the income of my estate when made in writing duly signed and filed in the Offices of the Surrogate of Camden County, New Jersey, and the Register of Wills in Philadelphia, attested by a certificate of their acknowledgment before a Notary Public or Master in Chancery of New Jersey, shall constitute a sufficient and valid investment of the Executors and Trustees so appointed with the title, estate, and powers herein given to my original Executors and Trustees.

FOURTEENTH. As I am very averse to litigation, and greatly desire that my children and descendants who may be interested in my estate under this my will shall fully acquiesce in its provisions for their benefit without any contest at law or otherwise respecting their rights in my estate NOW I hereby declare that it is my will and intention that if any person named in this my will or designed to take any portion of my estate under it shall dispute or contest at law the interpretation of its provisions made by the majority of my Trustees, or shall attempt to set my will aside or any part of it, such person or persons shall forfeit and lose all claims to such part of my estate as they may sue for and recover.

FIFTEENTH. It is my will and I do direct that no claim shall be made by my Executors against any of my children for monies advanced by me to them in my lifetime, and I hereby cancel all such debts and obligations held by or owing to me by my children. Provided however that any notes which may be endorsed by me as an accommodation to my sons in my lifetime, and which by reason of such endorsement my Executors may be obliged to pay, shall be

a charge against the share of such sons or son and be refunded out of his share of the income of my estate.

SIXTEENTH. Upon the decease of all the children of any one of them my sons Joseph O. Cuthbert Junior, Allen Cuthbert and Henry C. Cuthbert, also of my daughter Mary C. Gillespie and of my granddaughter Mary Rue leaving issue to survive them my said grandchildren, I authorize my Trustees to set apart the proper share of the capital of my estate which may appertain to the children of such deceased grandchildren of mine, and to assign and convey the said share of capital to them absolutely. And so on as often as the same case shall happen.

SEVENTEENTH. I revoke all wills heretofore made by me and declare this only to be and contain my last will and testament.

In TESTIMONY WHEREOF I have set my hand and seal hereunto this fifteenth day of July, in the year of our Lord One Thousand eight hundred and eighty-seven. (1887).

J. Ogden Cuthbert. (seal)

The above and foregoing writing or thirteen pages of paper was duly signed and declared by the said Joseph Ogden Cuthbert the testator as and for his last will and testament in the presence of us, who in his presence and that of each other and at his request have set our hands hereto as witnesses.

Geo. Frescoln, 21 N. 7th St. Philia.

John Little, 21 N. 7th St. Philia.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between
CAMDEN SAFE DEPOSIT AND TRUST COMPANY,
Complainant-Respondent,
and
ELIZA GUERIN, *et als.*,
Defendants-Appellants.

ON APPEAL.

BRIEF OF RESPONDENT, CAMDEN SAFE DEPOSIT AND TRUST COMPANY, TRUSTEE

BRIEF ON THE FACTS.

The respondent, Camden Safe Deposit and Trust Company, one of the Trustees under the last will and testament of Joseph Ogden Cuthbert, deceased, complainant below, filed its bill in the Court of Chancery praying that the Court properly interpret and construe the will of said decedent, and advise respondent and the other Trustees particularly as to the validity of said will or certain provisions thereof, and, generally, as to the duties of said Trustees in the premises.

The statements of fact as to the parties and pleadings and as to the will, and as to the pertinent facts in the case, as set forth in the brief of appellants, are substantially correct, except as to the statement of the attitude of neutrality in this appeal on the part of the respondent, Camden Safe Deposit and Trust Company, one of the Trustees under the will, and as to the facts contained in the second, third and fourth paragraphs under the heading "Pertinent facts in the case," page 9 of the brief, and as to the claims of the appellants as to the disposition of the estate as set forth in the table on page 10 of the brief.

The respondent, as one of the Trustees under the will, does not stand as a complainant to an interpleader, and does not stand in a neutral position so far as relates to this appeal.

As to those parts of the estate in relation to which valid life estates still exist, the total amounting to the forty-nine sixtieths part of the estate, it is the plain duty of the respondent as one of the Trustees under the will to see that the trusts under which they were created are fully and faithfully carried out and performed, and that there shall be no division of the corpus of that part of the estate as to which there are existing life estates, until those life estates have ended.

The respondent does not concede that the appellants, holders of present existing life estates, are either heirs at law or next of kin of the testator, or that there is any merger.

In order that certain provisions of the "sixth" and "seventh" paragraphs of the will, not fully printed in appellants' brief, may be brought clearly and distinctly to the attention of the Court, they are herein set forth as follows:

"Sixth. All the rest and residue of my estate real and personal, I give, devise and bequeath to my Executors and Trustees above named and the survivors of them and their successors in office their heirs and assigns IN TRUST nevertheless for the following uses, intents and purposes, to wit; IN TRUST to rent and lease the real estate for such terms and rents as they may deem best, and to collect and receive the said rents and all income derived therefrom until the property shall be sold or divided as hereinafter mentioned. Said rents and income shall then be applied to paying the interest on my bonds or obligations, and taxes, repairs, and insurance on the property and other legal expenses attending the care and management of my estate. The balance of income if any, shall then be equally distributed among my said children and granddaughter Mary Rue, and her Mother Lucy C. Cuthbert, in such proportions that each of my children shall receive one-fifth part, and the said Mary Rue and Lucy C. Cuthbert shall each receive one-tenth part of said net balance of income in quarterly portions and during their respective lives. * * * * "

"Seventh. I direct my trustees to sell all my real estate at such times and in such parts and portions and for such price or prices and either at public or private sale as they or a majority of them may deem most conducive to the best interests of all my children and grandchildren. And for this purpose I give to them my said Trustees and the majority of them and their successors in office full power and authority to execute and deliver all such deeds, conveyances and assurances in the law as may be requisite

to vest a perfect title in fee simple to the land and estate so sold in the purchasers thereof clear of all the trusts and limitations in this my will, and also clear of all encumbrances, so that no purchaser shall be responsible for the application of the purchase money after payment thereof to the said Trustees."

Grounds of Appeal.

The grounds of appeal alleged by the appellants are as follows, viz:—

A. The refusal to apply the doctrine of merger.

B. The refusal to distribute so much of the corpus as was affected by the intestacies in the will.

C. The requirement that even the income from these intestate portions of the estate should be withheld from distribution until the winding up of the whole estate.

In the discussion of the law relating to the case, we will consider the case with reference to these three heads.

BRIEF ON THE LAW.

Doctrine of Merger not Applicable.

The appellants contend that the holders of the valid life estates are also entitled to take an estate in fee in the corpus, as heirs-at-law and next of kin

of the testator, Joseph Ogden Cuthbert, and that the estates of the life tenants are merged in the larger estate in fee, and that, therefore, a considerable portion of the corpus of the whole estate has become ripe for immediate distribution. The respondent insists that this contention cannot be sustained for the following reasons:

1. That the legal estate is in the Trustees.

2. That the appellants, holders of the valid life estates, are not heirs and next of kin of the testator, Joseph Ogden Cuthbert, and, therefore, cannot claim any interest in his estate as such.

3. That as the legal and equitable estates are not united in the same person, there is not and cannot be a merger.

1. The Legal Estate is in the Trustees.

The learned Vice-Chancellor found (S. of C., page 88, l. 12), that "the legal title of the corpus is vested in the Trustees for all lawful purposes of the trust." If we read the sixth and seventh paragraphs of the will (S. of C., pages 135, 136 and 137), we must arrive at the conclusion that it is not possible for the legal title to vest in anyone else. By the terms of the devise and bequest contained in the sixth paragraph of the will, the rest and residue of the estate, real and personal, was devised and bequeathed to the testator's executors and trustees and the survivors of them, and their successors in office, their heirs and assigns, in trust, nevertheless, for the uses, intents and purposes set forth in the will.

We find, therefore, by the express terms of the will itself that the entire residue of the estate was specifically given to the Trustees in fee. The Trustees were directed to rent and lease the real estate for such terms and rents as they might deem best and to collect and receive the said rents and all income derived therefrom until the property should be sold or divided, as in such will provided for. Said rents and income were directed to be applied to paying the interest on the testator's bonds or obligations, and taxes, repairs and insurance on the property and other legal expenses attending the care and management of his estate. By the seventh paragraph of the will, there was an absolute direction to sell all of the testator's real estate. The necessary result, therefore, arising from the provisions of the will, which we have just referred to, is that even if by the express terms of the will itself, the legal title in fee of the corpus of the estate had not been specifically bequeathed and devised to the Trustees, still the Trustees would have held the legal title to the entire corpus of the estate.

In the case of *Crane and Bolles, Executors, vs. Bolles*, 49 Eq. 373, it was held:

> "1. Where a will imperatively required the executors thereof to sell real estate in fee after a short time, and during that time to control the property by leasing it, collecting the rents, paying the taxes, insurance and repairs, and incidental expenses in its management, and made no other disposition of the property: Held, that the fee went to the executors in trust for the purposes aforesaid."

In the earlier case of *Zabriskie vs. The Morris and Essex Railroad Co.*, 33 Eq. page 22, affirmed in 34 Eq. page 282, it was held:

> "A trust to sell or improve lands; to invest and re-invest the proceeds; to collect rents and income; to pay taxes, assessments, commissions, and other annual expenses and charges; to pay over the net income, and to divide the estate, vests a fee simple title in the designated trustees, not limited to the lifetime of the donor's children, which trust descends to the heir at common law, the eldest son of the survivor of the trustees, and his contract to sell lands of the estate may be specifically enforced."

In each of the two cases last above cited, it was held that in order that the trusts created by the will should be fully carried out, it was necessary that the Trustee should have an estate in fee, notwithstanding the fact that by the form of the will itself, the title was apparently given to others, and it was accordingly decreed that the Trustee had such title in fee.

But the appellants contend that the Trustees have only a dry trust and only such title to the property as enables them to carry on the trust and that they do not hold a fee. The authorities cited by appellants to sustain this claim, *Hopping vs. Gray*, 82 N. J. Eq. 502, and 9 *Cyc.* 208-213 are not in point.

In *Hopping vs. Gray*, cited *supra*, the Trustees did not have the legal title, nor did the legal title ever vest in them, they merely having a naked power of sale and lease (see opinion, page 504), while in the case at bar the legal title vested in the Trustees at the death of the testator by express devise and bequest under the will (Case, p. 135, pars. 5 to 10), and

therein lies the distinction. In the Hopping case, two estates met in one and the same person, to wit, an equitable life estate in 1/3 of the whole, and a legal estate in an undivided 1/9 of the whole, resulting in a merger and operating to give a fee simple title to the heir in 1/9 of the lands in question.

Counsel for the appellants is evidently under a misapprehension as to what a dry trust is. If there can be any question as to what is an active and what is a passive or dry trust, this question must necessarily be completely eliminated by an examination of the case of *Cooper vs. Cooper,* 36 N. J. Eq. page 121, also by an examination of the definitions of an active trust and of a dry trust contained in 39 *Cyc.* pages 213 to 215, and 39 *Cyc.* pages 219 to 220. Certainly the duties of the Trustees under the will in question, as in *Cooper vs. Cooper, supra,* involve confidence, discretion and active duties. In both cases, the testator gave the litigants the income on a certain share for life and nothing more. In the Cooper case, the testator made no disposition of the remainder, while in the present case, the testator attempted to dispose of the remainder, but failed. We submit that the very nature of the duties of the Trustees in the case at bar are such that it is impossible to construe the trust to be other than an active trust. The case of *Cooper vs. Cooper, supra,* is cited with approval in two recent New Jersey cases dealing with the subject of dry and active trusts.

Supreme Lodge K. P. vs. Rutzler, 100 Atl. 189;

Polkowitz vs. Nash, et al., 100 Atl. 564;

and to the same effect see *Rosenbaum vs. Garrett,* 57 N. J. Eq. 186.

Counsel for appellants also contends that, in any

event, the title of the Trustees must be subordinated to the interests of the *cestuis qui trustent* in hostility to whom they have no right to assert it, and again refers to the case of *Hopping vs. Gray,* but we submit again that the Court pointed out in that case that there was no specific devise or bequest of the fee to the Trustees under the will, but only a naked power of sale, the legal title descending to the heirs, and that it was upon that ground alone that the Court was able to apply the doctrine of merger.

We respectfully submit that the holding of the title by the Trustees is not in hostility to the interests of the *cestuis qui trustent,* but on the contrary, the title is held by the Trustees upon the trusts created by the testator for their benefit, advantage and support.

2. The Appellants, Holders of the Valid Life Estates, Can Claim no Title as Heirs and Next of Kin of Joseph Ogden Cuthbert.

It was properly held by the learned Vice-Chancellor that at the death of the testator, the equitable title to the corpus of his residuary estate passed to his four children and a grandchild, in equal shares, subject to the operation of all lawful provisions of the will relating to the trust for the management of the estate and distribution of the net income therefrom (S. of C., page 81, l. 26). All of the children of the testator being now deceased, the equitable title to their respective shares of the corpus of the residuary estate has become vested in their respective executors or administrators, for the testator having directed the conversion of all of his real estate, the

entire residue of the estate must be regarded as personal property and must be distributed as such.

Crane and Bolles, Executors, vs. Bolles, 49 Eq. page 373;

Ackerman vs. Ackerman, 81 Eq. pp. 437, 442.

Those portions of the estate of Joseph Ogden Cuthbert as to which there is an intestacy must necessarily go to such persons as would have been entitled to receive the same at the time of his decease. The only heirs and next of kin of Joseph Ogden Cuthbert were his four children, who survived him, and his granddaughter, Mary C. Rue, a daughter of a deceased son.

Not one of the appellants in this case has any right to claim any part of the estate of Joseph Ogden Cuthbert, either in the capacity of an heir-at-law or next of kin, for they are children of his heirs-at-law and next of kin who were living at the time of his decease, and under no circumstances can they claim directly any part or share in his estate, either as heir-at-law or next of kin.

Further, if the appellants were the next of kin of the decedent, they would not hold any real title to the personal estate of which he died intestate and would have no standing in any Court of Law or Equity to maintain an action for the recovery of property belonging to the decedent.

In the case of *Buchanan vs. Buchanan,* 75 Eq. p. 274, this Court held that

> "1. The next of kin of a decedent have no standing in a court of law, or equity to maintain an action for the recovery of property alleged to belong to the estate of their decedent. Such actions can be brought only by the duly appointed personal representative of the deceased."

3. There Can Be No Merger.

We have clearly shown that the legal title to the corpus of the estate is in the Trustees. We have also clearly shown that the equitable title of the one-fifth part of the corpus of the estate is in Mary C. Rue, and that the equitable title of the four-fifths part of the corpus of the estate is in the executors or administrators of the four deceased children of Joseph Ogden Cuthbert.

The appellants hold valid equitable life estates in a portion of the estate of the decedent. The rule is well established that "where the legal and equitable estates are united in the same person, the equitable estate is merged in the legal," but in the case at bar the equitable and the legal estates do not and cannot unite in the same person, and, therefore, there can be no merger. It was the declared intention of the testator, as expressed by his will, that the trust estates created for the benefit of the appellants should continue in full force and effect throughout their respective lives, and that the legal title of the estate from the income of which these appellants receive the benefit, should remain absolute in the trustee.

Under the conditions existing in this case, we respectfully submit that there can be no merger and that the life estates, as created by the will, must hold valid during the lives of the respective life tenants.

B. Distribution of Corpus of Intestate Property.

The appellants insist that the corpus of those parts of the estate as to which there was an intestacy and

as to which there are now no valid life estates outstanding, shall be distributed immediately.

These shares amount in the aggregate to the eleven-sixtieths part of the estate. Some of the parties in interest in the estate are of the opinion that such a distribution at this time would be injurious to their interests.

We respectfully submit this question for the decision of this Court, with the assurance that if such a distribution is ordered at this time, we shall endeavor fully to carry out such order.

C. Distribution of Income on Intestate Property.

We believe that the income from those parts of the estate as to which there was an intestacy, and as to which there are now no valid life estates outstanding, should be distributed immediately.

We therefore submit that the legal estate is in the Trustees and that the appellants holders of the valid life estates are not heirs and next of kin of the testator, Joseph Ogden Cuthbert, and cannot claim any interest in his estate as such, that the trust created under the will is an active and not a passive or dry trust and that, as the legal and equitable estates are not united in the same person there is not and cannot be a merger; and further we submit to this Court the question as to a present distribution of those parts of the estate as to which there was an intestacy and also as to which there are now no valued life estates outstanding; and ask that an immediate distribution be ordered of the income on those parts of the estate

where there is an intestacy and now no valued life estates outstanding.

Respectfully submitted,

GROVER C. RICHMAN,
WILLIAM D. LIPPINCOTT,
Counsel for Complainant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between
CAMDEN SAFE DEPOSIT AND TRUST COMPANY, *et als.*,
Complainants-Respondents,
and
ELIZA GUERIN, *et als.*,
Defendants-Appellants.

ON APPEAL.
BRIEF OF APPELLANTS.

BRIEF ON THE FACTS.

Parties and Pleadings.

Suit was brought in Chancery by the three trustees acting under the will of Joseph Ogden Cuthbert, setting forth that certain gifts in the will were claimed to offend the Rule against perpetuities, and seeking directions touching the administration of the testamentary trust. All persons interested were made parties defendant, a number of whom answered the bill.

Of these answering defendants, Mary and John Rue and Rebecca and T. Sherman Borden,—the wife, in each case, a present, the husband a prospective,

life tenant under the will,—assumed the position that although invalidities might exist in the will, the present administration of the estate was valid and should be permitted to continue. *S. of C. pp.* 50-55.

Another group of defendants, Hannah Ebert, Elizabeth C. Bowden, T. Percival Cuthbert, Edgar G. Cuthbert, James Blair Cuthbert, and Broadway Trust Company,—all (except the Trust Company, an assignee of James Blair Cuthbert), life tenants under the will,—claimed in their answers that the invalidities in the will threw open a certain portion of the estate to immediate distribution. *S. of C. p.* 40.

A counter-claim, filed by Edgar G. Cuthbert, James Blair Cuthbert, and Broadway Trust Company, not only claimed the right to a distribution of so much of the estate affected by the intestacies referred to, but further alleged that the testamentary disposition of the residuary fee being invalid and no estate (save the legal title of the trustees), intervening between this reversionary fee and the life estates of a number of the beneficiaries, a merger of these life estates in so much of the fee as descended to each life tenant resulted, and entitled the respective beneficiaries to an immediate distribution *pro tanto* of the corpus. *S. of C. p.* 41.

The litigation in the Court of Chancery thus assumed the form of a controversy between two groups of defendants, the complainant trustees taking no part therein, but standing as complainants to an interpleader.

The Court below adjudged the existence of the invalidities referred to in the pleadings, but denied that any merger had occurred, or that any portion of the whole estate could be taken for the purpose of distribution. It held that the whole estate whether testate or intestate property must remain in the

hands of the trustees while any part thereof remained validly subject to the testamentary trust. Further, the Court declined to allow distribution even of the income accruing to the trustees upon the intestate portions of the estate, but required a hoarding of this income by the trustees—"to accumulate until the (whole of) said estate is distributable."

From this decision an appeal has been taken by a number of the defendants, all of whom are vitally interested in securing not only a distribution of the income due them as heirs at law or next of kin on the intestate portions of the estate, but also a distribution of the corpus to which they are entitled either because of existing intestacies, or through the operation of the doctrine of merger, or both.

Of these appellants, Hannah Ebert, James Blair Cuthbert, Edgar G. Cuthbert, T. Percival Cuthbert, Louisa G. Hopkins, Anna G. Boyd, and Elizabeth C. Gillespie (represented in this action by her guardian, the Fidelity Trust Company), are all grandchildren of the testator, and presently enjoying life estates under his will.

Marguerite Ray Nickerson is a great-granddaughter, who was previously enjoying a testamentary gift of income for life, but who has been compelled to forego this because of the Court's decision holding her life estate invalid and denying her right, as next of kin, to a distribution of income on the intestate portion.

Broadway Trust Company, as already explained, appears as assignee of James Blair Cuthbert.

Answers to this appeal have been filed by the complainants, who neither oppose nor support the appeal, and by the Bordens and the Rues. The Bordens, however, no longer oppose the relief sought by these appellants, and have announced through counsel

their intention of taking no part in the argument. The Rues, we understand, are in entire harmony with the appeal in so far as it seeks a distribution of the income accrued and to accrue on the intestate portions of the estate.

With this brief account of the parties and their relation to each other on this appeal we will turn to a discussion of the questions of law presented.

The Will.

The will, which is the source of controversy in this case, is set forth in full as Exhibit C1 on pages 133-142 of the Record. It is epitomized in the following paragraphs, numbered to accord with the original document. We have indicated by the use of italics and letter symbols the different gifts held invalid by the Court below. Concerning these invalidities there is no dispute. The will provides for:

First. The appointment of three executors and trustees.

Second. Bequest of household goods.

Third. Bequest of library stock.

Fourth. Provision for the distribution by the trustees of various household articles.

Fifth. Bequest of money to the testator's daughter, Mary Gillespie.

Sixth. Gift of all the rest and residue of the estate, real and personal, to the trustees to hold in accord-

ance with the trusts thereinafter established. This sixth paragraph then proceeds to direct the trustees in the performance of their trust. They are to rent and lease the real estate for such terms and rents as they deem best, to apply the income received to the payment of interest on testator's bonds and obligations, and on the various expenses connected with the care of his estate. The balance of the income is then to be distributed among his four children and granddaughter Mary Rue and her mother Lucy Cuthbert, so that each of the children receive an equal one-fifth and Mary Rue and Lucy Cuthbert each one-tenth. An option is given to the three sons, Joseph, Allan and Henry, of renting certain of the testator's farms. After setting forth the conditions upon which these sons might hold the farms, the will proceeds:

Seventh. "I direct my trustees to sell all my real estate at such times and in such parts and portions and for such price or prices and either at public or private sale as they or a majority of them may deem most conducive to the best interests of all my children and grandchildren * * * ."

Eighth. "Upon the receipt of any purchase moneys I direct my trustees to apply the same to the payment and discharge of my mortgage and other debts as rapidly as they can be paid off so as to release my estate from all encumbrances. * * * The net income * * * to be paid to my children Mary C. Gillespie, Joseph O. Cuthbert, Jr., Allan Cuthbert and Henry C. Cuthbert in equal fifth parts and to my granddaughter Mary Rue and my daughter-in-law Lucy C. Cuthbert in equal tenth parts during all the term of their natural lives respectively and so that neither

the principal or income of my estate shall be liable to attachment for the debts or engagements of any of my said children or said grandchild or daughter-in-law or their descendants."

Ninth. "Upon the death of my daughter-in-law Lucy C. Cuthbert, her share of income in my estate shall go to my granddaughter Mary Rue for her life under the same trusts and conditions as aforesaid.

"Upon the death of any of my sons or daughter or granddaughter Mary Rue leaving a wife or husband surviving them, one-third of the income so as aforesaid made payable to said decedent shall thereafter be paid to the child or children of such decedent, if any, during the life of such children's surviving parent. In case such son or daughter or granddaughter Mary Rue so dying should leave no wife or husband to survive them; also (a) *after the death of any such surviving wife or husband, I give, devise and bequeath that fifth part of the share of the income of my estate so as aforesaid held in trust for such son, daughter or granddaughter Mary Rue for life, to the child or children of such deceased son, daughter or granddaughter Mary Rue living at the time of the death of such parent* in equal parts and shares, during their respective lives to be paid to them by my said trustees upon their own receipts only and so that the said capital and income shall not be subject to the debts, control or engagement of my grandchildren. (b) *Provided,* however, that *in case any of my said children or granddaughter Mary Rue should die without leaving any child to survive them, then upon the death of the surviving husband or wife, if any, that share or fifth part of the income of my estate which was so held in trust for the life of such decedent shall be paid by my trustees to my surviv-*

ing children, and the issue of any of my children who may be then dead leaving issue," per stirpes and not *per capita.*

(c) *Tenth. "Upon the death of all my sons and daughter and granddaughter Mary Rue above named and their surviving husbands and wives; also after the death of all the children of the first generation of my said sons, daughter and granddaughter Mary Rue, the trusts hereby created shall cease, and the trustees of this my will, or their successors in office, shall part, divide and distribute all the residue of the capital of my estate to and among the lawful grandchildren of my said sons, daughter and granddaughter Mary Rue, absolutely in the shares and proportions above directed respecting the income, clear of further trusts, per stirpes and not per capita."*

Eleventh. The trustees are given power to mortgage under certain conditions.

Twelfth. The trustees are authorized to develop the land for building purposes.

Thirteenth. Provision is made for the appointment of succeeding trustees.

Fourteenth. The testator expresses his aversion to litigation and his desire that "my children and descendants who may be interested in my estate under this my will shall fully acquiesce in its provisions for their benefit without any contest at law, etc."

Fifteenth. The testator cancels any debts or obligations held by him against his children.

(c) *Sixteenth. "Upon the decease of all the chil-*

dren or any one of them of my sons Joseph C. Cuthbert, Jr., Allan Cuthbert and Henry C. Cuthbert, also of my daughter Mary C. Gillespie and of my granddaughter Mary Rue, leaving issue to survive them my said grandchildren, I authorize my trustees to set apart the proper share of the capital of my estate which may appertain to the children of such deceased grandchildren of mine, and to assign and convey the said share of capital to them absolutely. And so on as often as the same case shall happen."

Concerning these gifts it was held that:

(a) Offends the rule against perpetuities because it is made to vest at the death of a surviving spouse who is not identified as in *esse* at the testator's death. *S. of C. p.* 84, *l.* 15.

(b) Is invalid for the same reason. *S. of C. p.* 87, *l.* 5.

(c) Involves conflicting gifts of the residuary estate, both limited on the same contingency, the death of members of the second generation, and an even plainer violation of the Rule. *S. of C. p.* 81, *l.* 5; *S. of C. p.* 87, *l.* 22.

These invalidities being established by the Court's decision and undisputed on appeal we now proceed to consider the problems which they create with regard to the administration of the estate.

Pertinent facts in the case.

A few facts of family history must first be stated. Of the first five takers under the will the grandchild

Mary Rue alone survives. Mary C. Gillespie and Allan Cuthbert died leaving no surviving spouses, but leaving children who are now life tenants under the will. Joseph Ogden Cuthbert *II* left a widow, now Mrs. Guerin, but no children. Henry Cuthbert left a widow, Katharine, and three children, all life tenants at the present time. See Chart on page 10.

The situation is simplified by the circumstance that the testamentary disposition of the estate followed closely the order of succession established by our intestate law. So that those who are now life tenants under the will are also entitled to take as heirs at law and next of kin. The learned Vice-Chancellor has further pointed out that the distinction between real and personal property is not involved inasmuch as heirs and next of kin are identical. *S. of C. p.* 81, *l.* 22.

This double interest—as heirs of the fee and tenants for life in the same property—results, as we argued below, in a merger of the two estates. This merger operates to wholly extinguish the lesser estate, the estate for life, leaving the life tenant vested with a fee simple.

This fee in each individual case is further increased in quantity by the intestacy resulting from the invalidities in the will which are indicated on the chart below. It has resulted that a considerable portion—two-thirds—of the fee of the whole estate has passed, unrestricted by any valid testamentary act, to the heirs and next of kin, which portion of the estate is ripe for immediate distribution.

Our claim is illustrated in the following chart which shows at a glance the deceased and surviving beneficiaries, the portions of the estate on which they were drawing income at the time of suit, and on the right the present status of their respective interests.

TABLE OF CUTHBERT FAMILY SHOWING SHARES OF THE CORPUS NOW BEING ENJOYED BY PRESENT LIFE TENANTS AND THE DISPOSITION CLAIMED FOR SUCH SHARES.

I. Mary C. Gillespie (Deceased)	
Elizabeth Gillespie—(1/15)	
Anna G. Boyd—(1/15)	Merger 1/5
George C. Gillespie—(1/15)	
II. Mary C. Rue—(1/5)	Valid and subsisting 1/5
(Nine children)	
III. Joseph Ogden Cuthbert II (Deceased)	
Eliza Guerin (widow) 1/15	Valid and subsisting 1/15
(No children)	Intestacy—2/15.
IV. Allan Cuthbert (Deceased)	
Hannah E. Cuthbert—(1/20)	Merger 3/20
Louisa Hopkins—(1/20)	
Edgar G. Cuthbert—(1/20)	
Joseph O. Cuthbert III (Deceased)	
Marguerite Ray Cuthbert (1/60)	Intestacy 1/20
Charles Waldon Cuthbert (1/60)	
Gladys Josephine Cuthbert (1/60)	
V. Henry C. Cuthbert (Deceased)	
Katharine Cuthbert (widow)—1/15	Valid and subsisting 1/15
J. Blair Cuthbert—(2/45)	
Elizabeth C. Bowden—(2/45)	Merger—2/15.
T. Percival Cuthbert—(2/45)	

Ripe for distribution—(2/3)
Presently unripe—(1/3)

Wherever a merger is found noted above, the life estate affected was valid under the will, but the remainders limited after it were invalid, and the fee, descending upon the life tenant, extinguished his life tenancy. The right to immediate distribution follows.

Grounds of appeal.

The prejudicial errors of which we complain may be summarized under three heads:

A. The refusal to apply the doctrine of merger.

B. The refusal to distribute so much of the corpus as was affected by the intestacies in the will.

C. The requirement that even the income from these intestate portions of the estate should be withheld from distribution until the winding up of the whole estate.

A little further explanation of these errors is needed before we proceed to a discussion of the law.

A. We contended at the final hearing that there was at law no valid outstanding estate under the will in any of the present life tenants (excluding Mary Rue whose tenancy is followed by the admittedly valid life estates of her children), but that in each case the life interest had merged in the greater fee descended upon such life tenant. It follows from these premises that an immediate distribution should have been ordered of so much of the estate as was affected by this merger. This error is referred to in paragraph (a) of our petition of appeal, *S. of C. p.* 6.

B. In any event, we contended, that since two-thirds of Allan Cuthbert's share and one-fourth of the share of Joseph Cuthbert *II* had become intestate property these portions of the corpus of the whole estate should be distributed to the heirs en-

titled to divide them. This was also denied us on the ground that the corpus of the estate could not be disintegrated. *S. of C. p. 8, lines 15 to 25.* This error is referred to in paragraphs (b) and (c) of our Petition of Appeal, (b) relating to the two-thirds of Allan Cuthbert's share, and (c) to the one-fourth of Joseph Cuthbert *II's* share.

C. Furthermore, the learned Vice-Chancellor, after the case had been argued, inserted in his opinion the statement that "that portion of the *income* earned on the intestate portions of the estate found in the shares of Joseph and Allan necessarily fell into the corpus *so long as the trust continues.*" *S. of C. p.* 87, l. 18. The solicitor for the complainant in drawing the final decree followed perforce this holding of the Vice-Chancellor and the decree, therefore, adjudges that "the other fourth part thereof (referring to Allan's share) shall remain in the hands of said trustees as part of the estate of which said Joseph Ogden Cuthbert died intestate, and shall accumulate with its accretions until said estate is distributable." *S. of C. bottom of p.* 75. The same adjudication is made with regard to the intestate portion of Joseph *II's* share. *S. of C. top of p.* 77. The right of the next of kin (who happen to be identical with the beneficiaries under the will) to receive the interest earned by the intestate portions of the whole estate had hitherto never been questioned or doubted by any of the parties, and the question was broached neither in the oral argument nor in the briefs of counsel. The result of this adjudication was to immediately cut off from all the beneficiaries of the estate a certain portion of their income which they had previously enjoyed and to lock this income up in the hands of the trustees.

The practical results of this direction have been grievous in the extreme. Not only was eleven-sixtieths of the whole income withdrawn from its customary distribution among those who were entitled to it under the intestate law as well as under the will—many of these in needy circumstances—but the trustees are under the necessity of repeating this practice in the future upon every occasion when one of the present life tenants dies and his share of the principal becomes intestate property. In other words, with every death in the family the amount of income annually distributable dwindles. This shrinking process continues until the last of the present life tenants expires when (although it is not expressed in the decree) it is evidently intended that there should be a final distribution.

No reasons have been assigned by the learned Vice-Chancellor for this extraordinary policy with regard to the interest now accumulated and to accumulate in the future on intestate portions of the estate. Nor do we feel that his action can be justified upon any recognized principle of law or equity. It has resulted in some very real hardship on the part of beneficiaries who had depended upon the whole of the income previously paid them by the estate, and who now find this income materially reduced. His action in this respect is assigned as error in paragraph (d) of our Petition of Appeal. *S. of C. p.* 7.

BRIEF ON THE LAW.

A. Doctrine of merger.

The opinion of the Vice-Chancellor sufficiently explains the invalidities in the testator's will. *S. of C. p.* 84. As the result of these invalidities we have seen that the attempted disposition of the fee has resulted in an intestacy and a reversion of the fee to the heirs and next of kin. In the case of all the life tenants enjoying income at the time suit was brought (excepting Mary Rue, whose children after her take valid life estates) the remainders left after these estates were void, so that the fee which descended upon the life tenants as heirs or next of kin was joined to or merged in these valid life estates.

The rule of merger is too well founded on logic and authority to require any explanation, except as it applies particularly to the facts in the case at bar. It is obvious that where a life estate and an estate in fee in the same property unite in the same person, the life estate must sink and be extinguished in the greater fee.

The sole features in the present case which may be claimed to raise difficulties in the way of merger are:

First, that the merger claimed is of an equitable and of a legal estate.

Secondly, that the legal title of the trustees intervenes to prevent the merger.

Merger of Legal and Equitable Estates—New Jersey cases.

The rule is stated in *Cyc.* that "it is essential to the merger of an equitable in a legal estate that the two estates should be co-extensive and commensurate." (16 *Cyc.* 669). The note cites *Wills vs. Cooper,* 25 N. J. L. 127. This case holds simply that:

> "Trust estates are, in all cases, subject to merge in the legal estate, whenever both estates come to the same person; for a man cannot be trustee for himself."

The use of the words "co-extensive" and "commensurate" in *Cyc.*, therefore, only applies to such estates as related to the same property or same fractional share of the property.

In *Wills vs. Cooper*, the testator created V. B. C. and wife trustees for the benefit of their children with the provision that the land should be conveyed to the children upon the happening of a certain contingency. V. B. C. survived his wife and died having first devised all the residue and reversion of this estate to his three children, R., S. and W. The Court held that the legal title as trustee descended to R., as well as the equitable title and that the two merged. The Court said:

> "The devise is of all the residue of the testator's estate, wheresoever situate and no other disposition is made of this trust property. But the consequence of such a construction utterly annuls the trust for the devise is to the three children who are the *cestuis que trustent,* to be equally divided between them; and as under it

each would take the legal title in one-third of the land, the beneficial interest of each would merge in the legal title; for there can be no doubt of the general principle that trust estates are, in all cases, subject to merge in the legal estate, whenever both estates come to the same person." *P.* 161.

Cooper vs. Cooper, 5 N. J. Eq. 9 (Ch. 1845) held:

"Where the legal and equitable estates are united in the same person, the equitable estate is merged in the legal."

In *Whyte vs. Arthur,* 17 N. J. Eq. 521 (Errors and Appeals, 1866), it was held:

"The well-settled rule of law is that where the equitable and legal estates unite in the same person the equitable estate is merged in the legal."

The merger was that of a complete equitable interest in the legal title.

In *Bolles vs. State Trust Company,* 27 N. J. Eq. 308, 310, the Court expressed the rule thus:

"Where the equitable and legal estates unite in the same person, the equitable sinks and merges into the legal, *provided the legal estate is as extensive as the equitable.*"

In this case the complainant was made trustee for several *cestuis,* one of whom was himself. It was held that a devise to trustees, one of whom is to take a beneficial interest in the trust property, gave the trustee a legal estate to the extent of such interest.

The case most in point, however, is *Hopping vs. Gray,* 82 N. J. Eq. 502 (opinion by Howell, V. C.).

George D. Randall had died testate of a will which divided his property into three equal parts. Two "Executors and Trustees" were appointed and authorized to sell any or all of the real estate, or to rent the same whenever in their judgment it would be most advantageous to the estate, and to invest the proceeds, and from the income to pay the legacies provided by the will. Each of the testator's three children was given a life estate in the income. The reversionary fee as to two-thirds of the estate was disposed of, but not as to one-third, an intestacy resulting. A certain creditor recovered a judgment against the testator's son, levied upon his interest in the estate of his father under the will, sold the same at a sheriff's sale, and took a deed thereof.

The question of the validity of the purchaser's title was the issue involved. It was necessary to pass a valid title that the son have, at the time of the levy, a legal title in the property sold, and this was only possible through the doctrine of merger. If the equitable right to one-third of the income during life could merge in the reversionary fee in one-ninth, *pro tanto,* it is evident that the son was possessed of a legal estate. This, the Court declared, was the case.

> " * * * Upon the death of the testator there was a merger of the equitable estate into the larger legal estate which had devolved upon him by reason of the intestacy before mentioned. That such a merger may take place appears in the authorities cited upon the brief of the exceptants. (Citing *Wills vs. Cooper; Bolles vs. State Trust Co.;* and *Harrison vs. Moore,* 64 Conn. 344.) Chancellor Kent evidently considered that estates of different quantity might merge *pro tanto* (4 *Kent Com.* 99). That is to say the

equitable life estate of Frederick to the extent of one-third thereof will merge in the remainder to the extent of one-ninth thereof. This view operates to give Frederick seisin of a fee simple title in one-ninth of the land in question on which the judgment and execution were a lien."

The situation before the Court in *Hopping vs. Gray* gives it additional weight as an authority. The claim against the testator's estate was made by a creditor of a beneficiary under the will, the very party against whom the testator had sought to make his gifts secure. It is obvious that the Court must have been disposed against the claim to levy on such property and yielded only because the rule of law was inflexible.

Merger—English cases.

It was held in *Donisthorpe vs. Porter,* 2 Eden, 162 (Ch. 1762), where a certain grantor created a trust for the benefit of his son, among others, but failed to dispose of the ultimate fee in the lands, that upon his death the real estate descended to the son subject to the uses of the settlement. The Court held that the equitable interest of the son merged in the reversionary fee.

In *Wade vs. Paget,* 1 Bro. C. C. 364 (Chancery, 1784), an equitable life estate was created in James Moore with remainder to such child or children of the said tenant as he should name and in default thereof to the use of all and every of the children of the said Moore. The life tenant made a marriage settlement, whereby a remainder was given to the

daughter, Anne Moore, for life, with power of disposition in her and her husband Slade, and in default of the execution of such power, among other things, to the use of the only daughter of the said marriage, in fee. Both parents died leaving surviving them an only daughter. The legal fee and the equitable fee were thus combined in the daughter, provided the marriage settlement was good. The settlement was held valid and the doctrine of merger was recognized.

> "The Lord Chancellor (Lord Thurlow) said that during the twelve months the infant survived her mother, she had a legal estate in fee in one moiety, as well as the equitable estate in fee by the covenant; and that it is universally true that where the estates unite, the equitable must merge in the legal, that the estate was executed without any act done, therefore, that moiety had descended to the defendant, Mrs. Paget."

In *Selby vs. Alston* (Ch. 1797), 3 Ves. 339, James Selby devised his property to his wife in trust to maintain his son until he reached the age of twenty-one, and then upon his son making a sufficient settlement to his mother to convey and dispose of the property remaining to the son. The widow died before the son attained the age of twenty-one. He afterwards attained that age and died in possession of his father's estate, intestate. The bill was filed by the heir at law *ex parte paterna,* claiming against the heir *ex parte materna,* who was in possession. The defendant put in a general demurrer.

It was held (by Sir Charles Pepper Arden, M. R.) that the demurrer should be sustained. The legal title held by the mother had descended to the son

and united in time with his equitable title, *i. e.*, a right to demand a conveyance. It resulted, therefore, that the paternal heir was excluded from any claim against the estate. The following excerpts from the Court's opinion are worthy of quotation:

> "*In Phillips vs. Brydges* (3 Ves. 120, 126), I stated as a universal proposition that wherever the legal and equitable estates uniting in the same person are coextensive and commensurate, the latter is absorbed in the former. * * * *
>
> "It has been argued that the trustee is a mere instrument and his acts can have no effect at all upon the estate. I have put a case where the facts being that the legal estate descends upon the *cestui que trust* and is united with the trust estate he becomes solely seised at law; and both his widow and heir are entitled. * * *
>
> "I have not found that courts of equity have ever, upon that circumstance, held that he is not considered as having a coextensive estate in law and equity. The case relied upon in *Phillips vs. Brydges* was *Wade vs. Paget,* 1 Bro. C. C. 363. There Lord Thurlow lays down a universal proposition, to which I am inclined to accede, that where the estates unite, the equitable must merge in the legal. That was the opinion of the Judges in *Goodright vs. Wells;* and upon consideration, I am inclined not to lay any restriction upon or to narrow it in any respect, but to hold that by whatever means, whether by conveyance or otherwise, a person obtains the absolute ownership at law of the estate, though he acquired that by an equitable title and both either come together or are afterwards united in him, the legal will prevail and the equitable is totally gone for the purpose of being acted upon by any person in this court."

The facts in this case were before the Court of King's Bench in *Goodright vs. Wells,* 2 Dougl. 771, and the opinion of Lord Mansfield on the point of merger was an outstanding authority for the Court of Chancery. Lord Mansfield said:

> "The question is to whom the whole estate descended on the death of the sons, for it did descend, the devise to charitable uses being void. It descended upon the lessor of the plaintiff, heir at law. * * * Cases must often have happened on which the narrow question would arise; viz., whether when the *cestui que trust* takes a legal estate, possesses under it, and dies, the legal and equitable estates, upon his death, shall be severed for the different heirs. * * * * On principle it sees to me impossible, for the moment both meet in the same person, there is an end of the trust. He has the legal interest and all of the profits by his best title. A man cannot be trustee for himself."

Alleged obstruction of the Trustees' title.

The rule is that the greater and less estates, in order to merge, must coincide and meet without any intermediate estate. By "intermediate estate," however, is intended the estate of a third party who holds in his own right. The purpose of the exception is evident, to protect against the operation of merger any outstanding legal interest in a third party. But where no substantial interest intervenes, the doctrine of merger is strictly enforced and will even operate to destroy a contingent remainder where the estate of reversion is acquired

by mediate descent from the creator of the particular estate. *McCreary vs. Coggelsall,* 74 S. C. 42; 53 S. E. 978; 7 L. R. A. (N. S.) 453, and cases in footnote to 7 L. R. A. (N. S.) 453.

To support the claim that the trustees' title is sufficient to bar the merger of the life estates under the Cuthbert will it must be shown that their title is a legal, substantial, and independent title vesting them with rights which they may exercise free from the interference of *cestuis que trustent.*

Other considerations also apply. There is for instance the principle that a trustee cannot assert his legal estate, whatever it may be, in hostility to the benefit and advantage of his *cestuis que trustent.* Whatever title the Cuthbert trustees may have to the estate is a title held, so far as two-thirds of the corpus of the estate is concerned, for the sole benefit of the life tenants in whom also the reversion at law of so much of the estate lies. These trustees have no personal or individual interest whatever in the execution of their trust. They have no right in connection with it, only a duty. It would be paradoxical that this duty which is exercised for the benefit of the life tenants should so operate as to preclude a merger of the life tenants' estates in fee, an event which would distinctly benefit the same life tenants.

Our answer to the objection that the title of the trustees intervenes and prevents a merger, therefore, is two-fold:

First, that the trustees have only a dry trust, and only such title to the property as enables them to carry on the trust. They do not hold a fee.

Second, that, in any event, their title must be subordinated to the interest of the *cestuis que trustent,* in hostility to whom they have no right to assert it.

1. Nature of the Trustees' title.

In paragraph 6 of the will the testator gives to his trustees all the residue of his estate, "in trust for the following uses." Among these uses appears the direction that all the residuary estate is to be converted into United States bonds or real property mortgages, the income from which is to be applied in accordance with the directions of the will. While under this paragraph of the will the legal fee may have passed to the trustees to all the lands of the testator held by him at his death, it did not vest them with a like title to the converted property.

The duties of the trustees with regard to this converted property called for the payment of income with reinvestments as they became necessary, and in the future a final division of the corpus. Nothing in these duties requires an outstanding title in the trustees, and as a matter of law a Court will not extend by construction the title of a trustee further than the requirements of the trust call for. This was definitely held in *Hopping vs. Gray, supra.*

In the present case a mere possessory title is all that the trustees require; a fee is not needed. It follows that no title in fee simple can be assumed to exist in the trustees.

> "The estate of the trustee is commensurate with the powers conferred by the trust and the purposes to be effectuated by it, or, in other words, the trustee takes exactly that quantity of interest, whatever it may be, which the purposes of the trust and its proper execution may require, and no more, and the purposes of the trust being executed, the trust estate ceases; the title passing by operation of law to the

cestui que trust. The trustee will take the fee without words of limitation or inheritance when necessary for the trust, and, *a fortiori,* if there are words of limitation or inheritance; but, in the absence of evidence to show that the creation of a fee was necessary to effectuate the purposes of the trust, the Court will not presume that a fee was intended, no words of intention appearing. *The question is not whether the testator has used words of limitation, or expressions adequate to convey an estate of inheritance, but whether the exigencies of the trust demand the fee simple, or can be satisfied by any, and what, less estate.* * * * And the principle that the trustee of an express trust of real property takes only such an estate as is requisite to enable him to carry out the terms of his trust applies also, by analogy, to express trusts of personal property. In the case of a deed expressly and exclusively intended to create a trust, the habendum and the covenants do not necessarily give any beneficial interest to the grantee. After a trust has terminated, the trustee cannot claim to be the beneficial owner of the property held in trust unless this clearly appears to have been the intention of the testator. A trustee cannot hold a legal title to an estate or fund, the absolute title to which is vested in another."

9 *Cyc.* 208-213.

In the situation at bar we are dealing with personal property and are relieved of the embarrassment of a technical fee outstanding in the trustee. The rules of real property apply to personalty only by way of analogy, and to assist in determining

rights and equities. But these rules are invoked only when there is necessity for their application. With real property there must always be a home for the fee; no lapse in the strict legal ownership is allowed. With personal property, possession is generally ownership, and the feudal incidents of real property ownership do not obtain.

For the purposes of the execution of their trust duties, the present Cuthbert trustees do not require a fee and, in accordance with the rule of law above cited, and in the absence of any direct testamentary direction, none can be held to exist.

2. Trustees' title must yield to that of cestuis'.

The question as applied to the present issue whether or not the Cuthbert trustees take a fee simple or only a mere possessory title, seems to us purely academic. If they took a fee it was taken not for their own benefit but for that of their *cestuis que trustent.* A vesting of the fee in them had no effect on their testamentary duties, to sell, to rent, to invest the proceeds, to pay out the income—the same duties that were imposed upon the trustees in *Hopping vs. Gray,* and which the Court held did not vest them with a fee title. But if a legal fee had passed in the Hopping case, or if it must be held to have passed in the present case by virtue of the will, how does this affect the rights of the life tenants to claim a merger and a division of the corpus?

In determining this exact question, it is necessary to bear in mind the principles upon which the doctrine of merger rests. It is, of course, a doctrine

of convenience; the unnecessary tacking on of a number of different estates in one person being a source of confusion; but it is designed primarily for the benefit of the tenant in whom the estates merge. In law, where the rule is hard and fast, his interests are not considered, but, in equity, where the rule is enforced only where equitable, the interests of the tenant, whose estate is lost by merger, are first considered. The distinction was clearly laid down in the leading case of *James vs. Morey*, 2 Cohen, 246 (N. Y. Ct. of Errors, 1823), where it was held:

> "At law, where a greater and a less estate meet and coincide in the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or in law phrase, is said to be merged.
>
> "This rule at law is inflexible.
>
> "And where the equitable and legal estates unite in the same person, the equitable is merged in the legal estate.
>
> "But in equity the rule is not inflexible.
>
> "It depends on the express or implied intention of the *person in whom the estates unite* whether the equitable estate shall merge or still be kept in existence.
>
> "Or upon the circumstance that he is not capable of making an election, being an infant, a lunatic, etc."

The general rule is given the following expression in *Cyc.*:

> "Equity will prevent or permit a merger as will best conserve the purposes of justice and the actual or just intent of the parties. Wherever a merger will operate inequitably, it will be prevented. The controlling consideration is

> the intention, express or implied, of the person in whom the estates unite, provided the intention be fair and just, and a merger will not be permitted contrary to such intent. Where there is no expression of intention, equity will presume such an intent as is consistent with the best interests of the party, and the same presumption is indulged where the party is an infant or person of unsound mind.''
>
> 16 *Cyc.* 665.

Reference may also be made to the House of Lords cases of *Thorne vs. Cann,* 64 L. J. Ch. 1, and *Liquidated Estates Purchase Co. vs. Willoughby,* 67 Ibid. 251.

Very much the same situation as is found here is discovered in the case of *Warner vs. Sprigg,* 62 Md. 14. There the holder of a fee conveyed the same to a trustee in trust for his own life, reserving to himself a power of disposal by will. It was held that the equitable life estate and the reversion merged in him, and that he could by deed dispose of the entire property so conveyed in trust.

To much the same effect is *Langley vs. Conlon,* 212 Mass. 135, 98 N. E. 1064 (S. C. 1912). Here the testator conveyed to the trustee to hold in trust for his daughter for life with a power of disposition in her at her death. The Court held that these directions left an intestacy and that the fee descended to the heirs subject to the disposition by the daughter. The daughter acquired from the heirs the reversionary fee and executed a mortgage of the property in her own name. At this time the trustee appointed under the will had resigned. Later another trustee was appointed who, acting under the testamentary direction, made a conveyance of the

entire trust property. In a contest between the mortgagee and the grantee under the trustee's deed, the Court held the former's rights superior, basing this conclusion upon a merger in the daughter through the jointure of her equitable estate with the reversionary fee.

To sum up, the parties litigant are in a court of equity which in determining their rights must look to the intent of the instrument under which they take rather than to the form. A naked fee cannot be set up in the trustees to defeat the application of a doctrine of law such as merger in favor of the beneficiaries for whom they hold. A purely artificial title in the Cuthbert trustees will not avail to bar a merger of the equitable life tenancies in the legal fee which has descended upon the life tenants.

Alleged indivisibility of the estate.

The learned Vice-Chancellor expressed the belief that any number of the beneficiaries less than the whole could not elect to terminate the trust and have a distribution of their share of the corpus, and that for this reason the division prayed for could not be made. *See S. of C.*, p. 88. We shall find it more convenient however to deal with this objection under the discussion of our right to distribution of the intestate portion of the residuary estate, which we shall now deal with.

B. Distribution of Intestate Property.

The Vice-Chancellor has refused to decree a distribution of the intestate portions of the residuary corpus as prayed in the cross bill filed by certain of the defendants. *S. of C. bottom of p.* 78. For this refusal we have assigned error. *S. of C.* p. 7, l. 22.

As we have seen, the testator failed to make valid disposition of the fee to his residuary estate, and an intestacy resulted as to this reversionary interest. Moreover, with regard to the income on this estate bequeathed by the testator to various members of his family, it happens that at the present time two life tenancies created by his will have terminated without any valid remaindermen to take after them. Thus when Joseph Ogden Cuthbert *II* died leaving him surviving his widow, who took a life estate in one-third, the remaining two-thirds of his share had no taker because of the failure of the testator to provide for the contingency of one of his children dying without issue surviving. There is then with regard to this two-fifteenths of the whole estate no possible taker under the will, either for life or in fee, and it results that two-fifteenths of the corpus, title to the fee of which at the death of the testator vested in his next of kin, is now held by the trustees unused and despite the fact that it serves no valid testamentary purpose.

So likewise with a one-twentieth of the estate, the income upon which descended to Joseph Cuthbert *III*, one of the children of Allan Cuthbert. This gift to Joseph *III* was valid, but upon his decease it could not validly pass to his three children, who at the time the suit was brought were nonetheless

receiving the father's share of the income from the trustees. The right to this income is now barred by the Court's decision, and no other valid testamentary gift remains with regard to this fraction of the corpus.

Effect of Invalidity.

It cannot be argued that the equitable fee which the testator attempted to pass to the beneficiaries under his will is void and the naked fee in the trustees remains valid. This fee is held only for the purposes of the trust and ceases the instant that the trust terminates. The validity of the trust is the measure of its own validity.

> "When, by reason of an equitable interest being too remote, there is a legal interest vested in the trustee without any corresponding equitable interest, there is a resulting trust to the heir or next of kin."
>
> *Gray on Perpetuities, Section* 414.

There is more than a resulting trust, however, in this case, for with regard to the various portions of the corpus of the estate invalidated by the Rule against perpetuities there are no further duties for the trustee to perform. As we have shown, their title as trustees existed only so long as the equitable interests continued. The final gift of the corpus being void, there was a reversion to the next of kin, an interest which vested in enjoyment the instant the trust ceased.

> "If the devise of a future interest is void for remoteness, but the prior devise is for life only or other limited period * * * the property, *after*

the termination of the prior interest, goes to the person to whom property which has been invalidly devised or bequeathed goes. This person is generally the heir in the case of realty, and the residuary legatee in the case of personalty. There is no difference in this respect between a devise or bequest void for remoteness and a devise or bequest void for any other reason."

Gray on Perpetuities, Section 248.

Right to partial distribution.

The Vice-Chancellor, after our argument had been heard, addressed a letter to counsel, wherein he raised the question of whether one or more beneficiaries less than the whole number could "elect" to terminate a trust and receive present absolute enjoyment of so much of the whole as they were entitled to. The same consideration was evidently in his mind when he wrote his opinion, for he reverts there to the doctrine of election and attempts to show that this right is not available to the defendants in this case.

"Where trust duties under a naked power of sale involve solely the conversion of real estate into personal property and the distribution of the proceeds, and the whole beneficial interest in the land thus directed to be converted belongs to the person for whose use it is given, equity will not compel the trustee to execute the trust against the wishes of the *cestui que trust,* but will permit him to take the land if he elect to do so before the conversion has actually been made. But even in such case,

> where there are several *cestuis que trust* while one may take an election which will be operative to effect a legal conversion of his interest he cannot, against the will of the others, exercise an election which will be effective to entitle him to receive his undivided share in specie. The reason appears to be that the remaining undivided shares may not sell so beneficially in proportion as if the estate were entire."
>
> *S. of C.* p. 89.

As a matter of law we feel that the doctrine of election has no place in this situation at all. The right of heirs or next of kin to a distribution of the principal of an estate which has devolved upon them by operation of law is not embarrassed by any necessity of election. The right is an absolute one unlimited and unhampered by any requirements of action on their part. The fee must have a home, and vests in them whether they will or not. The right to possession follows the fee. The case of a widow's election to take under the will or exercise her claim of dower right is a marked exception to this general principle.

Moreover, the objection suggested by the Vice-Chancellor's opinion has no practical application to the facts before this Court. There is no danger of the rights of the other beneficiaries suffering. The Court evidently had in mind such cases as *Fluke vs. Fluke,* 16 N. J. Eq. 478, in which the Courts were dealing with the equitable conversion of land into personal property, and the right of a single beneficiary to oppose the conversion and claim the property in its original state. In these cases the Courts very properly hold that the trust property cannot be carved up at the instance of any single beneficiary

for the reason that the division claimed might result inequitably to those entitled to the conversion. Real property when partitioned may, and frequently does, bring in less than on a sale of the whole tract.

In the converse situation—where personal property is to be converted into real estate—a different rule should and does apply. Here there is no injury done by a single beneficiary claiming his individual share of the money which is to be spent in the purchase of real property. The distinction has been noted by the foremost authority on the law of trusts.

> "Where an estate is directed to be sold and the proceeds to be divided amongst several persons, no one singly can elect that his own undivided share shall not be disposed of, but shall remain realty, for the other undivided shares will not sell so beneficially in proportion as if the estate were entire; but if money be directed to be laid out in lands to be settled on A, B, and C, as tenants in common, any one of them may elect to take his own third as money, for two-thirds may be invested just as advantageously as the whole sum."
>
> *Lewin on Trusts,* 12th Ed. 1911, p. 1244.

The text cites *Seeley vs. Jago* and *Walker vs. Denne.*

In *Seeley vs. Jago*, 1 P. W. 389 (Ch. 1717), there was a devise of £1000 to be paid out in the purchase of lands in fee to be settled upon A, B, and C, and their heirs, equally to be divided. A died leaving an infant heir and B and C together with the infant brought a bill to have the £1000 divided mang them. It was held:

> "The money being directed to be laid out in lands for A, B, and C, equally (which makes

them tenants in common), and B and C electing to have their two-thirds in money, let it be paid to them; for it is in vain to lay out this money in land for B and C when they may, the next moment, turn it into money, and equity, like nature, will do nothing in vain.

"But as to the share of the infant, that must be brought before the master and put out for the benefit of the infant who, by reason of his infancy, is incapable of making an election."

Again in *Walker vs. Denne*, 2 Ves. Jr. 170 (Ch. 1793), the testator had directed that money should be laid out by the trustee in manors, lands, hereditaments, etc. One of the beneficiaries of the proceeds, a *feme covert*, made a deed of appointment of her share. The money was never invested and, on failure of heirs, the crown claimed by escheat against the next of kin. It was held, with regard to the *feme covert*, that her deed of appointment was sufficient indication of her intention that the money should continue personal property. The Chancellor declared that a single beneficiary had the right to make election independently of the other beneficiaries.

We submit these cases as precedents of value in the present discussion. The right claimed by the next of kin of Joseph Ogden Cuthbert to a distribution of the intestate corpus is analogous to the right claimed for these beneficiaries, for the trustees in both cases were given money to invest. In either case there is a trust fund of personal property which a number of beneficiaries less than the whole attempt to divide so as to obtain the corpus for themselves, leaving the remaining portion to be administered in accordance with the trust.

The fact that the English Court of Chancery in these two instances recognized the right of individual election upholds our contention.

One other English case may be cited as helpful in this matter. In *Fytche vs. Fytche*, L. R. 7 Eq. 494 (Ch. 1868), J. F. in his will gave to his wife certain personal property and annuities and the interest and proceeds on certain shares of stock and mortgages, all in lieu of dower and freebench. The widow failed in her lifetime to elect to take under or against the will. Her death left four next of kin surviving, one the administrator of her will. Three of these elected to take under the will and the administrator brought suit to prevent the partial election. The Court upheld the right of partial election and said:

> "* * * All persons interested have a right to exercise their judgment as to the way in which they will elect. And one may elect to take one way and one another * * * Each has a distinct right to say which way he chooses."

The Vice-Chancellor is further answered by the circumstance that in *Fluke vs. Fluke, supra*, the right of election was one recognized by the law as applicable to a single situation, viz., the directed conversion of real property into personalty. The election in such case operates in opposition to the testamentary direction, and is necessarily limited by the law to those cases where no outstanding rights of third parties are affected. In the case at bar the "election" (we feel that the word is wholly inappropriate) does not operate against the testamentary intent, at least not against a valid testamentary intent. It is in fact no election at all, but the simple operation of the fundamental rule of real property which entitles the holder of a fee, unrestricted by

any life estate or any other right in a third party, to possession of the land (or the fund into which the land has been converted).

In at least two of our States the Courts have recognized the right of the next of kin to distribution of an intestate portion of a trust estate.

The Howland will cases constitute the most notable decisions on this point. The testator had directed in his will that the residue of his estate, real and personal, be divided equally among his children (five sons, four daughters, and four grandchildren, the issue of a deceased daughter), but subject to certain trusts. Thus his sons were to get one-half of their shares on reaching twenty-one and the other half when they attained twenty-five years, the income in the meantime being paid them. The daughters' shares were to be invested by the executors, as trustees, and the "interest, dividends or other periodical income thereof" was to be paid them from time to time during their lives. After death the principal of their shares was to go to their respective issue. No provision was made for the contingency of their death without issue. Two of the daughters having passed the child-bearing age claimed the right to dispose of their shares by will. The trustees, to determine the validity of these contentions, brought suit to construe the will. *Howland vs. Clendenin* (Ct. of App., N. Y. 1892), 31 N. E. 977, 134 N. Y. 305.

The Court held that the failure to provide for the contingency of the daughters dying without issue resulted in an intestacy, and the corpus of the estate when freed from the charge of paying the daughters' income should upon their deaths be successively distributed as intestate property to the next of kin.

The two ladies in question later died, and the trustees prepared to distribute their portions of the prin-

cipal. A controversy arose as to whether the fee to the intestate portions had vested on the testator's death in the ten surviving branches of his family, or whether it vested at his daughters' death in the heirs then in being. The Supreme Court in *Grinell vs. Howland* (1906), 100 N. Y. S. 765, held that the former alternative was correct, and concluded their opinion with the following direction:

> "Accordingly, the funds held in trust for Mrs. Clendenin and Mrs. Grinell must be distributed among the heirs at law and next of kin of the testator determined as of the time of the testator's death, with the result that the estates of each of the children mentioned in the will shall receive respectively one-tenth of said fund."

Likewise in the case of *Beers vs. Narramore* (Sup. Ct. of Errors, Conn.), 22 Atl. 1061, suit was brought by trustees to construe a will. The testament bequeathed "all the rest and residue of my property of every description, real, personal or mixed, in trust, to be improved and kept intact so far as is profitable and for the best interest of my estate, to be used for the following purposes: The profits and income of said property shall be distributed in quarterly payments in each and every year as follows:" Three life estates were then created in the income in favor of the wife, the son, Frank W. Beers, and the daughter, Emma J. Narramore, of the testator. Certain remainders over were next attempted, of which it is sufficient to say that no valid provision was made for the event of the son dying without widow or children, or the daughter dying without children. Referring to these contingencies and the duty of the trustees with regard to them, the Court, in construing the will, said:

> "In the event of the death of Frank W. Beers before the termination of the trust leaving no widow or children surviving him, or of the death of the said Emma J. Narramore before the termination of said trust leaving no children surviving her, it seems to us that there is nothing in the will to indicate any intent that the share of the income to which said Frank or Emma or the widow or children would have been entitled should either go to increase the share of income of any survivor, or be accumulated and added to the principal, to be divided at the termination of the trust, as the principal is directed to be divided, and that the proportionate amount of the principal of the trust estate would, therefore, upon the happening of such event, be divested from the trust and become the subject of immediate distribution and possession as intestate property."

Finally we call the attention of the Court to the case of *Hewitt vs. Green*, 77 N. J. Eq. 335, where the Court of Chancery upheld its power to make division of a single trust fund, part of which was invalid because of the operation of the Rule against Perpetuities. It was there held that:

> "The Court has power to make a division of a single trust fund which has been created for two independent objects, one valid and one invalid, so as to reduce the fund to such amount as is required for the accomplishment of the legal object—the amount the testator presumably would have fixed in case he had known how much of the contemplated trust scheme would have been adjudged void, and where the illegal and legal objects are to be accomplished

> successively the whole income of the trust fund will be appropriated first to the accomplishment of the legal object and will then be terminated and the fund disposed of on the theory that the whole trust has been executed."

To conclude, the question we are discussing is one in which are involved no conflicting equitable rights. If the distribution prayed for by these defendants be allowed none of the other beneficiaries will be injured in the slightest degree. The Vice-Chancellor, it is true, suggests in the closing sentences of his opinion:

> "It is impossible to say that, with a considerable portion of the corpus of this estate removed from the management of the trustees, the net income of the remaining portion will be as beneficial to the remaining beneficiaries as is the lesser, but proportionate, fractional, part of the net income of the whole."

But as a matter of fact the trust estate is made up of securities which have a ready market, and it is not conceived how the sale of so much of these securities as might be necessary to provide for the distribution prayed would affect the income on those which remain. Moreover, no suggestion that such a result would follow was made in the trial of this case. The defendants in their cross bill were not required to prove the negative fact that no harm would result from the distribution to the remaining testamentary beneficiaries. All that was required of them was to serve upon these beneficiaries full notice of their claim. Certain of these beneficiaries were in court represented by their counsel, and no testimony was offered to show that the value of the remaining

estate would be injuriously affected through a distribution of part of it, nor was this contention made in the briefs or oral arguments of counsel.

We submit that we are entitled to a distribution as next of kin of eleven-sixtieths of the estate which at present have no lawful takers under the will. It should also be decreed that a like distribution will be made in every successive instance in the future when valid life tenancies are terminated with no valid remaindermen after them. In other words, whenever a complete intestacy is created there should be an immediate distribution *pro tanto* of the estate to those entitled under our intestacy laws.

C. Distribution of Income on Intestate Property.

The learned Vice-Chancellor not only declined to decree a distribution of the intestate portions of the residuary estate, but of his own motion adjudged that the income on this intestate principal should not be distributed but should remain in the hands of the trustees *"so long as the trust continues."* *S. of C.* p. 87, l. 19. As the life estates bequeathed to the children of Mary Rue are undisputably valid so far as the will is concerned, and as the youngest of these ten Rue children has only recently come of age, it is apparent that there is a reasonable probability of the trust continuing for a great many years. Vice-Chancellor says:

> "The period of a trust may lawfully extend to the decease of any designated person or the survivor of any number of designated ~~number of~~ persons, in being at the death of a testator, and if so directed, twenty-one years thereafter. The life of Mary B. Rue accordingly supports

the continuance of this trust for the management of the entire corpus and the distribution of the income therefrom."

S. of C. pages 87 to 89.

He is dealing here with present conditions, and cites Mary Rue merely to illustrate how any of the valid existing life estates is capable of supporting the trust. It would follow that the valid life estates of her children would also support the trust. With this proposition we have no quarrel. Our point is that these valid life estates uphold the trust only to the extent of their proportionate interests in the entire estate of the testator. They do not and cannot support the administration by the Cuthbert trustees of intestate property. Nor do we conceive of any reason why part of the estate left by the testator should not be subject to the trust administration and part free from this trust and subject to distribution. This point we have already discussed.

The learned Vice-Chancellor seems to have been possessed of the idea that whatever property came into the hands of these trustees, either as part of the original corpus of the testator's property or as income accrued upon this property, must be administered in accordance only with the testamentary direction,—that it could not have the double character of testate and intestate property. No authorities are cited at any place in his opinion, and we are at a loss to comprehend the authoritative basis for such a view.

An excerpt from the middle of his opinion (*S. of C.* middle of p. 87) illustrates the fallacy under which the Vice-Chancellor labored. He says with reference to the two-thirds of the one-fifth originally given Joseph *II,* and which was left without a taker at the latter's death without issue ——

> "It follows that no lawful provision of the trust exists to authorize the payment to any one of the remaining two-thirds of the income which was payable to Joseph during his lifetime."

He then adds this conclusion—as if it logically followed from what we have just quoted ——

> "That part of the *income* necessarily falls into the corpus *so long as the trust continues*, and the same will be true as to the one-third of the one-fifth at the decease of the widow of Joseph."

Why it necessarily follows from the fact of intestacy that the income on this intestate principal should fall into the corpus is not at all apparent to us, and we lack the benefit of citation of such precedents as may have been in the Vice-Chancellor's mind.

It is all the more difficult to understand his view when we consider that the distribution of income realized on the intestate property may be continued by these trustees to the next of kin in accordance with their original method of payment, to the beneficiaries. Executors and trustees are competent to administer such portions of their principal as constitute intestate property, acting therein as administrators *ex officio*—a right which saves the confusion and expense of having additional administrators appointed.

> "It is the right and duty of the executor to administer upon estate undevised or undisposed of under the will, where there is a partial intestacy, as well as to execute the will itself; and this he may do *ex officio* without procuring letters of administration for that purpose, being in such sense considered trustee for the next of kin."
>
> 2 *Schouler on Wills,* Sec. 1250, 5th Ed.;

Hays vs. Jackson, 6 Mass. 149; 152 Mass. 24;
Wilson vs. Wilson, 3 Binn. 557;
Landers vs. Stone, 45 Ind. 404;
Parris vs. Cobb, 5 Rich. Eq. 450;
Venable vs. Mitchell, 29 Ga. 566;
Dean vs. Biggers, 27 Ga. 73.

Moreover, this is positive authority in this state recognizing the right of the heirs or next of kin to the income earned on undevised property. The point has come up in a number of Chancery decisions where property has been left to executors with directions that it be turned into moneys and securities and distributed to named beneficiaries; and it has been held in such cases that the income accruing on the property prior to the time of sale belongs to the heirs or next of kin, as property undisposed of by the will.

Thus in the case of *Herbert vs. Tuthill,* 1 N. J. Eq. 141, the testator after giving some specific bequests, orders "that all the rest of his estate, real and personal, should be sold by his executors, and turned into money as soon after his decease as convenient might be and distributed among his children, etc.," and the Chancellor holds that the heirs are entitled to be paid the rents and profits between the death of the testator and sale of the land. This decision has been cited frequently as a leading case on the subject.

In *Current vs. Current,* 11 N. J. Eq. 186, the testator directed the sale of certain lands for a particular purpose, disposing of them after sale to certain beneficiaries. One of the heirs was in possession of a part of the realty and surrendered it to the executor for sale. He applied to the Court for an accounting of the rents and profits up to the day of sale. The Court held:

> "Where a testator directs his executor to sell certain lands for a particular purpose, until such disposition is made of them, the heir is entitled to the rents and profits, unless the testator has, by express terms or by implication, otherwise disposed of them."

The Prerogative Court in *Todd vs. Wortman*, 45 N. J. Eq. 723, held, on exceptions filed to the account of the executor:

> "Where a testator directed his executors to sell his real and personal estate as soon as it could conveniently be done for the best interest of the estate, and made no devise of the lands pending such sale—*Held*, that, until the power of sale was exercised by the executors, the legal title to the lands descended to and vested in the testator's heirs at law, and that they were entitled to the rents and profits while such title was vested in them."

The right of the heir or next of kin to the income was recognized by the Supreme Court in *Ware vs. Hall*, 16 N. J. L. 333, and by the Court of Chancery in *Trenton Trust & Safe Deposit Co.*, 91 Atl. 908, 910.

This current of authority clearly leads to the conclusion that the present appellants have a right to an immediate distribution of the accrued income and to successive distributions of income accruing in the future.

The Court exhibited an unwillingness to make any adjudication with regard to future contingencies likely to occur under the will. We feel that definite instructions should have been given the trustees with regard to all possible future contingencies, and in this connection we call attention to *Sec.* 7 of the new Chancery Act:

> "7. *Decree to Declare Rights.*—Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested."

This act was construed by the Chancellor in a recent decision, In *re Ungaro's Will,* 102 Atl. 244, in which he declared that it was intended by the Legislature that the Court of Chancery should have full power to advise an applicant regarding the meaning and effect of the will, although there might be no need of action incident to the application.

We submit on the strength of the argument herein presented that the present appellants are entitled to immediate distribution by the trustees of two-thirds of the entire corpus of the Cuthbert estate; that in the event that this Court finds that the doctrine of merger is not applicable a distribution of at least eleven-sixtieths should be decreed, based on the fact of intestacy; and that finally, and in any event, the appellants are entitled to a distribution of the income presently accrued upon the intestate portions of the corpus, and such as will accrue in the future upon intestacies occurring under the will.

HARVEY F. CARR,
LOUIS B. LEDUC,
Solicitors for Appellants-Defendants.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between
CAMDEN SAFE DEPOSIT AND TRUST COMPANY. *et als.*,
Complainants-Respondents,
and
ELIZA GUERIN, *et als.*,
Defendants-Appellants.

ON APPEAL.

REBUTTAL BRIEF OF APPELLANTS

By permission of the Court, the following brief is filed by the appellants in reply to that prepared by the learned counsel for the trustees. As this brief of our opponents only reached us the day before the hearing of our case we were unable to reply orally to its arguments, and obtained in consequence the right to make our reply by brief.

At the same time we obtained permission of the Court to the filing of a brief by Messrs. Gaskill & Gaskill, of counsel for Mary and John Rue. We are now advised that no brief will be filed by these counsel.

Before undertaking to answer the arguments advanced by counsel for the trustees in their brief, we

desire to call the Court's attention to the changed attitude assumed by these parties. This action—one to obtain a judicial construction of the will—was brought by these trustees, who asserted in their bill of complaint that certain invalidities were alleged to exist in the testament of the deceased, and that certain beneficiaries claimed an immediate distribution of some portion of the corpus of the estate. The trustees sought the advice of the Court as "to whom they should pay the incomes of said estate, and whether or not any of the principal thereof should now be distributed, and if not now, then at what time the same should be distributed and to whom, and whether or not any of the provisions of the said will are invalid, and if so to what extent, etc." *S. of C., bottom of p.* 35.

Consistently with the nature of the relief sought, counsel for the trustees in the hearing before the Vice-Chancellor disclaimed all interest in the merits of the controversy which had arisen over the will between the two sets of defendants who answered the bill. All the trustees sought was a clear definition of the meaning of the instrument and of their duties in regard to it. Their brief filed with the Vice-Chancellor expressed the same disinterestedness.

But at the eleventh hour of appeal, and but a few hours before the oral argument of counsel, the trustees filed a brief which takes a decided stand against the construction of the testament claimed by one set of defendants, and seeks to refute it. We submit that the character of their bill and the record of litigation disentitle these complainants to assert a claim to any particular construction of the will. They have come into the Court of Chancery admitting their misapprehension with regard to the meaning of that instrument, and seeking the assistance of the Court

in its construction; they cannot now attempt to dictate to this Court the construction which the lower Court should have adopted.

Moreover, an unjust hardship is imposed upon these appealing defendants. The brief of our opponents contains points which are made for the first time on appeal. These points, as we shall show, involve to some extent questions of fact which, had they been properly presented in the pleadings filed in Chancery, would have enabled us to have met the issue which they presented at that time.

We shall, however, discuss very briefly our opponents' points, and endeavor to show their fallacy.

1. A legal estate in the Trustees.

Counsel assert that the doctrine of merger is barred by an outstanding legal title in the Cuthbert trustees. In support of this argument, which we have largely anticipated in our earlier brief, they refer to the case of *Hopping vs. Gray,* 82 N. J. Eq. 502, already explained by us. It is sufficient answer to point out that in that case the powers of the trustees were identical with those vested by Joseph Ogden Cuthbert in his trustees. In the Hopping case Gray and Duryea were appointed trustees by the testator, who

> "Authorized them to sell any or all of his real estate, or rent the same whenever in their judgment it would seem to them most advantageous to his estate to do so, and to invest the proceeds thereof, and from the income of said investment to pay the several legacies provided for in his will."
>
> *Page* 504.

If these powers were insufficient, as counsel maintain, to vest legal title in the trustees of the Randall will, then manifestly the powers vested by Joseph Ogden Cuthbert in his trustees were inadequate to give those gentlemen a legal estate. And if no legal estate was given the Cuthbert trustees, there is no outstanding title to bar a merger. *Hopping vs. Gray* is an authority in our favor.

2. Alleged intervening title of executors and administrators.

The next point of our adversaries has more apparent merit. The argument is that the interest of the Cuthbert children in the corpus of the estate which passed to them because of their father's intestacy, descended not in turn upon their children, but (the property being personalty) upon their executors or administrators. Such reversionary title being now vested in these executors or administrators, it is claimed that the doctrine of merger has no application.

The answer to this contention is two-fold. *First,* the title of the administrator in itself is not sufficient to bar the operation of merger. *Secondly,* the executors and administrators in many cases being also beneficiaries under the will are entitled to claim a merger of their own interests.

We have stated that the outstanding title of an administrator was not sufficient to block a merger of the equitable interest vested in the next of kin. In this connection we must bear in mind the purpose which the law has in requiring the appointment of an officer to administer a decedent's estate. This purpose has primarily in mind the protection of

creditors and the payment out of the personal estate of all debts owing by the decedent. It is manifest in the present case there can be no creditors of the estates of the deceased children of Joseph Ogden Cuthbert. Henry C. Cuthbert died intestate on April 18, 1902, and his son, T. Percival Cuthbert, was appointed his administrator. Allan Cuthbert likewise died intestate on November 10, 1903, and Joseph O. Cuthbert, *III,* was appointed his administrator. He has since died, and according to the Court's decree there is no one now entitled to receive his share of the estate. Mary C. Gillespie died November 11, 1906, appointing her three children executors, and dividing her estate among them. The second Joseph O. Cuthbert died in 1899, leaving his wife, now Eliza Guerin, his executor. *S. of C., pp.* 77-78.

It is evident that whatever debts may have existed against the estates of these parties are now barred by the statutes of limitations. It follows that in the absence of debts no administration is necessary, and the passing of the title to an administrator and from him to the next of kin may be dispensed with.

> "In most states it is held that where there are no debts administration may be dispensed with, so that the heirs or distributees may without administration take and hold or recover personal property, or divide it among themselves by agreement."
>
> 14 *Cyc.* 107.

The foot-note shows this to be the rule recognized in most of our states. While the point has never been adjudicated in our own courts, there is every reason for adopting a rule of law which has received such general recognition throughout the country. This rule will operate in the present instance to vest

the legal title to the corpus of the Cuthbert estate (independent of Mary Rue), in the grandchildren of the testator now living, and the descendants of those now dead.

Whatever view this Court may take of the legal theory by which the corpus of the Cuthbert estate will eventually be vested in the possession of the next of kin, it must be admitted that the part played by an administrator or executor is that of a mere conduit through which the title runs to those entitled under the law. We are in a Court of Equity and free to regard the substantial rights of the parties and ignore what is merely superficial. Equity regards that as done which ought to be done. Carrying the familiar maxim to its reasonable conclusion we must hold that there is nothing in the outstanding title of those administrators and executors of the deceased children of Joseph Ogden Cuthbert—if such outstanding title really exists—which operates to bar a merger of the reversionary fee and the equitable life interests of the Cuthbert grandchildren.

Secondly, we may point out that in the case of those beneficiaries who are also acting as executors or administrators of the estates of their parents, the children of the testator, the argument of our opponents has no logical application. These parties hold at one and the same time the legal title of administrator or executor, and the equitable title of a beneficiary. It is apparent that in these cases the equitable title merges in the legal title.

Wills vs. Cooper, 25 N. J. L. 127;
Bolles vs. State Trust Co., 27 N. J. Eq. 308.

We discern in these cases where a Cuthbert beneficiary acts as administrator or executor a double merger: First, a merger of the reversionary fee

and the legal title of the administrator, and secondly, a merger of this interest with the equitable life estate now being enjoyed.

The only argument that can be urged against a merger of the administrator's title and his interest as beneficiary is that he is trustee for the creditors of the estate which he represents, and as such the duties of his office operate to prevent a merger. As we have already shown, however, no creditors exist against these estates of the children of the testator, and this objection must fall.

Concerning a merger which operates to terminate the trust title of an executor, we may quote from Preston on Conveyancing as follows:

> "Though a person is originally entitled to a term or to an estate of freehold as an executor or administrator, yet in process of time he may become the owner of that estate in his own right. This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the will, and holds the estate as legatee, or when the executor pays money of his own to the value of the term in discharge of the testator's debts, and with an intention to appropriate the term to his own use in lieu of money. And in the case of administrators when the administrator is the only person entitled to a beneficial ownership of the intestate property or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances the executor or administrator will have the estate in his own right; *and when he has the estate in his own right it will be subject to merger.*"
>
> 3 *Preston on Conveyancing*, 310, *London*, 1829.

So another text writer declares

> "* * * If the executor himself should be the legatee of the term it seems that after all the creditors have been paid the term will merge."
>
> *Williams on Real Property*, 22 *Ed.*, *p.* 549.
>
> Citing *Law vs. Urlwin*, 16 *Sim.* 377.

These observations apply to the following life tenants now claiming a distribution of the corpus of the estate:

The three children of Mary Gillespie—George C. Gillespie, Anna G. Boyd and Elizabeth C. Gillespie (represented in this case by the Fidelity Trust Company) are all executors under her will and entitled to an equal division of her estate. *S. of C., top of p.* 76. Manifestly there is nothing in the title of these three parties as executors which will prevent a merger of their life estates in the fee which has come to them by virtue of their mother's will.

Joseph O. Cuthbert, Jr., left a will in which he gave all his property to his wife, Eliza Cuthbert, now Eliza Guerin, and appointed her executrix. *S. of C., p.* 132. What we have said with regard to the interest of Mary C. Gillespie in the Cuthbert estate applies likewise to the interest which Eliza Guerin has inherited through her husband.

Henry C. Cuthbert died intestate, and T. Percival Cuthbert, one of the life tenants and a party to this bill, was appointed his administrator. His duties of administration having been discharged and one-third of his father's estate vesting in him by virtue of the intestate law, it must be admitted that this share is capable of merging in the life estate in the income which he is now enjoying.

Joseph O. Cuthbert, *III*, was appointed administrator of his father, Allan Cuthbert, but having de-

ceased there is at present no administrator in charge of Allan's estate. We submit that in this situation the title to Allan's reversionary interest in the Cuthbert estate passes directly to his next of kin. 14 *Cyc.*, 107. If not, the title is merely suspended until an administrator is appointed, and upon such appointment the doctrine of merger may or may not be applicable, depending upon in whom is vested the duty of administration.

In closing we again call attention to the fact that it is unfair to require us to meet the arguments advanced by counsel for the trustees at this late hour in the course of litigation. Had the point been raised in the pleadings and presented as an issue before the Vice-Chancellor we could have introduced testimony showing beyond a doubt that the debts of these different estates had in each case been paid and the final account filed.

Our opponents cite *Buchanan vs. Buchanan*, 75 *N. J. Eq.* 274, to the effect that the next of kin have no standing in a Court of Equity to maintain an action for the recovery of property belonging to the decedent. This proposition we can afford to concede. We have not brought our suit for the recovery of property belonging to the decedent. We have been brought into court by a bill of complaint filed by these trustees to require us to set forth what interest we conceive ourselves possessed of in the Cuthbert estate, and what interpretation should be made of the testator's will. Whether or not the doctrine of merger operates so as to entitle these beneficiaries to a division of the estate is one which is merely incidental to the granting of the very relief prayed by these complainants. Moreover, it is evident, since the point is made out of the course of pleading, that if it is to be admitted we are likewise entitled

to amend if necessary so as to bring the executors and administrators in as parties defendant.

We may say in closing that the whole argument of our opponents ignores one pertinent fact. The relief which is allowed in such suits as this is of the broadest possible character, and contemplates future contingencies as well as present conditions. *In re Ungaro,* 102 Atl. 244. It is, therefore, incumbent upon the Court of Chancery to frame a decree which will advise the trustees of the rights which arise upon particular contingencies certain to occur. Among these is the transfer by these executors and administrators of the testator's children of the respective interests in the Cuthbert estate which vesting in their parents pass in turn to their issue. As soon as these transfers have been made,—and they may be made at any time,—the estate of the executor or administrator will in each case be at an end, and the title which he has passed to the real beneficiary will be subject to merger. This is the situation which presents the substantial aspects of our clients' rights. It is manifestly the situation which this court must have in mind when it determines this appeal.

Respectfully submitted,

HARVEY F. CARR,
LOUIS B. LEDUC,
Counsel for Defendants.