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New Jersey Court of Errors and Appeals

GRACE E. SWETLAND, *et als.*, *Complainants-Respondents,* *and* MAURICE J. SWETLAND, *et als.*, *Defendants-Appellants.*	*On Bill, Etc.*

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TRANSCRIPT OF THE RECORD.

By orders of the Court of Chancery made on the 14th day of May, 1929, Grace E. Swetland was duly appointed next friend of the infants, Carolyn G. Swetland, Florence A. Swetland and Henry M. Swetland to prosecute the litigation for and on their behalf.

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BILL OF COMPLAINT.

Filed May 14, 1929.

IN CHANCERY OF NEW JERSEY.

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

The complainants, Grace E. Swetland, individually, and Henry M. Swetland, Florence A. Swetland and Carolyn C. Swetland, infants under the age of twenty-one years, by Grace E. Swetland, as their next friend, all residing at No. 532 North Arden Boulevard, Los Angeles, California, respectfully show that:

1. The complainants, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland are children of the complainant, Grace E. Swetland and Maurice J. Swetland, one the defendants in this suit, and grandchildren of Horace M. Swetland, father of said Maurice J. Swetland. The said Maurice J. Swetland and Grace E. Swetland were married October 10, 1908 and the said Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland are the only children that have been born of the said marriage. The said children are all infants under the age of twenty-one years for whom their mother, the said Grace E. Swetland, has been duly appointed by this Court as next friend to institute and prosecute this suit.

2. On July 14, 1917 the said Horace M. Swetland and the said Maurice J. Swetland, both residents of the Town of Montclair, in the County of Essex and State of New Jersey, entered into a certain Trust Agreement under the terms of

which the said Horace M. Swetland transferred and delivered to the said Maurice J. Swetland 1,100 shares of the Preferred "B" stock of the United Publishers Corporation, a corporation of the State of Delaware, evidenced by certificates therefor numbered 204 and 319, which the said Maurice J. Swetland agreed to hold in trust for the sole benefit, advantage and use of the complainant, his wife, Grace E. Swetland, and their children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, subject to the following conditions in regard thereto as imposed in connection therewith by the said Horace M. Swetland, founder of said trust, to wit:

"1. To pay and apply the income received from the principal of said trust to the sole benefit, advantage and use of my wife and children, or the survivor or survivors of them until such time as my youngest living child shall reach thirty years of age, on the happening of which event the said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided;

* * * * * * * *

"3. That upon my youngest living child attaining the age of thirty years the principal of said trust and all additions thereto shall be divided equally between and paid to my present wife, if then living, my children and the living issue of any deceased child or children of mine who shall take in equal parts the share or part which his or her parent and said deceased child of mine would have taken if living at the time aforesaid; that in the event of the death of my

said wife before my youngest living child shall reach thirty years of age, and of the death of all of my children before reaching thirty years of age, without leaving issue them surviving, that then and in that event the principal of said trust shall revert to and become a part of the residuary estate of the aforesaid, founder thereof, Horace M. Swetland."

The said agreement further provided that Horace M. Swetland, the founder of said trust, should have at all times during his lifetime, the personal right, power and privilege of terminating the same, and that upon his election so to do the shares of stock constituting the principal of said trust should be returned and revert to him free and clear of any and all claims and demands of whatsoever kind or nature, with the same force and effect as if the trust therein provided for had never been created, any law to the contrary notwithstanding. A true copy of said trust agreement is annexed hereto and made a part hereof and marked Exhibit "A."

3. Thereafter and on or about January 3, 1922, the said Horace M. Swetland and Maurice J. Swetland, both residents of the Town of Montclair, in the County of Essex and State of New Jersey, entered into a certain other Trust Agreement wherein and whereby the parties thereto by mutual consent expressed the desire to establish said new trust by substituting said new trust agreement bearing date January 3, 1922 for the said trust agreement of July 14, 1917 then in effect and to that end the said Horace M. Swetland assigned, transferred and set over unto the said Maurice J. Swetland 1,350 shares

of the said United Publishers Corporation Class "B" Preferred Stock, represented by said certificates numbered 204 and 319 mentioned in the said trust agreement of July 14, 1917 and by certificate numbered 357, 700 shares of the Common Stock of Swetland Realty Company, a corporation of the State of New York, 1,998 shares of the Common Stock of the Publishers Securities Company, a corporation of the State of New Jersey, and a $10,000 note of said Swetland Realty Company dated November 1, 1917, payable to the said Maurice J. Swetland, trustee, on demand, with interest at 5%. The said trust agreement of January 3, 1922, among other things, provided:

"Second: (a) The aforesaid transfers to said Maurice J. Swetland are IN TRUST, nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:

* * * * * * *

"(d) The income received from the principal of said Trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the education of the family of the second part or the survivor or survivors of them until such time as the youngest child of the party of the second part shall have reached the age of thirty years. In which event said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.

"(e) The said Trustee shall not during the period of this trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or to charge or encumber the corpus or principal of said trust fund or any part thereof or any beneficial interest therein."

A true copy of the said trust agreement is attached hereto and made a part hereof and marked Exhibit "B".

4. The said Horace M. Swetland died on June 15, 1924, a resident of the County of Essex and State of New Jersey, leaving a last will and testament, dated January 12, 1922, which was duly admitted to probate by the Ordinary of the State of New Jersey on June 30, 1924, a true copy of which said will is annexed hereto and made a part hereof and marked Exhibit "C".

5. The said Horace M. Swetland by his said last will and testament after providing that all his just debts and funeral expenses and all transfer, inheritance and succession taxes upon the devises and bequests therein named should be paid, gave, devised and bequeathed all of his estate to his Executors in trust, among other things, to pay over to his half sister, Hattie Swetland, if she should survive him, the sum of Twelve Hundred Dollars ($1200.00) each year during her life, in semi-annual installments of Six Hundred Dollars ($600.00) each, with power in their discretion to increase such bequest if any misfortune should befall her whereby her necessities should require the payment of a larger sum; to deliver and pay over to his wife, Clara A. Swetland, the sum of Fifteen Thousand Dol-

lars ($15,000.00) per year in equal monthly payments, with power in their discretion to increase such sum if any misfortune should befall her whereby it should become necessary to provide for her competent and comfortable support and maintenance, and to maintain and permit her to use the testator's homestead and its furnishings situated in the Town of Montclair, County of Essex and State of New Jersey, during her life. The testator made no provision for the disposition of the income from his estate in excess of that to be paid to his half-sister, Hattie Swetland, and his wife, Clara A. Swetland, as aforesaid.

6. As to the remainder of his estate the testator, Horace M. Swetland, by his said last will and testament, provided as follows:

> "Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein created, and upon the death of said Hattie Swetland, if she shall have survived me, to distribute the principal of the trust held for her benefit, by dividing the principal of said trust or trusts, as the case may be, equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, and Dorothy A. Johnson, and my son Maurice J. Swetland, as Trustee, or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein (therein) provided.

"In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per stirpes and not per capita, the share its parent would have taken under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her or me surviving, the share such child of mine would have received under the provisions hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purpose therein provided."

7. The said Horace M. Swetland in his said last will and testament named as his Executors and Trustees, without bond or other security, his son, Maurice J. Swetland, hereinbefore mentioned, E. M. Corey, F. C. Stevens and M. J. Kane. Thereafter, on or about June 30, 1924, they duly qualified. Letters Testamentary were issued to them and they entered upon and have since continuously and now are engaged in the discharge of their duties as said Executors and Trustees. All of said Executors, except M. J. Kane, are non-residents of the State of New Jersey. The estate of the said Horace M. Swetland, deceased, consisted of stocks, bonds, securities and other personal property, and real estate located in the State of New Jersey and in the State of New York.

8. Thereafter, and on or about , 19 doubts and difficulties having arisen in the minds of Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the said last will and testament of the said Horace M. Swetland, as aforesaid, as to the true construction and effect of said last will and testament, the said Executors and Trustees filed a bill in this Honorable Court to seek its advice and direction in the premises to the end that the said last will and testament of the said Horace M. Swetland, deceased, might be construed and the true meaning and legal effect of the various provisions thereof determined and the rights of the respective parties interested therein declared by this Court. All persons in interest were made parties defendant, duly served with process, guardians ad litem appointed for all infants, and all parties answered.

9. Thereafter, and on or about December 14, 1926, after hearing, this Honorable Court entered its final decree wherein and whereby it was, among other things, ordered, adjudged and decreed:

"4. By the words 'herein provided' as used at the end of the paragraph of said will hereinabove marginally numbered 16," (referring to the paragraph of the will first set forth in paragraph 6 of this Bill of Complaint) "the testator meant and intended 'therein provided' and said words are hereby construed to mean 'therein provided' ".

* * * * * * *

"9. As to all income not required for the comfortable support, care and maintenance

of Hattie Swetland and of the widow, Clara A. Swetland, and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which was devised to Clara A. Swetland during her life and for the expenses incident to said trusts including the charges and expenses in connection with the New York real estate, and the expenses of administration, the said testator died intestate; and it was the intention of said testator that all of such surplus income should be accumulated until the death of the widow, at which time it should be distributed among those entitled under the intestate laws of this state.

"10. Under the laws of the State of New York, the directions for the accumulation of the income derived from the New York real estate, are void, and such part of the net income so derived from the New York real estate as is not needed for the purposes of the trusts created by said will, is distributable amongst those entitled to the next eventual estate; those entitled to the next eventual estate are those named in the paragraph of the will hereinabove marginally numbered 16" (referring to the paragraph of the will first set forth in paragraph 6 of this Bill of Complaint) "and comprise the testator's three daughters, Velma I. Stevens, Ruth D. Kane, and Dorothy A. Johnson, and his son Maurice J. Swetland, as Trustee.

* * * * * * *

"14. In the paragraphs of said will hereinabove marginally numbered 16 and 17," (referring respectively to the two paragraphs of the will set forth in paragraph 6

of this Bill of Complaint) "the testator referred to the Trust Agreement bearing date of 14th day of July, 1917, hereinabove set forth, and the bequests in said will to Maurice J. Swetland, as Trustee, are valid."

Thereafter an appeal was taken by one or more of the defendants in such suit to the Court of Errors and Appeals, and after argument the decree of this Honorable Court in all the respects appealed from was affirmed on or about February 6, 1928.

10. The said Horace M. Swetland left surviving him his widow, Clara A. Swetland, and his three daughters, Velma I. Stevens, Ruth D. Kane and Dorothy A. Johnson, and his son, Maurice J. Swetland, as his only heirs-at-law and next-of-kin, all of whom are still living.

11. On or about February 28, 1927, said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees of the last will and testament of the said Horace M. Swetland, deceased, as aforesaid, filed their first account as Executors and Trustees as aforesaid, in the Prerogative Court of the State of New Jersey. Exceptions having been filed to the said account by Dorothy A. Johnson, one of the children of the said Horace M. Swetland, deceased, a hearing thereon was had and certain of the exceptions allowed and others denied, and on June 29, 1928 a decree was entered by which it was ordered, adjudged and decreed that the account as amended be allowed, and that as of January 31, 1927, the date of said account, there was a balance of corpus, other than New York real estate, amounting to the sum of $953,317.96, and a balance of income, other than from New York real estate,

amounting to the sum of $16,722.74, and a balance of corpus consisting of New York realty amounting to the sum of $384,000, and a balance of income from New York realty amounting to the sum of $92,827.63, remaining in the hands of said accountants, and further ordered, adjudged and decreed that after deducting the commissions thereinbefore allowed the balance of income from New York realty, amounting to the sum of $118,568.87 be distributed, one-fourth to Velma I. Stevens, one-fourth to Ruth D. Kane, one-fourth to Dorothy A. Johnson, and one-fourth to Maurice J. Swetland, as Trustee, in accordance with said decree of the Court of Chancery dated December 14, 1926, hereinbefore in this Bill of Complaint referred to. Thereafter, by order of said Prerogative Court bearing date December 18, 1928, said decree was amended so that the sum of $118,568.76, the balance of income from New York realty available for distribution, was changed to the sum of $87,887.26.

12. On or about July 6, 1928, the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees as aforesaid, pursuant to the said decree of the Prerogative Court of this State, bearing date June 29, 1928, and to the provisions of the said last will and testament of the said testator, Horace M. Swetland, deceased, paid to the said Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917, the sum of $21,971.82, being one-fourth of the income of $87,887.26 accumulated from the New York realty, and directed to be distributed by the decree of the said Prerogative Court bearing date June 29, 1928, as amended as aforesaid.

13. Since the receipt on or about July 6, 1928 of the said sum of $21,971.82 income from the New York real estate as aforesaid, the said Maurice J. Swetland, as trustee under the trust agreement of July 14, 1917 has not expended any portion thereof for the benefit, advantage and use of the complainant, Grace E. Swetland, or the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, as directed and required by the provisions of said trust agreement, although repeatedly requested by the complainants so to do; he has never filed any account in any court as trustee under said trust agreement, and although demand has been made upon him so to do, he has refused and still does refuse to account to these complainants or any of them personally, and these complainants are informed and believe that he has appropriated to his own use the whole or a large portion of said trust funds.

14. The said Maurice J. Swetland as trustee under the trust agreement of January 3, 1922 has not expended any portion of the income of said trust for the benefit of his wife, the complainant, Grace E. Swetland, or for the support, comfort or education of the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, for several years last past, as directed and required by the provisions of said trust, although repeatedly requested by the complainants so to do; he has never filed any account in any court as trustee under said trust agreement, and although repeated demand has been made upon him to account to the complainants he has refused and still does refuse so to do; and these complainants are informed and

believe that he has received payment of the $10,000.00 note of the Swetland Realty Company which constituted a part of the principal of said trust and that in violation of the terms and provisions of said trust agreement, has disposed of the said stocks originally constituting a major portion of the principal of said trust; and that he has appropriated to his own use the whole or a large portion of the proceeds of the sale of said stocks and of the moneys received in payment of said note, the exact amount of which misappropriation is unknown to these complainants.

15. The relations of mutual trust and confidence between the said Maurice J. Swetland and the complainants, his wife and children, beneficiaries, continued up to about October, 1927, at which said time the said Maurice J. Swetland separated from the said complainants, and since which time he has failed and refused to adequately provided for the complainant, Grace E. Swetland, or for the comfort, support, maintenance and education of his children, the said Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, from December, 1927, to October, 1928, and since March 1, 1929, he has wholly refused and failed to provide for the complainants, his wife and children, or any of them, and that complainants and each of them are now dependent upon the charity of friends and relatives for the necessities of life, as is well known to the said Maurice J. Swetland. The said Maurice J. Swetland, has received the said sum of $21,781.82 paid by the Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, to him as Trustee under the Trust Agreement of July 14, 1917, as afore-

said, and the income of the trust of January 3, 1922, for several years last past amounting in all to a sum largely in excess of $100,000, all of which he is chargeable to apply to the maintenance, education, comfort and support of the complainants, his wife and children.

16. On or about the 6th day of March, 1929, the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, filed their second account in the Prerogative Court of the State of New Jersey, and gave notice that said account would be audited and stated by the Register of the Prerogative Court and reported for settlement to the Ordinary or Surrogate-General and Judge of the Prerogative Court of the State of New Jersey, on Tuesday, April 23, 1929, at Newark, New Jersey, and that application would at that time be made for the allowance of commissions and counsel fees; on said April 23, 1929, the matter was duly continued until May 21, 1929, at ten o'clock in the forenoon, at the Chancery Chambers, 1060 Broad street, Newark, New Jersey.

17. The said account shows that there is now in the hands of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Trustees under the said last will and testament of Horace M. Swetland, deceased, a balance of $71,997.32 income from New York realty. The complainants are informed and believe that upon the allowance of the account of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Trustees under the last will and testament of

Horace M. Swetland, deceased, as aforesaid, the said sum of $71,997.32, less such trustees' commissions and counsel fees, as may be allowed, will be distributed and one-fourth thereof paid to the said Maurice J. Swetland, as trustee under the trust agreement of July 14, 1917, and the complainants fear and firmly believe that unless this Honorable Court shall intervene such moneys as the said Maurice J. Swetland may receive upon the said distribution by the said Trustees as aforesaid will not be paid and applied to the sole benefit, advantage and use of the said complainant, his wife, Grace E. Swetland, and the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, but will be wrongfully and fraudulently misappropriated and expended by him to his own use; all to the irreparable loss and damage and injury of the complainants.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That the said Maurice J. Swetland, individually, and as trustee under the trust agreement of July 14, 1917 and as Trustee under the trust agreement of January 3, 1922, and the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors and Trustees under he last will and testament of Horace M. Swetland, deceased, who are the defendants to this suit, may answer this bill of complaint and every statement therein made.

2. That the said defendant, Maurice J. Swetland, may be ordered and decreed to account as Trustee under the trust agreement of July 14, 1917 for the moneys received by him as such

trustee from the Executors and Trustees under the Last Will and Testament of Horace M. Swetland, deceased, as aforesaid, and to make a full and complete discovery and disclosure as to the condition of said trust estate and as to how the property of said estate is invested and held, and may be further ordered and decreed to pay and apply all moneys constituting income of said trust which have been received by him to the sole benefit, advantage and use of the complainant, his wife, Grace E. Swetland, and the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland.

3. That the said defendant, Maurice J. Swetland, may be ordered and decreed to account as Trustee under the trust agreement of January 3, 1922, and to make a full and complete discovery and disclosure as to the condition of said trust estate and as to how the property of said estate is invested and held, and be further ordered and decreed to pay and apply all moneys constituting income of said trust which have been received by him to the sole benefit, advantage and use of the complainant, his wife, Grace E. Swetland, and the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland.

4. That the said Maurice J. Swetland, as Trustee under said trust agreement of July 14, 1917, as well as Trustee under the said trust agreement of January 3, 1922, may be removed and that the Fidelity Union Trust Company, a corporation of the State of New Jersey, or some other person or persons, corporation or corporations, may be appointed in his place and stead to administer the aforesaid

trust of July 14, 1917, and that Heman J. Redfield of Montclair, New Jersey, the Montclair Trust Company, a corporation of the State of New Jersey (successor trustees named therein) or some other person or persons, corporation or corporations, may be appointed in his place and stead to administer the aforesaid trust of January 3, 1922.

5. That the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, may be enjoined and restrained from paying over any moneys or delivering any property of any kind, character or description from the estate of the said Horace M. Swetland, deceased, to Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917.

6. That a writ or writs of sequestration may issue against the real and personal property, moneys, effects, rights and credits of the defendant, Maurice J. Swetland, within this state, directed to a Master of this Court commanding said Master to take sufficient of said property to answer the demands of these complainants into his possession and to hold the same subject to the orders and decrees of this Court.

7. That the complainants may have such further and other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

8. That a writ of subpoena may issue commanding said defendants and each of them to answer this bill of complaint and to abide by such

decree or decrees that this Court may make in the premises.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants.

J. EDWARD ASHMEAD,
Of Counsel.

"Exhibit A."

WHEREAS heretofore and on the 25th day of September 1916 HORACE M. SWETLAND of Montclair, New Jersey, delivered to the undersigned Five Hundred (500) shares United Publishers Corporation Preferred B. stock, and on April 10, 1917, six Hundred (600) shares United Publishers Corporation, Preferred B stock, to be held by the undersigned as trustee for the use and purposes expressed in the declaration of trust executed by the undersigned in connection therewith on the date aforesaid; and

WHEREAS the said Horace M. Swetland revoked said trust pursuant to the rights and privileges which he had reserved unto himself in connection therewith at the time of the establishment thereof; and

WHEREAS the stock hereinbefore mentioned has been re-delivered to me as trustee by the said Horace M. Swetland pursuant to the terms and conditions of the trust hereinafter set forth for the purpose of establishing and constituting a new trust in regard thereto in favor of my wife and children and for the purpose amongst others as hereinafter stated of applying the income from said stock for their support, education and maintenance.

Now, Therefore in consideration of the premises and the sum of One Dollar to me in hand paid by the aforesaid Horace M. Swetland, the receipt whereof is hereby acknowledged, I, Maurice J. Swetland of Montclair, N. J., hereby acknowledge and declare that I am possessed of Eleven Hundred (1,100) shares United Publishers Corporation, Preferred B stock, evidenced by certificates therefor numbered 204 and 319 in trust, and for the sole benefit, advantage and use of my wife and children, subject to the following conditions in regard thereto as imposed in connection therewith by the founder of said trust, to wit:

1. To pay and apply the income received from the principal of said trust to the sole benefit, advantage and use of my wife and children, or the survivor or survivors of them until such time *as my youngest living child shall reach thirty years of age,* on the happening of which event the said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided;

2. That in the event of my death during the continuance of said trust, or if upon the happening of any event or for any reason, during said period, I shall consider it necessary or advisable in the best interest of my wife and children to cease to act as such trustee, that I shall have the right, power and authority to name as my successor or successors the trustee or trustees to carry out the trust herein provided for;

3. That upon my youngest living child attaining the age of thirty years the principal of said trust and all additions thereto shall be divided equally between and paid to my present

wife, if then living, my children and the living issue of any deceased child or children of mine who shall take in equal parts the share or part which his or her parent and said deceased child of mine would have taken if living at the time aforesaid; that in the event of the death of my said wife, before my youngest living child shall reach thirty years of age and of the death of all of my children before reaching thirty years of age, without leaving issue them surviving, that then and in that event the principal of said trust shall revert to and become a part of the residuary estate of the aforesaid founder thereof, Horace M. Swetland.

4. That the founder of said trust, Horace M. Swetland, reserves at all times during his lifetime, the personal rights, power and privilege of terminating the aforesaid trust, and that upon his election so to do, the aforesaid shares of stock constituting the principal thereof shall be returned and revert to him free and clear of any and all claims or demands whatsoever kind or nature, with the same force and effect as if the trust herein provided for had never been created, any law to the contrary notwithstanding.

In Witness Whereof I have hereunto set my hand and seal this 14th day of July, 1917.

(signed) Maurice J. Swetland (l. s.)

Witness:

L. J. Montgomery

Bill of Complaint—Exhibit A.

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

On this 14th day of July, 1917, personally appeared before me MAURICE J. SWETLAND to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same for the use and purposes therein set forth.

Notary Public, New York County.

I, MAURICE J. SWETLAND, the trustee named in the foregoing declaration of trust, and pursuant to the power and authority therein contained, hereby nominate and appoint as my successor to administer the foregoing trust in the event of my death during the period thereof, ERNEST M. COREY, of the Borough of Manhattan, City, County and State of New York, and as his successor for said purpose in the event that he should fail or refuse to accept the administration of said trust, or for any reason become incapable of administrating the same, then and in that event I hereby nominate, constitute and appoint the MONTCLAIR TRUST COMPANY, of Montclair, N. J., as my successor to carry out the terms and provisions of the trust aforesaid.

(signed) MAURICE J SWETLAND (L. S.)

Witness:

"Exhibit B."

DECLARATION OF TRUST.

THIS AGREEMENT made this 3rd day of January, 1922, by and between HORACE M. SWETLAND, of Montclair, N. J., party of the first part, and Maurice J. Swetland, of Montclair, N. J., party of the second part,

WITNESSETH THAT

WHEREAS it is the desire of both the parties to this agreement that definite and certain means shall continue to be provided for the comfort, support and maintenance of the family of the party of the second part, and the education of his minor children, and

WHEREAS the party of the first part has heretofore delivered to the party of the second part as trustee certain shares of stock of the United Publishers Corporation for the uses and purposes above mentioned, and

WHEREAS the party of the first part desires to increase the trust estate so held by the party of the second part, and

WHEREAS the parties hereto by mutual consent wish to establish a new trust by substituting this agreement for the one now in effect, without prejudice, but to the great advantage of the beneficiaries hereof.

NOW, THEREFORE, in consideration of One Dollar each to the other paid, the receipt whereof is hereby acknowledged, and of other good and valuable considerations each to the other moving, the parties hereto

AGREE

First: That the party of the first part shall and hereby does assign, sell, transfer and set

over unto the party of the second part, all and singular, his right title and interest in or to the following property, namely:

500 Shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 204 to M. J. Swetland, Trustee.

250 Shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 319 to M. J. Swetland, Trustee.

600 shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 357 to M. J. Swetland, Trustee.

700 shares Swetland Realty Co. common stock represented by Certificate No. 34—to M. J. Swetland, Trustee.

1998 shares Publishers Securities Company common stock, represented by Certificate No. 1 —to M. J. Swetland, Trustee.

$10,000 note of Swetland Realty Co. dated November 1, 1917, payable January 1, 1918, and thereafter extended on demand with interest at 5%, payable to M. J. Swetland, Trustee.

Second: (a) The aforesaid transfers to said MAURICE J. SWETLAND are IN TRUST nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:

(b) It is expressly agreed by and between the parties hereto that any and all additions to the TRUST ESTATE shall be received by the said TRUSTEE for the purposes and uses and subject to all the terms and conditions of the TRUST hereby created, without the execution of any further or additional instrument or agreement.

(c) Upon payment of the note of the SWETLAND REALTY COMPANY, or the redemption or sale of any of the stocks or other property of the TRUST ESTATE the net proceeds thereof shall be reinvested by the trustee for the purposes of the TRUST:

(d) The income received from the principal of said trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the survivor or survivors of them until such time as the youngest child of the party of the second part shall have reached the age of 30 years. In which event said TRUST shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.

(e) The said Trustee shall not during the period of this Trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or to charge or encumber the corpus or principal of said trust fund or any part thereof or any beneficial interest therein.

Third. That when the youngest living child of said MAURICE J. SWETLAND party of the second part hereto, shall have attained the age of 30 years, the principal of this trust and all additions thereto making in total the net trust estate at the time aforesaid, shall be divided as follows:

(a) That portion of the trust estate represented by 1998 shares of the Publishers Securities Company common stock, standing in the name of MAURICE J. SWETLAND TRUSTEE, shall be delivered to and become the personal property of MAURICE J. SWETLAND if living.

(b) The balance of the net trust estate at the time aforesaid shall be divided equally between and paid to the wife of the party of the second part, if then living, and his children, and the living issue of any deceased child or children, and the living issue of such child or children shall receive in equal parts the share or part which his or her parent, as the case may be, would have taken if living at the time aforesaid.

(c) In the event of the death of the party of the second part, said MAURICE J. SWETLAND prior to the termination of this trust, his share of the trust estate specificially mentioned in paragraph A of this article shall become a part of the net estate to be divided in accordance with paragraph B of this article.

(d) In the event of the death of the wife of the party of the second part before the termination of the TRUST hereby created, her share shall become a part of the net trust estate to be divided equally and paid to the children or the living issue of the children of the party of the second part in accordance with paragraph B of this article.

(e) In the event of the death of all the beneficiaries hereunder, namely, the wife and children and the living issue of such children of the party of the second part, prior to the termination of the TRUST hereby created, then and in that event, the net principal of the TRUST ESTATE shall revert to and be paid over to the Corporation known as the Publishers Securities Company of Montclair, New Jersey, with the exception noted in paragraph A, that the number of shares of stock of said Publishers Securities Company forming a part of this trust estate, shall be delivered to

and become the property of MAURICE J. SWETLAND, if living, otherwise said shares shall revert to and become a part of the net trust estate, reverting to said Publishers Securities Company as aforesaid.

Fourth. Should the said Maurice J. Swetland, party of the second part, in any manner become disqualified to act as Trustee hereunder or in case of his death prior to the termination of the trust hereby created, then and in any such event, party of the first part hereto, HORACE M. SWETLAND shall become and is hereby designated to succeed said MAURICE J. SWETLAND as said Trustee hereunder, and in case of the disability or death of the said Horace M. Swetland prior to the termination of the TRUST hereby created, then in any such event HEMAN J. REDFIELD of Montclair, New Jersey, shall become and is hereby designated as the successor to either MAURICE J. SWETLAND or HORACE M. SWETLAND, as the case may be, and in the event of the disability of the said HEMAN J. REDFIELD prior to the termination of the TRUST hereby created, the MONTCLAIR TRUST COMPANY of Montclair, New Jersey, is hereby designated as the successor hereunder, and each shall have as such trustee the same powers and duties with respect to holding and administering said TRUST.

Fifth: The receipts by the respective beneficiaries hereunder or their respective children, as the case may be, or the legal representatives of said children for their respective distributive share of the said net trust fund, shall be full acquittance to said trustee of any and all claims of any kind or character upon the part of said beneficiaries or their respective children against the said Trust Fund.

Sixth: By their signatures hereto, the parties hereto expressly ratify all of the provisions hereof, which, prior to said signatures they have respectively read and considered, and the said MAURICE J. SWETLAND accepts the trusteeship hereunder.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this third day of January, 1922.

(signed) HORACE M. SWETLAND,
Party of the first part.

(signed) MAURICE J. SWETLAND,
Party of the second part.

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

Be it remembered that on this 3rd day of January, 1922, before me, L. F. DAY, personally appeared HORACE M. SWETLAND and MAURICE J. SWETLAND, who I am satisfied are the persons named in the foregoing agreement as the parties of the first and second part respectively, and to whom I first made known the contents thereof, and thereupon they severally duly acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

L. F. DAY,
Notary Public.

Notary Public, Queens Co. Clerk's No. 123.
Certificate filed in New York Co. No. 62.
New York County Register's No. 2023.
Commission expires March 30th, 1922.

"Exhibit C."

I, HORACE M. SWETLAND, of the Township of Verona, County of Essex, State of New Jersey, do hereby make, publish and declare this my last Will and Testament, in manner and form following:

FIRST: I direct that all my just debts and funeral expenses be paid, except business obligations which may be carried at the discretion of my Executors.

SECOND: I direct that all transfer, inheritance or succession taxes upon the foregoing devises and bequests shall be paid by my Executors from my residuary estate.

THIRD: All of my estate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my Executors hereinafter named, IN TRUST NEVERTHELESS, and for the following uses and purposes, and subject to the terms, conditions, powers and agreements as herein provided:

(A) To have and to hold and possess the same, to collect the rents, issues and income and the profits thereof, and to pay from the net income therefrom the following amounts:

1. To deliver and pay over to my half sister, Hattie Swetland, if she shall survive me, the sum of Twelve Hundred Dollars ($1200) each year, during her life, in semi-annual installments of Six Hundred Dollars ($600) each, and I direct my Executors to make the first of such payments immediately after my decease.

It is my will, and I direct my Trustees in the exercise of their absolute discretion, to increase

as they may consider necessary, the amount to be paid to said Hattie Swetland, if any misfortune should befall her whereby her necessities should require the payment of a larger sum.

It is my will, and I direct my Trustees upon the death of my wife, or if she should have predeceased me and I am survived by said Hattie Swetland, to immediately distribute the principal of the trust hereby created and as herein provided, except such amount of cash or assets as they shall set aside and retain as sufficient to insure the return of an annual net income of not less than Twelve Hundred Dollars ($1,200) to be used and applied as above provided for the benefit of said Hattie Swetland.

It is my will, and I direct that if my Trustees shall set aside and retain assets sufficient for the purpose specified in the next preceding paragraph hereof and in the event the necessities of said Hattie Swetland should require the payment of a greater annual amount than therein provided, that they shall have the power and authority to pay over or apply any part of, and if necessary all of the principal so set aside for the aforesaid purposes for her comfort, care and maintenance, as in the exercise of their absolute discretion my Trustees may consider necessary or advisable.

Upon the decease of said Hattie Swetland, and in the event that a separate fund shall have been established for her benefit as herein provided, I direct my Trustees to distribute the principal of said fund or the remainder thereof and all additions thereto, if any, in the same manner as hereinafter provided for the final distribution of my residuary estate.

2. To deliver and pay over to my wife, CLARA A. SWETLAND, the sum of Fifteen Thousand Dollars ($15,000) per year during her life, in equal monthly payments, the first of which shall be paid by my Executors immediately after my decease.

The provisions herein contained for the benefit of my wife, I hereby declare are intended to be and are so given to her in full satisfaction and in lieu of and for her dower and thirds, which she may or can in any wise claim or demand out of any estate.

It is my will, and I direct my Trustees in the exercise of their absolute discretion to increase, as they may consider necessary or advisable, the amount to be annually paid to my said wife, if any misfortune should befall her whereby it should become necessary to provide for her competent and comfortable support and maintenance.

It is my will, and I direct that my Trustee shall permit my said wife to have the use of, and to occupy free of rent or other charges, except as herein specifically otherwise provided, my dwelling house and the grounds attached thereto situated in the Township of Verona, Town of Montclair, County of Essex, State of New Jersey, and all the furniture and articles of use and ornament of every kind and nature therein contained at the time of my decease, together with all personal property and equipment located upon said premises during the term of her life.

It is my will, and I direct my Trustees to pay and discharge, during the life of my wife, all taxes, assessments, insurance charges and charges of every kind and nature except as herein otherwise specifically provided, which may

be imposed upon any of the lands and premises used and occupied by my wife, as herein provided, from the income received by them from the principal of the trust herein created, except that my said wife shall personally pay for all repairs to and improvements upon the said property while used and occupied by her, and that in the event of her failure so to do, and if it shall become necessary for the proper maintenance and protection of said property, and premises, I authorize and empower my said Trustees to make such repairs or improvements thereon as they in the exercise of their absolute discretion may consider proper and necessary, and to charge the cost thereof to the Trust account.

3. Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein created, and upon the death of said Hattie Swetland, if she shall have survived me, to distribute the principal of the trust held for her benefit, by dividing the principal of said trust or trusts, as the case may be, equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, and Dorothy A. Johnson, and my son, Maurice J. Swetland, as Trustee, or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein provided.

In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per

stirpes and not per capita, the share its parent would have taken under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her or me surviving, the share such child of mine would have received under the provisons hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned, and created by me under date of July 14, 1917, for the purpose therein provided.

B. Except as hereinbefore otherwise provided, I direct and empower my Trustees in the exercise of their absolute discretion, to sell either at public or private sale, and at such times and in such manner and upon such terms and conditions as may be deemed most advantageous and for the best interest of my estate, the whole or any part of the real estate of which I may die seized or possessed, or any interest therein, and to execute and deliver any and all conveyances, deeds or other instruments that may be necessary or proper to transfer said property or to carry out the intention of this provision.

It is my will, and I hereby expressly direct that my Executors and Trustees in their absolute and uncontrolled discretion, may retain for such period as they shall see fit, any investments of any nature or kind made by me in my lifetime, and that no liability shall attach to them by reason of any loss occasioned to my estate by reason of so doing. It is also my will,

and I hereby direct that the Trustees of the trusts created by this will may accept from my said Executors and may retain for such period as they deem wise, any securities or property in which I may have invested my estate in my lifetime, even if such securities and investments are not of a character in which fiduciaries are authorized to invest trust funds, and that no liability shall attach to such Trustees by reason of any loss occasioned by such acceptance or retention.

I also expressly authorize and empower the Trustees of the Trusts hereby created in their absolute discretion to invest and re-invest the properties which may come into their hands in such manner as they may deem most advisable, and with regard to the question whether such investments or re-investments so made by them are of a character permitted by law to fiduciaries, and I direct that no liability shall attach to said Trustees by reason of any investments or re-investments so made by them.

I expressly authorize my Executors and Trustees of the trusts hereby created, at any time to sell, assign and transfer any stocks or bonds or other securities in which my estate or any of the trust funds hereby created may at any time be invested.

FOURTH: I hereby nominate, constitute and appoint my son, Maurice J. Swetland, E. M. Corey, F. C. Stevens and M. J. Kane, as Executors and Trustees of this, my will, I direct that no bond or other security shall be required from my Executors or Trustees herein named under any circumstances or in any event.

In case of the death or resignation or inability to act of any one of the Executors and Trustees above named, the three remaining Executors and Trustees shall act without the appointment of a fourth, but thereafter in the event of the death or disqualification of any of the remaining Executors or Trustees, I nominate and appoint as substituted Executor and Trustee, in the place of Maurice J. Swetland, Emerson P. Harris, and as substituted Executor and Trustee in the place of F. C. Stevens, I nominate, constitute and appoint my daughter, Mrs. Velma I. Stevens; and as substituted Executor and Trustee in the place of M. J. Kane, I nominate, constitute and appoint my daughter, Mrs. Ruth D. Kane: and as substituted Executor and Trustee in the place of E. M. Corey, I nominate, constitute and appoint Emerson P. Harris.

All powers conferred by this Will upon my Executors or upon my Trustees may be exercised by such of them as shall qualify or assume the execution of said Trustees and by the survivors or survivor of them, and by their lawful and qualified successors.

Wherever in the foregoing provisions hereof, I have vested or authorized my Executors or Trustees to exercise their discretion in any matter, it is my will and I direct that in all matters pertaining to the administration of my estate and the trusts herein created, that the will of the majority of my then qualified and active Executors and Trustees shall be binding and final upon the remainder of them on all such questions.

Lastly: I hereby cancel, annul and revoke all wills and testamentary dispositions by me heretofore made.

IN WITNESS WHEREOF I have hereto attached my hand and seal in the presence of my subscribing witnesses, this 12th day of January, 1922.

HORACE M. SWETLAND.

WITNESSES:

We, the undersigned witnesses to the above signature, have signed this Will in the presence of the testator, and in the presence of each other:

A. B. SWETLAND, Mayville, N. Y.
E. M. COREY, Flushing, N. Y.
L. J. MONTGOMERY, New York City.

Affidavit of Grace E. Swetland.

Filed May 14, 1929.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES. } *ss.*

GRACE E. SWETLAND, being duly sworn according to law upon her oath, deposes and says:

1. I am one of the complainants in the foregoing bill of complaint named and have read said bill of complaint and know the contents thereof and all of the matters and things therein contained are true to the best of my knowledge and belief.

2. Maurice J. Swetland, one of the defendants in the foregoing bill named, and I were married at Montclair, New Jersey, on October 10, 1908. The complainants, Henry M. Swetland, born April 14, 1910, at New York City; Florence

Affidavit of Grace E. Swetland.

A. Swetland, born October 16th, 1911, at Montclair, New Jersey, and Carolyn G. Swetland, born December 11, 1913, at Montclair, New Jersey, are children and the only children that have been born of said marriage. All of said children are still living and reside with me at Number 532 North Arden Boulevard, in the City and County of Los Angeles, State of California.

3. At the time of my marriage to the said Maurice J. Swetland he had not established any permanent business connection and I soon learned that he was unable to earn an income sufficient to support his children and myself without calling upon his father, Horace M. Swetland for assistance, who gave my husband employment from time to time in the various enterprises in which he was interested in New York City, as well as a substantial allowance for our support, which arrangement continued during the life of said Horace M. Swetland, who died on or about June 15, 1924, a resident of the town of Montclair, County of Essex and State of New Jersey.

4. In view of the incapacity and inaptitude of my husband, Maurice J. Swetland, to carry on any business successfully and because of his inability to support his family, his father, the said Horace M. Swetland, desiring to secure comfortable maintenance and support of the complainants, constituting the family of the said Maurice J. Swetland, on or about September 25, 1916, delivered to his son, my husband, the said Maurice J. Swetland, 500 shares of Preferred Class "B" Stock of the United Publishers Corporation, and on or about April 10, 1917, an additional 600

shares of Preferred Class "B" Stock of said Corporation, to be held by the said Maurice J. Swetland, as Trustee, for the uses and purposes expressed in a declaration of trust executed by said Maurice J. Swetland in connection therewith, which said trust was subject to the right of revocation by the said Horace M. Swetland.

5. Later on, or about July 14, 1917, the trust hereinbefore mentioned was revoked and the said shares of stock therein mentioned were redelivered by the said Horace M. Swetland to the said Maurice J. Swetland, as Trustee, both residents of the Town of Montclair, in the County of Essex and State of New Jersey, upon a new trust in favor of myself and my said children and for the purpose, among others, of applying the income from said stock for our support and maintenance and the education of said children, which said trust was executed in writing and a true copy theerof attached to the foregoing bill of complaint and marked Exhibit "A".

6. In addition to the establishment of the said trust, said Horace M. Swetland in or about the year of 1912 built on his property adjoining his own home on After Glow Way in Montclair, New Jersey, a house in which he permitted his son, Maurice J. Swetland, and his family, the complainants to reside. We lived in this house at Montclair, New Jersey, from the time it was built until early in 1922. In February, 1923, because of the failure of the various enterprises in which my husband, Maurice J. Swetland, had attempted to engage, and because of the ill health of our said children, my said husband, our children and I moved to Redlands, in the

County of San Bernardino, and State of California, where we lived about two years. Subsequently, and in 1925, we moved to Altadena, California, on the outskirts of Pasadena, where we continued to reside until in or about September, 1926.

7. After my marriage to Maurice J. Swetland, my father-in-law, the said Horace M. Swetland, prospered financially and my husband, Maurice J. Swetland, continued to evidence his incapacity and inability to succeed in any business enterprise, a number of which he had unsuccessfully attempted, and by such failures showed that he would probably never be able to provide through his own efforts for his family. The said Horace M. Swetland realizing more and more fully the business inability of his son, and desiring to further protect myself and children against such incapacity of Maurice J. Swetland to provide for us, the said Horace M. Swetland established a new trust by substituting a later trust agreement, bearing date January 3, 1922, for the said trust agreement of July 14, 1917, then in effect, under which the said Horace M. Swetland assigned, transferred and set over unto the said Maurice J. Swetland, as Trustee, the stocks that had been transferred to him as such Trustee under the two previous trust agreements hereinbefore mentioned and certain additional shares of stock and other property, to be held by the said Maurice J. Swetland, as Trustee, for the sole benefit, advantage and use of his family, the complainants, wife and children of said Maurice J. Swetland, and the income thereof to be applied to my and their support and to the maintenance and education of our children. A true copy of said trust agreement

is attached to the foregoing bill of complaint and marked Exhibit "B".

8. The said Horace M. Swetland died on or about June 15, 1924, a resident of the County of Essex and State of New Jersey, leaving a last Will and Testament, dated June 12, 1922, which was admitted to probate by the Ordinary of the State of New Jersey on June 30, 1924, a true copy of which said Will is attached to the foregoing bill of complaint and marked Exhibit "C." The said Horace M. Swetland, deceased, under said Last Will and Testament, named as Executors and Trustees therof of his son, my husband Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, all of whom are known to me and known to me to be non-residents of the State of New Jersey, except Maurice J. Kane, who resides in the Town of Montclair, County of Essex and State of New Jersey. According to the first account of the said Executors and Trustees, a copy of which I have received, the estate of said Horace M. Swetland, deceased, consisted of stocks, bonds, securities and other personal property and real estate located in the State of New Jersey and the State of New York.

9. Subsequent to the probate of the said Will of Horace M. Swetland, deceased, and the qualification of the Executors and Trustees therein mentioned, the said Executors and Trustees, having doubt and difficulty as to the true meaning and effect of the said Will, instituted a suit in the Court of Chancery of the State of New Jersey praying that the said Will be construed and the true meaning and legal effect of the various provisions thereof be determined and the rights

of the respective parties therein mentioned be declared by said Court, to which the complainants were made parties and were represented in said suit. Proceedings in said suit were had and on or about December 14, 1926, a final decree construing said Will was entered in said Court. Subsequently an appeal was taken to the Court of Errors and Appeals of the State of New Jersey and the decree of the Court of Chancery of the State of New Jersey appealed from in all respects was affirmed on or about February 6, 1928, all as set forth in paragraph 8 of the foregoing bill of complaint.

10. The said Horace M. Swetland left him surviving his widow, Clara A. Swetland, his three daughters, Velma I. Stevens, Ruth E. Kane and Dorothy A. Johnson, and his son, Maurice J. Swetland, as his only heirs-at-law and next of kin, all of whom are still living.

11. I have read paragraphs 11 and 12 of the foregoing bill of complaint and am informed and verily believe that the matters and things therein set forth are true.

12. After the said Maurice J. Swetland and the complaints became settled in California, as aforesaid, said Maurice J. Swetland, my husband, entered into several businesses. He first organized in 1922 the Bureau of Research and Service, Inc., a California corporation, which I am informed and verily believe was intended to promote and extend contact between Eastern investors and promoters in sales organizations desiring information as to the resources and possibilities of California. Later, in 1926, he organized the Swetland Operating Company, a corporation of the State of California, which I

am informed and believe was to be operated by him for the purpose of and as part and parcel of a scheme for receiving funds, monies and property belonging to the trust aforesaid, the same to be reinvested in certain real estate operations and developments in and about Altadena, and elsewhere in California, with the express design of divesting the trust of property belonging thereto; and that said misappropriation of funds was actually consummated in furtherance of said scheme and design. In 1927 he also organized the Swetland Publications, Inc., a corporation of the State of California, whose purpose I am informed and believe was the publication of certain magazines. In addition to the promotion of these various enterprises, my husband, Maurice J. Swetland, soon became dissatisfied with our rented house at Altadena and in 1926 he caused to be built a palatial home in South Pasadena, California (investing over Seventy-five Thousand Dollars ($75,000) therefor from trust funds) where we continued to live until October, 1927.

13. My husband, Maurice J. Swetland, had always been secretive with me as to the sources of his income and when repeatedly questioned by me in respect to his large expenditures, would offer no explanation other than that he had the funds available for such expenditures and would refuse to give me any details in respect to their source. By the summer of 1927 my husband, the said Maurice J. Swetland, had become more and more addicted to the use of liquor and associated with a number of men and women who had the reputation of leading sporting and fast lives. His business enterprises were not at all successful and he became very much depressed

concerning his financial affairs. After the close of school in June, 1927, he arranged a trip to Alaska, on which he, the children and I embarked and we went up the Pacific Coast to Nome and Skagway. Upon our return trip he separated from me and our two daughters at Jasper Lodge, Canada, and went direct to New York City taking with him our son, Henry, returning to California on or about September, 1927. Later in the year 1927 his financial affairs apparently reached a crisis and he informed me that it would be impossible for us to continue to live in our home in South Pasadena, so he arranged that it should be closed.

14. In October, 1927, he arranged a trip to Europe for me and our two daughters. On or about October 6, 1927, he left me at Pasadena and with our said son, Henry, proceeded to New York City. Subsequently, on or about October 17th, 1927, I started for New York City with our two daughters, Florence A. Swetland and Carolyn G. Swetland, and a trained nurse, Miss Elinor Mettel. We were met at the Railroad Station in New York City by my husband, the said Maurice J. Swetland, who had engaged passage for us upon a steamer leaving at midnight. We were immediately taken to the Biltmore Hotel. My said husband then sent Miss Mettel, the two girls and Henry to the Roosevelt Hotel for supper, and when they had gone he locked the room door and would not permit me to communicate with my sister or with anyone else. He then presented some papers for me for my signature, and over my vehement objections and by duress compelled me to sign the same, without acquainting me as to their legal purport and effect. Prior to my signing these documents, he permitted me to

communicate by telephone with a lawyer, Bruce McDaniel, of Redlands, California, whom I assumed was friendly and would advise me in my own behalf, but whom I afterwards learned was in the employ of my husband. Upon his refusal to advise me I was helpless to further resist my husband's threats that he would abandon immediately my children and myself unless the papers were executed, and I signed the papers and departed for Europe with our two daughters at midnight of that day, with funds which my husband had given me to cover the expenses of the trip. While I was in Europe I received some further funds from my husband, Maurice J. Swetland.

15. I returned to New York City from Europe on or about December 21, 1927. The next day I was informed by my brother-in-law, F. C. Stevens, that during my absence my husband had taken some sort of proceedings against me for divorce in Mexico, using the papers above referred to in furtherance of his scheme, and considered himself divorced from me, and had, in fact, during my absence gone through the formality of a marriage to another woman with whom he was at the time living. I forthwith left with my two daughters for California, where I arrived on December 26, 1927, and immediately went to the home of my parents in Los Angeles, who provided and have ever since provided a home for me and my children.

16. Up to the last mentioned date I do not recall having ever seen any of the agreements of trust created by the said Horace M. Swetland, hereinbefore mentioned, and had no knowledge of the terms thereof. My only knowledge

of the existence thereof was from the general conversation of my husband and from the fact that during the time that my husband and I were living together in California he had presented to me certain checks signed by him as Trustee, and had presented to me certain documents which he said were necessary for me to sign in connection with the trusts created by his father, Horace M. Swetland. At the time I signed said papers I had absolute confidence in my said husband and considered them only as a formality and signed them without knowledge of their contents or legal effect.

17. Upon my return to California after the trip to Europe, my father employed a lawyer to investigate the situation in respect to my husband's activities and the relation of myself and children to the trusts. Demand was made upon my husband, Maurice J. Swetland, for an accounting under the trust agreements of 1917 and 1922, above referred to, and through Court proceedings instituted in the Courts of California, bookkeepers and accountants were employed and an examination was made of such of his personal books and records, as well as of the books and records of the Swetland Operating Company of California, Inc., and Swetland Publications, Inc., as were available or could be obtained, and as a result thereof I am informed and verily believe my husband, Maurice J. Swetland, as Trustee under the trust agreement of January 3, 1922, converted the principal of said trust into cash in the following manner: A promissory note of the Swetland Realty Company for $10,000 was paid in March or April, 1926, the 1998 shares of Publishers Securities Company Common Stock were sold in March or

April, 1926, for $135,000 to Frederic C. Stevens, who was one of the Executors of and Trustees under the Last Will and Testament of the said Horace M. Swetland, deceased; the 1,350 shares of stock of United Publishers Corporation were sold in March or April, 1926, for $100,000 to the said Frederic C. Stevens and one A. C. Pearson; the 699 shares of stock of Swetland Realty Company were sold in or about April, 1927, to the said Frederic C. Stevens for $90,000. I have been informed and verily believe that the checks in payment for the sale and transfer of this stock were deposited in the United Securities Trust & Savings Bank of Redlands or at the Bank in Redlands formerly known as First National Bank of Redlands, in an account standing either in the name of Maurice J. Swetland, as Trustee, and/or individually, and that from time to time the said Maurice J. Swetland, as Trustee, and/or individually, drew from these banks the monies so deposited by checks upon the accounts, payable to the order of the Swetland Operating Company of California, Inc., or the Swetland Publications, Inc., and/or other individuals and/or corporations, all of which checks were paid to the payees. The accountants who examined the books of the Swetland Operating Company of California, Inc., and the Swetland Publications, Inc., have reported that there are no available assets of either of these corporations and no assets of my husband, Maurice J. Swetland, in California other than certain real estate, some of which stands in the name of the Swetland Operating Company of California, Inc., and the rest in the name of my husband individually (all of which real property is encumbered and said encumberances together with taxes and as-

sessments are now in default), and about $600 in cash in one of the banks. The purpose of the suit instituted by me, as Guardian ad litem for my children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, against my husband in California is to recover the properties in which the assets of the trust of January 3, 1922, have been invested and still stand in the name of my husband and to follow the other assets in which the trust funds have been invested into the hands of purchasers with notice of his breaches of trust and default.

18. Since my return to California I have learned from my son, Henry, that when his father took him to New York, after our trip to Alaska, as well as during his stay in New York while I was in Europe, although our said son was then only seventeen years of age, his father took him on parties at which his said father was accompanied by the woman with whom he is now living and her sister was invited to accompany our said son, Henry, and at said parties there was considerable drinking and our son was permitted and encouraged to participate therein. During his stay in New York, our son was left at the hotel at which he was staying for periods of several days at a time while his father was living at the apartment of the woman with whom he is now living.

19. That the said Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917, has not expended any portion of the $21,971.82 income from the New York real estate received by him from the Executors and Trustees of the estate of Horace M. Swetland, deceased, on or about July 6, 1928, for the benefit, advan-

tage or use of myself or his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, although repeatedly requested on my behalf and in behalf of the children so to do. He has never filed any account in any Court as Trustee under said trust agreement, and although demand has been made upon him so to do, he has refused and still does refuse to account to me or them personally, and I am informed and verily believe that he has in fact misappropriated to his own use the whole or a large portion of the said sum of $21,971.82 paid to him, as aforesaid under the trust agreement of July 14, 1917.

20. That the said Maurice J. Swetland, as Trustee under the trust agreement of January 3, 1922, has not expended any portion of the income of said trust for my benefit or for the benefit, support, comfort or education of his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland since the latter part of 1927. Although repeatedly requested in behalf of the children and on my behalf so to do, he has never filed any account in any Court, as Trustee under said trust agreement, and although repeated demand has been made upon him to account to me and my said children personally, he has refused and still does refuse so to do. From December, 1927, to October, 1928, he wholly failed and refused to expend any money for our comfort, maintenance and support from said trusts, or any of them, or from any other source whatsoever. In October, 1928, he forwarded $1,800 to his attorney in California, to be used at the rate of $300 per month for the maintenance of his children at school, without any indication that it was income from any of said trusts. Since March 1, 1929, he has wholly

failed and refused to maintain, support or aid either myself or our children to any extent whatsoever, although demand has been made upon him so to do, and that myself and our children are now destitute and dependent upon the charity of our friends and relatives for the necessities of life, all of which is well known to my husband, Maurice J. Swetland.

21. I have read paragraphs 16 and 17 of the bill of complaint and am informed and verily believe that the matters and things therein set forth are true.

GRACE E. SWETLAND.

Subscribed and sworn to before me a Notary Public in and for the County of Los Angeles, in the State of California, at the City of Los Angeles, in the County of Los Angeles and the State of California, on the 8th day of May, 1929.

MARTHA S. DUBOIS,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Henry Monroe Swetland.

Filed May 14, 1929.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES, } *ss.*

HENRY MONROE SWETLAND, being duly sworn according to law upon his oath, deposes and says:

1. I am one of the complainants in the foregoing bill of complaint named and have read said bill of complaint and know the contents thereof. All of the matters and things therein contained are true to the best of my knowledge and belief.

2. My father is Maurice J. Swetland, one of the defendants named in the foregoing bill. The first intimation of any domestic difficulties between my father and mother came to me shortly after we moved into our new home in South Pasadena during the forepart of the year 1927. From that time until my mother and sisters went to Europe, in or about October, 1927, my father was constantly irritable, used profane language in the presence of our family and it was evident that he was drinking steadily.

3. During the forepart of 1927, my father took occasion to talk to me regarding his feeling towards mother. He stated that his life and mother's life had come to a point where they could not live together peaceably any longer. That some other woman had come into his life and that she was at that time the center of his affections. That he intended to go his way and mother could go hers. That, although he bore no ill-feeing towards mother, he could not afford

to sacrifice his own happiness and that of the other woman and that he was going to live his own life as he saw fit, at any cost. He later said that he would make no attempt to influence any of the children against mother and that each of us could make our own choice as to whether we would live with mother or with him.

4. During the summer of 1927, mother, father, my sisters, Florence and Carolyn, and myself went on a trip to Alaska, returning to Jasper Lodge, Canada, where father and I left mother and the girls and went to New York. We arrived in New York City a few days prior to July 4th. While enroute on the train father told me that he planned to marry the woman he had previously referred to as soon as possible, and that he intended to divorce mother. He stated that the woman's name was Lillie Carlquist. He said he was very anxious to have me meet this woman and that he hoped that we would like each other. He did not say when he had first met her, but he did state that although business had taken him to New York City on a number of occasions in the past, Lillie Carlquist had also taken him to New York as well. I also noticed while we were in Canada, and during the trip to New York, that my father was drinking very heavily. When we arrived at the Pennsylvania Station in New York City, Lillie Carlquist was there to meet father. They spoke to each other, using such terms of endearment as "Dear," "Honey" and "Darling." The three of us then went to the City Club where we left our bags and then went out to dinner.

From that time on father was almost constantly with Lillie Carlquist. He went to her

apartment daily and on some occasions stayed all night. I often went up to Lillie's apartment, when father was present, and spent a great deal of time there. On these occasions my father and Lillie drank a great deal and she was frequently intoxicated. Lillie Carlquist's apartment in New York City was a small one on the second floor of an apartment house and consisted of a living room, bedroom and small kitchenette. On many occasions while I was in this apartment my father and Lillie would spend a half hour or longer together in the bedroom. I also noticed that my father was spending a great deal of money on this woman. He purchased for her new clothes, stockings, shoes, hats, fur coats and jewelry. Father told me that he had purchased an engagement ring for her at Tiffany's and that the diamond was priceless. My father also provided her with a car and chauffeur.

5. About a month after we arrived in New York, father, Lillie Carlquist and myself made a trip to Washington where we stayed three or four days at the New Willard Hotel. Lillie Carlquist's room was on the same floor as ours and father spent a great deal of time with her there. Both of them drank all the time we were in Washington. Father and Lillie Carlquist repeatedly insisted that I drink with them and were in the habit of saying very sarcastic things to me when I refused to do so.

Upon our return to New York City, I stayed there about three weeks before going to Cape Cod to visit my aunt. During this interval my father was daily at Lillie Carlquist's apartment. Father and I left New York about the middle of September and returned to California. He talked all the time on the train about Lillie Carl-

quist and stated that he would not return home to live with the family but would reside at the Jonathan Club in Los Angeles. He said he was going to divorce mother as soon as he could raise sufficient money to put the divorce through and marry Lillie Carlquist. When we arrived in Los Angeles, my father obtained a room at the Jonathan Club and lived there until his next trip to New York City.

6. On or about the first part of October, 1927, my father and I returned to New York where we stayed a week or ten days before the arrival of my mother and sisters. My father continued to spend all of his time with Lillie Carlquist and I noticed that he was there morning, noon and night and frequently stayed there over night. My father and I were stopping at the Blackstone Hotel which was located about three blocks from her aparment. In the mornings he would often call me on the telephone and tell me to come over to Lillie Carlquist's apartment for breakfasts. I noticed that father had taken most of his suits and other clothing to her apartment. Frequently he would leave me alone at the Blackstone Hotel while he spent the night at her apartment.

A few days before my mother and sisters were to arrive in New York my father told me that he had reserved a room at the Biltmore Hotel for my mother and sisters, that he was going to have a lawyer at the hotel when they arrived and would try to have mother sign papers pertaining to a Mexican divorce before she left for Europe. He said that the papers were prepared, and that the ground for divorce was incompatibility. I expressed my opinion that mother

would not sign any papers for such a purpose. He replied, "If I can put this program through, I am greater than Jesus Christ Almighty." Mother and the girls arrived in New York City on the train which father had instructed them to take. At the station father was very irritable. Mother was taken off the train in a wheel chair, father rushed up to her and said, "For Christ's sake, why didn't you come in when I told you to." After some more words we then went to the Hotel Biltmore. Mother, father, my two sisters, the nurse and myself went up to the room. Father ordered dinner to be sent up to the room for mother and himself and instructed me to take my two sisters and the nurse to the Hotel Roosevelt for dinner. Upon our return we went upstairs and father asked the nurse to take the girls downstairs as he wanted to talk to mother and me. Father then had a man come to the room whom he introduced as his lawyer. This man and father then tried to make mother sign some papers. By this time mother was in a state of complete hysteria, she cried all the time and said she did not want to sign anything. Mother wanted to telephone to some of her relatives who were in New York City but father refused to permit it. Finally he allowed her to telephone one Bruce McDaniel of Redlands, California. After this conversation my mother still refused to sign the papers. My father stated that unless she signed the same he would immediately abandon her and the children. Finally they placed her at a desk in the room and while the man who was represented as an attorney held the paper, my mother signed it. Whereupon he placed the paper in his pocket and left the room. Later in the evening my

father and I went to the boat with mother and my sisters. As soon as mother and the girls were on board, mother lost consciousness and father left before she recovered.

7. After mother and the girls left for Europe, I stayed in New York until just before Christmas. During this time father was with Lillie Carlquist continuously. He received his mail at the City Club but he lived at her apartment. During this interval my father often had me come to Lillie Carlquist's apartment for breakfast. On these occasions I often saw them disrobed and each of them frequently commenced to drink before breakfast. Father told me that he was glad that he had "put this over" on mother and that he would have a divorce within sixty to ninety days from that time. He said he was only forty years old and was ready to start life anew.

8. My father bought Lillie Carlquist many household articles, various kinds of clothing, a beautiful wedding ring and two engagement rings, and also other articles of jewelry. I also saw my father on numerous occasions give Lillie Carlquist substantial sums of money. He continued to keep the Cadillac car and a chauffeur at Lillie Carlquist's disposal, my recollection is that he rented this car and hired the chauffeur for a period of over five months. The chauffeur's name was A. Johnson.

9. During the intervals when I was in New York with my father, and which I have hereinabove referred to, my father took Lillie Carlquist with him on many theatre and cabaret parties and they also attended prize fights together. On one occasion my father, Lillie Carlquist and my-

self were at the Athletic Club witnessing a prize fight. We had gone there at the invitation of one Mark Grady. During the evening my father and Lillie Carlquist had been drinking heavily and she became so drunk that she finally was taken sick and father had to leave the fight with her. It was a daily occurrence for father and Lillie Carlquist to drink heavily and each of them were frequently in an advanced stage of intoxication. My father often insisted that I accompany him and Lillie Carlquist on their parties, which I did. Whenever I was with them, either at Lillie Carlquist's apartment or elsewhere, they not only encouraged me but insisted that I drink with them which I seldom did. Whenever I refused to participate, they made me the butt of sarcastic remarks and ribald joking.

HENRY MONROE SWETLAND,

Subscribed and sworn to before me a Notary Public in and for the County of Los Angeles, in the State of California, at the City of Los An- Angeles, in the County of Los Angeles and the State of California, on the 8th day of May, 1929.

(SEAL) MARTHA S. DUBOIS,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Louis A. Schaefer.

Filed May 14, 1929.

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

LOUIS A. SCHAEFER, of full age, being duly sworn, according to law, on his oath, doth depose and say:

I am a resident of the State of New York. I have read the foregoing bill of complaint and know the contents thereof. I have known Maurice J. Swetland, one of the defendants therein named, for a period of at least fifteen years. For many years past I have also been well acquainted with his wife, Grace E. Swetland and their children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, the complainants named in said bill of complaint.

I first worked for the said Maurice J. Swetland from 1914 until 1917. When I first became employed by him, he was interested in the partnership of Partridge, Clark & Kerrigan, an automobile sales agency, at No. 239 West 56th street, New York City. He was also interested in the Concealed Wire Chain Company, of New York City, and in the Motion Picture Trade Directory, with offices at No. 105 West 40th street, New York City. The business of Partridge, Clark & Kerrigan failed and was discontinued. The business of the Concealed Wire Chain Company never was successful, and in 1917, at about the time the said Maurice J. Swetland went into the Army, the Motion Picture Trade Directory, whose business had run down under his management, was taken over by the United Publishers Company, with offices in New York City, a corporation in

which Horace M. Swetland, father of the said Maurice J. Swetland, was interested.

Subsequent to the return of the said Maurice J. Swetland from the war in February, 1919, I worked for him occasionally, and again began working for him continuously in September, 1926. At that time he was in California and had incorporated the Bureau of Research and Service, a corporation of the State of California, which was an organization intended to promote and extend contact between Eastern investors and promoters and sales organizations desiring information as to the resources and possibilities of California. In 1926 he organized the Swetland Operating Company of California, Inc., a corporation of the State of California, which was intended to handle certain real estate operations and developments in and about Altadena. In 1927 he also organized the Swetland Publications, Inc., a corporation of the State of California, whose purpose was the publication of certain magazines. In all of these corporations he owned all of the stock excepting the qualifying shares for directors.

I was employed by him as private confidential secretary and office manager, and became a director and treasurer of the Bureau of Research and Service, Swetland Operating Company of California, Inc., and the Swetland Publications, Inc. I held these positions from the time of my arrival in California in 1926 until November, 1927.

At the time of my arrival in California, I found that he had never kept any books of his business affairs and I was instructed to go through all of his records from the time he went to California and set up a system of books. I found that he had previously held as Trustee

under the trust agreement of January 3, 1922, a copy of which is attached to the foregoing bill of complaint, the stocks and other securities therein mentioned and that of these securities he had sold, in March or April of 1926, the 1998 shares of Publishers Securities Company to Frederic C. Stevens for $135,000, and the 1,300 shares of United Publishers Corporation to the said Frederic C. Stevens and one A. C. Pierson, for $100,000, and had collected the note of the Swetland Realty Company for $10,000 about the same time. Part of the moneys received from these sales had been invested in a number of stocks and bonds which were held by him in a safe deposit box at the First National Bank of Redlands, California, and a part was deposited in said bank in his name as Trustee. Subsequently the said stocks and bonds were from time to time sold and the money deposited in the said First National Bank of Redlands in his name as Trustee. In April, 1927, he disposed of 699 of the 700 shares of Swetland Realty Company stock, a part of the corpus of said trust of January 3, 1922, to the said Frederic C. Stevens, for $90,000, and similarly deposited the proceeds thereof in the First National Bank of Redlands, California in his name as Trustee.

A substantial portion of the said account in the First National Bank of Redlands was subsequently disbursed by him in buying certain vacant lands located in Altadena, California, and vicinity, for development purposes, all of which as far as I can recollect, was taken in his name as Trustee, and most of which I am informed and verily believe he still holds.

The said Maurice J. Swetland built two houses on the land that he owned as Trustee, one at

1851 Allan Drive and the other at 2844 Crescent Drive, Altadena, California. The expense of building these houses was paid for through the Swetland Operating Company of California, Inc., with moneys furnished by the said Maurice J. Swetland drawn from his said account as Trustee in the First National Bank of Redlands, California. Later the house at 1851 Allan Drive was disposed of for $12,000 subject to a mortgage of $5,000. $3,000 was paid in cash and a second mortgage given for the balance of $4,000 which he took as Trustee. The house at 2844 Crescent Drive, Altadena, had been completed but was vacant when I left his employ in November, 1927.

While I was associated with him in California he also built a residence at Pasadena at a cost in excess of $100,000 for the use of himself and family. The Swetland Operating Company of California, Inc., was used to disburse a portion of the expenses incurred in connection with the building of this house, and the remainder thereof was disbursed by him directly from the moneys deposited in his name as Trustee in the First National Bank of Redlands, California.

Soon after I arrived in California the said Maurice J. Swetland expressed a desire to get back in the publishing business and for a time operated said business under the name of Swetland Publishing Company of California, and in June, 1927, organized the Swetland Publications, Inc., hereinbefore mentioned. This company published a magazine known as the Pacific International Export and subsequently purchased another magazine known as "Beauty Craft," for which there was paid $5,000. All the moneys to carry on the business of the said Swetland

Publishing Company were supplied by the said Maurice J. Swetland from his account as Trustee in the First National Bank of Redlands.

During the time that I was in California the said Maurice J. Swetland did not personally attend to the businesses of either the said Bureau of Research and Service, Swetland Operating Company of California, Inc., or Swetland Publications, Inc., but very largely left the same to the employees of the said companies. He was away most of the time. I arrived in California in September, 1926, and he left the following October on a trip and was gone approximately three weeks. He went away again on February 1, 1927, and was gone until April 17, 1927. About April 22, 1927, he left with Mrs. Swetland for a trip through the Grand Canyon of Arizona, and was away approximately ten days. About June 17, 1927, he left with his family for Alaska and on their return trip separated from his family at Jasper National Park Lodge on or about July 1, 1927, and proceeded to New York with his son Henry, returning to California on or about September 5, 1927. He stayed in Los Angeles a few days and then took a trip to San Francisco, extending over a period of a week or ten days. On October 5, 1927, he left Los Angeles for New York and had not returned when I severed my connection with the companies on November 5, 1927.

During the time that I was connected with the Bureau of Research and Service, Swetland Operating Company of California, Inc., and Swetland Publications, Inc., all of the moneys needed for the business of these companies were supplied by the said Maurice J. Swetland from his said account in the name of himself as Trustee in the

First National Bank of Redlands, California. While I was there these disbursements amounted to between $200,000 to $250,000 of which between $150,000 and $175,000 was expended through the Swetland Operating Company of California, Inc., between $50,000 and $75,000 through the Swetland Publications, Inc., and between $200,000 and $250,000 through Bureau of Research and Service. None of the companies prospered and all of them became financially embarrassed.

During the time that I was associated with the said Maurice J. Swetland in California aforesaid, I became acquainted with the fact that he had an agreement with one Bruce McDaniel, a lawyer of Redlands, California, who was his legal adviser during all of the time I was there, under which agreement he was to pay to the said Bruce McDaniel 10% of what he, the said Maurice J. Swetland, should receive. I know that the said Bruce McDaniel was actually paid 10% of the purchase price realized from the sale of the stock of the Publishers Securities Company, United Publishers Company, the Swetland Realty Company and of the moneys collected on the Swetland Realty Company note, and 10% of all interest and dividends received on the stocks, bonds and other securities in which said moneys were reinvested. The records of the said Maurice J. Swetland show that the said Bruce McDaniel got 10% on practically everything the said Maurice J. Swetland received.

When I first went to California, the said Maurice J. Swetland had on his desk a picture of a young lady not his wife, and in respect to whom he remarked to me that I knew her, and recalled an occasion that I had been with him at the Marlborough Hotel in New York City in

1922 when she was the hostess in the cabaret of said hotel and introduced herself to the said Maurice J. Swetland and myself. Her name was Miss Lillie Carlquist. In October, 1926, I was informed that the apartment of Miss Carlquist had been damaged by fire and I know of my own knowledge that the said Maurice J. Swetland sent her a check to help her refurnish it.

Subsequently, in April 1927, while on a trip to New York and out to dinner with the said Maurice J. Swetland at the City Club I again met Miss Carlquist. The said Maurice J. Swetland seemed to be much infatuated with her at that time.

During the period that I was in California, the said Maurice J. Swetland seemed from time to time to find cause for complaint against his wife, Grace E. Swetland, and frequently talked to me about her. He said that she did not understand him and that he could not stand it much longer. As his infatuation for Miss Carlquist increased, this attitude on his part seemed to grow stronger and he finally determined and began to plan ways and means by which he might divorce his wife.

In August, 1927, while in New York the said Maurice J. Swetland bought Miss Carlquist a diamond engagement ring and a wedding ring at Tiffany's, for which he paid $3,000. I paid this bill through the Swetland Operating Company of California, Inc., which got its money from the account in the First National Bank of Redlands, California, standing in the name of the said Maurice J. Swetland as Trustee.

While he was in New York in August 1927 he telegraphed me that he was coming back to Los Angeles but did not intend to return to his home

and desired me to engage rooms for him at the Los Angeles Athletic Club. About the same time he telegraphed his wife, Grace E. Swetland that he was not intending to come home but would stay at the Los Angeles Athletic Club. She at the time was staying for the summer at Santa Monica, California. Upon the receipt of this telegram she telephoned me and asked me if I would come down to see her. I believe this telegram was the first time she knew of his intention to break with her, for when I arrived she said she knew of no reason why her husband was not coming home, and seemed to be heartbroken and asked me if I would not do all I could to get him to come home. I told her I would and tried, but it was of no avail.

Upon his arrival in California, the said Maurice J. Swetland did not go to his home but stayed at the Los Angeles Athletic Club for a time and later removed to the Jonothan Club. While there he began to make definite plans to get a divorce from his wife, Grace E. Swetland. His first thought was to get the divorce at Reno. He intended to buy some property in Reno but was to make his headquarters in San Francisco, where the aforesaid companies had an office. He was going to bring Miss Carlquist to San Francisco and I advised him not to do so for his own protection. He then determined to procure a divorce in Paris and directed me to make reservations on a ship sailing from New York on or about October 21st or 22nd, 1927 for his wife, Grace E. Swetland, and his two daughters and nurse, and to procure reservations for him and his son Henry on a ship for France sailing one week later, which I did. He and his son Henry left California for New York on or

about October 5, 1927 and Mrs. Swetland and her two daughters left Los Angeles about October 17, 1927. I accompanied her and the children to the train and the last words she said to me were "I hope to bring my husband back." After the ship on which I engaged reservations for Mrs. Swetland, the two girls and the nurse, had sailed, I received instructions from the said Maurice J. Swetland to cancel the reservations I had made for him and his son Henry on the ship to France.

I left California on November 5, 1927, and subsequently met the said Maurice J. Swetland in New York on several occasions. On one of these occasions he purchased a supply of imported frankfurters, sauerkraut and various groceries and took them and me to the apartment of Miss Carlquist at 140 East 58th street, New York City. At the time we arrived no one was there and the said Maurice J. Swetland let himself in with a pass-key and started to prepare the dinner. Later Miss Carlquist came in with her mother and her sister. I was invited to dinner but declined the invitation. I did have a cream cocktail, a drink of which the said Maurice J. Swetland was exceedingly fond, with them.

Shortly before Christmas I again met the said Maurice J. Swetland at the Blackstone Hotel and had dinner with him, at which time he informed me that he had secured a divorce from his wife, Grace E. Swetland, in Mexico and would now soon marry Miss Carlquist, which I am informed and verily believe he subsequently did.

LOUIS A. SCHAEFER.

Affidavit of Charles P. Loeser.

Sworn to and subscribed before me, a Notary Public in and for the County of New York in the State of New York at the City of New York in said County and State, this 9th day of May, 1929.

(SEAL) WILLARD C. STEINKAMP,
Notary Public in and for the County of New York in the State of New York.

WILLARD C. STEINKAMP
Notary Public
N. Y. Co. Clerk's No. 972 Reg. No. 0-1239.
Bronx Co. Clerk's No. 136 Reg. No. 3077C.
Commission Expires March 30, 1930.

Affidavit of Charles P. Loeser.

Filed May 14, 1929.

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

CHARLES P. LOESER, of full age, being duly sworn according to law on his oath, doth depose and say:

I am an Attorney and Counsellor at Law of the State of New York, and reside in New York City. I am the husband of Florence E. Loeser, nee Elliott, who is a sister of Mrs. Grace E. Swetland, one of the complainants in the foregoing bill of complaint named.

I have read the said bill of complaint and know the contents thereof.

I am well acquainted with all of the complainants and the defendants. The defendant Maur-

ice J. Swetland is the son of Horace M. Swetland, deceased, and resides at Southbury, Connecticut; the defendant Frederic C. Stevens is the husband of Velma I. Stevens, daughter of the said Horace M. Swetland, deceased, and resides at 325 West End avenue, New York City; the defendant Maurice J. Kane is the husband of Ruth D. Kane, daughter of the said Horace M. Swetland, deceased, and resides at 23 Prospect Terrace, Montclair, New Jersey, and the defendant Ernest M. Corey is a former employee of the said Horace M. Swetland, deceased, and resides at 146 Eleventh Street Beach, Flushing, Long Island, New York.

Upon the death of the said Horace M. Swetland, deceased, on June 15, 1924, I became counsel for the Executors and Trustees under his last will and testament, and attended to the probate of the said will, which was admitted to probate by the Ordinary of the State of New Jersey on June 30, 1924, and on the same day Letters Testamentary were issued to the Executors and Trustees therein named. A true copy of said will is annexed to the bill of complaint and marked Schedule "C". I continued to act as counsel for said Executors and Trustees up to about the time that the bill was filed by said Executors and Trustees for a construction of the said will, at which time they employed New Jersey counsel, and since which time I have not acted as counsel to them.

I have, however, kept myself informed of the proceedings taken in said suit and am familiar with the provisions of the trust agreements of July 14, 1917 and January 3, 1922, mentioned in the bill of complaint filed in said suit, and know of my own personal knowledge that the facts set

forth in paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the bill of complaint filed in the above entitled cause are true.

The complainants in the above entitled cause, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, are children of the complainant Grace E. Swetland and the said Maurice J. Swetland, and grandchildren of Horace M. Swetland, deceased, the father of the said Maurice J. Swetland. The said Maurice J. Swetland and Grace E. Swetland were married on October 10, 1907, and the said Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland are the only children that have been born of the said marriage, and are all under the age of twenty-one years.

The said Horace M. Swetland left surviving him his widow, Clara Swetland, and his three daughters, Velma I. Stevens, Ruth D. Kane, and Dorothy A. Johnson, and his son, Maurice J. Swetland, as his only heirs-at-law and next-of-kin all of whom are still living.

I am also familiar with the first account of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees of the last will and testament of the said Horace M. Swetland, deceased, filed in the Prerogative Court of New Jersey on or about February 28, 1927, and with the proceedings had in said Court thereon, and of my knowledge the facts set forth in paragraphs 11 and 12 are true. A photostatic copy of the receipt for $21,971.82 mentioned in paragraph 12 as having been paid by the Executors and Trustees of the Estate of Horace M. Swetland, deceased, to Maurice J. Swetland under the trust agreement of July 14, 1917, is on file in the

Affidavit of Charles P. Loeser.

Office of the Register of the Prerogative Court of the State of New Jersey.

I have made a careful inquiry into the circumstances set forth in paragraphs 13, 14 and 15 of the bill of complaint, and as a result am informed and verily believe that all of the facts therein stated are true. I know of my own knowledge that the said Grace E. Swetland, and her children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, are now dependent upon the charity of friends and relatives for the necessities of life, and that this is well known to the said Maurice J. Swetland.

I am also familiar with the account filed by the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, in the Prerogative Court of the State of New Jersey on or about March 6, 1929, and with the proceedings had thereon, mentioned in paragraph 16 of the bill of complaint filed in the above entitled cause. I have examined said account and know that the facts stated in said paragraph 16 are true. I also know that the account shows that there is now in the hands of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Trustees under the last will and testament of Horace M. Swetland, deceased, a balance of $71,997.32 income from New York realty, as stated in paragraph 17 of said bill of complaint and fear and firmly believe that unless this Honorable Court shall intervene, such moneys as the said Maurice J. Swetland may receive upon a distribution by said trustees will not be paid and applied to the sole benefit, advantage and use of the said complainant, his wife,

Grace E. Swetland and the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, but will be wrongfully and fraudulently misappropriated and expended by the said Maurice J. Swetland to his own use; all to the irreparable loss and damage and injury to the said complainants.

CHARLES P. LOESER.

Sworn to and subscribed before me, a Notary Public in and for the County of New York in the State of New York, at the City of New York in said County and State, this 9th day of May, 1929.

(SEAL) WILLARD C. STEINKAMP
Notary Public in and for the County of New York in the State of New York.

WILLARD C. STEINKAMP
Notary Public.

N. Y. Co. Clerk's No. 972, Reg. No. 0-1239.
Bronx Co. Clerk's No. 136, Reg. No. 3077c.
Commission expires March 30, 1930.

ORDER TO SHOW CAUSE AND AD INTERIM STAY.

Filed May 14, 1929.

The Court having read and considered the bill of complaint heretofore filed in the above stated cause, and the affidavits of Grace E. Swetland, Henry M. Swetland, Louis A. Schaefer and Charles P. Loeser attached thereto,

It Is on this 14th day of May, 1929, on motion of Messrs. Lindabury, Depue & Faulks, solicitors for the complainants, Ordered that Maurice J. Swetland, individually and as trustee under two trust agreements dated July 14, 1917 and January 3, 1922, mentioned in said bill of complaint, and the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, therein mentioned, do show cause before the Chancellor at the Chancery Chambers, No. 1060 Broad street, in the City of Newark, on the 21st day of May, 1929, at 10:30 o'clock in the forenoon or as soon thereafter as counsel may be heard, why an injunction should not issue in accordance with the prayer of the said bill of complaint enjoining and restraining the defendants Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, from paying over or delivering to the said Maurice J. Swetland, individually, or as Trustee under the said Trust Agreement of July 14, 1917, and the said Maurice J. Swetland, individually, or as Trustee under the Trust Agreement of July 14, 1917 from receiving any moneys or other property of any

kind, character or description, from the estate of said Horace M. Swetland, deceased;

And It Is Further Ordered that the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as executors of and trustees under the last will and testament of Horace M. Swetland, deceased, their agents and attorneys, in the meantime and until the further order of this Court in the premises, desist and refrain from paying over or delivering to the said Maurice J. Swetland, individually, or as trustee under the trust agreement of July 14, 1917, and the said Maurice J. Swetland, individually, and as trustee under the said trust agreement of July 14, 1917 from receiving any moneys or other property of any kind, character or description from the estate of the said Horace M. Swetland, deceased;

And It Is Further Ordered that a true copy of said bill of complaint and affidavits and of this order (which need not be certified) be served upon each of the said defendants or their solicitors or attorneys or by mailing the same to each of the said defendants at his last known post office address within three days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

Alonzo Church,
V.-C.

Service of the above order acknowledged by Messrs Whiting & Moore, solicitors of executors and trustees under last will and testament of Horace M. Swetland, on May 16, 1929.

Affidavit of Service.

Affidavit of Service.

Filed May 21, 1929.

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

Mahlon M. Meier, of full age, being duly sworn according to law, on his oath deposes and says:

I am an attorney-at-law of New Jersey employed in the office of Messrs. Lindabury, Depue & Faulks, solicitors for the complainants in the above entitled cause.

On May 16, 1929, I deposited in the United States post office in the City of Newark, New Jersey, for delivery by registered mail with postage prepaid, an envelope containing a true copy of the rule to show cause and ad interim stay allowed in the above entitled cause on May 14, 1929, a true copy of which is annexed hereto, together with a true copy of the bill of complaint, exhibits and attached affidavits filed in said cause on May 14, 1929, directed to Maurice J. Swetland, Waterbury Road, Southbury, Connecticut, and received therefore United States Post office Department registered mail receipt number 220,499, which is annexed hereto. On May 20, 1929, I received United States Post office Department registered mail return receipt No. 220,499 signed "M. J. Swetland," which is annexed hereto.

MAHLON M. MEIER.

Subscribed and sworn to before me
this 21st day of May, 1929.

(SEAL)

HAROLD J. BROWN,
Notary Public of New Jersey.

ORDER FOR WRIT OF SEQUESTRATION.

Filed May 14, 1929.

It appearing by the bill of complaint of Grace E. Swetland, individually and Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infants under the age of twenty-one years, by Grace E. Swetland, as next friend, filed herein and duly verified by affidavits, that the said bill of complaint in this cause prays a money decree against Maurice J. Swetland, one of the defendants in said bill of complaint named, based on the liability of the said defendant, Maurice J. Swetland, for certain breaches of trust committed by him as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922 respectively, of which said trusts the said complainants are beneficiaries, and that the said defendant, Maurice J. Swetland, is a non-resident of this State and has personal property, moneys, effects, rights and credits within the State of New Jersey.

It Is, on this 14th day of May, 1929, on motion of Messrs. Lindabury, Depue & Faulks, solicitors of the said complainants, Ordered, that a writ of sequestration issue out of and under the seal of this Court, directed to Roger E. Salmon, a master of this Court, commanding said master to take into his possession sufficient of said property to answer the demand of said complainants, Grace E. Swetland, individually, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, by Grace E. Swetland, next friend, that the said defendant Maurice J. Swetland, restore to the said trusts of July 14, 1917 and January 3, 1922, all moneys misappropriated by him or which he is unable to prop-

erly account for to this Court, and pay over and apply all moneys constituting the income of said trusts respectively which have been received by him, to the sole benefit, advantage and use of the said complainants, Grace E. Swetland, individually, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, by Grace E. Swetland, next friend, and for that purpose to take sufficient of said property to make the sum of $325,000 and hold the same subject to the orders and decrees of this Court.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

In accordance with this order a writ of sequestration was duly issued out of the Court of Chancery on the 15th day of May, 1929 to Roger E. Salmon, one of the Masters in Chancery, as sequestrator, which writ was returned on June 17, 1929.

RETURN TO WRIT OF SEQUESTRATION.

Filed June 17, 1929.

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

I, the subscriber, one of the Masters of this Court, hereby report that by virtue of the above writ of sequestration to me directed and delivered, I have taken into my possession all of the right, title and interest of the defendant Maurice J. Swetland in and to all of the following goods, rights, claims and personal estate and other property:

All of the interest, right and title of the said Maurice J. Swetland in and to the estate of Horace M. Swetland, deceased, and in and to the commissions allowed to Trustees, Maurice J. Swetland, Ernest M. Corey, Frederick C. Stevens and Maurice J. Kane by Vice-Ordinary Berry on June 4, 1929, in the matter of the estate of Horace M. Swetland, deceased.

Dated June 17, 1929.

ROGER E. SALMON,
Master in Chancery of New Jersey.

ORDER OF CONTINUANCE.

Filed May 21, 1929.

It appearing that the order to show cause allowed in the above entitled cause on the 14th day of May, 1929, having been duly served upon all the defendants in the said cause, and application for that purpose being made by Messrs. Lindabury, Depue & Faulks, solicitors for the complainants, and Messrs. Whiting & Moore, solicitors for the defendants, Maurice J. Swetland, Ernest M. Corey, Frederick C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, consenting thereto, and no one appearing in opposition thereto on behalf of the defendant, Maurice J. Swetland, individually, and as trustee under certain trust agreements, dated July 14, 1917 and January 3, 1922.

It Is, on this 21st day of May, 1929, Ordered that the hearing on the said order to show cause be and the same is hereby continued before the Chancellor at the Chancery Chambers, No. 1060 Broad street, Newark, New Jersey, until June 4, 1929, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Respectfully advised.

Alonzo Church,
V.-C.

We consent to the making and entry of the above order.

WHITING & MOORE,
Solicitors of defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens, Maurice J. Kane, Executors of and Trustees under the last Will and Testament of Horace M. Swetland, deceased.

Special Appearance and Motion on Behalf of Maurice J. Swetland, Individually.

Filed June 4, 1929.

The defendant, Maurice J. Swetland, individually of Southberry, in the State of Connecticut, appearing specially for the sole purpose of objecting to the jurisdiction and power of the Court to compel him to appear in the aforesaid action and of contesting the jurisdiction of the Court and for that reason moving to vacate the writ of sequestration herein and the order to show cause herein made upon the 14th day of May, 1929, and to dismiss the bill as to him, and for no other purpose whatsoever, says and alleges:

1. This defendant was not at the time of the filing of the bill of complaint herein and had not been for many years theretofore and has not been since and is not now a resident, citizen or inhabitant of the State of New Jersey.

2. No one of the complainants or any one of the beneficiaries of the alleged trusts created by the instruments of July 14, 1917 and January 3, 1922 was, at the time of the commencement of this suit, or for many years prior thereto or since that time or now a citizen, resident or inhabitant of the State of New Jersey.

3. The said alleged trust instruments of July 14, 1917 and January 3, 1922 were made, executed and delivered in the State of New York and the property referred to in said trust instruments was delivered to this defendant as trustee under such alleged trust instruments in the State of New York and said trust property has never been, since its delivery to this defendant as trustee as aforesaid in the State of New Jersey.

Special Appearance and Motion (Individually).

4. That the situs of the trusts created by the instruments above referred to is not now, was not at the time of the filing of the bill and never was in the State of New Jersey.

5. Prior to the commencement of this suit the complainants herein then being residents, citizens and inhabitants of the State of California, the property alleged to be trust property under the terms of said trust being in the State of California, commenced a suit in the said State of California in the appropriate court against this defendant for the relief prayed for in the bill of complaint herein, and said suit is pending undetermined, and in said suit such complainants claimed and insisted that the Court had full and complete jurisdiction because the situs of said trust was in the State of California.

6. In the proceedings which were pending in this court referred to in the bill of complaint which was a suit instituted by this defendant and others solely in their capacity as executors and trustees of the last will and testament of Horace M. Swetland, deceased, and solely for the purpose of a construction of said last will and testament, it was determined that such moneys as were to be paid under the said last will and testament of said Horace M. Swetland, deceased, to this defendant as trustee were to be paid to him as the trustee of a trust created by the testator before the execution of his will by the alleged trust instrument heretofore referred to and that the effect of such bequests to this defendant as trustee, was but to add additional property to said trust and that said trust was a distinct and definite entity and this defendant says that all such moneys which he received, and

all of the moneys which he is to receive, under the last will and testament of Horace M. Swetland deceased, under the bequest aforesaid he receives in his capacity as trustee under said definite and distinct trust, which said trust never, as aforesaid, had a situs in the State of New Jersey, and of the administration of said trust this Court has no jurisdiction whatsoever, and neither the beneficiaries of said trust nor this defendant being residents, citizens or inhabitants of the State of New Jersey and this defendant not being subject to process within said State.

7. And this defendant further says that this Court has no jurisdiction to compel this defendant to appear and to account as trustee as aforesaid, nor has it jurisdiction to determine the rights of the beneficiaries as against this defendant as aforesaid, nor has it the right to remove this defendant nor has it the right to compel this defendant in his individual capacity to respond to any claims of the said complainants before an accounting by this defendant as trustee in an appropriate court of appropriate jurisdiction having control of the trusts aforesaid, and this defendant further says that no process or other legal notice of this suit has been served upon this defendant and that to compel this defendant to appear and answer to the order to show cause herein made or to any other process and the award by this Court of a writ of sequestration, which said writ of sequestration was issued upon the 15th day of May, 1929, for the purpose of compelling this defendant to appear in the meantime sequestering the property of this defendant under the provisions of the statute in such case made and provided results in a taking of the property of this Court individually

without due process of law in violation of the rights of this defendant secured to him by the 14th amendment to the constitution of the United States.

8. Neither the writ of sequestration nor the order to show cause of this court made on May 19, 1929, nor any other process or order of this Court was served upon this defendant within the State of New Jersey.

9. This defendant humbly submits that this Court has not now, nor ever had or obtained jurisdiction over the person or property of this defendant and cannot obtain jurisdiction over his person and property and that this defendant is not compellable to appear in response either to the order to show cause made herein or to the writ of sequestration issued herein, or to any other process and he does not accept or waive service and does not submit to the jurisdiction of this Court.

This defendant prays the judgment of this Honorable Court whether he should be compelled to appear in accordance with any writ or order of this Court or to make answer to said bill and he prays that the order to show cause be vacated as to him and that the writ of sequestration issued herein be quashed, and that the bill be dismissed as to him.

MAURICE J. SWETLAND,
Defendant.

MERRITT LANE,
Solicitor for Maurice J. Swetland appearing specially for the purpose aforesaid.

Special Appearance and Motion (Individually).

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

MAURIEC J. SWETLAND, of full age being duly sworn according to law upon his oath deposes and says:

I am the defendant named in the foregoing special appearance and motion; the statements of fact therein contained are upon my personal knowledge and those statements of fact are true; the foregoing special appearance and motion is not interposed for delay but in good faith for the purposes therein set forth.

MAURICE J. SWETLAND.

Sworn and subscribed to before me, a Notary Public of the State of New York, in and for the County of Kings, on the 3rd day of June, 1929, and I do certify that I am a Notary Public in and for the County of Kings, State of New York, and that my authority is now in full force and effect, and that my certificate as Notary Public was on the 3rd day of June, 1929, was duly filed in the County of New York.

(SEAL) CHARLES R. COULTER,
Notary Public Kings Co. No. 6.
Registers No. 440.
Certificate filed in New York County. No. 848
Registers No. O-561.
Commission expires March 30, 1930.

Special Appearance and Motion on Behalf of Maurice J. Swetland, Trustee under the Trust Instrument of July 14, 1917 and as Trustee under the Trust Agreement of January, 3, 1922.

Filed June 4, 1929.

The defendant, Maurice J. Swetland, Trustee under the trust instrument of July 14, 1917 and as trustee under the trust agreement of January 3, 1922, of Southbury, in the State of Connecticut, appearing specially for the sole purpose of objecting to the jurisdiction and power of the Court to compel him to appear in the aforesaid action and of contesting the jurisdiction of the Court and for that reason moving to vacate the writ of sequestration herein and the order to show cause herein made upon the 14th day of May, 1929, and to dismiss the bill as to him, and for no other purpose whatsoever, says and alleges:

1. He is not and for many years has not been and was not at the time of the commencement of this suit nor at any time since a resident, citizen or inhabitant of the State of New Jersey.

2. No one of the complainants nor any person interested as beneficiary under the alleged trusts set up in the said bill of complaint has been for many years last past a resident, citizen and inhabitant of the State of New Jersey nor was anyone of such persons at the time of the commencement of this suit nor has any one of such persons since been a resident, citizen or inhabitant of the State of New Jersey.

3. The instruments of July 14, 1917 and January 3, 1922, were made, executed and delivered

in the State of New York; the trust property referred to in said instruments and delivered in pursuance thereof was delivered to this defendant in the State of New York and no part of said trust property so delivered was, since its delivery to this defendant as aforesaid under the terms of the said instrument, in the State of New Jersey.

4. The trust created by the instruments of July 14, 1917 and of January 3, 1922 did not have at the time of the filing of the bill and does not have at this time and never had a situs in the State of New Jersey.

5. Prior to the commencement of this suit the complainants then being resident in the State of California and alleged trust property then and there being in the State of California, instituted a proceeding in the appropriate court of California against this defendant individually and trustee for an accounting by this defendant as trustee under the alleged trust agreement of July 14, 1917 and under the alleged trust agreement of January 3, 1922 and for the relief prayed for in the bill of complaint herein, excluding the prayer for a writ of sequestration, claiming and insisting that the situs of the said trust was in the State of California, the beneficiaries of said alleged trust and trust property being within the State of California, and said suit is now pending undetermined.

6. By the proceedings heretofore taken in this court entitled "Maurice J. Swetland, *et als.* complainants, and Hattie Swetland, *et als.* defendants," said suit being brought by this defendant and others solely in their capacity as executors of and trustees under the last will and

testament of Horace M. Swetland, for a construction of said last will and testament and for no other purpose, it was held that the effect of the gift in the last will and testament of Horace M. Swetland deceased, to Maurice J. Swetland, trustee, was but to add additional property to the trusts created by the said Horace M. Swetland under the said alleged trust agreements of July 14, 1917, and January 3, 1922, established by him before the execution of the said will, and that said trust was a distinct and definite entity.

7. This defendant says that any moneys coming to him by virtue of said clauses of said last will and testament of Horace H. Swetland, deceased, referred to in the bill of complaint come to him as trustee of said trust so established as aforesaid, and become a part of the trust property of said trusts.

8. This defendant further says that the said trusts never having any situs and not having a situs in this State and neither this defendant nor the beneficiaries of said trust being residents, citizens or inhabitants of this State this Court is without jurisdiction to call this defendant to account as trustee or to remove this defendant as trustee or to bring this defendant before this Court by process of writ of sequestration, or otherwise, and that no process or other legal notice of this suit has been served upon this defendant and that to compel this defendant to appear in this suit as aforesaid would be to deprive him of the rights secured to him by the 14th amendment to the Constitution of the United States in that it would result in a taking of his property without due process of law.

Special Appearance and Motion (as Trustee).

9. Neither the writ of sequestration nor the order to show cause of this Court made on the 14th day of May, 1929, nor any other process or order of this Court was served upon this defendant within the State of New Jersey.

10. And this defendant humbly submits that this Honorale Court has not now nor ever had or can obtain jurisdiction over the person and property of this defendant as trustee as aforesaid or of the trust estate and that this defendant as such trustee is not compellable to appear in response to said order to show cause as aforesaid or any other order, or to the writ of sequestration issued herein and he does not accept or waive service of proper process if such there may be.

This defendant therefore prays the judgment of this Honorable Court whether he in his capacity as trustee as aforesaid should be compelled to appear in accordance with any process of this court issued in this suit or to make any answer to said bill, and he prays that the said order to show cause as aforesaid and the said writ of sequestration may be vacated and set aside and that as to him the bill should be dismissed upon the grounds aforesaid.

MAURICE J. SWETLAND,
Defendant.

MERRITT LANE,
Solicitor for defendant, Maurice J. Swetland appearing specially for the purpose aforesaid.

Special Appearance and Motion (as Trustee).

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

MAURICE J. SWETLAND, of full age being duly sworn according to law upon his oath deposes and says:

I am the defendant named in the foregoing special appearance and motion; the statements of fact therein contained are upon my personal knowledge and those statements of fact are true: the foregoing special appearance and motion is not interposed for delay but in good faith for the purposes therein set forth.

MAURICE J. SWETLAND.

Sworn and subscribed to before me a Notary Public of the State of New York, in and for the County of Kings, on the 3rd day of June, 1929, and I do certify that I am a Notary Public of the State of New York in and for the County of Kings, Certificate filed in New York County and that my authority is now in full force and effect.

(SEAL)

CHARLES R. COULTER,
Notary Public Kings Co., No. 6.
Register No. 440.
Certificate filed in New York Co., No. 848.
Registers No. 0-561.
Commission expires March 30, 1930.

Affidavit of Charles P. Loeser.

Filed September 10, 1929.

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

CHARLES P. LOESER, being duly sworn according to law upon his oath deposes and says:

I am a counsellor at law of the State of New York and have read the special appearance filed in this cause on behalf of defendant, Maurice J. Swetland, trustee under the trust agreements of July 14, 1917, and January 3, 1922, respectively.

The action in the courts of California by the complainants herein against Maurice J. Swetland individually, and as trustee, and others, referred to in said special appearances were instituted under my direction and the complaint therein was prepared with my assistance, and I am familiar with the matters and things therein contained and know of my own knowledge that the copy of said complaint attached hereto and made a part hereof is a true copy of the original complaint which was filed in the Superior Court of the State of California in and for the County of Los Angeles on July 23, 1928.

I know of my own knowledge that the defendant, Maurice J. Swetland, individually, and as trustee under the trust agreement of January 3, 1922, a party defendant in said action in the Superior Court in the State of California, was not served personally in said suit although every effort so to do was made, and that the said Maurice J. Swetland, has never entered an appearance in said suit either personally or by an attorney and has never filed an answer or taken any step in said cause which would sub-

ject him personally to the jurisdiction of said Court.

CHARLES P. LOESER,

Sworn to and subscribed before me this 21st day of June, 1929.

DOROTHY B. GOODEN,
Notary Public for New Jersey.
(SEAL)

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

Henry Monroe Swetland, an infant, et al.; Florence A. Swetland, an infant; Carolyn G. Swetland, an infant, by Grace Elliott Swetland, their Guardian *ad Litem*, and Grace Elliott Swetland, individually,

Plantiffs,

vs.

Maurice J. Swetland, individually, and Maurice J. Swetland, as Trustee, et al.; Swetland Operating Company of California, Inc., a corporation; Bruce McDaniel, Lohr Ludwig, Crown Transfer & Storage Co., a corporation; First Trust & Savings Bank of Pasadena, a corporation; Pasadena Trust & Savings Bank, a corporation; United Securities Trust & Savings Bank, successor of First National Bank of Redlands, a corporation; Merchants National Trust and Savings Bank, a corporation; The Swetland Publications, Inc., a corporation; John Doe Brothers, a co-partnership; John Doe and John Smith, co-partners, doing business under the firm name and style of John Doe Brothers, John One, John Two, John Three, John Four, John Five, John Six, Mary One, Mary Two, Mary Three, Mary Four, and Company, a corporation; MNO Company, a corporation; XYZ Company, a corporation,

Defendants.

No.....

Complaint.

(Action for Breach of Express Trust and Accounting).

Plaintiffs complain and for cause of action against the above named defendants, allege:

I.

That the plaintiffs, Henry Monroe Swetland, Florence A. Swetland and Carolyn G. Swetland, are each under the age of twenty-one years and neither the said Florence A. Swetland nor Carolyn G. Swetland are married.

II.

That on the 21st day of July, 1928, at Los Angeles County, State of California, the above named Grace Elliott Swetland was duly appointed by the Superior Court of the State of California, in and for the County of Los Angeles, the guardian ad Litem of the above named Henry Monroe Swetland, Florence A. Swetland and Carolyn G. Swetland, for the purposes of this action.

III.

That the defendant SWETLAND OPERATING COMPANY OF CALIFORNIA, INC., is a corporation, organized and existing under and by virtue of the laws of the State of California, having its principal place of business at Los Angeles, State of California, and now does business in the City of Los Angeles, State of California.

That at all times herein mentioned as to it, Pasadena Trust and Savings Bank was and still is a California Banking Corporation, at Pasadena, California.

That at all times herein mentioned as to it, Crown Transfer & Storage Company was and still is a corporation of California.

That United Security Trust & Savings Bank at all times herein mentioned was and still is a a National Banking Corporation, and successor in interest to First National Bank in Redlands, a National Banking Corporation at Redlands, California.

That at all times herein mentioned as to it, the Merchants National Trust and Savings Bank was and still is a National Banking Corporation, with principal place of business at Los Angeles, California.

That at all times herein mentioned as to it, the Swetland Publications, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of California.

That at all times herein mentioned as to it, the First Trust & Savings Bank of Pasadena, is a corporation, organized and existing under and by virtue of the laws of the State of California.

IV.

That the plaintiffs and the defendant Maurice J. Swetland, and each of them, are beneficiaries under a trust created by a certain declaration of trust, heretofore executed, in writing by H. M. Swetland, as party of the first part, and Maurice J. Swetland, as party of the second part, on January 3, 1922, wherein and whereby the said H. M. Swetland transferred to the defendant, Maurice J. Swetland, and said defendant as Trustee declared himself to be seized and possessed as said Trustee of certain personal property hereinafter and in said declaration of trust described, for the uses and purposes in said declaration provided and set forth, that is to say:

> SECOND: (a) The aforesaid transfers to said Maurice J. Swetland are in Trust nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:
>
> (b) It is expressly agreed by and between the parties hereto that any and all additions to the Trust Estate shall be received by the said Trustee for the purposes and uses and

subject to all the terms and conditions of the Trust hereby created, without the execution of any further or additional instrument of agreement.

(c) Upon payment of the note of the Swetland Realty Company, or, the redemption or sale of any of the stocks or other property of the *Trust Estate,* the net proceeds thereof shall be reinvested by the *Trustee* for the *purposes* of the Trust

(d) The income received from the principal of said Trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the survivor or survivors of them until such time as the *youngest child* of the party of the second part shall have reached the age of thirty years. In which event said Trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.

(e) The said Trustee shall not during the period of this trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or *to charge or encumber the corpus or principal of said trust fund or any part thereof or any beneficial interest therein.*

THIRD: That when the youngest living child of said Maurice J. Swetland, party of the second part hereto, shall have attained the age of Thirty years, the principal of this Trust and all additions thereto, making in total the net trust estate at the time aforesaid, shall be divided as follows:

(a) That portion of the trust estate represented by 1998 shares of the Publishers Securities Company Common Stock, standing in the name of Maurice J. Swetland, Trustee, shall be delivered to and become the personal property of Maurice J. Swetland, if living.

(b) The balance of the net trust estate at the time aforesaid, shall be divided equally between and paid to the wife of the party of the second part, if then living, and his children, and the living issue of any deceased child or children, and the living issue of such child or children shall receive in equal parts the share or part which his or her parent, as the case may be, would have taken if living at the time aforesaid.

(c) In the event of the death of the party of the second part, said Maurice J. Swetland, prior to the termination of this Trust, his share of the trust estate, specifically mentioned in Paragraph (a) of this article, shall become a part of the net estate to be divided in accordance with Paragraph (b) of this Article.

(d) In the event of the death of the wife of the party of the second part before the termination of the trust hereby created, her share shall become a part of the net trust estate, to be divided equally and paid to the children or the living issue of the children of the party of the second part in accordance with Paragraph (b) of this Article.

(e) In the event of the death of all the beneficiaries hereunder, namely, the wife and children and the living issue of such children of the party of the second part, prior

to the termination of the *Trust* hereby created, then and in that event, the net principal of this Trust Estate shall revert to and be paid over to the Corporation known as The Publishers Securities Company of Montclair, New Jersey, with the exception noted in Paragraph (a), that the number of shares of stock of said Publishers Securities Company forming a part of this trust estate, shall be delivered to and become the property of Maurice J. Swetland, if living, otherwise said shares shall revert to and become a part of the net trust estate, reverting to said Publishers Securities Company, as aforesaid;

and for the period of time in said Declaration of Trust set forth, as follows, to-wit: From the said January 3, 1922, to and until such time as the youngest child of Maurice J. Swetland, the defendant herein, shall have reached the age of thirty years; that a copy of said Declaration of Trust is hereto annexed, marked Exhibit "A" and by this reference is hereby made a part of this complaint, as fully as though the same were here set forth at length.

V.

That said personal property mentioned and set forth in said Declaration of Trust and transferred to said Maurice J. Swetland, as aforesaid, is described therein as follows; to wit:

500 shares of United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 204, to M. J. Swetland, Trustee.

250 shares of United Publishers Corporation Class "B" preferred stock, represented by

certificate No. 319, to M. J. Swetland, Trustee.

600 shares of United Publishers Corporation Class "B" preferred stock, represented by certificate No. 357, to M. J. Swetland, Trustee.

700 shares of Swetland Realty Co. Common Stock, represented by certificate No. 34, to M. J. Swetland, Trustee.

1998 shares of Publishers Securities Company Common Stock, represented by certificate No. 1 to M. J. Swetland, Trustee.

$10,000.00 note of Swetland Realty Co., dated November 1, 1917, payable January 1, 1918, and thereafter extended on demand with interest at five per cent. (5%) payable to M. J. Swetland, Trustee.

VI.

That on said January 3, 1922 the said Trustee accepted the said trust referred to in Paragraph IV hereof, in writing, and on said date entered upon the discharge of his duties as such trustee under said declaration of trust; that from January 3, 1922, to and including the date of the commencement of this action the said trustee has continued and still continues to act as such trustee under said declaration of trust, but, nevertheless, has wholly failed and refused during said period of time to perform and carry out the terms and provisions of said declaration of trust in the several respects and particulars hereinafter set forth.

VII.

Plaintiffs are informed and believe and upon such information and belief allege that about the year 1926, the exact date whereof is unknown

to these plaintiffs, the said Trustee for the sum of Three Hundred and Twenty-five Thousand Dollars ($325,000.00) wrongfully sold the said personal property consisting of the said shares of stock described in Paragraph V hereof and in said declaration of trust, and constituting the major part of the principal so held in trust by him as aforesaid under the terms and provisions of said declaration of trust, to divers persons and corporations, to these plaintiffs unknown; that from said sale and as the proceeds thereof the said Trustee received from said persons and corporations the sum of approximately $325,000.00 cash; that at said time, the said Trustee, by endorsement in writing on each of the said certificates of stock, representing the said shares of stock, wrongfully transferred and assigned and delivered the said certificates of stock and each thereof and the shares of stock represented thereby to said persons and corporations unknown to these plaintiffs; that thereafter the said certificates of stock and the ownership of the shares of stock represented thereby, and each thereof, were wrongfully transferred to the names of the said unknown persons and corporations on the records of the several corporations which theretofore had issued said certificates of stock.

VIII.

That at all times mentioned in this complaint said shares of stock, personal property and/or the said cash proceeds thereof amounting to approximately the sum of $325,000.00, together with the annual income therefrom, the exact amount of which is to these plaintiffs unknown, were and are held and possessed by the said trustee as such trustee, in trust, under the terms

and provisions of said declaration of trust hereinbefore referred to in Paragraph IV hereof.

IX.

That the said shares of stock and personal property and the cash proceeds of said sale hereinbefore mentioned, constituted and now constitute the principal of said trust fund created under and by virtue of the terms and provisions of said Declaration of Trust hereinbefore referred to; that on or about February, 1922 said Trustee removed and transferred the said personal property, constituting said trust fund, from the State of New Jersey to the State of California, where the said trust fund has continued to be and remain since the said February, 1923, to and including the date of the commencement of this action, except as to such portions thereof which the said Trustee has fraudulently misappropriated and converted to his own use, as in Paragraph X hereof set forth.

X.

Plaintiffs are informed and believe, and upon such information and belief allege, that since on or about the year 1926 to the date of the commencement of this action, but at what exact dates are to these plaintiffs unknown, the defendant Trustee, with intent to deprive the plaintiffs of their shares of the principal of said trust fund and the property unto them belonging and of their share of the income accumulations and accretions of said trust fund, has fraudulently misappropriated and converted the major part or portion thereof to his own use, in violation of his said trust and the terms and provisions of said declaration of trust.

That at various other times since the said year 1926 to the date of the commencement of this action, the said trustee has unlawfully expended other and further sums of the principal of said trust fund for divers and sundry purposes and objects, which plaintiffs are informed and believe, and upon such information and belief allege, amount in the aggregate to the sum in excess of $25,000.00

XI.

That said trustee has failed and refused since January 3, 1922, and still fails and refuses to account to these plaintiffs for the said shares of stock and personal property and for the said sum of $325,000.00, or any part thereof, although these plaintiffs have heretofore demanded of said trustee that he account therefor to these plaintiffs.

XII.

That on or about February, 1922 the said trustee, together with the plaintiff, Grace Elliott Swetland, his wife, and Henry Monroe Swetland, Florence A. Swetland and Carolyn G. Swetland, issue of the marriage of said Maurice J. Swetland and Grace Elliott Swetland, removed from the City of Montclair, State of New Jersey, to the State of California; that since last named date to the time of the commenecment of this action the said Trustee and these plaintiffs have been and now are residents and citizens of the State of California; that said trustee and these plaintiffs have been residents and inhabitants of the County of Los Angeles, State of California for three years last past.

XIII.

That since said January 3, 1922 the said Trustee has never made and/or filed in any court of the State of New Jersey or the State of California, or any other place, any report of his receipts and disbursements under the terms and provisions of said declaration of trust.

XIV.

That the relation of mutual trust and confidence between said trustee and said beneficiaries continued from the said January 3, 1922 up to about October 1927, at which said time the said trustee failed and refused to provide for the comfort, support and miantenance of the plaintiffs and/or to provide for the education of Henry, Florence and Carolyn Swetland, or either of them, or to pay or cause to be paid to these plaintiffs any sums of money whatsoever under the terms and provisions of said declaration of trust, or otherwise; that said Trustee has continued since said October, 1927, to fail and refuse to apply, pay over and/or expend for the benefit, use, support, comfort and/or education of the plaintiffs, or any of them, any of the income received by said Trustee from the principal of said trust, or pay or cause to be paid to these plaintiffs any sums of money whatsoever for the education of said Henry, Florence or Carolyn Swetland, or for any other purpose; that the plaintiffs are now dependant upon the charity of friends and relatives for the necessities of life; that all of said facts were and are well known to said trustee.

XV.

That these plaintiffs are informed and believe and upon such information and belief allege,

that since the said Trustee and these plaintiffs became residents and inhabitants of the State of California, that the said Trustee has operated through and by and in the name of the Swetland Operating Company of California, Inc., a corporation, in various and sundry real estate transactions; that the defendant trustee is the sole owner of the entire capital stock of said corporation with the exception of qualifying shares held by directors thereof; that in pursuance of said plan of operation through, by and in the name of said Swetland Operating Company of California, Inc. the said trustee has misappropriated and converted large sums of the principal of said trust fund, the exact amount of which is to the plaintiffs unknown.

XVI.

Plaintiffs are informed and believe, and upon such information and belief allege, that the said trustee through and by and in the name of the Swetland Operating Company of California, Inc. has also invested in and purchased certain parcels of real property in the State of California; that in some instances the said trustee has caused the legal title to a portion of said real property so purchased by him, with a portion of the principal of said trust fund, to be taken in the name of the said Swetland Operating Company of California, Inc., that in other instances he has caused the legal title to certain portions of said real property so purchased by him with a portion of the principal of said trust fund to be taken in the name of the said trustee as an individual, to-wit: Maurice J. Swetland; that in some instances he has caused legal title to certain of the real property so purchased by

him with a portion of the principal of said trust fund to be taken in the name of Maurice J. Swetland, Trustee.

XVII.

That these plaintiffs are informed and believe, and upon such information and belief allege, that the following is a description of the aforesaid real property so purchased by the said trustee with a portion of the principal of said trust fund, so held by him in trust as aforesaid, together with the name of the record owner of each parcel, thereof, a description of the amount and character of the incumbrances thereon, and the name of the creditor alleged to be secured by said incumbrances, and the reasonable value of each of said parcels of land, to-wit:

(a) That certain piece or parcel of land described as follows:

> Lot 19, Tract 8445, recorded in the Official Records of Los Angeles County, California, in Book 94 at pages 17, 18 and 19 of Maps,

the legal title to which said parcel of land now appears of record in the name of Swetland Operating Company of California, Inc., as more fully and at large appears from the official records of the County of Los Angeles, State of California; that said parcel of land purports to be encumbered by a certain trust deed executed by Swetland Operating Company of California, Inc., to First Trust and Savings Bank of Pasadena, bearing seven per cent. interest, payable quarterly from April 26, 1928, to secure the payment of the sum of $25,000 which said trust deed now appears of record on the official records of Los Angeles County, State of California, at Book

8492, page 263; that the reasonable value of said parcel of land is $100,000.

(b) That certain piece or parcel of land described as follows:

> Lot 28, Tract 2762, recorded in the Official Records of Los Angeles County, California, in Book 30 at page 51 of Maps,

title to which said parcel of land now appears of record in the name of M. J. Swetland, as more fully and at large appears from official records of the County of Los Angeles, State of California; that said parcel of land purports to be encumbered by a certain mortgage executed by M. J. Swetland to Martin Thurin, bearing interest at eight per cent., payable quarterly from January 14, 1927, to secure the payment of the sum of $14,000 which said mortgage now appears of record on the official records of Los Angeles County, State of California, at Book 6928, page 65; that the reasonable value of said parcel of land is $30,000.

(c) That certain piece or parcel of land described as follows:

> Lot 60, Tract 2762, recorded in Official Records of Los Angeles County, California, in Book 30, page 51 of Maps,

title to which said parcel of land now appears of record in the name of M. J. Swetland, as more fully and at large appears from the official records of the County of Los Angeles, State of California; that said parcel of land purports to be encumbered by a certain mortgage executed by M. J. Swetland to Martin Thurin, bearing interest at seven per cent, payable semi-annually from April 1, 1926, to secure payment of the

sum of $2,500, which said mortgage now appears of record on the official records of Los Angeles County, State of California, at Book 5873, page 343; that the reasonable value of said parcel of land is $5,000.

(d) That certain piece or parcel of land described as follows:

Lot 61, Tract 2762, recorded in the Official Records of Los Angeles County, California, in Book 30, page 51 of Maps,

title to which said parcel of land now appears of record in the name of M. J. Swetland, as more fully and at large appears from the Official Records of the County of Los Angeles, State of California; that said parcel of land is encumbered by a certain mortgage executed by M. J. Swetland to John C. Bogardus, Jr., bearing interest at seven per cent., payable semi-annually from March 9, 1926, to secure the payment of the sum of $1,000, which said mortgage now appears of record on the Official Records of Los Angeles County, California, at Book 5836, page 237; said mortgage was assigned to Frederick Monhoff by written assignment, dated August 13, 1926, and recorded in the Official Records of Los Angeles County in Book 6380, at page 9; that the reasonable value of said parcel of land is $5,000.

(e) That certain piece or parcel of land described as follows:

Lot 62, Tract 2762, recorded in Official Records of Los Angeles County, California, in Book 30, page 51 of Maps,

title to which said parcel of land now appears of record in the name of M. J. Swetland, as

more fully and at large appears from the Official Records of the County of Los Angeles, State of California; that said parcel of land purports to be encumbered by a certain mortgage executed by M. J. Swetland to Samuel H. French and Ethel Webb French, bearing eight per cent. interest, payable quarterly from October 20, 1927, to secure the payment of the sum of $2,000, which said mortgage now appears of record on the official records of Los Angeles County, State of California, at Book 8001, page 155; that the reasonable value of said parcel of land is $10,000.

(f) That certain parcel of land described as follows:

> The Easterly 92 feet of that portion of the Grogan Tract, in the Rancho San Pasqual, described as follows: Beginning at the intersection of the North line of Altadena Drive with the Northerly prolongation of the East line of Tanoble Drive, as established by Deeds to the County of Los Angeles, recorded in Book 3931, page 236, and in Book 6566, page 309 of Deeds, respectively; thence North along said Northerly extention of the East line of Tanoble Drive, 225 feet; thence East parallel with said North line of Altadena Drive 200 feet; thence South parallel with said Northerly extensioin of the East line of Tanoble Drive, 225 feet to the North line of Altadena Drive; thence West along said line 200 feet, to the point of beginning,

title to which said parcel now appears of record in the name of M. J. Swetland, as more fully and at large appears from the Official Records

of the County of Los Angeles, State of California; that said parcel of land purports to be encumbered by a certain mortgage executed by M. J. Swetland to Jonathan R. Day and Mina S. Day, bearing interest at the rate of eight per cent. payable quarterly from October 15, 1927, to secure the payment of the sum of $4,000.00, which said mortgage now appears of record on Official Records of Los Angeles County, State of California, at Book 7991, page 59; that the reasonable value of said parcel of property is $10,000.00.

XVIII

That the said Trustee received the sum of Twenty-five Thousand Dollars ($25,000.00) cash by means of that certain mortgage described in subdivision (a) of Paragraph XVII hereof on or about April 26, 1928, and has paid therefrom the sum of approximately Three Thousand Dollars ($3,000.00) for the purpose of commissions and taxes; that the said trustee now has in his possession and under his control the proceeds of said mortgage; that the said trustee threatens to and will, unless restrained by the injunctive order of this court, convert and misappropriate the said proceeds of said mortgage to his own use and will encumber and/or dispose of the said parcels of land hereinbefore described in Paragraph XVII hereof, for cash or property and convert the same to his own use.

XIX

That all of said real and personal property described herein at all times mentioned in this complaint have been and now are held in trust for the benefit of these plaintiffs and defendant,

Maurice J. Swetland, as beneficiaries under the terms and provisions of said declaration of trust.

XX

That since the year 1926 and at all times thereafter to the date of the commencement of this action, so much of the principal of said trust fund as has been converted into cash by said trustee and so held by him in trust has been indiscriminately mixed and mingled by the said trustee with his own property, funds and moneys and such portion of said trust fund so held by said trustee as aforesaid has been and is now used by him as his own property and for his own purposes and subject to his exclusive dominion and control; that the principal of said trust fund so converted into cash as aforesaid by the said trustee has not been kept separate and apart or invested separately as the principal of the trust fund; that these plaintiffs have no means of ascertaining the exact amount of said principal of said trust fund converted and misappropriated by said trustee as aforesaid or the exact amount thereof now remaining in the possession and under the control of said trustee; that these plaintiffs are the owners of their respective proportionate shares of the principal of said trust fund and entitled to the same, in pursuance of and under the terms and provisions of said declaration of trust.

XXI

On information and belief, plaintiffs allege that the defendants First Trust and Savings Bank of Pasadena, a corporation; Pasadena Trust and Savings Bank, a corporation; United Securities Trust and Savings Bank, successor in interest to First National Bank in Redlands, and Mer-

chants National Trust and Savings Bank, a corporation, have on deposit, in their possession and custody, respectively, amounts of money which are a portion of the principal of said trust fund, the exact amounts of which are to these plaintiffs unknown, standing in the name of and to the credit of Maurice J. Swetland, M. J. Swetland, M. J. Swetland, Trustee; Maurice J. Swetland, Trustee and/or M. J. Swetland, Special, and/or Swetland Operating Company of California, Inc.; that said sums of money so held in custody of the said defendant banking corporations are subject to the order, check and draft of the said M. J. Swetland, either individually or in the capacities last hereinbefore set forth, and/or Swetland Operating Company of California, Inc.; that the said Maurice J. Swetland threatens to and will, unless restrained by the order of this court, withdraw the said moneys from the possession and custody of the said defendant banking corporations; that said banking corporations will pay the amount of said deposits on the order, check and draft of the said Maurice J. Swetland, either individually or in the capacities hereinbefore set forth, unless restrained by the injunctive order of this court; that plaintiffs will suffer great and irreparable injury unless the said Maurice J. Swetland, individually, and as trustee, said Swetland Operating Company, and said First Trust and Savings Bank of Pasadena, a corporation, Pasadena Trust & Savings Bank, a corporation, United Securities Trust & Savings Bank, successor in interest to First National Bank in Redlands, and Merchants National Trust & Savings Bank, a corporation, are each enjoined from drawing upon and/or paying out or disbursing any of said sums of money so on deposit.

XXII.

That it is provided in substance, among other things, in said Declaration of Trust, that should the said Maurice J. Swetland in any manner become disqualified to act as trustee thereunder, or in case of his death prior to the termination of the trust thereby created, then Horace M. Swetland shall become trustee to succeed the said Maurice J. Swetland, and in case of the disability or death of the said Horace M. Swetland prior to the termination of the trust, then Heman J. Redfield of Montclair, New Jersey, shall become the successor to either Maurice J. Swetland or Horace M. Swetland and in the event of the disability of the said Heman J. Redfield prior to the termination of the said trust the Montclair Trust Company of Montclair, New Jersey, is designated as the successor thereunder.

XXIII.

That the said Horace M. Swetland is deceased; that the said Heman J. Redfield is not a resident of the State of California but is now a resident of the State of New Jersey; that the said Montclair Trust Company of Montclair, New Jersey, is a Banking Corporation of the State of New Jersey; that plaintiffs are informed and believe, and upon such information and belief allege, that said Montclair Trust Company has not complied with the laws of the State of California with reference to foreign corporations doing business in the State of California and with reference to Trust Companies acting as trustees in the State of California; that none of the successor trustees named in said Declaration of Trust are qualified to act as trustees thereunder in the State of

California where the said trustee and the said beneficiaries thereunder now reside and where the remainder of the principal of said trust fund is now located.

XXIV.

Plaintiffs are informed and believe, and upon such information and belief allege, that on or about January, 1926, the defendant trustee paid to the defendant Bruce Mc Daniel, the sum of Thirty Thousand Dollars ($30,000.00) of the principal of said trust fund, which the said Bruce Mc Daniel then received with full knowledge of the terms and provisions of said Declaration of Trust; that he, the said Bruce Mc Daniel, then and well knew that said sum of Thirty Thousand Dollars ($30,000.00) so paid to him by the said defendant Trustee was so paid in violation of the terms and provisions of said Declaration of Trust and contrary thereto.

XXV.

Upon information and belief the plaintiffs allege that the entire stock of the said defendant Swetland Publications, Inc., a corporation, is owned by the defendant trustee, with the exception of qualifying shares held by the directors thereof; that said corporation is engaged in the business of publishing certain magazines and pamphlets, known as the Pacific International Exporter, Beauty Craft, and others, in the City of Los Angeles, State of California; that the defendant trustee has invested in the plant and equipment of said corporation and has expended for current expenses approximately the sum of $25,000.00 of the principal of said trust fund; that the entire plant, equipment, office furniture and fixtures, good will and publications of said

Swetland Publications, Inc. was purchased by the said trustee by and with funds of said trust, and the same are trust property.

XXVI.

That during the year 1926 the said Trustee purchased furniture for the said house, known as 801 Columbia Avenue, Pasadena, California, to the amount and of the value of $20,000.00, with a portion of the principal of said trust fund; that said furniture was and is now trust property; that said furniture has heretofore been and is now stored by the defendant trustee in the Crown Warehouse, at Pasadena, California, owned and operated by Crown Transfer & Storage Company, which claims some interest in and to said furniture by reason of storage charges upon said furniture; that said defendant threatens to and will remove said furniture from the State of California unless he be restrained therefrom by this court.

XXVII.

That during the three years last past each and all of the defendants received, had and/or now have in their possession or under their control, monies, funds and/or property, real or personal, belonging to said trust estate.

XXVIII.

That the true names of the defendants sued herein under the fictitious names of John Doe Brothers, a copartnership, John Doe and John Smith, copartners, John One, John Two, John Three, John Four, John Five, John Six, Mary One, Mary Two, Mary Three, Mary Four, ABD Company, a corporation, MNO Company, a corporation, XYZ Company, a corporation, are un-

known to plaintiffs and, therefore, plaintiffs pray that when their true names are ascertained that the same may be inserted herein in lieu of said fictitious names, and this complaint amended accordingly.

XXIX.

That the plaintiffs have no plain, speedy and adequate remedy at law in the premises for the injuries and wrongs herein set forth:

WHEREFORE, plaintiffs pray judgment:

(a) That this Court adjudge that the defendant, Maurice J. Swetland, individually and/or M. J. Swetland, Trustee, and/or Swetland Operating Company of California, Inc., a corporation, do hold the real property hereinbefore described, purchased with said trust funds, in trust, for the beneficiaries named in said Declaration of Trust, for the uses and purposes therein declared.

(b) That this court further adjudge that the defendant, Maurice J. Swetland, individually, and/or M. J. Swetland, Trustee, and/or Swetland Operating Company of California, Inc., a corporation, do hold the said cash proceeds of the said mortgage referred to in Paragraphs XVII and XVIII hereof, and any other real and/or personal property, which is now in his its or their possession or under their control, in trust, for the beneficiaries named in said declaration of trust, and for the uses and purposes *therin* declared.

(c) That the said Maurice J. Swetland be compelled by decree of this court to account to these plaintiffs for all of his dealings and transactions with the principal and income of said trust fund in whatsoever form the same may have been placed or may now be.

(d) That on such accounting the plaintiffs have and recover judgment against the said Maurice J. Swetland, individually, and as such trustee, for the amount of the plaintiffs proportionate share of the remainder of the whole principal of said trust fund which this Court shall ascertain has been misappropriated and converted by the said Maurice J. Swetland in whatsoever capacity he may have acted with respect thereto.

(e) That each and all of the defendants account to these plaintiffs for any and for all real or personal property, funds, and/or moneys had and received by them, respectively, from said Maurice J. Swetland and disclose to these plaintiffs any and all moneys and properties said defendants may have in their possession and/or under their control, belonging to or for the use or account of said Maurice J. Swetland, individually and/or as Trustee.

(f) That the plaintiffs be adjudged entitled to receive their proportionate shares of the principal of said trust fund in whatsoever form the same may now be, pursuant to the terms, provisions and limitations of said Declaration of Trust.

(g) That the said Maurice J. Swetland be removed by decree of this Court as such trustee under said declaration of trust and that some person or corporations qualified to act as such trustee under the laws of the State of California be appointed in the place and stead of said trustee to administer said trust and the principal and income thereof, pursuant to the terms, provisions and limitations of said Declaration of Trust.

(h) That a Receiver *pendente lite* be appointed herein by this court, with the usual powers of receivers, to take, hold, preserve, manage, operate, protect and do all other necessary and proper acts in the premises with respect to any of the principal of said trust fund which is subject to the jurisdiction of this court.

(i) That the defendants and each of them be enjoined and restrained by this court from drawing upon, paying, disbursing and/or transferring any funds or moneys on deposit with them or either of them, or under their control, to the said Maurice J. Swetland and/or Swetland Operating Company of California, Inc., and/or his or its agents, servants, employees, and/or assigns, or to the other or either of them.

(j) That the said Maurice J. Swetland and M. J. Swetland, Trustee, and/or Swetland Operating Company of California, Inc. be enjoined and restrained from disposing of or encumbering in any manner the real property hereinbefore described or any portion thereof, and that upon the final hearing of this cause the defendant, M. J. Swetland and Swetland Operating Company of California, Inc., be directed by decree of this court to make, execute and deliver to the successor trustee herein prayed for, good and sufficient deeds of conveyance, assignments and transfers, of all that certain real and personal property herein described and held by him as such trustee, in the several capacities herein set forth, and that upon his failure so to do this Court appoint its Commissioner for such purposes.

(k) That these plaintiffs have such other and further relief as to the court may appear meet

and just and that they recover their costs in this action.

ROBERT P. STEWART,
FLINT & MacKAY,

By ARTHUR R. SMILEY,
Attorneys for Plaintiffs.

"Exhibit A."

DECLARATION OF TRUST

THIS AGREEMENT made this 3rd day of January, 1922, by and between HORACE M. SWETLAND of Montclair, N. J., party of the first part, and MAURICE J. SWETLAND of Montclair, N. J., party of the second part:

WITNESSETH THAT

WHEREAS, it is the desire of both the parties to this agreement that definite and certain means shall continue to be provided for the comfort, support, and maintenance of the family of the party of the second part, and the education of his minor children, and

WHEREAS, the party of the first part has heretofore delivered to the party of the second part as trustee, certain shares of stock of the United Publishers Corporation for the uses and purposes above mentioned, and

WHEREAS, the party of the first part desires to increase the trust estate so held by the party of the second part, and

WHEREAS, the parties hereto by mutual consent wish to establish a new trust by substituting this agreement for the one now in effect, with-

out prejudice, but to the great advantage of the beneficiaries hereof;

Now, THEREFORE, in consideration of One Dollar ($1.00) each to the other paid, the receipt of which is hereby acknowledged, and of other good and valuable considerations each to the other moving, the parties hereto

AGREE

First: That the party of the first part shall and hereby does assign, sell, transfer and set over unto the party of the second part, all and singular, his right, title and interest in or to the following property, namely:

500 shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 204, to M. J. Swetland, Trustee.

250 shares United Publishers Corporation Class "B" preferred stock, represented by certificate No. 319 to M. J. Swetland, Trustee.

600 shares United Publishers Corporation Class "B" preferred stock, represented by certificate No. 357, to M. J. Swetland, Trustee.

700 shares Swetland Realty Co., Common Stock represented by certificate No. 34, to M. J. Swetland, Trustee.

1998 shares Publishers Securities Company Common stock, represented by certificate No. 1, to M. J. Swetland, Trustee.

$10,000 Note of Swetland Realty Co. dated November 1, 1917, payable January 1, 1918, and thereafter extended on demand, with interest at 5 per cent, payable to M. J. Swetland, Trustee.

Second: (a) The aforesaid transfers to said Maurice J. Swetland are IN TRUST, nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:

(b) It is expressly agreed by and between the parties hereto that any and all additions to the TRUST ESTATE shall be received by the said TRUSTEE for the purposes and uses and subject to all the terms and conditions of the TRUST hereby created, without the execution of any further or additional instrument of agreement.

(c) Upon payment of the note of the Swetland Realty Company, or, the redemption or sale of any of the stocks or other property of the TRUST ESTATE, the net proceeds thereof shall be reinvested by the TRUSTEE for the purposes of the TRUST:

(d) The income received from the principal of said Trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the survivor or survivors of them until such time as the youngest child of the party of the second part shall have reached the age of thirty years. In which event said Trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.

(e) The said Trustee shall not during the period of this trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or to charge or encumber

the corpus or principal of said trust fund or any part thereof or any beneficial interest therein.

Third: That when the youngest living child of said Maurice J. Swetland, party of the second part hereto, shall have attained the age of thirty years, the principal of this Trust and all additions thereto, making in total the net trust estate at the time aforesaid, shall be divided as follows:

(a) That portion of the trust estate represented by 1998 shares of the Publishers Securities Company Common Stock, standing in the name of Maurice J. Swetland, Trustee, shall be delivered to and become the personal property of Maurice J. Swetland, if living.

(b) The balance of the net estate at the time aforesaid, shall be divided equally between and paid to the wife of the party of the second part, if then living, and his children, and the living issue of any deceased child or children, and the living issue of such child or children shall receive in equal parts the share or part which his or her parent, as the case may be, would have taken if living at the time aforesaid.

(c) In the event of the death of the party of the second part, said Maurice J. Swetland, prior to the termination of this Trust, his share of the trust estate, specifically mentioned in Paragraph (A) of this Article, shall become a part of the net estate to be divided in accordance with Paragraph (b) of this Article.

(d) In the event of the death of the wife of the party of the second part before the termination of the Trust hereby created, her share shall become a part of the net trust estate, to be divided equally and paid to the children or the

living issue of the children of the party of the second part in accordance with Paragraph (b) of this Article.

(e) In the event of the death of all the beneficiaries hereunder, namely, the wife and children and the living issue of such children of the party of the second part, prior to the termination of the Trust hereby created, then and in that event, the net principal of this Trust Estate shall revert to and be paid over to the Corporation known as the Publishers Securities Company of Montclair, New Jersey, with the exception noted in Paragraph (a), that the number of shares of stock of said Publishers Securities Company forming a part of this trust estate, shall be delivered to and become the property of Maurice J. Swetland, if living, otherwise said shares shall revert to and become a part of the net trust estate, reverting to said Publishers Securities Company, as aforesaid.

Fourth: Should the said Maurice J. Swetland, party of the second part, in any manner become disqualified to act as trustee hereunder, or in case of his death prior to the termination of the Trust hereby created, then and in any such event, the party of the first part hereto, Horace M. Swetland, shall become and is hereby designated to succeed said Maurice J. Swetland as said trustee hereunder, and in case of the disability or death of the said Horace M. Swetland prior to the termination of the Trust hereby created, then in any such event, Heman J. Redfield of Montclair, New Jersey, shall become and is hereby designated as the successor to either Maurice J. Swetland or Horace M. Swetland, as the case may be, and in the event of the disability of the said Heman J. Redfield

prior to the termination of the Trust hereby created, the Montclair Trust Company of Montclair, New Jersey, is hereby designated as the successor hereunder and each shall have as such trustee the same powers and duties with respect to holding and administering said Trust.

Fifth: The receipts by the respective beneficiaries hereunder or their respective children, as the case may be, or the legal representatives of said children for their respective distributive shares of the said net trust fund, shall be full acquittance to said trustee of any and all claims of any kind or character upon the part of said beneficiaries or their respective children against the said Trust fund.

Sixth: By their signature hereto, the parties hereto expressly ratify all of the provisions hereof, which, prior to said signatures they have respectively read and considered, and the said Maurice J. Swetland accepts the trusteeship hereunder.

In Witness whereof, the parties hereto have hereunto set their hands and seals this third day of January, 1922.

(signed) H. M. SWETLAND
Party of the First Part

(signed) MAURICE J. SWETLAND
Party of the Second Part

Exhibit A—Proceedings in State of California.

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

BE IT REMEMBERED, that on this 3rd day of January, 1922, before me, L. F. DAY, personally appeared HORACE M. SWETLAND and MAURICE J. SWETLAND, who I am satisfied are the persons named in the foregoing agreement as the parties of the first and second part respectively, and to whom I first made known the contents thereof, and thereupon they severally duly acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

L. F. DAY
Notary Public

NOTARY PUBLIC, Queens Co. Clerks No. 123
Certificate filed in New York Co. No. 62
New York County Register's No. 2023.
Commission Expires March 30th, 1922.

STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES. } *ss.*

GRACE ELLIOTT SWETLAND being duly sworn, says: That she is One of the Plaintiffs in the within entitled action; that she has read the foregoing Complaint and knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated on her information or belief, and as to those matters that she believes it to be true.

GRACE ELLIOTT SWETLAND

Subscribed and sworn to before me
this 23rd day of July 1928

MARTHA S. DUBOIS
Notary Public in and for the
County of Los Angeles,
State of California.

(NOTARIAL
SEAL)

Formal orders of continuance were entered continuing the hearing upon the order to show cause and the application of Maurace J. Swetland, individually and as trustee, under the trust agreement, etc., upon his motion to dismiss under his special appearances from time to time from June 4, 1929, to September 10, 1929.

Answer of Defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors and Trustees under the Last Will and Testament of Horace M. Swetland, deceased.

Filed June 15, 1929.

The defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, answering the bill of complaint, say:

1. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the bill of complaint, except that they admit that Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, are children of the complainant, Grace E. Swetland and Maurice J. Swetland, and grandchildren of Horace M. Swetland, father of said Maurice J. Swetland.

2. They admit the execution of the trust agreement of July 14th, 1917, and aver that the same will speak for itself, and except as herein admitted, these defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 2 of the bill of complaint.

3. They admit the execution of the agreement of Janury 3rd, 1922, and aver that the same will speak for itself, and except as herein admitted, these defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the bill of complaint.

4. They admit paragraph 4 of the bill of complaint.

5. As to the allegations of paragraph 5 of the bill of complaint, these defendants say that the said last will and testament speaks for itself and for accuracy they beg to refer thereto.

6. They admit paragraphs 6, 7, 8, 9, 10, 11 and 12 of the bill of complaint.

7. As to the allegations set forth in paragraphs 13, 14 and 15 of the bill of complaint these defendants have no knowledge or information sufficient to form a belief.

8. They admit paragraph 16 of the bill of complaint.

9. They admit paragraph 17 of the bill of complaint, except that these defendants aver that said account, to which they beg to refer for accuracy, will speak for itself, and except further as to the allegations that complainants fear and firmly believe that unless the court intervenes the moneys referred to will not be paid and applied to the use of complainant, Grace E. Swetland, and the complainants, children of the said Maurice J. Swetland, but will be wrongfully and fraudulently misappropriated and expended by the said Maurice J. Swetland to his own use, to the irreparable loss and damage and injury of the complainants, these defendants have no knowledge or information sufficient to form a belief.

WHITING & MOORE,
Solicitors of Defendants,
Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors and Trustees under the last will and testament of Horace M. Swetland, deceased.

Replication.

REPLICATION.

Filed June 20, 1929.

Complainants join issue on the Answer of the defendants Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors of and Trustees under the Last Will and Testament of Horace M. Swetland, deceased.

LINDABURY, DEPUE & FAULKS,
Solicitors of Complainants.

CONCLUSIONS.

Filed January 21, 1930.

Lindabury, Depue & Faulks, for Complainant.

Merritt Lane, Esq., for Maurice J. Swetland, individually and as trustee.

Whiting & Moore, for defendants, The Executors and Trustees of Horace M. Swetland, deceased.

SYLLABUS.

1. As a general rule the *situs* of a trust of personalty created *inter vivos,* by gift to one person for the use of another, is at the domicile of the creator at the time of its creation and the laws of the state in which the trust has its *situs* determine its validity and control its administration.

2. The trustee of such a trust may be called to account in the jurisdiction of the *situs* of the trust notwithstanding he resides in a foreign jurisdiction.

3. Where it appears that such a trustee has wasted and misapplied the trust estate which has come into his possession, and he is entitled, under the will of the trustor, to receive additional assets bequeathed to him as trustee, an injunction will issue out of this court restraining the executors of that will from delivering such assets to the trustee pending an accounting by him in this court.

4. The sequestration act (Chapter 204 P. L. 1919, page 444) is remedial and is to be liberally construed to effectuate its purpose which is to subject the property of non-residents to the satisfaction of claims cognizable in a court of equity in analogy to attachment proceedings at law.

5. It contains no limitation upon the type of action in equity in which a writ of sequestration may issue, other than that it to be one in which a money decree is sought.

6. A special appearance on behalf of a non-resident defendant filed without leave of court for the purpose of a motion challenging the jurisdiction of the court because process was not served within the State, amounts to a general appearance in the cause.

BERRY, *V.-C.*:

This is a bill against Maurice J. Swetland, trustee, by the *cestuis que trustent* under a certain trust created by Horace M. Swetland in his lifetime, and alleges misappropriation and dissipation of the trust fund; seeks an accounting; the removal of the trustee, and the appointment a new trustee in his stead. Two trust agreements are involved in this controversy. The first is that of July 14, 1917 and the second that of January 3d, 1922.

Notwithstanding there are two declarations of trust there is in effect but one trust to be administered. The purpose of the second declaration was not to destroy the trust created by the first but "to increase the trust estate" and was "without prejudice, but to the great advantage of the beneficiaries" of the trust as established by the first declaration.

Under the will of Horace M. Swetland, deceased, which was construed by this court in *Swetland* v. *Swetland,* 100 N. J. Eq. 196 (affirmed 6 N. J. Adv. Repts. 360, 140 Atl. 279) and because of intestacy with respect to surplus income, the trustee defendant is presently entitled to approximately $18,000 from the net income of the Swetland Estate. He will be eventually entitled,

upon the death of the life beneficiaries, to a very substantial interest in the corpus of that estate. Among other things, besides an accounting, this bill seeks to restrain the executors and trustees of the Swetland Estate from paying over to the defendant, individually, any commissions to which he may be entitled as one of the trustees under the Swetland will, and, as trustee of the trust created by Horace M. Swetland in his lifetime, any of the income or principal of the Swetland estate to which he, as such trustee, may now be or hereafter become entitled, and the bill prays a money decree against the defendant trustee for such sums as upon such accounting may be found to be due from the trustee individually to the trust estate. Upon this application it may be considered that the trustee defendant has been unfaithful to his trust and has dissipated the entire trust estate which has come into his possession, no answering affidavits denying the charges of unfaithfulness and misappropriation having been filed. His defense upon the return of this order to show cause is based upon technical grounds and is a challenge to the jurisdiction of this court.

Maurice J. Swetland, the defendant trustee, is a non-resident of the state of New Jersey, presently residing in Connecticut, and service of this order to show cause was had upon him by mail, and process of subpoena, by publication. A writ of sequestration was also issued herein upon application of the complainants and the interest of this defendant in the Horace M. Swetland estate was duly sequestered. His counsel has, without leave of court, filed a special appearance in his behalf on the return of the order to show cause, for the purpose of interposing an

objection to the jurisdiction and moving to quash the service of the order to show cause and process, and to discharge the writ of sequestration.

The attack upon the jurisdiction of this court is based upon the fact that the defendant trustee is a non-resident and the contention that therefore the service of the order to show cause and the subpoena in this cause in the manner stated confers no jurisdiction over the person of this defendant; and that the trust under the 1917 and 1922 agreements has no *situs* in the state of New Jersey, and that only a court of the state in which the trust has its *situs,* or which has jurisdiction of the person of the defendant trustee, can require him to account; and that jurisdiction cannot be obtained in this court by the issuance and execution of a writ of sequestration in this cause. These objections raise the following questions:

1. *What is the situs of the trust under the* 1917 *and* 1922 *agreements?*

2. *Is the writ of sequestration issued herein good as against this defendant and does it bind the property seized by the officer by whom the writ was executed?*

3. *Does the filing of a special appearance without leave of court amount to a general appearance in the cause?*

These questions will be considered in the order stated.

Other questions were raised in the arguments of counsel, but in view of my conclusions on the questions above recited, I deem it unnecessary to discuss them.

At the time of the creation of this trust and the execution of both trust agreements, Horace

M. Swetland, the creator, was a resident of and domiciled in the State of New Jersey. This appeared conclusively in the will construction case (*Swetland* v. *Swetland, supra*), to which I have already referred. His residence in this state appears also from recitals in the trust agreements. The defendant trustee was then a resident of and domiciled in New Jersey, as were all the beneficiaries of that trust, and three successor trustees named in the 1922 trust agreement were respectively the trustor himself; a resident of Montclair, New Jersey, and a New Jersey trust company. The entire corpus of the trust fund as established by these agreements consisted of personal property. The trust agreements were executed in New York. Certain substantial additions to this trust were made by the creator by his will and it was the validity of this bequest that constituted the main issue in the will construction case.

That bequest was held valid, not on the ground of incorporation by reference (that question not being decided either by this court or the Court of Errors and Appeals), but irrespective of that rule, and because by the bequest the testator had merely added other property to a trust fund previously established under a valid, active, subsisting trust, and it was held that the "trustee-legatee" was a distinct and definite entity. It was *not* held, as is asserted by counsel for the defendant trustee. that the trust itself was a distinct and definite entity. It is on this erroneous assertion of the court's decision in the will construction case that the defendant's counsel bases his argument of analogy to continuous charitable trusts with a legal habitation in a foreign state. It is contended that the doctrine theretofore applica-

ble only to charitable trusts was by that decision extended to *inter vivos* trusts not charitable in their nature. The fallacy of this argument is clear and the analogy fails when it is realized that it is based upon a false premise. The reason for the rule as applied to charitable trusts is clearly stated by Vice-Chancellor Reed in *Rosenbaum* v. *Garrett*, 57 N. J. Eq. 186, 41 Atl. 252, where he distinguishes charitable trusts from the ordinary trust created by a gift to one person for the use of another.

The rule of law is well settled that the courts of the testator's domicile and of the state in which the will is probated have primary jurisdiction over testamentary trusts. *McCullough's Executors* v. *McCullough*, 44 N. J. Eq. 313; *Marsh* v. *Marsh's Executors*, 73 N. J. Eq. 99; *Davis* v. *Davis*, 57 N. J. Eq. 252; *Murphy* v. *Morrisey & Walker*, 99 N. J. Eq. 238; *Hewitt* v. *Green*, 77 N. J. Eq. 345;

It is contended that the rule as to testamentary trusts has no application to trusts created *inter vivos*. The reason for the rule with respect to testamentary trusts is based upon the fact that personal property has its *situs* at the domicile of the owner. *Mobilio sequunter personam.* And a testamentary disposition of personality must be in accordance with the laws of testator's residence and domicile *at the time the will becomes effective*. *Murphy* v. *Morrisey & Walker, supra.* The same reasoning which results in that rule suggests that the validity and *situs* of trusts *inter vivos* are determined by the law of the domicile of the settlor or creator *at the date of the execution of the trust instrument.* 39 Cyc. 194; *Mercer* v. *Buchanan*, 132 Fed. Rep. 501; *Liberty National Bank and Trust Company* v. *New*

England Investors, 25 Fed. rep. (2d Ed.) 493; *Maynard* v. *Farmers' Loan and Trust Company*, 203 N. Y. Supp. 83. Either of these rules applied to the trust here under consideration would fix the *situs* of the trust in New Jersey and render its administration subject to New Jersey laws.

In Massachusetts it has been suggested that the *situs* of an *inter vivos* trust is a question of intention of the creator. *Greenough, et als.* v. *Osgood, et als.*, 126 N. E. 461. If intention were to govern in the case at bar, evidence of the intention of the creator to fix the *situs* of this trust in New Jersey is abundant. The creator, the trustee, all of the *cestuis que trustent,* and the successor trustees named in the trust declaration, of which the trustor himself was one, were then domiciled in New Jersey, and one of the successor trustees is a New Jersey trust company. The corpus of the trust consisted entirely of personal property and under certain circumstances the entire corpus of the 1917 trust reverted to the creator and became a part of his residuary estate disposed of by his will, a clear indication that the creator of this trust intended that it should be governed by the same laws as controlled the testamentary disposition of his property. But the safer rule, it seems to me, is to hold that the *situs* of an *inter vivos* trust of personality is at the domicile of the creator because "*mobilia sequuntur personam.*" By the application of this rule there seldom can be any difficulty of construction or conflict of authority. But like all general rules it is probably not without its exceptions. 1 *Perry on Trusts* (3d Ed.), page 60, Sec. 72 a. One of the exceptions is a charitable trust. In the Massachu

setts case the trust estate consisted largely of realty and mortgages on realty located in Massachusetts, and the declaration of trust provided that in certain contingencies the property should go to the person entitled thereto by the laws of that commonwealth, compelling circumstances in fixing the *situs* of the trust. I do not consider *Lines* v. *Lines*, 142 Pa. St. 149, 21 Atl. Rep. 809, as in any way controlling. It does not appear from the report of that case where the trustor was domiciled when the trust deed was executed. See 39 Cyc. 194, title "Trusts," Sec. III, Subsec. A. par. 2.

It is suggested on behalf of the defendant trustee, that the *situs* of a trust of personalty not testamentary in character is shifting and changes with every change in domicile of the trustee which is accompanied by a change of the location of the trust property itself. I cannot accede to that doctrine; but irrespective of its soundness it cannot be applied to such portion of the trust *res* as still remains in the jurisdiction of the original *situs* of the trust. Two general propositions, it seems to me, are clear: that a trust of personalty has its *situs* at the domicile of the creator at the time of its creation, and that the courts of the *situs* of the trust have jurisdiction to direct its administration and to require the trustee to account; and that a trustee may be called upon to account in any jurisdiction where he may be found because a court of equity acts *in personam*. Jurisdiction in the latter class of cases is exercised without regard to the *situs* of the trust property. *Lindley* v. *O'Reilly*, 50 N. J. L. 636; 28 Am. & Eng. Enc. of Law, p. 1100; *Godefroi On Trusts and Trustees* (5th Eng. Ed.), p. 641.

I think it clear, that the law of testator's domicile applies as well to an *inter vivos* trust as to a testamentary trust. 1 *Perry on Trusts,* pp. 53-54, Sec. 71; 26 R. C. L. p. 1170, Title "Trusts" Sec. 3; *Cross* v. *United States Trust Company* (N. Y. Court of Appeals 1892) 30 N. E. Rep. 125; *Buck* v. *Beach,* 206 U. S. 392; *Blodgett* v. *Silberman,* 277 U. S. 1; *Bullen* v. *Wisconsin,* 240 U. S. 625; *Chase* v. *Chase,* 2 Allen, 101.

And it has been held that if the trust property is within the jurisdiction of the court it may be dealt with in enforcement of the trust regardless of the residence of the trustee. *DePuy* v. *Mineral Company,* 88 Maine, 202; 33 Atl. Rep. 976; *Gossert* v. *Strong,* 38 Montana, 18; 98 Pacific Reporter 497. It will be bore in mind that a substantial portion of the trust *res* here involved is now within this state. All of the personal assets of the estate of Horace M. Swetland, deceased, are in the hands of the executors and trustees of that estate, and therefore subject to the jurisdiction of this court.

In England, if either the trustees or the trust property is within the jurisdiction that is sufficient. *Lewin on Trusts,* page 41, noted.

The bequest in the Swetland will to Maurice J. Swetland, trustee, is under the 1917 trust. On this application it is to be taken as a fact that all of the corpus of that trust, except that yet coming from the Swetland estate under the will, has been wasted and dissipated. It follows, therefore, that the only remaining assets of this trust estate are those which are in the hands of the executors and trustees under that will. Therefore, the entire balance of the trust estate is under the control of the courts of this juris-

diction. In view of the misapplication of these trust funds by the defendant trustee, it may be considered as a practical certainty that if the funds now within the control of our courts are turned over to him by the executors of the Swetland estate, those funds will also be misapplied and wasted. To deny this court's right or power to prevent the delivery to the defaulting trustee of what now constitutes the sole assets of this trust estate would be a monstrous doctrine. The general equity jurisdiction of this court over trustees and their administration applies as well to trusts *inter vivos* as to testamentary trusts. And if specific authority were needed for the exercise of jurisdiction to prevent further dissipation of this trust estate, it may be found in the decisions of this court (*Conover* v. *Fischer,* 36 Atl. Rep. 948; *Tappan's Executor* v. *Ricamio, et als.* 16 N. J. Eq. 89) and the decisions of other jurisdictions (*Chase* v. *Chase* (Supreme Court of Massachusetts), 2 Allen, 101). And "in suits by a beneficiary against his trustee, an injunction, if needed, will be granted as a matter of course" to restrain violations of the trust. 4 *Pomeroy's Equity Jurisprudence,* Sec. 1687.

In *Drummond* v. *Drummond,* Law Reports, 2 Chancery Appeals, 32-35, it was said:

> "Much confusion has arisen by treating want of power to enforce jurisdiction as tantamount to want of jurisdiction."

Counsel for complainant states the proposition thus:

> "Much confusion has arisen through failure to distinguish the two principal meanings of the word 'jurisdiction'; namely, power to deal with the person of the defendant and

power to deal with the subject matters of the suit."

Irrespective of the *situs* of the trust, if the subject matter of the suit is under the control of the court by virtue of the sequestration proceedings, the court may enforce its decree. And it is conceded by counsel for the defendant trustee that if the court has jurisdiction of the subject matter of the suit in the sense that it has jurisdiction over the administration of the trust, because the trust arose under our law and has its *situs* here, the court may obtain jurisdiction of the defendant by substituted service or by seizure of property. In *Redzina* v. *Provident Institution,* 96 N. J. Eq. 346, the Court of Errors and Appeals said:

"A state and its courts have power and jurisdiction over all things, tangible and intangible, whose *situs* is within its physical limits. * * * It follows, then, that where there is a *res* within the borders of the state, against which a judgment in *rem* or *quasi in rem* may be taken, the constitutional requirements, both of notice to parties, and of power in the courts, are met."

See also *Amparo Mining Company* v. *Fidelity Trust Company,* 74 N. J. Eq. 197; affirmed 75 N. J. Eq. 555, and *Wilson* v. *American Palace Car Company,* 65 N. J. Eq. 730 (E & A).

Defendant urges that an *inter vivos* trust is a mere contract and that, therefore, the place of its execution and delivery should determine the law by which it is administered. This is inaccurate. He has confused the *lex loci* with the *lex fori* or the *lex rei sitae.* The relationships created by a trust agreement are far different

from those created by a mere contract for the benefit of a third person. The rights of the *cestui que trust* were enforceable against a trustee long before the obligor of a simple contract could be held answerable to a third party beneficiary. Defendant's citations from *Beale's* tentative draft on the "Conflict of Laws" prepared under the direction of the American Law Institute, are inapplicable; nor, if applicable, would they be helpful to the defendant. The language of Section 320 of that draft merely indicates the result of a court acting *in personam* in a suit against a trustee. But that does not prevent the courts of the state in which the trust has its *situs* from acting *in rem* so long as any of the trust *res* remains within that jurisdiction; and if by attaching this *res* in sequestration proceedings the court obtains jurisdiction of the defendant in the suit, it has jurisdiction to compel an accounting. Not having control of the person of the trustee, it may not be able to enforce its decree beyond what the defendant's property sequestered will satisfy; but that does not prevent an adjudication of rights asserted on the one hand and denied on the other, where the defendant has been offered an opportunity to be heard and has refused the offer. The law of the state in which a contract is executed does not, however, always govern its performance. The law of the place of performance, unless otherwise indicated in the contract, undoubtedly must determine what constitutes performance and what constitutes a breach of the contract. *Da Costa* v. *Davis,* 24 N. J. L. 319, 331; *Healy* v. *Gorman,* 15 N. J. L. 328; *Cox* v. *United States* 31 U. S. 172; *Hicks* v. *Guinness,* 269 U. S. 71; *Stebbins* v. *Leonwolf,* 57 Mass. 137; *Tarbox* v.

Childs, 165 Mass. 408; *Richard* v. *American Union Bank,* 241 N. Y. 163; *Knoup* v. *Carver,* 70 Atl. Rep. 660; *Hunkly* v. *Freick,* 86 N. J. L. 281.

The fact that the trust agreement was executed in New York is not, therefore, controlling. If the trust *situs* were in New York, it is possible that the trust might be illegal as in violation of the New York rule against perpetuities, although it has been already determined to be a valid trust (*Swetland* v. *Swetland, supra*) and is not violative of the New Jersey rule against perpetuities.

II.

The next question to be considered is that concerning the writ of sequestration. The writ was issued pursuant to the sequestration act. P. L. 1919, page 444, 1 C. S. to C. S. p. 261, Title "Chancery", Subject 33, Section 52 a. That act is very broad and there is no limitation put upon the type of action in equity in which a writ of sequestration may properly issue other than that it be one in which a money decree is sought. *Frank* v. *H. E. Salzburg Company, Inc.,* 140 Atl. 241, 6 N. J. Adv. Repts. 59. There is no doubt but that a money decree is sought in this suit for the amount which the defendant trustee may owe to the trust estate by reason of his alleged defalcations. Section 15 of the Act (1 C. S. to C. S. Sec. 52 o) provides "This act is remedial and is to be liberally construed. Its purpose is to subject the property of non-residents to the satisfaction of claims cognizable in a court of equity *in analogy to attachment proceedings at law*". (Italics mine). In view of what I have already held with respect to the *situs* of the trust here involved a decision of

the question as to the validity of the writ of sequestration may seem unimportant, but since it is contended that an action for an accounting does not lie against the defendant because jurisdiction over his person has not been obtained, the point should be decided. It is precisely such a defect in our chancery procedure which it was the purpose of the Sequestration Act to remedy by permitting seizure of an absent defendant's property situated within the state prior to the entry of a final decree, in analogy to attachment proceedings at law, thereby converting such an action into one *quasi in rem.* The requirements of "due process" as laid down by the courts of this state and of the United States are fully met in this statute. *Amparo Mining Company* v. *Fidelity Trust Company, supra,* affirmed 75 N. J. Eq. 555; *Wilson* v. *American Palace Car Company, supra; Sohege* v. *Singer Manufacturing Company,* 73 N. J. Eq. 567; *Pennoyer* v. *Neff,* 95 U. S. 714.

It cannot be denied that the defendant, both individually and as trustee, has a vested interest in the estate of Horace M. Swetland, deceased. The corpus of that estate and the defendant's undivided interest therein constitute a *res* within this state and subject to the control and disposition of our courts. This applies also to his interest in the fees allowed to the executors and trustees of the Swetland Estate on the present accounting in the Prerogative Court. This *res* has been seized under the Sequestration Act and there is no doubt of its liability to satisfy any money decree which may be made in this suit against the defendant.

III.

It is contended by the complainant that the special appearances filed on behalf of the defendant, individually and as trustee, are, in effect, general appearance, and, because filed without leave of court, subject him personally to the court's jurisdiction. Undoubtedly under the English practice a special appearance for the purpose of objecting to the jurisdiction of the court because of improper service of process could be made only by leave of court. 1 *Daniels Chancery Pleading and Practice,* 4th Ed., p. 453 and note; pp. 512, 536, 537. Such leave was usually granted upon condition that if the motion was denied the special appearance was to stand as a general appearance. *Ibid.* This practice seems to have been uniformly followed in this state. *Hervey* v. *Hervey*, 56 N. J. Eq. 166; *Groel* v. *United Electric Company*, 69 N. J. Eq. 397; *Ewald* v. *Ortynsky*, 77 N. J. Eq. 76, affirmed 78 N. J. Eq. 527; *Allman* v. *United Brotherhood*, 79 N. J. Eq. 150, affirmed 79 N. J. Eq. 641; *Meller* v. *Kaighan*, 87 N. J. Law, 543; *McVoy* v. *Baumann*, 93 N. J. Eq. 360; *Spoor-Thompson Company* v. *Bennett*, 105 N. J. Eq. 108. Where the jurisdiction over the person or thing, as distinguished from service of process, was attacked, it formerly could be raised by plea to the jurisdiction, filed without leave, before such pleas were abolished. *Wilson* v. *American Palace Car Company, supra; Puster* v. *Parker Mercantile Company*, 70 N. J. Eq. 771; *Groel* v. *United Electric Company, supra; Sohege* v. *Singer Manufacturing Company, supra; Ewald* v. *Ortynsky, supra; Brimberg* v. *Hartenfeld Bag Company,* 89 N. J. Eq. 425, and, I have no doubt, may still be raised by answer under our present

practice. *Chancery Rules* 67 and 68, *McVoy* v. *Baumann, supra.* But where the question is raised by answer and the defense thus presented is held ineffective, the result would be the same as upon a motion addressed to the jurisdiction under a conditional appearance. Counsel for the defendant trustee argues that there is no case in New Jersey which holds that a special appearance filed without leave of court amounts to a general appearance, and that there is but one cause, namely, *McVoy* v. *Baumann, supra,* where a conditional appearance was required. In *Hervey* v. *Hervey, supra,* it was stated that the proper practice was to require a conditional appearance, and this doctrine has been re-asserted as late as June, 1929, by Vice-Chancellor Fallon in *Spoor-Thompson Company* v. *Bennett, supra;* and in *Allman* v. *United Brotherhood, supra,* Vice-Chancellor Walker (now Chancellor), said:

> "And if the defendant desires to appear specially for the purpose of making the motion to dissolve only and not to have his appearance operate to clothe the court with jurisdiction over him generally in the suit, he must doubtless obtain leave of the court to enter such appearance."

As this decision was affirmed by the Court of Errors and Appeals on the opinion below, it seems to me that I have no alternative but to assume that this language was approved by the Court of Errors and Appeals and I feel that I am bound by it, irrespective of what the rule may be in the Federal or other jurisdictions. It is true that in *Laure* v. *Singer,* 100 N. J. L. 98, at page 102 the Chancellor said:

> "It may be that the entry of a special appearance, for the sole purpose of objecting

to the jurisdiction would be good without leave of court for that purpose obtained."

But I consider that as in no way affecting his previous statement in the *Allman* case, as in the latter case he was not called upon to say what would have been the effect of a special appearance filed without leave of court. So far as this court is concerned, I consider it settled that a special appearance for the purpose of addressing a motion to the jurisdiction of the court, filed without leave, amounts to a general appearance. And it is my understanding of the law that this was always so where the question was one of jurisdiction over the person arising out of service of process. This discussion is, perhaps, more or less academic in view of the fact that I have already held the *situs* of the trust here involved to be in New Jersey.

I will advise an order in accordance with these conclusions.

January 21, 1930.

ORDER DENYING MOTIONS.

Filed February 18, 1930.

This matter coming on to be heard in the presence of Messrs. Lindabury, Depue & Faulks, of counsel for the complainants, Messrs. Whiting & Moore of counsel for the defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, and Merritt Lane, Esq., appearing on behalf of the defendant, Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922, respectively, under a special appearance filed without leave of court, and it appearing that the Order to Show Cause entered on May 14, 1929 was duly served upon the defendant Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922, respectively, by mailing a copy of said Order to Show Cause, together with a copy of the bill of complaint, attached exhibits and affidavits to him postage prepaid at Waterbury Road, Southbury, Connecticut, his last known post-office address on May 16, 1929; and it further appearing that on May 16, 1929 Messrs. Whiting & Moore on behalf of defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, acknowledged service of a true copy of the bill of complaint and attached exhibits and affidavits and the said Order to Show Cause; and it further appearing that on June 4, 1929 an Order for Publication against the defendant Maurice J.

Swetland, individually and as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922, respectively, was made, whereby he was adjudged an absent defendant and ordered to appear and answer the complainants' bill of complaint on or before August 5, 1929, and pursuant to the terms of said Order of Publication notice thereof was duly published in the Newark Evening News, one of the public newspapers printed and published in the City of Newark in this State for four times for four consecutive calendar weeks at least once in each week, and a copy of said notice was on June 8, 1929 mailed to the said Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922, respectively, postage prepaid directed to him at Waterbury Road, Southbury, Connecticut, the post-office nearest his residence at which he usually received his letters; and it further appearing that on June 4, 1929 the said Maurice J. Swetland, individually and as trustee under the trust agreements of July 14, 1917 and January 3, 1922 filed, without leave of this Court, special appearances questioning the jurisdiction of this Court to compel him to appear in accordance with any process of this Court issued in this cause or to make any answer to said bill of complaint and praying that the Order to Show Cause and the writ of sequestration issued in this cause might be vacated and set aside, and that as to him the bill of complaint be dismissed; and no motion having been made to quash or strike out such special appearance and the Court having considered the bill of complaint and affidavits attached thereto and the special appearances and motions filed as aforesaid on behalf

of Maurice J. Swetland, individually and as trustee under the trust agreements of July 14, 1917 and January 3, 1922, respectively, and the arguments and briefs of counsel for the respective parties;

It Is on this 18th day of February, 1930 on motion of Messrs. Lindabury, Depue & Faulks ORDERED that the motions of the defendant, Maurice J. Swetland, individually and as trustee under the trust agreement of July 14, 1917 and January 3, 1922 respectively appearing as aforesaid to vacate the Order to Show Cause heretofore made in this cause on May 14, 1929 and the writ of sequestration issued against him in this cause on May 15, 1929 and to dismiss the bill of complaint as to him, be and the same are each denied, with costs to the complainants as against the defendant, Maurice J. Swetland, individually;

And It Is Futher Ordered that the said Maurice J. Swetland, individually and as trustee under the trust agreements of July 14, 1917 and Janury 3, 1922 be adjudged to have appeared generally in this cause and that he answer or make such motion as he may be advised with respect to the bill of complaint herein on or before the 18th day of March 1930, or in default therof complainants' bill shall be taken as confessed against him and such decree shall be made against the said Maurice J. Swetland, individually and as trustee under the trust agreements dated July 14, 1917 and January 3, 1922,

respectively, as the Chancellor shall deem just and equitable.

E. R. WALKER,
C.

Respectfully advised

MAJA LEON BERRY,
V.-C.

Service of a certified copy of the foregoing order acknowledged by Messrs. Whiting & Moore and Merritt Lane, Esq., on behalf of all defendants on March 10, 1930.

ORDER FOR PRELIMINARY INJUNCTION.

Filed February 18, 1930.

This matter coming on to be heard upon the Order to Show Cause heretofore allowed in the above cause on May 14, 1929 in the presence of Messrs. Lindabury, Depue & Faulks, of counsel for the complainants, Messrs. Whiting & Moore, of counsel for the defendants Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors and trustees under the Last Will and Testament of Horace M. Swetland, deceased, and Merritt Lane, Esq., appearing under a special appearance filed without leave of the Court on behalf of the defendant Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922, and it appearing that the said Order to Show Cause was duly served upon the defendant, Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917 and January 3, 1922, respectively, by mailing a copy of said Order to Show Cause, together with a copy of the bill of complaint, attached exhibits and affidavits to him postage prepaid at Waterbury Road, Southbury, Connecticut, his last known post-office address on May 16, 1929; and it further appearing that on May 16, 1929 Messrs. Whiting & Moore, on behalf of defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, acknowledged service of a true copy of the bill of complaint and attached exhibits and affidavits and the said Order to Show Cause; and the Court having read and consid-

ered the bill of complaint and the affidavits attached thereto and having considered the arguments and briefs of counsel for the respective parties;

It is on this 18th day of February, 1930 on motion of Messrs. Lindabury, Depue & Faulks, ORDERED that the defendants Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, be and they are hereby enjoined and restrained from paying over and delivering to the said Maurice J. Swetland, individually, or as trustee under the said trust agreement of July 14, 1917, and/or the said trust agreement of January 3, 1922, and the said Maurice J. Swetland, individually, and as trustee under the said trust agreement of July 14, 1917 and/or the said trust agreement of January 3, 1922, from receiving any moneys or other property of any kind, character or description from the estate of the said Horace M. Swetland, deceased.

E. R. WALKER,
C.

Respectfully advised,

Maja Leon Berry,
V.-C.

Service of a certified copy of the foregoing order was acknowledged by Messrs. Whiting & Moore and Merritt Lane, Esq., on behalf of all defendants on March 10, 1930.

Affidavit of Mailing.

Affidavit of Mailing.

Filed March 11, 1930.

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

MAHLON M. MEIER, of full age being duly sworn according to law upon his oath deposes and says:

I am an attorney at law of the State of New Jersey and am employed in the office of Messrs. Lindabury, Depue & Faulks, solicitors for the complainants in the above cause.

On March 10, 1930 I mailed certified copies of the Order for Preliminary Injunction and Order on Motion to the Jurisdiction, which Orders were entered on February 18, 1930, to the defendant, Maurice J. Swetland, individually and as trustee under certain Trust Agreements dated July 14, 1917 and January 3, 1922, respectively, by depositing the same in the United States mail in the City of Newark, with postage prepaid thereon and directed to the said Maurice J. Swetland, c/o General Delivery, Washington, D. C., his last known post office address.

MAHLON M. MEIER.

Sworn to and subscribed before me
this 10th day of March, 1930.

HAROLD J. BROWN,
(SEAL) Notary Public of New Jersey.

Notice of Appeal.

NOTICE OF APPEAL.

Filed March 14, 1930.

The defendant, Maurice J. Swetland, trustee under the trust instrument of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, hereby appeals from the whole and every part of the order made in the above-entitled cause by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Hon. Maja Leon Berry, Vice-Chancellor, bearing date the 18th day of February, 1930, enjoining and restraining Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as executors, from paying over and delivering to the said Maurice J. Swetland, individually, and as trustee, any moneys or property, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

MERRITT LANE,
Solicitor of Defendant,
Maurice J. Swetland, Trustee, etc.

Dated March 10, 1930.

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

MERRITT LANE,
Of Counsel.

Service duly acknowledged for all respondents on March 11, 1930.

Notice of Appeal.

NOTICE OF APPEAL.

Filed March 14, 1930.

The defendant, Maurice J. Swetland, trustee under the trust instrument of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, hereby appeals from the whole and every part of the order made in this cause by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of the Hon. Maja Leon Berry, Vice-Chancellor, bearing date the 18th day of February, 1930, denying the motions of the defendant Maurice J. Swetland, trustee under the trust instrument of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, to vacate the order to show cause theretofore made in this cause, and to vacate the writ of sequestration to the New Jersey Court of Errors and Appeals in the last resort in all causes.

MERRITT LANE,
Solicitor of Defendant,
Maurice J. Swetland, Trustee, etc.

Dated March 10, 1930.

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

MERRITT LANE,
Of Counsel.

Service duly acknowledged for all respondents on March 11, 1930.

PETITION OF APPEAL.

Filed March 14, 1930.

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

The humble petition of Maurice J. Swetland, trustee under a certain trust agreement of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Hon. Maja Leon Berry, Vice-Chancellor, bearing date the 18th day of February, 1930, in a cause wherein Grace E. Swetland, *et als.*, were complainants and Maurice J. Swetland, *et als.*, were defendants, in this respect to wit: that the said order enjoins and restrains the defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, from paying over and delivering to appellant, and enjoins appellant from receiving, any moneys or other property of any kind, character or description from the estate of the said Horace M. Swetland, deceased. And your petitioner humbly appeals from such portions of said order which decree as aforesaid upon the ground that the same is erroneous for that your petitioner had filed a special appearance in said cause setting up that the said Court of Chancery had obtained no jurisdiction over this defendant and that he could not be brought into court by publication or by writ of sequestra-

tion as was attempted, he not being a resident or inhabitant of this State and not having been served with process within this State, and the court having no jurisdiction over the trusts their situs not being within this State, and having moved to vacate the order to show cause and to set aside the writ of sequestration as to him and which said motions the said court should have granted for the reasons stated therein and if said court had granted said motions the injunctive relief granted by the order of February 18, 1930 could not have been given because appellant would not be before the Court; and said order is further erroneous because the court had no power or control over the trusts and had no jurisdiction to make such order and because the facts before the court did not warrant said order.

Your petitioner therefore prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

MERRITT LANE,
Solicitor for and of Counsel
with Maurice J. Swetland, Trustee, etc.

Service duly acknowledged for respondents on March 11, 1930.

Formal answer to petition of appeal filed March 22, 1930.

PETITION OF APPEAL.

Filed March 14, 1930.

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

The humble petition of Maurice J. Swetland, trustee under a certain trust agreement of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, the appellant in the above-stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Hon. Maja Leon Berry, Vice-Chancellor, bearing date the 18th day of February, 1930, in a cause wherein Grace E. Swetland, *et als.*, were complainants, and Maurice J. Swetland, *et als.*, were defendants, in this respect, to wit: That the said order denies the motions of appellant Maurice J. Swetland, to vacate the order to show cause made in the cause on May 14, 1929, and to vacate the writ of sequestration issued in the cause on May 15, 1929, and to dismiss the bill of complaint as to him; and in this respect, to wit: That the said order awards costs to the complainants as against the defendant Maurice J. Swetland, individually; and in this respect, to wit: That the said order adjudicates that the said Maurice J. Swetland, individually and as trustee as aforesaid, has appeared generally in this cause and that he answer or make such motion as he may be advised with respect to the bill of complaint on or before the 18th day of March, 1930, or that in default complainants' bill shall be taken as confessed against him and

that such decree shall be made against the said Maurice J. Swetland, individually and as trustee under the trust agreements dated July 14, 1917, and January 3, 1922, respectively, as the Chancellor shall deem just and equitable. And your petitioner humbly appeals from such portions of the said order which decree as aforesaid, upon the ground that the same is erroneous for that the said court should have granted the motions of appellant as aforesaid and which said motions were made in the special appearances filed by him, and should not have awarded costs against this defendant, and should not have adjudicated that he had appeared generally in this cause and that he answer or make such motion as he may be advised with respect to the bill of complaint herein on or before the 18th day of March, 1930, or in default thereof complainants' bill of complaint shall be taken as confessed against him and such decree shall be made against him as the Chancellor shall deem just and equitable, for the reasons set up in the special appearance and motion filed by this appellant; and for that no one of complainants nor appellant had been for many years prior to the commencement of the suit nor was not at the time of the commencement of the suit a resident, citizen or inhabitant of the State of New Jersey and the instruments of July 14, 1917, and January 3, 1922, created trusts which, at the time of their creation, had their *situs* in New York and that neither trust had, at the time of the filing of the bill, any *situs* in the State of New Jersey and that the effect of the decree in the case of Maurice J. Swetland, *et als.*, complainants, and Hattie Swetland, *et als.*, defendants, was to adjudicate that the effect of the gift in the last will and testa-

ment of Horace M. Swetland, deceased, to Maurice J. Swetland, trustee, was but to add additional property to the trust created by the said Horace M. Swetland under the said alleged trust agreements of July 14, 1917, and January 3, 1922, and that the said trust never having had any *situs* and not having a *situs* in the State of New Jersey and neither appellant nor the beneficiaries of said trust being residents or inhabitants of New Jersey, the Court of Chancery was without jurisdiction to call appellant to account as trustee or to remove the appellant as trustee or to bring appellant before the Court by process of writ of sequestration or otherwise, no process or other legal notice having been served upon appellant within the State of New Jersey, and for that to compel the appellant to appear in said suit would be to deprive him of the rights secured to him by the Fourteenth Amendment to the Constitution of the United States in that it would result in the taking of his property without due process of law, and for that it appears that there was a suit pending in California brought by the complainants against appellant for the relief prayed for in the bill in the cause in the Court of Chancery; and your petitioner further humbly submits that the Court of Chancery erred in treating the special appearance of appellant as a general appearance for the reason that the special appearance could not be treated as a general appearance although no leave of Court was obtained, and that to so treat it would result in a violation of the rights secured to appellant by the Fourteenth Amendment to the Constitution of the United States in that it would deprive him of his property without due process of law, and for the further reason that no motion

was made by complainants to strike out said special appearance and for further reason that under the act concerning sequestration, appellant was entitled to appear specially without leave of court.

Your petitioner therefore prays that the said order of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this honorable court shall seem meet.

MERRITT LANE,
Solicitor for and of Counsel with
Maurice J. Swetland, Trustees, etc.

Same duly acknowledged for all respondents on March 11, 1930.

Formal answer to petition of appeal filed March 22, 1930.

SUPPLEMENT.

Subpoena was issued to "Maurice J. Kane, Maurice J. Swetland, Frederic C. Stevens and Ernest M. Corey, executors and trustees under the last will and testament of Horace M. Swetland, deceased," tested May 22, 1929, and acknowledged by Whiting and Moore, as solicitors for the above-named respondents on the 22nd day of May, 1929.

Subpoena was issued to "Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917, and January 3, 1922, respectively," tested May 22, 1929, and placed in the hands of the Sheriff of Essex

County, and on the 28th day of May, 1929, returned "Non Est."

On the 4th day of June, 1929, the proper affidavit was filed by the complainant to the effect that Maurice J. Swetland was a non-resident and resided on Waterbury Road, in the Town of Southbury, State of Connecticut.

On the 4th day of June, 1929, an order of publication was made by the Court of Chancery ordering that: "Ordered that the said Maurice J. Swetland, individually, and as trustee under certain trust agreements dated July 14, 1917, and January 3, 1922, respectively, be deemed and taken to be an absent defendant and that he appear and answer the complainants' bill on or before the 5th day of August, 1929, and in case he does not appear and answer the complainants' bill within the time hereinbefore limited, complainants' bill shall be taken as confessed against him and in case of such default such decree shall be made against him as the Chancellor shall deem just and equitable."

"And it is further ordered that notice of this order be served personally on the said Maurice J. Swetland, individually, and as said trustee under certain trust agreements dated July 14, 1917, and January 3, 1922, respectively, within twenty days from the date hereof, by delivery of a copy thereof to him or by publishing the same in the Newark Evening News, one of the public newspapers printed and published in the City of Newark, in this State for four times for four consecutive calendar weeks at least once in each week and that in case of said publication, that a copy of said notice be mailed to the said Maurice J. Swetland, individually, and as said trustee under certain trust agreements dated

July 14, 1917, and January 3, 1922, respectively, postage prepaid, directed to him at the post office nearest his residence at which he usually receives his letters, unless such residence or post office be unknown and cannot be ascertained upon making inquiry prescribed by law and the rules of this court."

On the 12th day of July, 1929, an affidavit was filed in the office of the Clerk in Chancery by the complainants as follows:

Affidavit of Mailing.

Filed July 12, 1929.

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

MAHLON M. MEIER, of full age, being duly sworn according to law, on his oath deposes and says:

I am an attorney at law of the State of New Jersey employed in the office of Messrs. Lindabury, Depue & Faulks, solicitors for complainants in the above-entitled cause. On June 8, 1929, I mailed a true copy of the annexed notice directed to Maurice J. Swetland, by depositing the same at the United States post office in the City of Newark, County of Essex and State of New Jersey, in a sealed envelope addressed to the said Maurice J. Swetland at Waterbury Road, Southbury, Connecticut, with proper postage prepaid thereon.

MAHLON M. MEIER.

Notice.

Subscribed and sworn to before
me this 12th day of June,
1929.

HAROLD J. BROWN,
Notary Public of New Jersey.
(Notary Seal.)

The notice mailed is as follows:

IN CHANCERY OF NEW JERSEY—To Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917, and January 3, 1922, respectively:

By virtue of an order of the Court of Chancery, made on the day of the date hereof, in a cause wherein Grace E. Swetland, individually; Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infants, by Grace E. Swetland, their next friend, are complainants, and Maurice J. Swetland, individually and as trustee under certain trust agreements dated July 14, 1917, and January 3, 1922, respectively, and others, are defendants, you are required to appear and answer the bill of complaint on or before the fifth day of August, 1929, or the said bill will be taken as confessed against you.

The objects of said suit are to enjoin the defendants, Maurice J. Swetland, Ernest M. Corey, Frederick C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, from paying over any moneys or delivering any property of any kind, character or description from the estate of Horace M. Swetland to the defendant, Maurice J. Swetland, as trustee under

Notice.

a certain trust agreement of July 14, 1917; to seek an order of the court removing said Maurice J. Swetland as trustee under a certain trust agreement of July 14, 1917, as well as trustee under a certain trust agreement of January 3, 1922; to seek an order of the court compelling the said defendant Maurice J. Swetland, trustee under the said trust agreement of July 14, 1917, as well as under said trust agreement of January 3, 1922, to account to the complainants and to make a full and complete discovery and disclosure as to the condition of each of said trust estates and as to how the property of each of said trust estates is invested and held; and to obtain a money decree against the said defendant, Maurice J. Swetland, individually and as trustee under the said trust agreements of July 14, 1917, and January 3, 1922, respectively, to pay over all the moneys constituting the income of each of said trusts which have been received by him for the sole benefit, advantage and use of the complainants; and you, Maurice J. Swetland, are made a defendant because you are the trustee under said trust agreements of July 14, 1917, and January 3, 1922, respectively, and because you are the person against whom said money decree is sought, and you are further notified that a writ of sequestration has issued and that your property taken under said writ within the State of New Jersey will be taken to satisfy such order or decree as the chancellor may make in this cause.

Dated June 4, 1929. ($35.88)

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainants,
763 Broad street, Newark, N. J.

Notice.

On July 12, 1929, an affidavit was filed in the Court of Chancery of due publication of the foregoing notice in accordance with the terms of the order of publication.

INDEX

New Jersey Court of Errors and Appeals

IN THE MATTER OF THE ESTATE OF HORACE M. SWETLAND, deceased.	*On Appeal from New Jersey Prerogative Court.*

TRANSCRIPT OF THE RECORD.

Grace E. Swetland, upon proper petition and affidavits was assigned and appointed by orders of the Prerogative Court made on May 14, 1929 next friend of the infants, Carolyn G. Swetland, Florence A. Swetland and Henry M. Swetland, by whom they might file and prosecute the petition.

Notice.

NOTICE.

Filed May 21, 1929.

New Jersey Prerogative Court

To Maurice J. Swetland, Trustee under a certain Trust Agreement dated July 14, 1917:

PLEASE TAKE NOTICE that on Tuesday, May 21, 1929, we shall apply to the Ordinary of the Prerogative Court at Chancery Chambers, No. 1060 Broad street, Newark, New Jersey, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order directing Maurice J. Swetland, Frederic C. Stevens, Ernest M. Corey and Maurice J. Kane, Executors of and Trustees under the last will and testament of Horace M. Swetland, deceased, not to pay any moneys or deliver any property of any kind, character or description from the estate of the said Horace M. Swetland, deceased, to Maurice J. Swetland, as Trustee under a certain trust agreement of July 14, 1917 until the further order of this court; and further ordering that the said Maurice J. Swetland be removed as trustee under the said trust agreement of July 14, 1917 and that the Fidelity Union Trust Company, a corporation of the State of New Jersey, or some other person or persons, corporation or corporations, may be appointed in his place and stead to administer the aforesaid trust of July 14, 1917;

And in support of said application we shall present the petition of Grace E. Swetland, individually, Henry M. Swetland, Florence A. Swetland, and Carolyn G. Swetland, infants by Grace E. Swetland, their next friend, duly veri-

Notice.

fied and supported by the affidavits annexed thereto, a true copy of which petition, verification and supporting affidavits are attached hereto.

LINDABURY, DEPUE & FAULKS,
Proctors for Petitioners.

Dated May 16, 1929.

Same form of notice filed May 21, 1929, directed to Whiting & Moore, proctors of accountants, Maurice J. Swetland, Frederic C. Stevens, Ernest M. Corey and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased—

Service of a copy of this notice and of petition and affidavits was acknowledged on May 16, 1929 by Messrs. Whiting & Moore.

Petition.

PETITION.

Filed May 21, 1929.

NEW JERSEY PREROGATIVE COURT.

To the Honorable Edwin Robert Walker, Ordinary of the State of New Jersey:

The petitioners, Grace E. Swetland, individually, and Henry M. Swetland, Florence A. Swetland and Carolyn C. Swetland, infants under the age of twenty-one years, by Grace E. Swetland, as their next friend, all residing at No. 532 North Arden Boulevard, Los Angeles, California, respectfully show that:

1. The petitioners, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland are children of the petitioner, Grace E. Swetland, and Maurice J. Swetland, one of the defendants herein, and grandchildren of Horace M. Swetland, father of said Maurice J. Swetland. The said Maurice J. Swetland and Grace E. Swetland were married October 10, 1908 and the said Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland are the only children that have been born of the said marriage. The said children are all infants under the age of twenty-one years for whom their mother, the said Grace E. Swetland, has been duly appointed by this Court as next friend to file and prosecute this petition.

2. On July 14, 1917 the said Horace M. Swetland and the said Maurice J. Swetland, both residents of the Town of Montclair, in the County of Essex and State of New Jersey, entered into a certain Trust Agreement under the terms of

which the said Horace M. Swetland transferred and delivered to the said Maurice J. Swetland 1,100 shares of the Preferred "B" stock of the United Publishers Corporation, a corporation of the State of Delaware, evidenced by certificates therefor numbered 204 and 319, which the said Maurice J. Swetland agreed to hold in trust for the sole benefit, advantage and use of the petitioner, his wife, Grace E. Swetland, and their children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, subject to the following conditions in regard thereto as imposed in connection therewith by the said Horace M. Swetland, founder of said trust, to wit:

"1. To pay and apply the income received from the principal of said trust to the sole benefit, advantage and use of my wife and children, or the survivor or survivors of them until such time as my youngest living child shall reach thirty years of age, on the happening of which event the said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided;

* * * * * * * *

"3. That upon my youngest living child attaining the age of thirty years the principal of said trust and all additions thereto shall be divided equally between and paid to my present wife, if then living, my children and the living issue of any deceased child or children of mine who shall take in equal parts the share or part which his or her parent and said deceased child of mine would have taken if living at the time aforesaid; that in the event of the death of my

said wife before my youngest living child shall reach thirty years of age, and of the death of all of my children before reaching thirty years of age, without leaving issue them surviving, that then and in that event the principal of said trust shall revert to and become a part of the residuary estate of the aforesaid, founder thereof, Horace M. Swetland."

The said agreement further provided that Horace M. Swetland, the founder of said trust, should have at all times during his lifetime, the personal right, power and privilege of terminating the same, and that upon his election so to do the shares of stock constituting the principal of said trust should be returned and revert to him free and clear of any and all claims and demands of whatsoever kind or nature, with the same force and effect as if the trust therein provided for had never been created, any law to the contrary notwithstanding. A true copy of said trust agreement is annexed hereto and made a part hereof and marked Exhibit "A."

3. Thereafter and on or about January 3, 1922, the said Horace M. Swetland and Maurice J. Swetland, both residents of the Town of Montclair, in the County of Essex and State of New Jersey, entered into a certain other Trust Agreement wherein and whereby the parties thereto by mutual consent expressed the desire to establish said new trust by substituting said new trust agreement bearing date January 3, 1922 for the said trust agreement of July 14, 1917 then in effect and to that end the said Horace M. Swetland assigned, transferred and set over unto the said Maurice J. Swetland 1,350 shares

of the said United Publishers Corporation Class "B" Preferred Stock, represented by said certificates numbered 204 and 319 mentioned in the said trust agreement of July 14, 1917 and by certificate numbered 357, 700 shares of the Common Stock of Swetland Realty Company, a corporation of the State of New York, 1,998 shares of the Common Stock of the Publishers Securities Company, a corporation of the State of New Jersey, and a $10,000 note of said Swetland Realty Company dated November 1, 1917, payable to the said Maurice J. Swetland, trustee, on demand, with interest at 5%. The said trust agreement of January 3, 1922, among other things, provided:

"Second: (a) The aforesaid transfers to said Maurice J. Swetland are IN TRUST, nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:

* * * * * * *

"(d) The income received from the principal of said Trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the education of the family of the second part or the survivor or survivors of them until such time as the youngest child of the party of the second part shall have reached the age of thirty years. In which event said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.

Petition.

"(e) The said Trustee shall not during the period of this trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or to charge or encumber the corpus or principal of said trust fund or any part thereof or any beneficial interest therein."

A true copy of the said trust agreement is attached hereto and made a part hereof and marked Exhibit "B".

4. The said Horace M. Swetland died on June 15, 1924, a resident of the County of Essex and State of New Jersey, leaving a last will and testament, dated January 12, 1922, which was duly admitted to probate by the Ordinary of this Court on June 30, 1924, a true copy of which said will is annexed hereto and made a part hereof and marked Exhibit "C".

5. The said Horace M. Swetland by his said last will and testament after providing that all his just debts and funeral expenses and all transfer, inheritance and succession taxes upon the devises and bequests therein named should be paid, gave, devised and bequeathed all of his estate to his Executors in trust, among other things, to pay over to his half sister, Hattie Swetland, if she should survive him, the sum of Twelve Hundred Dollars ($1200.00) each year during her life, in semi-annual installments of Six Hundred Dollars ($600.00) each, with power in their discretion to increase such bequest if any misfortune should befall her whereby her necessities should require the payment of a larger sum; to deliver and pay over to his wife, Clara A. Swetland, the sum of Fifteen Thousand Dol-

lars ($15,000.00) per year in equal monthly payments, with power in their discretion to increase such sum if any misfortune should befall her whereby it should become necessary to provide for her competent and comfortable support and maintenance, and to maintain and permit her to use the testator's homestead and its furnishings situated in the Town of Montclair, County of Essex and State of New Jersey, during her life. The testator made no provision for the disposition of the income from his estate in excess of that to be paid to his half-sister, Hattie Swetland, and his wife, Clara A. Swetland, as aforesaid.

6. As to the remainder of his estate the testator, Horace M. Swetland, by his said last will and testament, provided as follows:

"Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein created, and upon the death of said Hattie Swetland, if she shall have survived me, to distribute the principal of the trust held for her benefit, by dividing the principal of said trust or trusts, as the case may be, equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, and Dorothy A. Johnson, and my son Maurice J. Swetland, as Trustee or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein (therein) provided.

Petition.

"In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per stirpes and not per capita, the share its parent would have taken under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving now lawful issue her or me surviving, the share such child of mine would have received under the provisions hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purpose therein provided."

7. The said Horace M. Swetland in his said last will and testament named as his Executors and Trustees, without bond or other security, his son, Maurice J. Swetland, hereinbefore mentioned, E. M. Corey, F. C. Stevens and M. J. Kane. Thereafter, on or about June 30, 1924, they duly qualified. Letters Testamentary were issued to them and they entered upon and have since continuously and now are engaged in the discharge of their duties as said Executors and Trustees. All of said Executors, except M. J. Kane, are non-residents of the State of New Jersey. The estate of the said Horace M. Swetland, deceased, consisted of stocks, bonds, securities and other personal property, and real estate located in the State of New Jersey and in the State of New York.

Petition.

8. Thereafter, and on or about August 14th, 1925 doubts and difficulties having arisen in the minds of Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the said last will and testament of the said Horace M. Swetland, as aforesaid, as to the true construction and effect of said last will and testament, the said Executors and Trustees filed a bill in the Court of Chancery of New Jersey to seek its advice and direction in the premises to the end that the said last will and testament of the said Horace M. Swetland, deceased, might be construed and the true meaning and legal effect of the various provisions thereof determined and the rights of the respective parties interested therein declared by that Court. All persons in interest were made parties defendant, duly served with process, guardians ad litem appointed for all infants, and all parties answered.

9. Thereafter, and on or about December 14, 1926, after hearing, the Court of Chancery entered its final decree wherein and whereby it was, among other things, ordered, adjudged and decreed:

"4. By the words 'herein provided' as used at the end of the paragraph of said will hereinabove marginally numbered 16," (referring to the paragraph of the will first set forth in paragraph 6 of this Petition) "the testator meant and intended 'therein provided' and said words are hereby construed to mean 'therein provided' ".

* * * * * * *

"9. As to all income not required for the comfortable support, care and maintenance

of Hattie Swetland and of the widow, Clara A. Swetland, and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which was devised to Clara A. Swetland during her life and for the expenses incident to said trusts including the charges and expenses in connection with the New York real estate, and the expenses of administration, the said testator died intestate; and it was the intention of said testator that all of such surplus income should be accumulated until the death of the widow, at which time it should be distributed among those entitled under the intestate laws of this state.

"10. Under the laws of the State of New York, the directions for the accumulation of the income derived from the New York real estate, are void, and such part of the net income so derived from the New York real estate as is not needed for the purposes of the trusts created by said will, is distributable amongst those entitled to the next eventual estate; those entitled to the next eventual estate are those named in the paragraph of the will hereinabove marginally numbered 16" (referring to the paragraph of the will first set forth in paragraph 6 of this Petition) "and comprise the testator's three daughters, Velma I. Stevens, Ruth D. Kane, and Dorothy A. Johnson, and his son Maurice J. Swetland, as Trustee.

* * * * * * *

"14. In the paragraphs of said will hereinabove marginally numbered 16 and 17," (referring respectively to the two paragraphs of the will set forth in paragraph 6

of this Petition) "the testator referred to the Trust Agreement bearing date of 14th day of July, 1917, hereinabove set forth, and the bequests in said will to Maurice J. Swetland, as Trustee, are valid."

Thereafter an appeal was taken by one or more of the defendants in such suit to the Court of Errors and Appeals, and after argument the decree of the Court of Chancery in all the respects appealed from was affirmed on or about February 6, 1928.

10. The said Horace M. Swetland left surviving him his widow, Clara A. Swetland, and his three daughters, Velma I. Stevens, Ruth D. Kane and Dorothy A. Johnson, and his son, Maurice J. Swetland, as his only heirs-at-law and next-of-kin, all of whom are still living.

11. On or about February 28, 1927, said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees of the last will and testament of the said Horace M. Swetland, deceased, as aforesaid, filed their first accounts as Executors and Trustees as aforesaid, in this Court. Exceptions having been filed to the said account by Dorothy A. Johnston, one of the children of the said Horace M. Swetland, deceased, a hearing thereon was had and certain of the exceptions allowed and others denied, and on June 29, 1928 a decree was entered by which it was ordered, adjudged and decreed that the account as amended be allowed, and that as of January 31, 1927, the date of said account, there was a balance of corpus, other than New York real estate, amounting to the sum of $953,317.96, and a balance of income, other than from New York real estate,

amounting to the sum of $16,722.74, and a balance of corpus consisting of New York realty amounting to the sum of $384,000, and a balance of income from New York realty amounting to the sum of $92,827.63, remaining in the hands of said accountants, and further ordered, adjudged and decreed that after deducting the commissions thereinbefore allowed the balance of income from New York realty, amounting to the sum of $118,568.87 be distributed, one-fourth to Velma I. Stevens, one-fourth to Ruth D. Kane, one-fourth to Dorothy A. Johnson, and one-fourth to Maurice J. Swetland, as Trustee, in accordance with said decree of the Court of Chancery dated December 14, 1926, hereinbefore in the Petition referred to. Thereafter, by order of this Court bearing date December 18, 1928, said decree was amended so that the sum of $118,568.76, the balance of income from New York realty available for distribution, was changed to the sum of $87,887.26.

12. On or about July 6, 1928, the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees as aforesaid, pursuant to the said decree of this Court bearing date June 29, 1928, and to the provisions of the said last will and testament of the said testator, Horace M. Swetland, deceased, paid to the said Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917, the sum of $21,971.82, being one-fourth of the income of $87,887.26 accumulated from the New York realty, and directed to be distributed by the decree of the said Prerogative Court bearing date June 29, 1928, as amended as aforesaid.

Petition.

13. Since the receipt on or about July 6, 1928 of the said sum of $21,971.82 income from the New York real estate as aforesaid, the said Maurice J. Swetland, as trustee under the trust agreement of July 14, 1917, has not expended any portion thereof for the benefit, advantage and use of the petitioner, Grace E. Swetland, or the petitioners, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, as directed and required by the provisions of said trust agreement, although repeatedly requested by the petitioners so to do; he has never filed any account in any court as trustee under said trust agreement, and although demand has been made upon him so to do, he has refused and still does refuse to account to these petitioners or any of them personally, and these petitioners are informed and believe that he has appropriated to his own use the whole or a large portion of said trust funds.

14. The said Maurice J. Swetland as trustee under the trust agreement of January 3, 1922 has not expended any portion of the income of said trust for the benefit of his wife, the petitioner, Grace E. Swetland, or for the support, comfort or education of the petitioners, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, for several years last past, as directed and required by the provisions of said trust, although repeatedly requested by the petitioners so to do; he has never filed any account in any court as trustee under said trust agreement, and although repeated demand has been made upon him to account to the petitioners, he has refused and still does refuse so to do; and these petitioners are informed and believe that he has received payment of the

$10,000.00 note of the Swetland Realty Company which constituted a part of the principal of said trust and that in violation of the terms and provisions of said trust agreement, has disposed of the said stocks originally constituting a major portion of the principal of said trust; and that he has appropriated to his own use the whole or a large portion of the proceeds of the sale of said stocks and of the moneys received in payment of said note, the exact amount of which misappropriation is unknown to these petitioners.

15. The relations of mutual trust and confidence between the said Maurice J. Swetland and the petitioners, his wife and children, beneficiaries, continued up to about October, 1927, at which said time the said Maurice J. Swetland separated from the said petitioners, and since which time he has failed and refused to adequately provide for the petitioner, Grace E. Swetland, or for the comfort, support, maintenance and education of his children, the said Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, from December, 1927, to October, 1928, and since March 1, 1929, he has wholly refused and failed to provide for the petitioners, his wife and children, or any of them, and that petitioners and each of them are now dependent upon the charity of friends and relatives for the necessities of life, as is well known to the said Maurice J. Swetland. The said Maurice J. Swetland, has received the said sum of $21,781.82 paid by the Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, to him as Trustee under the Trust Agreement of July 14, 1917, as aforesaid, and the income of the trust of January

3, 1922, for several years last past amounting in all to a sum largely in excess of $100,000, all of which he is chargeable to apply to the maintenance, education, comfort and support of the petitioners, his wife and children.

16. On or about the 6th day of March, 1929, the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, filed their second account in this court and gave notice that said account would be audited and stated by the Register of this court and reported for settlement to the Ordinary or Surrogate-General and Judge of this court, on Tuesday, April 23, 1929, at Newark, New Jersey, and that application would at that time be made for the allowance of commissions and counsel fees; on said April 23, 1929, the matter was duly continued until May 21, 1929, at ten o'clock in the forenoon, at the Chancery Chambers, 1060 Broad street, Newark, New Jersey.

17. The said account shows that there is now in the hands of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Trustees under the said last will and testament of Horace M. Swetland, deceased, a balance of $71,997.32 income from New York realty. The petitioners are informed and believe that upon the allowance of the account of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Trustees under the last will and testament of Horace M. Swetland, deceased, as aforesaid, the said sum of $71,997.32, less such trustees' commissions and counsel fees, as may be allowed,

will be distributed and one-fourth thereof paid to the said Maurice J. Swetland, as trustee under the trust agreement of July 14, 1917, and the petitioners fear and firmly believe that unless this Honorable Court shall intervene such moneys as the said Maurice J. Swetland may receive upon the said distribution by the said Trustees as aforesaid will not be paid and applied to the sole benefit, advantage and use of the said petitioner, his wife, Grace E. Swetland, and the petitioners, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Sweetland, but will be wrongfully and fraudulently misappropriated and expended by him to his own use; all to the irreparable loss and damage and injury of the petitioners.

And your petitioners pray:

I. That the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, their successor or successors, may be restrained from paying and ordered not to pay any moneys or deliver any property of any kind, character or description from the estate of the said Horace M. Swetland, deceased, to Maurice J. Swetland, as Trustee under said trust agreement of July 14, 1917 until the further order of this Court.

II. That the said Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917 created by the said last will and testament of Horace M. Swetland, deceased, may be removed, and that the Fidelity Union Trust Company, a corporation of the State of New Jersey, on some other person or persons, corporation or

corporations, may be appointed in his place and stead to administer the aforesaid trust of July 14, 1917.

III. That your petitioners may have such further and other relief in the premises as the nature of the case may require and as this Honorable Court may grant.

And your petitioners will ever pray.

LINDABURY, DEPUE & FAULKS,
Proctors for Petitioners.

"Exhibit A."

WHEREAS heretofore and on the 25th day of September 1916 HORACE M. SWETLAND of Montclair, New Jersey, delivered to the undersigned Five Hundred (500) shares United Publishers Corporation Preferred B. stock, and on April 10, 1917, six Hundred (600) shares United Publishers Corporation, Preferred B stock, to be held by the undersigned as trustee for the use and purposes expressed in the declaration of trust executed by the undersigned in connection therewith on the date aforesaid; and

WHEREAS the said Horace M. Swetland revoked said trust pursuant to the rights and privileges which he had reserved unto himself in connection therewith at the time of the establishment thereof; and

WHEREAS the stock hereinbefore mentioned has been re-delivered to me as trustee by the said Horace M. Swetland pursuant to the terms and conditions of the trust hereinafter set forth for the purpose of establishing and constituting a new trust in regard thereto in favor of my wife

and children and for the purpose amongst others as hereinafter stated of applying the income from said stock for their support, education and maintenance.

Now, THEREFORE in consideration of the premises and the sum of One Dollar to me in hand paid by the aforesaid Horace M. Swetland, the receipt whereof is hereby acknowledged, I, MAURICE J. SWETLAND of Montclair, N. J., hereby acknowledge and declare that I am possessed of Eleven Hundred (1,100) shares United Publishers Corporation, Preferred B stock, evidenced by certificates therefor numbered 204 and 319 IN TRUST, and for the sole benefit, advantage and use of my wife and children, subject to the following conditions in regard thereto as imposed in connection therewith by the founder of said trust, to wit:

1. To pay and apply the income received from the principal of said trust to the sole benefit, advantage and use of my wife and children, or the survivor or surviviors of them until such time *as my youngest living child shall reach thirty years of age,* on the happening of which event the said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided:

2. That in the event of my death during the continuance of said trust, or if upon the happening of any event or for any reason, during said period, I shall consider it necessary or advisable in the best interest of my wife and children to cease to act as such trustee, that I shall have the right, power and authority to name as my successor or successors the trustee or trustees to carry out the trust herein provided for;

Petition—Exhibit A.

3. That upon my youngest living child attaining the age of thirty years the principal of said trust and all additions thereto shall be divided equally between and paid to my present wife, if then living, my children and the living issue of any deceased child or children of mine who shall take in equal parts the share or part which is or her parent and said deceased child of mine would have taken if living at the time aforesaid; that in the event of the death of my said wife, before my youngest living child shall reach thirty years of age and of the death of all of my children before reaching thirty years of age, without leaving issue them surviving, that then and in that event the principal of said trust shall revert to and become a part of the residuary estate of the aforesaid founder thereof, Horace M. Swetland.

4. That the founder of said trust, Horace M. Swetland, reserves at all times during his lifetime, the personal rights, power and privilege of terminating the aforesaid trust, and that upon his election so to do, the aforesaid shares of stock constituting the principal thereof shall be returned and revert to him free and clear of any and all claims or demands whatsoever kind or nature, with the same force and effect as if the trust herein provided for had never been created, any law to the contrary nothwithstanding.

In Witness Whereof I have hereunto set my hand and seal this 14th day of July, 1917.

(signed) Maurice J. Swetland (l. s.)

Witness:

L. J. Montgomery

Petition—Exhibit A.

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

On this 14th day of July, 1917, personally appeared before me MAURICE J. SWETLAND to me known and known to me to be the person described in and who executed the foregoing instrument and he acknowledged to me that he executed the same for the use and purposes therein set forth.

Notary Public, New York County.

I, MAURICE J. SWETLAND, the trustee named in the foregoing declaration of trust, and pursuant to the power and authority therein contained, hereby nominate and appoint as my successor to administer the foregoing trust in the event of my death during the period thereof, ERNEST M. COREY, of the Borough of Manhattan, City, County and State of New York, and as his successor for said purpose in the event that he should fail or refuse to accept the administration of said trust, or for any reason become incapable of administrating the same, then and in that event I hereby nominate, constitute and appoint the MONTCLAIR TRUST COMPANY, of Montclair, N. J., as my successor to carry out the terms and provisions of the trust aforesaid.

(signed) MAURICE J SWETLAND (L. S.)

Witness:

Petition—Exhibit B.

"Exhibit B."

DECLARATION OF TRUST.

THIS AGREEMENT made this 3rd day of January, 1922, by and between HORACE M. SWETLAND, of Montclair, N. J., party of the first part, and Maurice J. Swetland, of Montclair, N. J., party of the second part,

WITNESSETH THAT

WHEREAS it is the desire of both the parties to this agreement that definite and certain means shall continue to be provided for the comfort, support and maintenance of the family of the party of the second part, and the education of his minor children, and

WHEREAS the party of the first part has heretofore delivered to the party of the second part as trustee certain shares of stock of the United Publishers Corporation for the uses and purposes above mentioned, and

WHEREAS the party of the first part desires to increase the trust estate so held by the party of the second part, and

WHEREAS the parties hereto by mutual consent wish to establish a new trust by substituting this agreement for the one now in effect, without prejudice, but to the great advantage of the beneficiaries hereof.

NOW, THEREFORE, in consideration of One Dollar each to the other paid, the receipt whereof is hereby acknowledged, and of other good and valuable considerations each to the other moving, the parties hereto

AGREE

First: That the party of the first part shall and hereby does assign, sell, transfer and set

over unto the party of the second part, all and singular, his right title and interest in or to the following property, namely:

500 Shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 204 to M. J. Swetland, Trustee.

250 Shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 319 to M. J. Swetland, Trustee.

600 shares United Publishers Corporation Class "B" preferred stock, represented by Certificate No. 357 to M. J. Swetland, Trustee.

700 shares Swetland Realty Co. common stock represented by Certificate No. 34—to M. J. Swetland, Trustee.

1998 shares Publishers Securities Company common stock, represented by Certificate No. 1 —to M. J. Swetland, Trustee.

$10,000 note of Swetland Realty Co. dated November 1, 1917, payable January 1, 1918, and thereafter extended on demand with interest at 5%, payable to M. J. Swetland, Trustee.

Second: (a) The aforesaid transfers to said MAURICE J. SWETLAND are IN TRUST nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:

(b) It is expressly agreed by and between the parties hereto that any and all additions to the TRUST ESTATE shall be received by the said TRUSTEE for the purposes and uses and subject to all the terms and conditions of the TRUST hereby created, without the execution of any further or additional instrument or agreement.

(c) Upon payment of the note of the SWETLAND REALTY COMPANY, or the redemption or sale of any of the stocks or other property of the TRUST ESTATE the net proceeds thereof shall be reinvested by the trustee for the purposes of the TRUST:

(d) The income received from the principal of said trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the survivor or survivors of them until such time as the youngest child of the party of the second part shall have reached the age of 30 years. In which event said TRUST shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.

(e) The said Trustee shall not during the period of this Trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or to charge or encumber the corpus or principal of said trust fund or any part thereof or any beneficial interest therein.

Third. That when the youngest living child of said MAURICE J. SWETLAND party of the second part hereto, shall have attained the age of 30 years, the principal of this trust and all additions thereto making in total the net trust estate at the time aforesaid, shall be divided as follows:

(a) That portion of the trust estate represented by 1998 shares of the Publishers Securities Company common stock, standing in the name of MAURICE J. SWETLAND TRUSTEE, shall be delivered to and become the personal property of MAURICE J. SWETLAND if living.

Petition—Exhibit B.

(b) The balance of the net trust estate at the time aforesaid shall be divided equally between and paid to the wife of the party of the second part, if then living, and his children, and the living issue of any deceased child or children, and the living issue of such child or children shall receive in equal parts the share or part which his or her parent, as the case may be, would have taken if living at the time aforesaid.

(c) In the event of the death of the party of the second part, said MAURICE J. SWETLAND prior to the termination of this trust, his share of the trust estate specificially mentioned in paragraph A of this article shall become a part of the net estate to be divided in accordance with paragraph B of this article.

(d) In the event of the death of the wife of the party of the second part before the termination of the TRUST hereby created, her share shall become a part of the net trust estate to be divided equally and paid to the children or the living issue of the children of the party of the second part in accordance with paragraph B of this article.

(e) In the event of the death of all the beneficiaries hereunder, namely, the wife and children and the living issue of such children of the party of the second part, prior to the termination of the TRUST hereby created, then and in that event, the net principal of the TRUST ESTATE shall revert to and be paid over to the Corporation known as the Publishers Securities Company of Montclair, New Jersey, with the exception noted in paragraph A, that the number of shares of stock of said Publishers Securities Company forming a part of this trust estate, shall be delivered to

and become the property of MAURICE J. SWETLAND, if living, otherwise said shares shall revert to and become a part of the net trust estate, reverting to said Publishers Securities Company as aforesaid.

Fourth. Should the said Maurice J. Swetland, party of the second part, in any manner become disqualified to act as Trustee hereunder or in case of his death prior to the termination of the trust hereby created, then and in any such event, party of the first part hereto, HORACE M. SWETLAND shall become and is hereby designated to succeed said MAURICE J. SWETLAND as said Trustee hereunder, and in case of the disability or death of the said Horace M. Swetland prior to the termination of the TRUST hereby created, then in any such event HERMAN J. REDFIELD of Montclair, New Jersey, shall become and is hereby designated as the successor to either MAURICE J. SWETLAND or HORACE M. SWETLAND, as the case may be, and in the event of the disability of the said HERMAN J. REDFIELD prior to the termination of the TRUST hereby created, the MONTCLAIR TRUST COMPANY of Montclair, New Jersey, is hereby designated as the successor hereunder, and each shall have as such trustee the same powers and duties with respect to holding and administering said TRUST.

Fifth: The receipts by the respective beneficiaries hereunder or their respective children, as the case may be, or the legal representatives of said children for their respective distributive share of the said net trust fund, shall be full acquittance to said trustee of any and all claims of any kind or character upon the part of said beneficiaries or their respective children against the said Trust Fund.

Petition—Exhibit B.

Sixth: By their signatures hereto, the parties hereto expressly ratify all of the provisions hereof, which, prior to said signatures they have respectively read and considered, and the said MAURICE J. SWETLAND accepts the trusteeship hereunder.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals this third day of January, 1922.

(signed) HORACE M. SWETLAND,
Party of the first part.

(signed) MAURICE J. SWETLAND,
Party of the second part.

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

Be it remembered that on this 3rd day of January, 1922, before me, L. F. DAY, personally appeared HORACE M. SWETLAND and MAURICE J. SWETLAND, who I am satisfied are the persons named in the foregoing agreement as the parties of the first and second part respectively, and to whom I first made known the contents thereof, and thereupon they severally duly acknowledged that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

L. F. DAY,
Notary Public.

Notary Public, Queens Co. Clerk's No. 123.
Certificate filed in New York Co. No. 62.
New York County Register's No. 2023.
Commission expires March 30th, 1922.

Petition—Exhibit C.

"Exhibit C."

I, HORACE M. SWETLAND, of the Township of Verona, County of Essex, State of New Jersey, do hereby make, publish and declare this my last Will and Testament, in manner and form following:

FIRST: I direct that all my just debts and funeral expenses be paid, except business obligations which may be carried at the discretion of my Executors.

SECOND: I direct that all transfer, inheritance or succession taxes upon the foregoing devises and bequests shall be paid by my Executors from my residuary estate.

THIRD: All of my estate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my Executors hereinafter named, IN TRUST NEVERTHELESS, and for the following uses and purposes, and subject to the terms, conditions, powers and agreements as herein provided:

(A) To have and to hold and possess the the same, to collect the rents, issues and income and the profits thereof, and to pay from the net income therefrom the following amounts:

1. To deliver and pay over to my half sister, Hattie Swetland, if she shall survive me, the sum of Twelve Hundred Dollars ($1200) each year, during her life, in semi-annual installments of Six Hundred Dollars ($600) each, and I direct my Executors to make the first of such payments immediately after my decease.

It is my will, and I direct my Trustees in the exercise of their absolute discretion, to increase

as they may consider necessary, the amount to be paid to said Hattie Swetland, if any misfortune shall befall her whereby her necessities should require the payment of a larger sum.

It is my will, and I direct my Trustees upon the death of my wife, or if she should have predeceased me and I am survived by said Hattie Swetland, to immediately distribute the principal of the trust hereby created and as herein provided, except such amount of cash or assets as they shall set aside and retain as sufficient to insure the return of an annual net income of not less than Twelve Hundred Dollars ($1,200) to be used and applied as above provided for the benefit of said Hattie Swetland.

It is my will, and I direct that if my Trustees shall set aside and retain assets sufficient for the purpose specified in the next preceding paragraph hereof and in the event the necessities of said Hattie Swetland should require the payment of a greater annual amount than therein provided, that they shall have the power and authority to pay over or apply any part of, and if necessary all of the principal so set aside for the aforesaid purposes for her comfort, care and maintenance, as in the exercise of their absolute discretion my Trustees may consider necessary or advisable.

Upon the decease of said Hattie Swetland, and in the event that a separate fund shall have been established for her benefit as herein provided, I direct my Trustees to distribute the principal of said fund or the remainder thereof and all additions thereto, if any, in the same manner as hereinafter provided for the final distribution of my residuary estate.

Petition—Exhibit C.

2. To deliver and pay over to my wife, CLARA A. SWETLAND, the sum of Fifteen Thousand Dollars ($15,000) per year during her life, in equal monthly payments, the first of which shall be paid by my Executors immediately after my decease.

The provisions herein contained for the benefit of my wife, I hereby declare are intended to be and are so given to her in full satisfaction and in lieu of and for her dower and thirds, which she may or can in any wise claim or demand out of any estate.

It is my will, and I direct my Trustees in the exercise of their absolute discretion to increase, as they may consider necessary or advisable, the amount to be annually paid to my said wife, if any misfortune should befall her whereby it should become necessary to provide for her competent and comfortable support and maintenance.

It is my will, and I direct that my Trustee shall permit my said wife to have the use of, and to occupy free of rent or other charges, except as herein specifically otherwise provided, my dwelling house and the grounds attached thereto situated in the Township of Verona, Town of Montclair, County of Essex, State of New Jersey, and all the furniture and articles of use and ornament of every kind and nature therein contained at the time of my decease, together with all personal property and equipment located upon said premises during the term of her life.

It is my will, and I direct my Trustees to pay and discharge, during the life of my wife, all taxes, assessments, insurance charges and charges of every kind and nature except as herein otherwise specifically provided, which may

be imposed upon any of the lands and premises used and occupied by my wife, as herein provided, from the income received by them from the principal of the trust herein created, except that my said wife shall personally pay for all repairs to and improvements upon the said property while used and occupied by her, and that in the event of her failure so to do, and if it shall become necessary for the proper maintenance and protection of said property, and premises, I authorize and empower my said Trustees to make such repairs or improvements thereon as they in the exercise of their absolute discretion may consider proper and necessary, and to charge the cost thereof to the Trust account.

3. Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein created, and upon the death of said Hattie Swetland, if she shall have survived me, to distribute the principal of the trust held for her benefit, by dividing the principal of said trust or trusts, as the case may be, equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, and Dorothy A. Johnson, and my son, Maurice J. Swetland, as Trustee, or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purpose herein provided.

In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per

stirpes and not per capita, the share its parent would have taken under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her or me surviving, the share such child of mine would have received under the provisons hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned, and created by me under date of July 14, 1917, for the purpose therein provided.

B. Except as hereinbefore otherwise provided, I direct and empower my Trustees in the exercise of their absolute discretion, to sell either at public or private sale, and at such times and in such manner and upon such terms and conditions as may be deemed most advantageous and for the best interest of my estate, the whole or any part of the real estate of which I may die seized or possessed, or any interest therein, and to execute and deliver any and all conveyances, deeds or other instruments that may be necessary or proper to transfer said property or to carry out the intention of this provision.

It is my will, and I hereby expressly direct that my Executors and Trustees in their absolute and uncontrolled discretion, may retain for such period as they shall see fit, any investments of any nature or kind made by me in my lifetime, and that no liability shall attach to them by reason of any loss occasioned to my estate by reason of so doing. It is also my will,

and I hereby direct that the Trustees of the trusts created by this will may accept from my said Executors and may retain for such period as they deem wise, any securities or property in which I may have invested my estate in my lifetime, even if such securities and investments are not of a character in which fiduciaries are authorized to invest trust funds, and that no liability shall attach to such Trustees by reason of any loss occasioned by such acceptance or retention.

I also expressly authorize and empower the Trustees of the Trusts hereby created in their absolute discretion to invest and re-invest the properties which may come into their hands in such manner as they may deem most advisable, and with regard to the question whether such investments or reinvestments so made by them are of a character permitted by law to fiduciaries, and I direct that no liability shall attach to said Trustees by reason of any investments or re-investments so made by them.

I expressly authorize my Executors and Trustees of the trusts hereby created, at any time to sell, assign and transfer any stocks or bonds or other securities in which my estate or any of the trust funds hereby created may at any time be invested.

FOURTH: I hereby nominate, constitute and appoint my son, Maurice J. Swetland, E. M. Corey, F. C. Stevens and M. J. Kane, as Executors and Trustees of this, my will, I direct that no bond or other security shall be required from my Executors or Trustees herein named under any circumstances or in any event.

Petition—Exhibit C.

In case of the death or resignation or inability to act of any one of the Executors and Trustees above named, the three remaining Executors and Trustees shall act without the appointment of a fourth, but thereafter in the event of the death or disqualification of any of the remaining Executors or Trustees, I nominate and appoint as substituted Executor and Trustee, in the place of Maurice J. Swetland, Emerson P. Harris, and as substituted Executor and Trustee in the place of F. C. Stevens, I nominate, constitute and appoint my daughter, Mrs. Velma I. Stevens; and as substituted Executor and Trustee in the place of M. J. Kane, I nominate, constitute and appoint my daughter, Mrs. Ruth D. Kane: and as substituted Executor and Trustee in the place of E. M. Corey, I nominate, constitute and appoint Emerson P. Harris.

All powers conferred by this Will upon my Executors or upon my Trustees may be exercised by such of them as shall qualify or assume the execution of said Trustees and by the survivors or survivor of them, and by their lawful and qualified successors.

Wherever in the foregoing provisions hereof, I have vested or authorized my Executors or Trustees to exercise their discretion in any matter, it is my will and I direct that in all matters pertaining to the administration of my estate and the trusts herein created, that the will of the majority of my then qualified and active Executors and Trustees shall be binding and final upon the remainder of them on all such questions.

Lastly: I hereby cancel, annul and revoke all wills and testamentary dispositions by me heretofore made.

IN WITNESS WHEREOF I have hereto attached my hand and seal in the presence of my subscribing witnesses, this 12th day of January, 1922.

HORACE M. SWETLAND.

WITNESSES:

We, the undersigned witnesses to the above signature, have signed this Will in the presence of the testator, and in the presence of each other:

A. B. SWETLAND, Mayville, N. Y.
E. M. COREY, Flushing, N. Y.
L. J. MONTGOMERY, New York City.

Affidavit of Grace E. Swetland.

Filed May 21, 1929.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES. } *ss.*

GRACE E. SWETLAND, being duly sworn according to law upon her oath, deposes and says:

1. I am one of the petitioners in the foregoing petition named and have read said petition and know the contents thereof and all of the matters and things therein contained are true to the best of my knowledge and belief.

2. Maurice J. Swetland, one of the defendants in the foregoing petition named, and I were married at Montclair, New Jersey, on October 10, 1908. The petitioners, Henry M. Swetland, born April 14, 1910, at New York City; Florence

A. Swetland, born October 16th, 1911, at Montclair, New Jersey, and Carolyn G. Swetland, born December 11, 1913, at Montclair, New Jersey, are children and the only children that have been born of said marriage. All of said children are still living and reside with me at Number 532 North Arden Boulevard, in the City and County of Los Angeles, State of California.

3. At the time of my marriage to the said Maurice J. Swetland he had not established any permanent business connnection and I soon learned that he was unable to earn an income sufficient to support his children and myself without calling upon his father, Horace M. Swetland for assistance, who gave my husband employment from time to time in the various enterprises in which he was interested in New York City, as well as a substantial allowance for our support, which arrangement continued during the life of said Horace M. Swetland, who died on or about June 15, 1924, a resident of the town of Montclair, County of Essex and State of New Jersey.

4. In view of the incapacity and inaptitude of my husband, Maurice J. Swetland, to carry on any business successfully and because of his inability to support his family, his father, the said Horace M. Swetland, desiring to secure comfortable maintenance and support to the petitioners, constituting the family of the said Maurice J. Swetland, on or about September 25, 1916, delivered to his son, my husband, the said Maurice J. Swetland, 500 shares of Preferred Class "B" Stock of the United Publishers Corporation, and on or about April 10, 1917, an additional 600

shares of Preferred Class "B" Stock of said Corporation, to be held by the said Maurice J. Swetland, as Trustee, for the uses and purposes expressed in a declaration of trust executed by said Maurice J. Swetland in connection therewith, which said trust was subject to the right of revocation by the said Horace M. Swetland.

5. Later on, or about July 14, 1917, the trust hereinbefore mentioned was revoked and the said shares of stock therein mentioned were redelivered by the said Horace M. Swetland to the said Maurice J. Swetland, as Trustee, both residents of the Town of Montclair, in the County of Essex and State of New Jersey, upon a new trust in favor of myself and my said children and for the purpose, among others, of applying the income from said stock for our support and maintenance and the education of said children, which said trust was executed in writing and a true copy thereof attached to the foregoing petition and marked Exhibit "A".

6. In addition to the establishment of the said trust, said Horace M. Swetland in or about the year of 1912 built on his property adjoining his own home on After Glow Way in Montclair, New Jersey, a house in which he permitted his son, Maurice J. Swetland, and his family, the petitioners to reside. We lived in this house at Montclair, New Jersey, from the time it was built until early in 1922. In February, 1923, because of the failure of the various enterprises in which my husband, Maurice J. Swetland, had attempted to engage, and because of the ill health of our said children, my husband, our children and I moved to Redlands, in the

County of San Bernardino, and State of California, where we lived about two years. Subsequently, and in 1925, we moved to Altadena, California, on the outskirts of Pasadena, where we continued to reside until in or about September, 1926.

7. After my marriage to Maurice J. Swetland, my father-in-law, the said Horace M. Swetland, prospered financially and my husband, Maurice J. Swetland, continued to evidence his incapacity and inability to succeed in any business enterprise, a number of which he had unsuccessfully attempted, and by such failures showed that he would probably never be able to provide through his own efforts for his family. The said Horace M. Swetland realizing more and more fully the business inability of his son, and desiring to further protect myself and children against such incapacity of Maurice J. Swetland to provide for us, the said Horace M. Swetland established a new trust by substituting a later trust agreement, bearing date January 3, 1922, for the said trust agreement of July 14, 1917, then in effect, under which the said Horace M. Swetland assigned, transferred and set over unto the said Maurice J. Swetland, as Trustee, the stocks that had been transferred to him as such Trustee under the two previous trust agreements hereinbefore mentioned and certain additional shares of stock and other property, to be held by the said Maurice J. Swetland, as Trustee, for the sole benefit, advantage and use of his family, the petitioners, wife and children of said Maurice J. Swetland, and the income thereof to be applied to my and their support and to the maintenance and education of our children. A true copy of said trust agreement

is attached to the foregoing petition and marked Exhibit "B".

8. The said Horace M. Swetland died on or about June 15, 1924, a resident of the County of Essex and State of New Jersey, leaving a last Will and Testament, dated June 12, 1922, which was admitted to probate by the Ordinary of the State of New Jersey on June 30, 1924, a true copy of which said Will is attached to the petition and marked Exhibit "C." The said Horace M. Swetland, deceased, under said Last Will and Testament named as Executors and Trustees thereof his son, my husband Maurice J. Swetland, Ernest M. Corey, Frederick C. Stevens and Maurice J. Kane, all of whom are known to me and known to me to be non-residents of the State of New Jersey, except Maurice J. Kane, who resides in the Town of Montclair, County of Essex and State of New Jersey. According to the first account of the said Executors and Trustees, a copy of which I have received, the estate of said Horace M. Swetland, deceased, consisted of stocks, bonds, securities and other personal property and real estate located in the State of New Jersey and the State of New York.

9. Subsequent to the probate of the said Will of Horace M. Swetland, deceased, and the qualification of the Executors and Trustees therein mentioned, the said Executors and Trustees, having doubt and difficulty as to the true meaning and effect of the said Will, instituted a suit in the Court of Chancery of the State of New Jersey praying that the said Will be construed and the true meaning and legal effect of the various provisions thereof be determined and the rights

of the respective parties therein mentioned be declared by said Court, to which the petitioners were made parties and were represented in said suit. Proceedings in said suit were had and on or about December 14, 1926, a final decree construing said Will was entered in said Court. Subsequently an appeal was taken to the Court of Errors and Appeals of the State of New Jersey and the decree of the Court of Chancery of the State of New Jersey appealed from in all respects was affirmed on or about February 6, 1928, all as set forth in paragraph 8 of the foregoing petition.

10. The said Horace M. Swetland left him surviving his widow, Clara A. Swetland, his three daughters, Velma I. Stevens, Ruth E. Kane and Dorothy A. Johnson, and his son, Maurice J. Swetland, as his only heirs-at-law and next of kin, all of whom are still living.

11. I have read paragraphs 11 and 12 of the petition, and am informed and verily believe that the matters and things therein set forth are true.

12. After the said Maurice J. Swetland and the petitioners became settled in California, as aforesaid, said Maurice J. Swetland, my husband, entered into several businesses. He first organized in 1922 the Bureau of Research and Service, Inc., a California corporation, which I am informed and verily believe was intended to promote and extend contact between Eastern investors and promoters in sales organizations desiring information as to the resources and possibilities of California. Later, in 1926, he organized the Swetland Operating Company, a corporation of the State of California, which I

am informed and believe was to be operated by him for the purpose of and as part and parcel of a scheme for receiving funds, monies and property belonging to the trust aforesaid, the same to be reinvested in certain real estate operations and developments in and about Altadena, and elsewhere in California, with the express design of divesting the trust of property belonging thereto; and that said misappropriation of funds was actually consummated in furtherance of said scheme and design. In 1927 he also organized the Swetland Publications, Inc., a corporation of the State of California, whose purpose I am informed and believe was the publication of certain magazines. In addition to the promotion of these various enterprises, my husband, Maurice J. Swetland, soon became dissatisfied with our rented house at Altadena and in 1926 he caused to be built a palatial home in South Pasadena, California (investing over Seventy-five Thousand Dollars ($75,000) therefor from trust funds) where we continued to live until October, 1927.

13. My husband, Maurice J. Swetland, had always been secretive with me as to the sources of his income and when repeatedly questioned by me in respect to his large expenditures, would offer no explanation other than that he had the funds available for such expenditures and would refuse to give me any details in respect to their source. By the summer of 1927 my husband, the said Maurice J. Swetland, had become more and more addicted to the use of liquor and associated with a number of men and women who had the reputation of leading sporting and fast lives. His business enterprises were not at all successful and he became very much depressed

concerning his financial affairs. After the close of school in June, 1927, he arranged a trip to Alaska, on which he, the children and I embarked and we went up the Pacific Coast to Nome and Skagway. Upon our return trip he separated from me and our two daughters at Jasper Lodge, Canada, and went direct to New York City taking with him our son, Henry, returning to California on or about September, 1927. Later in the year 1927 his financial affairs apparently reached a crisis and he informed me that it would be impossible for us to continue to live in our home in South Pasadena, so he arranged that it should be closed.

14. In October, 1927, he arranged a trip to Europe for me and our two daughters. On or about October 6, 1927, he left me at Pasadena and with our son, Henry, proceeded to New York City. Subsequently, on or about October 17th, 1927, I started for New York City with our two daughters, Florence A. Swetland and Carolyn G. Swetland, and a trained nurse, Miss Elinor Mettel. We were met at the Railroad Station in New York City by my husband, the said Maurice J. Swetland, who had engaged passage for us upon a steamer leaving at midnight. We were immediately taken to the Biltmore Hotel. My said husband then sent Miss Mettel, the two girls and Henry to the Roosevelt Hotel for supper, and when they had gone he locked the room door and would not permit me to communicate with my sister or with anyone else. He then presented some papers for me for my signature, and over my vehement objections and by duress compelled me to sign the same, without acquainting me as to their legal purport and effect. Prior to my signing these documents, he permitted me to

communicate by telephone with a lawyer, Bruce McDaniel, of Redlands, California, whom I assumed was friendly and would advise me in my own behalf, but whom I afterwards learned was in the employ of my husband. Upon his refusal to advise me I was helpless to further resist my husband's threats that he would abandon immediately my children and myself unless the papers were executed, and I signed the papers and departed for Europe with our two daughters at midnight of that day, with funds which my husband had given me to cover the expenses of the trip. While I was in Europe I received some further funds from my husband, Maurice J. Swetland.

15. I returned to New York City from Europe on or about December 21, 1927. The next day I was informed by my brother-in-law, F. C. Stevens, that during my absence my husband had taken some sort of proceedings against me for divorce in Mexico, using the papers above referred to in furtherance of his scheme, and considered himself divorced from me, and had, in fact, during my absence gone through the formality of a marriage to another woman with whom he was at the time living. I forthwith left with my two daughters for California, where I arrived on December 26, 1927, and immediately went to the home of my parents in Los Angeles, who provided and have ever since provided a home for me and my children.

16. Up to the last mentioned date I do not recall having ever seen any of the agreements of trust created by the said Horace M. Swetland, hereinbefore mentioned, and had no knowledge of the terms thereof. My only knowledge

of the existence thereof was from the general conversation of my husband and from the fact that during the time that my husband and I were living together in California he had presented to me certain checks signed by him as Trustee, and had presented to me certain documents which he said were necessary for me to sign in connection with the trusts created by his father, Horace M. Swetland. At the time I signed said papers I had absolute confidence in my said husband and considered them only as a formality and signed them without knowledge of their contents or legal effect.

17. Upon my return to California after the trip to Europe, my father employed a lawyer to investigate the situation in respect to my husband's activities and the relation of myself and children to the trusts. Demand was made upon my husband, Maurice J. Swetland, for an accounting under the trust agreements of 1917 and 1922, above referred to, and through Court proceedings instituted in the Courts of California, bookkeepers and accountants were employed and an examination was made of such of his personal books and records, as well as of the books and records of the Swetland Operating Company of California, Inc., and Swetland Publications, Inc., as were available or could be obtained, and as a result thereof I am informed and verily believe my husband, Maurice J. Swetland, as Trustee under the trust agreement of January 3, 1922, converted the principal of said trust into cash in the following manner: A promissory note of the Swetland Realty Company for $10,000 was paid in March or April, 1926, the 1998 shares of Publishers Securities Company Common Stock were sold in March or

April, 1926, for $135,000 to Frederick C. Stevens, who was one of the Executors of and Trustees under the Last Will and Testament of the said Horace M. Swetland, deceased; the 1,350 shares of stock of United Publishers Corporation were sold in March or April, 1926, for $100,000 to the said Frederic C. Stevens and one A. C. Pearson; the 699 shares of stock of Swetland Realty Company were sold in or about April, 1927, to the said Frederic C. Stevens for $90,000. I have been informed and verily believe that the checks in payment for the sale and transfer of this stock were deposited in the United Securities Trust & Savings Bank of Redlands or at the Bank in Redlands formerly known as First National Bank of Redlands, in an account standing either in the name of Maurice J. Swetland, as Trustee, and/or individually, and that from time to time the said Maurice J. Swetland, as Trustee, and/or individually, drew from these banks the monies so deposited by checks upon the accounts, payable to the order of the Swetland Operating Company of California, Inc., or the Swetland Publications, Inc., and/or other individuals and/or corporations, all of which checks were paid to the payees. The accountants who examined the books of the Swetland Operating Company of California, Inc., and the Swetland Publications, Inc., have reported that there are no available assets of either of these corporations and no assets of my husband, Maurice J. Swetland, in California other than certain real estate, some of which stands in the name of the Swetland Operating Company of California, Inc., and the rest in the name of my husband individually (all of which real property is encumbered and said encumberances together with taxes and as-

sessments are now in default), and about $600 in cash in one of the banks. The purpose of the suit instituted by me, as Guardian ad litem for my children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, against my husband in California is to recover the properties in which the assets of the trust of January 3, 1922, have been invested and still stand in the name of my husband and to follow the other assets in which the trust funds have been invested into the hands of purchasers with notice of his breaches of trust and default.

18. Since my return to California I have learned from my son, Henry, that when his father took him to New York, after our trip to Alaska, as well as during his stay in New York while I was in Europe, although our said son was then only seventeen years of age, his father took him on parties at which his said father was accompanied by the woman with whom he is now living and her sister was invited to accompany our said son, Henry, and at said parties there was considerable drinking and our son was permitted and encouraged to participate therein. During his stay in New York, our son was left at the hotel at which he was staying for periods of several days at a time while his father was living at the apartment of the woman with whom he is now living.

19. That the said Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917, has not expended any portion of the $21,971.82 income from the New York real estate received by him from the Executors and Trustees of the estate of Horace M. Swetland, deceased, on or about July 6, 1928, for the benefit, advan-

tage or use of myself or his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, although repeatedly requested on my behalf and in behalf of the children so to do. He has never filed any account in any Court as Trustee under said trust agreement, and although demand has been made upon him so to do, he has refused and still does refuse to account to me or them personally, and I am informed and verily believe that he has in fact misappropriated to his own use the whole or a large portion of the said sum of $21,971.82 paid to him, as aforesaid under the trust agreement of July 14, 1917.

20. That the said Maurice J. Swetland, as Trustee under the trust agreement of January 3, 1922, has not expended any portion of the income of said trust for my benefit or for the benefit, support, comfort or education of his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland since the latter part of 1927. Although repeatedly requested in behalf of the children and on my behalf so to do, he has never filed any account in any Court, as Trustee under said trust agreement, and although repeated demand has been made upon him to account to me and my said children personally, he has refused and still does refuse so to do. From December, 1927, to October, 1928, he wholly failed and refused to expend any money for our comfort, maintenance and support from said trusts, or any of them, or from any other source whatsoever. In October, 1928, he forwarded $1,800 to his attorney in California, to be used at the rate of $300 per month for the maintenance of his children at school, without any indication that it was income from any of said trusts. Since March 1, 1929, he has wholly

failed and refused to maintain, support or aid either myself or our children to any extent whatsoever, although demand has been made upon him so to do, and that myself and our children are now destitute and dependent upon the charity of our friends and relatives for the necessities of life, all of which is well known to my husband, Maurice J. Swetland.

21. I have read paragraphs 16, 17 and 18 of the Petition and am informed and verily believe that the matters and things therein set forth are true.

GRACE E. SWETLAND,,

Subscribed and sworn to before me a Notary Public in and for the County of Los Angeles, in the State of California, at the City of Los Angeles and the State of California, on the 8th day of May, 1929.

MARTHA S. DUBOIS,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Henry Monroe Swetland.

Filed May 21, 1929.

STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES, } *ss.*

HENRY MONROE SWETLAND, being duly sworn according to law upon his oath, deposes and says:

1. I am one of the petitioners in the foregoing petition named and have read said petition and know the contents thereof. All of the matters and things therein contained are true to the best of my knowledge and belief.

2. My father is Maurice J. Swetland, one of the defendants named in the foregoing petition. The first intimation of domestic difficulties between my father and mother came to me shortly after we moved into our new home in South Pasadena during the forepart of the year 1927. From that time until my mother and sisters went to Europe, in or about October, 1927, my father was constantly irritable, used profane language in the presence of our family and it was evident that he was drinking steadily.

3. During the forepart of 1927, my father took occasion to talk to me regarding his feeling towards mother. He stated that his life and mother's life had come to a point where they could not live together peaceably any longer. That some other woman had come into his life and that she was at that time the center of his affections. That he intended to go his way and mother could go hers. That, although he bore no illfeeling towards mother, he could not afford to sacrifice his own happiness and that of the

other woman and that he was going to live his own life as he saw fit, at any cost. He later said that he would make no attempt to influence any of the children against mother and that each of us could make our own choice as to whether we would live with mother or with him.

4. During the summer of 1927, mother, father, my sisters, Florence and Carolyn, and myself went on a trip to Alaska, returning to Jasper Lodge, Canada, where father and I left mother and the girls and went to New York. We arrived in New York City a few days prior to July 4th. While enroute on the train father told me that he planned to marry the woman he had previously referred to as soon as possible, and that he intended to divorce mother. He stated that the woman's name was Lillie Carlquist. He said he was very anxious to have me meet this woman and that he hoped that we would like each other. He did not say when he had first met her, but he did state that although business had taken him to New York City on a number of occasions in the past, Lillie Carlquist had also taken him to New York as well. I also noticed while we were in Canada, and during the trip to New York, that my father was drinking very heavily. When we arrived at the Pennsylvania Station in New York City, Lillie Carlquist was there to meet father. They spoke to each other, using such terms of endearment as "Dear," "Honey" and "Darling." The three of us then went to the City Club where we left our bags and then went out to dinner.

From that time on father was almost constantly with Lillie Carlquist. He went to her apartment daily and on some occasions stayed all

night. I often went up to Lillie's apartment, when father was present, and spent a great deal of time there. On these occasions my father and Lillie drank a great deal and she was frequently intoxicated. Lillie Carlquist's apartment in New York City was a small one on the second floor of an apartment house and consisted of a living room, bedrom and small kitchenette. On many occasions while I was in this apartment my father and Lillie would spend a half hour or longer together in the bedroom. I also noticed that my father was spending a great deal of money on this woman. He purchased for her new clothes, stockings, shoes, hats, fur coats and jewelry. Father told me that he had purchased an engagement ring for her at Tiffany's and that the diamond was priceless. My father also provided her with a car and chauffeur.

5. About a month after we arrived in New York, father, Lillie Carlquist and myself made a trip to Washington where we stayed three or four days at the New Willard Hotel. Lillie Carlquist's room was on the same floor as ours and father spent a great deal of time with her there. Both of them drank all the time we were in Washington. Father and Lillie Carlquist repeatedly insisted that I drink with them and were in the habit of saying very sarcastic things to me when I refused to do so.

Upon our return to New York City, I stayed there about three weeks before going to Cape Cod to visit my aunt. During this interval my father was daily at Lillie Carlquist's apartment. Father and I left New York about the middle of September and returned to California. He talked all the time on the train about Lillie Carl-

quist and stated that he would not return home to live with the family but would reside at the Jonathan Club in Los Angeles. He said he was going to divorce mother as soon as he could raise sufficient money to put the divorce through and marry Lillie Carlquist. When we arrived in Los Angeles, my father obtained a room at the Jonathan Club and lived there until his next trip to New York City.

6. On or about the first part of October, 1927, my father and I returned to New York where we stayed a week or ten days before the arrival of my mother and sisters. My father continued to spend all of his time with Lillie Carlquist and I noticed that he was there morning, noon and night and frequently stayed there over night. My father and I were stopping at the Blackstone Hotel which was located about three blocks from her aparment. In the mornings he would often call me on the telephone and tell me to come over to Lillie Carlquist's apartment for breakfasts. I noticed that father had taken most of his suits and other clothing to her apartment. Frequently he would leave me alone at the Blackstone Hotel while he spent the night at her apartment.

A few days before my mother and sisters were to arrive in New York my father told me that he had reserved a room at the Biltmore Hotel for my mother and sisters, that he was going to have a lawyer at the hotel when they arrived and would try to have mother sign papers pertaining to a Mexican divorce before she left for Europe. He said that the papers were prepared, and that the ground for divorce was incompatibility. I expressed my opinion that mother

would not sign any papers for such a purpose. He replied, "If I can put this program through, I am greater than Jesus Christ Almighty." Mother and the girls arrived in New York City on the train which father had instructed them to take. At the station father was very irritable. Mother was taken off the train in a wheel chair, father rushed up to her and said, "For Christ's sake, why didn't you come in when I told you to." After some more words we then went to the Hotel Biltmore. Mother, father, my two sisters, the nurse and myself went up to the room. Father ordered dinner to be sent up to the room for mother and himself and instructed me to take my two sisters and the nurse to the Hotel Roosevelt for dinner. Upon our return we went upstairs and father asked the nurse to take the girls downstairs as he wanted to talk to mother and me. Father then had a man come to the room whom he introduced as his lawyer. This man and father then tried to make mother sign some papers. By this time mother was in a state of complete hysteria, she cried all the time and said she did not want to sign anything. Mother wanted to telephone to some of her relatives who were in New York City but father refused to permit it. Finally he allowed her to telephone one Bruce McDaniel of Redlands, California. After this conversation my mother still refused to sign the papers. My father stated that unless she signed the same he would immediately abandon her and the children. Finally they placed her at a desk in the room and while the man who was represented as an attorney held the paper, my mother signed it. Whereupon he placed the paper in his pocket and left the room. Later in the evening my

father and I went to the boat with mother and my sisters. As soon as mother and the girls were on board, mother lost consciousness and father left before she recovered.

7. After mother and the girls left for Europe, I stayed in New York until just before Christmas. During this time father was with Lillie Carlquist continuously. He received his mail at the City Club but he lived at her apartment. During this interval my father often had me come to Lillie Carlquist's apartment for breakfast. On these occasions I often saw them disrobed and each of them frequently commenced to drink before breakfast. Father told me that he was glad that he had "put this over" on mother and that he would have a divorce within sixty to ninety days from that time. He said he was only forty years old and was ready to start life anew.

8. My father bought Lillie Carlquist many household articles, various kinds of clothing, a beautiful wedding ring and two engagement rings, and also other articles of jewelry. I also saw my father on numerous occasions give Lillie Carlquist substantial sums of money. He continued to keep the Cadillac car and a chauffeur at Lillie Carlquist's disposal, my recollection is that he rented this car and hired the chauffeur for a period of over five months. The chauffeur's name was A. Johnson.

9. During the intervals when I was in New York with my father, and which I have hereinabove referred to, my father took Lillie Carlquist on many theatre and cabaret parties and they also attended prize fights together. On one occasion my father, Lillie Carlquist and my-

self were at the Athletic Club witnessing a prize fight. We had gone there at the invitation of one Mark Grady. During the evening my father and Lillie Carlquist had been drinking heavily and she became so drunk that she finally was taken sick and father had to leave the fight with her. It was a daily occurrence for father and Lillie Carlquist to drink heavily and each of them were frequently in an advanced stage of intoxication. My father often insisted that I accompany him and Lillie Carlquist on their parties, which I did. Whenever I was with them, either at Lillie Carlquist's apartment or elsewhere, they not only encouraged me but insisted that I drink with them which I seldom did. Whenever I refused to participate, they made me the butt of sarcastic remarks and ribald joking.

HENRY MONROE SWETLAND,

Subscribed and sworn to before me a Notary Public in and for the County of Los Angeles, in the State of California, at the City of Los Angeles, in the County of Los Angeles and the State of California, on the 8th day of May, 1929.

(SEAL) MARTHA S. DUBOIS,
Notary Public in and for the County of Los Angeles, State of California.

Affidavit of Louis A. Schaefer.

Filed May 21, 1929.

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

LOUIS A. SCHAEFER, of full age, being duly sworn, according to law, on his oath, doth depose and say:

I am a resident of the State of New York. I have read the foregoing bill of complaint and know the contents thereof. I have known Maurice J. Swetland, one of the defendants therein named, for a period of at least fifteen years. For many years past I have also been well acquainted with his wife, Grace E. Swetland and their children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, the complainants named in said bill of complaint.

I first worked for the said Maurice J. Swetland from 1914 until 1917. When I first became employed by him, he was interested in the partnership of Partridge, Clark & Kerrigan, an automobile sales agency, at No. 239 West 56th street, New York City. He was also interested in the Concealed Wire Chain Company, of New York City, and in the Motion Picture Trade Directory, with offices at No. 105 West 40th street, New York City. The business of Partridge, Clark & Kerrigan failed and was discontinued. The business of the Concealed Wire Chain Company never was successful, and in 1917, at about the time the said Maurice J. Swetland went into the Army, the Motion Picture Trade Directory, whose business had run down under his management, was taken over by the United Publishers Company, with offices in New York City, a corporation in

which Horace M. Swetland, father of the said Maurice J. Swetland, was interested.

Subsequent to the return of the said Maurice J. Swetland from the war in February, 1919, I worked for him occasionally, and again began working for him continuously in September, 1926. At that time he was in California and had incorporated the Bureau of Research and Service, a corporation of the State of California, which was an organization intended to promote and extend contact between Eastern investors and promoters and sales organizations desiring information as to the resources and possibilities of California. In 1926 he organized the Swetland Operating Company of California, Inc., a corporation of the State of California, which was intended to handle certain real estate operations and developments in and about Altadena. In 1927 he also organized the Swetland Publications, Inc., a corporation of the State of California, whose purpose was the publication of certain magazines. In all of these corporations he owned all of the stock excepting the qualifying shares for directors.

I was employed by him as private confidential secretary and office manager, and became a director and treasurer of the Bureau of Research and Service, Swetland Operating Company of California, Inc., and the Swetland Publications, Inc. I held these positions from the time of my arrival in California in 1926 until November, 1927.

At the time of my arrival in California, I found that he had never kept any books of his business affairs and I was instructed to go through all of his records from the time he went to California and set up a system of books. I found that he had previously held as Trustee

under the trust agreement of January 3, 1922, a copy of which is attached to the foregoing bill of complaint, the stocks and other securities therein mentioned and that of these securities he had sold, in March or April of 1926, the 1998 shares of Publishers Securities Company to Frederic C. Stevens for $135,000, and the 1,300 shares of United Publishers Corporation to the said Frederic C. Stevens and one A. C. Pierson, for $100,000, and had collected the note of the Swetland Realty Company for $10,000 about the same time. Part of the moneys received from these sales had been invested in a number of stocks and bonds which were held by him in a safe deposit box at the First National Bank of Redlands, California, and a part was deposited in said bank in his name as Trustee. Subsequently the said stocks and bonds were from time to time sold and the money deposited in the said First National Bank of Redlands in his name as Trustee. In April, 1927, he disposed of 699 of the 700 shares of Swetland Realty Company stock, a part of the corpus of said trust of January 3, 1922, to the said Frederic C. Stevens, for $90,000, and similarly deposited the proceeds thereof in the First National Bank of Redlands, California in his name as Trustee.

A substantial portion of the said account in the First National Bank of Redlands was subsequently disbursed by him in buying certain vacant lands located in Altadena, California, and vicinity, for development purposes, all of which as far as I can recollect, was taken in his name as Trustee, and most of which I am informed and verily believe he still holds.

The said Maurice J. Swetland built two houses on the land that he owned as Trustee, one at

1851 Allan Drive and the other at 2844 Crescent Drive, Altadena, California. The expense of building these houses was paid for through the Swetland Operating Company of California, Inc., with moneys furnished by the said Maurice J. Swetland drawn from his said account as Trustee in the First National Bank of Redlands, California. Later the house at 1851 Allan Drive was disposed of for $12,000 subject to a mortgage of $5,000. $3,000 was paid in cash and a second mortgage given for the balance of $4,000 which he took as Trustee. The house at 2844 Crescent Drive, Altadena, had been completed but was vacant when I left his employ in November, 1927.

While I was associated with him in California he also built a residence at Pasadena at a cost in excess of $100,000 for the use of himself and family. The Swetland Operating Company of California, Inc., was used to disburse a portion of the expenses incurred in connection with the building of this house, and the remainder thereof was disbursed by him directly from the moneys deposited in his name as Trustee in the First National Bank of Redlands, California.

Soon after I arrived in California the said Maurice J. Swetland expressed a desire to get back in the publishing business and for a time operated said business under the name of Swetland Publishing Company of California, and in June, 1927, organized the Swetland Publications, Inc., hereinbefore mentioned. This company published a magazine known as the Pacific International Export and subsequently purchased another magazine known as "Beauty Craft," for which there was paid $5,000. All the moneys to carry on the business of the said Swetland

Publishing Company were supplied by the said Maurice J. Swetland from his account as Trustee in the First National Bank of Redlands.

During the time that I was in California the said Maurice J. Swetland did not personally attend to the businesses of either the said Bureau of Research and Service, Swetland Operating Company of California, Inc., or Swetland Publications, Inc., but very largely left the same to the employees of the said companies. He was away most of the time. I arrived in California in September, 1926, and he left the following October on a trip and was gone approximately three weeks. He went away again on February 1, 1927, and was gone until April 17, 1927. About April 22, 1927, he left with Mrs. Swetland for a trip through the Grand Canyon of Arizona, and was away approximately ten days. About June 17, 1927, he left with his family for Alaska and on their return trip separated from his family at Jasper National Park Lodge on or about July 1, 1927, and proceeded to New York with his son Henry, returning to California on or about September 5, 1927. He stayed in Los Angeles a few days and then took a trip to San Francisco, extending over a period of a week or ten days. On October 5, 1927, he left Los Angeles for New York and had not returned when I severed my connection with the companies on November 5, 1927.

During the time that I was connected with the Bureau of Research and Service, Swetland Operating Company of California, Inc., and Swetland Publications, Inc., all of the moneys needed for the business of these companies were supplied by the said Maurice J. Swetland from his said account in the name of himself as Trustee in the

First National Bank of Redlands, California. While I was there these disbursements amounted to between $200,000 to $250,000 of which between $150,000 and $175,000 was expended through the Swetland Operating Company of California, Inc., between $50,000 and $75,000 through the Swetland Publications, Inc., and between $200,000 and $250,000 through Bureau of Research and Service. None of the companies prospered and all of them became financially embarassed.

During the time that I was associated with the said Maurice J. Swetland in California aforesaid, I became acquainted with the fact that he had an agreement with one Bruce McDaniel, a lawyer of Redlands, California, who was his legal adviser during all of the time I was there, under which agreement he was to pay to the said Bruce McDaniel 10% of what he, the said Maurice J. Swetland, should receive. I know that the said Bruce McDaniel was actually paid 10% of the purchase price realized from the sale of the stock of the Publishers Securities Company, United Publishers Company, the Swetland Realty Company and of the moneys collected on the Swetland Realty Company note, and 10% of all interest and dividends received on the stocks, bonds and other securities in which said moneys were reinvested. The records of the said Maurice J. Swetland show that the said Bruce McDaniel got 10% on practically everything the said Maurice J. Swetland received.

When I first went to California, the said Maurice J. Swetland had on his desk a picture of a young lady not his wife, and in respect to whom he remarked to me that I knew her, and recalled an occasion that I had been with him at the Marlborough Hotel in New York City in

1922 when she was the hostess in the cabaret of said hotel and introduced herself to the said Maurice J. Swetland and myself. Her name was Miss Lillie Carlquist. In October, 1926, I was informed that the apartment of Miss Carlquist had been damaged by fire and I know of my own knowledge that the said Maurice J. Swetland sent her a check to help her refurnish it.

Subsequently, in April 1927, while on a trip to New York and out to dinner with the said Maurice J. Swetland at the City Club I again met Miss Carlquist. The said Maurice J. Swetland seemed to be much infatuated with her at that time.

During the period that I was in California, the said Maurice J. Swetland seemed from time to time to find cause for complaint against his wife, Grace E. Swetland, and frequently talked to me about her. He said that she did not understand him and that he could not stand it much longer. As his infatuation for Miss Carlquist increased, this attitude on his part seemed to grow stronger and he finally determined and began to plan ways and means by which he might divorce his wife.

In August, 1927, while in New York the said Maurice J. Swetland bought Miss Carlquist a diamond engagement ring and a wedding ring at Tiffany's, for which he paid $3,000. I paid this bill through the Swetland Operating Company of California, Inc., which got its money from the account in the First National Bank of Redlands, California, standing in the name of the said Maurice J. Swetland as Trustee.

While he was in New York in August 1927 he telegraphed me that he was coming back to Los Angeles but did not intend to return to his home

and desired me to engage rooms for him at the Los Angeles Athletic Club. About the same time he telegraphed his wife, Grace E. Swetland that he was not intending to come home but would stay at the Los Angeles Athletic Club. She at the time was staying for the summer at Santa Monica, California. Upon the receipt of this telegram she telephoned me and asked me if I would come down to see her. I believe this telegram was the first time she knew of his intention to break with her, for when I arrived she said she knew of no reason why her husband was not coming home, and seemed to be heartbroken and asked me if I would not do all I could to get him to come home. I told her I would and tried, but it was of no avail.

Upon his arrival in California, the said Maurice J. Swetland did not go to his home but stayed at the Los Angeles Athletic Club for a time and later removed to the Jonothan Club. While there he began to make definite plans to get a divorce from his wife, Grace E. Swetland. His first thought was to get the divorce at Reno. He intended to buy some property in Reno but was to make his headquarters in San Francisco, where the aforesaid companies had an office. He was going to bring Miss Carlquist to San Francisco and I advised him not to do so for his own protection. He then determined to procure a divorce in Paris and directed me to make reservations on a ship sailing from New York on or about October 21st or 22nd, 1927 for his wife, Grace E. Swetland, and his two daughters and nurse, and to procure reservations for him and his son Henry on a ship for France sailing one week later, which I did. He and his son Henry left California for New York on or

about October 5, 1927 and Mrs. Swetland and her two daughters left Los Angeles about October 17, 1927. I accompanied her and the children to the train and the last words she said to me were "I hope to bring my husband back." After the ship on which I engaged reservations for Mrs. Swetland, the two girls and the nurse, had sailed, I received instructions from the said Maurice J. Swetland to cancel the reservations I had made for him and his son Henry on the ship to France.

I left California on November 5, 1927, and subsequently met the said Maurice J. Swetland in New York on several occasions. On one of these occasions he purchased a supply of imported frankfurters, sauerkraut and various groceries and took them and me to the apartment of Miss Carlquist at 140 East 58th street, New York City. At the time we arrived no one was there and the said Maurice J. Swetland let himself in with a pass-key and started to prepare the dinner. Later Miss Carlquist came in with her mother and her sister. I was invited to dinner but declined the invitation. I did have a cream cocktail, a drink of which the said Maurice J. Swetland was exceedingly fond, with them.

Shortly before Christmas I again met the said Maurice J. Swetland at the Blackstone Hotel and had dinner with him, at which time he informed me that he had secured a divorce from his wife, Grace E. Swetland, in Mexico and would now soon marry Miss Carlquist, which I am informed and verily believe he subsequently did.

LOUIS A. SCHAEFER.

Affidavit of Charles P. Loeser.

Sworn to and subscribed before me, a Notary Public in and for the County of New York in the State of New York at the Cty of New York in said County and State, this 9th day of May, 1929.

(SEAL) WILLARD C. STEINKAMP,
Notary Public in and for the County of New York in the State of New York.

WILLARD C. STEINKAMP
Notary Public
N. Y. Co. Clerk's No. 972 Reg. 0-1239.
Bronx Co. Clerk's No. 136 Reg. No. 30770
Commission Expires March 30, 1930.

Affidavit of Charles P. Loeser.

Filed May 21, 1929.

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

CHARLES P. LOESER, of full age, being duly sworn according to law on his oath, doth depose and say:

I am an Attorney and Counsellor at Law of the State of New York, and reside in New York City. I am the husband of Florence E. Loeser, nee Elliott, who is a sister of Mrs. Grace E. Swetland, one of the complainants in the foregoing bill of complaint named.

I have read the said bill of complaint and know the contents thereof.

I am well acquainted with all of the complainants and the defendants. The defendant Maur-

ice J. Swetland is the son of Horace M. Swetland, deceased, and resides at Southbury, Connecticut; the defendant Frederic C. Stevens is the husband of Velma I. Stevens, daughter of the said Horace M. Swetland, deceased, and resides at 325 West End avenue, New York City; the defendant Maurice J. Kane is the husband of Ruth D. Kane, daughter of the said Horace M. Swetland, deceased, and resides at 23 Prospect Terrace, Montclair, New Jersey, and the defendant Ernest M. Corey is a former employee of the said Horace M. Swetland, deceased, and resides at 146 Eleventh Street Beach, Flushing, Long Island, New York.

Upon the death of the said Horace M. Swetland, deceased, on June 15, 1924, I became counsel for the Executors and Trustees under his last will and testament, and attended to the probate of the said will, which was admitted to probate by the Ordinary of the State of New Jersey on June 30, 1924, and on the same day Letters Testamentary were issued to the Executors and Trustees therein named. A true copy of said will is annexed to the bill of complaint and marked Schedule "C". I continued to act as counsel for said Executors and Trustees up to about the time that the bill was filed by said Executors and Trustees for a construction of the said will, at which time they employed New Jersey counsel, and since which time I have not acted as counsel to them.

I have, however, kept myself informed of the proceedings taken in said suit and am familiar with the provisions of the trust agreements of July 14, 1917 and January 3, 1922, mentioned in the bill of complaint filed in said suit, and know of my own personal knowledge that the facts set

forth in paragraphs 2, 3, 4, 5, 6, 7, 8, and 9 of the bill of complaint filed in the above entitled cause are true.

The complainants in the above entitled cause, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, are children of the complainant Grace E. Swetland and the said Maurice J. Swetland, and grandchildren of Horace M. Swetland, deceased, the father of the said Maurice J. Swetland. The said Maurice J. Swetland and Grace E. Swetland were married on October 10, 1907, and the said Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland are the only children that have been born of the said marriage, and are all under the age of twenty-one years.

The said Horace M. Swetland left surviving him his widow, Clara Swetland, and his three daughters, Velma I. Stevens, Ruth D. Kane, and Dorothy A. Johnson, and his son, Maurice J. Swetland, as his only heirs-at-law and next-of-kin all of whom are still living.

I am also familiar with the first account of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees of the last will and testament of the said Horace M. Swetland, deceased, filed in the Prerogative Court of New Jersey on or about February 28, 1927, and with the proceedings had in said Court thereon, and of my knowledge the facts set forth in paragraphs 11 and 12 are true. A photostatic copy of the receipt for $21,971.82 mentioned in paragraph 12 as having been paid by the Executors and Trustees of the Estate of Horace M. Swetland, deceased, to Maurice J. Swetland under the trust agreement of July 14, 1917, is on file in the

Office of the Register of the Prerogative Court of the State of New Jersey.

I have made a careful inquiry into the circumstances set forth in paragraphs 13, 14 and 15 of the bill of complaint, and as a result am informed and verily believe that all of the facts therein stated are true. I know of my own knowledge that the said Grace E. Swetland, and her children, Henry M. Swetland, Florence A. Swetland and Carolyn C. Swetland, are now dependent upon the charity of friends and relatives for the necessities of life, and that this is well known to the said Maurice J. Swetland.

I am also familiar with the account filed by the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, in the Prerogative Court of the State of New Jersey on or about March 6, 1929, and with the proceedings had thereon, mentioned in paragraph 16 of the bill of complaint filed in the above entitled cause. I have examined said account and know that the facts stated in said paragraph 16 are true. I also know that the account shows that there is now in the hands of the said Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Trustees under the last will and testament of Horace M. Swetland, deceased, a balance of $71,997.32 income from New York realty, as stated in paragraph 17 of said bill of complaint and fear and firmly believe that unless this Honorable Court shall intervene, such moneys as the said Maurice J. Swetland may receive upon a distribution by said trustees will not be paid and applied to the sole benefit, advantage and use of the said complainant, his wife,

Affidavit of Mailing.

Grace E. Swetland and the complainants, his children, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, but will be wrongfully and fraudulently misappropriated and expended by the said Maurice J. Swetland to his own use; all to the irreparable loss and damage and injury to the said complainants.

CHARLES P. LOESER.

Sworn to and subscribed before me, a Notary Public in and for the County of New York in the State of New York, at the City of New York in said County and State, this 9th day of May, 1929.

(SEAL) WILLARD C. STEINKAMP
Notary Public in and for the County of New York in the State of New York.

WILLARD C. STEINKAMP
Notary Public.
N. Y. Co. Clerk's No. 972, Reg. No. 0-1239.
Bronx Co. Clerk's No. 136, Reg. No. 3077c.
Commission expires March 30, 1930.

Affidavit of Mailing

Filed May 21, 1929.

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

MAHLON M. MEIER, of full age, being duly sworn according to law, on his oath, deposes and says:

Affidavit of Mailing.

I am an attorney-at-law of New Jersey employed in the office of Messers. Lindabury, Depue & Faulks, proctors for the petitioners, Grace E. Swetland, individually, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infants, by Grace E. Swetland as their next of friend.

On May 16, 1929, I deposited in the United States Post Office in the City of Newark, New Jersey, for delivery by registered mail with postage prepaid, an envelope containing a true copy of the attached notice and petition, exhibits and attached affidavits, directed to Mr. Maurice J. Swetland, Waterbury Road, Southbury, Connecticut, and received therefor United States Post Office Department Registered Mail Receipt Number 220,499. On May 20, 1929, I received United States Post Office Department Registered Mail Return Receipt Number 220,499 signed "M. J. Swetland." The originals of these Post Office Receipts are on file in the files of the Court of Chancery in the case of Grace E. Swetland, individually, et al. against Maurice J. Swetland, individually, et al, Docket Number 72, page 697.

MAHLON M. MEIER,

Subscribed and Sworn to before me this 21st day of May, 1929.

(SEAL) HAROLD J. BROWN
Notary Public for New Jersey.

ORDER OF CONTINUANCE.

Filed May 21, 1929.

It is, on this 21st day of May, 1929, on motion of Messrs. Lindabury, Depue & Faulks, proctors of petitioners, Grace E. Swetland, individually, and Henry M. Swetland, Carolyn G. Swetland and Florence A. Swetland, infants by Grace E. Swetland, as their next friend, and Messrs. Whiting & Moore, proctors for the accountants, Maurice J. Kane, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and Trustees under the Last Will and Testament of Horace M. Swetland, deceased, consenting thereto, and no one appearing in opposition thereto,

ORDERED that the application of the aforesaid petitioners for an order directing Maurice J. Swetland, Frederic C. Stevens, Ernest M. Corey and Maurice J. Kane, Executors of and Trustees under the last Will and Testament of Horace M. Swetland, deceased, not to pay any moneys or deliver any property of any kind, character or description from the estate of the said Horace M. Swetland, deceased, to Maurice J. Swetland, as Trustee under a certain trust agreement of July 14, 1917 until the further order of this court; and further ordering that the said Maurice J. Swetland be removed as trustee under the said trust agreement of July 14, 1917 and that the Fidelity Union Trust Company, a corporation of the State of New Jersey, or some other person or persons, corporation or corporations, may be appointed in his place and stead to ad-

minister the aforesaid trust of July 14, 1917, be and the same hereby is continued before the Ordinary, at the Chancery Chambers, No. 1060 Broad street, Newark, New Jersey, until June 4, 1929 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

And Further Ordered that the application of Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors of and Trustees under the last Will and Testament of Horace M. Swetland, deceased, for settlement of their account as Trustees aforesaid, be and the same is hereby continued before the Ordinary, at the Chancery Chambers, No. 1060 Broad street, Newark, New Jersey, until June 4, 1929 at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

E. R. WALKER,

Respectfully advised, *O.*

Alonzo Church,

V.-O.

We consent to the making and entry of the foregoing order.

WHITING & MOORE,

Proctors for Accountants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens, Maurice J. Kane, Executors of and Trustees under the Last Will and Testament of Horace M. Swetland, deceased.

Formal orders of continuance entered adjourning from time to time the hearings on the application of petitioners for an accounting and the application of Maurice J. Swetland, as trustee, etc., from June 4, 1929, to September 10, 1929.

Special Appearance and Motion.

SPECIAL APPEARANCE and MOTION of MAURICE J. SWETLAND, Trustee under a certain trust agreement dated July 14, 1917.

Filed June 4, 1929.

Respondent, Maurice J. Swetland, trustee under a certain trust agreement of July 14, 1917 of Southbury in the State of Connecticut, appearing specially to object to the jurisdiction and power of this court to compel him to appear in the aforesaid action and for no other purpose, respectfully shows:

1. This respondent had not been for many years prior to the commencement of this proceeding and was not at the time of the commencement of this proceeding, which said proceeding was commenced by the notice of May 16, 1929, and had not been and has not been since and is not now a resident, citizen or inhabitant of the State of New Jersey.

2. No one of the petitioners nor any beneficiary under the alleged trust agreement of July 14, 1917 or the alleged trust agreement of January 3, 1922 had been for several years prior to the commencement of this suit or at the time of the commencement of this proceeding or subsequent thereto, or at this time a resident, citizen and inhabitant of the State of New Jersey.

3. The said alleged trust agreements of July 14, 1917 and January 3, 1922 were made, executed and delivered in the State of New York and the property referred to in said alleged trust agreements and delivered in pursuance

thereof was delivered to this respondent as trustee in the State of New York and no part of said property since its delivery to this respondent as aforesaid has ever been in the State of New Jersey.

4. In a cause instituted in the Court of Chancery of the State of New Jersey entitled—"Maurice J. Swetland, et als., complainants and Hattie Swetland, et als., defendants," which said suit was brought by this respondent and others as executors of and trustees under the last will and testament of Horace M. Swetland, deceased, solely for a construction of said last will and testament and for no other purpose, it was determined that the effect of the provisions of the said last will and testament of Horace M. Swetland, deceased, in devising and bequeathing property to this defendant as trustee under said trust agreements was but to add additional property to the trust established by the said testator before the execution of the will, and that said trust was a separate and distinct entity, and this respondent prays to refer to said proceedings in said cause.

5. This respondent further says that the said trust never had a situs in the State of New Jersey and did not have at the institution of this proceeding and has not now such a situs, and that no Court of this State has jurisdiction either to call upon the said trustee to account or to remove said trustee.

6. This respondent further says that prior to the institution of this proceeding petitioners herein instituted proceedings in an appropriate court in the State of California, in which State the said beneficiaries were then resident, for an

accounting for said trusts, and for all the relief which can be granted herein and said proceedings now pending undetermined and that the said petitioners therein claimed that the said trust had a situs in the State of California, the said beneficiaries being resident therein, and trust property being likewise therein.

7. This respondent further says that he has not been served with any process whatsoever in the State of New Jersey, and that all that he has received has been the notice of May 16, 1929, a part of the files herein, which said notice he received out of the State of New Jersey.

8. This respondent humbly submits that this Court has not now, nor never had or obtained jurisdiction over the person or property of this respondent and that to compel this respondent to appear herein would be to deprive this respondent of the rights secured to him by the 14th amendment to the Constitution of the United States, in that it would deprive him of his property without due process of law, and this respondent says that he is not compellable to appear in response to said notice nor in response to any other process issued by this Court, and he does not accept or waive service of process.

This respondent therefore prays the judgment of the Court whether he should be compelled to appear in accordance with any notice or writ of this Court or to make answer to said

petition and he prays that the said petition be dismissed as to him.

MAURICE J. SWETLAND,
Respondent.

MERRITT LANE,
Proctor for Respondent, Maurice J. Swetland, appearing specially for the purpose aforesaid.

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

MAURICE J. SWETLAND, of full age being duly sworn according to law upon his oath deposes and says:

I am the respondent named in the foregoing special appearance and motion; the statements of fact therein contained are upon my personal knowledge and those statements of fact are true; the foregoing special appearance and motion is not interposed for delay but in good faith for the purposes therein set forth.

MAURICE J. SWETLAND.

Sworn and subscribed to before me a Notary Public of the State of New York, in and for the County of Kings, on the 3rd day of June, 1929, and I do certify that I am a Notary Public of the State of New York in and for the County of Kings and that my authority is now in full force and effect, and that my certificate as Notary Public was on the 3rd day of June, 1929, duly filed in the County of New York.

(SEAL) CHARLES R. COULTER.

ANSWER of DEFENDANTS, MAURICE J. SWETLAND, ERNEST M. COREY, FREDERIC C. STEVENS and MAURICE J. KANE, Executors and Trustees under the Last Will and Testament of Horace M. Swetland, deceased.

Filed June 15, 1929.

The defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased, answering the petition, say:

1. They have no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the petition, except that they admit that Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, are children of the petitioner, Grace E. Swetland, and Maurice J. Swetland, and grandchildren of Horace M. Swetland, father of said Maurice J. Swetland.

2. They admit the execution of the trust agreement of July 14, 1917, and aver that the same will speak for itself, and except as herein admitted, these defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 2 of the petition.

3. They admit the execution of the agreement of January 3, 1922, and aver that the same will speak for itself, and except as herein admitted, these defendants have no knowledge or information sufficient to form a belief as to the allegations of paragraph 3 of the petition.

4. They admit paragraph 4 of the petition.

5. As to the allegations of paragraph 5 of the petition, these defendants say that the said last will and testament speaks for itself and for accuracy they beg to refer thereto.

6. They admit paragraphs 6, 7, 8, 9, 10, 11 and 12 of the petition.

7. As to the allegations set forth in paragraphs 13, 14 and 15 of the petition, these defendants have no knowledge or information sufficient to form a belief.

8. They admit paragraph 16 of the petition.

9. They admit paragraph 17 of the petition, except that these defendants aver that said account, to which they beg to refer for accuracy, will speak for itself and except further as to the allegations that petitioners fear and firmly believe that unless the Court intervenes the moneys referred to will not be paid and applied to the use of petitioner, Grace E. Swetland, and the petitioners, children of the said Maurice J. Swetland, but will be wrongfully and fraudulently misappropriated and expended by the said Maurice J. Swetland to his own use, to the irreparable loss and damage and injury of the petitioners, these defendants have no knowledge or information sufficient to form a belief.

WHITING & MOORE,

Solicitors of Defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors and Trustees under the last will and testament of Horace M. Swetland, deceased.

CONCLUSIONS.

Filed February 3, 1930.

Merritt Lane, Esq., for the motion.

Lindabury, Depue & Faulks, proctors for petitioners Grace E. Swetland, et als., contra.

Whiting & Moore, for the executors of the Swetland will.

SYLLABUS.

1. A special appearance on behalf of a non-resident defendant, filed without leave of Court for the purpose of challenging the jurisdiction of the Court on the ground that process or notice of the proceeding was not served within the state, amounts to a general appearance.

2. A non-resident trustee legatee under a will of a New Jersey decedent, who appears or is noticed to appear in this court on an intermediate accounting by the executors of such will, is already in court for the purposes of a petition by his *cestuis que trustent* alleging dissipation of trust assets by the trustee and seeking to restrain the distribution and delivery of further assets of the trust estate to the trustee by the executors, notwithstanding the notice of such petition was served upon the trustee outside the State of New Jersey. Service of such notice on his proctor in the accounting proceedings would also be sufficient.

3. Where it appears that a trustee of a trust created *inter vivos* by a New Jersey resident who later by will bequeathed additional property to said trustee, to be administered as in the trust agreement directed, has dissipated and misap-

plied all of the trust estate previously delivered to him, this Court will restrain the executors of the will from paying or delivering to the defaulting trustee any income or property the subject of such bequest pending an accounting by the trustee.

4. This Court, under such circumstances, has complete power to withhold the subject of the bequest from the defaulting trustee and to make such order or decree as will insure its application to the purposes intended by the testator.

BERRY, *Vice-Ordinary.*

Under the provisions of the will of Horace M. Swetland, deceased, Maurice J. Swetland, trustee under a trust created by the decedent in his lifetime, under date of July 14, 1917, is presently entitled to receive approximately $18,000 of distribution income from said estate. While the trust is not testamentary, but created *inter vivos,* the sole trust estate now consists of property the subject of a bequest in the decedent's will. (For a copy of the will and trust agreement, see *Swetland* v. *Swetland,* 100 N. J. Eq. 196, in which the will was construed.) The trustee has already received, pursuant to said bequest, in excess of $20,000 from the executors of the Swetland will. The sole beneficiaries of the trust of July 14, 1917, and the primary beneficiaries of the bequest are the wife and children of the trustee who are the petitioners here. They allege the misapplication and dissipation of the entire trust estate that has thus far come into the possession of the trustee and ask this Court to enjoin the executors of the Swetland will from making further payments to him on account of the bequest to which I have referred; the removal of

Maurice J. Swetland as trustee, and the appointment of a new trustee in his place and stead. On this motion it may be assumed that the only remaining assets of this trust estate consist of funds in the hands of the executors of the Swetland will and therefore subject to the jurisdiction and control of this Court.

Maurice J. Swetland, the trustee, is a non-resident of New Jersey, presently residing in Connecticut. Notice of this proceeding was served upon him outside the State of New Jersey. A special appearance has been filed on his behalf without leave of Court for the purpose of challenging the "jurisdiction and power of this Court to compel him to appear in the aforesaid action and for no other purpose." I have already held in *Swetland* v. *Swetland*, Chancery Docket 72, page 697 (not yet officially reported) which is a suit against the same trustee for an accounting, that a special appearance filed in that court, without leave, for the purpose of addressing a motion to the jurisdiction, accounts to a general appearance. The same rule applies here.

Aside from this fact, the present proceeding arises on an accounting by the executors and trustees of the Swetland will of which Maurice J. Swetland is one. He, as trustee under the July 14, 1917 trust, is a party to the proceeding and is already in court. I have no doubt of the jurisdiction of this Court over the person of Maurice J. Swetland in this proceeding nor have I any doubt of the power of this Court to grant relief if the allegations of the petition are sustained. *Conover* v. *Fischer*, 36 Atl. 948; *Chase* v. *Chase* (Sup. Ct. of Mass.) 2 Allen, 101; 2 *Perry on Trusts* (3d Ed.) Sec. 620. It is unthinkable that, with full knowledge of the un-

faithfulness of the trustee and the practical certainty that he will misapply and dissipate whatever additional trust funds come into his hands, this Court cannot withhold from him such of the trust property as is now within its control, and by decree of this Court make such disposition of it as will insure its application to the purposes intended by the testator. Whether it should be to a trustee to be appointed by this Court, or by some other Court having jurisdiction over the administration of the trust estate, need not be now decided. It is sufficient that the arm of this Court is long enough and strong enough to withhold from a recreant trustee title to any more New Jersey property, the subject of a bequest in a New Jersey decedent's will, to squander and dissipate to the injury of his *cestuis que trustent.*

I will advise a decree in accordance with these conclusions.

Decided February 3, 1930.

Order denying motion to dismiss, etc.

ORDER.

Filed February 18, 1930.

This matter coming on to be heard on the petition of Grace E. Swetland, individually, and Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, appearing by Grace E. Swetland, as their duly appointed next friend, filed on May 15, 1929, in the presence of Messrs. Lindabury, Depue & Faulks, proctors for the said petitioners, Messrs. Whiting & Moore, proctors for the respondents, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, and Merritt Lane, Esq., appearing under a special appearance filed without leave of the Court on behalf of the respondent, Maurice J. Swetland, as trustee under a certain trust agreement dated July 14, 1917; and it appearing that a notice of application pursuant to the prayer of said petition, together with a copy of said petition and attached exhibits and affidavits was mailed on May 16, 1929 postage prepaid to the respondent Maurice J. Swetland, individual and as trustee under a certain trust agreement dated July 14, 1917 directed to him at Waterbury Road, Southbury, Connecticut, his last known post-office address; and it further appearing that service of a copy of a notice of application pursuant to the prayer of said petition, the said petition and attached exhibits and affidavits was acknowledged on May 16, 1929 by Messrs. Whiting & Moore on behalf of the respondents Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testa-

ment of Horace M. Swetland, deceased; and it further appearing that on June 4, 1929 the said Maurice J. Swetland, as trustee under the said trust agreement dated July 14, 1917, filed without leave of Court a special appearance questioning the jurisdiction of this Court over his person or property or to compel him to appear in answer to the petition or to any other process issued by this Court, and praying the judgment of this Court whether he should be compelled to appear in accordance with any notice or writ of this Court or to make answer to said petition and moving that the said petition be dismissed as to him, and no motion having been made to quash or strike out said special appearance and the Court having read and considered the arguments and briefs of the respective proctors;

It Is on this 18th day of February, 1930, on motion of Messrs. Lindabury, Depue & Faulks, proctors for the petitioners Ordered that the motion of the said respondent Maurice J. Swetland as trustee under the said trust agreement of July 14, 1917 to dismiss the said petition be and the same is hereby denied, and

It Is Further Ordered that the said respondent Maurice J. Swetland, as trustee under the said trust agreement of July 14, 1917, be adjudged to have appeared generally to the said petition and that he answer or make such motion as he may be advised with reference to the said petition on or before the 18th day of March, 1930, or in default thereof the said petition shall be taken as confessed against him and such Order shall be made against the said Maurice J. Swetland, as trustee under the trust agreement

of July 14, 1917 as the Ordinary shall deem just and equitable.

E. R. WALKER,
O.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

Endorsed:

"Filed March 3, 1930.

JOSEPH F. S. FITZPATRICK,
Clerk."

Service of a certified copy of the above order was acknowledged by Messrs Whiting & Moore and Merritt Lane, Esq., on behalf of all respondents on March 10, 1930.

Order of Restraint.

ORDER.

Filed February 18, 1930.

This matter coming on to be heard on the petition of Grace E. Swetland, individually and Henry M. Swetland, Florance A. Swetland and Carolyn G. Swetland, infants appearing by Grace E. Swetland as their duly appointed next friend, filed on May 15, 1929, in the presence of Messrs. Lindabury, Depue & Faulks, proctors of the petitioners and Messrs. Whiting & Moore, proctors of Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, and Merritt Lane, Esq., appearing under a special appearance filed without leave of the Court on behalf of the defendant Maurice J. Swetland, individually and as trustee under a certain trust agreement dated July 14, 1917; and it appearing that a notice of application pursuant to the prayer of said petition, together with a copy of said petition and attached exhibits and affidavits, was mailed on May 16, 1929 postage prepaid to the defendant Maurice J. Swetland, individually and as trustee under the trust agreement of July 14, 1917, directed to him at Waterbury Road, Southbury, Connecticut, his last known post-office address and it further appearing that service of a copy of a notice of application pursuant to the prayer of said petition, the petition and attached exhibits and affidavits, was acknowledged on May 16, 1929, by Messrs. Whiting & Moore, on behalf of the defendants Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M.

Order of Restraint.

Swetland, deceased; and the Court having read and considered the said petition and exhibits and affidavits attached thereto, and having considered the arguments and briefs of the respective proctors;

It Is on this 18th day of February, 1930, on motion of Messrs. Lindabury, Depue & Faulks, proctors for the petitioners Ordered that until the further order of this Court, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, refrain from paying any moneys or delivering any property of any kind, character or description from the estate of the said Horace M. Swetland, deceased, to Maurice J. Swetland, as trustee under the said trust agreement of July 14, 1917.

E. R. WALKER,
C.

Respectfully advised,

Maja Leon Berry,
V.-C.

Endorsed:

"Filed Mar. 3, 1930,

Joseph F. S. Fitzpatrick,
Clerk."

Service of a certified copy of the above order was acknowledged by Messrs Whiting & Moore and Merritt Lane, Esq., on behalf of all respondents on March 10, 1930.

Affidavit of Mailing.

Affidavit of Mailing

Filed March 11, 1930.

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

MAHLON M. MEIER, of full age being duly sworn according to law upon his oath deposes and says:

I am an attorney at law of the State of New Jersey and am employed in the office of Messrs. Lindabury, Depue & Faulks, proctors for the petitioners, Grace E. Swetland, individually, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infants appearing by Grace E. Swetland, their next friend.

On March 10, 1930, I mailed certified copies of each of the Orders entered in the above matter on February 18, 1930, on motion of Messrs. Lindabury, Depue & Faulks, proctors for the petitioners, to the respondent Maurice J. Swetland, individually, and as trustee under a certain Trust Agreement dated July 14, 1917, by depositing the same in the United States mail in the City of Newark, with postage prepaid thereon and directed to the said Maurice J. Swetland, % General Deliverey, Washington, D. C., his last known post-office address.

MAHLON M. MEIER.

Sworn to and subscribed before me
this 10th day of March, 1930.

HAROLD J. BROWN,
(SEAL) Notary Public of New Jersey.

Notice of Appeal.

NOTICE OF APPEAL.

Filed March 14, 1930.

Respondent, Maurice J. Swetland, Trustee under a certain trust agreement of July 14, 1917, hereby appeals from the whole and every part of the order made in this cause by His Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, on the advice of the Hon. Maja Leon Berry, Vice-Ordinary, bearing date the 18th day of February, 1930, denying the motion of Maurice J. Swetland, as Trustee under the trust agreement of July 14, 1917, to dismiss the said petition, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

MERRITT LANE,
Proctor for Respondent, Maurice J. Swetland, Trustee, etc.

Dated March 10, 1930.

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

MERRITT LANE,
Of Counsel.

Service duly acknowledged by proctors of all parties March 11, 1930.

Notice of Appeal.

NOTICE OF APPEAL.

Filed March 14, 1930.

Respondent, Maurice J. Swetland, Trustee under a certain trust agreement of July 14, 1917, hereby appeals from the whole and every part of the order made in this cause by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, on the advice of the Hon. Maja Leon Berry, Vice-Ordinary, bearing date the 18th day of February, 1930, enjoining Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors, from paying any moneys or delivering any property to Maurice J. Swetland, as trustee, under the trust agreement of July 14, 1917, to the New Jersey Court of Errors and Appeals in the last resort in all causes.

MERRITT LANE,
Proctor for Respondent, Maurice J. Swetland, Trustee, etc.

Dated March 10, 1930.

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

MERRITT LANE,
Of Counsel.

Service duly acknowledged for all parties on March 11, 1930.

PETITION OF APPEAL.

Filed March 14, 1930.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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

The humble petition of Maurice J. Swetland, trustee under a certain trust agreement of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the New Jersey Prerogative Court by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, upon the advice of the Hon. Maja Leon Berry, Vice-Ordinary, bearing date the 18th day of February, 1930, in a cause pending in said court entitled "In the Matter of the Estate of Horace M. Swetland, deceased," in this respect, to wit: that the said order denies the motion of appellant to dismiss the petition of the respondents Grace E. Swetland, individually, and Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infants, appearing by Grace E. Swetland, as their duly appointed next friend; and in this respect, to wit: that the said order adjudges appellant to have appeared generally to the said petition and directs that he may answer or make such motion as he may be advised with respect to the said petition on or before the 18th day of March, 1930, or in default thereof the said petition shall be taken as confessed against him and such order shall be made against him as the Ordinary shall

deem just and equitable, for that the said order should have granted the motion of appellant made in his special appearance and adjudicated that he should not be compelled to appear in accordance with any notice or writ of the said New Jersey Prerogative Court or to make answer to said petition and should have dismissed the said petition for the reasons stated in the special appearance filed by him in the said New Jersey Prerogative Court because it appeared that no one of the petitioners nor appellant was at the time of the commencement of the proceeding or had been for many years prior thereto a resident, citizen or inhabitant of the State of New Jersey and the trusts never had a situs in the State of New Jersey and that the Prerogative Court had no jurisdiction or control over said trusts and that appellant had never been served with process in the State of New Jersey and that to compel him to answer the petition would be to deprive him of the rights secured to him by the Fourteenth Amendment to the Constitution of the United States in that it would deprive him of his property without due process of law, and that appellant was not compellable to appear in response to the notice issued upon the petition nor in response to any process of the Prerogative Court and that there was pending a proceeding in an appropriate court in the State of California brought by petitioner against appellant for the same relief prayed for in the petition herein; and so much of said order as directs that the special appearance of appellant should be treated as a general appearance is erroneous for the reason that appellant, under the law, was entitled to file said special appearance without leave of Court and no motion was made

to strike out said special appearance and because to treat said special appearance as a general appearance would be to deprive appellant of the rights secured to him by the Fourteenth Amendment to the Constitution of the United States in that it would permit him to be deprived of his property without due process of law.

Your petitioner therefore prays that the said order of the said Ordinary may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

MERRITT LANE,
Proctor for and of Counsel with Maurice J. Swetland, Trustee, etc.

Service duly acknowledged by proctors of all parties on March 11, 1930.

Formal answer filed by Lindabury, Depue & Faulks, proctors for respondents on March 22, 1930.

PETITION OF APPEAL.

Filed March 14, 1930.

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

The humble petition of Maurice J. Swetland, trustee under a certain trust agreement of July 14, 1917, and as trustee under the trust agreement of January 3, 1922, appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the New Jersey Prerogative Court by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, upon the advice of the Hon. Maja Leon Berry, Vice Ordinary, bearing date the 18th day of February, 1930, in a cause pending in said court entitled "In the Matter of the Estate of Horace M. Swetland, deceased," in this respect, to wit: that the said order directs that until the further order of the Court, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, refrain from paying any moneys or delivering any property of any kind character or description from the estate of the said Horace M. Swetland, deceased, to Maurice J. Swetland, as trustee under the trust agreement of July 14, 1917. And your petitioner humbly appeals from the part of the decree which decrees as aforesaid upon the ground that the same is erroneous for that the said order should have denied the relief granted thereby because the motion of appellant for an adjudication that he was not compelled to answer the said petition or to appear in said pro-

ceedings should have been granted for the reasons stated in the special appearance of appellant, from the denial of which motion appellant has appealed to this court, and because it appeared that no one of the beneficiaries nor appellant was at the time of the commencement of the proceedings a resident, citizen or inhabitant of the State of New Jersey and that the trust had no situs in the State of New Jersey and that the Prerogative Court had no jurisdiction over the trust or to grant the relief awarded in said order, and because the effect of the granting of said order is to deprive appellant of his property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner therefore prays that the said order of the said Ordinary may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

MERRITT LANE,
Proctor for and of Counsel with Maurice J. Swetland, Trustee, etc.

Service duly acknowledged for all parties on March 11, 1930.

Former answer filed by Lindabury, Depue & Faulks, proctors for respondents on March 20, 1930.

New Jersey Court of Errors and Appeals

Between GRACE E. SWETLAND, *et als.*, Complainants-Respondents, *and* MAURICE J. SWETLAND, *et als.*, Defendants-Appellants.	On Appeal from Chancery. Appeal of Maurice J. Swetland, Trustee, etc. Sat Below Berry, V. C.
IN THE MATTER *of* The ESTATE OF HORACE M. SWETLAND, deceased.	On Petition of Grace E. Swetland, individually, etc. On Appeal of Maurice J. Swetland, Trustee. Sat Below Berry, V. C.

BRIEF FOR APPELLANT, MAURICE J. SWETLAND.

(Italics, etc., mine, except where otherwise noted.)

(Where the record in the Chancery case is referred to the page numbers will be prefaced by "Ch."; where the record in the Prerogative Court by "Pr.").

Statement of the Case.

But one brief will be filed, for all of the facts are applicable to each appeal and so much of the law as that to file separate briefs would result in duplication.

These are appeals from two orders in the Court of Chancery, one (Ch. 143) denying motions of Maurice J. Swetland, individually and as trustee, made under special appearances (Ch. 78, 83) to

vacate an order to show cause made on May 14, 1929 (Ch. 71), and a writ of sequestration (Ch. 74) and to dismiss the bill as to such defendant upon the ground that he was a non-resident of the state and was not served within the state and could not be brought in by substituted service and that the suit could not proceed without his being brought in, the action being *in personam,* and the other enjoining the executors and trustees of the Last Will and Testament of Horace M. Swetland, deceased, from paying to such defendant, either as trustee under a trust agreement of July 14, 1917, or under a trust agreement of January 3, 1922, or individually, any moneys of the Estate of Horace M. Swetland, deceased (Ch., p. 147), which orders were made after conclusions of the Vice Chancellor (Ch., p. 126), and from two orders of the Prerogative Court, one, denying a motion of Maurice J. Swetland as trustee under the trust agreement of July 14, 1917 (Pr., p. 84), made under special appearance (Pr., p. 74), to dismiss the proceedings against him upon the ground that he was a non-resident of the State of New Jersey and had not been served with any process within the State and the other (Pr., p. 87) enjoining the executors of the Horace M. Swetland Estate from paying any moneys from the Estate of Horace M. Swetland, deceased, to Maurice J. Swetland as trustee under the trust agreement of July 14, 1917, which orders were made after conclusions of the Vice Ordinary (Pr., p. 80).

The notices and petitions of appeal in the Chancery proceedings are found in Ch. 150, 151, 152, 154; those in the proceedings in the Prerogative Court at Pr. 90, 91, 92 and 95.

In both causes appellant claimed that to compel him to appear and answer and to permit the proceedings against him without service of process upon him within the state would be to de-

prive him of the rights secured to him by the Fourteenth Amendment to the Constitution of the United States, in that it would deprive him of property without due process of law (see special appearances Ch. 80, paragraph 7; Ch. 85, paragraph 8; Pr. 76, paragraph 8), and that point is insisted upon here.

The bill in the Chancery case was filed by Grace E. Swetland, alleging herself to be the wife of appellant Maurice J. Swetland, individually and as next friend for Henry M. Swetland, Florence A. Swetland and Caroline G. Swetland, children of complainant and appellant, and charged an alleged failure of appellant to comply with the terms of a trust instrument of July 14, 1917, executed by appellant under the terms of which he acknowledged receipt from Horace M. Swetland of certain property upon condition that he was "to pay and apply the income received from the principal of said trust to the sole benefit, advantage and use of my wife and children, or the survivor or survivors of them, until such time as my youngest living child shall reach thirty years, on the happening of which, the said trust shall terminate and the principal thereof and all additions thereof shall be distributed as hereinafter provided * * *," and an alleged failure of appellant to comply with the terms of a certain other agreement dated January 3, 1922, which was a substitute for the agreement of July 14, 1917, and which agreement of January 3, 1922, provided that certain property delivered to appellant was "in trust nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part (appellant Maurice J. Swetland), their support, maintenance and education, subject to and in accordance with the following * * *," and which bill prayed (Ch., pp. 16, 17) for an ac-

counting and discovery and that appellant be removed as trustee and that the executors of the estate of Horace M. Swetland should be enjoined and restrained from paying over any moneys from the estate of Horace M. Swetland, deceased, to appellant as trustee under the trust agreement of July 14, 1917, the Will of Horace M. Swetland providing with respect to his residuary estate that, upon certain contingencies, it should be divided;

> "equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, and Dorothy A. Johnson, *and my son Maurice J. Swetland, as Trustee, or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein (therein) provided*" (Ch., p. 7).

The validity and effect of this provision in the Will of Horace M. Swetland was before the Court of Chancery and this Court, 100 N. J. Eq. 196, 6 N. J. Adv. Rep. 360, and both the opinion and the decree sustained the validity of the gift to appellant as trustee upon the ground that the testator "*merely added additional property to a trust fund established by him years before the execution of his will under a valid, active trust, and to which he had, from time to time, during his lifetime, added securities.* The trust to which this bequest is added is not theoretical, nebulous, intangible or incapable of identification, but *exists in fact,* and *the trustee-legatee is as distinct and definite an entity as would have been an individual or corporation legatee * * *. The trust to which this bequest is added was not created by the Will, and, therefore, legal rules applicable to testamentary trusts are not uniformly applicable here * * *.*" Appellant Maurice J. Swetland was

one of the executors and trustees of the Will of Horace M. Swetland.

Upon the filing of the bill praying for a decree *in personam* against appellant directing him to account as trustee under the trust agreement of July 14, 1917, and as trustee under the trust agreement of January 3, 1922 (it will be argued that there was but one trust, the instrument of January 3, 1922, being a substitute for that of July 14, 1917), and to pay and apply all moneys constituting the income of the trust *in accordance with the terms and conditions of the trust,* and removing him as trustee and enjoining the executors of the estate of Horace M. Swetland from paying over to him any moneys from the estate of Horace M. Swetland, an order was made (Ch., p. 71) requiring him and others to show cause why, pending the suit, the executors should not be enjoined from making payments to him, and an order was also made (Ch., p. 74) directing the issuance of a writ of sequestration against his property under the provisions of the Act of 1919, 1 Cum. Sup. to Compiled Statutes of N. J., p. 264. The order to show cause was served upon appellant without the state by mail (Ch., p. 73). The writ of sequestration was executed by the Master to whom it was directed by levy upon the right, title and interest of appellant in and to the Estate of Horace M. Swetland, deceased, and in and to commissions allowed to him in that estate (Ch., p. 76).

He filed, individually and as trustee, special appearances and motions in effect to quash the service (Ch., p. 78, and Ch., p. 83). Those special appearances set up: the trust instruments of July 14, 1917, and January 3, 1922, were made, executed and delivered in the State of New York, and the property mentioned in them was delivered to appellant as trustee in that state, and the trust

property had never been, since its delivery to appellant, the trustee, in the State of New Jersey; the situs of the trusts created by the instruments was not at the time of the filing of the bill, and never was, in the State of New Jersey; prior to the commencement of the suit, the complainants, then being residents, citizens and inhabitants of the State of California, and the trust property being within that state, commenced a suit in that state, which was then pending, and claimed and insisted that the Courts of that state had jurisdiction because the situs of the trusts was in that state; in the proceedings in the Court of Chancery and in this Court, involving the construction of the Will of Horace M. Swetland, it had been determined that the effect of the bequest to appellant as trustee was but to add additional property to a trust then existing, which was a distinct and separate entity, and that no trust was created under the Will of Horace M. Swetland; the distinct and definite entity to which additional moneys were bequeathed never had a situs in the State of New Jersey; the Court of Chancery had no jurisdiction over the administration of the trusts, neither the beneficiaries nor appellant being residents of this state, and appellant not being subject to process within the state. The special appearances prayed the judgment of the Court as to whether appellant should be compelled to appear in accordance with any writ or order of the Court and that the order to show cause be vacated as to him and that the writ of sequestration be quashed, and the bill dismissed as to him.

The petition in the Prerogative Court was filed in the matter of the Estate of Horace M. Swetland by Grace E. Swetland, individually, and as next friend for the infants. It alleged practically the same state of facts as did the bill in Chancery and prayed that the executors and trustees of the

estate should be enjoined from delivering any property to appellant as trustee under the trust agreement of July 14, 1917 and that appellant be removed as trustee (Pr., pp. 4, 18). No order to show cause was made by the Ordinary but notice was given to appellant by mailing to him without the State (Pr., p. 71) a notice that application would be made to the Ordinary upon the petition and supporting affidavits for temporary relief. Appellant filed a special appearance and motion (Pr., p. 74) which set up substantially what was set up in the special appearances in the Court of Chancery and prayed the judgment of the Court whether he should be compelled to appear in accordance with any notice or writ of the Prerogative Court and that the petition be dismissed as to him.

All special appearances were duly verified and appellant offered to prove the facts alleged therein.

No testimony was taken with the result that *the statements contained in the special appearances must be taken as facts.*

In his conclusions in the Chancery case (Ch., pp. 126, 127), the Vice Chancellor overruled the motions and granted the temporary relief upon the grounds: 1, that the situs of the trust under the 1917 and 1922 agreements was in this State and appellant might be called upon to account, notwithstanding that he resided in a foreign jurisdiction and could not be, and was not, served within the State; 2, that the effect of the filing of the special appearances without leave of Court was to subject appellant to the jurisdiction of the Court as if he had entered general appearances (Ch., p. 126).

The order denying the motions (Ch., p. 143) also adjudges that appellant has appeared generally in the cause, and directs him to file an answer

within a limited time, or "in default thereof, complainant's bill shall be taken as confessed against the said Maurice J. Swetland, individually, and as trustee under the trust agreements dated July 14, 1917, and January 3, 1922, respectively, and such decree made as to the Chancellor shall seem just and equitable."

The conclusions of the Vice Ordinary in the Prerogative Court (Pr., p. 80) refer to the conclusions in the Court of Chancery, and further state that, inasmuch as the proceedings in the Prerogative Court are an outgrowth of an accounting by the executors and trustees of the Swetland Will, of which appellant is one, there is no doubt of the jurisdiction of the Court over the person of appellant or of the power of the Court to grant relief if the allegations of the petition are sustained. The Vice Ordinary holds that appellant, as trustee under the July 14, 1917, trust, is a party to the proceedings and already in Court. The order in the Prerogative Court (Pr., p. 84) adjudges that appellant by his filing of a special appearance without leave of Court appeared generally to the petition and directs that he answer or make such motion as he may be advised with reference to the petition within a limited time, or, in default thereof, "the said petition shall be taken as confessed against him, and such order shall be made against the said Maurice J. Swetland, as trustee under the trust agreement of July 14, 1917, as the Ordinary shall deem just and equitable".

I.

The Court erred in holding that the effect of the filing of a special appearance without leave of court for the purpose of a motion challenging the jurisdiction of the Court because process was not served within the State, was a general appearance.

The Vice Chancellor held that the effect of the filing of the special appearances without leave of Court was to subject appellant, both as trustee and individually, to the jurisdiction of the Courts.

In the Chancery case there was a writ of sequestration, issued under chapter 204 of the laws of 1919, p. 444, 1 Cum. Supp. to C. S. of New Jersey, p. 264, 1911-1924, secs. 33-52. By the express terms of that act it is provided:

> "*Motion to quash the writ may be made under special appearance* on five days' notice (or such other time as the court may direct) to complainant or petitioner, and on such motion, affidavits or other proof, taken as the court may direct, may be considered, and the court shall determine whether the writ shall shall stand upon the proofs as they appear on such hearing."

There was no writ of sequestration issued in the cause in the Prerogative Court, the attempt being to bring appellant into court by *mere notice* served without the State.

The Vice Chancellor in his conclusions in the Chancery case (Ch., p. 126) does not mention the leave to file a special appearance, expressly conferred upon appellant by the statute, but, **irrespective of the statute, appellant had the absolute right to appear and be heard upon the question of the jurisdiction over his person under the pro-**

tection of a special appearance filed without leave of court, and to deny him that right would be to deprive him of his property without due process of law within the meaning of the 14th Amendment of the Constitution of the United States.

The Vice Chancellor, while recognizing that, prior to the new Chancery rules, where jurisdiction over the person or thing, as distinguished from service of process, was attacked it could be raised by plea to the jurisdiction filed without leave, says that, those pleas now being abolished, while it may still be raised by answer, if it is overruled, the result would be the same as upon a motion addressed to the jurisdiction under a *conditional* appearance (Ch., p. 140).

The Vice Chancellor overlooks I submit that what led this Court in *Wilson* v. *American Palace Car Co.*, 65 N. J. E. 730, at p. 731, to say: "The right of a defendant to raise the question of the jurisdiction of a Court of Equity and to demand *in limine* the judgment of the Court whether he should answer the bill is clear" and without any leave of Court was the existence of the Federal Constitution and no change of rules of practice can change the right. It must be accorded in some form or other. If the appropriate plea is abolished then the right may be exercised by motion. To restrict the exercise of the right to a method which, in effect, requires a *conditional* appearance is to deny the right.

The English authorities, which the Vice Chancellor mentions in his conclusions (Ch. p. 140) requiring leave of Court and a conditional appearance to question the jurisdiction over the person were noted by this Court in *Wilson* v. *American Palace Car Co.*, 65 N. J. E. 730, and *held to be not applicable in view of our system of government,* the practice of the English Courts springing, as this Court said in *Wilson* v. *American Palace Car Co.*:

> "out of the fact that those courts regarded every person as subject to their jurisdiction, unless he could designate a particular tribunal wherein, as a special privilege, he was to be sued,"

and this Court adding:

> "But in this country that fact cannot be predicated of either the federal or the state courts, or even of the governments under which they exist."

The Vice Chancellor refers to *Hervey* v. *Hervey*, 56 N. J. E. 166, in which Vice Chancellor Emery said at p. 182:

> "The leave to enter a special appearance was granted in this case without terms, but as a matter of practice it should be stated that the more correct practice seems to be to require, as a condition of granting such leave, that there be inserted in the order an undertaking or stipulation that the defendant would submit without further process to the orders of the court, if the point should be decided against him. Romaine *v.* Insurance Company, 28 Fed. Rep. 625 (Hammond, District Judge, 1886). The plain reason is that the special leave without such condition places the defendant in the position of drawing the opinion of the court without any risk, for if the court has no jurisdiction by reason of failure to serve process, its decision that it has such jurisdiction does not settle this question so that it may not be questioned after judgment and in any court. Unless, therefore, the defendant agrees to come in if the decision on the point of jurisidction is against him, he should as a general rule be left to question the jurisdiction of the court in a form where all parties will be bound."

But that a defendant *has* the right not only to place himself in the position of drawing the opinion of the Court without any risk, but the further

right, after having placed himself in that position, of electing to proceed with the litigation *reserving the point for consideration* by the Supreme Court of the United States, if he so elect, was established by this Court in the later case of *Wilson* v. *American Palace Car Co.,* 65 N. J. E. 730, and reiterated in *Puster* v. *Parker Mercantile Co.,* 70 N. J. E. 771. He has that right under the doctrine of *Pennoyer* v. *Neff,* 95 U. S. 714, 24 L. Ed. 565.

In *Groel* v. *United Electric Co.,* 68 N. J. E. 249, after *Wilson* v. *American Palace Car Co.,* 65 N. J. E. 730, there was a special appearance and plea to the jurisdiction filed without leave and a motion to strike for that reason. Vice Chancellor Emery, who had decided *Hervey* v. *Hervey,* 56 N. J. E. 166, considered the cases and *doubted whether to raise the matter of jurisidiction any appearance was necessary* and he said at p. 252:

> "The conditional appearances under the English practice seem to have been based on the necessity of an appearance as the basis for any subsequent proceedings in the suit and *are not applicable if my view of our statute and practice is correct.*"

He further said:

> "Neither should the special appearance be stricken out. If the limitation of the purposes of an appearance is not authorized, except by special order of the court, then the real question arising on such entry relates to the effect of the appearance as entered, with this attempted limitation of its purpose by the solicitor without authority. *This question may arise if the plea to the jurisdiction be overruled and further proceedings in the cause be taken by complainant.*"

Vice-Chancellor Emery held that the Court was bound, for the purposes of the jurisdictional question raised by the plea (here by the motion), to

consider that meritorious question. If the position of the Vice-Chancellor in the case at bar be sound, then the filing of the special appearance had the effect of a general appearance and there would have been no necessity for the determination of the jurisdictional question by Vice-Chancellor Emery.

The Vice-Chancellor in the case at bar relies upon *Groel* v. *United Electric Co.,* 69 N. J. E. 397.

It is true that Vice-Chancellor Garrison referred to many cases and the English practice and said that he *thought* that the plea to the jurisdiction therein involved should not be entertained except upon a conditional appearance, but he finally said (p. 407 of 69 N. J. Eq.):

> "It is true that the question as to whether the objection should be by plea or motion does not appear to have been raised in the Wilson case, and it may be that the court of errors and appeals, upon consideration, will settle our practice in accordance with the ancient English practice, *but I feel constrained to follow the clear precedent now existing, and will therefore entertain the plea in its present form.*"

This Court did not, as Vice-Chancellor Garrison thought it might when another case came befor it, alter its conclusion for in *Puster* v. *Parker Mercantile Co.,* 70 N. J. E. 771, the *question as to whether there should be a conditional appearance was squarely raised as the record will show, and this Court affirmed an order of the Chancellor sustaining the plea which recited a special and not a conditional appearance.*

The Vice-Chancellor below relies upon *Ewald* v. *Ortinsky,* 77 N. J. E. 76, affirmed 78 N. J. E. 527. Whatever may have been the language of Vice Chancellor Garrison in *Ewald* v. *Ortynsky,* 77 N. J. E. 76, the *result* of his conclusion was that

he permitted the question sought to be raised by the defendant under special appearance to be so raised. The case was not affirmed upon the opinion below, *Ewald* v. *Ortynsky,* 78 N. J. E. 527.

This Court said (p. 529):

> "We, of course, did not intend to say, and did not say, that a defendant in an equity suit *who was a resident of the state, and subject to be brought within the jurisdiction of the court by the compulsory process,* could, after bill filed, but before subpoena was served upon him, successfully challenge the jurisdiction and obtain a dismissal by pleading that he had not been served. The mere statement of the proposition exposes its absurdity, for if such was the situation a defendant could always defeat the complainant's claim if he could manage to forestall the service of subpoena by filing such a plea."

It is true that the Chancellor, then Vice-Chancellor, in *Allman* v. *United Brotherhood of Carpenters, etc.,* 79 N. J. E. 150, made the statement quoted by the Court below (Ch., p. 141) and that the order or decree was affirmed on his opinion by this Court, but the remark of the Chancellor was unnecessary to the decision of the cause and he quoted as authority Daniels Chancery Pleading and Practice, 6th Ed., 453, overlooking, I submit, that this Court had held in *Wilson* v. *American Palace Car Co.,* 65 N. J. E. 730, and *Puster* v. *Parker Mercantile Co.,* 70 N. J. E. 771, that, because of our federal and State constitutions and the fact that, unlike England, no Court could claim jurisdiction over everybody, the English practice did not apply, and the Chancellor later in *Laure* v. *Singer,* 100 N. J. L. 98, at p. 102, speaking for this Court, said (p. 102):

> "It may be that the entry of a special appearance, for the sole purpose of objecting

> to the jurisdiction, *would be good without leave of the court for that purpose obtained* (Groel *v.* United Electric Co., 68 N. J. E. 249; Allman *v.* United Brotherhood, 79 *Id.* 150; affirmed for the reasons given in the court below (*Ibid.* 641), but no such appearance was entered, with or without leave."

It is to be noted that the Chancellor cited as his authority for this remark *Groel* v. *United Electric Co.,* 68 N. J. E. 249, and *Allman* v. *United Brotherhood,* 79 N. J. E. 150, affirmed 79 N. J. E. 641, relied on for the opposite rule by the Court below in the case at bar.

This Court, speaking through the same Judge, in *Laure* v. *Singer,* 100 N. J. L. 98, at p. 102, made it quite clear that it did not intend, in affirming in *Allman* v. *United Brotherhood of Carpenters, etc.,* 79 N. J. E. 150, affirmed 79 N. J. E. 641, to hold that the matter of jurisdiction of the person could not be raised except by conditional appearance filed with leave of Court.

There was nothing, therefore, I submit in *Allman* v. *United Brotherhood of Carpenters,* 79 N. J. E. 150, affirmed 79 N. J. Eq. 641, by which the Vice Chancellor below could be *bound* to the conclusion which he reached.

The Vice Chancellor below refers to the opinion of Vice Chancellor Fallon in *Spoor-Thompson, &c., Co.* v. *Bennett, &c.,* 105 N. J. E. 108, as re-asserting the practice of requiring conditional appearance. What Vice Chancellor Fallon said in that case was (p. 112):

> "It is *proper* practice to make an *ex parte* application or file a petition for leave to appear specially to contest the jurisdiction of the court. Hervey *v.* Hervey, 56 N. J. E. 166, 182; Wilson *v.* American Palace Car Co., 65 N. J. E. 730; Groel *v.* United Electric Co., 68 N. J. E. 249; Puster *v.* Parker Mercantile Co., 70 N. J. E. 771; Allman *v.* United Brother-

> hood of Carpenters, 79 N. J. E. 150, 154; affirmed *Ibid.* 641."

Vice Chancellor Fallon cites as authority *Wilson* v. *American Palace Car Co.,* 65 N. J. E. 730; *Puster* v. *Parker Mercantile Co.,* 70 N. J. E. 771, both cases in this Court and both of which establish the practice to be the contrary.

And the remark was not at all necessary for his decision.

I stated in the Court below, as the Vice Chancellor indicates (Ch., p. 141), and I reiterate here that the only instance that I know of of a conditional appearance having been required is *McVoy* v. *Baumann,* 93 N. J. E. 360, affirmed p. 638. A motion had been made by non-residents in a specific performance suit to dismiss the bill on the ground of lack of jurisdiction, such defendants not being residents of this State and any service of process having been by publication. The motion was not granted but leave *was* granted "to file an answer under their special appearance, subject to the condition that if on final hearing the motion to dismiss for want of jurisdiction is denied, their answer shall stand as a general appearance." Instead of appealing to this Court on the refusal to grant the motion as was their right they filed their answers and then participated in the trial. The Court held that it had jurisdiction and made a decree. The Court said at p. 363:

> "Assuming the cause of action to be one strictly *in personam,* it is surely no ground for dismissal of the bill that service has not been made (except, perhaps, where there has been such long continued delay as to constitute laches. Dey *v.* Hathaway, 41 N. J. E. 419). Not only is this true where there is nothing of record to indicate that service has been made, but also in a case where it appears by the record that service has duly been made, but defendant contends the contrary.

> In the former case there is nothing upon which defendant can take any action. After proof of service appears of record he may either move to set aside the service or the proof thereof, or, if he be a non-resident, he may raise the question by setting up in his answer a denial of the acquisition of jurisdiction over his person. Chancery Rules 52, 53; Groel *v.* United Electric Co., 69 N. J. E. 397; Wilson *v.* American Palace Car Co., 65 N. J. E. 730; Ewald *v.* Ortynsky, 78 N. J. E. 527; Brimberg *v.* Hartenfeld Bag Co. 89 N. J. E. 427."

Both the Court below and this Court held, however, aside entirely from the effect of the answer under the conditions stated, that, the action being one *in rem,* the Court had jurisdiction notwithstanding the absence of personal service. It was held to be *in rem* because the statute provided that the decree in a specific performance case should act directly upon the land. In his opinion, Vice Chancellor Buchanan said, that the attempt to question the jurisdiction or to set aside the process was premature, because attempted service had not been completed. He recognized, however, that the non-resident defendant had the right to raise the question at the proper time (p. 363).

This case has no application here for the reason, among others, that jurisdiction over appellant in the Chancery case is not only sought to be obtained by publication but by *sequestration* under the provisions of chapter 204 of the laws of 1919, p. 444, Vol. 1, Cum. Sup. Com. Stat., Sec. 33-520, p. 264, and defendant's property or rights have been seized and payment to him has been enjoined in both causes of that to which he is entitled. He is entitled to a judgment *in limine* under special appearance as to whether the courts so interfering with his property rights have any

jurisdiction to do so if he is not brought in by personal service of process. This is not the kind of a case where, if he is not properly before the court, he is not injured. Courts without jurisdiction, as appellant contends, are actually interfering with his rights of property.

In *Apgar* v. *Altoona Glass Co.*, 92 N. J. E. 352, at p. 353, Vice-Chancellor Backes said:

> "Process issued and was returned *non est*, and thereupon an order for substituted service upon the defendants was entered and published and posted as therein provided. Later, a second subpoena issued against them and was returned by the sheriff of Atlantic County served upon three, the Dunkirk Window Glass Company, Camp Glass Company and Smethport Glass Company, service being made upon the president of the first two and upon the vice-president of the third. They entered special appearances, and, upon the return of an order to show cause, the service was quashed, it appearing, by the proofs, that the defendants were not authorized and never had in fact transacted any business in this state, which was not controverted, and that the officers upon whom process was served were, at the time, temporarily in this state upon business of their own. Service under such circumstances was obviously abortive. Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. Law 15; Puster *v.* Parker Mercantile Co., 70 N. J. E. 771."

And he also said at p. 354:

> "*Jurisdiction of the court over the persons of the defendants was properly raised by motion to quash the writ.* Brimberg *v.* Hartenfeld Bag Co., 89 N. J. E. 425."

Respondent in the Court below relied on my opinion in *Brimberg* v. *Hartenfeld Bag Co.*, 89 N. J. E. 425.

The Court decided nothing in that case with respect to this subject matter and expressly declined to do so.

It is true that it expressed the view that it thought that the proper motion "in response to any process then served, or attempted to be served, and that to secure such judgment he must come in under a conditional as distinguished from a special appearance * * * ". But it could not well have meant that the conditional appearance would oblige the defendant, upon the denial of his motion, to submit to the jurisdiction, foreclosing him from questioning the point on appeal, and in the Supreme Court of the United States for, to require any *such* conditional appearance, would be to fly in the face of the Federal decisions, and the right of a citizen to have the constitutional question raised under the 14th amendment determined by the Supreme Court of the United States.

In *Harkness* v. *Hyde,* 98 U. S. 476-479, 25 L. Ed. 237, the Supreme Court of the United States, at p. 238 of 25 L. Ed. said:

> "The right of the defendant to insist upon the objection to the illegality of the service *was not waived by the special appearance of counsel for him to move the dismissal of the action on that ground* or what we consider as intended, that the service be set aside; *nor, when that motion was overruled, by their answering for him to the merits of the action.* Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. *It is only where he pleads to the merits in the first in-*

> *stance, without insisting upon the illegality that the objection is deemed to be waived."*

It said in *Goldey* v. *Morning News,* 156 U. S. 517, 39 L. Ed. p. 517, at p. 520:

> "Irregularity in a proceeding by which jurisdiction is to be obtained is in no case waived by a special appearance of the defendant for the purpose of calling the attention of the court to such irregularity. Harkness *v.* Hyde, 98 U. S. 476 (25: 237); Southern Pac. Co. *v.* Denton, 146 U. S. 202 (36: 943); Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194 (37: 699)."

And see the long list of cases in Rose's Notes to *Harkness* v. *Hyde* and *Goldey* v. *Morning News,* both in the Annotated Edition of the U. S. Supreme Court Reports, and in Rose's Notes on U. S. Reports, Revised Edition Supplement.

The rule was followed in the Supreme Court of the United States as lately as *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 234, 62 L. Ed. 260, L. R. A. 1918-C 497.

The rule is recognized by the courts of this State. See *Hubbard* v. *Montrose Shingle Co.,* 79 N. J. L. 208 at p. 211, and *Duke* v. *Duke,* 70 N. J. Eq. 135 at p. 157.

Respondents suggested below that appellant had attempted to join with a motion to quash the service of process one in the nature of a true plea to the jurisdiction questioning the power of the court to deal with the subject matter of the suit, and that *this* resulted in a waiver of the special appearance and acquiescence in the jurisdicton over the person, respondents asserting in their brief below:

> "To prevail on such a motion the defendant must convince this Honorable Court that an action for accounting cannot be maintained

> by *cestuis* against their trustee, personally before the Court, unless the trust agreement was executed or the trust property is physically present in the jurisdiction in which suit is instituted.''

In other words, they asserted that, by questioning the jurisdiction of the Court over the subject matter, *assuming the jurisdictional defect is the absence of the non-resident trustee,* the non-resident trustee has brought himself within the jurisdiction of the Court so that the motion defeats itself.

Respondents misapprehended the extent of the allegations in the special appearances and their purpose. The allegations which respondents asserted go to the jurisdiction of the Court over the subject matter are those with respect to the situs of the trust but it was necessary for appellant to insert those allegations to show that the Court *could not obtain jurisdiction over him by process of sequestration or by publication.* For, if the Court had jurisdiction of the subject matter in the sense that it had jurisdiction over the administration of the trust because the trust arose under our law and had its situs here, then it *may be* that the Court might obtain jurisdiction for certain purposes over appellant by substituted service or by seizure of property.

Respondents overlooked that the power of the Court to proceed against appellant by substituted service depends upon the *nature of the cause of action.* For the purpose of indicating to the Court, therefore, that its jurisdiction of the subject matter *depended upon its jurisdiction over the person of appellant,* it was necessary that appellant should insert the allegations which respondents said go to jurisdiction over the subject matter and not over the person. The special appearances in the Chancery suit are limited by the allegations of

paragraph 9, in which paragraph (Ch. 81; Ch. 76), after a recitation of the facts, appellant "submits that this Court has not now, nor ever had or obtained jurisdiction over the person or property of this defendant and cannot obtain jurisdiction over his person and property and that this defendant is not compellable to appear in response either to the order to show cause made herein or to the writ of sequestration issued herein, or to any other process and he does not accept or waive service and does not submit to the jurisdiction of this Court." The special appearance in the suit in the Prerogative Court is substantially the same.

While the matter of whether the Court would have jurisdiction to administer relief even if appellant were personally before the Court had been adverted to and to some extent argued, it was only for the purpose of strengthening appellant's position that the Court could not obtain jurisdiction over him by substituted service.

No plea or answer to the merits was joined with the motions to quash and no case was cited by respondents below that a motion in the form of that present amounts to any waiver of an objection to the jurisdiction over the person specifically urged.

The only case cited was *Stohege* v. *Singer Manufacturing Co.*, 73 N. J. Eq. 567, but in that case to a plea of non-service, etc., was joined one that the subject matter of the suit had been considered by another court and decided. There was united a plea going to the jurisdiction of the court over the person and one of *res adjudicata.* As a matter of pleading it was contended that the plea was bad, being double. The defendants said, in reply, that the proceedings in the English suit were not set up as a plea in bar "but only for the purpose of showing the court here that another court there had entertained the same suit and *had decided it,*

and that for such reason alone this court could not take jurisdiction". The defendant's position was that it was pertinent to the questioning of the jurisdiction of the Court.

Vice Chancellor Howell said, p. 572 of 73 N. J. Eq.:

> "There is grave doubt about the soundness of the defendants' position. If they are wrong, then the plea must be overruled, and they must be put to their answer."

He did *not* suggest that, by pleading this matter of *res adjudicata,* the defendants had waived their objections to the jurisdiction because of non-service. All that he said was that the plea might be bad in form and therefore subject to being overruled. He did *not* overrule it upon this ground, however, but considered its merits as a plea to the jurisdiction and, upon the authority of *Andrews* v. *Guayaquil and Quito Railway Co.,* 69 N. J. E. 211, the principle of which does not apply in this case, sustained the jurisdiction and overruled the plea.

Mr. Richard V. Lindabury filed the plea (the firm of which he was the head represents respondents here) and the complainants were represented by Edward M. Colie and Mr. Louis Marshall (of the New York bar) and it is inconceivable that, with these distinguished counsel representing the complainants, if there were any merit in the suggestion, it would not have been argued to the court that the effect of so joining in the one plea an objection to the jurisdiction over the person and a statement with respect to the prior proceedings in another court was to submit the defendant to the jurisdiction, for, if the respondents' position here be sound, that would have been an obvious way of disposing of the case in favor of the complainants and of preventing the defendants from

ever after questioning the jurisdiction of the court upon appeal or otherwise.

Indeed, under our present practice, it may be that a plea to the jurisdiction of the court because of lack of service may be set up in an answer to the merits.

Vice-Chancellor Buchanan, in effect, said in *McVoy* v. *Bauman,* 93 N. J. E. 360, at p. 363, with respect to an individual defendant:

> "After proof of service appears of record he may either move to set aside the service or the proof thereof, or if he be a non-resident, *he may raise the question by setting up in his answer a denial of the acquisition of jurisdiction over his person.*"

He conceives this to be the effect of the new chancery rules providing that "every defense heretofore presentable by plea shall be made in the answer—."

Under the former practice appellant had an election either to raise the question by motion or by plea. While it was held that the matter *might* be raised by plea no case has held that it could not likewise be raised by motion. If he is permitted to raise the question now in the answer which may also go to the merits he must be permitted to do it under a special appearance and to reserve the point.

It is not the law generally that the combining of a plea to the jurisdiction of the person with a plea to the jurisdiction of the subject matter is a waiver of the point of lack of jurisdiction of the person.

The Circuit Court of Appeals for the Second Circuit reviewed the cases in *Armstrong* v. *Langmuir,* 6 Fed. (Second Series), p. 369.

If the motions in the instant cases be considered to be motions which go to the jurisdiction of the

subject matter as well as to the jurisdiction over the person, they are analogous to those considered by the Circuit Court of Appeals in the *Armstrong* case. There, in the language of the Court, "The De Forest Company appeared specially and moved to dismiss the bill as to it, *because it was not subject to process of the District Court, and further moved to dismiss it as to all parties, because it was an indispensable party to the suit*".

So here appellant objected to the service made upon him and the nature of the case is such that, if the service made upon him be not good and he cannot be brought in by publication, *the bill should be dismissed because he is an indispensable party or at least all injunctive relief which affects his rights should be vacated.*

The Circuit Court of Appeals by Judge Hand, said, p. 371 of 6 Fed. (Second Series):

> "A man may not say that he is not properly before the court, and in the same breath argue that, if he be, there is no ground to hold him. Courts have found an inconsistency in such an attitude which has led them to insist that a motion upon the merits presupposes that the party is before the court. *But no such inconsistency arises when the second motion is not an alternative, but a supposed sequela of the first.* We think, therefore, that the dismissal of the bill as against the De Forest Company was valid, and should not be reversed."

He also referred to the cases and said, p. 370:

> "While of course we agree that a special appearance and motion to dismiss for lack of personal jurisdiction cannot be coupled with a motion upon the merits, it seems to us that the two motions here coupled do not fall within that rule. It is, for example, settled in at least three circuits that a party sued in the wrong district may couple a motion to dismiss on that ground with a motion to dis-

> miss for lack of substantive jurisdiction over the subject-matter. Southern Pac. Co. *v.* Arlington Heights Co., 191 F. 101 (C. C. A. 9), 111 C. C. A. 581; Jones *v.* Gould, 149 F. 153 (C. C. A. 6), 80 C. C. A. 1; Kelly *v.* Smith, 196 F. 466 (C. C. A. 7), 116 C. C. A. 240. The decision to the contrary in Mahr *v.* Union Pacific Co. (C. C.) 140 F. 921, must be considered as overruled."

In *Southern Pac. Co.* v. *Arlington Heights Fruit Co.*, 191 Fed. Rep. 101, the Circuit Court of Appeals for the Ninth Circuit, after reviewing all of the cases, said:

> "The latest case upon the subject, and one which upon the facts is of very close analogy to the one at bar, is Davidson Marble Co. *v.* Gibson, 213 U. S. 10, 29 Sup. Ct. 324, 53 L. Ed. 675. That was on writ of error to the Circuit Court for the Northern District of California. A demurrer and a motion to quash and dismiss were filed at the same time. The demurrer assigned grounds therefor, among others, first, that the court had no jurisdiction of the defendants or either of them; second, that the plaintiff was not a resident or citizen of the Northern District of California; third, that the defendants were not, nor was either of them, a resident or citizen of the Northern District of California; fourth, that the plaintiff was a citizen and resident of the State of Pennsylvania, and the defendants, and each of them, were citizens and residents of the state of Illinois; fifth, that the court had no jurisdiction of the subject of the action; and sixth, that the court had no jurisdiction of the controversy alleged in the complaint. The motion to quash the service and dismiss the action is as follows:
>
> 'The defendants above named and each of them hereby appear specially in the above-entitled cause for the purpose only of moving the said court to quash and set

aside the service of the summons in the said cause, and to dismiss the said action, upon the ground that the said court has no jurisdiction of the persons of the defendants, and upon the further ground that the said court has no jurisdiction of the person of the plaintiff; and upon the further ground that neither the plaintiff nor the defendants, or any or either of them, are citizens of the state of California or residents of the Northern District of California in the Ninth judicial circuit, and upon the *further ground that the said court has no jurisdiction of the controversy at issue.* The said motion will be based upon the complaint of the plaintiff and all subsequent proceedings and the return of service of summons herein.'

The motion to quash was denied, and the demurrer overruled. The defendants declining to plead further, a judgment was entered against them, from which the writ of error was prosecuted. After indicating that the case was governed by that part of act March 3, 1887, as corrected by Act Aug. 13, 1888 (25 Stat. 433, c. 866), which provides that no civil suit shall be brought before any of the Circuit Courts of the United States against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, Mr. Justice Moody says:

'It follows, therefore, that the court below was without jurisdiction of this cause, and, as the defendants have taken no action whatever in response to the summons, except to appear specially and object to the jurisdiction, it cannot possibly be said that the objection to the jurisdiction has been waived.'

And later:

'The defendants appeared specially, as they had a right to do, solely for the purpose of objecting to the jurisdiction. They were not bound to agree to submit their ob-

jection to the final decision of the judge of the Circuit Court, and the rule of court which treated the special appearance, without such an agreement, as a general appearance is invalid.'

So it was determined in that case that the appearance made in the form and manner as above indicated was a special appearance for the purpose of contesting the authority of the court to take jurisdiction of the person of the defendant, and it was accordingly held that waiver of jurisdiction was not made by such an appearance.''

And the Court said, p. 110:

''There the motion to quash the summons and to dismiss the action combined the two grounds as distinctly as here, and the demurrers were based upon like grounds, which were also acted upon and overruled by the court, *yet it was determined there was no waiver as respects jurisdiction over the person.* It would seem to be deducible, therefore, from these authorities from the Supreme Court, including the Gibson case, that when the defendant appears specially for the express purpose of challenging the jurisdiction of the court over the person *for want of proper service,* or upon the ground that the venue is not laid in his judicial district, *although he may have combined in his motion or plea to the jurisdiction matter going to the subject of the suit or action, he does not thereby waive jurisdiction over his person.* The purpose of the defendant is to be gathered rather from the nature of his appearance. If, being special, it is to insist unquestionably upon want of jurisdiction of the court, there would be no waiver. By appearing generally the party submits himself to the jurisdiction of the court for all purposes of which the court can take cognizance. The manner of the appearance would be taken as an indication of the purpose of the pleader to submit to the court's jurisdiction, notwith-

standing an objection to the contrary. *But, where the appearance is declared in unmistakable language to be special, the pleader's intendment that it is not so is not always to be deduced from the fact of the combination of an objection to the jurisdiction with an objection to the subject-matter.* Of course, the court cannot pass judgment upon the subject-matter without at the same time having jurisdiction of the person, yet if the defendant insists upon his objection to the jurisdiction over his person, and he is in a position to insist thereon, the court ought to give him the benefit of that objection and pass judgment respecting it. In the case at bar all three of the grounds assigned by the plea went to the jurisdiction of the court in one sense—the first to the jurisdiction over the person, *and the last two to the jurisdiction of the court as a court of equity.* In either case, if the plea was well taken, the bill of complaint would have to be dismissed, but the court could not proceed to a ruling upon the two latter objections, without first entertaining jurisdiction of the person. Now, if it be that the defendants have confused the kind of jurisdiction they were insisting upon, as might well happen, or believed they had a legal right to combine the objections, it nevertheless appears that it was distinctly their purpose to appear specially in the first instance with a view of raising the jurisdictional question, to be disposed of before the merits were reached. We are therefore of the opinion that, under such circumstances, the defendants have not waived their personal privilege of being sued within their own district."

In *Wilson* v. *Beard,* Circuit Court of Appeals for the Second Circuit, June, 1928, 26 Fed. (2d Series), at p. 863, the Circuit Court of Appeals said:

"It is argued that the appellee waived his right to ask for a dismissal below because he

> not only asserted his privilege of a personal suit in the District Court but urged that the court lacked jurisdiction of the subject-matter, and, further, that he failed to move to set aside the order of service of the subpoena in Oklahoma. There was no general appearance, nor was a demurrer filed, presenting arguments addressed to the jurisdiction of the court and on the merits of the case, as in St. Louis & S. F. R. R. Co. *v.* McBride, 141 U. S. 127, 11 S. Ct. 982, 35 L. Ed. 659, and Western Loan & Sav. Co. *v.* Butte & Boston Mining Co., 210 U. S. 368, 28 S. Ct. 720, 52 L. Ed. 1101. Appellee limited his appearance to the motion to dismiss. He sought to raise no question as to the merits. Armstrong *v.* Langmuir (C. C. A.) 6 F. (2d) 369; Kelley *v.* T. L. Smith Co. (C. C. A.), 196 F. 466. Nor is there force in the claim of waiver for failure to move to set aside the service of the subpoena. This relief was obtainable by a special appearance and motion to dismiss the bill without asking to vacate the service of process. Camp *v.* Gress, 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 997; Ladew *v.* Tenn. Copper Co., 218 U. S. 357, 31 S. Ct. 81, 54 L. Ed. 1069. The court properly dismissed the bill as against this appellee."

The net effect of these cases is that a pleading or motion prefaced by a special appearance cannot be converted into a general appearance by the Court merely because there are matters set forth which go further than the question of mere jurisdiction over the person. The matter is one of intent or presumed intent.

Construing the special appearances most favorably to respondent's point of view, they cannot be said to contain more than the pleadings considered by the Circuit Court of Appeals for the Second Circuit in *Armstrong* v. *Langmuir,* 6 Fed. (2d) p. 369.

II.

The situs of the trust or trusts created by the instruments of 1917 and 1922 was not at the time of the institution of the proceedings in the Court of Chancery and in the Prerogative Court, and never had been, in the State of New Jersey, and at the time of the institution of the proceedings, and for many years before, neither the trustee nor anyone of the beneficiaries, was domiciled in New Jersey.

To sustain the jurisdiction, the court below was obliged to hold that the situs of the trust or trusts created by the agreements of 1917 and 1922 was in New Jersey, for the reasons that:

(a) The Court was precluded from holding that the effect of the bequest in the Will of Horace M. Swetland to appellant, Maurice J. Swetland, as "trustee, or his successor trustee, * * * under the trust agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes therein provided", was to create a trust under the Will of Horace M. Swetland over which the Court would have jurisdiction as a trust created by the will of a person domiciled in this State, because of the opinion of the Court of Chancery in *Swetland* vs. *Swetland,* 100 N. J. Eq. 196, and the decree which followed the opinion, and which was affirmed by this Court, 6 Advance Reports, 360, on the opinion below. By that decree it was adjudicated that by the bequest the testator "*merely added and intended to add additional property to a trust fund established by him years before the execution of his will under a valid, active trust,* and to which he had, from time to time during his lifetime, added securities, said trust fund having been established under the

declaration of trust hereinbefore set forth dated July 14, 1917; that the trust to which this bequest is added is not theoretical, nebulous, intangible or incapable of identification, but exists in fact, *and the trustee-legatee is as distinct and definite an entity as would have been an individual or corporation legatee;* that the trust exists, and the beneficiaries thereof are capable of identification, *and that the trust to which this bequest is added was not created by the Will.*"

(b) No Court may remove a trustee, call upon a trustee for an accounting, give instructions with respect to the administration of the trust, or otherwise interfere, save a court of the situs of the trust. This does not preclude, of course, recovery against a trustee, *if he may be found within the jurisdiction,* of trust property which he has carried into the state and it may be that under certain conditions a trustee may be compelled to account in a jurisdiction *in which he may be found.*

The purpose of the proceedings here is not to recover from a trustee trust property found within the state but to compel the trustee to account for trust property which was never within the state supposed to have been dissipated by him. Such an action is one *in personam.* It cannot be maintained in any court except one of the jurisdiction in which the trust has its *situs* or, to say the best for complainants and petitioners below, in one *which has control over the person of the trustee.*

In the tentative draft on the Conflict of Laws prepared by Joseph H. Beale with his advisors, among others, Learned Hand, Judge of the United States Circuit Court of Appeals for the Second Circuit, and Frederick F. Faville of the Supreme Court of Iowa, which restatement of the law may

be considered as the latest work by Beale on the Conflict of Laws, it is stated:

> "The administration of a trust of movables is supervised by the courts of that state *only* in which the administration of the trust is located."

As a subhead:

> "In the case of a trust created *inter vivos* the administration of the trust will be supervised by the courts of that state in which the administration of the trust is located."

There is but one exception pointed out in Section 320 by the following language:

> "Though the administration of a trust is to be supervised in a particular court, the obligation of the trustee with regard to the trust *res* may *under certain circumstances* be enforced in other courts. Thus, if a trustee repudiates the trust and absconds with the trust property, *he may be followed into another state and* sued there and a judgment obtained for the full amount of the property."

It is apparent that this statement is based upon the hypothesis that the trustee *can be personally found in the court of the jurisdiction in which suit is brought.*

In their comment upon Sec. 320 the reporters say (Commentaries on Conflict of Laws, The Am. Law Inst. Rest. #3, p. 44):

> "A court of a state not the domicil of the testator will refuse to give directions to a testamentary trustee. Lewis *v.* Chester, 60 Pa. 325 (1869). The administration of a testamentary trust given to a foreign trust company as trustee is supervised by the court of the state of the trust company. Farmers' L. & T. Co. *v.* Ferris, 67 N. Y. App. Div. 1 (1901).

> In case of a trust created *inter vivos,* the court of the state where the trust is to be administered will give instructions for carrying out the trust, Greenough *v.* Osgood, 235 Mass. 235, 126 N. E. 461 (1920); *and a court of another state will not interfere with the trust, as for instance by authorizing the trustee to surrender the fund to a public trustee.* In re Hewitt's Settlements (1915) 1 Ch. 228."

See also, *Campbell & others* v. *John Wallace,* 10 Gray, 76 Mass. 162; *Jenkins* v. *Lester,* 131 Mass. 355; *Sewall* v. *Wilmer,* 132 Mass. 131, which latter case holds that a trustee cannot be compelled to account in a state other than that which has control over the administration of the trust "even if they should be personally found there". *Walliam McCullough's Executors* vs. *William McCullough, and others,* 44 N. J. Eq. 313; *Greenough* v. *Osgood,* 126 N. E. 461, 235 Mass. 235 (a case involving a trust *inter vivos* in which the Supreme Court of Massachusetts said that the "Massachusetts trustee or trustees could at no time have been compelled to account for the property in trust, in any state other than Massachusetts"); *Lines* vs. *Lines,* 142 Penn. State 149, 24 American State Reports, 487, 21 Atl. 809; *Servis* vs. *Nelson,* 14 N. J. Eq., p. 94; *Farmers' Loan & Trust Co.* v. *Ferris,* 67 App. Div. 1, 73 N. Y. Supp. 475.

Before proceeding to consider the reasoning of the Vice-Chancellor by which he comes to the conclusion that the trusts created by the instruments of 1917 and 1922 have their *sitae* in New Jersey, I desire to refer to the various trust agreements.

The declaration of trust of July 14, 1917, is printed (Ch. 19). It is in the form of a declaration signed by appellant, Maurice J. Swetland, and recites a former trust created on September 25, 1916, which had been revoked in accordance with

a power reserved to the creator, Horace M. Swetland. It recites the delivery by Horace M. Swetland of certain specific property to be held by the trustee 'for the sole benefit, advantage and use of my wife and children, subject to the following conditions, in regard thereto as imposed in connection therewith by the founder of said trust, to wit * * *''. The provision as to the use of the income for the sole benefit and use of the wife and children of appellant until the youngest living child shall reach the age of 30 years, when the trust *res* is to be distributed in a certain manner, follows. Horace M. Swetland reserves the right to terminate the trust at any time.

The instrument of January 3, 1922, made between Horace M. Swetland and appellant recites that Horace M. Swetland has already delivered certain property to appellant in trust, which is the property delivered under the trust declaration of July 14, 1917. The agreement then provides (Ch., p. 23):

> ''WHEREAS the party of the first part desires to increase the trust estate so held by the party of the second part, and
>
> WHEREAS the parties hereto by mutual consent wish to *establish a new trust by substituting this agreement for the one now in effect, without prejudice, but to the great advantage of the beneficiaries hereof.*''

Horace M. Swetland then, by the terms of the agreement, transfers to appellant certain property, including all of the property which had previously been delivered under the trust of July 14, 1917, which Horace M. Swetland had the absolute right to terminate, and which by the agreement of January 3, 1922, he did terminate, and certain other property in trust irrevocable ''for the sole benefit, advantage and use of the family, wife and

children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following * * *". Provisions with respect to distribution of the trust *res,* etc., which are different from the provisions with respect to the distribution of the trust *res* under the agreement of July 14, 1917, follow.

The effect of the agreement of January 3, 1922, was to obliterate the agreement of July 14, 1917.

While the Court in *Swetland* vs. *Swetland,* 100 N. J. Eq. 196, affirmed 6 N. J. A. R. 360, speaks of the trust of July 14, 1917, it is immaterial for present purposes whether there is one or more trusts, *for each was created in such manner as that, I submit, its situs was in New York at the time of its creation.*

The Vice Chancellor holds otherwise *upon the sole ground that the situs of an inter vivos trust of personalty is at the domicile of the creator because "mobilia sequuntur personam".* In this, I submit, he erred, and I submit that the cases which he cited do not support him.

The domicile of the creator of the trust is a factor to be considered but *the cases do not hold that it is a determining factor.* The Court below relies upon cases having to do with testamentary trusts which are not applicable to a trust *inter vivos.* The rule with respect to testamentary trusts has not been applied to trusts *inter vivos.*

The rule that, with respect to the distribution of personal property, the law of the domicile of the decedent applies, is one which has grown up as a part of international law to prevent conflict. It was not based upon the theory *mobilia sequuntur personam,* but upon the law of nations.

This Court in *Caruso* vs. *Caruso,* 106 Eq. 130, quoted with approval the language of Mr. Justice Wayne, speaking for the Supreme Court of the United States in *Ennis et al.* vs. *Smith et al.,* 14 Howard 400, 14 Law. Ed., p. 398, who said:

> "It has been universal for so long a time that it may now be said to be a part of the *jus gentium.* Lord Thurlow speaks of it as such in the House of Lords, in * * *. Erskine in his Institutes of the Law of Scotland, B. 3, titl. 9, sec. 4, 644, says *this rule is founded on the law of nations.*"

In cases involving disposition of personal property of a decedent the rule is not that the law of the domicile shall control because *mobilia sequuntur personam* but rather *mobilia sequuntur personam* because of the law of nations.

The rules to determine the situs of a trust created *inter vivos* and the law applicable to such a trust, are those applicable to *contracts,* for an instrument creating a trust *inter vivos* is nothing but a contract.

The principles of the conflict of laws as to the validity of contracts and the capacity to contract and the laws governing the construction of contracts are well settled.

Williston on Contracts, Vol. 1, sec. 222, states:

> "Whether a party has capacity to contract is determined *by the law of the place of the contract,* in accordance with the general rule that the validity of a contract and its construction are determined by that law."

And Williston refers to an exhaustive article by Professor Beale, 23 Harv. L. Rev. 1, 79, 194, 260.

Again, in sec. 1792, vol. 3, he says:

> "*The legality of a contract depends upon the law of the place where it is made.* If the contract was illegal (as distinguished from merely unenforceable) where made it is invalid everywhere and if valid where made it is generally enforceable everywhere. The latter rule, however, is qualified by the doctrine that no state will enforce a contract, though

valid where made, if its enforcement is contrary to the policy of the forum."

And in section 353 of Restatement No. 4, Conflict of Laws by Beale and his reporters (which, as I have already indicated, may be considered as a textbook by Beale), we find the following:

"Section 353. The law of the place of contracting determines the binding effect of a promise with respect to

(a) The capacity to make the promise;

(b) The necessary form, if any, in which the promise must be made;

(c) The legal requirements for making a promise binding, such as consideration, seal, etc.;

(d) The circumstances which make a promise ineffective or a contract voidable;

(e) The nature of the act to which a party becomes bound;

(f) The time when and the place where the promise is by its terms to be performed;

(g) The absolute or conditional character of the promise."

It is true that in Beale's Restatement of the Conflict of Laws, section 317, the statement is made:

"The interpretation of an instrument creating a trust of movables is, in the absence of circumstances indicating the contrary, governed by the usage of the domicile of the settlor."

That is so under ordinary circumstances *where the trust instrument is made at the domicile of the settlor. If* the domicile of the settlor and the place of the making of the trust instrument are the same, *then,* under ordinary conditions, the

instrument is to be interpreted under the laws, and the trust has its *situs* in the place, of the domicile of the settlor and the place of the domicile of the trustee or of the beneficiaries is immateral. But no case is cited, where the trust instrument is not made at the place of the domicile of the settlor, to the effect that the trust instrument is to be governed by the laws of the domicile of the settlor.

The general rule is well expressed in *Curtis* v. *Curtis,* 185 App. Div. 391, 173 N. Y. Supp. 103, to the effect that the instrument should be construed "according to the law of the State *where the instrument was executed and* the settlors were domiciled" (p. 32).

Assume that the settlor was domiciled in New Jersey, but the trust instrument was made and delivered and the trust property was delivered and administered in New York, we have a case where the *usual rule cannot apply,* because the place of the making of the instrument and of the domicile of the settlor are *not* the same.

In *Mercer* v. *Buchanan,* 132 Fed. 501, Judge Buffington said:

> "We think it is to be regarded as a New York state instrument, *since it was there executed, acknowledged, delivered and accepted.* * * *."

That these rules are recognized in this state is indicated by *Thompson* v. *Taylor,* 66 N. J. L. 253, in this Court, at p. 256, where the question involved was the capacity of a married woman to contract, and in which case it was held that the written promise of a married woman *domiciled in New Jersey* to pay a sum of money to the order of her husband, signed by her at her domicile and carried by him, with her acquiescence, to New York, and there endorsed and delivered in exchange for other securities of like import, *is a*

contract made in the State of New York, and the capacity of the wife to bind herself by a contract is to be determined by the law of that State.

What this Court said in *Mayer* v. *Roche,* 77 N. J. L. 681, and in *Commercial Credit Corp.* v. *Boyko,* 103 N. J. L. 620, to the effect that the proper law of the contract is the law by which the parties thereto intended, or may fairly be presumed to have intended, the contract to be governed, has no effect in this case for, in the absence of evidence to the contrary, it is *presumed that the parties intended the contract to be governed by the laws of the place in which the contract was made.*

The cases cited by the Court below all involved testamentary trusts, except *Mercer* v. *Buchanan,* 132 Fed. Rep. 501; *Liberty National Bank & Trust Co. of New York* v. *New England Investors,* 25 Fed. 2nd, 493; *Maynard* v. *Farmers Loan & Trust Co.,* 203 N. Y. Supp. 83, and these were all of the cases mentioned by complainants in the Court below.

The decision in *Liberty National Bank & Trust Co. of New York* v. *New England Investors,* 25 Fed. 2nd, 493, was by Brewster, District Judge, and what he said on page 495 is purely *dictum,* and he relies upon *dicta.*

There was a specific provision in the trust instrument that all questions concerning the terms, provisions and effect of the agreement should be determined according to the laws of the Commonwealth of Massachusetts, which *was the domicile of the creator of the trust, and the decision was based upon* (p. 495):

> "The manifest *intention* of all parties to the trust, including settlor, trustee, and shareholder, was that their respective rights and duties were to be controlled by the laws of Massachusetts, and there would seem to be

> no good reason for disregarding the familiar rule that, when *parties to an instrument have stipulated that their rights and duties shall be determined according to the laws of a particular jurisdiction, their intention will be respected by the court.* 13 Corpus Juris 251, and cases cited; New England Oil Corp. *v.* Island Oil Marketing Corp. (C. C. A.) 288 Fed. 961; New York Life Ins. Co. *v.* Dodge, 246 U. S. 357, 38 S. Ct. 337, 62 L. Ed. 772, Ann. Cas. 1918E 593; London Assurance *v.* Companhia De Moagens Do Barrieiro, 167 U. S. 149, 161, 17 S. Ct. 785, 42 L. Ed. 113."

The learned judge then indulges in *dictum,* prefacing it by the words "but it would seem" and he refers to *Cross* v. *U. S. Trust Co.,* 131 N. Y. 330, 30 N. E. 125, which was the case of a *testamentary* trust.

This case of *Cross* v. *U. S. Trust Co.,* New York Court of Appeals 1892, 131 N. Y. 330, 30 N. E. 125, is also mentioned by the Vice-Chancellor (Ch. 134) as authority for the rule that the law of the *testator's domicile* applies to an *inter vivos* trust as well as to a testamentary trust, but, as above stated, that case involved a testamentary trust.

Maynard v. *Farmers Loan & Trust Company,* Supreme Court, Appellate Division, 1924, 203 N. Y. Supp. 83, has I submit no application to the case at bar. There was no question in that case but that the trust instrument was to be construed according to the laws of Pennsylvania for, not only did *all* of the parties reside in Pennsylvania at the time of the making of the trust agreement, *but the agreement was made in Pennsylvania and the property was delivered there.*

While Judge Martin, delivering the opinion for four of the Judges, said:

> "In relation to the trust agreement and its construction, the law of the State of Pennsylvania controls, it being conceded that both

> parties resided in that State at the time it was made",

Judge Smith, dissenting in part, more properly expressed it:

> "The construction of this trust *which was made in Pennsylvania* must be governed by the Pennsylvania law."

The Court, in *Mercer* v. *Buchanan,* C. C., W. D. Pa., 1904, 132 F. 501, did *not* hold that a trust instrument *inter vivos* was to be construed according to the law of the settlor's domicile. The Court said (p. 503):

> "Under such conditions, and in view of the fact that the deed *neither expressly or impliedly designated a place of performance,* we think it is to be regarded as a *New York state instrument, since it was there executed, acknowledged, delivered, and accepted,* and that it is presumed to have been made with reference to the law of such state; Benners *v.* Clemens, 58 Pa. 24; Brooke *v.* Railroad Co., 108 Pa. 529, 1 Atl. 206, 56 Am. Rep. 235; Allshouse *v.* Ramsay, 6 Whart. 331, 37 Am. Dec. 417; Watson *v.* Brentner, 1 Pa. 381. Moreover, the *mere* fact that the trustees were citizens of Pennsylvania, would not make it a Pennsylvania trust; Fowler's Appeal, 125 Pa. 392, 17 Atl. 431, 11 Am. St. Rep. 902. While the nature, validity, and construction of this contract should be determined in the light of New York law, there are strong arguments for asserting that the question of what, under the facts in this case, all under the term 'income'—which is, after all, the crucial question—is one of such general character that a federal tribunal would solve that question in the light of its own reasoning and decisions. As, however, the federal and New York decisions are not conflicting when applied to the facts of the present case, we are not required to determine which system is controlling."

The Court *did* say that, for the purpose of construction of the instrument, the law under which it was to be construed *was fixed at the time of its execution and no subsequent change of residence by the settlor could change the law under which the instrument was to be construed.*

The significance of this case is that, in determining the law under which the instrument was to be construed, the Court *applied the law of contracts and not the law with reference to wills or to intestacy.*

Neither *Buck* v. *Beach,* 206 U. S. 392, 51 L. Ed. 1106, nor *Blodgett* v. *Silberman,* 277 U. S. 1, 72 L. Ed. 749, nor *Bullen* v. *Wisconsin,* 240 U. S. 625, 60 L. Ed. 831, referred to by the Vice-Chancellor (Ch., p. 134) have, I submit, any application. They all involve the matter of taxation. *Chase* v. *Chase,* 2 Allen 101, referred to by the Vice-Chancellor at Ch., p. 134, and again at Ch., p. 135, involved a trust and sub-trust, both created by the will of a Massachusetts resident probated there.

No cases are cited in Perry on Trusts, 7th ed., Volume 1, on pages 53, 54, 70, referred to by the Vice-Chancellor at Ch., 134, involving trusts *inter vivos* which have any application here or which support the theory that the same rule is to be applied to a trust *inter vivos* as to a testamentary trust. When Perry states, Section 70:

> "The question has been frequently mooted in courts, how far a trust could be engrafted and enforced upon foreign property, or property beyond the limits of the jurisdiction of the court where the suit is pending. In regard to personal property there is no difficulty, for it follows the person; *and if the court has jurisdiction over the parties,* it has jurisdiction over the subject-matter, and can enforce a trust or any other equity,"

he is referring to following the *"person of the trustee"*. So the author in Section 3, Title Trusts 26, Ruling Case Law, p. 1170, is referring to *testamentary* trusts. No case was cited by complainants in the Court below, nor is any case referred to by the Vice Chancellor, which holds, as a basis for the decision, that the validity or the situs of a trust *inter vivos* is to be determined solely by the law of the domicile of the creator. There are, however, cases to the contrary, and that the rule is to the contrary is indicated by some of those already mentioned.

In *Lines* v. *Lines,* 142 Penn. State 149, 24 American State Reports 487, 21 Atl. 809, there was an attempt in Pennsylvania to set aside trust deeds one being to the Union Trust Co. of New York as Trustee covering various securities. The Pennsylvania Supreme Court, Paxson, Chief Judge, said, p. 488:

> "It remains to consider the second objection in connection with each of the trust deeds. That it cannot be invoked in this proceeding, so far as the deed to the Union Trust Company is concerned is clear, for obvious reasons. *That deed is a New York contract. It was made in New York; the deed was delivered in New York, and it was intended to be executed there.* Moreover, the trustee is a New York corporation, and the *securities in question were delivered there to the said corporation.* It is almost needless to say that the court of common pleas of Northampton County has no jurisdiction of a trust *where both the trustee and the trust estate are in another state.*"

The Vice Chancellor disposes of this case by saying (Ch., p. 133) that it does not appear from the report where the trustor was domiciled when the trust deed was executed. It does not so state in so many words but it would seem from the report that he was domiciled in Pennsylvania. The

suit was in Pennsylvania, brought by his widow, and it would seem that if, at the time of the making of the deed, the trustor had been domiciled in New York, *the Court would have so stated.* It stated everything with respect to the execution of the trust but omitted, upon the view taken by the Vice Chancellor below, the most important feature of the trustor's domicile. If the trustor had been domiciled in New York, there could have been no question and the Court would not have considered the matter. It referred to the domicile of the trustee, but not that of the trustor.

In *Greenough* v. *Osgood,* 126 Northeastern 461, 235 Mass. p. 235, the matter arose upon a bill for construction of an antenuptial declaration of trust made in Massachusetts by a *resident of New York* who, after several residences in other states, including Massachusetts, died a resident of New York, to trustees who were, at the time the trust instrument was executed, residents of Massachusetts, of property largely situated in Massachusetts. Some of the original trustees had resigned and some of the trustees at the time of the decision were non-residents of Massachusetts. One always had been a resident of Massachusetts and was such at the commencement of the proceedings.

The Massachusetts Court held that the *situs of the trust was in Massachusetts* and stated that the trustees could at no time have been compelled to account for the property in trust in any Court in any state other than Massachusetts. The Court said, p. 462:

> "Although the donor in her declaration of trust was not domiciled in Massachusetts, we think it plain that she intended that the trust should be administered under the laws of that state, by the appointment of the trustees who were residents of Massachusetts, by the fact that the trust property consisted very largely

> of real estate and real estate mortgages, located entirely in Massachusetts, by the provision of the trust instrument that the property in certain contingencies should go to the 'person or persons as would, by the laws of the Commonwealth of Massachusetts, have been or be entitled to the same', and by the further fact that the Massachusetts trustees or trustee *could at no time have been compelled to account for the property in trust, in any state other than Massachusetts.* Sewall *v.* Wilmer, 132 Mass. 131; Codman *v.* Krell, 152 Mass. 214, 218, 25 N. E. 90; Russell *v.* Joys, 227 Mass. 263, 116 N. E. 549. It follows that the Massachusetts courts have jurisdiction over the matter in issue."

Even in the case of a testamentary trust, the rule is not *always* applied that the only court having jurisdiction is the court of the domicile of the testator.

In *Farmers' Loan & Trust Co.* v. *Ferris,* 67 App. Div. 1, 73 N. Y. Supp. 475, it appeared that the will of the testator had been probated in Charleston, S. C., where the testator resided and died, and:

> "After making certain bequests and leaving part of his estate in trust for the benefit of his wife, the testator provided in the twenty-third section of his will that the executors should transfer and deliver the rest, residue and remainder of his estate to the plaintiff, as trustee, to hold and pay the income thereof to each of his said children and grandchild during their lives, respectively, and the income and principal thereof to be held in all other respects subject to the uses, trusts, purposes and limitations prescribed in said seventh, eighth, and ninth clauses of the will, respectively. The testator's surviving son and grandson both died without issue prior to the commencement of this action. We must look, therefore, to the twenty-ninth clause of the will to ascertain who are entitled to share in

this residue of the estate, as that is the question presented.

At the outset the jurisdiction of the courts of this state over the subject-matter of the litigation is challenged. It appears that all the parties have been personally served or have voluntarily appeared, and the appellant Amelia J. Emanuel is the only one who raises the jurisdictional question. *She has appeared generally and answered.* Her interest is as a beneficiary for life of one-third of the income of the residue after the payment of certain legacies. As already stated, the trustee is a domestic corporation, and the fund is within this state. The trustee received the fund by virtue of the will of the testator, although it was delivered under an order of the court made in an action brought by the executors in South Carolina for instructions with reference to their turning the funds over to plaintiff as directed in the will. The order was in accordance with the clause of the will, and contained no additional condition. *The courts of South Carolina cannot obtain jurisdiction over the plaintiff except by its voluntary appearance.* The trust fund and its administration being here, the trustee being a corporation of this state, and the court having obtained jurisdiction of the parties; it may properly exercise jurisdiction, and direct how the fund shall be distributed; and its decree, when complied with by the plaintiff, will relieve it from further liability. Cross *v.* Trust Co., 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597."

Curtis v. *Curtis,* 185 App. Div. 391, 173 N. Y. Supp. 103, which was relied upon by Judge Brewster for his *dictum* in *Liberty National Bank & Trust Co. of N. Y.* v. *New England Investors,* 25 Fed. 2nd, 493, is in reality authority *contra.* There the trust instrument was executed and delivered in Plainfield, New Jersey. The settlors were designated in the instrument as *"both residents of*

the City of Plainfield, County of Union and State of New Jersey'' and the trust was created for the benefit of Harriet Louise Curtis, *of the City of Plainfield,* County of Union and State of New Jersey.

Of course, the statement of the court that:

> ''There is no question but that, if both settlors resided in Plainfield at the time of the execution of the trust, it would be governed by the law of New Jersey,''

is correct, for then we would have the settlors, and the beneficiaries, all residing in New Jersey and *the trust instrument executed and delivered in New Jersey.*

The court then considered where the actual residence of one of the settlors was and found that, *notwithstanding the statement in the deed of trust,* it was in New York. The beneficiary was also at the time a resident in New York. The co-trustee was a resident of New York. The Court then said (p. 106):

> ''Here, then, one of the settlors, of the trust residing in New Jersey and another in this State, the usual rule of construing the instrument according *to the laws of the state where the instrument was executed and* the settlors were domiciled affords no guide; that rule is founded upon comity (Dammert *v.* Osborne, *supra;* Cross *v.* U. S. Trust Co., *supra*), and the foreign domicile of Thomas E. H. Curtis, deceased, must give way in favor of the New York domicile of Mrs. Curtis, in a case *where the property is kept in the State of New York,* where the beneficiary resides in the State of New York, and where the trust is being administered in the State of New York, not only by Mrs. Curtis, but by her co-trustee, the Central Union Trust Company, which is located in New York, and was appointed trustee of Thomas E. H. Curtis upon the latter's death.''

The significance of the case is that the court, in determining whether the New York courts had jurisdiction, took into consideration *not only* the domicile of the settlors, but also many other matters, such as: the *situs* of the trust property; the residence of the beneficiaries; the place where the trust was being administered; the place of the execution and delivery of the trust instrument.

As before stated the *usual* rule is that a trust instrument is to be construed according to the law of the State *"where the instrument was executed and the settlors were domiciled"*.

But, in the case at bar, those two elements did *not* coincide, and the subject matter of the trust was delivered in New York, and never brought into New Jersey, and the trust was administered in New York or some place elsewhere than in New Jersey, and the settlor and the trustee were engaged in business in New York. The Court in the *Curtis* case upheld the jurisdiction of the New York courts.

Dammert v. *Osborne,* 140 N. Y. 30, 35 N. E. 407, was a case of a testamentary trust.

As before stated, the law with respect to the disposition of the property of a decedent being governed by the law of the domicile is one based wholly upon comity.

A trust *inter vivos* is *not* in the nature of a disposition of property either by intestacy or by will, but, on the contrary, is in the nature of a disposition of property *by contract.* It would seem that, upon principle, the law of *contracts* and not the law of testamentary or intestate disposition should be applied. It is significant that the *determining* factor as to what law governed adopted by Judge Buffington in *Mercer* v. *Buchanan,* 132 Fed. 501, was the fact that the deed was *"executed, acknowledged, delivered and accepted"* in New York, and he further states: *"And that it is*

presumed to have been made with reference to the law of such State''. The domicile of the parties played no part in this statement of the Court, and the Court there applied, *not the law of wills, but the law of contracts,* to a trust *inter vivos.*

Beale, in his Reinstatement of the Law, No. 3, draws a distinction between the rules to determine the *situs* of a trust *inter vivos* and one created by will. He says, Section 318:

> ''A trust of movables created by an instrument *inter vivos* is administered according to the laws of the state *where the instrument creating the trust located the administration of the trust.''*

Under Subsection C, he says:

> ''In order to determine where the administration of the trust is located, consideration is given to the provisions of the instrument, the residence of the trustees, the residence of the beneficiaries, the location of the property, the place where the business of the trust is to be carried on.''

He omits entirely the residence or domicile of the settlor, but when it comes to *testamentary* trusts he says (Sec. 319):

> ''A testamentary trust of movables is administered according to the law of the state of the testator's domicil at the time of his death unless the will shows an intention that the trust should be administered in another state.''

It is this distinction between trusts created by wills and those created by instruments *inter vivos* that permits the courts of a state other than those of the *situs* of the trust, under certain conditions, to enforce the trust where jurisdiction can be obtained *over the trustee by personal service.*

The Vice Chancellor says that, if the determination as to the *situs* of the trust is one of intention (Ch., p. 132), "*evidence* of the intention of the creator to fix the *situs* of this trust in New Jersey is abundant". He then refers to the fact that the creator, the trustee, all of the *cestuis que trustent,* and the successor trustees named in the trust declaration were then domiciled in New Jersey and that the *corpus* of the trust consisted entirely of personal property and, under certain circumstances, the entire *corpus* of the 1917 trust reverted to the creator and became a part of his residuary estate disposed of by his will.

I submit that the general rule as to the *situs* of a trust *inter vivos* is *that it is at the place of the execution of the trust instrument, and where the property is delivered and kept,* for that is the place where, among other things, the trust is to be performed. That general rule cannot be overcome by "*evidence*" unless "*evidence*" be taken. None was in the case at bar.

Applying the rules which the Courts have used in determining the law by which a trust instrument *inter vivos* is to be construed and the trust *situs* fixed, we find that: the trust instruments were made, executed, *acknowledged* and delivered in the State of New York; while the settlor and the trustee were domiciled in New Jersey (as indicated in the instruments, but *not alleged or proven* in these proceedings, and that the statement in the instrument is not always controlling is indicated by *Curtis* v. *Curtis,* 185 App. Div. 391, 173, N. Y. S. 103), they were in business in New York; the trust property was in the State of New York and was delivered in New York; it was always kept in New York, or at least never was brought within the State of New Jersey; inasmuch as the trust property was always kept in New York, or at least never brought within New Jersey, the

trust *was actually administered in a state other than New Jersey.*

A very significant fact which points to the law under which the parties *intended* the trust instruments to be construed and the trust to be administered is that the trust instruments *were acknowledged.* They are not such instruments as, under *our statute,* are required or permitted to be acknowledged. The acknowledgment, therefore, serves no useful purpose if the instruments are to be construed and the trust is to be administered under the law of New Jersey. They add nothing. But not so under the law of New York for, by the present section 386 of the Civil Practice Act, title "Evidence" it is provided:

> "Any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for taking and certifying the acknowledgment or proof of a conveyance of real property; *and thereupon it is evidence as if it was a conveyance of* real property."

and that was the law of New York when these trust instruments were executed.

The acknowledgments were taken by a Notary Public of New York County. No certificates which would permit the use of the acknowledgments in New Jersey are affixed, even if they could serve any useful purpose, which they could not.

It must be presumed that the acknowledgments were put on for some purpose. They could serve a purpose in New York if the trust was to be administered in New York and the instruments used there and considered New York instruments; they were useless if the instruments were to be used in New Jersey.

Added, then, to the facts that the instruments were made, executed and delivered in New York, with respect to property in New York, and the

trust property was never brought here and the trust was never administered here is the fact that the parties had the instruments acknowledged, the acknowledgments serving a useful purpose *only* if the instruments were to be considered New York contracts.

Moreover, there is not in the pleadings of the complainants and petitioner any allegation that these trust instruments are to be governed by the laws of New Jersey or that the trust has a situs in New Jersey.

In the special appearances of appellant there are specific allegations that the trust created by the trust instruments *never had its situs in the State of New Jersey.* There is no denial of this allegation. *It is an allegation of a fact and if there be a denial of it, appellant was entitled to have evidence taken.*

If testimony were taken upon this issue, there are many circumstances to be considered and inferences to be drawn from circumstances. Appellant might show that: although the Swetlands are stated in the agreement to be of New Jersey, they maintained residences in New York; they were residing in New York at the time of the making of the agreement; they were in business in New York; the will might have been probated in New York; the business of all the corporations whose stock was involved was in New York; all active duties in connection with the trust were and had to be, performed in New York; the parties considered all the transactions as New York affairs and many other circumstances bearing upon the mater of the *situs* of the trust.

It would be one thing if there was a *universal* rule that the *situs* of a trust is determined by the domicile of the settlor. *There is, I submit, no such universal rule.* No case indicates that there is any such inflexible rule.

The Court could not, I submit, in the face of the specific allegations of appellant decide upon the issue of the *situs* of the trust, making *that* the determining factor of the decision, without taking proof. To do so is to deprive him of his day in Court upon an issue upon which he is entitled to to be heard in *limine* under the provisions of the Fourteenth Amendment to the Constitution of the United States.

By the proceedings in California (Ch., p. 90) the complainants attempted to locate the trust *situs* in California. In the proceedings below, they attempted to locate it in New Jersey. It could not be in both places. So far as the record shows, the proceedings in California still continue and the complainants seek to locate the trust *situs* there upon the ground that the trust property is there in some form or another, and that the beneficiaries there reside, and that the trustee did there reside and carried the trust property into the State.

The California bill seeks precisely the same ultimate relief as does the bill in the Court of Chancery. It prays for an accounting (paragraph C of the prayer, Ch., p. 112) and for the removal of the trustee (paragraph G of the prayer, Ch., p. 113).

III.

The fact that there is property in this State in the possesion of the executors of the estate of Horace M. Swetland which by the will is to be delivered to appellant as trustee does not give the Courts of this State jurisdiction without the general appearance of appellant.

While the Vice-Chancellor does not base the assumption of jurisdiction upon the fact that there is property of the estate of Horace M. Swetland

in the possession of the executors and trustees which is to be delivered to appellant as trustee, he refers to that matter (Ch., 136 and Ch., 130). He says that "It was *not* held (in the proceedings in the Court of Chancery for the construction of the will of Horace M. Swetland) as is asserted by counsel for the defendant trustee, that the trust itself was a distinct and definite entity. It is on this erroneous assertion of the court's decision in the will construction case that the defendant's counsel bases his argument of analogy to continuous charitable trusts with a legal habitation in a foreign state."

I submit that there is no distinction between what the Court of Chancery in the will construction case held (and its determination was sustained by this Court), i. e., that "the trustee legatee is as distinct and definite an entity as would be an individual or corporation legatee" and a holding that the *trust* was a separate and distinct entity.

The Court of Chancery in its opinion, 100 N. J. E. 196, affirmed 6 N. J. A. R. 360, and the language of the opinion was repeated in the decree, not only stated that the trustee legatee is as distinct and definite an entity as would have been an individual or corporation legatee, but also stated that by it (the bequest to Maurice J. Swetland, as trustee) the testator merely *added additional property* to a *trust fund* established by him years before the execution of his will under a valid, active trust, and to which he had, from time to time, during his lifetime, added securities, and further, "The *trust* to which this bequest is added is *not theoretical,* nebulous, intangible or incapable of identification, but *exists in fact",* and after this language comes the language that "the *trustee-legatee* is as distinct and definite an entity as would have been an individual or corporation legatee", and it is followed by the language: "*The*

trust to which this bequest is added was *not created by the will,* and, therefore, legal rules applicable to testamentary trusts are not uniformly applicable here".

There is no doubt, I submit, but that the Court intended by this language to hold that the *trust itself was a distinct and definite entity.* It was only by so holding that the bequest could be sustained, for the doctrine of incorporation by reference has been expressly repudiated in this State.

Smith v. *Smith,* 54 N. J. E. 1, affirmed 55 N. J. E. 821;
Murray v. *Lewis,* 94 N. J. E. 681.

What the courts did in the will construction case was to apply to private trusts a doctrine which theretofore had been confined to trusts of a public nature. That the doctrine had not been extended to trusts of a private nature until the decision in *Swetland* v. *Swetland,* 100 N. J. E. 196, affirmed 6 N. J. Adv. 360, is very clearly indicated by *Atwood* v. *Rhode Island Hospital,* 275 Fed. 513-522.

The result is that those cases which have been heretofore cited holding that no court may remove the trustee, call upon him for an accounting or give instructions with respect to the administration of the trust or otherwise interfere except a court of the *situs* of the trust apply with full force.

Complainants urged below, and will undoubtedly urge here, that, notwithstanding this general rule as above stated, the fact that there is property to be turned over to this trust in this State gives the Court of Chancery of this State jurisdiction and they cited below the cases mentioned by the Vice Chancellor (Ch. 125)—*Conover* v. *Fischer,* 36 Atl. 948; *Tappan's Executor* v. *Ricamio, et als.,* 16 N. J. E. 89; *Chase* v. *Chase,* Supreme Court of Massachusetts, 2 Allen 101 (84 Mass.); *Redzina* v.

Provident Institution for Savings in Jersey City, et als., 96 N. J. E. 346; *Amparo Mining Co.* v. *Fidelity Union Trust Co.*, 74 N. J. E. 197, affirmed 75 N. J. E. 555; *Wilson* v. *American Palace Car Co.*, 65 N. J. E. 730.

Conover v. *Fischer* (Ct. of Ch. of N. J., 1897), 36 Atl. 948 (not officially reported), has no application. There the trust was created by the will of a person domiciled in New Jersey. The trustee was in New Jersey. Of course, the Court had control of the trust.

It is significant, upon another branch of this case, that Vice Chancellor Emery held that a trust, arising from a direction in a will to the wife to, out of interest and income coming to her, "maintain, support and educate", etc., *did not give the cestuis any right to payment to them,* but that the payments were in the discretion, if reasonably exercised, of the trustee as well as the method of support, and the Court said:

> "If complainant, however, does not ask further inquiries of any kind, and desires to rest the complainant's application on her absolute right to require payment of money directly to complainant, her mother or guardian, without regard to the facts set up in the answer, the bill will be dismissed."

And further:

> "The trust is not expressly made for the payment of money by the widow either directly to complainant or to any one else for complainant's support, in which case it might be fairly urged that it could be satisfied only by such payment."

So, here, the trust instruments do not require the payment of money to complainants but only the expenditure of moneys for the benefit of complainants, their maintenance and the like.

Tappan's executor v. *Ricamio, et als.,* 16 N. J. E. 89, has no application. There the trust was created and existing in this State and the Court but stated the general rule that it was the duty of a court of equity to protect the interests of legatees and remaindermen during the life of the tenant for life. That is, of course, conceded. The question is what Court has jurisdiction?

Nor has *Chase* v. *Chase,* 2 Allen 101, 84 Mass. 101, a decision of the Essex County Court of Massachusetts, heard before Bigelow, C. J., and Metcalf, J., any application for there, the will of a Massachusetts resident, probated in Massachusetts, created both the trust and the sub trust and, upon familiar principles, the administration of both the trust and the sub trust was in Massachusetts. It is quite true that the Chief Justice used language to the effect that the trustee holding the principal in trust being *a resident in Massachusetts,* the Court could enjoin the trustee, who was within the jurisdiction, from making further payments and pass such decree in relation to the future disposition of the income as the rights of the *cestuis que* trust might, in equity, require. But this language must be considered in the light of the facts. While the Court said that "jurisdiction" was clear upon that ground, the Court used the term "Jurisdiction" to mean power to enforce its decrees. In view of the law it could only have so meant. The fact was that the trust and the sub trust were created by a will of a Massachusetts resident, probated in Massachusetts and the jurisdiction of the Court to determine *any* controversies with respect to the trusts was clear. But, as the Chancellor pointed out in *William McCullough's Executors* v. *William McCullough, et al.,* 44 N. J. E. 313, if the trust property were without the State and the trustees were without the State, the Court might

find itself powerless to make its decree effective. All that the Chief Justice in the *Chase* case was indicating was that, having control of the principal trust, it *could* enforce its decree with respect to the sub trust even if the trustee were without the State, the administration of *both* trusts being *within its jurisdiction* (using the word properly), because arising under a will of a Massachusetts resident, probated in Massachusetts.

This general language of the Chief Justice at Circuit, overruling a demurrer, cannot be considered as overturning the settled law that the administration of a trust is for the courts where the *situs* of the trust is located, at least unless the trustee is personally before the Court.

The rule with respect to testamentary trusts applies to trusts *inter vivos* on *this* point for, in this instance, they are analogous.

In *Campbell & others* v. *John Wallace,* 10 Gray, 76 Mass. 162, there was a bill to enforce the execution of a trust created by the will of an English subject. The trustee was a resident of Massachusetts and the will bequeathed a portion of the testator's estate to a citizen of Massachusetts to be put at interest for the use of his sister Helen so long as she might live, and at her death, to be divided among her children. There was a demurrer to the jurisdiction, which was sustained, and while the decision somewhat involved a construction of certain statutes settled by a previous decision, the Court concluded by saying:

> "But if the point were a new one, the difficulties of exercising the jurisdiction prayed for are obvious, and, we incline to think, insuperable."

In that case both beneficiaries and trustee were residents of Massachusetts. The trust property was in Massachusetts. Yet the Court declined to

entertain jurisdiction to enforce the trust because it was created by a foreign will.

This case was followed by *Jenkins* v. *Lester*, 131 Mass. 355. A bill was brought by residents of Maryland alleging that they were creditors of a person having a life interest in a legacy left in trust for her benefit under the will of her father, probated in New York, to his wife as trustee, the wife, the defendant in the suit, being a resident of Massachusetts. It was also shown that the trustee had never filed any inventory or account as executrix and never reported to *any court* what sums she had invested under the will. It may be gathered from the report, I think, that it was assumed that the trustee held the trust property in Massachusetts. Upon demurrer to the jurisdiction, the Court said:

> "But the difficulty is that she (the trustee) does not hold the fund by virtue of a trust created by instrument *inter partes* and without judicial decree, and which, therefore, might be enforced against her *wherever she might be found.* Massie *v.* Watts, 6 Cranch, 148, 160. Perry on Trusts, Sec. 70. * * * The trust on which the property is held by her having been created by judicial decree of a court of another State having jurisdiction of the matter, she is accountable in the courts of that State for the due execution of the trust; and, by the decisions and the settled practice of this court, the trust cannot be enforced in this Commonwealth, *although the trustee personally resides here.* * * *
>
> *The fact that the trustee is not shown to have given any bond or returned any inventory in the State of New York cannot vary the general principle.* * * *."

The bill was dismissed.

Sewall v. *Wilmer,* 132 Mass. 131, illustrates the necessity that there should be but one court having jurisdiction in matters of this kind. The

question arose upon the validity of the execution of a power under a will, the determination of which depended upon the construction of a will of a Massachusetts resident. The donee of the power resided in Maryland and exercised the power by a will probated in Maryland and also as a foreign will in Massachusetts. Under the Maryland law the exercise of the power was not good. Under the Massachusetts law it was good. The Court held that the Massachusetts law applied and said:

> "The property is held by trustees residing and appointed in Massachusetts, and must be distributed here, and the trustees cannot be compelled to account for it in Maryland or in any other State, *even if they should be personally found there.*"

That the law of this state is in accord with these cases is indicated by *William McCullough's Executors* v. *William McCullough and others,* 44 N. J. Eq. 313. It appeared that by the will of a person domiciled in this state, a trust was created in residents of Minnesota and the trust funds were invested in mortgages on lands in Minnesota. One of the *cestuis que trustent* resided in this state and all of them resided in states distant from Minnesota. Upon a bill for instructions, the Chancellor, McGill, said, p. 316:

> "The courts of a state, within which a trustee must account, should hesitate to sanction an investment upon the security of lands that are not within their own jurisdiction, not merely because, in such case, they will be left without the proper facilities to obtain accurate and satisfactory information concerning the investment, but also because they will lose direct control of the fund itself.
>
> Where the trustee is without the jurisdiction, it becomes more important that the fund should be within it, for otherwise the courts

> may find themselves stripped, not only of power to properly investigate the condition of the trust, but also of power to enforce their decrees."

He further said, p. 317:

> "In the case under consideration the trustees reside and have the trust funds in a state distant from the state of the courts to which they must account, and distant from the residences of their *cestuis que trustent*. The continuance of such a condition of affairs must be condemned. If it remains, the happening of circumstances may readily be imagined that may not only put the beneficiaries of the trust to great annoyance, disadvantage and expense, but also render our courts powerless to do them material service."

He ordered the trust funds brought within the state and invested in securities approved by the Court.

And see those cases which I have already mentioned and quoted from (p. 44 *et seq.* of this brief) involving trusts *inter vivos* and applying the same rule *except* in some instances where the trustee can be *personally* gotten into the court attempting to exercise jurisdiction.

Greenough v. *Osgood,* 126 N. E. 461, 235 Mass. 235;

Lines v. *Lines,* 142 Penn. State 149, 24 American State Reports 487, 21 Atl. 809;

Farmers Loan & Trust Co. v. *Ferris,* 67 App. Div. 1, 73 N. Y. Supp. 475.

The distinction between the principle applicable to the administration of testamentary trusts and that applicable to the administration of trusts created by instruments *inter vivos* recognized by any of the cases, is only that, unlike the case of a

testamentary trust, in the case of a trust created by instrument *inter vivos,* relief may be afforded against the trustee *in a jurisdiction in which he may be personally found.* It is not clear that there is such a distinction, and I know of no case in which it has been applied, except those in which *both the trustee and the beneficiaries* were within the jurisdiction, or where the *trustee* and *all of the trust property* were within the jurisdiction.

In the first of these situations, jurisdiction may be sustained upon the ground that all of the parties interested are personally before the court, and, in the second, it may be claimed that, *both the trustee and the trust property* being within the jurisdiction, the *situs* of the trust has been removed to that jurisdiction, and there, therefore, is a *res* within the jurisdiction so that those interested may be brought in other than by personal service. To sustain the jurisdiction upon this latter ground, however, would be to ignore the principle that the *situs* of a trust and the place of administration of the trust is determined by conditions existing at the time of the creation of the trust.

Perry recognized that the foundation of the right of a court of one jurisdiction to enforce a trust, the *situs* of which is in another jurisdiction, against a trustee within the jurisdiction of the court, depends upon the fact that equity acts *in personam.* He clearly indicates that in Sec. 72, 7th edition, where he says:

> "The foundation of this doctrine is the jurisdiction of the court *over the person,* which was originally the only jurisdiction of courts of equity."

In *Massie* v. *Watts,* 6 Cranch. 148, 159, 160; 3 Lawyers Ed. 181, 185, 186, U. S. 9-13, Chief Justice Marshall, after considering the cases in

England as to the power of the Court of Chancery to decree specific performance of lands without the realm said:

> "Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, *or trust,* or of contract, the jurisdiction of a Court of Chancery is sustainable *wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.*"

The cases referred to in Rose's notes to *Massie* v. *Watts,* particularly those distinguishing it, indicate that it is *only* in case the decree is made effective by the act of the person directed to perform it that it will be recognized in any other jurisdiction.

Thus in *Burton-Lingo Co.* v. *Patton,* 15 N. M. 304, 27 L. Rep. Anno., New Series 420, 107 Pac. 679, the New Mexican Supreme Court disregarded a decree of a Texas court *which had jurisdiction of the person* which directed the transfer of a lien in New Mexican lands, and the Court quoted from *Fall* v. *Easton,* 215 U. S. 1, 54 L. Ed. 65, and said (p. 423):

> "In the late case of Fall *v.* Easton, 215 U. S. 1, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3, the court, after restating with approval the doctrine announced in Carpenter *v.* Strange, *supra,* goes on to say that it is a well-recognized principle: 'That when the subject-matter of a suit in a court of equity is within another state or country, but the parties within the jurisdiction of the court, the suit may be maintained and remedies granted which may directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain

> from certain acts toward it, and it is thus ultimately but indirectly affected by the relief granted. In such cases the decree is not itself legal title, nor does it transfer the legal title. It must be executed by the party, and obedience is compelled by proceedings in the nature of contempt, attachment or sequestration. On the other hand, where the suit is strictly local, the subject-matter is specific property, and the relief, when granted, is such that it must act directly upon the subject-matter, and not upon the person of the defendant, the jurisdiction must be exercised in the state where the subject-matter is situated. 3 Pom. Eq. Jur., Sec. 1317, 1318, and notes'."

The New York Court, in *Farmers' Loan & Trust Co.* v. *Ferris,* 67 App. Div. 1, 73 N. Y. Supp. 475, heretofore quoted from (p. 46) seems to have departed from what has been expressed to be the general rule, i. e., that no instructions may be given by a court with respect to a testamentary trust except a court of the jurisdiction in which the will is probated, for in that case it held, notwithstanding the probate was in South Carolina and the testator there resided, that the New York Court would act where *both the trustee and the trust fund* were within the jurisdiction and *all of the beneficiaries had appeared generally,* the question of jurisdiction being raised by a beneficiary who *had* appeared *generally.* The jurisdiction of the courts of this state in the cases at bar cannot be sustained upon any theory indicated in any of these cases. The trustee is *not* within the jurisdiction and, therefore, the Court *cannot act in personam.* The *situs* of the trust is *not* within the jurisdiction, and, therefore, the Court cannot act as if in a proceeding *in rem.*

It is true that there are certain moneys in the possession of the executors of the Will of Horace M. Swetland which are properly payable to the

trustee under the trust, *but these moneys are not a part of the trust estate or of the trust res at the present time,* and will not become a part thereof until they are in fact turned over to the trustee, and, when they are so turned over, *they become a part of a trust established in another jurisdiction,* no part of the assets of which is within this jurisdiction, and no one of the beneficiaries of which is a resident in this jurisdiction.

No case was cited below or mentioned by the Vice-Chancellor holding that the *mere* fact that there are moneys within the jurisdiction of a state which, *after administration by the courts of that state of a will of a person domiciled in that state,* are to be turned over to a trustee of a trust *created and existing in another state,* gives jurisdiction to the Court either to remove the trustee or call upon him for an accounting, *or to withhold the payment of the moneys upon the ground that he has not faithfully performed his duties,* for, if the latter may be done, *it is in effect permitting a court having no jurisdiction over the trust to determine whether the trust has been properly administered, for, only as a result of that determination, can it act in withholding the funds.*

Such relief could be only temporary. It could not be final, for final relief could only consist in the removal of the trustee, which the Court is powerless to accomplish. But temporary relief is only granted *pendente lite.* No temporary relief is granted in any case unless the Court in that case can grant final relief, except only in those cases where the relief granted may be ancillary to some proceedings pending in another jurisdiction or in a court of law.

Another insuperable objection, I submit, to the granting of any such temporary relief is that, if that temporary relief can be granted by the courts

of one jurisdiction in which there are pending proceedings, as a result of which moneys may become due to a foreign trust, of course, similar relief can be granted by courts in other jurisdictions, and again we would have the situation of matters involving the administration of a trust determined in numerous jurisdictions with perhaps conflicting decrees.

The principle of *Andrews* v. *Guayaquil & Quito Railway Co.*, 69 N. J. Eq. 211, affirmed 71 N. J. Eq. 768 on the opinion below, and *Amparo Mining Co.* v. *Fidelity Trust Co.*, 75 N. J. Eq. 555, and *Pilger* v. *U. S. Steel Corp.*, 97 N. J. Eq. 102, affirmed 98 N. J. Eq. 665, some of which are mentioned by the Vice-Chancellor, does not help respondents for the jurisdiction in those cases was sustained upon the ground that the subject matter of the litigation was stock in a New Jersey corporation which had its *situs* in the State of New Jersey, and that the *ownership of the stock was the point in issue.* No one of the cases involved the *administration* of a trust. The point in *Amparo Mining Co.* v. *Fidelity Trust Co.*, 75 N. J. Eq. 555, was not whether a trust had been *properly* administered, and not whether *instructions* should be given to a foreign trustee, but whether, in fact, the stock, having a *situs* in this state, was held in trust, or, in other words, *the matter went to the ownership of the stock.* It was upon that narrow ground that the jurisdiction of the courts of this state was sustained.

We have no such situation in the cases at bar. The question is not whether any moneys within the jurisdiction of this Court should properly become a part of the trust estate. *It is conceded that they should.* The question is whether because of the personal acts of the trustee, he, as such trustee, representing his trust should receive the monies, which is quite a different thing. So

long as he has not been removed by a court of competent jurisdiction, *he, in his person, represents the trust.*

It was sought to apply the rule of *Amparo Mining Co.* v. *Fidelity Trust Co.* in *Elmendorf* v. *American Combustion Co.,* 80 N. J. Eq. 461, but the Court declined to apply it. In the *Elmendorf* case the subject matter of the suit is indicated in the headnote:

> "The owner of a patent, a New Jersey corporation, licensed one of the defendants to manufacture the patented device; he assigned the license to a New York corporation; stockholders of the New Jersey corporation filed a bill to set aside the license as fraudulent; no notice was served upon the licensee or his assignee, the New York corporation, and neither was amenable to process of New Jersey.—Held, that the subject-matter of the suit was the right claimed by the New York corporation and questioned by the complainants, and that this right had no *situs* in New Jersey which would sustain the bill as a proceeding *in rem.*"

Again, in *Redzina* v. *Provident Institution for Savings in Jersey City, et al.,* 96 N. J. Eq., 346, mentioned by the Vice-Chancellor, it was sought to apply the doctrine of the *Amparo Mining Co.* case in one to determine the ownership of a joint savings account in New Jersey, one of the joint owners being without the jurisdiction and refusing to appear and jurisdiction being based upon publication. This Court held that the attempt to bring in the joint owner by publication was a violation of his rights under the Fourteenth Amendment to the Constitution of the United States, and a consideration of the opinion indicates that the bank would have no right to interplead and obtain jurisdiction of the co-owners by publication.

If the Provident Institution for Savings in the *Redzina* case could not interplead with respect to a fund on deposit with it, where jurisdiction over one of the owners could only be obtained by publication, it follows that the executors of Horace M. Swetland could not interplead upon a claim being made adverse to the non-resident trustee under the agreement of July, 1917, for the relationship of the executors of Horace M. Swetland, deceased, to the trustee under the agreement of July, 1917, is certainly, under the previous decisions of the Court of Chancery and of this Court, *no other than that of debtor and creditor.*

Then how can the Court of Chancery *in effect compel the executors to interplead* when the ultimate determination of the rights of the parties depends, not upon the matter of ownership of the fund, which, in itself, has been held not a sufficient ground (*Redzina* v. *Provident Inst. etc.,* 96 N. J. Eq. 346), but upon the matter as to whether the foreign trust, to which the debt is owed, has been properly administered?

I submit the question answers itself.

Again, it was sought to apply the doctrine of the *Amparo Mining Co.* case in *Griswold* v. *Kelly-Springfield Tire Co.,* 94 N. J. Eq. 308. The decision of Vice-Chancellor Backes is indicated by the first head note, which is as follows:

> "1. Where a resident of Ohio executed his will in New York and died there, and the will was offered for probate in New York, and contested there, upon which a temporary administrator was appointed in New York, and the probate court of Ohio also appointed administrators, who filed their bill in this court to obtain certain certificates of stock in a New Jersey corporation, owned by the testator, but physically in New York, and to procure their transfer by the New Jersey corporation, the ownership of the stock not being

in dispute, this court will not interfere between the rival claimants and settle the lawful right of possession."

POINT IV.

Jurisdiction could not be obtained by the seizure of property under writ of sequestration issued under P. L. 1919, p. 444, 1 Cum. Supp. to C. S. 1911-1924, p. 261, subject 33, sec. 52A, and no such writ could issue in a case such as is here involved.

A writ of sequestration as original process is provided for by P. L. 1919, Chapter 204, 1 Cumm. Supp. to Comp. Stats. of N. J. 1911-1924, Sec. 33-52A, p. 261, which reads as follows:

> "33-52A. Writ to sequester property of non-resident. 1. In any proceeding commenced in the Court of Chancery *in which a money decree is prayed against a defendant,* and it shall be made to appear, by affidavit, that the defendant is a non-resident and has property, real or personal, moneys, effects, rights or credits within this State, the court may, upon the filing of the bill or petition or at any time thereafter, issue its writ or writs of sequestration directed to the sheriff of any county in which the said property may be situate, or to any master of the court, commanding said sheriff or sheriffs or master to take into his or their possession said property, and hold the same subject to the orders and decrees of the court. (L. 1919, c. 204, p. 444, supplementing L. 1902.) (C. S., p. 410.)"

The purpose of this statute was to permit proceedings in the Court of Chancery analogous to attachment at law. *It could have no application if the personal presence of defendant before the*

Court is necessary to confer jurisdiction of the Court over the subject matter.

In this action for *an accounting and for the removal of the trustee,* which involves a general administration of a trust having no *situs* here, complainants sought to substitute, for personal service or appearance of the trustee, a levy upon his private property rights under a writ of sequestration.

It must be conceded that, if there is any such right to substitute seizure under a writ of sequestration for personal appearance, it must rest upon statute. It did not exist at common law. A writ of sequestration never was used in the Court of Chancery as original process. The statute provides: that a writ of sequestration may issue in any proceeding or cause in the Court of Chancery "in which a *money decree* is prayed against a defendant. Said writ may issue in a case in which the amount demanded is uncertain, as well as in cases where the amount demanded is certain. If uncertain, to answer the demand of the complainant or petitioner according to the prayer of the bill or petition reciting sufficient of such prayer as to indicate the nature of the relief prayed for."

By Section 8 the defendant is given the right to specially appear, and by Section 9 it is provided that if he does appear specially "then the order or decree made in the cause shall be effective only as against property seized prior to the entry of the final order or decree, *unless the Court have jurisdiction not depending in anywise upon any provisions of this statute, to make an order or decree generally effective.*"

The statute is speaking of a final decree which results in a money *judgment against an individual* which may be *satisfied* out of his property. It is stated that the word "person" includes "partner-

ship and corporations'' and a corporation shall be deemed non-resident, etc. (Section 12).

There is a specific provision with respect to the award of the writ against trustees. That provision is confined to those ''cases in which the writ might have issued against a deceased immediately prior to his decease''. It is provided that (Sec. 15) ''Motion to quash the writ may be made under special appearance on five days' notice (or such other time as the Court may direct) to complainant or petitioner, and on such motion, affidavits or other proof, taken as the Court may direct, may be considered, and the Court shall determine whether the writ shall stand upon the proofs as they appear on such hearing''.

Is an action, such as this, which involves a *general accounting* by a trustee and in which there *is no prayer for any money decree within the purview of the statute,* and, if within the purview of the statute, is the statute constitutional to that extent?

It does not appear from the opinion of the Court what the facts were in *Frank* v. *H. E. Salzburg Co. Inc.,* 140 Atl. 241, mentioned by the Vice Chancellor (Ch. 1138). The defendant had appeared *generally,* and the Court said that, having appeared generally, the writ of sequestration had served its purpose and he was present before the Court as if he had been brought in by personal service of process within the State.

Of course, there are cases where the jurisdiction of the Court of Chancery may be sustained to award damages for the violation of equitable rights resting upon contracts made without the State and these are cases in which the demands are strictly for money decrees.

While the Court of Chancery has general jurisdiction in a proper case over an accounting, it has *no* jurisdiction over an accounting of a trustee of

a foreign trust, *unless the trustee be personally present.* In such a case *it is the control of the Court over the person upon which the jurisdiction is based.* And the reason for that is that the Court, having control of the person, may direct to that person a decree that he account and may enforce that decree against his *person.*

Where the *jurisdiction* depends upon the control *over the person* and upon the doctrine that equity acts *in personam,* how can there be a substitute for that control? The moment control over the person is gone, that moment the Court loses its power to, by process of contempt or otherwise, compel that person to account and to perform the decree personally. *That* being the basis of its jurisdiction, *there can be no substitute for the personal control.*

It is this confusion between jurisdiction of a subject matter which may be had without personal control, and jurisdiction which rests upon personal control, which led, I submit, to the contention of complainants below that the effect of the filing of the special appearance is a general appearance because in that special appearance the lack of jurisdiction of the Court, as respondents urged, over the subject matter is set up. But the jurisdiction over the subject matter is bound up with the control over the person, and the allegations with respect to the *situs* of the trust and the like are all designed to indicate that the Court cannot proceed against appellant by sequestration or in any other way than by personal service, which matter, so far as sequestration is concerned, section 15 of the act gives appellant the right to set up under a special appearance. The special appearance and its effect is like that considered by the Circuit Court of Appeals for the Second Circuit in *Armstrong* v. *Langmuir,* 6 Fed. (2nd) 369, heretofore mentioned (p. 25).

The bill of complaint in this cause in none of its several prayers prays for a money decree.

Its first prayer is for answer (Ch. 16).

Its second is that the trustee "may be ordered and decreed to *account* as trustee under the trust agreement of July 14, 1917, for the moneys received by him as such trustee from the executors and trustees under the last will and testament of Horace M. Swetland, deceased, as aforesaid, and to make a full and complete discovery and disclosure as to the condition of said trust estate and as to how the property of said estate is invested and held" and "to pay and apply all moneys constituting income of said trust which have been received by him *to the sole benefit, advantage and use of the complainant* * * *". Its third prayer is that he account as trustee under the trust agreement of January 3rd, 1922, and for the same relief as under the second prayer. Its fourth prayer is for his removal. Its fifth prayer is for an injunction. Its sixth prayer for a writ of sequestration and its seventh for further relief.

The words in the statute, chapter 204 of the laws of 1919, p. 444, "in which a money decree is prayed against a defendant" are confined, and must be confined upon constitutional grounds, to a suit in which a decree is prayed equivalent to a money judgment at law *in favor of the complainants* which may be *satisfied* out of property.

Vice-Chancellor Fallon said in *Frank* v. *H. E. Salzburg Co.*, 140 Atl. 241, that "the proceedings are analogous to the procedure under the Attachment Act". Accounting, discovery and disclosure by a trustee require *personal* acts of the trustee other than the mere payment of money. Removal of course has nothing to do with the payment of money.

The prayers with respect to a decree that he should be ordered to pay and apply "all moneys

constituting income of said trust which have been received by him *to the sole benefit, advantage and use of the complainant, his wife* * * *" are not prayers for a money judgment but for a decree directing him *personally* to proceed to carry out the terms and conditions of the trust instrument. How, when and where he should expend it is left to his discretion (*Conover* v. *Fischer,* 39 Atl. 948) (not officially reported).

Respondent contended below that the purpose of the Sequestration Act was to permit seizure of an absent defendant's property situate within the State prior to the entry of the final decree and thereby convert such an action into one *quasi in rem.* But what is the *res?* The seizure of a trustee's *personal* property cannot bring the trust *situs* into the State so as to create a trust *res* in the State. The *res* can only be the personal property of the trustee. And it is fundamental that in cases *quasi in rem,* the action must be one which, in some way, involves the *res.*

In attachment cases, where actions are brought for debt and private property is seized, the action is said to be *quasi in rem* because the private property is properly subject to the payment of its owner's debts and in that sense the litigation involves a *res.*

But the private property of a trustee is *not* subject to the trustee's duty to account, to discover or to disclose or to pay, for all these involve personal acts of the trustee.

It is true that as a result of a disclosure and accounting in certain cases a decree may be made directing the trustee to make payment, which decree, if ignored, may result in the seizure of the trustee's property. *But, before such a decree can be made, there must be an adjudication by a court of competent jurisdiction upon the accounting.* The accounting not only precedes the fixation of

the liability but it precedes the *existence* of the liability of the private property of the trustee.

Jurisdiction in such an action cannot, I submit, be obtained by seizing property which may be taken to satisfy a decree directing payments if and when the court shall determine, upon an accounting which involves personal conduct, there is a payment which must be made by the trustee.

In the instant case no payment can be directed to be made by the trustee to the complainants, nor is one prayed, for the trustee has the discretion how and when the moneys may be expended for the benefit of the complainants (*Conover* v. *Fischer* (Court of Chancery of N. J.), 36 Atl. 948, not officially reported).

An action for an accounting in equity has always been held to be *in personam.* In no case has a writ of sequestration been held to be proper original process. On the contrary, a writ *ne exeat regno* has always been held to be proper process.

> 2 Daniels Chancery Pleading and Practice, 6th American Edition, star page 1700;
>
> *Jones* v. *Alephein,* 16 Ves. Jr., 470, 33 Full English Reprint 1063.

The reason why a writ of *ne exeat regno* is always granted in matters of account is that the *accounting requires the personal presence of the accountant.*

In *Williams* v. *Williams,* 3 N. J. E. 130, the Court, in denying a writ of *ne exeat,* said:

> "This is a proper case for an injunction, but not for a *ne exeat.* Here is no debt either legal or equitable, due from the defendant to the complainants, *nor are the complainants entitled to an account.* Such a demand is necessary to sustain the writ. This is the general rule."

It further said (p. 131):

> "The suit can proceed in his absence; and if the decree be in favor of the complainants, it will operate as a conveyance in case the defendant fails to execute a deed according to the order of the court: Rev. Laws 499."

In *Palmer* v. *Palmer,* 84 N. J. E. 550 the Chancellor considered the cases in which a writ of *ne exeat* will go and, holding that it might go in aid of an order upon a spouse to permit access to a minor child by the other spouse, said:

> "As in the case *in re* J. Watts Kearney, *supra,* this court has jurisdiction over the parties before it in this case and can keep the contumacious defendant within its jurisdiction by a writ of *ne exeat,* so as to compel obedience to its order for the father's access to the infant child of the parties."

In an accounting suit there must be a decree that the defendant account.

1 Corpus Juris, title "Accounts and Accounting", p. 643, sec. 130.

This is so even if the bill be taken *pro confesso.* The accounting is usually before a Master.

1 Corpus Juris, title "Accounts and Accounting", sec. 644, p. 131.

The person directed to account must submit himself before the Master.

> 2 Daniels Chancery Pleading and Practice, 6th American Edition, star page 1221;
>
> *Jackson* v. *Jackson's Executors,* 3 N. J. E. 96, at pp. 101, 102, 103.

If upon the accounting it appears that there is a balance due from the accountant *to the complainant, then* the decree is for the payment of the balance due *to complainant.*

> *Ruckman* v. *Decker,* 28 N. J. E. 5.

The language of the cases indicates that personal jurisdiction over the accountant is a requisite and no case was cited below holding that the Court might proceed in an accounting suit as if *in rem* or *quasi in rem.*

But, in the instant case there cannot in any event be a decree that the trustee pay any sums to the complainant, nor is such a decree prayed for. If the monies are not to be paid to appellant they must be paid to another trustee for the trust is an active trust. But who can either remove appellant or appoint a new trustee? Both must be done before there can be any *money* decree.

The bill in effect prays for a decree of specific performance involving *personal action* of the trustee and is *not* a prayer for a money decree, and it is only where the bill prays for a "money decree" against a defendant that the statute, Chapter 204 of the Laws of 1919, p. 444 (1 Cum. Sup. C. S. of N. J., Sec. 33-520, p. 264) applies.

It might be said that if, as a result of the proceedings, there were an order against a defendant to pay a complainant a certain amount of money, such an order would be within the meaning of the words a "money decree". But it *cannot* be said that a final order that the defendant expend certain moneys for a certain purpose, the manner of expenditure being within his discretion, is any "money decree" within the meaning of the statute, and no money decree under any circumstances could be made in this case in favor of complainants. The decree would have to be to turn over the trust property to a new trustee.

A consideration of the statute, as a whole, indicates that it is intended to be confined to a set of circumstances which has resulted in money damages to a complainant by reason of the breach of an equitable duty which may result in a decree directing the payment of money to a complain-

ant, strictly analogous to a judgment at law in which case sequestration under Chapter 204 of the Laws of 1919, page 444, may be invoked, analogous to attachment at law.

In *Smith* v. *Smith,* 88 Cal. 572, 26 Pac. 357, the Court said:

> "An action for an accounting is a proceeding in equity, and is essentially a *personal* action."

In *Gassert* v. *Strong,* Supreme Court of Montana, 98 Pac. 497, in an action to establish and enforce a trust in stock situate within the State, the alleged trustee being non-resident, and objection having been taken to the jurisdiction, the Court carefully examined the authorities. First it reiterated what it had said in *Silver Camp Min. Co.* v. *Dickert,* 31 Mont. 438, 78 Pac. 702, 67 L. R. A. 940, to the effect that a suit to enforce specific performance of a contract to convey real estate "is a proceeding in *personam,* notwithstanding the fact that the land, the subject of the controversy, was located within this State, and within the jurisdiction of the Court; and we think it will not be questioned now that service by publication will not warrant a judgment in a proceeding strictly in *personam* * * *."

This Court has held that an action for specific performance involving real estate may be brought against a non-resident and jurisdiction obtained by publication and that the proceeding is *in rem,* but that is because our statute now provides that the decree shall have the effect of transferring the title without action on the part of the defendant (*McVoy* v. *Bowman,* 93 N. J. E. 638).

The Montana Court then carefully considered the law as to what are actions *in rem* and *quasi in rem.* The Court reaches the conclusion, paraphrasing its language, that an action *in rem* is

one against the very property itself, as a *res*. The result is a judgment founded upon a proceeding instituted, not against the person as such, but against the thing or subject matter itself. An action *quasi in rem* is one, generally speaking, in which, while the litigation involves a *res*, the interest of the defendant in that *res* only is sought to be established or affected. And the Court said, at page 501:

> "Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages and other liens."

With reference to trusts the Court says (p. 501):

> "It has been quite generally held that an action to establish and enforce a trust *in real estate* is a proceeding *quasi in rem* (Porter Land and Water Co. *v.* Baskin, (C. O.) 43 Fed. 323; Reeves *v.* Pierce, 64 Kan. 502, 67 Pac. 1108), and that 'the courts of the state where the trust property is situate have jurisdiction over the enforcement and administration of the trust, so far as the property within their jurisdiction is concerned'. 22 Ency. Pl. & Pr. 21. And, again, it is said that a court having jurisdiction of a trust estate does not lose it by reason of the trustee's absence from the state. Pennington *v.* Smith, (C. C.) 69 Fed. 188.
>
> The Supreme Court of California, in Loaiza *v.* Superior Court, 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197, remarked: 'If the state court has such power with reference to title to real estate held by a non-resident, how much more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purpose of the action here under review is to determine the *title and right to possession of the moneys and securities now*

within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind and did rescind upon discovery of the fraud. Our statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civ. Code, sec. 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee—he who has become trustee by fraud—by remaining beyond the jurisdiction of the court can prevent the court from seizing upon the subject of the trust within its jurisdiction and *restoring* it to the defrauded *cestui que trust.*"

* * * * * *

"From the facts stated in the complaint in this action, it appears that these 5,000 shares of stock are charged with a trust, and it cannot be urged that our courts are powerless, to enforce such trust, merely because one of the parties holding the legal title thereto is beyond the reach of the process of such courts. * * * Felch *v.* Hooper, 119 Mass. 52."

The Court then held that, the stock being within the jurisdiction of the Court, substituted service was sufficient to enable the Court to determine the relative rights of the parties *to* the stock in question, even though it would not be sufficient to warrant a personal judgment against the trustee. It will be at once observed that the Court treated the *ownership of the stock within its jurisdiction as the subject matter of dispute* and sustained the jurisdiction upon the same reasoning applied by this Court in *Amparo Mining Co.* v. *Fidelity Trust Co.,* 74 N. J. E. 197, affirmed 75 N. J. E. 555, which case, and others I have mentioned and distinguished and compared with those holding that a bank cannot interplead with respect to a

joint bank account where one of the joint owners is beyond the jurisdiction.

Redzina v. *Provident Inst. for Savings,* 96 N. J. E. 346.

Porter Land & Water Co. v. *Baskin,* Circuit Court, S. D., California, 43 Federal 323, was a suit brought to establish a trust in *lands,* and the jurisdiction was sustained solely upon that ground.

Reeves v. *Pierce,* Supreme Court of Kansas, 67 Pacific 1108, was a suit brought to follow trust funds, improperly invested by the trustee, in *real estate located* within the jurisdiction, and the Court said:

> "While a *personal judgment could not be rendered,* the pleadings justify the court in finding the amount of the trust fund due to the ward, and in making it a charge against the assets *into which it had gone.*"

Pennington v. *Smith,* Circuit Court, Southern District of New York, 69 Federal 188, was a case in which it was held that the Court of the jurisdiction in which a will was probated had power to appoint a trustee, and that the fact that the trustee appointed by the will had removed out of the state did not affect its jurisdiction. This is but in accord with the general principle that a *situs* of a trust created *by a will* under ordinary conditions is the domicile of the testator and in that case there was also trust property within the jurisdiction.

Loaiza v. *Superior Court for San Francisco,* 9 L. R. A. 376, California Supreme Court contains a review of the authorities (p. 379). An examination of the case indicates that the suit was to rescind promissory notes executed and made payable in California, to a resident in California,

secured by a mortgage recorded therein, of *land* therein situated, and it was held that these notes and mortgage being within the jurisdiction of the court, the court might proceed to determine their validity notwithstanding the fact that the mortgages and notes were given with respect to the purchase of property in a foreign state, and that the vendor was a non-resident and could not be personally served. It is unimportant whether the determination of the California Supreme Court was right, because the facts are in no way analogous to the case at bar. The case *is* important, however, for its review of the authorities.

Reference is made to *Matthaei* v. *Galitzin,* L. R. 18 Eq. 340 in which a suit was brought by the plaintiff, a foreigner, against the Princess Galitzin, also a foreigner, *for an accounting of profits made in the working of a mine in Russia,* the mine being operated by an English company, *which was a mere stakeholder in the premises,* and made a defendant solely for the purpose of *preventing the payment of the profits over to the princess until the accounting was made,* the plaintiff claiming that he was entitled to share in the profits by way of commission. The California Supreme Court said as to this case (p. 379):

> "The action was purely *in personam, whether it involved the matter of accounting between plaintiff and the princess,* or included the settlement as preliminary thereto of the question of whether or not the plaintiff *was entitled to a commission as claimed.* The contract relied upon was confessedly made in a foreign country, in relation to foreign property, between parties both of whom were foreigners, and all rights and liabilities under it were personal. We fail to perceive how the case has any bearing upon the questions involved in this case."

And distinguishing that case from that before the California court, the Supreme Court said (p. 379):

> "The conclusion of the Court was that '*a foreign resident abroad cannot bring another foreigner into this Court respecting property with which this Court has nothing to do.*' That is not this case. Here the parties are brought into court to cancel *a contract made and to be executed in this jurisdiction*—the notes and mortgage—and in relation to property which is subject to the jurisdiction of the Court. *It is not proposed that the judgment of the Court shall make the defendants actors in the disposition of property beyond its jurisdiction, or appoint anybody to act for them in the disposition of such property.*"

But the facts in the case at bar are analogous to those present in *Matthaei* v. *Galitzin,* L. R. 18 Eq. 340. Here, as there, the action is brought by a foreigner against a foreigner for an accounting which, as the California Court holds, is an action "*purely in personam*" and the executors of the estate of Horace M. Swetland are made defendants *solely because it is alleged that they are stakeholders,* for the purpose of obtaining an injunction against them enjoining them from paying over any moneys to the foreigner trustee *until it* should be determined whether the complainants are entitled—*not* to a money judgment, *but to a decree that the foreigner perform the duties of the trust* or that he be removed and a new trustee appointed. The Court also referred to the opinion of Mr. Justice Sharswood, in *Coleman's Appeal,* 75 Pa. State 442, and quoted the Justice as follows:

> "(5) That 'though it is an undoubted principle that wherever a court of equity has jurisdiction it will go on to make a complete decree, so as to settle the entire controversy

> between the parties . . . *any subject of property within its reach will (not) give it jurisdiction of the person of a non-resident defendant, so as to authorize . . . a personal decree against him, if he does not appear, for the payment of money.'* And after some further consideration, it concludes that branch of the discussion with the words: 'We are of opinion that the bill must be confined, at least so far as the interest of the foreign defendant is concerned, to a prayer for a decree affecting only the property in question'."

Examining the cases of *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. Ed. 565 and *Hart* v. *Sansom*, 110 U. S. 151, 28 L. Ed. 101, the Court said (at p. 380):

> "Added to them are many others, such as Belcher *v.* Chambers, 53 Cal. 635; Anderson *v.* Goff, 72 Cal. 73; Pennoyer *v.* Neff, 95 U. S. 714 (24 L. Ed. 565), and others of that class, all of which discuss the question of the power of the court to render judgment in actions purely in personam, without personal service or appearance of the defendant; or others like Hart *v.* Sansom, 110 U. S. 155 (28 L. Ed. 103), where the decree was to operate against the defendant proprio vigore to annul a deed or establish a title, *or to compel the defendant personally to be an actor in the performance of some act prescribed by the decree, whether he desired to perform it or not. It is conceded that the court would have no power to render a decree in such cases, and of such a character, in the absence of the defendant, unless there had been personal service of process within the jurisdiction to which the court could send its process.*"

In *Hart* v. *Sansom*, 110 U. S. 151, at p. 155, 28 L. Ed. 101, at p. 103, the Supreme Court of the United States said:

> "Generally, if not universally, equity jurisdiction is exercised *in personam* and not in

rem, and *depends upon the control of the court over the parties, by reason of their presence or residence,* and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, *is clearly not a judgment in rem,* establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff, Langdell, Eq. Pl. 2d Ed. secs. 43, 184; Massie *v.* Watts, 6 Cranch 148; Orton *v.* Smith, 18 How. 263 (59 U. S. XV, 393); Vandever *v.* Freeman, 20 Tex. 334.

It would, doubtless, be within the power of the State in which the land lies to provide by statute that, if the defendant is not found within the jurisdiction or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose. Felch *v.* Hooper, 119 Mass. 52; Ager *v.* Murray, 105 U. S. 126, 132 (XXVI, 942, 944). But in such a case, as in the ordinary exercise of its jurisdiction, a court of equity acts in personam, by compelling a deed to be executed or canceled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed or to establish a title."

The Montana Supreme Court in *Silver Camp Min. Co.* v. *Dickert,* 31 Mont. 488, 3 American and English Cases, 1000, considered the subject and, holding that an action for specific performance in equity was one strictly *in personam,* stated that jurisdiction could *not* be obtained over a non-resident defendant by publication, although the lands were in Montana, notwithstanding the fact that there was a statute authorizing publication. There is a careful review of the authorities.

I have already adverted to the fact that this Court has held that there may be jurisdiction obtained by publication in such an action, but, as I stated before, that is only because, by force of our statute, the decree of the Court acts directly upon the land.

> *McVoy* v. *Baumann,* 93 N. J. E. 638, at p. 642.

It is not the statute permitting the bringing in of absent defendants by substituted service, but the statute which makes the decree of the Court operate upon the land as a *res,* which gives the Court power to proceed by substituted service.

If the action is one strictly *in personam* no statute permitting the bringing in of absent defendants by substituted service is efficacious nor any statute which purports to permit the seizure of the property of the absent defendant, not connected with the subject matter of the litigation, for in that case the *seizure of the property is but a method of substituted service* and is no more efficacious than any other method of substituted service.

Speaking of a statute of Texas generally permitting service upon non-residents by substituted service, the Supreme Court in *Roller* v. *Holly,* 176 U. S. 399, at p. 406, 44 L. Ed. p. 520, at p. 523, said:

> "Obviously, this article has no application to suits *in personam.*"

In *Pennoyer* v. *Neff*, 95 U. S. 714, at p. 726, 24 L. Ed. 565, at p. 570, the Supreme Court of the United States, after referring to those cases in which seizure of property as by attachment would be efficacious, said:

> "In other words, such service may answer in all actions which are substantially pro-

> ceedings *in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose.* Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, *are equally unavailing in proceedings to establish his personal liability.*"

I submit that the law gathered from these authorities is this: where the suit is one strictly *in rem,* that is, where the *res* is, in effect, the defendant, power over non-residents to determine may be obtained by substituted service; where the suit is one involving the determination of rights and interests of persons in property within the jurisdiction—such as actions to foreclose, partition, actions to determine the ownership of stock (illustrated by *Andrews* v. *Guayaquil and Quito Railway Co.,* 69 N. J. E. 211, affirmed 71 N. J. E. 768, and by *Amparo Mining Co.* v. *Fidelity Trust Co.,* 74 N. J. E. 197, affirmed 75 N. J. E. 555, and *Pilger* v. *United States Steel Corp.,* 97 N. J. E. 102, affirmed 98 N J. E. 665) and in this class of cases is included the subjecting of property of a non-resident within the jurisdiction to satisfy his debts, power to determine may be obtained by publication, but the determination can go no further than to control the property within the jurisdiction, and those actons are called *quasi in rem;* to sustain the power to determine upon the theory of seizure of property, it is necessary that the property *itself* be the subject matter of the dis-

pute; property within the jurisdiction which it is sought to take to satisfy debts of a non-resident is considered to be the subject matter of the dispute upon the theory that the state owes a duty to take the property of a non-resident within the jurisdiction to satisfy claims of its citizens and there is a direct relation between the property of a debtor and his liability to make good his debts; where the action, however, is *in personam* and included in this class are all cases where the decree does not operate *ex proprio vigore* but directs that the defendant perform some act, *power to determine cannot be obtained by publication even where based upon seizure of the property of the defendant;* included also in these latter class of cases under our decisions are those in which it is sought to settle the rights of the parties in joint savings accounts, proceeds of policies of insurance and the like illustrated by *Elmendorf* v. *American Combustion Co.,* 80 N. J. E. 461; *Redzina* v. *Provident Institution for Savings,* 96 N. J. E. 346; *Griswold* v. *Springfield Kelly Tire Co.,* 94 N. J. E. 308; *McBride* v. *Garland,* 89 N. J. E. 314.

Applying the law as settled by the cases to the one at bar we find, I submit, that: it is strictly *in personam;* accounting cases are always *in personam;* there is no money decree prayed; every prayer is directed to the obtaining of a decree commanding the defendant to perform some act other than the payment of money to the complainants; summarized the bill prays (1) for an accounting, (2) that defendant be directed to faithfully perform the trust by expending moneys for the benefit of complainants (which is quite a different thing from a money decree against defendant in favor of complainants), (3) for the removal of the trustee; the removal of the trustee is sought to be predicated upon the result of the accounting which complain-

ants believe will show misappropriation by appellant-trustee, for the accounting and adjudication of misappropriation must precede the removal, and, therefore, before the Court can proceed to remove (if otherwise it had the power) it must embark upon an investigation which it cannot embark upon without the personal presence of the defendant.

But it cannot, in any event, remove the trustee unless the situs of the trust is within the jurisdiction.

If the doctrine relied upon by the Vice Chancellor, *mobilia sequuntur personam* (Ch. 131), to sustain the finding that the trust has a situs in this State be applied under the present point, then *there is no property of appellant here to sequester* for his right as executor of his father's estate to commissions and to a share of the accumulated rents arising from property in New York are intangible personal property located at his domicile and have no situs here and cannot be reached by sequestration here, and the Court, therefore, having no *res* within its control, there is nothing whatever upon which it can base jurisdiction.

I am well aware that it has been held that there may be attachment of a debt due to a creditor at the residence of the debtor. *Chicago, R. I. and P. R. Co. v. Sturm,* 174 U. S. 712, 43 L. Ed. 1144. The decision of the Supreme Court of the United States was made in 1898, and involved a *debt* and was based, to a large extent, upon the custom of London, from which our attachment law sprang, and also upon the duty of a State to apply property within its control, either because it had a physical situs in the State or because, in the case of a debt, by reason of the control of the debtor, to satisfy the claims of citizens of the State.

This Court has refused however to hold that the Courts of this State may settle the rights of

joint owners of a bank account, one of them being within the State, although the bank account was within the State and subject to the control of the Court. *Redzina* v. *Provident Institution,* 96 N. J. E. 346.

If the rule be as broad as complainants contend below how can the intangible interest of Maurice J. Swetland to executor's fees or to any interest in the estate of his father, which are *not* debts, be sequestered to answer a claim which is not a debt, but an equitable right, to a proper administration of a trust fund, of persons who are neither citizens of nor resident in the State?

I submit that the orders brought up in the Chancery proceedings are erroneous and should be reversed and the record remitted to the Court of Chancery with directions to grant the motions of appellant made under special appearances.

The Case in the Prerogative Court.

In his conclusions in the Prerogative Court (Pr., 80) the Vice Ordinary holds firstly, that the special appearance amounts to a general appearance, and the same argument as made in the Chancery proceedings applies here, and secondly, that appellant, as one of the executors and trustees of the Horace M. Swetland will is a party to the proceeding and already in Court.

The Vice Ordinary then says that he has no doubt of the jurisdiction of the court under *Conover* v. *Fischer,* 36 Atl. 948; *Chase* v. *Chase* (Supreme Court of Massachusetts), 2 Allen 101, 84 Mass. 101; 2 Perry on Trusts, 3d Ed., sec. 620. I have already considered these cases on pages 57 *et seq.* of this brief. Each of them involved a testamentary trust.

Of course, assuming that a trustee has misappropriated the funds of a trust, a Court *having*

jurisdiction over the trust may direct further payments to be withhold from the trustee, and this is all that is stated in 2 Perry on Trusts, 7th Ed., sec. 620. The whole question is whether the Court has jurisdiction of a trust which the Court of Chancery and this Court affirming, in *Swetland* v. *Swetland,* 100 N. J. E. 196, 6 N. J. Adv. 360, has held is *not* a trust arising under the will of Horace M. Swetland.

For the same reasons urged in the Chancery proceedings, the Court erred, I submit, in denying the motions of appellant in the Prerogative Court.

No jurisdiction was sought to be established over appellant in the Prerogative Court except by a notice served upon him without the State.

It is true, as the Vice Ordinary states, that appellant, as executor and trustee of the estate of Horace M. Swetland, *is* a party to the proceedings in the Prerogative Court, but it is *not* true, I submit, that he is a party to those proceedings either in his individual capacity or in his capacity as a trustee under the trusts of 1917 and 1922, and in those capacities *he is a distinct, legal entity not created by the will of Horace M. Swetland.*

The Prerogative Court, upon the accounting of the executors and trustees of the estate of Horace M. Swetland, has made orders directing payment to appellant *as trustee,* and these payments were directed to be made to him as matter of course and as a result of the decree in the will construction case and in accordance with the terms and provisions of the last will and testament. *But* the payments were directed to be made to him as trustee acting under an active, existing trust "and the trustee-legatee is as definite and distinct an entity as would have been an individual or corporation legatee", and "the trust to which this bequest is added was not created by the will, and,

therefore, legal rules applicable to testamentary trusts are not uniformly applicable here."

Swetland v. *Swetland*, 100 N. J. E. 196, affirmed 6 N. J. A. R. 360.

Does a corporation or individual legatee, because he appears in probate proceedings and receives the order of the Probate Court directing the payment of moneys to him as legatee, submit to the jurisdiction of the Probate Court to determine *the rights and interests of third parties as against him?*

A Probate Court may go no further than to ascertain whether, in fact, *he* is the legatee designated by the will, and, *if he is, so far as the Probate Court is concerned, the moneys must be paid to him as legatee.* If third parties have any rights or interests arising out of some agreement, or what not, with him the rights of those third parties must be determined in some other tribunal. The petitioners in the Prerogative Court proceedings, who are also the complainants in the Chancery proceedings, recognized this fact when they filed their bill in Chancery. If the reasoning of the Vice Ordinary be correct, then, if a resident of New York made a will bequeathing property to the trustees of Princeton University, the fact that the Surrogate Court on an accounting directed certain monies to be paid to such trustees in accordance with the provisions of the will, would vest the Surrogate's Court with jurisdiction to determine whether the trustees of Princeton University had faithfully administered their trust established under an agreement made in the State of New Jersey and being administered in that State.

I have already considered the statement of the Vice Ordinary made as Vice Chancellor in the Chancery proceedings (Ch. 130) when, in refer-

ring to the opinion and decree in *Swetland* v. *Swetland,* 100 N. J. E. 196, he said:

> "It was not held, as is asserted by counsel for the defendant trustee, that the trust itself was a distinct and definite entity. It is on this erroneous assertion of the court's decision in the will construction case that the defendant's counsel bases his argument of analogy to continuous charitable trusts with a legal habitation in a foreign state. It is contended that the doctrine theretofore applicable only to charitable trusts was by that decision extended to *inter vivos* trusts not charitable in their nature. The fallacy of this argument is clear and the analogy fails when it is realized that it is based upon a false premise."

How can the *trustee-legatee* be a separate distinct entity, the *trust* being one not created under the will, as this Court by affirming held in *Swetland* v. *Swetland,* 100 N. J. E. 196, 6 N. J. Adv. 360, was the situation, and the trust itself not be a separate and distinct entity? The trustee-legatee cannot be separated from the trust.

Unless the *trust* is a separate and distinct entity and unless the rule formerly applicable only to charitable trusts *was* applied by the Court of Chancery and by this Court in *Swetland* v. *Swetland,* 6 N. J. Adv. 360, then the decree must rest upon the doctrine of incorporation by reference and that doctrine has been expressly repudiated in this State.

Only by holding that the *trust* is a separate and distinct entity existing and controlled by trust agreements without the will and not controlled in any way by any language in the will can the bequest be sustained without resort to the doctrine of incorporation by reference. That is what, I submit, the Court in *Swetland* v. *Swetland*

meant when it said that "the trust to which this bequest was added was not created by the will."

Now, the Prerogative Court assumes to control the administration of a trust not created by the will *in probate proceedings with respect to the will of Horace M. Swetland.*

The effect of the decree in *Swetland* v. *Swetland,* 100 N. J. Eq. 196, is *not* that the bequest is to go to appellant as trustee to be administered by him in accordance with the terms and conditions of the trust instruments made a part of the will by incorporation and hence under the terms and conditions of the will, but rather to him in his capacity as representing the intangible entity known as *"the trust",* the effect of which is that, when he takes, he takes *not* to administer under the terms of the will but for the purposes of *his* trust, the *trust* taking the bequest *free from any control of the will* and subject *only* to such control as a Court having jurisdiction over *the then existing trust* might exercise, and the exercise of such control would, in no event, be dependent on or circumscribed by the will but only by the terms of the trust instrument.

The Vice Ordinary says (pr. 82, 83)—

> "On this motion it may be assumed that the only remaining assets of this trust estate consist of funds in the hands of the executors of the Swetland will and therefore subject to the jurisdiction and control of this court."

The Vice Ordinary ignores, I submit, in making this statement, the bill filed by complainants and petitioners in the proceedings in this State in the State of California (Ch. 90) in which bill it is alleged that assets of the trust estate were brought into the State of California and, in one form or another, are still there, that bill praying not only for an accounting by the trustee but to have it

decreed that certain property in California is property belonging to the trust.

But it would make no difference if there were no other assets of the trust. The theory upon which the bequest was sustained was that there was a valid subsisting trust not created by the will, to which the gift from the Horace M. Swetland estate was to be added.

No part of the property of the estate of Horace M. Swetland is now a part of the trust fund. It will not become a part of the trust fund unless and until it is actually turned over by order of the Prerogative Court to the trustee but the moment it is turned over to the trustee, which is the moment that it becomes part of the trust fund, it ceases to be subject to the jurisdiction of any Court in this State, because the valid existing trust to which it is added has no situs in this State.

The Prerogative Court of New Jersey is obliged to turn over the funds that were bequeathed to appellant as trustee, under the trust of July 14, 1917, unless it be determined by *a court of competent jurisdiction* that he should be removed as trustee and another appointed in his place and stead.

The Prerogative Court of New Jersey cannot turn over any part of these funds to the beneficiaries. The beneficiaries have no interest in the funds as such. Their interest is in the *application* of the funds and that application is confided to the discretion of a trustee. The whole point of the case in the Prerogative Court is whether the Prerogative Court can, in this proceeding, determine that a new trustee should be appointed which point the Vice Ordinary declines to decide (Pr. 83).

Appellant has not admitted "that he has misappropriated for his own use every penny previously paid by order of this Court to him as trus-

tee under such trust." No such *admission* is made. I repeat that this is *not* a motion to strike in the nature of a demurrer, but a motion *in limine*. The question is whether the Prerogative Court has any power to compel appellant to admit or to deny.

It is not denied that the estate of Horace M. Swetland is a New Jersey estate and that the courts of New Jersey have supreme control over *that* estate but this does not answer the question as to whether they have control over a trust which the decree of the Court of Chancery, affirmed by this Court, has specifically adjudged *is not a trust created under the will.*

I do *not* contend that the Prerogative Court of New Jersey has no jurisdiction to see that the moneys which it holds are distributed *in accordance* with the will of Horace M. Swetland, but, when we turn to that will, as construed by the courts of this State, we find that his *sole* direction is that the moneys should be paid to Maurice J. Swetland, as trustee, under an independent valid, existing trust, not created by the will. The farthest that the Prerogative Court can go is to see that the payment *is made to that trustee* who has been defined to be the same as any other corporate or individual legatee. Whether, after having received those funds, the trustee under this valid active trust, not created by the will, properly applies them is for a court having jurisdiction over that trust and over the trustee.

If the Prerogative Court may go further and see to it that the trustee properly performs his functions then the Court must read into the will the provisions of the trust instrument, defining the trust, but, if it does that, it is *"incorporating by reference"* and then the trust *would* be created under the will. But in the face of the opinions in the will construction case, it may *not* do

that thing nor could it under the law. The result is that the will cannot be made to include the terms of the trust. *The eye of the Court stops at the will. It cannot look beyond the legatee-trustee, who is like any other individual or corporate legatee.*

Nor can the orders appealed from be sustained upon the theory that the relief is temporary. If a proper proceeding is started in a proper court to compel the trustee to account and for his removal and, as a result of such proceeding, appellant is required to account and it appears that he has misappropriated the trust funds and a new trustee is appointed and a liability arises to pay over the trust funds to the new trustee, then, and not until then, does a liability of the trustee of a pecuniary nature arise. If such a proceeding be started in a proper court and, in *that* proceeding *ad interim* relief be granted, *then,* in aid of the proceedings in the proper jurisdiction, the Prerogative Court of New Jersey might possibly intervene but no proceeding has been started except in the State of California, and, if that be a proper proceeding, so far as the courts of this State are advised, no temporary relief has been granted and there was nothing before the Prerogative Court indicating that there was any proper proceeding to which the relief asked for by petitioners would be ancilliary.

When the matter is stripped of words, it clearly appears, I submit, that what the Prerogative Court has done has been to assume jurisdiction over the trust and the administration of the trust upon the theory that the trust *was* created by the will, whereas, in *Swetland* v. *Swetland,* 100 N. J.

E. 196, affirmed 6 N. J. Adv. 360, the Court of Chancery and this Court held the contrary.

It is respectfully submitted that the orders in the Prerogative Court should be reversed and the record remitted to that Court with directions to grant the motions of appellant.

Respectfully submitted,

MERRITT LANE,
Of Counsel for Appellant.

(4076) Pandick Press, Inc., 22 Thames St., New York, U. S. A.

New Jersey Court of Errors and Appeals

In the Matter *of* The Estate of Horace M. Swetland, Deceased.	On Appeal from the Prerogative Court.

BRIEF OF THE APPELLEES, GRACE E. SWETLAND, INDIVIDUALLY, AND AS NEXT FRIEND OF HENRY M. SWETLAND, FLORENCE A. SWETLAND AND CAROLYN G. SWETLAND, INFANTS.

These are appeals from two orders advised by Vice-Ordinary Berry, bearing date February 18, 1930 (Case, pp. 84, 87).

The first of these orders denied the motion by appellant to dismiss the petition as to him, and the second granted the restraints prayed for in the petition.

The issues arose on a petition filed on May 21, 1929, in the above entitled matter, by Grace E. Swetland, individually, and as next friend of Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infants, who are all the beneficiaries under a certain trust created by Horace M. Swetland, deceased, on July 14, 1917 (Case, pp. 4-19). The appellant, Maurice J. Swetland, one of the respondents named in said petition, is Trustee under the said Trust Agreement of July 14, 1917, and as such Trustee is named as a beneficiary in the last will and testament of the said Horace M. Swetland, deceased.

The facts set out in the petition and the supporting and verifying affidavits (Case, pp. 4-70) are exactly the same as those set out in the bill of complaint filed in the Court of Chancery in the case of Grace E. Swetland, individually, *et al.*, against Maurice J. Swetland, individually, *et al.*, and now before this Court on appeal (List of Causes of this Court, May Term, 1930, Cases 65 and 66).

The relief sought in the instant case, however, pertains solely to the Trust of July 14, 1917, the only remaining assets of which are a part of the Estate of Horace M. Swetland, deceased, now being administered in the Prerogative Court of this State.

The petition prays that the respondents therein named, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of the said Horace M. Swetland, deceased, be ordered not to pay any moneys or deliver any property of any kind, character or description, from the Estate of Horace M. Swetland, deceased, to Maurice J. Swetland, as Trustee under said Trust Agreement of July 14, 1917, and that the said Maurice J. Swetland, as Trustee under the Trust Agreement of July 14, 1917, may be removed and the Fidelity Union Trust Company or some other person or persons, corporation or corporations, may be appointed in his place and stead to administer the aforesaid trust of July 14, 1917 (Case, pp. 18, 19).

On May 16, 1929, notice of the proposed presentation of said petition, with a true copy of the petition and supporting affidavits, was served upon, and service thereof acknowledged by Messrs. Whiting & Moore, proctors for Maurice J. Swetland, Frederic C. Stevens, Ernest M. Corey and Maurice J. Kane, executors of and

trustees under the last will and testament of Horace M. Swetland, deceased. On the same day a notice of the proposed presentation of said petition, with a true copy of the petition and supporting affidavits, addressed to Maurice J. Swetland, as Trustee under a certain Trust Agreement of July 14, 1917, was mailed to him at his residence at Southbury, Connecticut (Case pp. 2, 3, 70, 71).

The petition thereafter came on for hearing before Vice-Ordinary Berry on May 21, 1929, the same day on which an intermediate account of the said executors and trustees was set for hearing.

On the day set for hearing the respondent, Maurice J. Swetland, as Trustee under the said Trust Agreement of July 14, 1917, filed without leave of Court a purported special appearance, and by motion sought to question the jurisdiction of the Court upon the grounds that the petition and notice of hearing thereon were not served on him within the State of New Jersey, and that the Court had no jurisdiction over the subject matter of the suit (Case, p. 74).

The petition and motions were finally heard on September 10, 1929, and the Court by the first of said orders, entered on February 18, 1930, as aforesaid, denied the motion of the appellant and adjudged that he, by appearing specially without leave of Court, had in effect appeared generally (Case, p. 84). By the second of said orders the Court, until its further order, restrained the exectuors and trustees under the last will and testament of Horace M. Swetland, deceased, from paying over any moneys from said Estate to Maurice J. Swetland, as Trustee under the Trust Agreement of July 14, 1917 (Case, p. 87).

I.

The appellant's objection to the manner of service upon him is without merit.

The appellant, Maurice J. Swetland, as trustee aforesaid, is a beneficiary of the estate of Horace M. Swetland, deceased, being administered by the Prerogative Court in this matter. He was, at the time of the filing of the petition, already a party to the administration of the estate of his father in the Prerogative Court in so far as jurisdiction over him personally in his capacity as trustee under the Trust Agreement of July 14, 1917, is concerned, and had already received a portion of the distributive share of said estate to which he was entitled as such trustee. Having received the affirmative aid of said Court in this matter, it cannot be contended that he was a party for the purpose of receiving the funds, but not for the purpose of questioning his right to receive any further funds from the same source.

Under these circumstances he did not have to be brought in by service of process to compel his appearance but was only entitled to notice of any steps in the proceedings, which notice did not have to be served upon him within the State. It is admitted that a copy of the petition and notice of hearing was served by mailing to Maurice J. Swetland as Trustee under a certain Trust Agreement of July 14, 1917 at his Connecticut address and there received by him.

Furthermore, he filed a purported special appearance without leave of Court and, in addition to questioning the jurisdiction of the Court over him personally as trustee of the trust of July 14, 1917, questioned its jurisdiction over the subject matter. For the reasons set out at length under

Point IV in our brief on the appeals taken in the suit in the Court of Chancery, hereinbefore referred to, it is clear that the Court below correctly determined this purported special appearance was in legal effect a general appearance, and that appellant was personally before the Court as trustee of the trust of July 14, 1917.

II.

The Prerogative Court also has jurisdiction over the subject matter.

Inasmuch as the only property which can possibly constitute any part of the assets of the trust of July 14, 1917, is now a part of the estate of Horace M. Swetland, deceased, it would seem equally clear that the objection to the jurisdiction over the subject matter raised by the trustee of said trust, Maurice J. Swetland, is without merit.

As shown in our brief (Point I-B), on the appeals taken in the Court of Chancery case (List of Causes of this Court, May Term, 1930, cases 65 and 66), under the settled law of this State the Trust Agreement of July 14, 1917, was incorporated by reference into the last will and testament of said Horace M. Swetland, as a result of which the trust thereby created became one of the testamentary trusts set up in the said will probated and now being administered in the Prerogative Court of this State. It is not denied that the testator, Horace M. Swetland, was a resident of New Jersey at the time of his death, and it necessarily follows that our Courts have full power to administer and distribute his estate according to the laws of this State. This being true, it is indisputable that our Prerogative Court has jurisdiction to administer the trust.

III.

Even though it should be held that the trust of July 14, 1917, is not a testamentary trust, nevertheless the Prerogative Court has jurisdiction to withhold any and all moneys constituting a part of the estate of Horace M. Swetland, deceased, from the appellant as trustee under said trust agreement and to appoint a new trustee to receive such moneys.

The petition shows that the trustee has misappropriated all of the funds of this trust which he has received to date, has deserted his wife and children, the beneficiaries of this trust, and has substantially misappropriated both the corpus and income of another trust, that of January 3, 1922, created for the same purpose as the trust of July 14, 1917. Under these circumstances it is inconceivable that the Prerogative Court does not have the jurisdiction and power to order the executors and trustees under the last will and testament of Horace M. Swetland, deceased, appointed by it and who are properly before it, to make no further payments from said estate to the said Maurice J. Swetland, as trustee of the trust of July 14, 1917, and to appoint a new trustee to receive these moneys and apply them for the benefit of the appellees, the beneficiaries of said trust.

As shown in our brief (Point III.) on the appeals taken in the Court of Chancery case (List of Causes of this Court, May Term 1930, Cases 65 and 66), the authorities clearly establish the exercise of such jurisdiction and authority, and even suggest that should the executors and trustees of the estate of Horace M. Swetland, deceased, continue to make payments to Maurice J. Swetland, as Trustee of the trust of July 14, 1917,

with the knowledge that he has misapplied previous payments and intends to continue so to do, they would be liable to the beneficiaries of such trust. *Conover* v. *Fischer,* (Ct. of Ch. N. J. 1897) 36 Atl. 948 (not officially reported).

As pointed out in our brief on the appeal from the Court of Chancery hereinbefore referred to, the case of *Chase* v. *Chase* (Sup. Ct. Mass. 1861), 2 Allen 101, cited by Vice Chancellor Emery in the case of *Conover* v. *Fischer, supra,* is directly in point. The only possible distinction is that in the *Chase* case, the sub-trust had been created in the will of the settlor, while in the instant case appellant urges that this Court has already held the trust of July 14, 1917, to be separate and apart from the will of the settlor. This we deny (Point II, *supra*).

But even if the trust of July 14, 1917, be not a testamentary trust but only a trust separate and apart from the will of the settlor, this is a mere difference in form and not a valid basis for distinguishing the case, for Chief Justice Bigelow in the *Chase* case supported the Court's jurisdiction on the theory that it had control of the executor under the will and of the fund out of which the moneys were to be paid to the trustee; a situation identical with the instant case.

As stated in *Chase* v. *Chase, supra,* this Court having complete control of the source of the funds, may pass such decrees in relation to the further disposition of these funds as the rights of the *cestuis que* trust in equity require, and to this end, if necessary, may appoint a new trustee amenable to its process.

It is certain that the Prerogative Court under the circumstances in the instant case should not permit any of the moneys constituting part of the Estate of Horace M. Swetland, deceased, over

which it has complete control, to pass out of its control without adequately safeguarding the beneficiaries who are the objects of the testator's bounty. If said Court is not inclined to appoint a new trustee to administer this trust, it certainly has the jurisdiction and power, and should require Maurice J. Swetland, as Trustee under the Trust Agreement of July 14, 1917, as a condition to the payment of any further moneys to him, to file a satisfactory bond to adequately secure the beneficiaries of this trust in case of any further derelictions, and likewise require him to file a power of attorney to accept service of process issuing out of any of the Courts of this State with respect to any action in connection with his duty as trustee of this trust.

In re Satterthwaite's Estate (Ct. of Ch. N. J. 1900) 47 Atl. 227, (not officially reported), a petition was filed by the executors under a will for the appointment of a resident trustee to receive a portion of the residuary which had been left in trust. The trustee named in the will was a foreign corporation. Vice Chancellor Reed denied the petition, but said:

> "My conclusion is that the Guaranty Trust & Safe Deposit Company shall execute and file a bond, made to the chancellor of the state of New Jersey, with a New Jersey corporation qualified to act as sureties, as surety; which bond, in addition to the ordinary conditions of such a bond, shall contain a condition that whenever an order shall be served upon the foreign corporation to account before the Orphans' Court of Burlington County, the Court of Chancery, or the Prerogative Court of this state, it will obey such order by filing its account, and by producing any and all vouchers or securities in its possession, belonging to such trust estate, before said court, or before a master appointed by the said court, to make and state an account of the

same, and obey all orders of the said court in respect of said trust; also that the New Jersey corporation so signing as surety shall be the agent of the trustee to receive and accept service of all notices and orders in respect of said trust. Upon the execution and filing of such bond, approved by me, with the clerk of this court, this petition will be dismissed without costs."

In the case of *Price et al.* v. *United Hebrew Charities et al.* (Ct. of Ch. N. J. 1925) 129 Atl. 712 (not officially reported), the testatrix had created a charitable trust naming as trustee a foreign corporation. Vice Chancellor Buchanan held that inasmuch as this was a charitable trust given to a corporation of high standing a bond would not be required, but that a power of attorney would be necessary.

"It is conceded that there is no obligatory requirement of law that bond should be given. The provisions of the Orphans' Court Act, Sec. 51 (2 Comp. St. 1910, p. 3829), apply only to non-resident executors (where the testator has not absolved such from the duty of giving security). It is also conceded on the other hand that this Court may, in its discretion, require the giving of such security. Cf. *In re Satterthwaite* (N. J. Prerog.) 47 A. 227 (which was the case of a private trust). No case has been discovered where security has been required by the Court in such a case.

"It appears, and is admitted, that the named trustee is a corporation of the highest standing, with a long record of efficient administration of charities in its particular denomination, involving many years and very great sums annually. All parties are desirous that it should act in the present instance. The Attorney General recommends that security be not required.

"The testatrix obviously knew that the corporation was a nonresident, but imposed no

testamentary requirement for security. Presumably she knew that there was no statutory requirement.

"Under all the circumstances the trustee will not be required to furnish security. It will, however, be required to execute an irrevocable power of attorney to the Secretary of State of this State, authorizing him to accept for it service of all process issued out of the courts of this State in cases or proceedings involving this trust, and the administration thereof, in order that the courts of this State may maintain jurisdiction over the same for the benefit of the beneficiaries who are residents of this state."

For the reasons stated, we submit that the Orders appealed from should be affirmed.

LINDABURY, DEPUE & FAULKS,
Proctors for Petitioners.

J. EDWARD ASHMEAD,
Of Counsel.

New Jersey Court of Errors and Appeals

Between

GRACE E. SWETLAND, *et al.*,
Complainants-Appellees,

and

MAURICE J. SWETLAND, individually and as trustee &c.
Defendant-Appellant.

On Appeal from the Court of Chancery.

BRIEF FOR APPELLEES, GRACE E. SWETLAND, INDIVIDUALLY, AND AS NEXT FRIEND OF HENRY M. SWETLAND, FLORENCE A. SWETLAND AND CAROLYN G. SWETLAND, INFANTS.

These are appeals from two Orders advised by Vice Chancellor Berry, bearing date February 18, 1930.

The complainants filed their Bill of Complaint and obtained an Order granting a Writ of Sequestration against the individual property in this state of the defendant-appellant, and an Order to Show Cause why the executors and trustees under the last will and testament of Horace M. Swetland, deceased, also defendants, should not be restrained from paying over to the defendant-appellant, Maurice J. Swetland, either as trustee under a certain Trust Agreement of July 14, 1917, and/or a certain Trust Agreement of January 3, 1922, or to him individually, any moneys from said estate.

The defendant-appellant, Maurice J. Swetland, appearing specially without leave of Court, moved

to vacate the Order to Show Cause and the Writ of Sequestration and to dismiss the Bill of Complaint on the grounds that the Court had no jurisdiction over him personally, nor over the subject matter of the cause of action.

The Court by the first of the Orders appealed from denied each of the motions made by the defendant-appellant and further ordered that the said Maurice J. Swetland, individually, and as trustee under the Trust Agreements of July 14, 1917, and January 3, 1922, be adjudged to have appeared generally in the cause, and by the second Order appealed from granted the restraints prayed for.

The defendant-appellant, Maurice J. Swetland, as Trustee under the Trust Agreements of July 14, 1917, and January 3, 1922, respectively, has appealed from each of the aforesaid Orders (Case, pp. 150-157). No notice or petition of appeal has been filed, however, on behalf of said Maurice J. Swetland, *individually,* or on behalf of the defendants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased.

Statement of the Case.

These matters having arisen in the Court below on the return of an Order to Show Cause and the said motions of the defendant-appellant, and no answering affidavits having been filed for the defendant-appellant, the Bill of Complaint, attached exhibits and supporting affidavits (Case, pp. 2-70) constitute the facts of this case and are, briefly, as follows:

Appellee, Grace E. Swetland, married appellant, Maurice J. Swetland, at Montclair, New Jer-

sey, on October 10, 1908. The remaining appellees, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, are all minors and are all of the issue of this marriage (Case, pp. 2, 36). The appellant, Maurice J. Swetland, has never since his marriage been able to support appellees through his own efforts, and during the lifetime of Horace M. Swetland, deceased, the father of Maurice J. Swetland, his family was provided for by the said Horace M. Swetland (Case, p. 37). Realizing the inaptitude of his son, Horace M. Swetland on or about July 14, 1917 (Case, pp. 2, 38) transferred certain securities to the appellant, Maurice J. Swetland, as trustee, which the said Maurice J. Swetland agreed to hold in trust for the sole benefit, advantage and use of the appellees, subject to the following conditions in regard thereto as imposed in connection therewith by the said Horace M. Swetland, founder of said trust, to wit:

> "1. To pay and apply the income received from the principal of said trust to the sole benefit, advantage and use of my wife and children, or the survivor or survivors of them until such time as my youngest living child shall reach thirty years of age, on the happening of which event the said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided:
>
> * * * * * *
>
> "3. That upon my youngest living child attaining the age of thirty years the principal of said trust and all additions thereto shall be divided equally between and paid to my present wife, if then living, my children and the living issue of any deceased child or children of mine who shall take in equal parts the share or part which his or her parent and said deceased child of mine would have taken if living at the time aforesaid; that in the

> event of the death of my said wife before my youngest living child shall reach thirty years of age, and of the death of all of my children before reaching thirty years of age, without leaving issue them surviving, that then and in that event the principal of said trust shall revert to and become a part of the residuary estate of the aforesaid, founder thereof, Horace M. Swetland'' (Case, p. 20).

On July 14, 1917, the date of execution of this Trust Agreement, the settlor, Horace M. Swetland, was and for many years prior thereto had been a resident of the Town of Montclair in this State. At this time Maurice J. Swetland, the trustee named in said Trust Agreement, and his wife and children, the beneficiaries therein named were also domiciled in the State of New Jersey. The father, Horace M. Swetland, had built on his homestead property in Montclair a house for his son and family, in which they resided for some time prior to and at the time of making said Trust Agreement (Case, p. 2, p. 38). The appellant claims that the Trust Agreement was executed in the State of New York and delivery of the securities by the settlor to the trustee actually made there. Upon the present argument we may assume this contention to be true.

Subsequently, the father, Horace M. Swetland, the settlor, for the primary benefit of the appellees and the incidental benefit of his son, the appellant, entered into a new Trust Agreement with his said son, Maurice J. Swetland, bearing date January 3, 1922 (Case, p. 4, p. 39). By the terms of this Agreement the corpus of the trust under the terms of the Agreement of July 14, 1917, became part of the corpus of the trust of January 3, 1922. The remainder of the corpus constituted additional securities transferred at the time of its execution (Case, p. 23).

The said Trust Agreement of January 3, 1922 among other things, provided:

> "Second: (a) The aforesaid transfers to said Maurice J. Swetland are IN TRUST, nevertheless, but absolute and irrevocable and for the sole benefit, advantage and use of the family, wife and children of the party of the second part, their support, maintenance and education, subject to and in accordance with the following:
>
> * * * * * *
>
> "(d) The income received from the principal of said Trust shall be applied, paid over and expended for the sole benefit, use, support, comfort and education of the family of the second part or the survivor or survivors of them until such time as the youngest child of the party of the second part shall have reached the age of thirty years. In which event said trust shall terminate and the principal thereof and all additions thereto shall be distributed as hereinafter provided.
>
> "(e) The said Trustee shall not during the period of this trust have any power to encumber or charge by way of anticipation or otherwise the interest or income from the trust estate hereby created or to charge or encumber the corpus or principal of said trust fund or any part thereof or any beneficial interest therein.
>
> "THIRD. That when the youngest living child of said MAURICE J. SWETLAND party of the second part hereto, shall have attained the age of 30 years, the principal of this trust and all additions thereto making in total the net trust estate at the time aforesaid, shall be divided as follows:
>
> "(a) That portion of the trust estate represented by 1998 shares of the Publishers Securities Company common stock, standing in the name of MAURICE J. SWETLAND TRUSTEE, shall be delivered to and become the personal property of MAURICE J. SWETLAND if living.

> "(b) The balance of the net trust estate at the time aforesaid shall be divided equally between and paid to the wife of the party of the second part, if then living, and his children, and the living issue of any deceased child or children and the living issue of such child or children shall receive in equal parts the share or part which his or her parent, as the case may be, would have taken if living at the time aforesaid" (Case, pp. 24-26).

Like the Trust Agreement of July 14, 1917, it is claimed that the Trust Agreement of January 3, 1922 was executed in New York, but likewise at the time of the execution thereof the settlor, trustee and all of the beneficiaries were domiciled within the State of New Jersey, as were both of the substitutionary trustees therein named (Case, pp. 4, 27, 38).

Horace M. Swetland died on June 15, 1924, a resident of Essex County, New Jersey, and left a last will and testament dated January 12, 1922 which was duly admitted to probate by the Ordinary of the Prerogative Court of this State on June 30, 1924 (Case, pp. 6, 29, 67).

On August 14, 1925 Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, who had duly qualified as executors of and trustees under the last will and testament of Horace M. Swetland, deceased, filed a bill in the Court of Chancery of New Jersey to seek its advice and direction as to the construction thereof and to determine the rights of the respective parties interested thereunder (Case, p. 8). After final hearing before Vice Chancellor Berry, whose opinion is reported in *Swetland* v. *Swetland* 100 N. J. Eq. 196, a final decree was entered in said cause on December 14, 1926 wherein among other things it was decreed:

> "9. As to all income not required for the comfortable support, care and maintenance

of Hattie Swetland, and of the widow, Clara A. Swetland, and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which was devised to Clara A. Swetland during her life and for the expenses incident to said trusts including the charges and expenses in connection with the New York real estate, and the expenses of administration, the said testator died intestate; and it was the intention of said testator that all of such surplus income should be accumulated until the death of the widow, at which time it should be distributed among those entitled under the intestate laws of this state.

"10. Under the laws of the State of New York, the directions for the accumulation of the income derived from the New York real estate, are void, and such part of the net income so derived from the New York real estate as is not needed for the purposes of the trusts created by said will, is distributable amongst those entitled to the next eventual estate; those entitled to the next eventual estate are those named in the paragraph of the will hereinabove marginally numbered 16" (referring to the paragraph of the will first set forth in paragraph 6 of this Bill of Complaint, Case, p. 7) "and comprise the testator's three daughters, Velma I. Stevens, Ruth D. Kane, and Dorothy A. Johnson, and his son, Maurice J. Swetland as trustee.

* * * * * *

"14. In the paragraphs of said will hereinabove marginally numbered 16 and 17" (referring respectively to the two paragraphs of the will set forth in paragraph 6 of this Bill of Complaint, Case, p. 7), "the testator referred to the trust agreement bearing date the 14th day of July, 1917, hereinabove set forth, and the bequests in said will to Maurice J. Swetland, as trustee, are valid" (Case, pp. 9-11).

Thereafter an appeal was taken by one or more of the defendants in that suit to this Court and

after argument the decree of the Court of Chancery in all respects appealed from, was affirmed on or about February 6, 1928 (*Swetland* v. *Swetland,* 6 N. J. Adv. Rep. 360, not officially reported).

The result of that decision is that the appellant, Maurice J. Swetland, *individually,* has a one-quarter interest in all of the surplus income from the New Jersey property over and above that necessary to meet the annuity payments, which individual interest is not distributable until the death of the annuitants. As *trustee* under the Trust Agreement of July 14, 1917, appellant is entitled to one-quarter of the surplus income from the New York real estate during the life of the annuitants. Upon final distribution of the estate of Horace M. Swetland, appellant as *trustee* under the Trust Agreement of July 14, 1917, is entitled to one-quarter of the residue of the said estate of his father, Horace M. Swetland, deceased.

The said Maurice J. Swetland, as trustee under the Trust Agreement of July 14, 1917, received from the executors and trustees of the estate of Horace M. Swetland, deceased, on July 6, 1928, the sum of $21,971.87, which was one-quarter of the surplus income accumulated from the New York realty (Case, pp. 13, 68). However, the appellant, as such trustee, has not expended any portion of this sum for the benefit, advantage and use of the appellees as directed and required by the provisions of the said Trust Agreement so to do; and he has never filed any account in any Court as trustee under this Trust Agreement, although demand has been made upon him so to do; it is not denied that he has appropriated to his own use the whole or a large portion of these funds, and it is certain that appellees have not received or had applied for their benefit any portion thereof (Case, pp. 13, 47, 69).

Just prior to the death of Horace M. Swetland, the appellant left Montclair, New Jersey, with his family, the appellees, and settled in California (Case, p. 38). He there became interested in various business enterprises none of which were conducted at a profit, and for the support of which he applied the moneys which he was receiving as income under the Trust Agreement of January 3, 1922. In March or April of 1926, not satisfied with the diversion of the income of this trust to his personal use, he sold all of the securities which had constituted the corpus of this trust fund and received therefor the sum of $335,000 (Case, p. 59). These moneys, the proceeds of the entire corpus of the trust of January 3, 1922, were gradually expended by the appellant, trustee of said trust, in the various business enterprises which he was conducting and only a small portion thereof was devoted for the benefit of the appellees as in said agreement directed (Case, pp. 41, 42, 58-63).

In 1927 the appellant, Maurice J. Swetland, became infatuated with a former cabaret hostess whom he had known for at least five years. He made frequent trips to New York to visit her and expended large sums of money, which properly belonged to the trust of January 3, 1922, in lavishly entertaining this woman (Case, pp. 51-52, 62-64). Finally he discontinued living with the appellees, his wife and children, and laid plans to secure a divorce; all of which was at the time unknown to his wife, the appellee, Grace E. Swetland (Case, pp. 43, 51-55, 63-65).

In the fall of 1927 these plans culminated in a scheme to send his wife and his two daughters to Paris. He was to follow them with his son, Henry M. Swetland, on a ship sailing about a week later (Case, p. 64). Upon the arrival of Mrs. Swetland and her daughters in New York City he took her to the Biltmore Hotel and intimidated and coerced

her into signing certain documents, the true purport of which she had no knowledge, and then placed her on the steamer (Case, pp. 43, 54). He did not follow his family to Paris as planned but immediately took steps to procure a divorce in Mexico, using as a basis therefor the papers which he had forced his wife to sign (Case, pp. 44, 55, 64). Upon the return of the appellee, Grace E. Swetland, she learned that in her absence her husband, the appellant, had obtained what he considered a divorce and had actually gone through a form of marriage ceremony with the cabaret hostess, and was at that time living with this lady in Connecticut (Case, p. 44).

All of the appellees returned to California, destitute and without funds, where they have remained ever since, being supported through the charity of the mother and father of the appellee, Grace E. Swetland (Case, pp. 44, 69).

Investigation was made in so far as possible of the business affairs of the appellant, Maurice J. Swetland, which disclosed the fact that a considerable portion of the corpus of the trust of January 3, 1922 had been invested in real estate which was heavily encumbered with mortgages, and in some instances the titles to such properties were not held by appellant as trustee, but in the name of one or more corporations which he had caused to be organized and in all of which he owned all of the stock. Demand was made upon the appellant to account for his trusteeship under the Trust Agreement of January 3, 1922, but no accounting of this trust was or has ever been made either to the appellees or to any Court of any jurisdiction (Case, pp. 13, 48).

On July 23, 1928, a suit was instituted in the Superior Court of the County of Los Angeles in the State of California by the appellees herein against Maurice J. Swetland, individually, and as

trustee under the Trust Agreement of January 3, 1922, to seek an accounting under this trust (Case, p. 88). In said suit a large number of other defendants were named in an attempt to follow the proceeds of the funds under the Trust Agreement of January 3, 1922, and impress the trust on such properties held by the other defendants (Case, pp. 90-115). In the California action the appellant, Maurice J. Swetland, avoided service of process and has never appeared personally or by attorney, and, of course, has not filed any accounting under the Trust Agreement of January 3, 1922 (Case, p. 88).

The appellees herein learned in April, 1929, that the executors of and trustees under the last will and testament of Horace M. Swetland, deceased, had filed their second intermediate account with the Prerogative Court of this State and that upon its allowance the said Maurice J. Swetland, as trustee under the Trust Agreement of July 14, 1917, would become entitled to a one-quarter interest in the surplus income from the New York real estate, which fund, exclusive of counsel and trustees' fees, amounted to $71,-997.22 (Case, p. 69). After payment of said counsel and trustees' fees the one-quarter interest in said fund amounted to $17,069.65.

The appellees thereupon filed their Bill of Complaint in the Court of Chancery on May 14, 1929, supported and verified by the affidavits of the appellees, Grace E. Swetland and Henry M. Swetland, her son; Charles P. Loeser, her brother-in-law; and Louis A. Schaefer, who had been employed as a confidential secretary by the appellant, Maurice J. Swetland, for a number of years (Case, pp. 2-70). The Bill of Complaint in addition to naming as defendant the appellant herein, Maurice J. Swetland, individually, and as trustee under the Trust Agreements of July 14,

1917, and January 3, 1922, named as co-defendants the said Maurice J. Swetland, Frederic C. Stevens, Ernest M. Corey and Maurice J. Kane, the executors of and trustees under the last will and testament of Horace M. Swetland, deceased (Case, p. 16).

The relief sought by the Bill of Complaint is to secure an accounting by the appellant, Maurice J. Swetland, as trustee under the Trust Agreements of July 14, 1917, and January 3, 1922, to secure the removal of the appellant, Maurice J. Swetland, as trustee under both of said Trust Agreements, to secure a money decree directing that he pay to the substituted trustees such sums as the Court of Chancery may find he has misappropriated from each of the trusts of July 14, 1917, and January 3, 1922, to secure the issuance of a writ of sequestration against his individual property in the State of New Jersey, and to enjoin the trustees under the last will and testament of Horace M. Swetland, deceased, from making any further payments to the said appellant as trustee under the Trust Agreement of July 14, 1917 (Case, pp. 16-18).

On May 14, 1929, an Order was entered in the Court of Chancery, directing Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, and Maurice J. Swetland, individually, or as trustee under the Trust Agreements of July 14, 1917, and January 3, 1922, to show cause why the said executors should not be enjoined and restrained from paying over or delivering to the said Maurice J. Swetland, individually, or as trustee under the Trust Agreement of July 14, 1917, from receiving any moneys or other property of any kind, character or description from the estate of Horace M. Swetland, deceased, which

said Order also contained an *ad interim* stay (Case, p. 71). Service of the said Order to Show Cause was acknowledged on May 16, 1929, by Messrs. Whiting & Moore, solicitors for the executors of and trustees under the last will and testament of Horace M. Swetland, deceased (Case, p. 72); and on May 16, 1929, a true copy of said Rule to Show Cause and *ad interim* stay, together with a true copy of the Bill of Complaint, exhibits and attached affidavits was served on the appellant, Maurice J. Swetland, by mailing to him, registered mail, postage prepaid, at his post office address in Southbury, Connecticut (Case, p. 73).

Pursuant to an Order for that purpose entered on May 14, 1929 (Case, p. 34) a Writ of Sequestration was issued on May 15, 1929, directed to Roger E. Salmon, Esq., a Special Master in Chancery, directing him to sequester the individual property of the appellant, Maurice J. Swetland, up to the amount of $335,000 (Case, p. 75), which Writ was executed by sequestering all of the right and title which Maurice J. Swetland, individually, had in and to the estate of Horace M. Swetland, deceased, and in and to the commissions allowed to Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, trustees under the last will and testament of Horace M. Swetland, deceased, by Order of the Prerogative Court in the matter of the estate of Horace M. Swetland, deceased, which said Writ was on June 17, 1929, duly returned to the Court of Chancery (Case, p. 76).

A subpoena to answer the Bill of Complaint directed to Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, executors of and trustees under the last will and testament of Horace M. Swetland, deceased, was tested on May 22, 1929, and service thereof acknowledged

by Messrs. Whiting & Moore, as solicitors for the defendants therein named on May 22, 1929 (Case, p. 157).

A subpoena to answer the Bill of Complaint directed to Maurice J. Swetland, individually and as trustee under certain Trust Agreements of July 14, 1917 and January 3, 1922, respectively, was tested on May 22, 1929, and returned *non est* by the Sheriff of Essex County on May 28, 1929 (Case, p. 157).

On June 4, 1929, an Order of Publication was made against the said Maurice J. Swetland, individually and as trustee under certain Trust Agreements dated July 14, 1917, and January 3, 1922, respectively, and Notice of said Order of Publication was thereafter duly mailed to the said Maurice J. Swetland and duly published in the Newark Evening News as required by said Order of Publication (Case, pp. 157-162).

Under these circumstances the appellant, Maurice J. Swetland, individually and as trustee under the Trust Agreements of July 14, 1917 and January 3, 1922, filed on June 4, 1929, without leave of the Court of Chancery, purported Special Appearances questioning the jurisdiction of the Court of Chancery to grant any temporary relief on the return of the Order to Show Cause because of improper service thereof upon him by mail, outside the State of New Jersey, and further alleging that the Court of Chancery did not then nor never had nor never could obtain jurisdiction of the person and property of the appellant, Maurice J. Swetland, as trustee, and praying that the Order to Show Cause and the Writ of Sequestration be vacated and set aside and that as to him the Bill of Complaint be dismissed.

In answer to certain allegations of the purported Special Appearances, concerning a proceeding brought against the appellant in Cali-

fornia, the appellees filed the affidavit of Charles P. Loeser on September 10, 1929, to which is attached a true copy of the original complaint filed in the Superior Court of the State of California in and for the County of Los Angeles on July 23, 1929 (Case, pp. 88-122), from which it appears that although the appellant, Maurice J. Swetland, was sued individually and as trustee under the Trust Agreement of January 3, 1922, in California he was not served personally in that suit and has never entered any appearances nor filed any answer in that case nor taken any step which would subject him personally to the jurisdiction of that Court.

Thereafter the matter was continued from time to time and after briefs had been filed on behalf of the respective parties, Vice Chancellor Berry filed his conclusions in the Court below on January 21, 1930, wherein it was held that the jurisdiction of the Court of Chancery was amply sustained because the trusts of July 14, 1917, and January 3, 1922, respectively, had a situs in New Jersey; the Writ of Sequestration was properly issued against the individual property of the appellant in a proceeding in which a money decree was prayed against a non-resident defendant; and that the filing of the Special Appearances without lease of Court under the facts of the instant case amounted to general appearances (Case, pp. 126-142).

Thereupon the Orders hereinbefore referred to were entered on February 18, 1930 (Case, pp. 143, 147) and the appellant took these appeals therefrom.

I.

The learned Vice Chancellor correctly decided that the trusts of July 14, 1917, and January 3, 1922, respectively, have their situs in New Jersey.

(A) The learned Vice Chancellor correctly held the domicile of the settlor of an *inter vivos* trust of personal property determines the situs of the trust.

Appellant's contention that the Court of Chancery of New Jersey has no jurisdiction of the subject matter of this proceeding is built entirely on the false premise that the situs of both of these trusts is in the State of New York. Obviously, the underlying purpose of this contention is the hope that if the situs of these trusts should be held to be in New York, they would be held to be void and in violation of the rule against perpetuities applicable in that State. As stated by the Court below:

> "If the trust situs were in New York it is possible that the trust might be illegal as in violation of the New York rule against perpetuities, although it has been already determined to be a valid trust (*Swetland* v. *Swetland, supra*) and is not violative of the New Jersey rule against perpetuities" (Case, p. 138).

Even though the Courts of New York obtained jurisdiction of the person of the appellant and held, as they should hold, the situs of these trusts to be in New Jersey, appellant well knows that he is not a resident of New York and that none of the trust property or any property into which said trust property has been wrongfully converted by him is there—and consequently he would never

become and never could be held accountable there. He has avoided subjecting himself to the jurisdiction of New York, as he has assiduously avoided the jurisdiction of California. His sole purpose is to escape from all accountability.

The appellant has admitted throughout the proceedings and still admits (Appellant's Brief, p. 32) that if the situs of these trusts is in New Jersey, the Court of Chancery of New Jersey has complete jurisdiction to grant all the relief prayed for in the Bill of Complaint. The appellant is in the position of having to admit the misappropriation of all the corpus and income of the trusts of July 14, 1917, and January 3, 1922, that he has received. Indisputably, the only remaining assets of the trust of July 14, 1917, are those which, with other interests, are being administered in the Prerogative Court of this State.

In an endeavor to escape all responsibility imposed by the settlor of these trusts and to continue his malfeasance as trustee, the appellant claims that the courts of this State, within whose control there is both his individual and the trust property, are powerless to aid the *cestuis* of these trusts. In support of this endeavor to escape all accountability he has been forced to take the position that the situs of these trusts is not in New Jersey. If his contention were sustained he apparently believes he would escape all accountability and responsibility. The mere statement of appellant's position must necessarily impress a Court of Equity with the fact that there is some error in the premises or the logic of an argument that leads to such a result.

In support of his position the appellant claims the fact that these Trust Agreements were executed in the State of New York and the trust property (shares of stock) was there delivered by the

settlor to the trustee is completely determinative of the question of situs.

We submit that the learned Vice Chancellor below correctly held that in the determination of the situs of an *inter vivos* trust of personal property the domicile of the settlor was properly controlling as to the situs of trusts *inter vivos* as well as those testamentary.

In *Murphy* v. *Morrisey & Walker, Inc.* (Ct. of Ch. 1926), 99 N. J. Eq. 238, Vice Chancellor Berry said:

> "The validity or invalidity of a trust declared in a will is determined by the law of the testator's domicile at the time of his death."

In *Hewitt* v. *Green* (Ct. of Ch. 1910), 77 N. J. Eq. 345, 362, Vice Chancellor Stevens said:

> "The law which determines the validity or invalidity of a trust is the law of the testator's domicile at the time of his death."

In *Cross* v. *United States Trust Co.* (N. Y. Ct. of App. 1892), 30 N. E. Rep. 125, the case involved the validity of a disposition of personal property by a testatrix, a resident of Rhode Island, who made a bequest to the United States Trust Company, a New York corporation, in trust for her husband and children with gifts over. The question involved was whether the law of New York controlled this disposition, for, if so, then the trust violated the New York rule against perpetuities, although admittedly it did not violate the rule against perpetuities as enforced in Rhode Island.

The court said:

> "The controversy is thus reduced, so far as this court is concerned, to a single question, and that is whether this action can be main-

tained to declare invalid a disposition of personal property by will, perfectly lawful and valid at the place of the owner's domicile, when made, but which would be invalid if this were a New York will. The property and the trustees are here. So are all the beneficiaries, except one of the grandchildren, who resides in the State of Connecticut. From the present situation of all parties interested in the property thus disposed of, it may be assumed that the trust is to be administered here.

"It is a general and universal rule that personal property has no locality. *It is subject to the law of the owner's domicile, as well in respect to a disposition of it by act inter vivos as to its transmission by last will and testament, and by succession upon the owner dying intestate.* This is, in substance, the language in which Judge Denio stated the law in this court, and which he concisely and clearly extracted from the authorities cited by him. *Parsons* v. *Lyman,* 20 N. Y. 112. The learned judge added that 'the principle, no doubt, has its foundation in international comity; but it is equally obligatory, as a rule of decision in the courts, as any legal rule of purely domestic origin. It does not belong to the judges to recognize or to deny the rights which individuals may claim under it at their pleasure or caprice; but, it having obtained the force of law by user and acquiescence, it belongs only to the political government of the state, to change it whenever a change becomes desirable'. * * * The question is not changed by the circumstances that the trustee and the trust fund is within our jurisdiction, and all the beneficiaries but one are now residents of this state. The will was valid or not at the moment of the death of the testatrix, and if it was valid then it is valid now. Nothing that has since transpired can change any right which it confers."

The rule with respect to trusts created by will is that the validity of the trust is determined by

the law of the testator's domicile at the time when the will creating such trusts becomes effective. It should follow, therefore, that the rule with respect to *inter vivos* trusts is that their validity and situs is determined by the law of the domicile of the settlor or creator at the time of the execution of the trust instrument, and this, we submit is the well settled law.

In *Liberty Nat. Bank & Trust Co. of New York* v. *New England Investors* (Dist. Ct. of Mass., 1928), 25 Fed., 2nd, 493, the court said at page 495 in construing a non-testamentary declaration of trust:

> "* * * There is ample authority to support the proposition that the validity of the trust should be determined by the law of the domicile of the settlor if the property consists of personalty."

In *Maynard et al.* v. *Farmers Loan & Trust Co.* (Sup. Ct., App. Div., 1924), 203 N. Y. Supp. 83, in satisfaction of an alimony decree for $1,000,000 the husband agreed to turn over to trustees $700,000 and the wife entered into a trust agreement whereby she became the life beneficiary of the trust with power to appoint by will the remainderman. At the time of the creation of the trust both the husband and wife were domiciled in Pennsylvania and the agreement between the husband and wife as well as the trust agreement was executed in Pennsylvania. At the time of the death of the wife, she was domiciled in New York and the husband was seeking as the creator of the trust to recover the remainderman interest in the trust claiming the power of appointment had been improperly exercised. The court said:

> "In relation to the trust agreement and its construction, the law of the State of Pennsyl-

> vania controls, it being conceded that both parties resided in that state at the time it was made; but with reference to the power of appointment and its exercise provided for in the will of Blanch A. Thompson we are of the opinion that we are governed by the laws of the state of New York, the testatrix having been a resident of this state at the time of her death."

Appellant has urged that the situs of an *inter vivos* trust of personalty is shifting and changes with every change in the domicile of the trustee or of the beneficiaries or of the location of the trust property itself, and that while at the time of the execution of these Trust Agreements the settlor, the trustee, all of the beneficiaries and the substituted trustees were domiciled in New Jersey, the fact that the trustee and the beneficiaries are no longer domiciled here has in some way robbed the Courts of New Jersey of their power. This contention is obviously unsound and the situs of such a trust is fixed at the time of its creation.

In *Mercer* v. *Buchanan* (Cir. Ct. of Pa., 1904), 132 Fed. 501, suit was brought to determine the rights as between life tenants and remaindermen of certain corporate distributions on stock held by trustees. Creator of the trust who was also first life tenant executed the deed of trust in New York at a time when she was domiciled and resident therein. The trustees and the remaindermen were citizens and residents of Pennsylvania. Subsequent to the execution of the trust the creator removed to Pennsylvania. It was urged that the removal of the creator to Pennsylvania in connection with certain declarations of an intention to continue to reside there coupled with the fact that the trustees who were residents of Pennsylvania would transact the business of the trust in that

state made this a Pennsylvania trust. In answer to this Judge Buffington said at page 502:

> "* * * The status of the deed, however, was fixed in January preceding, when it was executed, and we fail to see how any subsequent change of residence by the donor, if established, would effect such status."

In further support of his proposition that the situs of these trusts is in New York the appellant assumes to rely on the tentative draft on the Conflict of Laws prepared by Joseph H. Beale, with advisors, among others Learned Hand, of the United States Circuit Court of Appeals, Second Circuit, and Frederick F. Faville, of the Supreme Court of Iowa, from which draft he quotes: (Appellant's Brief, p. 33):

> "The administration of a trust of movables is supervised by the Courts of that State only in which the administration of the trust is located."

As a subhead:

> "In the case of a trust created *inter-vivos* the administration of the trust will be supervised by the Courts of that State in which the administration of the trust is located."

Accepting the rule as stated, it is apparent that in order to apply the rule it is necessary to determine the State in which the administration of the trust is located, the very issue involved in the present proceedings. After citing the rule, appellant's counsel jumps to his erroneous conclusion that the place of administration of the trusts of July 14, 1917 and January 3, 1922, is in New York where they were executed and the certificates of stock delivered to the Trustee. But turning to the same authority on which defendant's counsel relies, namely, restatement No. 3, The American

Law Institute, Conflict of Laws, dated February 1, 1927, page 167, we find:

> "Section 317. *The interpretation of an instrument creating a trust of movables is, in the absence of circumstances indicating the contrary, governed by the usage of the domicile of the settlor.* (Italics ours.)
>
> "Section 318. A trust of movables created by an instrument *inter vivos* is administered according to the law of the state where the instrument creating the trust located the administration of the trust.
>
> * * * * * *
>
> "(c) *In order to determine where the administration of the trust is located, consideration is given to the provisions of the instrument, the residence of the trustees, the residence of the beneficiaries, the location of the property, the place where the business of the trust is to be carried on*". (Italics ours.)

Strange to say, of all the circumstances which should be considered in order to determine what Court shall have the administration of a trust, the only circumstances relied upon by the appellant, namely, the place of execution of the agreement or the delivery of the property, are not mentioned by this authority on which he assumes to rely. On the other hand, there is present in the instant case every circumstance considered by the foregoing authority to be important in deciding the situs of a trust; the settlor of both the trusts of July 14, 1917, and January 3, 1922, was domiciled in New Jersey; the residence of the trustee at the time of the execution of both of the Trust Agreements was New Jersey; all of the beneficiaries of each of these trusts resided in New Jersey; the trust estates consisted solely of tangible personal property and according to one of the most fundamental rules of property law, *mobilia sequuntur*

personam, its situs followed the domicile of the settlor, its owner, and consequently was in New Jersey. Some of the shares of stock constituting these trusts were shares of a New Jersey Corporation, some were shares of a Delaware Corporation and some shares of a New York Corporation. No one, we think, could reasonably claim that the situs of a share of stock is where the mere certificate might be. The logical situs of these trusts must be at the domicile of the owner—a trust can have but one situs. Furthermore, the primary purpose of the trust was the maintenance and support of the appellees, wife and children of Maurice J. Swetland, whose home was in New Jersey, and consequently the actual administration of the trusts had necessarily to be performed in New Jersey. Also by the provisions of the Trust Agreement of January 3, 1922, the settlor first appointed his son, the appellant, Maurice J. Swetland, a resident of the town of Montclair, New Jersey, and in case of the inability of his son, the appellant, Maurice J. Swetland, to act, Heman J. Redfield, another resident of Montclair, N. J., should assume the duties of Trustee, and if he should fail to act, the Montclair Trust Company, a corporation of the State of New Jersey should act as Trustee.

Appellant has cited *Greenough* v. *Osgood,* (Sup. Ct. Mass. 1920) 126 N. E. 461 in support of his contention that these trusts have no situs in New Jersey. In that case the trust instrument clearly contemplated administration of the trust in Massachusetts, as on certain contingencies distribution was to be made to the persons "as would by the laws of the Commonwealth of Massachusetts have been or be entitled to the same;" the Trustee resided in Massachusetts; the property was located physically in Massachusetts, a large part of it being real estate, and all of it

constituting an inheritance from a Massachusetts estate. Obviously this case but applied the same principles stated in the Restatement of Law by the American Law Institute above referred to.

Appellant has also relied upon the case of *Curtis* v. *Curtis* (Sup. Ct. App. Div. 1918) 173 N. Y. 103 wherein it appeared that the trust instrument was executed and delivered in New Jersey, one of the settlors resided in New York and one in New Jersey, the property was kept in New York, the beneficiary resided in New York and the trust was being administered in the State of New York by trustees domiciled therein. The Court said:

> "There is no question but that if both settlors resided in Plainfield at the time of the execution of the trust it would be governed by the laws of New Jersey. *Cross* v. *United States Trust Co.,* 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606; *Dammert* v. *Osborne,* 140 N. Y. 30; 35 N. E. 407."

Once again it is obvious that this case but applied the same principles stated in the Restatement of Law by the American Law Institute above referred to.

In the case of *Lines* v. *Lines* (Pa. Sup. Ct. 1891), 21 Atl. 809, strongly relied upon by the appellant, it does not appear where the settlor was domiciled. Considering only the facts that do appear, it is but another application of the principles stated in the Restatement of Law above referred to.

In respect to the other cases cited by the appellant on this point, it is enough to point out that many of them directly hold as contended by us that the situs of a trust is the domicile of the settlor. Appellant's counsel admits that this is certainly true as to testamentary trusts and he suggests no valid reason for a different rule in re-

spect to trusts *inter vivos,* and we submit that it is inconceivable that the mere circumstance that the form of an instrument is that of a deed of trust rather than that of a will can constitute any basis for an application of a different rule. He argues that an *inter vivos* trust is similar to an executory contract and the law applicable thereto is applicable to such a trust. But he does not cite a single case where such rules have been applied in determining the situs of a trust.

But as Vice-Chancellor Berry stated:

> "The law of the State in which a contract is executed does not, however, always govern its performance. The law of the place of performance unless otherwise indicated in the contract undoubtedly must determine what constitutes performance and what constitutes a breach of the contract. (Citing cases.) The fact that the trust agreement was executed in New York is not therefore controlling" (Case, pp. 137, 138).

We repeat, that in the instant case the primary purpose of the trust was the maintenance and support of the appellees, wife and children of Maurice J. Swetland, whose home was in New Jersey, and consequently the actual administration of the trust had necessarily to be performed in New Jersey. Also by the provisions of the Trust Agreement of January 3, 1922, the settlor first appointed his son, the appellant, Maurice J. Swetland, a resident of the town of Montclair, New Jersey, and in case of the inability of his son, the appellant, Maurice J. Swetland, to act, Heman J. Redfield, another resident of Montclair, N. J., should assume the duties of Trustee, and if he should fail to act, the Montclair Trust Company, a corporation of the State of New Jersey, should act as Trustee.

Appellant has also pointed out (Appellant's Brief, p. 53) that the appellees have not alleged in their pleadings that these Trust Agreements are to be governed by the laws of the State of New Jersey, or that their situs is in New Jersey. All of the facts upon which the appellees rely to sustain the situs of these trusts in New Jersey are clearly set out and the mere fact that the appellees did not see fit to deny the allegation contained in the purported Special Appearances of the appellant, that the Trust instruments never had their situs in the State of New Jersey, is of no avail. The determination of the situs of these trusts is clearly a question of law and it is a fundamental rule of pleading that no denial of conclusions of law is necessary. Furthermore, the appellant did not see fit to deny any of the allegations contained in the Bill of Complaint or affidavits filed on behalf of the appellees and it is idle for him to speculate as he has done (Appellant's Brief, p. 53) as to what facts might be disclosed, nor has he been deprived of any day in court for he did not demand an opportunity to take any testimony which would in anywise contradict the facts upon which the appellees rely in order to sustain the situs of these trusts as New Jersey.

When tested by the authority relied upon by appellant's counsel as to the situs of the trust, appellant's contention utterly fails. All of the cases which we have cited amply support the domicile of the settlor as controlling in the determination of the situs of an *inter vivos* trust of personal property when, as in the instant case, there are the added facts that the domicile of the trustee and substituted trustees and the domicile of the beneficiaries is in New Jersey and the trust actually to be performed in New Jersey.

We submit that the learned Vice-Chancellor correctly held that the situs of both the trust of

July 14, 1917 and January 3, 1922, has always been and still is in New Jersey.

(B) The *situs* of the Trust Agreement of July 14, 1917, in New Jersey may also be sustained on the ground that it is a testamentary trust incorporated by reference into the last will and testament of Horace M. Swetland, deceased, probated in the Prerogative Court of the State of New Jersey.

The *situs* of the trust of July 14, 1917, may be sustained upon the additional ground that it is a testamentary trust incorporated by reference into the last will and testament of Horace M. Swetland, deceased.

In his last will and testament dated January 12, 1922, the said Horace M. Swetland, deceased, provided as follows:

> "3. Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein created, and upon the death of said Hattie Swetland, if she shall have survived me, to distribute the principal of the trust held for her benefit, by dividing the principal of said trust or trusts, as the case may be, equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, and Dorothy A. Johnson, and my son, Maurice J. Swetland, as Trustee, or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein (therein) provided."

The validity of this bequest to Maurice J. Swetland, as Trustee, under the Trust Agreement of July 14, 1917, was questioned in the proceedings

brought by the executors and trustees of the estate of Horace M. Swetland, and the Court of Chancery and this Court expressly determined that this bequest was valid. It was contended that the Trust Agreement of July 14, 1917, was incorporated by reference into the will. The Court, however, based its decision as to the validity of the bequest upon other grounds. *Swetland* v. *Swetland* (Ct. of Chanc. 1926), 100 N. J. Eq. 196; (Ct. of E. & A. 1927), 6 N. J. Adv. Rep. 360 (not officially reported).

Counsel for appellant now erroneously assumes in his brief that the Court of Chancery and this Court decided in that case that the doctrine of incorporation by reference had no application in New Jersey, and that the validity of the bequest under said last will and testament to the appellant as Trustee under the Trust Agreement of July 14, 1917, cannot be sustained on the ground that it was incorporated into the said will by reference.

Such contention is without any basis whatsoever. Vice Chancellor Berry in his conclusions in this case after referring to his decision and the decisions of this Court in the previous case says:

> "That bequest was held valid, not on the ground of incorporation by reference (that question not being decided either by this court or the Court of Errors and Appeals), but irrespective of that rule, and because by the bequest the testator had merely added other property to a trust fund previously established under a valid, active, subsisting trust, and it was held that the 'trustee-legatee' was a distinct and definite entity" (Case, p. 130).

The instant case, however, necessarily presents the question whether the doctrine of incorporation by reference is applicable in New Jersey. It is admitted by all that if the trust is a testamentary

one its *situs* is in New Jersey. It would seem clear, therefore, that this Court before holding that the *situs* of the Trust of July 14, 1917, is elsewhere than in New Jersey, must definitely hold that the doctrine of incorporation by reference has no application in New Jersey and may, therefore, not be relied upon by these appellees in fixing the *situs* of this trust in New Jersey. We submit that to so hold would be contrary to both sound reason and authority.

The rule in England, in this country generally, and, we submit, in New Jersey has long been established that an extrinsic document, whether testamentary or not, may be incorporated into a will by reference, provided the following conditions are complied with: (a) there must be a testamentary reference in the will to the document sought to be incorporated; (b) the extrinsic document must be so accurately described in the will as to assure its identity; (c) the document must be in actual existence at the time when such reference to it is made in the will. *Jarman on Wills,* Sixth Ed. Vol. I, Chap. 6, Sec. XV, p. 135; *Schouler on Wills,* Fifth Ed., Part III, Chap. 1, Sec. 281, Vol. 1, p. 345; *Theobold on Wills,* Canadian Ed. of 1908, Chap. 9, p. 65; *Allen* vs. *Maddock,* 11 Moore, P. C. 427, 6 Week. Rep. 825; *In re Dickens,* 3 Curt. Eccl. Rep. 60, 1 Notes of Cases, 398, 163 English Reports, Full Reprint, page 654; *Goods of Durham,* 3 Curt. Eccl. 57, 1 Notes of Cases, 365, 163 English Reports Full Reprint, 654; *Molineux* v. *Molineux,* Cro. Jac. 144; *Quihampton* vs. *Going,* 24 Week. Rep. 917; *Newton* v. *Seamen's Friend Society* (Sup. Ct. Mass.) 130 Mass. 91; *Bemis* v. *Fletcher* (Mass. Sup. Ct.) 146 N. E. 277; *Chambers* v. *McDaniel,* 28 No. Car. (6 Ired. L.) 226; *Fickle* v. *Snepp* (Sup. Ct. Ind.) 97 Ind. 289; *Fessler* v. *Simpson* (Sup. Ct. Ind.) 58 Ind. 82; *In re Wiley* (Cal. Sup. Ct.) 56 Pac. 550; *In re Soher*

(Cal. Sup. Ct.) 21 Pac. 8; *Tuttle* v. *Berryman* (Ct. of App. Ky.) 23 S. W. 345; *McCurdy* v. *Neall* (Prerog. Ct. 1896) 42 N. J. Eq. 333; *Condit* v. *De Hart* (Sup. Ct. 1898) 62 N. J. L. 78; *Smith* v. *Runkle* (Prerog. Ct. 1915) 97 Atl. 296, affirmed 86 N. J. Eq. 257; 68 L. R. A. 353.

The leading English case is *Allen* vs. *Maddock,* 11 Moore, P. C. 427, 6 Week. Rep. 825. In that case the testatrix executed a will which was attested by one witness only and therefore invalid. Thereafter she executed a codicil by which she gave certain legacies to different persons, which was duly attested as provided by the statute. The only reference to the former paper or intestate will was in the beginning of the codicil in which she stated: "This is a codicil to my last will and testament." The Court, after reviewing the authorities on the question of incorporation of an extrinsic document in a will, concluded by saying that the only question in this case was whether there was sufficient evidence to identify the paper propounded as a will. It was shown by the testimony that the paper in question was written by the testatrix, was found locked in her possession at her death in a sealed envelope, on which there was an endorsement describing it as her will and that after diligent search no other paper had been found answering the description. The Court held that the will as well as the codicil was properly admitted to probate. The decision in this case was rested squarely upon the doctrine of incorporation by reference.

This doctrine has remained the settled law of England even after the passage in England of the Statute of Frauds (29 Car. II, Chap. 3) in 1677 and the Statute of Wills (1 Vict. 26, Chap. 9) in 1837; *Goods of Durham* (Prerog. Ct. 1842), 3 Curt. Eccl. 57, 1 Notes of Cases, 365, 163 Eng. Rep. Full Reprint, 654; *In re Dickens* (Prerog.

Ct. 1842), 3 Curt. Eccl. Rep. 60, 1 Notes of Cases, 398, 163 Eng. Rep. Full Reprint, page 654. The decision in *In re Dickens* is based upon a state of facts very similar to those in the instant case, and the report thereof is as follows:

> "Thomas Dickens died on the 13th day of February last, having two sons and daughters, he made a will on the 20th of August, 1840, and appointed his eldest son executor thereof. The testator left all of his estate, real and personal, to his eldest son, upon trust for him and the other children, in equal shares, the shares of the three younger children to be held by him, his heirs, executors and administrators, upon the same trust and for the same purposes, etc., as were mentioned in an indenture of settlement, dated the 20th of November, 1830, made between the testator and his son, or upon so many of the said trusts, intents and purposes as were then subsisting, or capable of taking effect. Upon an application of the executor that the deed referred to in the will was in his possession, and that it related, among other things, to freehold and copyhold estates, and that upon sale or mortgage thereof it would be necessary for him to produce the deed, and, therefore, that it was not in his power to leave the same in the registry of the court.
>
> "Haggard prayed probate of the will and settlement, but without leaving the original deed in the registry.
>
> "Sir Herbert Jenner Fust. The paper referred to in the will was in existence at the time, and is sufficiently referred to to incorporate it into the will, and the Court, upon the principle upon which it acted in the case of Lady Durham's Will, will hold this deed to be part of the testator's will.
>
> "The Court is prayed to decree probate without the original settlement, on the ground that it is necessary to be retained in the possession of the trustee to enable him properly to execute his trust; I think, in this case, that

> if a notarial copy be left in registry, and a notarial copy form part of the probate, it will be sufficient.
>
> "Great difficulty may arise in such cases where the original deeds cannot be got at."

The Statute of Wills in this State passed in 1851 (Nix. Digest 917) is admittedly based on these English statutes [*In re McElwaine* (Prerog. Ct. 1867), 18 N. J. E. 499], and by the indisputable rule of statutory construction the Courts of New Jersey should construe our Statute of Wills in the light of the construction placed by the English courts upon the English statute from which ours is taken.

In any event, the cases in New Jersey amply sustain the proposition that the doctrine of incorporation by reference is a valid subsisting doctrine in our law. In the case of *McCurdy* v. *Neall* (Prerog. Ct. 1896) 42 N. J. Eq. 333, the facts were similar to those in the leading English case of *Allen* v. *Maddock,* 11 Moore, P. C. 427, 6 Week. Rep. 825, in that the will which it was sought to probate had been defectively attested. However, there was a subsequent codicil to this will which was executed with all due formality. Chancellor Runyon, sitting as Ordinary, held that the Orphans' Court had correctly admitted both instruments to probate and that the proper execution of the codicil carried with it the right to probate the prior will and further said, "The law upon the subject above considered is in all its phases so well established in this State that there appears to have been no good ground of appeal".

In *Condit* v. *DeHart* (Sup. Ct. 1898) 62 N. J. L. 78, testator by his will devised his residuary estate to his son H. By a codicil he afterwards authorized his son to dispose, by his will, of the residuary estate. And then devised and bequeathed the same to such persons or person as

his son should designate and appoint by his will as those to whom he desired it to go. H. died before the testator, leaving a will in which, after reciting the power of appointment contained in the codicil to his father's will, he designated his wife A. as the person to whom the estate should go.

It was held that while the power of appointment could not be executed by H. during the donor's lifetime, and that therefore his will was not a good execution of it (because he could not by his will make a valid disposition of property which was wholly and absolutely in the ownership and control of another), yet the devise contained in the codicil to the testator's will, to such person or persons as H. should designate in his will, operated to pass the estate and that the will of the latter could be referred to for the purpose of ascertaining the personalty of the testator's devisee.

In the case of *Smith* v. *Runkle* (Prerog. Ct., 1915), 97 Atl. 296 (not officially reported), the Ordinary affirmed the decision of the Essex County Orphans' Court admitting to probate a will and a codicil wherein one of the questions was whether or not the first half-sheet offered for probate was a part of the testator's will. The Court held that this half-sheet, while it may not have been in the will at the time it was executed, was, nevertheless, prepared and annexed to the will prior to the execution of the codicil. Judge Martin, sitting as the Orphans' Court of Essex County, said (97 Atl. 302):

> "In the case at bar, if the preparation and annexation of the first half sheet were not prior to the execution of the will, it is clear that the preparation and annexation were prior to the execution of the codicil, and as the codicil is physically annexed to the will and is described as '1st codicil', which must be to some will, and as that will is the only

one presented, it seems to be a codicil to that will. *Allen* vs. *Maddock,* 11 Moo. P. C. 427''

The Court of Errors and Appeals affirmed the decision of the Ordinary for the reasons given in the opinion of Judge Martin filed in the Orphans' Court of Essex County, 86 N. J. Eq. 257.

It is true that there are reported decisions in this state in which the doctrine of incorporation by reference is urged upon the Court and in which the Court refused to allow the non-testamentary paper to be incorporated into the will. However, we submit that in none of these cases were all the requirements as are heretofore outlined complied with in connection with the non-testamentary documents.

In *Smith* v. *Smith* (Chanc., 1895), 54 N. J. Eq. 1, affirmed 55 N. J. Eq. 821, it was merely held that oral communications of a plan for the conduct of a charity to the trustees named in the will could not be incorporated into the will in order to sustain a bequest to the trustees.

In *Hartwell* v. *Martin* (Chanc., 1906), 71 N. J. Eq. 157, the will contained a direction to pay all of the debts outstanding in 1872, the time the testator had made an assignment for the benefit of creditors, and to ascertain who were his creditors he referred his executors to ''a list of all debts that I wish paid'', to be found enclosed with his will. The list of creditors found with his will did not correspond with a duplicate of the list held by the executor in that the testator had reduced the amount due to the various creditors to the extent of payments made by the testator to various creditors after the execution of his will. Consequently, it could not be said that the list was in actual existence at the time when the reference was made to it in the will, and Vice-Chancellor

Bergen properly held that the bequest to the creditors of the testator was void.

In *Magnus* v. *Magnus* (Chanc., 1912), 80 N. J. Eq. 346, the testatrix bequeathed the residue of her personal estate in the following language: "I give the same to my niece, Clara Seidensticker, to dispose of in accordance with my instructions to her." A letter was subsequently found dated anterior to the execution of the will and addressed to the legatee in question. Vice-Chancellor Stevens recognized the doctrine of incorporation by reference, but held:

> "It would seem, therefore, that the reference in the will under consideration is insufficient, first because it fails to sufficiently identify the writing to be incorporated and second, because by 'instructions' the testatrix does not limit herself either to written instructions or instructions then given. The language used is broad enough to include future instructions * * *."

We are thus brought to a consideration of the case of *Murray* v. *Lewis* (Chanc., 1923), 94 N. J. Eq. 681, by which it has been sought to establish that the doctrine of incorporation by reference is not accepted in New Jersey. In that case, the testator made the following bequest:

> "Second: To my executrix and executors who shall qualify the sum of $5,000.00.
>
> This legacy is not to be in lieu of any commissions they may be entitled to. A sealed letter or paper addressed to my executors will be found with this my will, expressing my wishes as to the said sum, *but such letter or paper shall not form part of my will.*" (Italics ours.)

After the testator's death, an envelope was found together with the will containing a sealed letter bearing the same date as that of the execu-

tion of the will, which letter contained directions to the executors as to the dispositon of this bequest. Vice-Chancellor Fielder refused to allow this letter to be incorporated into the will by reference and held the bequest to the executors invalid. The learned Vice-Chancellor recognized the rule prevailing in England, as stated in the leading case of *Allen* v. *Maddock,* 11 Moore, P. C. 427, 6 Week. Rep. 825, but stated that he did not find that the doctrine had been accepted in this State. The only New Jersey cases cited were *Hartnell* vs. *Martin,* 71 N. J. Eq. 157, and *Magnus* vs. *Magnus,* 80 N. J. Eq. 346, neither of which, as we have already shown, deny the existence of the doctrine in New Jersey. The attention of the Court apparently was not directed to the cases of *McCurdy* v. *Neall,* 42 N. J. Eq. 333; *Condit* vs. *Reynolds,* 66 N. J. L. 242, or *Smith* v. *Runkle,* 97 Atl. 296, affirmed 86 N. J. Eq. 257, which we have already shown to be holdings which are based on the existence of this doctrine. Furthermore, the denial of the existence of the doctrine was not at all necessary to support the correctness of Vice-Chancellor Fielder's decision, as in that case (*Murray* v. *Lewis,* 94 N. J. Eq. 681), the testator specifically provided in his will, *"such letter or paper shall not form part of my will".*

We submit, therefore, that this court should declare the doctrine of incorporation by reference, supported as it is by reason and sound authority, to be the established law of New Jersey, and apply it to the facts in the instant case.

Under the facts of the instant case, there can obviously be no question but that the requirements heretofore mentioned are fully complied with by the reference in paragraph 3 of the testator's will to the Trust Agreement of July 14, 1917, for the necessary testamentary reference is there made. The Trust Agreement of July 14, 1917 was

executed in writing on the day it bears date and is accurately described in the will. The will was executed on January 12, 1922.

II.

Irrespective of the *situs* of the trusts of July 14, 1917 and January 3, 1922 the New Jersey Court of Chancery has jurisdiction to require the appellant as trustee to account and to render a decree against him individually to the full extent of his liability as trustee, which decree may be satisfied from any of his individual property in the State of New Jersey sequestered prior to the entry of the final decree.

This suit being one by *cestuis que trust* against their trustee for an accounting of his trust, there can be no doubt that this Honorable Court has jurisdiction over the general subject matter of the suit.

> "The protection of *cestui que trust* against fraud of trustee is an object of peculiar solicitude in the courts of equity." *26 Ruling Case Law 1170.*
>
> "Trustees may at all reasonable times be called to account in a court of equity." *Perry on Trusts,* 5th Ed. Vol. 2, p. 531.

The appellant has admitted in these proceedings and still admits (Appellant's Brief, p. 32) that a trustee may be compelled to account in the jurisdiction in which he may be found. This admission is in accord with the well established law that a trustee physically present and before a court in a jurisdiction in which his trust has no *situs* may be required to account to such court for his administration of his trust.

"The court of equity having jurisdiction over the person of the trustee may administer the trust as an entirety regardless of where the property is situate and although the beneficiaries all reside in another state." *22 Enc. of Plead. & Prac., p. 20.*

In the case of *Reading* v. *Haggin* (Sup. Ct. Gen. Term, 1890), 12 N. Y. Supp. 368, there was an action for an accounting in which the defendant trustee was properly before the court but demurred to the jurisdiction upon the ground that the trust property was located in the State of California. It did not appear in what jurisdiction the agreement out of which the trust arose had been executed. The court said:

"Upon this subject, it has been said that, wherever the account stands upon equitable claims, or has equitable trusts attached to it, the jurisdiction is absolutely universal, and that cases of accounts between trustees and *cestui que trustent* may properly be deemed confidential agencies, and are peculiarly within the appropriate jurisdiction of courts of equity. 1 Story, Eq. Jur. (5th Ed.) Sec. 454, 465. The beneficiary is entitled to an account of the acts and management of the trustee, or *quasi* trustee, and, if it cannot be voluntarily obtained, then to the aid of a court of equity to secure it."

* * * * * *

"In support of the demurrer, it has been further objected that the complaint states no cause of action within the jurisdiction of this court, for the lands are now situated in the State of California and their management was confined to that state; but the action does not so much relate to the lands as to the conduct of the defendant in their management and disposition, and the uses made by him of their proceeds, and over that, as the defendant has been found within this state, this court has jurisdiction. This general subject was at an early day considered in the case of *Massie* v. *Watts,* 6 Cranch. 148, where after

> the examination of the authorities, it was concluded that 'upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.''

The soundness of such a rule cannot be questioned as to hold otherwise would mean that whenever a trustee had dissipated his trust in the state of its creation and where the trust property was administered, all that he need do in order to escape penalty for his misdeeds would be to transfer his residence and private property to a neighboring jurisdiction and continue unmolested.

But since the passage of our Sequestration Act (P. L. 1919, p. 444), both upon the basis of reason and authority, it does not make one iota of difference in the instant case whether the appellant, Maurice J. Swetland is personally served within the State of New Jersey, or whether there be any property constituting any part of the corpus of the trusts of July 14, 1917, or of January 3, 1922, located within the State.

It is an indisputable fact that the appellant, Maurice J. Swetland, has misappropriated substantially all of the income and corpus of the trust of January 3, 1922, and all of the property that has come to him as trustee under the trust of July 14, 1917, and that he is again seeking from the Prerogative Court a further distribution from the Estate of Horace M. Swetland to himself, as trustee under the trust of July 14, 1917, for similar misappropriation.

Furthermore, it is indisputable that the appellant, Maurice J. Swetland, has *individual* property within the State of New Jersey. The will of

his father, as construed by the Court of Chancery and affirmed by this Court, did not dispose of all of his Estate, and, consequently, the testator died intestate in respect to the undisposed portion. Upon the death of the widow and sister of the testator, this portion will become immediately distributable, and the appellant, individually, will receive one-quarter thereof. To this extent he has a present vested interest in his father's estate. Commissions have been allowed to the executors under the will, to which the appellant, Maurice J. Swetland, is entitled to a portion. Both of these individual interests of the appellant are not only located in the State of New Jersey but constitute part of the corpus of his father's estate actually in the course of administration in our Prerogative Court.

Both of these vested individual interests of the appellant in the estate of his father have been seized under the Sequestration Act (P. L. 1919, p. 444). Having seized these vested interests in property, the *situs* of which is without doubt in the State of New Jersey, the Court of Chancery has full and complete jurisdiction to inquire into any equitable claim which the appellees may have against the appellant, to the extent of the full value of such property, sequestered prior to the entry of the final decree and to appropriate such property to the satisfaction of appellee's claim to the full extent of his liability as trustee under each of the trusts of July 14, 1917 and January 3, 1922.

The pertinent provisions of the Sequestration Act (P. L. 1919, p. 444) are as follows:

> "1. In any proceeding commenced in the Court of Chancery in which a money decree is prayed against a defendant, and it shall be made to appear, by affidavit, that the defendant is a non-resident, and has property,

real or personal, moneys, effects, rights or credits within this State, the court may upon the filing of the bill or petition or at any time thereafter, issue its writ or writs of sequestration directed to the sheriff of any county in which the said property may be situate, or to any master of the court, commanding said sheriff or sheriffs or master to take into his or their possession said property, and hold the same subject to the orders and decrees of the court.

"2. Said writ may issue in a case in which the amount demanded is uncertain, as well as in cases where the amount demanded is certain. If certain, the writ shall command the officer to sequester the property, to answer the demand of the complainant or petitioner, for the amount demanded. If uncertain, to answer the demand of the complainant or petitioner according to the prayer of the bill or petition reciting sufficient of such prayer as to indicate the nature of the relief prayed for, in any case the court may, by order, direct what property and of what amount in value shall be taken, and may, at any time in the course of the proceedings issue alias writs for the purpose of taking additional property, and may release property from the operation of the writ or writs. No error in stating the amount demanded shall invalidate the writ of proceedings thereunder, but the writ and proceedings shall remain effective to secure the amount finally found due from defendant to complainant or petitioner."

Section 15 further provides:

"This act is remedial and is to be liberally construed."

As we have already shown, the proper rule is that the Court of Chancery can require the appellant to account and render a decree against him, individually, for such sums as the Court may find he has misappropriated, irrespective of the

question of *situs,* were he personally before the Court. The State of New Jersey by the Sequestration Act, as it indisputably had the power to do, has but authorized the seizure of the individual property of the appellant within the State prior to the time of the entry of the final decree, in lieu of personal service. *Pennoyer* v. *Neff* (1877), 95 U. S. 714.

In the Act itself there is no limitation put upon the type of action in equity upon which a writ of sequestration may properly issue other than it be one in which a money decree is sought.

In the case of *Frank* v. *H. K. Salsburg Co. Inc.* (Ct. of Ch. N. J. 1928), 140 Atl. 241 (not officially reported), a bill of complaint was filed by a non-resident of New Jersey seeking to satisfy a claim against the defendant, who was also a non-resident of New Jersey, which had arisen out of a contract entered into in the State of New York relating to property located in the State of Rhode Island. The case came up on the defendant's motion to dismiss a writ of sequestration and the bill of complaint. It was urged by the defendant that the bill of complaint should be dismissed because it did not set forth the residence of the complainant. In refusing to quash the writ of sequestration or to dismiss the bill of complaint Vice Chancellor Fallon said:

> "No distinction can be made in the construction of P. L. 1919, p. 444, between a claim that arose within the state and one that arose out of the state; nor is the fact that the property to which the agreement upon which the claim is based relates is located in the state of Rhode Island of any consequence in this case. The act authorizes the issue of the writ of sequestration, and the seizure of property thereunder, without limitation or qualification, in any proceeding commenced in this court wherein a money decree is prayed

> against a defendant, when it appears, by affidavit, that the defendant is a non-resident and has property, real or personal, moneys, effects, rights or credits, within this state. In this respect it is analogous to the procedure under the Attachment Act (Comp. St. 1910, p. 132 *et seq.*, and 1 Comp. St. Supp. 1924, p. 100 *et seq.*). *Goldmark* v. *Magnolia Metal Co.*, 65 N. J. Law 341, 346, 47 Atl. 720; *Bird* v. *Moth K-L Co.*, 1 Misc. Rep. 251, 140 A. 13."

In the instant case, as we have already pointed out, this being an action for an accounting, the Court of Chancery has jurisdiction over the subject matter and the only possible jurisdictional point which can be successfully raised, if the Court should hold the *situs* of the trusts to be other than New Jersey, is failure to obtain jurisdiction over the person of the appellant by service of process within the State. It is precisely such a situation which it was the purpose of the Sequestration Act to relieve by permitting seizure of an absent defendant's property situate within the State prior to the entry of the final decree and thereby converting an equitable action, wherein a money decree is sought against an absent defendant, into one *quasi in rem.*

It is clear that this statute fully meets the requirements of "due process" as laid down both by our courts and the Supreme Court of the United States.

In the leading case of *Pennoyer* v. *Neff* (1877), 95 U. S. 714, Mr. Justice Field said:

> "Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon

the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem.* * * *

"It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein. Such are cases commenced *by attachment against the property of debtors,* or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned." (Italics ours.)

In *Amparo Mining Co.* v. *Fidelity Trust Co.* (Chanc.—1908), 74 N. J. Eq. 197, affirmed 75 N. J. Eq. 555, Vice-Chancellor Stevens said:

"The origin of the jurisdiction of our courts in actions *quasi in rem* is to be found in the power of the sovereign state to exercise control over all objects to which that power can be directly applied. *The state must control all property within its territorial limits.* Parties interested in that property and residing within the state, *or voluntarily coming into the state in order to have their*

> *rights in respect of the property in question enforced or protected, have a right to be heard in the courts of the state,* and the utmost that can be demanded on the part of non-resident defendants is that they shall be fairly notified of the action so as to have an ample opportunity to appear and be heard therein. When these conditions exist the rights of all parties interested in the *res* are determined by due process of law." (Italics ours.)

And in discussing the elements of an action *quasi in rem* the Vice-Chancellor further said:

> "The authorities which control this court indicate, I think, the following as the essential elements of an action *quasi in rem.*
>
> "1. A *res* located within the territorial limits of the state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it.
>
> "2. A course of judicial procedure the object and result of which are to subject the *res* to the power of the state, directly by the judgment or decree which is entered as distinguished from the course of procedure which only affects or disposes of the *res* by compelling a party to the action to control or dispose of the *res* in accordance with the mandate of the judgment or decree.
>
> "3. A course of judicial procedure on its face directed specifically toward the *res* so as to disclose this *res* to the defendant when reasonably notified of the action."

In *Wilson* v. *American Palace Car Co.* (Ct. of E. & A., 1903), 65 N. J. Eq. 730, 734, Mr. Justice Dixon said:

> "No doubt, when the object of a suit is to enforce a specific lien upon property of the defendant within the state, *or when the court obtains control over such property,* or when the status of a citizen of the state is the subject for adjudication, a state court may be

> authorized, after reasonable effort to notify the absent defendant, to enforce the claim of the plaintiff respecting such property or status. In such cases the court acquires a jurisdiction *quasi in rem* sufficient to support the limited judgment; but the jurisdiction must precede the adjudication; the judgment cannot be made valid by the fact that steps might be taken to enforce it."

This was followed in the case of *Sohege* v. *Singer Mfg. Co.* (Chanc., 1907), 73 N. J. Eq. 567.

The *res* in the instant case is the individual interest which the appellant has in the estate of his father, which is being administered in this state, and in the commissions allowed to appellant as executor and trustee by the Prerogative Court in the course of the administration of said estate. This *res,* as required by the rule laid down in *Pennoyer* v. *Neff, supra,* and as expressly authorized by our Sequestration Act, has been duly seized and is before the Court in the pending suit and the appellant duly notified of its seizure, and of the objects of the suit by which such property will be affected.

Appellant's counsel has completely confused the issue on this point of his argument. Numerous authorities are cited to show that in the absence of a sequestration statute a court cannot acquire jurisdiction except when the suit directly involves the *res* or the defendant has been served within the jurisdiction. This is obviously sound law, but, quite as obviously, wholly beside the point in the instant case. This action is one *quasi in rem,* wherein an action otherwise *in personam* and requiring personal service is, by the statute, allowed to proceed by substituting property of the defendant for service upon him. Not one of the cases cited by the appellant involves the question of

jurisdiction based on a sequestration statute. Not one of the cases cited by the appellant supports his contention that the property seized under such a statute must bear some relation to the subject matter of the suit.

The real burden of appellant's argument rests upon mere matters of form rather than substantive law. He attempts to show that there is some peculiar personal control which a court must be in a position to exercise over a trustee before it may entertain a suit for an accounting. Even if this suit merely involved a formal act of accounting, appellant's argument would not be sound and would fail by virtue of his own admissions. Appellant has admitted that if personal service is effected upon a trustee a court may compel him to account. But suppose a defendant after being served left the state and would not appear before a Master to account or return to be imprisoned for contempt, would the Court be powerless to proceed because an accounting involves a personal act or the suit involved only a formal act of accounting? And also suppose the *situs* of these trusts were here, which appellant admits is sufficient to give our courts jurisdiction in an accounting action but the non-resident trustee refused to come in to account, are the courts powerless because accounting involves a personal act? These questions answer themselves.

Furthermore, there is more involved in the instant suit than the mere matter of account. The allegations of the bill in the present case, as previously stated, show in respect to the trust of July 14, 1917, the appellant has misappropriated all of the trust estate he has received, has nothing left and is at the bar of the Prerogative Court asking that more be paid to him for similar misappropriation. In respect to the trust of January 3, 1922, all that he has left is the fleeting

glimpse of what once constituted trust property as it is passing into the hands of third parties under foreclosure of mortgages and other liens placed upon it in breach of his trust obligation. The present case is one where each of the trust estates has been entirely dissipated, and in the last analysis there is no question of accounting or administration involved, but merely the determination of the personal liability of the appellant to the trust estates. As already stated, it makes no difference whether the appellant shall appear or not—his property having been seized and he having been given the opportunity to appear, and, failing to do so, he has no valid ground for objection as to the method of procedure by which the Court may fix his liability. Certainly such method of procedure as the Court may adopt to inquire into and fix the appellant's liability cannot affect the fundamental jurisdiction of the Court to satisfy the liability so fixed out of the appellant's property which is before the Court, which is the only really pertinent point.

However, appellant's counsel contends that there is no liability running from the appellant to the appellees; that in no event are the appellees entitled to a money decree against him. Apparently this is the theory upon which the appellant has been relying while engaged in the dissipation of all of the trust property that has heretofore come to him as Trustee, and if this is his conception of his obligation, appellees will have the right to anxiously anticipate what would happen to any other moneys that should be paid to him by the Prerogative Court. It is, we submit, a most curious argument for a Trustee to present to a Court of Equity and good conscience.

The appellees are the sole beneficiaries immediately entitled to the income of the trust estates,

and if the appellant is not responsible to them, to whom is he responsible?

The appellees are also those mainly interested in the distribution of the corpus of each of the trusts upon the termination thereof. In his argument that the appellant is under no liability to the appellees, the appellant's counsel again relies on form and not substance. By none of the provisions of either of the trusts is there the slightest discretion vested in the appellant to withhold one penny of income from the appellees. But we should not be side-tracked to the discussion of mere income. This case is for the recovery of corpus that has been dissipated. The liability of the appellant is a personal money liability running to the trust estates. The appellee's right, like a stockholder's right to bring suit when funds of the corporation have been dissipated, is a derivative one. It does not seem that anyone could seriously claim that a life tenant of a trust has no right to call the Trustee to account for misappropriation of the corpus. To be sure, the sum recovered would not be payable to the life tenant personally but to the trust estate for the benefit of both the life tenant and remaindermen. Surely no one could seriously contend that the decree in such case would not be a money decree, and surely no one could seriously contend that such a suit would not be a "proceeding commenced in the Court of Chancery in which a money decree is prayed against a defendant" (Sequestration Act, P. L. 1919, p. 444).

Appellant's counsel apparently places much reliance upon the special prayers contained in the bill of complaint, again basing his argument on form rather than substance. It is a sufficient answer to call attention to Chancery Rule No. 60, which provides "Relief other than that prayed for may be given (without a prayer for general

relief) to the same extent as if general or other relief had been prayed for".

As already pointed out, whatever the form of relief or whatever the method of procedure that may be followed, the essence of this case is the satisfaction out of property that has been seized by the Court of the individual liability of the defendant to the trust estates for his misappropriation of both income and corpus. Having first seized property in this State belonging to him, the jurisdiction of the Court to proceed to investigate and determine his liability and cause the same to be satisfied out of the property seized, rests upon the bedrock of both fundamental principle and indisputable authority, and this is true no matter where the *situs* of the trusts might be held to be.

III.

The jurisdiction of the Court of Chancery with respect to the Trust of July 14, 1917, may be sustained upon the additional ground that the remaining property constituting the Corpus of this trust is now under the control of the Courts of this State.

With respect to the trust of July 14, 1917, other than the property already misappropriated, the only property in this trust is to be paid over from the estate of Horace M. Swetland, deceased, which estate is being administered in the Prerogative Court of New Jersey. The Trustee has misappropriated all of the funds of this trust which he has received to date, has deserted his wife and children, the beneficiaries of this trust, and has substantially misappropriated both the corpus and income of the trust of January 3, 1922, created for substantially the same purposes as the

trust of July 14, 1917. Under these circumstances it is inconceivable that the Court of Chancery does not have or will not exercise its power to order the Trustees under the last will and testament of Horace M. Swetland, deceased, who are properly before it, to make no further payments from said estate to the said Maurice J. Swetland, as Trustee of the trust of July 14, 1917, and to take all such steps necessary to insure the application of the moneys of such trust estate for the benefit of the Appellees, the beneficiaries of said trust of July 14, 1917.

The reported cases fully support the exercise of such a power and even suggest that should the executors and trustees of the estate of Horace M. Swetland, deceased, continue to make payments to Maurice J. Swetland, as trustee of the trust of July 14, 1917 with the knowledge that he has misapplied previous payments and intends to continue so to do, they would be liable to the beneficiaries of such trust.

In *Conover* v. *Fischer* (Ct. of Ch. N. J. 1897), 36 Atl. 948 (not officially reported). A bill was filed on behalf of testator's granddaughter against the wife of the testator as sub-trustee under a will wherein provision had been made for the payment of income by the sub-trustee for the maintenance, support and education of the complainant. Complainant sought to compel the defendant as subtrustee to pay her or her general guardian the portion of the income to which she was entitled under the will. The defendant, testator's wife, as sub-trustee had not repudiated the trust but had offered to perform it in her own manner and the real question in the case was as to the character of the trust and what would be a sufficient performance of it by the sub-trustee.

Vice Chancellor Emery at p. 950 said:

> "I agree with complainant's counsel that the language 'from said interest and income I direct and authorize my wife to maintain, support, and educate my granddaughter' creates a trust in complainant's favor, and makes the testator's wife a sub-trustee for complainant *and I also think that if the testator's wife, after receiving the income from the executor, repudiates the trust, or refuses proper support or maintenance, a court of equity can afford relief, both against her and the executor who paid over the funds to the widow, knowing that she intended to repudiate the trust.* So far complainant's claim seems to be settled by the cases cited by her counsel; *Eberhardt* v. *Perolin,* 48 N. J. Eq. 592, 23 Atl. 501; cases cited page 596, 48 N. J. Eq. and page 503, 23 Atl.; *Collister* v. *Fassitt* (Sup. 1896) 39 N. Y. Supp. 800; and also by the authorities I find on my own investigation; 1 Jarm. Wills (Rand & T Ed.) pp. 696, 701; 2 Perry Trusts (3rd Ed.) § 620 etc.; *McKnights Ex'rs* v. *Walsh* 24 N. J. Eq. 498, cases cited page 504; *Leach* v. *Leach,* 13 Sim. 304; *Chase* v. *Chase,* 2 Allen 101." (italics ours.)

The case last cited in the foregoing opinion of Vice Chancellor Emery, *Chase* v. *Chase* (Sup. Ct. Mass. 1861), 2 Allen 101, is very pertinent as its facts are very similar to the instant case. In this case a bill in equity was filed in Massachusetts by a wife and her children, all of whom resided in Pennsylvania, against her husband who was likewise a resident of Pennsylvania and who was also sub-trustee under a testamentary trust created by his father for their benefit. The executor of and principal trustee under the will of her husband's father was also made a defendant. The will had been probated in Massachusetts and the executor of and the principal trustee under

the will was a resident of that state. The non-resident sub-trustee demurred to the bill claiming that the Court had no jurisdiction of his person or of any controversy between him and the complainants, all being residents of the State of Pennsylvania.

Bigelow, C. J., said at page 104:

> "The objection to the jurisdiction of the court cannot prevail. The residence of the trustee and *cestuis que trust* out of the Commonwealth does not take away the power of this court to regulate and control the proper administration of trust estates which are created by wills made by citizens of this state, and which have been proved and established in the courts of this commonwealth. The legal existence of the trust takes effect and validity from the proof of the will, and the right of the trustee to receive the trust fund is derived from the decree of the probate court. If the trustee is unfaithful or abuses his trust, that court has jurisdiction to remove him, in concurrence with this court, on the application of those beneficially interested in the estate. Gen. St. c. 100 §8. *In the case at bar, the jurisdiction of this court is clear on another ground. The trustee who by the terms of the will holds the principal in trust, out of which the income is to be raised and paid over to the son Philip for the support of himself and family, is a resident in this Commonwealth. Upon satisfactory proof that the income is misapplied by the sub-trustee, to whom by the will he is directed to pay it, the court can enjoin the trustee, who is within the jurisdiction, from making further payments, and pass such decree in relation to the future disposition of the income as the rights of the cestuis que trust may in equity require*" (Italics ours).

The *Chase* case (*supra*) is squarely in point in the instant case. The only possible distinction is that in the Chase case the sub-trust had been

created in the will of the settlor, while in the instant case appellant urges that this Court has already held the trust of July 14, 1917 to be separate and apart from the will of the settlor. This we deny (Point 1-B).

But even if the trust of July 14, 1917, be not a testamentary trust but only a trust separate and apart from the will of the settlor, this is a mere difference in form and not a valid basis for distinguishing the case, for Chief Justice Bigelow in the Chase case supported the Court's jurisdiction as well on the theory that it had control of the executor under the will and of the fund out of which the moneys were to be paid to the defaulting sub-trustee; a situation identical with the instant case.

Appellant's counsel argues that the interest of the trust of July 14, 1917 in the estate of Horace M. Swetland, deceased, which property is admittedly under the supervision and control of the Prerogative Court of this State, is not trust property or a part of the trust of July 14, 1917 until it is actually turned over to the trustee of this trust at which time it immediately becomes a part of a trust, whose *situs* is foreign to New Jersey, and that with the knowledge of all past defalcations upon the part of this trustee there is nothing that our Courts may do, other than to turn over additional properties to this trustee and compel the beneficiaries of this trust to seek their relief against the trustee in whatever jurisdiction they may subsequently have the good fortune to catch him.

In support of this unconscionable argument appellant's counsel relies upon a class of cases which hold that where an administrator or executor has been appointed by the Courts of one State or Country he will not be called to account in any other State or Country for his dealings with the

estate. An examination of such cases shows that they are based upon the following reasons. The next-of-kin must be determined by the laws of the State in which decedent is domiciled at the time of his death. The debts must be proved in that State and paid according to the order of priority in that State. The administrator or executor receives his appointment by authority of the law from the Courts of the State appointing him and consequently the rights of such administrator or executor originally were held to be strictly territorial and were not at the time of the adoption of the rule recognized in any other jurisdiction. If any property of the estate was located in any such other jurisdiction it was universally held that an ancillary administration was necessary. He was accountable to the Court appointing him and to no other. He had no authority outside of that jurisdiction.

Today a foreign executor is, under certain statutory restrictions, permitted to sue in this State without taking out ancillary letters of administration, and on the ground of comity the foregoing rule has been relaxed in other respects. At no time, however, has the rule been held to be as absolute as the appellant's counsel would lead the Court to believe. Any time an administrator takes to a foreign State any portion of the estate or property, of course, that State has the jurisdiction, the power and the well recognized duty to give relief.

The law governing such cases is tersely stated by Chancellor Magie in *Holzer* v. *Thomas* (Chanc. 1905) 69 N. J. Eq. 515 at page 519:

> "The demurrer of this defendant further questions complainant's right to require an accounting of the estate of her father, Henry B. Gates, on the ground that he died domiciled in a foreign state, and that this property is to be accounted for by his executrix in the

courts of that state. Such, in general is undoubtedly the law. *Cocks* v. *Varney,* 42 N. J. Eq. (15 Stew.) 514.

"But this relief cannot be invoked if a foreign executrix or trustee has brought into this state portions or the whole of the assets which should be accounted for in the foreign state, and has invested them in property in this state and within the jurisdiction of this court. In such case, this court may require an accounting of the assets for the purpose of reaching the relief sought, and may follow the assets and decree their disposition. *Brownlee* v. *Lockwood,* 20 N. J. Eq. (5 C. E. Gr.) 239; *Allen* v. *Arkenburgh,* 57 N. J. Eq. (12 Dick.) 440."

And see also *Farmers Loan & Trust Co.* v. *Ferris,* 73 N. Y. S. 475, cited and relied upon in appellant's brief.

If this Court should hold that the trust of July 14, 1917, may be incorporated by reference into the last will and testament of Horace M. Swetland, deceased, then the cases cited by appellant's counsel are applicable and would wholly support the appellee's contention that this defaulting trustee may be held to account for his misappropriations by the Courts of this State.

On the other hand even though the trust of July 14, 1917, be considered a separate and distinct entity and not incorporated in the last will and testament of Horace M. Swetland, deceased, the Courts of this state having all of the remaining trust property within their actual control and administration may, under the authority of *Chase* v. *Chase* (Sup. Ct. Mass. 1861) 2 Allen 101, enjoin the executors and trustees of the estate of Horace M. Swetland, deceased, from making any further payments to appellant as such trustee. As incidental to their power to pass such decree in relation to the future disposition of this trust prop-

erty as the rights of the *cestui que* trust in equity may require, the Courts of this state have the jurisdiction and authority to appoint a new trustee for the trust of July 14, 1917, to whom these New Jersey assets may then be safely delivered.

IV.

The learned Vice Chancellor correctly decided that the purported special appearances filed without leave of Court on behalf of the appellant, Maurice J. Swetland are in legal effect general appearances and subject him to the jurisdiction of the Court of Chancery.

As has already been noted, there were filed in this cause on June 4, 1929, without leave of Court, purported special appearances on behalf of the appellant, Maurice J. Swetland, individually, and as Trustee under the Trust Agreements of July 14, 1917, and January 3, 1922. The objections to the jurisdiction of the Court of Chancery raised in these appearances are twofold; on the one hand it is claimed that the Court of Chancery has no jurisdiction over the person of the appellant, as he is a non-resident and has not been served personally within the jurisdiction with a copy of the order to show cause issued in this suit; and on the other hand the jurisdiction of the Court over the subject matter of the suit is questioned on the theory that the appellant, Maurice J. Swetland, as Trustee, cannot under any circumstances be compelled to answer an accounting action brought in the Courts of this State. The writ of sequestration issued upon the filing of the bill of complaint was returned June 17, 1929. The proofs of publication and mailing were filed July 12, 1929, by which publication the appellant was required to answer on or before August 5, 1929.

The hearing on the rule to show cause, at which appellant appeared and in which he participated by counsel, was had on September 10, 1929.

As was said in the case of *Drummond* v. *Drummond,* Law Rep. 2 Ch. App. 32, 35, "much confusion has arisen by treating want of power to enforce jurisdiction as tantamount to want of jurisdiction," or, stated in another way, much confusion has arisen through failure to distinguish the two principal meanings of the word "jurisdiction", namely, power to deal with the person of the defendant and power to deal with the subject matter of the suit. It is clear, however, in the instant case that the purpose of these purported special appearances was to raise objection to the jurisdiction in both senses of the word.

First, as to the effect of these purported special appearances as objections to the jurisdiction of the Court of Chancery over the person of the appellant, Maurice J. Swetland, because of improper service of process. This objection under the old practice seems to have been permitted to be made by a plea to the jurisdiction or by motion or petition to set aside service of process. *Hervey* v. *Hervey* (Ct. of Ch. 1897), 56 N. J. Eq. 166, reversed on other grounds 56 N. J. Eq. 424; *Wilson* v. *American Palace Car Co.* (Ct. of E. & A. 1903), 65 N. J. Eq. 730; *Groel* v. *United Electric Co. of N. J.* (Ct. of Ch. 1904), 68 N. J. Eq. 249 (Emery, V. C.); *Groel* v. *United Electric Co. of N. J.* (Ct. of Ch. 1905), 69 N. J. Eq. 397; *Puster* v. *Parker Mercantile Co.* (Ct. of E. & A. 1906), 70 N. J. Eq. 771.

By the Chancery Act of 1915 pleas were abolished. But the proper practice has always been that it should be done after leave of Court first had and obtained upon a motion to quash the service of process, and it has always been the settled practice not to grant such leave unless the de-

fendant has agreed, should the motion be decided against him, to file answer in the cause. *Ewald* v. *Ortynsky* (Ct. of Ch. 1910), 77 N. J. Eq. 76; affirmed 78 N. J. Eq. 527; *Romaine* v. *Union Ins. Co.* (C. C. Tenn. 1886), 28 Fed. 625.

In the case of *Hervey* v. *Hervey* (Ct. of Ch. 1897), 56 N. J. Eq. 167, 182, Vice Chancellor Emery said:

> "The leave to enter a special appearance was granted in this case without terms, but as a matter of practice it should be stated that the more correct practice seems to be to require, as a condition of granting such leave, that there be inserted in the order an undertaking or stipulation that the defendant would submit without further process to the orders of the court, if the point should be decided against him. *Romaine* v. *Insurance Company*, 28 Fed. Rep. 625 (Hammond, District Judge, 1886). The plain reason is that the special leave without such condition places the defendant in the position of drawing the opinion of the court without any risk, for if the court has no jurisdiction by reason of failure to serve process, its decision that it has such jurisdiction does not settle this question so that it may not be questioned after judgment and in any court. Unless, therefore, the defendant agrees to come in if the decision on the point of jurisdiction is against him, he should as a general rule be left to question the jurisdiction of the court in a form where all parties will be bound."

In the case of *Groel* v. *United Electric Co. of New Jersey* (Ct. of Ch. 1904), 68 N. J. Eq. 249, Vice Chancellor Emery held that a special appearance entered for the sole purpose of objecting to the jurisdiction of the Court because of improper service of process, will not be stricken out because filed without any special leave or order of the Court. He said, however:

> "* * * If the limitation of the purposes of an appearance is not authorized, except by special order of the court, then the real question arising on such entry relates to the effect of the appearance as entered, with this attempted limitation of its purpose by the solicitor without authority. This question may arise if the plea to the jurisdiction be overruled and further proceedings in the cause be taken by complainant. As the case stands at present, it must be disposed of on a plea to which the appearance as limited or attempted to be limited certainly extends, and the motion must be denied."

In the case of *Allman* v. *United Brotherhood of Carpenters etc.* (Ct. of Ch., 1911), 79 N. J. Eq. 150; affirmed on opinion below, 79 N. J. Eq. 641, which arose on a motion to dissolve a preliminary injunction, Chancellor Walker, then Vice Chancellor, said:

> "To make this motion the defendant not being in court by plea, answer or demurrer, would have to appear formally for the purpose. *Groel* v. *United Electric Company,* 68 N. J. Eq. 249, 251. And if the defendant desires to appear specially for the purpose of making the motion to dissolve only and not to have his appearance operate to clothe the court with jurisdiction over him generally in the suit, he must doubtless obtain leave of the court to enter such an appearance. Dan. Ch. Pr. & Pl. (6th Am. Ed.) 453".

In *Meller* v. *Kaighan* (Ct. of E. & A., 1916), 89 N. J. L. 543, Chancellor Walker said:

> "It appears that leave of court must be obtained to enter a special appearance."

In *Romaine* v. *Union Insurance Co.* (C. C. Tenn., 1886), 28 Fed. 625, Judge Hammond said:

> "The objection that the defendants to a bill in equity have not been effectively served with process to bring them within the presence of the court for judgment, is not, as at law, one of jurisdiction to be pleaded by a formal plea to the writ, but one of mere irregularity of process, properly cognizable on motion, according to a practice always prevailing for that special purpose."

Vice Chancellor Garrison in *Groel* v. *United Electric Company of New Jersey* (Ct. of Ch., 1905), 69 N. J. Eq. 397, said:

> "From such investigation as I have made of the practice in the English court of Chancery, which is applicable to our practice, excepting where changed, I incline to the opinion that a motion based upon a conditional appearance, and not a plea to the jurisdiction of the court, was the settled practice in such a case as the present."

And in *Ewald* v. *Ortynsky* (Ct. of Ch., 1910), 77 N. J. Eq. 76, affirmed 78 N. J. Eq. 527, Vice Chancellor Garrison again examined the authorities with great care and after strongly criticizing some of the earlier cases held that an objection to the jurisdiction of the Court over the person of the defendant should be raised upon motion based on a conditional appearance.

In the later case of *Brimberg* v. *Hartenfeld Bag Co.* (Ct. of Ch., 1918), 89 N. J. Eq. 425, Vice Chancellor Lane said:

> "Prior to the passage of the Chancery act of 1915 it had been held by the court of errors and appeals in *Wilson* v. *American Palace Car Co.*, 65 N. J. Eq. 730, and *Puster* v. *Parker Mercantile Co.*, 70 N. J. Eq. 771, that a plea to the jurisdiction of the court might be filed by a foreign corporation which could not be served with process within this state and that such a defendant might demand *in limine* the

judgment of the court whether it should answer the bill. Vice Chancellor Garrison in *Groel* v. *United Electric Co. of N. J.*, 69 N. J. Eq. 397, was constrained by the authority of the Wilson Case to uphold a plea to the jurisdiction filed by a foreign corporation alleging that service had not been effectively made upon it, although attempted to be made in this state, and it was not subject to service within the jurisdiction. Since the determination of these cases pleas have been abolished, and those matters which formerly could be taken advantage of by plea must now be taken advantage of by motion. Vice Chancellor Garrison in *Ewald* v. *Ortynsky*, 77 N. J. Eq. (at p. 76), again examined the subject matter, which he had previously examined to a considerable extent in the Groel case, with great care and held that the decided cases did not apply to the case of a domestic corporation so as to warrant it in setting up defective service of process by a plea to the jurisdiction. On page 88 of the report he expresses his difference from the determination of the court of errors and appeals in *Wilson* v. *American Palace Car Co.* The court of errors and appeals affirmed his determination (78 N. J. Eq. 527), and while not referring to the language of Vice Chancellor Garrison, yet I think, by the language of the chief-justice (at p. 529), it must be considered as having approved its prior determination and the language used is broad enough to include non-resident individual defendants as well as foreign corporations.

"Feeling as I do, that the observations of Vice Chancellor Garrison in the *Groel and Ewald Cases* were justified and that the proper practice would be as pointed out by him, and that a non-resident defendant, who does not desire to submit to the jurisdiction, should not be entitled to have a bill dismissed as to him, but only to have improper methods which may have been attempted to be used to subject him to the jurisdiction set aside, and at the most to secure the judgment of the

> Court whether he must answer the bill in response to any process then served, or attempted to be served, and that to secure such judgment he must come in under a conditional as distinguished from a special appearance, I am unwilling pleas to the jurisdiction having been abolished, to indicate what I consider the proper practice and the proper form of motion, until I am obliged to, and I am not obliged to now, no formal motion having been made by the non-resident respondents. The individual non-resident defendant may be at the present time not subject to service of process; *non-constat,* that tomorrow he will not come within the jurisdiction. The bill will have been dismissed as to him. Before a new one can be filed and process issued he may have again departed the jurisdiction. In view of our rule that a suit is not commenced (except for certain purposes not necessary to be here considered) and therefore process cannot issue and be served until the bill is actually filed in Trenton. I can conceive that by proper diligence of counsel, a resident of New York or Pennsylvania may be in New Jersey almost daily, and yet not subject himself to service of process, except theoretically."

We submit that these cases clearly hold that an objection to the jurisdiction of the Court of Chancery over the person of the appellant, Maurice J. Swetland, for improper service of process, can only be raised upon a conditional appearance with leave of Court and the only relief which can be granted should the motion prevail is to quash the service of process. As the appellant insisted upon urging this motion without obtaining leave of the Court so to do or submitting to a conditional appearance, his motion was correctly considered by the learned Vice Chancellor below to be a general appearance, and hence, defeated itself.

Second, as before noted, the purported special appearances also questioned the jurisdiction of the Court of Chancery to deal with the subject matter of the suit. Such objections were always possible to be raised by a plea to the jurisdiction. As an objection thus raised goes to the merits of the suit, no conditional or special appearance was necessary, is being assumed that the Court had jurisdiction of the person or else no relief on the merits would be necessary. Under such a plea a decision in favor of the defendant resulted in a dismissal of the bill as to him and if the plea were found not to be true, the complainant was entitled to proceed as if upon a decree *pro confesso.* Such a plea to the jurisdiction was thus a plea in bar, and, of course, its filing constituted a waiver of all matters which were properly the subject of a plea in abatement. *Groel* v. *United Electric Company of N. J.* (Ct. of Ch. 1905), 69 N. J. Eq. 397; *Sohege* v. *Singer Mfg. Co.* (Ct. of Ch. 1907), 73 N. J. Eq. 567; *Ewald* v. *Ortynsky* (Ct. of Ch. 1910), 77 N. J. Eq. 76, affirmed 78 N. J. Eq. 527.

Thus the appellant's objections to the Court's jurisdiction over his person, which are mere matters in abatement, are waived, when, as has been done in the instant case, it was attempted to join a motion to quash the service of process with a motion in the nature of a true plea to the jurisdiction questioning the power of the Court to deal with the subject matter of the suit.

As was suggested in the case of *Sohege* v. *Singer Mfg. Co.* (Ct. of Ch. 1907), 73 N. J. Eq. 567, a plea in bar, such as a motion questioning the Court's jurisdiction of the subject matter of the suit, cannot be joined to a plea in abatement, such as a motion seeking to set aside service of process, as the former in seeking affirmative relief would tacitly admit and be a waiver of

the latter. In the *Sohege* case Vice Chancellor Howell said, page 572:

> "It is a primary rule in chancery pleading that a plea shall reduce the issue between the parties to a single point. The facts and circumstances may be various and voluminous, but they must, in the last analysis, be reducible to a single issue, and if a plea be so framed as to present two or more distinct issues or points, it must be held bad and the defendant be put to his answer and full discovery. Hence, if a plea alleges non-residence, non-service and non-appearance, this, though various, is to but one point, and would be good in form and would eventually prevail if found to be true in fact. But it is argued on behalf of the complainant that if the pleader add to this the fact that the same cause of action had already been adjudicated between the same parties, and that a decree had passed for the defendant that would introduce into the case a diverse issue which could not be heard with the issue of non-residence, non-service, and non-appearance; that one part of the plea would go to the jurisdiction of the court over the parties and that the other would tacitly admit the jurisdiction, but would set up in bar of the further action of the court the fact of the former adjudication, or, in other words, that such latter plea would be a plea in bar joined to a plea to the jurisdiction, and the latter would operate as a waiver of the former. This plea, counsel say, presents such a double aspect and must, on that account be overruled. The defendants say in reply that they did not set out the proceedings in the English suit and the decree thereon as a plea in bar, but only for the purpose of showing the court here that another court there had entertained the same suit and had decided it, and that for such reason alone this court could not take jurisdiction. There is grave doubt about the soundness of the defendants' position. If they are wrong, then the plea

> must be overruled, and they must be put to their answer. In consequence of the view which will hereafter be taken of this case it will not be necessary to decide the question so raised at this stage of the discussion; it is only necessary to say that if the document filed by the defendants as a plea is really chargeable with duplicity it must fall.''

In the instant case, as the appellant insisted upon urging and moving at the same time to dismiss the bill of complaint and quash the writ of sequestration on the ground that in the Court of Chancery an action against him for an accounting could not be maintained at any time and under any circumstances, we submit his motion to dismiss the bill could only be considered on the ground that the appellant be deemed to have appeared generally in this suit and to have waived all objection for failure to have served process personally upon him within this State.

Appellant's counsel has stated in his brief (pages 9-10) that the appellant had the absolute right to appeal and be heard upon the question of the jurisdiction over his person under the protection of a special appearance filed without leave of Court and to deny him that right would be to deprive him of his property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States. Not one of the numerous cases which appellant cites from the lower Federal Courts and the United States Supreme Court, in anywise supports the doctrine which he has enunciated. On the contrary, all that such cases show is that the rule in the Federal Courts with respect to special appearances is different than the long established rule with respect thereto in the courts of New Jersey. Nothing therein contained denies the right of a State to establish a different rule.

The precise question was considered by the United States Supreme Court in *Western Life Indemnity Company* v. *Rupp,* (1914) 235 U. S. 261, in which case all of the Supreme Court cases cited in appellant's brief are distinguished and the constitutional objection sought to be raised here by the appellant completely disposed of. Mr. Justice Pitney said (pages 271-273):

> "That a state, without violence to the 'due process' clause of the Fourteenth Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in *York* v. *Texas,* 137 U. S. 15; followed in *Kauffman* v. *Wootters,* 138 U. S. 285.
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> It is true that in *Harkness* v. *Hyde,* 98 U. S. 476, on review of the judgment of a territorial court, it was held that the right of the defendant to insist upon an objection to the illegality of the service of process was not waived by the special appearance of his counsel to move the dismissal of the action or the setting aside of the service upon that ground, nor when that motion was overruled by his answering to the merits; and that the objection was available here as a ground for reversal. To the same effect are the decisions on review of judgments and decrees of the Federal courts. *Southern Pacific Co.* v. *Denton,* 146 U. S. 202, 206; *Mexican Central Ry.* v. *Pinkney,* 149 U. S. 194, 209; *Goldey* v. *Morning News,* 156 U. S. 518; *Davis* v. *C. C. C. & St. Louis Ry.,* 217 U. S. 157, 174. And a standing rule of a federal court, requiring a party appearing specially for any purpose to declare at the same time that if the purpose

for which the special appearance was made should not be sanctioned or sustained by the court he would appear generally, was held inconsistent with the laws of the United States and therefore invalid. *Davidson Marble Co.* v. *Gibson*, 213 U. S. 10, 18. But the recognition and enforcement of this right on the part of defendants in the Federal courts is a matter quite apart from the authority of the States to establish a different rule of practice within their jurisdictions, as was expressly recognized in *York* v. *Texas*, 137 U. S. 15, 17, 20; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202, 208; *Mexican Central Ry.* v *Pinkney*, 149 U. S. 194, 207; *McLaughlin* v. *Hallowell*, 228 U. S. 278, 289.

The Fourteenth Amendment declares that no State shall 'deprive any person of life, liberty or property, without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. *Pennoyer* v. *Neff*, 95 U. S. 714, 732, 733; *York* v. *Texas*, 137 U. S. 15, 21. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case, that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exer-

> cise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it. As appears from *Southern Pacific Co.* v. *Denton,* and other cases of the same class above cited, the distribution of original and appellate jurisdiction in the Federal courts is such as to sometimes give an advantage of this kind to defendants; but it is not indispensable to 'due process of law.' "

There is, therefore, nothing in the suggestion of appellant's counsel that our Courts cannot demand a conditional appearance as a condition precedent to passing on the question of proper service or jurisdiction. A defendant may stay out of our Courts if he has not been properly served or if the Court has no jurisdiction of the subject matter. In neither case would he be bound by any judgment rendered. This much protection, we grant, the Constitution affords him, but on the other hand, if he asks the Court to pass upon the question, the Court need not do so except upon such conditions as it may impose. As already shown, it is settled that the Courts of New Jersey will not pass upon such a question except upon the defendant entering a conditional appearance. Unless an appearance without consent is held to amount to a general appearance, the position of our Court is wholly nullified. By disregarding the Court entirely and filing a special appearance a defendant could free himself of the condition which, if permission to contest the jurisdiction had been asked, would certainly have been imposed.

And it is also true that a defendant questioning the jurisdiction of a Court because of improper service of process upon him is not entitled to have the bill of complaint dismissed against him.

Under our Chancery Act the power of the Court to order publication against non-residents extends to any bill filed and cannot be construed to be limited to bills to enforce demands on which the Court has jurisdiction to make a final decree if the non-resident does not appear. *Kirkpatrick* v. *Post* (Ct. of Chanc. 1895) 53 N. J. Eq. 591, affirmed (Ct. of Errors and Appeals 1895) 53 N. J. Eq. 641.

Appellant's counsel also suggests that under the Sequestration Statute (P. L. 1919, p. 444) a defendant has an absolute right to appear specially on an application to quash the writ. If appellant's motion under his purported special appearance had been confined to the quashing of the writ of sequestration against him, there might have been something in the argument, but his motion is not so confined but seeks the setting aside of process against him for lack of proper service and the dismissal of the bill on the ground that the Court has no jurisdiction over the subject matter.

Appellant's counsel apparently admits that in certain circumstances a defendant who insists upon the objection that a Court has no jurisdiction over the subject matter has waived his right to contest service of process upon him, but, he argues that, the appellant here does not come within it because the effect of such a motion is a matter of intent and the appellant's intention was not to appear generally. We submit, however, that no matter what one intends he is bound by what he does. From the beginning of these proceedings appellant has been urging the dismissal of the bill of complaint on the ground that the Court has no jurisdiction over the subject matter of the suit. He is still pressing that very issue before this Court and seeks to have set aside the orders of the learned Vice Chancellor below in that respect.

We submit that this Court cannot proceed to a ruling upon such an issue without entertaining

jurisdiction of the person of the appellant and that his insistence upon the Court's determination of such a motion is consistent only with a general appearance, with which there must fall all possible controversy in the matters now before this Court.

We submit, therefore, that this Court is in no wise bound by any of the decisions in the Federal courts but should follow the decisions hereinbefore cited in the courts of New Jersey which clearly establish that a purported special appearance filed without leave of court amounts to a general appearance, and further that under such an appearance an application to quash the service of process upon the defendant will not be considered when joined with a motion attacking the jurisdiction of the court over the subject matter of the pending proceedings.

V.

The failure of appellant to appeal in his individual capacity from either of the orders entered in the Court of Chancery completely disposes of all questions properly before this Court.

Thus far we have argued the merits of these appeals as though the appellant had properly perfected his right to urge upon the Court all matters raised in the brief filed on his behalf.

There is, however, the circumstance of appellant's failure as a defendant individually to appeal from either of the orders which, we submit, is completely dispositive of all the issues sought to be raised by him.

The bill of complaint filed in this cause made the appellant a defendant thereto in several capac-

ities; as an individual, as trustee under the trust agreements of July 14, 1917, and January 3, 1922, respectively, and as co-executor of and co-trustee under the last will of his father, Horace M. Swetland, deceased (Case, p. 16). The appellant was subpoenaed to answer the bill of complaint in all of these capacities (Case, p. 157) and likewise directed to show cause in the order entered for that purpose (Case, p. 71).

An answer has been filed on his behalf in his capacity as executor of his father's estate (Case, p. 123). It has been urged, however, that this is not sufficient to confer jurisdiction over him because he has several other entities, namely, one as that of an individual with private property, the other as trustee of the trusts of July 14, 1917, and January 3, 1922, with trust property. With respect to his entity as a private individual, as well as his entity as trustee, however, the Court of Chancery has held that he has appeared generally in this cause. He has taken no appeal individually.

We, therefore, submit that having only appealed in his capacity as trustee of the trusts of July 14, 1917 and January 3, 1922, he has foreclosed all questions decided by the Court of Chancery with respect to him in his individual capacity, and in his capacity as co-executor of and co-trustee under his father's will, and in these respects is bound by the holdings of the Court of Chancery.

All that appellant can possibly urge before this Court on the appeals he has taken is (1) that the Court below erred in determining that the special appearances filed on his behalf as trustee under the trust agreement of July 14, 1917 and January 3, 1922 constitute general appearances with respect to him as such trustee and (2) that process was not duly served within the State upon

him as such trustee. If he be wrong in either of these contentions, his appeals must fail.

As has already been shown, each of these contentions is without merit (Point IV). Moreover, even if the first should be upheld, the second is unsound for an additional reason that has not as yet been mentioned—the fundamental basis of this contention is that he not having been brought personally into the action, the Court cannot bind him by its decree to account. But the Court has held that he has been brought into Court personally and from such holding he has taken no appeal.

We submit that Vice Chancellor Berry correctly determined all the questions herein involved and that the orders entered in the Court of Chancery should be in all respects affirmed.

Respectfully submitted,

LINDABURY, DEPUE & FAULKS,
Solicitors for Appellees.

J. EDWARD ASHMEAD,
Of Counsel.