NEW JERSEY COURT OF ERRORS AND APPEALS.

Between Richard G. Stevenson (Respondent) Complt. and Paul H. Markley, M. D. and Camden Safe Deposit and Trust Co., Executors of Mrs. Mary Josephine Markley, Deceased. (Appellant) Deft's.	Bill for Account. Appeals No. 1 & No. 2 Brief of Howard M. Cooper for Defendants.

I.

Paragraphs 4, 5, 6, and 7.

This bill is filed for an accounting by the guardian of the personal property of her ward. In such a bill no averments concerning the real estate of the ward's father are proper. Accordingly notice was given under Chancery rule 213 to strike out paragraphs 4, 5, 6 and 7 which relate only to real estate, as immaterial, irrelevant and impertinent. (Case p. 40,68).

The Vice Chancellor refused to strike them out but

did strike out paragraph 14 A (case p. 82) which was intended as he says (case p. 93) to amend and strengthen them. We respectfully submit, that in such refusal he was in error. Because by the averments of the bill the only money or estate that came into the hands of Mrs. Markley as guardian of her daughter Mary Markley was the sum of $4,037.14, Mary's share, one fifth, of the distributive personal estate $20,435.70 of her father Albert W. Markley. There is no averment in the bill that any portion of the proceeds of the sale under the partition of the real estate of Albert W. Markley came to the hands of Mary Josephine Markley as guardian for his daughter Mary Markley. On the contrary, the averment in paragraphs 4, 5 and 6, is, that at the sale in 1876 under partition proceedings had in Chancery on the complaint of Hamilton Markley, son of Albert W. Markley, Mrs. Markley purchased the most of Albert W. Markley's real estate and held the same twenty years until 1896 when she sold it, and (par. 7) that in 1903, twenty years after Mary Markley came of age and eighteen years after her death, Mrs. Markley declared a trust in favor of, among others, her grand child, Markley Stevenson, the son of her deceased daughter Mary Markley Stevenson, and placed therein personal and real estate amounting to the sum alleged in paragraph 6, to be the value of the real estate of Albert W. Markley, deceased, so that by the averments of the bill, Mary Markley's share of the personal estate of her father came to the hands of her mother as her guardian, and the proceeds of her father's real estate was placed by her mother in the hands of a trustee (the rightfulness of which action is in no way questioned in the bill),

and is not in the hands of the defendants, her mother's executors.

The Vice Chancellor gives no reason for the retention of those four paragraphs, no ground for his refusal to strike them out. They relate wholly to the real estate of Albert W. Markley. Mary Markley's share of the proceeds of her father's real estate belongs to her heir and not to her administrator, and the complainant, her administrator can have no claim therefore.

Paragraphs 4, 5, 6 and 7 are consequently wholly irrelevant and immaterial in any aspect of this case and should be stricken out.

II.

STATUTE OF LIMITATIONS.

The Vice Chancellor holds (Case p. 104) that after the death of Mary Markley Stevenson, the ward, the relation between Mrs. Markley, her guardian, and the person entitled to call the guardian to account was a trust by implication and within the purview of limitations, but that the limitation did not run until the appointment of a representative of Mrs. Stevenson.

The complainant as the husband of the ward, Mrs. Stevenson, had the exclusive right to administration on her estate and the exclusive right to all her personality. He controlled the appointment of her representative and he was the sole distributee of her

personal estate. It is highly inequitable, I submit, to hold, that he, who is the only one interested in that personality and the only one interested in its administration, can balk the statute of limitations, by simply refusing to exercise for twenty-one years the right which he alone can exercise, the right of administration; that he, who only can be the actor, can shield himself, who only is to be benefited, by simple non-action for all that long period, so that the statute of limitations may not run until after witnesses are dead and books, vouchers and memoranda are lost and then when the guardian's mouth is closed by death from explanation, bring suit against her representatives who have no knowledge of the transactions between the guardian and ward, and it may well be, are dependent only on such uncertain, unsatisfactory, disconnected evidence of long past events as may then exist. It is inequitable to hold that he who has the sole right to a fund and the sole right to take the action necessary to get that fund may be allowed to say, the statute of limitations will not run against me until I chose to take such action, I will not act therefore until the one having knowledge of the fund is dead and I can allege uncontradicted my claim to it. It is more in consonance with our knowledge of human relationhsip and the affection of mother for daughter to presume that Mrs. Markley had a valid explanation of her non-accounting with her daughter at her majority than to presume that she held the fund in violation of her trust. It does less harm to human probability to presume that her son-in-law knew of such explanation and therefore waited until she would be prevented by death from

making it before he, who had the exclusive right to do so, took the legal step to enable him to bring suit against her representatives, having no knowledge of transactions occuring twenty three years before their appointment, than to assume that Mrs. Markley wronged her daughter.

This view is supported by the authorities.

For his statement, (Case p. 104) "That where the cause of action did not exist during the life of the party and came into existance subsequent to the party's death the statute does not begin to run until the appointment of a representative," the Vice Chancellor cites 19 Am. & Eng. Encyc. Law p. 219. But on the same page 219, it is stated, "This rule is subject to the qualification that if it is within the power of the claimant to remove the incapacity, the exemption continues only for a reasonable time after he might have brought about a condition which would enable him to sue."

Again 19 Am. & Eng. Encyc. Law p. 211.

"The plaintiff cannot defer by his own laches the time at which the running of the statute shall begin. The statute runs from the time when he might have perfected his right, irrespective of the time at which he actually perfected it."

Also ibid p. 221.

"Where, as in practically all the jurisdictions of the United States, a claimant has it in his power to

procure the appointment of a personal representative by or against whom the suit may be begun and prosecuted, a reasonable time only in which to procure such appointment is allowed to such claimant, after the expiration of which the statute will run in any event."

The Vice Chancellor does not say that he thinks a delay of over twenty years in the complainant's perfecting his right of representation, is a reasonable time therefor. But he says (Case p. 100 & 101) that he can see no reason why a trustee should have the protection of the Statute after a stated period because the other party has not proceeded, the trustee having all the time the power to proceed had he seen fit.

But on an agreement to convey either party may file a bill for specific performance, yet laches of the moving party is a good defence for the party sued

Fry on Specific Performance, Sec. 1070, 1072.

A cestui que trust may be debarred from relief by long acquiesence in a breach of trust though he did not originally concur in it. If the cestui que trust neglects to sue for twenty years it will be such a laches as will bar relief.

2 Perry on Trusts 850.

In McCartin v Trephagen 16 Stew 323, a suit in equity by a cestui que trust against surviving exe-

cutors and administrators of deceased executor, a laches of sixteen years was held a good defence. The reason given by Vice Chancellor Van Fleet on p. 33, being an all sufficient reason in this case; "He who delays asserting his rights, until the proofs respecting the transaction, out of which he claims his right arose, are so indetermniate and obscure, that it is impossible for the court to see, whether what seems to be justice to him is not injustice to his adversary, should be denied all relief, for, by his laches, he has deprived to the court of the power of ascertaining, with reasonable certainty, what the truth is, and thus of doing justice.

Tested by this rule, it is plain, I think, that the claim made in this case should be rejected. The persons making it did not assert it until their delay had put them in the best possible position and their adversary in the very worst. They seek to turn their fault into an advantage. The evidence which they produce in support of their claim, consists largely of written matter, which endures notwithstanding the flight of time, while living witnesses both forget and die. From the character of the claim, it is manifest, that the only defences which could have existed against it were such as rested entirely in the knowledge and judgment of living witnesses." In that case the surviving executors and the deceased executor could have protected themselves by filing an early account but that did not prevent their having the protection of the statue, did not relieve the defendant from the consequences of his laches of sixteen years.

If the delay is sufficiently great to destroy evidence it will, even in a question with a kinsman, be such as to require a court of equity to refuse relief.

18 Am. & Eng. Encyc. Law 113.

What could more effectually destroy evidence than the fact, appearing in this bill, filed by the representative of the ward against the representative of the guardian, of the death of the guardian, the only person who could give her reason for not filing an account of her guardianship?

In Lutjen v Lutjen 19 Dick. 773 this court held that lapse of time alone is sufficient ground of estoppel when the court cannot feel as confident of its ability to ascertain the truth after a lapse of nine and one half years, as it could when the subject for investigation was recent and before the memories of those who had knowledge of the material facts have become faded and weakened by time. In Starkey v Fox 7 Dick. 768 Vice Chancellor Green says "There may be certain conditions which will prevent the application of the rule that time does not run against an express trust,, for when the relation is no longer admitted to exist, or gross laches in enforcing a known right or long acquiescence in the alleged breach of trust is shown, when lapse of time has obscured the nature and character of the trust or the acts of the parties, or other circumstances give rise to presumption unfavorable to its continuance, in all such cases a court of equity will, even in a case of express trust, refuse relief upon the ground of lapse of time and its inability to do complete just-

ice." The complainant in this cause might have perfected his right to sue by qualifying himself as his wife's representative within a week after her death in 1885. He slept on his right to do so for more than twenty years, until 1906. He cannot by such great laches defer the time when the running of the statute began and his laches appearing on the face of the bill, it should be dismissed.

Upon the ground of authority, the weight of adjudicated cases holding that a guardian's trust terminates at the majority of the ward, largely overbalances those that do not so hold. They are gathered, as the Vice Chancellor says, in 15 Am & Eng Encyc. of Law p. 82 n. 1. A better illustration of the wisdom of such a rule can hardly be found, than this suit brought by the representative of a deceased ward against the representatives of a deceased guardian more than twenty years after the death of the ward. I submit that the better reason for the passage of statutes of limitations against stale claims supports those courts holding the majority view, and that the courts of New Jersey being at liberty to adopt either view would more wisely follow that held by the courts of the much larger numbers of states, than to follow the few courts holding the opposite view. And upon that ground too, this bill sould be dismissed.

III.

EXCUSES FOR LACHES.

Mary Markley attained her legal majority on Jan-

uary 13th, 1883. She married the complainant March 26th, 1885 and died December 25th, 1885. Her husband was appointed administrator March 1st, 1906, and filed the bill in this cause on June 23rd, 1906 against the executors of her mother who died February 26th, 1905.

The complainant's excuse for his laches in suing for an account of the guardianship of his wife is given in the amendment to the bill marked 14 B. (Case p. 63) Notice was given to strike that amendment out (Case p. 69 & 71) The court by its order of January 31st, 1907 refused to do so (Case p. 81) Such refusal, I submit, was erroneous.

The excuses for the great laches of twenty-three years offered in that amendment, paragraph 14B, are, (1) that after the death of his wife the complainant made an agreement with her mother Mary Josephine Markley to the effect, that she should not be called to account for his wife's share of her father's estate during her life and was made in order that Mrs. Markley might hold the Cooper Street house until it could be disposed of advantageously and to enable her to use the investments which she held in trust that she might maintain her station in life and that of her family so that the same might not be broken up; and in consideraion therefor Mrs. Markley promised to account to complainant for his wife's share of her father's estate at her death by means of her last will; (2) that her children made a family arrangement with her whereby she was to have the proceeds of her husband's estate until her death; (3) that about June 1st, 1903 she asked him to sign a

release, the purpose of which was to release her on the payment of $9,932.05 from any claims he had against her on account of the estate of his wife, and that his counsel advised him not to sign it.

Neither of those three attempted explanations of the complainant's laches is a valid excuse therefor.

The first excuse is in its terms not an excuse for not enforcing an account. How could Mrs. Markley account by her will? She might by her will bequeath or devise money or real estate equal in amount or value to what an accounting might show to be due. But had she attempted by some provision of her will to pay what she might acknowledge to be due, this excuse alleges no assurance to her by the complainant that such provision would be accepted by him. Nothing stated in the excuse would prevent the complainant from alleging that the provision of her will did not sufficiently account for her guardianship and from filing a bill against her executors to account therefor and obtaining a decree to that effect. Nothing, now prevents him if the statute of limitations against the prosecution of stale claims does not apply, but the control of a court of equity over its suitors, to prevent one who has negligently or fraudulently not enforced his claim, until the other has been, by death, prevented from stating her answer thereto, from then inequitably pursuing such a claim. This case peculiarly calls for the maintenance of that rule. The defendants, the executors of Mrs. Markley, can have no knowledge of a guardianship that terminated in 1883, twenty four years ago. That long time makes it nearly impossible for those having no

personal knowledge of transactions, occuring in that distant period, to prove what did take place. That first excuse too is inherently improbable and impossible of satisfactory proof. It is not stated when or where it was made, whether or not it was in writing, nor, if verbal, in whose presence it was made, nor whether, if made, it was within the knowledge of any one other than the complainant and Mrs. Markley, who is prevented by death from either denying it or stating her understanding of it. It is beyond belief that Mrs. Markley would agree to provide by will for the payment of a claim undetermined and vague and not to be ascertained until after her death when she could not give her knowledge of it and its determination would so largely be left to the claimant.

The second excuse for the laches, that Mrs. Markley's children made a family arrangement with her whereby she was to have the proceeds of her husband's estate until her husband's death, is in not stating the terms of the arrangement, where it was made, when it was made, in whose presence it was made, is too hazy, indefinite and uncertain to form any excuse for laches were those children suing her. It it no excuse whatever for the complainant, who is not one of her children and who is not alleged to have joined them in any arrangement, in not bringing his suit for over twenty one years after his wife's death. That arrangement also is not alleged to have been in writing nor to have been within the knowledge of any other than those who were parties to it, none of whom can now testify to it.

The third excuse, that in 1903 Mrs. Markley caused to be delivered to complainant a release the purpose of which was to release her upon the payment of $9,-932.05 from any claim he had against her, is too vague as an excuse for the delay of over twenty-three years in bringing suit. Who delivered the release? What were its terms? How can the court from the pleading determine its purpose? If the statement shows anything it shows ~~rather~~ that Mrs. Markley was willing for peace to quiet an unconscionable claim of nearly $45,000. by the payment of one fifth thereof, rather than that the claim should be brought against her estate when her mouth would be closed by death from stating her defence thereto. Light on such a fear is thrown by the reason stated by the complainant's counsel, Mr. Snyder, for his advice (case p.64) to complainant not to sign, that the estate was large, over $100,000, and complainant could get more by holding off.

The plaintiff's excuse that for prudential reasons he refrained from asserting his rights is entitled to less favorable consideration by a court of Equity than if his conduct had been that of mere inaction.

Lane v. Lock 150 U. S. 201.

Thorne Co. v. Washburne Co. 159 U. S. 444.

The excuses offered for the complainant's laches do not excuse his neglect to have his claim settled while Mrs. Markley lived, when she could testify to it.

The Vice Chancellor says (Case p. 92) that the face of the bill disclosed a cause of action so old in default of explanation that he would have been inclined to dismiss this suit for laches at the hearing on December 10, 1906, had the defendants then moved for the same, but that not finding among the objections then filed any one based on laches he gave the complainant leave to amend by setting up facts explaining the laches. The complainant then filed the amendment, paragraph 14B, which the defendants objected to. The Vice Chancellor refused to strike the paragraph out, not because it was the statement of a valid excuse if proven, but because he was disinclined "to absolutely deprive the complainant of his day in court upon the ground of laches, in the face of a charge in the bill that there was some sort of an agreement or understanding between him and the person whom he seeks to hold as trustee concerning the subject-matter of the trust which, when disclosed, may explain or excuse the delay." I submit, that in such refusal the Vice Chancellor was also in error. If a case is so old that in default of explanation the court could dismiss it, the explanation made, to be sufficient to excuse the delay, should certainly in the bill be so definite and explicit in its statement of fact as to satisfy the court of its adequacy if proven. The excuses, given in paragraph B, state no definite facts. They say that Mrs. Markley made, an agreement "to the effect," a family arrangement "whereby," and asked for a release "the purpose of which was." They do not give the terms of the agreement, nor of the family arrangement, nor of the release, nothing from which the court can judge of the sufficiency of the

(Case p. 95)

excuses. They do not explain. They are too vague and indefinite to satisfactorily do so. The Vice Chancellor's characterization of them as "some sort of an agreement or understanding which when disclosed in detail may explain or excuse the delay" shows how shadowy he regarded the excuses as in explanation of the great delay. An excuse for such a delay so vague and so undefined as to require the evidence to disclose its detail, whereby its validity may be determined, is wholly inadequate in a bill as a valid excuse for so great a laches, as here shown, in its filing.

So much of the two orders as are appealed from should be reversed, and paragraphs 4, 5, 6, and 7 of the bill and paragraph 14B of the amendments thereto, should be stricken out for the reasons given in the notices to strike the same out (Case p. 40, 45, 65). And the whole bill should be stricken out because of the inhibition of the statute of limitations and because of the laches of the complainant in enforcing his claim.

HOWARD M. COOPER,

Of Counsel with Defendants.

COURT OF ERRORS AND APPEALS.

November Term 1907.

BETWEEN:

Richard G. Stevenson, Administrator of Mary Markley Stevenson, deceased, (Respondent),

Complainant.

-**On Bill for Account.**-

AND

Paul H. Markley, M. D., and Camden Safe Deposit and Trust Company, Executors of Mrs. Mary Josephine Markley, deceased, (Appellants),

Defendants.

APPEALS

—No. 1 and No. 2.—

BRIEF OF HERBERT A. DRAKE FOR APPELLANTS.

THE CASE.

This is a suit brought by bill filed in Chancery

June 23, 1906, by the administrator of a deceased ward who died December 25, 1885, against the executors of a deceased guardian who died February 26, 1905, on a claim made and presented April 27, 1906, by the complainant to and against the executors of the deceased guardian under Sections 72, 73, 74 of the Orphans' Court Act of 1898, (P. L. 1898 pp. 740-741) after their accounts had been settled and passed by the Orphan's Court of Camden County.

CHRONOLOGICAL STATEMENT OF PRINCIPAL EVENTS.

1875, September 23, Albert W. Markley died possessed of real and personal estate. A widow, Mary Josephine Markley, and six children of whom Mary Markley was one survived him, (Printed Case pp. 1, 2.

1876, October 6, Personal estate settled at $36,784.24
Share of Mrs. Markley, widow, $12,261.41
Share of Mary Markley, daughter, $4,087.13
paid to her guardian, Mrs. Markley., (P. C. 2).

1883, January 13, Mary Markley arrived at twenty-one years of age, when her guardian owed her, $9,932.05., (P. C. p. 9, lines 29-34).

1885, March 26, Mary Markley married Richard G. Stevenson (P. C. p. 7, lines 5-6).

1885, December 25, Mary Markley Stevenson died. Her son Markley Stevenson and her husband, Richard G. Stevenson, survived her. (Bill, Paragraph 8, P. C. p. 7, lines 10-20).

1905, February 26, Mrs. Markley died, and in about ten days Defendants were appointed her Executors, (P. C. p. 7, lines 35-36).

1906, March 1, Richard G. Stevenson appointed Administrator of Mary Markley Stevenson the deceased ward, (P. C. p. 9, lines 4-6).

1906, April 27, Executors settled their accounts of deceased guardian showing balance for distribution under her will of $77,774.79. (Bill, Paragraph 11, P. C. 8 and 9).

1906 April 27, Complainant served on defendants claim of Mary Markley Stevenson as ward of Mary Josephine Mrakley for amount due from guardian January 13, 1883, when ward attained her majority, $9,932.05, (Bill, Par. 13, P. C. 9, lines 29-34).

See also, Schedule No. 1, P. C. 29, lines 1-16.

1906, May 29, Defendants as executors, served upon complainant as administrator of deceased ward, notice that administrator forthwith proceed to establish his claim, (Bill, Par. 14, P. C. 10, lines 5-15).

1906, June 23, Bill filed, (P. C. 1-12).

1906, July 2, Appearance of defendants entered, (P. C. 13).

1906, July 2, Answer of Defendants filed, (P. C. 13-29).

1906, July 11, Defendants gave notice that on July 30, 1906, defendants would make application to under Rule 213 strike out complainant's bill, with notice of an application for leave to withdraw answer for the purpose, (P. C. 40-44).

1906, July 11, Replication filed, (P. C. 47).

1906, July 13, Defendants served supplementary notice to strike out bill under Rule 213, (P. C. 45-47).

1906, July 30, Order that the application to withdraw

answer and strike out bill be postponed to the final hearing of the cause, (P. C. 48-49).

1906, August 22, Order of Reference to Vice Chancellor, (P. C. 50-51).

1906, August 31, Defendants gave notice of application to set down case for final hearing, (P. C. 52-53).

1906, September 10, Case set down for final hearing for October 1, 1906, (P. C. 54).

1906, September 10, Defendants gave complainant notice that final hearing of the case would be moved at Chancery Chambers, Camden, October 1, 1906, and gave further notice that on the same day the applications theretofore made to withdraw answer and strike out bill would be brought on, on October 1, 1906, (P. C. 55-56).

1906, October 1, Stipulation reciting postponement of final hearing to first day of October Term, 1906, at Trenton, (P. C. 57-58).

1906, December 10, The case having been argued before the Vice Chancellor on the first day of October Term, October 16, 1906, and again on December 3, 1906, and December 10, 1906, an order was made December 10, 1906, filed December 22, 1906, giving complainant leave to amend his bill of complaint to explain the reasons for his delay in bringing of his suit, (P. C. 59-60).

1906, December 29, Complainant filed amendments to his bill, (P. C. 61-64).

1907, January 12, Defendants gave notice that on January 21, 1907, they would move to strike out complainant's bill and amendments under Rule 213, (P. C. 65- 75).

1907, January 26, Defendants gave notice of appeal

from order of December 10, 1906, permitting complainant to amend his bill, (P. C. 76-77).

1907, February 11, Defendants served and filed petition of appeal from order of December 10, 1906, (P. C. 78-80).

1907, January 31, Order striking out Paragraph 14A of complainants amendments, and further order denying application to strike out bill and particular portions of the bill, and denying motion to strike out Paragraph 14B of amendments to bill and overruling all objections except such as apply to Paragraph 14 A of the amendments, (P. C. 81-84).

1907, February 11, Notice and petition of appeal from order last above recited, (P. C. 85-89).

1907, February 13, Answers to petitions of appeal, in Appeal No. 1, and Appeal No. 2, (P. C. 90-91).

1907, March 7, Conclusions of the Court, (P. C. 92-105).

THE CASE AGAINST PARAGRAPHS 4, 5, 6, & 7.

The brief of my associate, Mr. Cooper deals with this question.

The real estate mentioned in these four paragraphs was conveyed by Mrs. Markley to a trustee for the benefit of four of Mrs. Markley's children and her grand-child, Markley Stevenson, the son of the complainant, one-fifth to each, the share of Markley Stevenson to remain in trust. The rightfulness of this action as stated by Mr. Cooper, is in no way questioned in the bill. The trustee to whom the land was conveyed and the beneficiaries for whom it was

conveyed are not made parties to this bill and therefore the matter of the real estate, pleaded in Paragraphs 4, 5, 6 and 7, is irrelevant and immaterial and should be struck out.

PARAGRAPHS 13 and 15.

The aspects of the case with which the Court is requested to deal, are almost wholly embodied in the portions of Paragraphs 13 and 15 of the Bill now quoted. The claim of the ward against her guardian, as stated in paragraph 13, is as follows:

"The amount due from said Mary Josephine Markley her guardian upon her, (the ward) attaining her majority, on the Thirteenth of January eighteen hundred and eighty-three, was the sum of Nine Thousand Nine Hundred and Thirty-two Dollars and five cents."

The material portion of Paragraph 15, is as follows:

"And your orator further shows, that neither the said Mary Josephine Markley in her lifetime, nor the said defendants since her decease, have paid to your orator the sum, or sums of money, which the said Mary Josephine Markley held in trust as the guardian of the said Mary M. Stevenson, and that no settlement was ever made with the said Mary M. Stevenson, (nee Markley) during her lifetime by her guardian, and that the whole of said sum of $9,932.05, held by said Mary Josephine Markley for her ward, the said Mary M. Stevenson, is now due and owing to your orator according to law."

These defendants seeking to sustain Appeals No. 1 and No. 2, ask that Paragraphs 13 and 15 and with them the residue of the bill be struck out, on the grounds now stated.

The first two grounds relied on, it is submitted, sufficiently affect the order of December 10, 1906, to sustain the appeal (Appeal No. 1) from that order. It is also submitted that these and the two additional grounds sustain the appeal (Appeal No. 2) from the portions of the order of Jaunary 21, 1907 appealed from.

We contend that both orders are erroneous, on the following grounds, viz:

I.

STATUTE OF LIMITATIONS.

Our Courts of Common Law had concurrent jurisdiction, with the Court of Chancery, of this cause of action, and the action at Law is barred by the Statute of Limitations. The complainant can therefore obtain no relief in this Court.

II.

WANT OF EQUITY.

This is a case where a legal demand is sought to be enforced in a Court of Equity. The complainant therefore has no standing in our Court of Chancery.

III

LACHES

The complainant, if entitled in Equity, was guilty of fatal laches and acquiescense.

IV.

EXCUSES FOR LACHES.

The complainant's excuses for laches are insufficient. They are incongruous with the right of action set up in his bill. They set up a new cause of action wholly inconsistent with the cause of action pleaded in the bill.

I.

STATUTE OF LIMITATIONS.

RAISING ITS BAR IN EQUITY TO REMEDY EXISTING CONCURRENTLY AT LAW.

1. The doctrine upon which the defendants expect to sustain this branch of their case, is stated in the conclusions of the learned Vice Chancellor, P. C. 101, lines 12 to 25, viz:

> "Succintly stated, the argument of the defendants is that the Statute of Account of this state, (Gen. Stat. p. 5), gives the right of action for an account against a guardian, and that the Statute of Limitations, (Gen. Stat. 1974, Sec.

8), provides **inter alia**, that all actions of account shall be commenced within six years next after the cause of action shall have accrued; therefore they argue that we have a case in which there is a concurrent remedy at law and in equity, and the legal remedy is barred by the Statute, whereupon a court of equity will hold that an action in equity is likewise barred."

This doctrine, although not applied, is thus stated in Partridge v. Wells, 3 Stew. 176, at page 179, viz: "If the complainant ~~is~~ my this case had a complete remedy at law, which has been lost by lapse of time, he is not entitled to the remedy he seeks here." A contention of the defendants therefor is, that the bar of the Statute ought to have been raised in response to the application made to strike out on December 10, 1906, and that the order of the Court of Chancery of that date, postponing the application of the defendants to strike out, and permitting the complainant to amend, (P. C. 59, 60), is erroneous and should be set aside. This would sustain Appeal No. 1.

2. Counsel for defendants respectfully submit, that the statement of the learned Vice Chancellor, P. C. 101, lines 25 and 26, that this doctrine is not applicable to the case in hand, is erroneous.

3. Originally, matters of account, proper for an action of account, were cognizable exclusively at law. 1 Cyc. 416, note 63.

Church v. Anti-Kalsomine Co., 118 Mich, 219; 76 N. W. Rep. 383.

"The equitable jurisdiction of the Court of Chancery in matters of account, is concurrent with that of Courts of law, and no precise rule can be laid down as to the cases in which it will be exercised."

Seymour v. Long Dock Company, 5 C. E. Gr., 397.

In Jewett v. Bowman, 2 Stew. 174, at page 176, the Court held, (Citing Cases) "While it is undoubtedly true that this Court has concurrent jurisdiction in matters of account, with the common law courts, it is also true it will not exercise jurisdiction in every case. Whether it will take jurisdiction or not, is a question always addressed to its discretion, and, as a general rule, unless it appears the accounts are intricate, or discovery is necessary, or some other sufficient reason is shown why it should assume cognizance, jurisdiction will be declined."

A Court of law is not ousted of its jurisdiction in an action of account because the account is intricate or involved. Church v. Anti-Kalsomine Co., 76 N. W. Rep. 383.

4. While the authorities seem to show that the action of account at common law lay against agents and baliffs, and as to matters arising **ex contractu** only, it also lay against guardians in socage, where a contractual relation can hardly be said to have existed, but when the action of account at law was extended by statute in England, it was extended not against guardians, but against the executors and administrators of guardians. See 1 Story. Eq. Jur.

Sec. 445. From this, it may fairly be inferred, that Parliment considered the actions as already lying against guardians by appointment as well as in socage. The first and second sections of our Statute support this view, and confine the extension of the remedy of the action of account at law, to the executors and administrators of guardians, bailiffs and receivers. The result is, that under our statute, and under the science of the law generally, as we contend, the action of account at law, has come to be an equitable action at law or an equito-legal action.

5. This view is supported by the following quotation from 1 Chit. on Pl. page 39, notes (g) and (3), (Perkins Ed. Springfield, 1874).

"At law, one partner or tenant in common, cannot in general sue his co-partner or co-tenant, in any action in form **ex contractu**, but must proceed by action of account or by bill in equity."

.6. Jurisdiction upon our Courts of law in matters of account was not conferred by statute, or by the act of 1794, entitled, "An Act Concerning the Action of Account." It was merely extended by statute, and as we now contend, all the extensions of the action of account at law, are subject to the limitations of the law under the Statute of Limitations. The action of account at law, having existed before equity intervened to exercise jurisdiction upon matters of account, we contend, that when equity did intervene and took up the action of account, it took it up subject to the limitations of law then existing, or which might thereafter be imposed. "So uniform-

ly have courts of equity assumed jurisdiction in matters of account, that the rule in general terms is now established, that they have concurrent jurisdiction with the courts of law in all matters of account." 1 Cyc. 418, note 85, referring to the New Jersey Cases of Jewett v. Bowman and Seymour v. Long Dock Company above referred to.

7. The statute entitled, "An Act Concerning Legacies," 2 Gen. Stat. 1938, is a totally different matter in its provision in regard to suits at law for legacies from the action of account at law, and the statute of account relating thereto. The Statute of Limitations affects by its terms the action of account. The Statute of Limitations affects by its terms an action of debt, an action on the case or in detinue. But it does not affect in terms, an action brought against an executor for a legacy in analogy to an action of debt, or in case, or detinue. We therefore respectfully submit, that the case of Hedges v. Norris, 5 Stew. 192, referred to by the Vice Chancellor in his conclusions, P. C. 102, is not an authority against the application of the doctrine now contended for. We therefore contend, that Mary Markley on her arriving at majority, had, under the circumstances of this case, during all the period from that time until her death, the right to an action of account at law against her guardian, and that the Statute of Limitations commenced to run from that time. This contention is further supported by the succeeding paragraphs.

8. In Hardenburgh v. Blair, 3 Stew. 643, at page 666, it was held that a legacy in the hands of an ex-

ecutor who has no duty to perform in relation to it, but to pay it over, and no discretion as to time of payment, may be recovered in an action at law, citing Wells v. Ely, 3 Stock. 172, decided by Chancellor Williamson in 1856, and Bacon v. Bonham, 12 C. E. Gr., 209, decided by Chancellor Runyon in 1876. Bacon v. Bonham must be collated with Hedges v. Norris.

The statement of the complainant in Paragraph 13, of his Bill, P. C. page 9, where he says, "That the amount due from the said Mary Josephine Markley, her guardian, upon her attaining her majority on the thirteenth day of January, 1883, was the sum of $9,932.05," was the statement of a fixed cerain definite sum held by Mrs. Markley, the guardian due by her to her daughter on that day. Mrs. Markley had no duty to perform in relation to it but to pay it over and no discretion as to time of payment. It could have been seized by the judgment creditor of the ward. In view of this allegation in paragraph 13, the prayer of the bill for an accounting, P. C. page 11, is inconsequent and rediculous. The complainant is praying for what by his pleading, he already had.

Pyatt v. Pyatt, 1 Dick. 285, refers to a case of a guardian after the ward becomes of full age and before the accounts are settled, and the guardian continues to manage the property at the request of the ward, and does not apply to the case in hand. The accounts of Mrs. Markley must have been computed in order to have ascertained the exact sum due on the ward's arriving at her majority, as stated in the

complainant's bill. To make this motion we were obliged to admit that this sum of $9,932.05 was due at that time.

9. On this view of the application of the Statute of Limitations to a case in equity, where there was a concurrent remedy at law, the case of highest authority and widest citation is Kane v. Bloodgood, 7 Johns. Ch., 90, decided by Chancellor Kent in 1823, affirmed 8 Cowan, 360 and followed in Bertine v. Varian, 1 Edws. Ch. 343, and in Atwater v. Fowler, 1 Edws. Ch. 417-423. In the case of Kane v. Bloodgood, it was held that the Statute of Limitations is a good plea in equity as well as at law. Trusts which are mere creatures of a court of equity are not within the cognizance of a court of law, and are not within the Statute of Limitations. As long as there is a continuing and subsisting trust, acknowledged and acted on by the parties, the statute does not apply; but if the trustee denies the right of his cestui que trust, and the possession of the property becomes adverse, lapse of time, from that period, may constitute a bar in equity. But other trusts, which are the grounds for an action at law are not exempted from the operation of the statute.

10. We say that the amount due by Mrs. Markley, the guardian to her ward, Mary Markley, when the ward arrived at her majority on the thirteenth of January, 1883, being a fixed certain and ascertained sum as stated by the bill of complaint, admitted now to be true for the purposes of this argument, demonstrates that there was here no trust except for Mrs. Markley to pay over the money, and no discretion as to her time of payment. The

further facts stated in the Bill, Paragraph 15, P. C., page 10, "That neither the said Mary Josephine Markley in her lifetime, nor the said defendants since her decease, have paid over to your orator the sum or sums of money which the said Mary Josephine Markley held in trust as the guardian of the said Mary M. Stevenson, and that no settlement was ever made with the said Mary M. Stevenson, nee Markley, during her lifetime by her guardian, and that the whole sum held by the said Mary Josephine Markley for her ward the said Mary M. Stevenson is now due and owing to your orator, according to law," shows that nothing was paid by Mrs. Markley on account of the sum of $9,932.05 from the time of the majority of her ward, and shows that the continued holding of Mrs. Markley was adverse and the reverse of the fact supporting the finding in Pyatt v. Pyatt, 1 Dick. 285, viz:—that the guardian after the ward attained her full age and before the receipts and payments during the ward's minority were settled, continued to manage the property at the request of the ward. The trust in the case at bar, whatever it was, instead of being an active continuing trust, acknowledged and acted on by the parties, cognizable only by a court of equity, was, from Mary Markley's majority to her death, a dead, passive trust, a dry trust, "dry as summer's dust," and the corpus of it a ground for an action at law and not exempted from the operation of the Statute of Limitations.

11. The case of Bertine v. Varian, 1 Edws. Ch., 343, is a case on all fours with the case at bar. It was decided by Vice Chancellor McCoun in 1832, and distinctly affirmed the doctrine of Kane v. Blood-

good, and decided that a bill of complaint, in all respects similar to the bill now asked to be struck out, must be dismissed with costs, as we contend the complainant's bill should be in this case. Following this case and affirming the doctrine of Kane v. Bloodgood, Vice Chancellor McCoun, in Atwater v. Fowler, 1 Edws. Ch. 417, at page 423, remarked as follows:—

"I have lately had occasion to examine the whole doctrine of the statute (of limitations) as applicable to courts of equity in Bertine v. Varian. There the

In support of Bertine v. Varian, see also:-
Matter of Latz, 33 Hun. 618, 621.
Matter of Van Dyke, 5 Dem. Sur. 331.
Bonst, v. Corey, 15 N. Y., 509.
Clark v. Ford, 3 Abb. Prac. Rep. (N. S.) 247.
Story on Equity, Sec. 549.

which was an action between partners.

12. The case of Bertine v. Varian has never been reversed or even questioned so far as counsel has been able to ascertain, and counsel must respectfully dissent from the view expressed by the learned Vice Chancellor in his conclusions, P. C. 99, lines 13, 20, to the effect that Matter of Camp, 126, N. Y. 377, expresses an opposite view. Matter of Camp

good, and decided that a bill of complaint, in all respects similar to the bill now asked to be struck out, must be dismissed with costs, as we contend the complainant's bill should be in this case. Following this case and affirming the doctrine of Kane v. Bloodgood, Vice Chancellor McCoun, in Atwater v. Fowler, 1 Edws. Ch. 417, at page 423, remarked as follows:—

"I have lately had occasion to examine the whole doctrine of the statute (of limitations) as applicable to courts of equity in Bertine v. Varian. There the complainant went against the representatives of a deceased guardian for an account of the personal estate of the ward which had come to his hands. The bill was not filed within six years from the time of the ward's coming of age, and the statute was set up in the answer. Upon principles established in Kane v. Bloodgood, I considered the Statute of Limitations applied to such a case: the remedy not being one exclusively of equitable cognizance, because an action of account at law might have been prosecuted against the guardian or his legal representatives."

He applied the same rule in Atwater v. Fowler which was an action between partners.

12. The case of Bertine v. Varian has never been reversed or even questioned so far as counsel has been able to ascertain, and counsel must respectfully dissent from the view expressed by the learned Vice Chancellor in his conclusions, P. C. 99, lines 13, 20, to the effect that Matter of Camp, 126, N. Y. 377, expresses an opposite view. Matter of Camp

relates to a case in which a surviving husband came into possession as tenant by the curtesy of land in Brooklyn, afterwards sold on condemnation proceedings for city improvements. The husband was appointed guardian, took possession of the fund, adventured it in business and lost it. The Court of Final Review held, as reported in Matter of Camp, 126 N. Y., 377, that the husband being entitled as tenant by the curtesy to the custody of the fund as long as he lived, the Statute of Limitations did not apply. It was the case of a guardian where the Court refused to apply the bar of the Statute of Limitations, but not on the ground of concurrent remedy at law and in equity. The Statute of Limitations did not apply, but the ground of the refusal was that the husband's right of possession by the curtesy was paramount to his right by guardian, and that the Statute would not commence to run until the termination of his life estate as tenant by the curtesy. The case of Matthew v. Brise, 14 Beav. 341, a case relating to a testamentary guardian held, that the relation of guardian is one of trust, and is direct, subsisting and continuing until there is an accounting and does not apply in this case, because evidently there had been an accounting or the certain sum of $9,932.05 alleged in the bill and admitted by the demurrant to have been due when Mary Markley arrived at her majority, could not have been ascertained and stated.

In the following New Jersey cases, the Statute of Limitations was applied, in equity, because there was a concurrent remedy at law to which the bar of the Statute was raised.

Conover v. Wright, 2 Hals. Ch. 613, by this Court, per Carpenter J. in 1848.

Dean v. Dean, 1 Stock 425, by Williamson Ch. in 1853.

Marsh v. Oliver 1 McCart 259, by Green Ch. 1862.

Cowart v. Perrine, 3 C. E. Gr., 454, by Zabriskie Ch., 1867.

McClane v. Shepherd, 6 C. E. Gr., 76, by Zabriskie Ch. 1870.

Buckingham v. Ludlam, 10 Stew. 137, per Van Fleet, V. C. 1883.

Somerset Bank v. Veghte, 15 Stew. 39, Runyon Ch. 1886.

Smith, Admr. v. Wood, 15 Stew. 563, Van Fleet, V. C. 1887. Affirmed on Appeal, 17 Stew. 603, 1888.

Agens v. Agens 5 Dick. 556, Van Fleet, V. C. 1892.

13. Other cases in support, are Hovenden v. Lord Annesley, 2 Sch. and Lef. 629.

Farnham v. Brooks, 9 Pick. 212.

Frame v. Kenny 12 Am. Dec. 367, at page 370.

A note to that case contains the following:

"The periods prescribed by the statutes are recognized in such cases as imposing a limitation on the cause of action itself and not merely upon the court in which it may be prosecuted. Hence the limitation follows the demand wherever it may be sued. The party is not permitted to evade the legal bar by changing his forum." Conover v. Wright 2 Hals. Ch. 613.

See also Sanford v. Tuttle 4 Vermont 82.

The case of Witter v. Brewster was decided by the New York Supreme Court, General Term, Third Department, May 1881 and reported in 12 Week. Dig. 358. The Court held as follows:—

"Where a guardian retains in his hands moneys belonging to an infant, payable at majority of the latter, for more than six years after he becomes of age, an action to recover said moneys is barred by the Statute of Limitations.

"After the ward becomes of age, there springs up between him and his guardian, the relation of debtor and creditor, and not that of trustee and cestui que trust."

The opinion was by Boardman J. Citing 12 Johns, 276.

46 N. Y. 456.

5 Duer 168-176; Learned P. J. and Bockes, J., concurred.

Hughes v. Brown, Tenn. Sup. Ct., 8 L. R. A. 480, is a case in point. That opinion contains the following:—

"In the early and well considered case of Cocke v. McGinnis, (Mart. & Y. 361) Judge Catron for this Court said: 'The history of English Jurisprudence, it is believed, furnishes not an instance where it was holden that the relation of cestui que trust and trustee prevents the Statute from creating a bar in a case where an action at law can be sustained."

Could Mary Markley after her majority have sustained an action of account at law against Mrs. Markley? We say, yes.

14. The question then is, with great respect, not as stated by the Vice Chancellor in his conclusions, P. C. 101, lines 28-36, that "The doctrine just con-"tended for applies where the courts of law origin-"ally had jurisdiction and courts of equity subse-"quently obtained or were held to have concurrent "jurisdiction. There, as has been just stated, a "statute of limitations which barred the right of "action at law, equally barred it in equity. But "where the court of law did not originally have "jurisdiction, the fact that it subsequently acquired "it, and the action in it was barred by the statute "does not result in finding that the suit in the Court "of equity is likewise barred." This, we respectfully contend, is not a true statement of the foundation of the rule. Under this statement of the rule, as announced by Judge Catron in the preceding paragraph, if, as we claim, Mary Markley could have sustained an action of account at law against Mrs. Markley, between her majority and death, for the subject matter of this suit, the statute would apply.

15. The true rule is stated by Chancellor Green in Marsh v. Oliver, 1 McCart, 259, 262:—

"The statute of limitations is a good plea in equity "as well as at law. But the doctrine of equity is, "that a direct trust, as between trustee and cestui "que trust, is not reached by the statute. The rule "as stated by Chancellor Kent, is that trusts in-

"tended by courts of equity not to be reached or af-
"fected by the statute of limitations are those techni-
"cal and continuing trusts which are not at all cog-
"nizable at law, but fall within the proper, peculiar,
"and exclusive jurisdiction of this court. Kane v.
"Bloodgood, 7 J. C. R. 111."

The rule is further stated by Chancellor Kent in Kane v. Bloodgood, 2 Johns. Ch., 90, 113, in the following words:

e Trust in the English law, is based upon the separatio
a perfect ownership (of the trust property) into a lega
tate, vested in one person, and a beneficial interest or
quitable title, vested in another."
Eaton on Eq. p. 348-9.

therefore, there was no necessity for his coming into his court for the accounting. The true question therefore is: **Not whether the trustee be an executor, or an administrator, or a guardian, the trustee of an express trust, or of an implied or constructive trust, but whether the condition of the trust is so express and direct and continuing as to be solely a creature of equity, and not at all cognizable at law.** During the minority of the ward the guardian is such a trustee. During the time of settlement, executors and administrators, within the year after the death of the testator or decedent, are such trustees. The

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"cal and continuing trusts which are not at all cog-
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"and exclusive jurisdiction of this court. Kane v.
"Bloodgood, 7 J. C. R. 111."

The rule is further stated by Chancellor Kent in Kane v. Bloodgood, 2 Johns. Ch., 90, 113, in the following words:

"The great and marked exception to this ordinary
"application of the statute to equity cases, exists in
"the matter of trusts falling exclusively within
"equity jurisdiction." Chancellor Kent quotes as his oldest and leading authority on the same page, the case of Lockey v. Lockey, decided by Lord Macclesfield in 1719 (Prec. in Ch. 518). That case was a case almost identical with this and in that early day the Lord Chancellor decided that the infant within six years after his coming of age, might have had his action of account at law, against the trustee, and that therefore, there was no necessity for his coming into his court for the accounting. The true question therefore is: **Not whether the trustee be an executor, or an administrator, or a guardian, the trustee of an express trust, or of an implied or constructive trust, but whether the condition of the trust is so express and direct and continuing as to be solely a creature of equity, and not at all cognizable at law.** During the minority of the ward the guardian is such a trustee. During the time of settlement, executors and administrators, within the year after the death of the testator or decedent, are such trustees. The

trustee of an express trust is such a trustee unless he hold the body of the trust adversely to the cestui que trust, or has openly repudiated the trust or the title to the trust property has become vested in the cestui que trust. The right of the trustee must not only be, as stated by Lord Redesdale in Hovenden v. Lord Annesley, 2 Sch. & Lef. 633, in such a position that the possession of the trustee is the possession of the cestui que trust, and so that the trustee's possession is according to his title, but the trustee must be in a position so fortified against his cestui que trust that the cestui que trust cannot obtain the title to the trust property. When the title to or the right of possession of the trust property vests in the cestui que trust, such a right of action arises in the cestui que trust, as puts the statute of limitations in play. When an executor has accounted and settled with the court after the year for settlement has expired, and sufficient money is in his hands to pay any particular legacy, the executor is in the position stated by Justice Depue in Hardenburg v. Blair, 3 Stew. 643, at page 666, as he has no duty to perform in relation to the legacy but to pay it over and no discretion as to time of payment. The trust under which Mrs. Markley held the property of Mary Markley her ward, up to the time of the majority of the ward, was a direct, continuing trust which the ward could not have disturbed, (except for breach of trust), and this might have continued to be a direct and continuing trust if as in Pyatt v. Pyatt, the parties had chosen to make it so. But when by arrangement of the parties, Mrs. Markley's indebtedness to her daughter on the day of her ward's majority was ascertained and settled by them

and became a sum certain as stated in the complainant's bill, that trust was no longer a direct, continuing trust, but a passive dry trust, and Mary Markley could have had her action of account at law as effectually as she could then have had her action of account in the Court of Chancery, because Mrs. Markley had no duty to perform except to pay over the $9,932.05, to her former ward and no discretion as to the time of payment. She was in the same position, which having been slept upon for over six years, was regarded as fatal to the complainant by Lord Macclesfield in Lockey v. Lockey, and by Vice Chancellor McCoun in Bertine v. Varian.

16. In the following cases the bar of the Statute prevailed against a suit for a legacy, although the law court subsequently acquired the concurrent remedy which barred recovery:

Smith v. Remington, 42 Barb. 75.
American Soc. v. Hebard, 51 Barb. 552.
Butler v. Johnson, 111 N. Y. 404.
DeGroff v. Terpenny, 14 Hun. 301.
Loder v. Hatfield, 4 Hun. 36.
Pratt v. Northam, 5 Mason, 95.
Phares v. Walker, 6 Iowa, 106.
Nelasko v. Lurty, 13 La. Ann. 100.
Roberts v. Roberts, 34 Miss. 322.
See also Kane v. Bloodgood, 7 Johns. Ch., 90, 127, quoted in Hedges v. Norris 5 Stew. 197.
See also Saxon v. Barksdale, 4 Desauss. 522.
Templeton v. Thompkins, 45 Miss. 424.
Wallace v. Cowell, 3 Iredell, 323.
Dugan v. Gittings, 3 Gill, 138.
Young v. Mackall, 3 Md. Ch. 398.

In the case of McCarter v. Campbell, in 1 Barb. Ch. 455, 465, a suit for a distributive share in equity was barred, Walworth, Chancellor, holding (1846) that it was a case of a constructive Trust.

On final settlement by an administrator or an executor the Statute of Limitations commences to run in his favor against claims of legatees and distributees.

Wilmerding v. Russ, 33 Conn. 67.
Buckmaster v. Reed, 7 Houst. (Del.) 207; 30 Atl. 971.
Jacobs v. Pou, 18 Ga. 346.
Walker v. Wootten, 18 Ga. 119.
Young v. Cook, 30 Miss. 320.
Peebles v. Acker, 70 Miss. 356; 12 South Rep. 248.
State v. Blackwell, 20 Mo. 97; and see State v. Shires 39 Mo. App. 560.
Wood v. Ricker, 1 Paige, 616.
In re VanDyke, 5 Dem. Sur, 331.
Wilkerson v. Dunn, 52 N. C. 125.
Lease v. Downy, 5 Ohio Cir. Ct. 480; 3 Ohio Cir. Dec. 235.
Buchanan v. Buchanan, 4 Strobh. 63.
Hugh v. Brown, (Tenn. Sup. Ct.) 8 L. R. A. 480.
Tinnen v. Mebane, 10 Tex. 246; 69 Am. Dec. 205.

17. The foregoing argument relates to the doctrine of concurrent remedy as applied to the period between January 13, 1883, when Mary Markley

reached her majority and December 25, 1885, when she died, and the contention is, that it has been established, that her remedy commenced to run from the time of her majority. This sustains Appeal No. 1.

II.

WANT OF EQUITY.

1. Still applying the argument to the period of Mary Markley's lifetime, and also extending it to the subsequent period, attention is called to the fact that in the action of assumpsit, the count in the declaration for "account stated," reads as follows:— "And for $9,932.05, for money found to be due from the said defendant, (Mrs. Markley) to the said plaintiff, (Mary Markley) on an account stated between them." A fuller statement of the count of "account stated" is contained in 1 Chit. on Pl. 342. See also, 2 Chit. on Pl. 90. It alleges that the defendant on a named day, month and year, accounted with the plaintiff of and concerning divers sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that upon such accounting the defendant was then found to be in arrear to the plaintiff in a named sum, and that being so found in arrear and indebted, the defendant in consideration thereof then promised the plaintiff to pay him the same on request.'

"The present rule is, that if a fixed and certain "sum is admitted to be due to plaintiff for which an "action would lie, that will be evidence to support "a count upon an "account stated."

1 Chit. on Pl. 358, citing. 456, 464
Porter v. Cooper 4 Tyr. ~~264, 265~~, per Barons Parke and Alderson.
Eaton on Equity, p. 520, Sec. 255, ~~Note 1.~~

"But an account stated is not proper to recover a "single sum under an express contract, but lies only "where an account has been stated with reference to "former transactions." 1 Chit. Pl. 358, notes (g) "and (3). And there it will lie in favor of one partner "against another, 1 Chit. on Pl. 39, Notes (h), (1)."

Mr. Justice Reed in deciding Weigel v. Hartman Steel Co., 22 Vr. 446, at page 452, in going over the law of "account stated," says: "So it appears that an assent to the balance of the sum total of the account need not be expressed by any formal undertaking, but, from acquiescence in the claim, it may be inferred that the account is correct, and that the sum total is due." Mr. Justice Reed also quotes with approval the remark of Justice Elmer in delivering the opinion of the Court of Errors in Brown v. VanDyke, 55 Am. Dec. 255; 4 Hals. Ch. 795, 801, viz: "Between merchants at home an account which has been presented and no objection made thereto after the lapse of several posts, is treated, under ordinary circumstances, as being by acquiescence, a stated account."

In Hudson v. Trenton Locomotive Co., I. C. E. Gr., 475, it was held "that upon a bill for account, the only material evidence upon the original hearing is that which conduces to prove the complainant's right to account. The ordinary decree is that an

account shall be taken. Evidence as to the particular items of the account is irrelevant at this stage of the cause."

The judgment at law or decree in Chancery against the defendant in the action of account, is **quod computet**, and is interlocutory. The sum due is ascertained in each case at law or in equity by a subsequent proceeding in the cause. In this case there is no object, and there never was any object in an interlocutory judgment or decree that the defendants or their testatrix account. The purpose of that interlocutory judgment or decree had been ascertained as shown by the allegation in Paragraph 13, of the bill of complaint, that a sum certain, $9,932.05 was due when the ward arrived at full age, and for the purposes of this appeal, the defendant appellants admit it and are obliged to admit it. It appearing by Paragraph 15 of the bill that nothing whatever was ever afterwards paid on account of that sum certain of $9,932.05, and that Mrs. Markley held adversely to her daughter from her daughter's majority, all that remained to be done was, that the complainant or his decedent sue at law within six years from the decedent's majority.

On this branch of the case, the contention of the appellants is, that the complainant's claim is for a legal demand, sought to be enforced in a Court of Equity, and that therefore he has no standing in our Court of Chancery. He has no occasion to bring his action of account. He, or his decedent, could have sued at law in assumpsit, and recovered on the count of "account stated."

I. A.

THE STATUTE OF LIMITATIONS CONTINUED.

1. The learned Vice Chancellor in his conclusions concedes that, "If the statute began to run at the death of the ward, notwithstanding that no administrator was appointed, then this suit is barred." P. C. 97-8. Admitting for the purposes of this branch of the argument that the Statute of Limitations did not commence to run during the lifetime of the ward, we contend that even in such case the Statute of Limitations did begin to run at the death of the ex-ward. There was no "direct, subsisting and continuing trust" in favor of the surviving husband of the ex-ward, after her death. The former guardian was only an implied trustee to him, if a trustee at all. Even if he were entitled to an action of account against Mrs. Markley, which we do not admit, the action was concurrent at law and in equity beyond question and must have been brought within six years. His rights as surviving husband were paramount to his rights as administrator of his deceased wife. The married womens' property act did not change this status. He was entitled "as to person-"al chattels and cash by marital right and as to "choses in action on taking out administration to "her estate to retain her undisposed of personal es-"tate to the exclusion of her next of kin," 2 Lewin on Trusts, 752. Another duty of his, requiring him to take out letters of administration was, to the creditors, if any, of his deceased wife, and having delayed over twenty years in becoming administrator of his deceased wife, his rights are now based

solely on his rights of survivorship in his wife's estate. Manly v. Kidd, 33 Miss. 141.

If there were any laches in taking out letters, those laches were his own. He could as well have taken out the letters in December 1885, as in March 1906. His excuse for not suing is answered first, because there was a person to be sued, and second, he is in no better plight for not suing than a non-resident who claims that the statute should not run against him because of his absence in another state. He could as well have sued in December, 1885, as in June, 1906. Obtaining letters was a mere formal step in the process of bringing suit.

2. The taking out of letters of administration is a proceeding which is subject to be barred by analogy to the Statute of Limitations.

Allen v. Froman, 96 Ky. 313: 28 S. W. 497, was a case in which the testator died in 1868, and his will was offered for probate in 1890, a lapse of twenty years. The Court in refusing probate, under a statute limiting proceedings generally, made this observation: "We can see no reason why a period of time should not be fixed for probating wills, as well as instituting or commencing any other action or proceeding for relief." The proceeding of granting letters of administration to a surviving husband on his wife's estate over twenty years after her death, should be barred by the Statute of Limitations, or rendered nugatory by analogy thereto as even actions affecting the title of land are barred after twenty years of adverse possession.

3. If a creditor die to whom his debtor owes a promissory note due after the creditor's death, and if the administrator of the creditor delay taking out letters for over twenty years, such an administrator can then sue on that note, without the bar of the statute being successfully raised against him, that is, if this complainant can claim immunity from the operation of the statute in the way he seeks. It is difficult to see how debtors, whom the Statute of Limitations is supposed to protect, are thus protected by it.

4. The complainant is not within the exceptions contained in Section 4, of "An Act for the Limitation of Actions," 2 Gen. Stat. 1975, paragraph 11. The complainant is a person who was entitled to an action of assumpsit on "account stated," or to an action of account mentioned in Section 1, of this Act, immediately after the death of Mary Markley Stevenson. His failure to take out letters does not relieve him from the operation of the Statute.

11 A.

WANT OF EQUITY CONTINUED

1. This claim was proved and is now being proceeded on under Sections 72, 73 and 74 of the Orphan's Court Act of 1898 (P. L. 1898 pp. 740-741). It is a case where an alleged creditor who has neglected to file his claim with an executor within the time prescribed in the Act may present such claim to such executor, under oath, at any time, before the surplus shall have been distributed and paid

ADDENDA.

To be inserted on page 30, above II. A. and to follow Paragraph 4.

5. The section of the Statute mentioned in the preceding paragraph is as follows:-

"Sec. 4. That if any person or persons who is are, or shall be entitled to any of the actions specified in the three preceding sections of this act, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, or insane, that then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited after his, her, or their coming to or being of full age, or of sane memory, as by other person or persons having no such impediment might be done."

6. "An express trust must be in writing. A re- "sulting trust is a trust which is raised or created "by the act or construction of law. A trust created "by the act of the parties is an express trust." Per Chancellor Williamson, in Baldwin v. Campfield, 4 Hals. Ch. 491, at page 492, as quoted in Lovett v. Taylor, 9 Dick. 311, at page 318.

In the case of an express trust even, "Although "a right of action by the cestui que trust against "the trustee will not be barred while the trust re- "lation continues, yet if that relation ceases to exist "by reason of some default on the part of the "trustee, or by his open repudiation of the trust,

"or by the title of the trust property becoming vested "in the cestui que trust, or by reason of any other "cause which terminates the trust, and the fact that "the trust is at an end is known to the cestui que "trust, then the possession of the trustee becomes "adverse, and right of action springs up in favor "of the cestui que trust, and the statute of limitations "accordingly commences to run." Note to Felkner v. Dooly, 28 Utah, 236, reported in 3 Am. & Eng. Ann.Cas. pp. 199, 200, and cases cited.

We claim that the title to and the right of possession of the money held by Mrs. Markley at her daughter's majority vested on her daughter's death in her husband, and that his right of action accrued at that time. See supra, page 28. See also Kane v. Bloodgood, 7 Johns. Ch. 115, where Chancellor Kent discussing Lawley v. Lawley, says, "That "the estate in law was in the trustees * * * must be "understood to mean that the plaintiff in the bill "had not the legal title and could not have main- "tained an action at law." See also Kane v. Bloodgood, 7 Johns. Ch. at page 123, where it is stated that if the trust subsisted so that the trustee could recover as having the legal estate, it would follow that the right of the cestui que trust as against the trustee could not be barred.

"But supposing the trustee was to deny the right "of his cestui que trust and assume absolute owner- "ship, is there any case in equity that would allow ',the latter his remedy beyond the period limited "for the recovery of legal estates at law?"

Long v. Carson, 4 Rich. Eq. (S. C.)· 60, was the case of a claim against a former guardian for in-

terest where a new guardian had been appointed and received all the estate except interest. The claim was held to be barred by the statute of limitations. Roberts v. Leslie 8 Rich. Eq., 35, was a similar case and the Court held the title being in the cestui que trust, suit at law could be brought and the statute would apply.

INTRODUCTORY.

The Court may always, at its discretion, permit a defendant to withdraw his answer so that a demurrer may be filed.

16 Cyc 314, 315.
Saunders v. Savage, 63 S. W. (Tenn) 218, 223.
Weissiger v. Richmond Co., 20 S. E. (Va.) 361, 362.
6 Encyc. Pl. and Pr. 424, and cases cited.

In Porch v. Fries, 3 C. E. Gr., 204, 20
decided by Chancellor Zabriskie in 1867, Mar
Porch, the deceased ward, had married Samuel
Fries, one of the defendants, when she was
teen years old and she died a few weeks unde
twenty one. The Chancellor said, "Martha P
"at her marriage, had a guardian of her pers
"and property, appointed by the Orphans' Cou
"his, (the guardian's) power ceased by her
"riage, it being incompatible with the right
"of her husband."

over and upon such claim being so presented, it shall be the duty of the executor either to pay the same, in case he is satisfied it is correct and ought to be paid, or if he be not satisfied of the correctness of the claim he must notify the alleged creditor, (as was done in this case) to proceed forthwith to establish his claim by the judgment of some court of competent jurisdiction, and in such case the executor shall not make any distribution or payment of the surplus to or among the devisees of the deceased, without retaining in his hands a sum sufficient to pay the amount of such claim so presented by such alleged creditor, with interest and costs in case it should be established by the judgment of the court, until the alleged creditor shall have an opportunity to establish the validity of his claim by the judgment of some competent court.

2. As a matter of fact, the surplus for the distribution, in the hands of the defendant executors in this case, under the will of Mrs. Markley is about $45,000. instead of the much larger amount mentioned in the bill,$77,774.79. The proceedings of the complainant requiring the executors to retain in in their hands a sum sufficient to pay the amount of the claim, ($44,932.05) practically covers the entire surplus for distribution, and restrains and enjoins, without an order of the Court to that effect, the distribution of the whole estate. The complainant instead of taking out his letters and filing his claim within the time for the proof of claims so that the litigation might proceed while the estate was being settled, by his delay is guilty of the inequity of tying up the whole estate since April 27, 1906. P.

C. 8, lines 33-34.

111.

LACHES.

1. "It is certainly true," said Sir. W. Grant, "that no time bars a direct trust; but if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but, where the true state of the fact is easily ascertained and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who, after long asquiescence, comes into a Court of Equity to seek relief."

The above is quoted from Beckford v. Wade, 17 Ves. 97, in 3 Lewin on Trusts, pp. 863, 864.

See Condit v. Bigalow, 19 Dick. 504.
Lutjen v. Lutjen, 19 Dick. 773.

2. The following is quoted from Calhoun v. Millard, 121 N. Y. 81. The principle is stated with great force and clearness by Lord Camden in Smith v. Clay (2 Ambl. 645): "Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. When these are wanting

the Court is passive and does nothing. Laches and neglect are discountenanced and therefore, from the beginning of this Court, there was always a Limitation to suits in this Court."

3. It will thus be seen what wise, able and experienced jurists in the sworn discharge of duty have adjudged respecting laches such as appear in this case. Such neglect is vile and unconscionable inequity and iniquity. It is so unconscionable and iniquitous as to be totally inconsistent with the existence of an actual valid **bona fide** reasonable claim, with which the complainant dared to face Mrs. Markley in her life time.

IV..

EXCUSES FOR LACHES.

1. The complainant's excuses for laches contained in paragraph (14B) of his bill, P. C. page 63, contain the following incongruities:

(a) Paragraphs 13 and 15 of the bill, P. C. pages, 9 and 10, make a claim against Mrs. Markley as guardian of Mary Markley her ward. The excuses make mention of Mrs. Markley as Trustee but no mention of Mrs. Markley as guardian or Mary Markley as ward.

(b) The bill makes a claim for a certain fixed sum of money due at Mary Markley's majority. The excuses appertain to complainant's "wife's share of her father's estate."

(c) In the bill the right of the complainant to sue is sought to be postponed until his letters were issued and he became administrator. In the excuses, he is in no wise deterred from dealing in relation to "his wife's share of her father's estate," before the issue of his letters.

(d) The expression in the excuses, "And in order to enable said Mary J. Markley to have the use "of the investments which she then held in trust," P. C. page 63, line 32-34, means nothing as defendants contend. If it means anything, it means that complainant gave Mrs. Markley the use of the $9,932.05, so that the indebtedness of Mrs. Markley remained at that sum, instead of being increased to to $44,932.05, as stated in Paragraph 13 of the bill, P. C. page 9.

(e) The inconsequent statement, P. C. 64, lines 13-30, if it mean anything, which we deny, would seem to give some warrant to the claim remaining at $9, 932.05.

(f) The excuses pretend to appertain to an arrangement or agreement for an accounting with the complainant, which Mrs. Markley was to make at her death by her last will, while the bill, Paragraph 13, states that a sum certain was due from Mrs. Markley, January 13, 1883, when Mary Markley arrived at twenty-one years, and this arrangement was entered into in December 1885, immediately after the death of complainant's wife, less than three years thereafter, P. C. 63.

(g) The statement in the excuses, P. C. page 64, lines 9-13, "That the children of the said Mary "J. Markley made an agreement or family arrange- "ment with the said Mary J. Markley whereby she "was to have and to hold all the proceeds of her "husband's estate until her death," relates to that portion of the bill comprised in Paragraph 7, where it appears that Mrs. Markley conveyed that property away to her children and grandson, Markley Stevenson, the son of the complainant, none of whom are parties in this case. This arrangement, if made, would exclude the complainant from any interest in Mrs. Markley's real estate as property disposed of by his wife before her death or marriage,

2. The bill has two main aspects:

(a) One, relating to Mrs. Markley's liability to her ward, Mary Markley and to the surviving husband and administrator of her deceased ward, Mary Markley Stevenson. . .Paragraphs 13 and 15, also paragraphs 11, 12 and 14, especially relate to this first aspect of the bill. . .To these paragraphs, the prayer of the bill for an accounting and the allegations of the excuses in Paragraph 14B as already demonstrated, are not apposite.

(b) The other portions of the bill appertain to the real estate and the proceeds of the sale of the real estate of which Albert W. Markley died seized. These portions of the bill, are paragraphs 4, 5, 6 and 7, which we asked to have struck out, to which the accounting prayed for can only relate, and to which Paragraph 14A already struck out relates, and to

which the accounting in Paragraph 14B, must also relate.

3. The only claim upon which the complainant can proceed against these executors is the claim served upon them April 27, 1906, as stated in Paragraph 13 of the bill, P. C. page 9. All other portions of the bill, including Paragraphs 4, 5, 6, 7 and Paragraphs 14A already struck out and 14B, relate to the real estate of which Albert W. Markley died seized and the proceeds of sale of that real estate disposed of by the complainant's wife as far as the complainant is concerned. That is to say, the complainant makes a claim against the estate of Mrs. Markley, alleging Mrs. Markley to be the guardian of his deceased wife, and he excuses his laches for not presenting that claim by alleging an arrangement which he had with Mrs. Markley, appertaining to the real estate and the proceeds of the sale of the real estate of which Albert W. Markley, the deceased husband of Mrs. Markley died seized. He makes a claim of one character and he excuses laches for not presenting the claim by alleging an arrangement of a totally different character relating to a totally different matter. The claim he makes on the real estate, we shall undertake to show in the next paragraph, is a claim which could not exist either in favor of himself or Mrs. Markley's children, by anything that is alleged in the bill.

4. The statements of the bill in relation to the real estate of which Albert W. Markley died seized, allege a Master's sale of the real estate of Albert W. Markley on partition, and conveyance to Mrs.

Markley of 420 Cooper Street by a Master's deed to her use, and in connection with recitals in Mrs. Markley's deed mentioned in Paragraph 7 of the bill, and in Mrs. Markley's last will, demonstrate an ownership of the real estate of which Albert W. Markley died seized, in Mrs. Markley in fee to her own use, especially the portion of it known as 420 Cooper Street and 521 Linden Street, Camden. On Lovett v. Taylor, 9 Dick, 311, this Camden property belonged absolutely to Mrs. Markley.

CONCLUSION.

The portion of this argument under headings prior to III and IV, are designed to support Appeal No. 1. They also support Appeal No. 2. The portions of the argument under headings III, and IV, relating to laches and excuses for laches, appertain exclusively to Appeal No. 2.

We confidently ask, that both of these Appeals be sustained.

Respectfully submitted,

HERBERT A. DRAKE,

of Counsel with Appellants and Defendants.

DATED, November Term, 1907.

New Jersey Court of Appeals.

Between
RICHARD G. STEVENSON
(Respondent)
Complt.

and

PAUL H. MARKLEY, M. D. and CAMDEN SAFE DEPOSIT and TRUST CO., Executors of Mrs. Mary Josephine Markley dec'd, (Appellant)
Deft's.

Bill for Account

Appeals No. 1 and No. 2.

STATE OF THE CASE

For Defts and Appellants
HERBERT A. DRAKE
HOWARD M. COOPER.

For Complt. and Respondent,
FRANCIS D. WEAVER.

INDEX.

IN CHANCERY OF NEW JERSEY

Between
RICHARD G. STEVENSON,
Administrator of Mary Markley Stevenson, deceased,
Complainant.
and
PAUL H. MARKLEY and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of Mary Josephine Markley, deceased,
Defendants.

On Bill for Account.

BILL OF COMPLAINT
Filed June 23, 1906.

To His Honor. William J. Magie, Chancellor of the State of New Jersey:

Complaining, shows unto your Honor, your orator, Richard G. Stevenson, administrator of the estate of Mary Markley Stevenson, deceased, of Mount Ephraim, in the County of Camden and State of New Jersey.

(1) That on or about the twenty-third day of September, in the year one thousand eight hundred and seventy-five, one Albert W. Markley, then of the City and County of Camden, and State of New Jersey, died intestate seized of real and personal property, and leaving surviving him, his widow,

Mary Josephine Markley and six children and heirs-at-law, to wit, Hamilton Markley, Virginia Markley, Richard C. Markley, Thaddeus W. Markley, Mary Markley and Anna Markley.

(2) That Charles P. Stratton and the said Hamilton Markley both late of the City and County of Camden and State of New Jersey, were duly appointed by the Surrogate of the County of Camden, on or about the sixth day of October, one thousand eight hundred and seventy-five, administrators of the estate of the said Albert W. Markley, deceased, and that on or about the sixth day of October, one thousand eight hundred and seventy-six, the account of the said Charles P. Stratton and Hamilton Markley, administrators as aforesaid, was allowed and passed by the Orphan's Court in and for the County of Camden, and that the said account showed a balance after payment of debts of decedent, and expenses of said estate for distribution to his widow and next of kin of thirty-six thousand seven hundred and eighty-four dollars and twenty-four cents ($36,784.24).

(3) That the balance of the said estate of Albert W. Markley, deceased, was distributed by virtue of an order of distribution of the Orphan's Court of said County, as follows: To Mary Josephine Markley, widow,twelve thousand two hundred and sixty-one dollars and forty-one cents; to Hamilton Markley, son, four thousand no hundred and eighty-seven dollars and thirteen cents ($4,087.13); to Mary Josephine Markley, guardian of her said children, Virginia, Richard, Thaddeus, Mary and Anna, five

in number, twenty thousand four hundred and thirty-five dollars and seventy cents ($20,435.70), or a total of thirty-six thousand seven hundred and thirty-four dollars and twenty-four cents ($36,734 24), distributed in accordance with said decree, and that releases were given accordingly, and the same are recorded in the office of the Surrogate of the County of Camden, in Book "B" of Releases, on page 150, 151 and 152, respectively.

(4.) That said Albert W. Markley was lawfully seized at the time of his death, of all that land and real estate known as No. 420 Cooper Street, situate on the South side of Cooper Street, in the said City and County of Camden, one hundred and sixty (160) feet East of Fourth Street, and extending thence Eastward a front or width of seventy-eight (78) feet and Southward of that width a depth of one hundred and eighty (180) feet; and also of all that tract of land, situate in the Township of Shamong, in the County of Burlington and State of New Jersey, containing about ninety-seven (97) acres, which was conveyed to the said Albert W. Markley, by Frank Earl by deed dated September 12, A. D., 1874, and recorded in the Clerk's Office of the said County of Burlington in Book "D-7" of Deeds, page 316, &c., and being so seized thereof, departed this life on or about the twenty-third day of September, one thousand eight hundred and seventy-five, as aforesaid, leaving him surviving his said widow and six children above named, as his only heirs-at-law.

5. That on or about the twentieth day of December, one thousand eight hundred and seventy-five

the said Hamilton Markley filed his bill of complaint in this Court against the said Mary Josephine Markley, widow as aforesaid, and against the said Virginia Markley, Richard C. Markley, Thaddeus W. Markley, Mary Markley and Anna Markley, in order to obtain a partition of the said lands hereinabove mentioned, to and among the parties aforesaid,and proceedings having taken place thereupon, this Court decreed that the said lands be sold by Alden C. Scovel, one of the Special Masters of this Court, and the same were sold and conveyed as follows:

The said tract of land of ninety-seven acres situate in said Township of Shamong was sold and conveyed by said Alden C. Scovel, to Maurice Raleigh, by deed dated July 29, A. D., 1876, and recorded in the said Clerk's Office of Burlington County in Book "I-9" of Deeds, pages 639, &c., at a consideration therein mentioned of Seven Hundred Dollars; and the part of said Number 420 Cooper Street, on the South side of Cooper Street, one hundred and sixty feet East of Fourth Street and extending thence, Eastward fifty-eight feet by a depth of one hundred and eighty feet, was sold and conveyed by the said Alden C. Scovel, Special Master, to the said Mary Josephine Markley, by deed dated July 29, A. D. 1876, and recorded in the Office of the Register of Deeds of Camden County, in Book 84 of Deeds, page 572, &c., at a consideration therein mentioned of three thousand dollars; and the remaining portion of said Number 420 Cooper Street, being the portion thereof, situate on the South side of Cooper Street, eighty feet west of Fifth Street, and

extending thence, Eastward a front or width of twenty feet by a depth of one hundred and eighty feet was sold and conveyed to the said Mary Josephine Markley, by said Special Master, by deed dated December 1st, A. D., 1877, and recorded in said Register's Office of Camden County in Book 116 of Deeds, pages 188, &c., at a consideration therein mentioned of twenty-five dollars.

(6.)That the said Mary Josephine Markley continued to hold the said real estate No. 420 Cooper Street, Camden, up to or about the month of May, in the year eighteen hundred and ninety-six, whereupon Mary Josephine Markley, by deed dated May 1st, A. D. 1896, and rceorded in the Office of the Register of Deeds of Camden County in Book 213 of Deeds, page 415, &c., at a consideration therein mentioned of twenty-two thousand five hundred dollars, granted and conveyed said house and lot No. 420 Cooper Street, containing a front of seventy-eight feet on the South side of Cooper Street, by a depth of one hundred and eighty feet, to one George A. Munger, as by reference to the said deed will appear; that the said consideration was paid to Mary Josephine Markley by the conveyancer to her of the house and lot numbered and known as No. 521 Linden Street in said City and County of Camden, by deed dated May 1st, A. D., 1896, and recorded in the said Register's Office in Book 214 of Deeds, page 332, &c., at a consideration therein mentioned of ten thousand dollars, and that the rest of said consideration was paid to Mary Josephine Markley in money, so that on or about the first day of May, one thousand eight hundred and ninety-six, Mary Josephine

Markley had realized for the real estate of which her husband died seized of, the following cash or property, that is to say, the sum of seven hundred dollars from the tract of land in Shamong Township, the property known as No. 521 Linden Street, Camden, New Jersey, representing a value of ten thousand dollars, and cash amounting to twelve thousand five hundred dollars, the balance of the purchase price of No. 420 Cooper Street, Camden, New Jersey, making the total value of cash received by her twenty-three thousand, two hundred dollars, for the real estate of which her heusband died seized of.

(7.) That on or about the twenty-sixth day of May, A. D. one thousand nine hundred and three, the said Mary Josephine Markley declared a trust, and made the Camden Safe Deposit & Trust Company, the trustee therein, and placed in trust No. 521 Linden Street, and personal property in addition thereto, to the value of thirteen thousand two hundred dollars, making altogether the aforesaid sum of twenty-three thousand, two hundred dollars upon trust that the said Mary Josephine Markley should enjoy the income thereof, and during her life, and upon her death, that the same should go to her four surviving children, Virginia, Anna, Richard and Thaddeus, and her grandchild Markley Stevenson, one-fith to each, the shares however, of the said Markley Stevenson and Thaddeus to remain in trust; that said trust was executed and the deed creating the same was dated the twenty-sixth day of May, one thousand nine hundred and three, and of record in the Register of Deeds Office of Camden

County in Deed Book 276, pages 330, &c.

(8.) That the said Mary Markley came of age on or about the thirteenth day of January, in the year one thousand eight hundred and eighty-three, and that on or about the twenty-sixth day of March, one thousand eight hundred and eighty-five, the said Mary Markley intermarried with your orator, Richard G. Stevenson, and that she lived with your orator from on or about the twenty-sixth day of March, on thousand eight hundred and eighty-five, at his home, in the City of Camden, until on or about the twenty-fifth day of December, one thousand eight hundred and eighty-five, when she died intestate leaving surviving her, her husband, your orator, and Markley Stevenson, her only son and heir-at-law.

9.) That on or about the first day of December, in the year nineteen hundred, the said Mary Josephine Markley, made and published her last will and testament in writing in due form of law; and on or about the twenty-eighth day of April in the year nineteen hundred and two, the said Mary Josephine Markley made and published a codicil to her said last will and testament, in writing, in due form of law, that on or about the twenty-sixth day of June in the year nineteen hundred and three, the said Mary Josephine Markley made a second codicil to her last will and testament, and the several codicils thereto after the death of the said Mary Josephine Markley, which occured on or about the twenty-sixth day of February, one thousand nine hundred and five, were on or about the sixth day of March in

the year nineteen hundred and five, duly proved before the Surrogate of the County of Camden, and have since been recorded in his office in Book "CC of wills, pages 217, &c., and that on or about the tenth day of March, nineteen hundred and five, letters testimentary were issued by the Surrogate of the County of Camden under the said will and the several codicils thereto, to Paul H. Markley, and the Camden Safe Deposit & Trust Company, the executors therein named, and thereupon the said Paul H. Markley, and the Camden Safe Deposit and Trust Company took upon themselves the burthen of the execution thereof.

(10.) That in and by said will and testament and the several codicils thereto, the said decedent devised and bequeathed the corpus of her estate to her son Richard C. Markley, and Thaddeus W. Markley and to her daughters Virginia M. Stockton and Anna M. Schellinger, and to her grand-son Markley Stevenson, and to her grand-daughter Naomo Markley, daughter of her son Thaddeus, in addition to the shares in and of her estate already assigned and conveyed to them by the said deed of trust, dated May twenty-sixth, nineteen hundred and three.

(11.)) That the said executors of Mary Josephine Markley, deceased, have filed their account relating to the said decedent's estate, and the same was duly passed by the Orphan's Court of the County of Camden, on or about the twenty-seventh day of April, nineteen hundred and six, whereupon it appeared that there remained in the hands of the executors for distribution the sum of seventy-seven thousand,

seven hundred and seventy-four dollars and seventy-nine cents.

(12.) That on or about the first day of March, one thousand nine hundred and six, the administration of the goods, and chattels, rights and credits, which were of Mary Markley Stevenson, late of the County of Camden, who died intestate, were granted to your orator, Richard G. Stevenson, and your orator is duly authorized to administer the same agreeably to law.

(13.) That on or about the twenty-seventh day of April, nineteen hundred and six, after the accounts of the said Mary Josephine Markley had been passed and settled by the Orphans' Court of the County of Camden, your orator according to the statute in such case made and provided, caused to be served upon Paul H. Markley and the Camden Safe Deposit & Trust Company, executors as aforesaid, in duplicate a claim of himself as administrator of Mary Markley Stevenson, deceased, and notified the said executors that the amount of said claim was forty-four thousand nine hundred and thirty-two dollars and five cents due to the said Mary Markley Stevenson, as the ward of the said Mary Josephine Markley, and for the amount due from the said Mary Josephine Markley, her guardian, upon her attaining her majority on the thirteenth day of January eighteen hundred and eighty-three was the sum of nine thousand nine hundred and thirty-two dollars and five cents; and that the accumulations thereon due to increase in value of the investments, accumulation of interest, &c., amount at the present

time to the further sum of thirty-five thousand dollars, to which was annexed an affidavit of your orator giving the particulars of his said claim.

(14.) That on or about the twenty-ninth day of May, nineteen hundred and six, the said Paul H. Markley and Camden Safe Deposit & Trust Company caused to be served on your orator, as administrator of the estate of Mary Markley Stevenson, deceased, a notice that he forthwith proceed to establish his claim by the judgment of some Court of competent jurisdiction, for the reason that they, the said executors, were not satisfied of the correctness of the said claim presented to them by your orator, since the settlement of the said decedent's estate.

(15.) And your orator further shows that neither the said Mary Josephine Markley in her life-time, nor the said defendants since her decease, have paid to your orator the sum, or sums of money which the said Mary Josephine Markley held in trust as the guardian of the said Mary M. Stevenson, and that no settlement was ever made with the said Mary M. Stevenson, nee Markley, during her life-time by her guardian, and that the whole of the said sum held by the said Mary Josephine Markley for her ward, the said Mary M. Stevenson, is now due and owing to your orator according to law, and that the said estate of the said Mary M. Stevenson, while in the hands of her guardian largely increased in value, due to profitable investments and the said Mary Josephine Markley has attempted to dispose of all the estate of the said Mary M. Stevenson without settling the same upon your orator, as she is lawfully bound to do.

In consideration whereof, and forasmuch as your orator is without adequate remedy in the premises, at and by the strict rules of the common law, and can only obtain relief in this honorable court, where matters of this nature are properly cognizable and relievable.

To the end, therefore, that the said defendants, Paul H. Markley and the Camden Safe Deposit and Trust Company, executors aforesaid, may, without oath to the best and utmost of their respective knowledge, remembrance, information and belief, full true and perfect answer make to all and singular the matters aforsaid, and that as fully and particularly as if the same were here repeated, and they and every of them distinctly interrogated thereto; and that the said Paul H. Markley and the Camden Safe Deposit and Trust Company, executors as aforesaid, may be required to state an account of the amount due by the said Mary Josephine Markley to her ward, the said Mary M. Stevenson, and that they may be required to take an account of all dealings and transactions between the said guardian, Mary Josephine Markley and her ward, the said Mary M. Stevenson, and that they may be required to account to your orator for all sums which may be due or found to be due from the said Mary Josephine Markley to Mary Markley Stevenson, your orator's intestate, and that this honorable court may make a decree for the payment to your orator, administrator as aforesaid, of such sum as shall be found to be due to your orator's intestate as aforesaid; and that your orator may have such other or further relief in the premises as the case shall require, or as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator the state's writ of subpoena, issuing out of and under the seal of this honorable court, to be directed to the said Paul H. Markley and the Camden Safe Deposit & Trust Company, commanding them, and each of them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this honorable court, then and there to answer all and singular the said premises, and to stand to, abide by, and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience And your orator, as in duty bound, will ever pray, &c.

FRANCIS D. WEAVER,

Solicitor for and of Counsel with

Complainant.

APPEARANCE OF DEFENDANTS

Entered July 2, 1906.

—o—

IN CHANCERY OF NEW JERSEY

Between
RICHARD G. STEVENSON, Administrator of Mary M. Stevenson, decd.,
Complainant.
and
PAUL H. MARKLEY and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of Mary Josephine Markley, deceased,
Defendants.

On Bill for Account.

ANSWER.
Filed July 2, 1906.

The Answer of Paul H. Markley and Camden Safe Deposit and Trust Company, Executors of the Last Will and Codicils of Mary Josephine Markley, deceased.

These Defendants, severally answering, say:

1. That Albert W. Markley mentioned in Paragraph 1, of said bill died on or about the twenty-third

of September, eighteen hundred and seventy-five intestate, leaving him surviving his widow, Mary Josephine Markley and six children, and heirs at law, namely, Hamilton Markley, Virginia Markley, Richard C. Markley, Thaddeus W. Markley, Mary Markley and Anna Markley, all of whom were under age except Hamilton Markley.

2. That Charles P. Stratton and Hamilton Markley were appointed the Administrators of the estate of Albert W. Markley, deceased, and on or about the sixth day of October in the year eighteen hundred and seventy-six, the account of the said Administrators was allowed and passed by the Orphans' Court of the County of Camden, showing a balance for distribution of Thirty-six Thousand, Seven hundred and Eighty-four Dollars and twenty-four cents, ($36,784.24).

3. That the said balance was distributed as follows:

To Mary Josephine Markley, widow,	$12,261.41
To Hamilton Markley, son,	4,087.13
To M. Josephine Markley, Guardian of Virginia, Richard, Thaddeus, Mary and Anna Markley,	20,435.70
Total,	36,784.24

making the share of Mary Markley the sum of Four Thousand and Eighty-seven Dollars and thirteen cents, ($4,087.13) as of October 6, 1876.

4. That the said Albert W. Markley died seized of real estate consisting of a tract of land situate in

the township of Shamong, in Burlington County, containing ninety-seven, (97) acres and a house and lot situate in Camden having afront of seventy-eight (78) feet on Cooper Street by a depth of One Hundred and Eighty (180) feet to Markley Street.

5. That in December in the year eighteen hundred and seventy-five, said Hamilton Markley filed his bill of complaint against his mother and brothers and sisters named in Paragraph 5, of said bill, in order to obtain a partition of the said lands, and such proceedings were had thereon that this Court decreed that said lands be sold by Alden C. Scovel, one of the Special Masters of this Court, and the same were sold as stated in Paragraph 5, of said bill, realizing as follows:

Shamong Tract,	$ 700.00
420 Cooper Street,	3,000.00
Balance of 420 Cooper Street	25.00
Total,	$3,725.00

That thereupon Mrs. Markley relinquished her dower by paper writing dated August 7th, 1876, and filed August 11, 1876: that thereupon an order of distribution was made directing that there be allowed a counsel fee of Seventy-five Dollars ($75.00) Master's fees and commissions, advertising and other expenses, and that the net proceeds of sale be distributed in six parts, one-sixth thereof, to said Mary Markley, which said order of distribution is recorded and enrolled in Book N 14 of Enrolled Decrees, pages 350 and 351, and to which for greater certainty these defendants refer; that the costs to

be deducted from the said proceeds of sale as nearly as these defendants can ascertain, including said counsel fee of Seventy-five Dollars, as there were sales and advertising fees and expenses in two counties amount to Two Hundred and Seventy-five Dollars, ($275.00), leaving a net balance for distribution of Three Thousand Four Hundred and Fifty Dollars, one sixth share or part of which going to Mary Markley, afterwards Mary Markley Stevenson, was the sum of Five Hundred and Seventy-five Dollars; that the taxed costs with other papers in the case have been taken from the files and cannot now be produced, and the enrollment of the cause concludes with the order of distribution, above recited; that the said order of distribution recites, that the said Virginia, Richard, Thaddeus, Mary and Anna Markley were then under age, and directs their share to be paid to their Guardian; that Mrs. Markley having been the purchaser, the share of the said Mary Markley was then in the possession of Mrs. Markley; that in any account to be rendered by these defendants as Executors of Mrs. Markley, Guardian for Mary Markley Stevenson, the charge side should be confined to the following charges as of October 6, 1876, namely;

Mary Markley's share of the personal estate of Albert W. Markley,	$4,087.13
Mark Markley's share of the real estate of Albert W. Markley, August 11, 1876,	575.00
Total Chargeable to Mrs. Markley,	$4,662.13

6. And these defendants further answering say; in answer to the sixth paragraph of the said bill,

that while Mrs. Markley continued to hold said 420 Cooper Street, her sale thereof on the first of May eighteen hundred and ninety-six for Twenty-two thousand Five Hundred Dollars, ($22,500.00) to one George A. Munger, is a matter of no concern to the complainant in this cause; that the total amount of the estate in which the said complainant is, or can be inerested, is the sum of Four Thousand Six Hundred and Sixty-two Dollars and thirteen cents, ($4,662.13), above stated in the preceeding paragraph of this answer; that it is not true as stated in Paragraph 6, of said bill, that on the first day of May eighteen hundred and ninety-six, Mrs. M. Josephine Markley had realized from the real estate of which her husband died seized, cash from Shamong Tract

in the sum of	$ 700.00
also 521 Linden Street representing,	10,000.00
and cash amounting to	12,500.00

making a total value of cash received from her husband's real estate by her, $23,200.00 and these defendants allege the truth to be, that said 420 Cooper Street, Camden, was, on May 1, 1896, the land of Mary Josephine Markley, and that all rights and interest therein and thereto of Mary Markley Stevenson, ceased on the completion of the said Master's Sale, in partition, and the confirmation thereof, and the order distributing the proceeds of sale; that the subsequent proceedings in said cause for which Twenty-five dollars was realized, in December Eighteen Hundred and seventy-seven,, was to correct an error and did not change results.

7. That on or about the twenty-sixth day of

May in the year nineteen hundred and three, Mrs. Markley did declare the trust mentioned in Paragraph 7, of the said bill, but that the same is no concern of the complainant, and was declared by her, not from any rights in the cestuis que trust in the said deed of trust mentioned, but at Mrs. Markley's option, in order to avoid, in extreme sickness and suffering, an illegal claim and controversy on the part of some of her children, and that the said sale of real estate and the said deed of trust having taken place more than six years after the majority of Mary Markley, in January 1883, and more than six years after her death in December, 1885, and more than six years after the distrbution of the proceeds of said partition sale, the same was a matter of no interest or concern to her, and is a matter of no interest or concern to her estate or to her administrator.

8. And these defendants further answering say: that said Mary Markley came of age on the thirteenth day of January eighteen hundred and eighty-three, and married the complainant in March eighteen hundred and eighty-five, and lived with him until the twenty-fifth of December eighteen hundred and eighty-five, when she died in premature childbirth, leaving her surviving the complainant, and Markley Stevenson, her son and only heir at law.

9. That the last Will and Codicils of Mrs. Mary Josephine Markley were made in due form of law, respectfully, on the several days mentioned in Paragraph 9, of said bill, and the same were, after her death, which occured on the twenty-fourth day of February nineteen hundred and five, duly proved

before the Surrogate of the County of Camden on the Sixth day of March nineteen hundred and five, and recorded in his office in Book CC of Wills, page 217, &c.; that on the tenth day of March nineteen hundred and five, Letters Testamentary were duly issued to these defendants, upon the said Will and Codicils, who thereupon took upon themselves the burden of the execution thereof.

10. That in and by the said Last Will and Codicils, Mrs. M. Josephine Markley, devised and bequeathed her estate as follows:

To Virginia M. Stockton,	$5,000.00
To Richard C. Markley,	5,000.00
To Thaddeus W. Markley, (in Trust,)	5,000.00
To Anna M. Schellenger,	5,000.00
To Markley Stevenson, (in Trust),	5,000.00
To Naomi Markley, daughter of Thaddeus W. Markley, (in Trust),	5,000.00
To Mrs. Sarah E. French,	100.00
Total,	$30,100.00

that the residue of her estate amounting to between Fifteen and Twenty Thousand Dollars, she gave and bequeathed to Richard C. Markley.

(11.) That these defendants have filed their account, and the same was passed by the Orphan's Court of the County of Camden on or about the twenty-seventh day of April in the year nineteen hundred and six, whereupon it erroneously appeared that there remained in the hands and possession of these defendants, for distribution Seventy seven Thousand Seven Hundred and Seventy-four Dollars and seventy-nine cents, ($77,774.79); that

since the twenty-seventh day of April nineteen hundred and six, a petition has been filed by these defendants in the Orphan's Court of the said County of Camden, showing an error in said final account by which debts of Mrs. Markley to the extent of Thirty-two Thousand Five Hundred and Twenty-eight Dollars and thirty-one cents, ($32,528.31) had been omitted by oversight from the allowance to these defendants, and an order has been made by which it appears that the true balance in the possession of these defendants now is, the sum of Forty-five Thousand Two Hundred and forty-six Dollars and forty-eight cents, ($45,246.48).

(12.) That on or about the first day of March in the year nineteen hundred and six, more than twenty years after the death of Mary Markley Stevenson, administration of her goods and chattels, rights and credits, were granted to the complainant.

(13.) That on or about the twenty-seventh day of April in the year nineteen hundred and six, after the accounts of the Executors of Mrs. M. Josephine Markley had been passed by the Orphan's Court as stated in Paragraph 11, of this answer, the complainant presented to these defendants a claim as administrator of Mary Markley Stevenson in the sum Forty-four Thousand Nine Hundred and Thirty Two Dollars and five cents, ($44,932.05); that these defendants annex hereto a copy of the said claim, and of the affidavit of the complainant accompanying the same, as Schedule No. 1, and thereto for greater certainty refer; and these defendants deny that when the said Mary Markley attained her majority on the thirteenth of January eighteen hundred

and eighty three, the sum then due to her by Mrs. Markley her Guardian was the sum of Nine Thouand Nine Hundred and Thirty two Dollars and five cents, and these defendants state the truth to be that the total indebtedness of Mrs. Markley to her daugher Mary Markley on the sixth day of October eighteen hundred and seventy six, without any allowance being made to Mrs. Markley up to that time, and charging to Mrs. Markley Five Dollars and twenty seven cents, ($5.27) interest, was as follows:

1876	August 11, Distributive share of proceeds of partition sale as aforesaid	$575.00
1876	October 6, Interest on same, to date	5.27
1876	October 6, Distributive share of estate of A. W. Markley,	4,087.13
	Total,	$4,667.40

that Mrs. Markley's indebtedness as Guardian of her daughter Mary Markley, was never larger than the said last mentioned sum of Four Thousand Six Hundred and Sixty-seven Dollars and forty cents; on the contrary thereof as these defendants allege and protest, the said indebtedness commenced to decrease, and had then suffered a decrease for allowances due to Mrs. Markley for the maintainance, education and schooling of her said daughter, and these defendants protest that Mrs. M. J. Markley while allowing interest, with yearly rests, on the said sum, and all reductions thereof, in her hands from that time until the marriage of her daughter in March 1885, should be allowed as follows:

For board of her said daughter during the whole period from October 6, 1875 to March 6, 1885, at Five Dollars, ($5.00) a week:

To clothing for the whole period, at One Hundred Dollars, ($100) a year;

To schooling, including music and languages for six years from October 6, 1875 to October 6, 1881, at One Hundred Dollars ($100) a year;

To incidentals, including physicians' bills, dentists' bills medicine and spending money, at the rate of Sixty Dollars, ($60.00) a year for the first three years and five months and at the rate of Eighty-four Dollars, ($84.00) a year for the remaining six years of said period; that these defendants have stated an account for Mrs. Markley, up to and including the sixth day of March eighteen hundred and eighty-five, the month in which the said Mary Markley was married, and they have charged to Mrs. Markley interest on the new principal each year, making yearly rests, and they find that the charge side of said account amounts to the sum of Six Thousand One Hundred and Eighty Two Dollars and sixty-six cents, ($6,182.66); and these defendants have allowed for the discharge side of said account the sum of Four Thousand Six Hundred and Ninety nine Dollars, on the basis above stated, and have also allowed the additional sum of Two Hundred and Fifty Dollars, as of March 6, 1885, as the necessary expenditure for the wedding out-fit of the said Mary Markley Stevenson, making the total allowance Four Thousand Nine Hundred and Forty Nine Dollars, and leaving a balance due

the said Mary Markley at the time of her marriage of One Thousand Two Hundred and Thirty-three Dollars and sixty-six cents, ($1,233.66); that these defendants have anneved hereto a copy of the said account, Marked Schedule No. 2, and for greater certainty refer thereto; and these defendants have also annexed hereto a copy of the said order of distribution in the said cause, in which Hamilton Markley was complainant and Mrs. M. Josephine Markley and others were defendants, made on the eleventh day of August in the year eighteen hundred and seventy-six, marked Schedule No. 3, and for greater certainty refer thereto as part hereof.

And these defendants further answering the said paragraph 13, of the said bill state and protest that Mrs. Markley ought to be allowed for the board, clothing, schooling, maintainance and incidentals of Markley Stevenson, for the period from February 24, 1887 to February 24, 1905, when Mrs. Markley died, as against the said complainant as follows, that is to say; for all that portion of the period up to and including the twenty-fourth day of June, eighteen hundred and ninety-eight at the rate of Three Hundred Dollars, ($300) a year; for the next two years, up to and including the twenty-fourth of June, 1900, being the first two years at Lawrenceville High School, at the rate of Seven Hundred Dollars, ($700) a year; for the next two years being the third and fourth years at the Lawrenceville High School, at the rate of Eight Hundred Dollars, ($800) a year; for the year ending June 24, 1903, being the year the said Markley Stevenson was out of school, the sum of Five Hundred Dollars, ($500); for the year ending June 24, 1904, being Markley Steven-

son's first year at Lafayette College, the sum of One Thousand Dollars; for the eight months ending February 24, 1905, at the rate of Eighty three Dollars and thirty-three cents, ($83.33) a month, during all of which period Mrs. Markley was at the expense of the support, and mainainance, clothing, board, schooling and incidentals of the said Markley Stevenson; and these defendants state that they have annexed hereto an account which charges to Mrs. Markley on the sixth day of March eighteen hundred and eighty five the sum of One Thousand Two Hundred and Thirty three Dollars and sixty-six cents, and with yearly rests thereon, shows that the said sum accounted for on the basis last aforesaid, becomes exhausted during the year beginning February 24, 1892, and about the middle of that year, say, in August 1892, at which time, being nearly fourteen years ago, all moneys in Mrs. Markley's hands, from the estate of her daughter Mary Markley Stevenson, had been exhausted and spent for or on behalf of Mary Markley and Markley Stevenson, wife and son of the complainant, who, said complainant, placed the said Markley Stevenson in the care and custody of Mrs, Markley, with the agreement to pay for his rearing and maintainance; that on the rates aforesaid as charged, the first deficit as of the twenty-fourth of February, 1893, is the sum of One Hundred and Forty-seven Dollars and eighty-two cents, ($147.82), and adding thereto interest to February 24, 1905, and continuing the said account to February 24, 1905, and allowing to Mrs. Markley the said charges and interest as aforesaid to February 24, 1905, the amount then, February 24, 1905, owing to Mrs. Markley by the complainant for the rearing

of his said son Markley Stevenson, was the sum of Eight Thousand Six Hundred and Ninety-two Dollars and ninety-one cents, ($8,692.91); that these defendants have annexed hereto, Marked Schedule No. 4, an account, showing the items and details of said deficits, and for greater certainty refer thereto.

And these defendants further answering Paragraph 13, of said bill, say: that there have been no accumulations of or upon the said sum of Four Thousand Six Hundred and Sixty-seven Dollars and forty cents, which came to the hands of Mrs. Markley on or about the sixth day of October eighteen hundred and seventy-six, as the Guardian of Mary Markley, and that the same has been uniformly decreased from that time in part, as aforesaid, and would be more largely decreased than as aforesaid, should Mrs. Markley receive full allowances for her expenses for her said daughter Mary Markley to the time of her marriage, but that the same are charged by these defendants only in part, and not fully;

14. These defendants answering Paragraph 14, of said bill say; that on the twenty-ninth day of May nineteen hundred and six, they caused to be served on the complainant, administrator as aforesaid, a formal notice that he forthwith proceed to establish his claim by the judgment of some Court of competent jurisdiction, and these defendants have annexed hereto a copyof the said notice, marked Schedule No. 5, and for greater certainty refer thereto.

And these defendants further answering said Par-

agraph 14 of the said bill, say, that on the seventh day of May in the year nineteen hundred and six, they filed their bill of complaint in this cause against the complainant, administrator as aforesaid, setting up that the said claim of the said complainant was fraudulent and void; that the said Richard G. Stevenson, Administrator as aforesaid was never properly entitled to any portion of the estate of the said Mary Markley Stevenson in the possession of Mrs. Markley, the testratrix and of these defendants, and that for a period of more than twenty years the complainant had failed to apply therefor, and these defendants refer to their said bill of complaint on file in this Court as being as complete a notice to the said complainant as their said formal notice of May 29, 1906; and that the complainant failed to proceed to establish his said claim by the judgment or decree of some Court of competent jurisdiction, until after thirty days from the notice of said suit, of May 7, 1906, which was served on the said complainant on or before May ninth nineteen hundred and six.

(15.) And these defendants answering Paragraph 15 of said bill say; that Mrs. M. J. Markley in her lifetime, paid and expended all the moneys which have come to her hands as the guardian of the said Mary Markley; that up to the marriage of the said Mary Markley to the complainant, Mrs. Markley had expended all of the money in her hands except the sum of One Thousand Two Hundred and Thirty-three Dollars and sixty-six cents, and that since that time and by the twenty-fourth day of February eighteen hundred and ninety-three, Mrs. Markley had more than expended said balance of One Thousand

Two Hundred and Thirty-three Dollars and sixty-six cents, and all accumulations thereto in the meantime, as by reference to the Schedule hereunto annexed, and to the allegations explaining them herein above pleaded, and also by reference to the said bill of these defendants filed on the seventh day of May nineteen hundred and six, and the affidavit filed thereto by the said Richard G. Stevenson, by all of which it appears that the said Richard G. Stevenson, administrator as aforesaid is liable to the estate of Mrs. Markley for the maintainance, rearing, support, clothing, schooling and incidentals of the said Markley Stevenson, from the twenty-fourth day of February, eighteen hundred and eighty seven to the twenty fourth day of February nineteen hundred and five, upon an agreement, promise and request of the said Richard G. Stevenson to pay Mrs. M. J. Markley therefor.

(16.) And these defendants, in addition to the foregoing answer, aver that the cause of action, if any there be, arising to the complainant on account of or by reason of the several allegations and complaints in the said bill contained, did not accrue within six years next before the said bill was filed, and this allegation these defendants make in bar of the bill of the complainant, and of the claim of the complainant, administrator as aforesaid therein set up, and these defendants pray that they may have the same benefit from this averment as if they had formally pleaded the same as a plea to the said bill of complaint.

(17.) And these defendants in addition to the foregoing answer and plea, also aver that the cause

of action, if any there be, arising to the complainant, on account or by reason of the several allegations and complaints in the said bill of complaint contained, accrued, if at all, within thirty days after the service, and not afterwards, upon the complainant of a certain bill of complaint, and the supboena thereon issued in a certain cause wherein these defendants were complaints, and the said complainant was defendant, which said bill was filed on the seventh day of May nineteen hundred and six and the said subpoena and a copy of the said bill served upon the defendant on or before the tenth day of May nineteen hundred and six, and this allegation, the defendants also make in bar of the bill of complaint of the complainant, and pray that they may have the same benefit therefrom as if they had formally pleaded the same.

All of which matters and things, these defendants, not waiving their said pleas, and relying and insisting thereon, are ready to aver, maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

H. A. DRAKE,
Solicitor for Defendants.

GEO. J. BERGEN,
Of Counsel.

SCHEDULE NO. 1.

To Camden Safe Deposit and Trust Company and Paul H. Markley, Executors of the estate of M. Josephine Markley, deceased.

Take notice that there is due to me as administrator of the estate of Mary M. Stevenson, deceased, the sum of forty-four thousand nine hundred and thirty two Dollars and sixty-five cents due to the said Mary M. Stevenson, as the ward of said M. Josephine Markley. That the amount due said Mary M. Stevenson by her guardian M. Josephine Markley upon her attaining her majority on the thirteenth day of January 1883 was the sum of $9932.05

That the accumulations thereon due to increase in value of the investments, accumulation of interest, &c., amount at the present time to the further sum of 35000.00

$44,932.05

Richard G. Stevenson,
Administrator of Mary M. Stevenson,
deceased.

STATE OF NEW JERSEY
CAMDEN COUNTY SS:

RICHARD G. STEVENSON, being duly sworn, according to law, on his oath says—that he is administrator of the estate of Mary M. Stevenson, deceased, and that as the representative of the said decedent he is the creditor named in the above claim, and that the said Mary M. Stevenson was the ward of M. Josephine Markley, and that the amounts

mentioned in the foregoing claim are justly due by M. Josephine Markley, as the guardian of Mary M. Stevenson, and by the executors of the estate of M. Josephine Markley to this deponant, as administrator of the estate of Mary M. Stevenson, deceased, and that the sums hereinabove mentioned are the amounts due together with the accumulations thereon of moneys held in trust by M. Josephine Markley in her lifetime, as the guardian of said Mary M. Stevenson, as near as this deponent can ascertain, and that no payments has been made on account of said claim, so far as this deponent can ascertain, and the whole amount of forty-four thousand nine hundred and thirty-two Dollars and five cents is now justly due and owing to deponent, as administrator as aforesaid, from the estate of said M. Josephine Markley, deceased.

Subscribed and Sworn to this tenth day of April one thousand nine hundred and six, before me, Raymond R. Donges, Master in Chancery of N. J. — Richard G. Stevenson

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SCHEDULE No. 2.

The account of Paul H. Markley and Camden Safe Deposit and Trust Company, Executors of Mrs. M. Josephine Markley, Guardian of Mary Markley Stevenson, as well of the estate that has come into her hands as of the payments, disbursements and allowances out of the same.

The said account is chargeable as follows;

1876. Aug. 11 To distributive share of Mary Markley in proceeds of Partition sale,	$ 575.00	
1876. Oct. 6, To interest on same date,	5.27	
1876, Oct. 6. To distributive share of Mary Markley in personal estate of A. W. Markley,	4,087.13	
1877, Oct. 6, To interest, one year, on new principal of Oct. 6, 1876, of$4147.40	248.84	
1878. Oct 6. To int., one year, on new principal of Oct. 6, 1877, of $3876.24	232.57	
1879. Oct. 6. To interest, one year, on new principal of Oct. 6, 1878, of $3588.21,	215.33	
1880, Oct. 6. To interest one year, on new principal, of Oct. 6, 1879, of $3270.14	196.20	
1881, Oct. 6. To interest, one year, on new principal, of Oct. 6, 1880, of $2922.34,	175.35	
1882, Oct. 6. To interest, one year, on new principal, of Oct. 6, 1881, of $2553.69	153.22	
1883, Oct. 6, To interest, one year, on new principal, of Oct. 6, 1882, of $2262.91	135.77	
1884, Oct. 6. To interest, one year, on new principal, of Oct. 6, 1883, of $1954.66,	117.28	
1885, March 6, To interest to March 6, 1885, on new principal, of Oct. 6, 1884, of $1627.94,	40.70	
Total charge side		$6,182.66

And these defendants claim credit for the said M. Josephine Markley, deceased, Guardian of Mary Markley, as follows: viz: 1876, October 6, by 52 weeks board to date at $5.00 per week, $260.00

1876 Oct. 6	By one year's clothing to date	100.00		
1876 Oct. 6	By schooling to date	100.00		
1876 Oct. 6	By incidentals, to date,	60.00	$520.00	
1877 Oct. 6	By ditto to date		520.00	
1878 Oct. 6	By ditto to date		520.00	
1879 Oct.6	By ditto for board, to date,	260.00		
1879 Oct. 6	By ditto for clothing, to date	100.00		
1879 Oct. 6	By ditto for schooling, to date,	100.00		
1879 Oct. 6	By incidentals, viz, 5 mos., at $5.00	25.00		
1879 Oct. 6	By incidentals, viz: 7 months at $7.00	49.00	534.00	
1880 Oct. 6	By ditto for board, clothing and schooling, to date	460.00		
1880 Oct. 6	By incidentals	84.00	544.00	
1881 Oct. 6	By ditto, to date,		544.00	
1882 Oct. 6	By ditto, omitting schooling, to date,		444.00	
1883 Oct. 6	By ditto, to date,		444.00	
1884 Oct. 6	By ditto to date,		444.00	
1885 Mch. 6	By ditto to date,			

	7/12 of $444	185.00
1885 Mch. 6	By wedding outfit	250.00
	Total allowances,	$4949.00
1885 Mch. 6	Add balance in hand	1233.66
	Amount of Charge side,	$6182.66

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SCHEDULE NO. 3.

IN CHANCERY OF NEW JERSEY.

Between,
Hamilton Markley,
Complt.
and
M. Josephine Markley,
Virginia Markley, et al,
Defts.

Distribution
Order for

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This cause being opened to the Court by Charles P. Stratton, of counsel with the complainant and it appearing by a report heretofore made by Alden C. Scovel Esquire, one of the Special Masters of this Court and now on file that the gross proceeds of the sale of the real estate and promises in the bill of complete mentioned amount to the sum of Three Thousand and seven hundred dollars, and it fur-

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ther appearing that M. Josephine Markley, widow of Albert W. Markley, deceased, was entitled to an estate in dower in the whole of said premises and that her said estate was sold and conveyed to the purchasers thereof and that the said M. Josephine Markley has consented by her writing to that effect on file in this cause to relinquish all her interest in the proceeds of the sale of said premises in the hands of the said Master as aforesaid and that said moneys be divided among the parties in interest according to their respective rights and interest in the same. It is thereupon on this Eleventh day of August in the year of our Lord one Thousand Eight Hundred and Seventy six Ordered, adjudged and decreed that the said Alden C. Scovel, Master as aforesaid do pay to the solicitor of the complainant his costs of this suit to be taxed with a counsel fee of Seventy-five Dollars and retain his fees and commissions on said sale as allowed by the rules of this Court and that of the residue he do pay to the complainant Hamilton Markley, one sixth part and to the guardian or guardians of the infant defendants Virginia Markley, Richard C. Markley, Thaddeus W. Markley, Mary Markley and Anna Markley one sixth part for each of said infants respectively upon said guardian or guardians severally executing bonds to the Ordinary of the State of New Jersey with sufficient sureties in double the amount of said sixth interest, which said bonds shall be approved by the said Master and shall be filed with the Clerk of this Court. And it is further ordered that the said Master file with the Clerk of this Court a statement of his fees disbursements and commissions under these proceedings, together with a statement or report of the

distribution, disposition and investment of the moneys that have come to his hand as the proceeds of said sale.

Theodore Runyon,
C.

A true copy,
Vivian M. Lewis,
Clerk.

Endorsed:
Filed Aug. 11, 1876.

SCHEDULE NO. 4.

The account of Paul H. Markley and Camden Safe Deposit and Trust Company, Executors of M. Josephine Markley, who in her lifetime was guardian of Mary Markley Stevenson, deceased, showing items and details to make up a deficit of $8,692.91, in and of expenditures of Mrs. Markley in the rearing and education of Markley Stevenson, over and above money in hand as such guardian.

These Defendants charge to the estate of Mrs. M. J. Markley, moneys in reduction of said deficit, viz:

1885 March 6	To balance in hand as shown by Schedule No. 2	$1233.66	
1888 Feb. 24	To interest to date, 2 yrs. 11 ms. 18 das,		219.59
1889 Feb. 24	To one year's interest of Feb. 24, 1888 of $1153.25		69.19
1890 Feb. 24	To one year's int. on new principal of 2/24/89, of		

		$922.44	55.35
1891	Feb. 24	To one year's int. on new principal of 2/24/90, of $677.79,	40.67
1892	Feb. 24	To one year's int. on new principal of 2/24/91, of $418.46	25.11
1893	Feb. 24	To one year's int. on new principal of 2/24/92, of $143.57,	8.61
			$1652.18
		Add deficit,	147.82
			$1800.00
1893	Feb. 24	Cr. By expenses of Markley Stevenson from Feb. 24, 1887, to date, 6 years, at $300 a year	1800.00

These defendants claim credit for the following deficits to February 24, 1905, with interest added to that date:

1893	Feb. 24	Deficit	$147.82
1905	Feb. 24	Add int. to date, 12 yrs.	106.43
1894	Feb. 24	Add Markley Stevenson's expenses for one year to date	300.00
1905	Feb. 24	Add int. to date, 11 yrs.	198.00
1895	Feb. 24	Add Markley Stevenson's expenses for one yr. to date	300.00
1905	Feb. 24	Add int. to date, 10 yrs.	180.00
1896	Feb. 24	Markley Stevenson's expenses, 1 yr. to date	300.00
1905	Feb. 24	Interest to date, 9 yrs.	162.00

1897 Feb. 24	Markley Stevenson's expenses, one year to date	300.00
1905 Feb. 24	Interest to date, 8 yrs.	144.00
1898 June 24	Markley Stevenson's expenses for one yr 4 mos. to dt.	400.00
1905 Feb. 24	Interest to date, 6 yrs. 8 mos.	160.00
1899 June 24	Markley Stevenson's expenses one year to date	700.00
1905 Feb. 24	Interest to date, 5 yrs. 8 mos.	238.00
1900 June 24	Markley Stevenson's expenses, one yr. to date	700.00
1905 Feb. 24	Interest to date, 4 yrs. 8 mos.	196.00
1901 June 24	Markley Stevenson's expenses, 1 yr., to date	800.00
1905 Feb. 24	Int. to date, 3 yrs. 8 mos.	176.00
1902 June 24	Markley Stevenson's expenses, 1 yr. to date	800.00
1905 Feb. 24	Interest to date, 2 yrs. 8 mos.	128.00
1903 June 24	Markley Stevenson's expenses, one year, to date,	500.00
1905 Feb. 24	Interest to date 1 yr. 8 mos.	50.00
1904 June 24	Markley Stevenson's expenses one year to date	1000.00
1905 Feb. 24	Add interest to date 8 mos.	40.00
1905 Feb. 24	Eight months expenses of Markley Stevenson, at $83.33 per month,	666.66
1905 Feb. 24	Total deficit of Mrs. Markley's expenditures over money in hand	$8692.91

SCHEDULE NO. 5.

In the matter of the Estate of M. Josephine Markley, deceased, of which Paul H. Markley, M. D., and Camden Safe Deposit and Trust Company are Executors. | Notice to Creditor to proceed forwith to establish Claim.

TO RICHARD G. STEVENSON:

Administrator of the estate of Mary M. Stevenson deceased.

You are hereby notified, That we are not satisfied of the correctness of the claim presented by you, to us, as Executors of said Estate, since the Estate was settled, for the sum of Forty-four Thousand Nine Hundred and Thirty-two dollars and five cents; and we hereby further notify you to proceed forwith to establish said claim by the judgment of some Court of competent jurisdiction.

DATED, at Camden, New Jersey, May 29th, A. D., 1906.

Paul H. Markley, M. D.,
Camden Safe Deposit and Trust Co.
Benj. C. Reeve,
Vice President.
Executors of the Estate of
M. JOSEPHINE MARKLEY, deceased.

Endorsed:

In the matter of the Estate of M. Josephine Markley, deceased, of which Paul H. Markley, M. D., and Camden Safe Deposit and Trust Company, are Executors. | Notice to Creditor to proceed forwith to establish Claim.

H. A. Drake, Proctor.

Service of a notice of which the within is a duplicate copy is hereby acknowledged by Richard G. Stevenson, administrator of the Estate of Mary M. Stevenson, deceased, May 29th, 1906.

F. D. Weaver,
Solr. and Proctor.

IN CHANCERY OF NEW JERSEY.

BETWEEN, Richard G. Stevenson, Administrator of Mary Markley Stevenson, Complt. and Paul H. Markley, et al, Executors of Mrs. M. Josephine Markley, Defts.	On Bill for Account Notice of Motion to strike out Bill and withdraw Answer already filed for the purpose.

TO FRANCIS D. WEAVER, ESQUIRE,

SOLICITOR FOR THE COMPLAINANT.

Take Notice: That on Monday the Thirtieth day of July, instant, at Chancery Chambers, Jersey City, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon the defendants in this cause, will apply to the Chancellor for leave to withdraw the Answer already filed by them in this cause, for the purpose of making the application of which notice is hereinafter given.

(2.) And take further notice, that on the same day and at the same time and place, the defendants in this cause, upon being granted the leave sought for, and of which notice is given in the introductory portion of this notice, will move to strike out the following paragraphs of the bill of complaint, filed by

the complainant in the above stated cause, namely, Paragraph (6) and Paragraph (7) on the ground of objection that the same are immaterial and irrelevant and do not concern the issue raised in this cause, and because of the partition proceedings relating to real estate of Albert W. Markley, deceased, pleaded in Paragraphs (4) and (5) of said bill, all interest of Mary Markley Stevenson in said real estate was concluded and set at rest, on or before December first, eighteen hundred and seventy seven, by the partition proceedings mentioned in said Paragraph (5).

(3). And take further notice, that the said defendants will move to strike out Paragraphs (13) and (15) of the said bill, especially all those portions of said Paragraphs relating to indebtedness arising and becoming due to Mary Markley Stevenson as the ward of Mary Josephine Markley, prior to six years next preceeding the date of the commencement of said suit, and the date of the filing of said bill on the Twenty-third day of June, nineteen hundred and six, on the ground of objection that this being an action or bill for account, the same cannot under the Statute in such case made and provided, relate and appertain to, and include transactions more than six years prior to the filing of said bill of complaint.

(4). And take further notice, that as a further reason and objection to the said bill, in striking out said Paragraph (13) and (15), and striking out the said bill generally, the defendants claim that by the said bill, the cause of action, if any there be, arising to the complainant on account of, or by reason of

the several allegations and complaints in the said bill contained, did not accrue within six years next before the said bill of complaint was filed.

(5). And take further notice, that these defendants as a further ground of objection to the said bill, state, that according to the said bill, and Paragraphs (13) and (15) thereof, the right of action of the said complainant, arose on the thirteenth day of January eighteen hundred and eighty three, when, as stated in said bill, the said claim amounted to Nine Thousand Nine Hundred and Thirty two Dollars and five cents, ($9,932.05) and that the accumulations thereon, due to increase in value of the investments, accumulation of interest, &c., amount, as stated in said bill, at the present time, to the further sum of Thirty-five Thousand Dollars, by which it appears that no payment on account of, or in recognition of the said claim was made by the Testatrix of the defendants after the thirteenth day of January in the year eighteen hundred and eighty-three and that therefore the said claim was barred by the Statute of Limitations, which provided that the action for account must be brought within six years, (See 2 Gen. Stat. page 1974, Paragraph 8, Section 1), and that where the action is brought by an administrator, and the statute commenced to run before the death of the decedent, six months prior to the death of the decedent, shall not be counted, (See 2 Gen. Stat. page 1976, Paragraph 16, Section 9.) That as there is not in the said bill any recognition of the said claim of the complainant, administrator as aforesaid, alleged or pleaded to have been given by the Testatrix of these defendants in her lifetime, after the

thirteenth day of January, eighteen hundred and eighty-three, or within six years next preceeding the date of the filing of said bill, the said action of the complainant for or of account, if any he ever had, lapsed and became invalid and void, immediately after the thirteenth day of January or July in the year eighteen hundred and eighty-nine, over seventeen years ago.

6. And take further notice, that as a further objection to the said bill, as pleaded, the defendants move to strike out the following words of the said bill, contained in Paragraph (13), viz: "and for the amount due from the said Mary Josephine Markley, her guardian, upon her attaining her majority on the thirteenth day of January eighteen hundred and eighty-three, was the sum of Nine Thousand Nine Hundred and Thirty-two Dollars and five cents" on the ground that the said bill shows that the liability of Mrs. Markley to her daughter, Mary Markley Stevenson, not earlier than October 6, 1876, was,

from personal estate,	$4,087.13
and from proceeds of Partition sale of real estate, not greater than one-sixth of $3,725.00, namely,	620.87
Total,	$4,708.00

thus giving the total liability of Mrs. Markley on, and not prior to the sixth day of October, eighteen hundred and seventy-six, of principal at the sum of Four Thousand Seven Hundred and Eight Dollars, and if interest be added to this last named sum to January 13, 1883, namely, 37-6/10 per cent., footing to Seventeen Hundred and Seventy Dollars, there

would be an amount of principal and interest of not over Six Thousand Four Hundred and Seventy-eight Dollars, which would show that Mrs. Markley's indebtedness, without allowing her a penny for her daughter's maintenance, and charging to Mrs. Markley interest at the rate of six per cent. for the whole period from October 6, 1876, to January 13, 1883, would not raise her indebtedness to her said daughter on January 13, 1883 above Six Thousand Four Hundred and Seventy-eight Dollars, ($6,478.00) instead of $9,932.05.

(7) And take further notice, that as a further ground of objection to the amount of said claim as pleaded in the said bill, the same is indefinitely stated and should be specifically stated, so as to give the said defendants notice as to whether the alleged increase of the said claim arose from increase in investments, or by addition in interest, and if so, to what extent, in what manner, and from what sources and securities and investments; and that the said application to strike out said bill of complaint, is made under the 213th Rule of this Court.

Dated July 11th, 1906.

Respectfully yours, &c.,
H. A. DRAKE,
Solicitor for Executors of
Mrs. M. Josephine Markley,
Defendants.

(Endorsed)

Service acknowledged July 11th, 1906.
F. D. WEAVER,
Sol'r. for Complt.

Filed July 30, 1906.

IN CHANCERY OF NEW JERSEY

Between
RICHARD G. STEVENSON,
Administrator of Mary Markley Stevenson,
Complt.
and
PAUL H. MARKLEY, et al.
Executors of Mrs. M. Josephine Markley,
Defts.

On Bill for Account.

SUPPLEMENTARY NOTICE TO STRIKE OUT BILL; &C.,
Served July 13th, 1906.
Filed July 30th, 1906.

TO FRANCIS D. WEAVER, ESQUIRE,
SOLICITOR FOR THE COMPLAINANT.

Take Notice; That the notice heretofore given you of an application to be made on Monday, the Thirtieth day of July, instant, at Chancery Chambers, Jersey City, is hereby amended and supplemented to the effect that the defendants above named will insist upon the following additional amended and supplementary grounds of objection to the said bill of complaint filed in this cause.

1. That Paragraph (6) and Paragraph (7) are

immaterial and irrelevant, and do not concern or appertain to any issue that could be raised in this cause by any answer thereto, and that no equitable relief could be founded on the allegations in said paragraphs contained, for the reasons stated in the original notice; and for the further reason that the partition proceedings pleaded in paragraph (4) and paragraph (5) of the said bill, could not be questioned collaterally, and the said bill contains no evidence of the same having been questioned directly within twenty years after the conclusion of them.

2. That there is no equity in the said bill to support the relief therein prayed for.

3. That the complainant has not, in and by his said bill made or stated such a case as entitled him in a Court of equity, to any relief against these defendants.

4. That the trust alleged and pleaded and sought to be sustained by the complainant, as between Mary Josephine Markley, guardian for Mary Markley, and Richard G. Stevenson, administrator of Mary Markley Stevenson, is not an express and continuing trust within the peculiar and exclusive jurisdiction of a Court of Equity; that under an Act of the Legislature of New Jersey, entitled, "An Act Concerning the Action of Account," passed December 1, 1794, and the Act entitled, "An Act for the Limitation of Actions," Revision approved March 27, 1874, the said complainant, administrator as aforesaid, could not bring an action for account, in law or equity, after the lapse of six years from the time the said action arose.

5. That the said trust, as between Mary Josephine Markley, Guardian for Mary Markley, and Richard G. Stevenson, Administrator of Mary Markley Stevenson, if any existed, was not a technical and continuing trust; that the same was cognizable at law and that the remedy at law of the complainant, administrator as aforseaid, for the trust set up in his bill, if any, he has lost.

Dated July 13, A. D. 1906.

Respectfully yours, & c.,
H. A. DRAKE,
Solicitor for the Executors of
Mrs. M. Josephine Markley,
Defts.

———o———

REPLICATION.

Entitled.
Filed July 11, 1906.

The Complainant in this cause joins issue on the answer of the defendants.

F. D. WEAVER,
Solr. for Complt.

IN CHANCERY OF NEW JERSEY

Between
RICHARD G. STEVENSON,
Admr., of Mary Markley Steven son,
Complt
and
PAUL H. MARKLEY, et al,
Excrs. of Mrs. M. Josephine Markley,
Defts.

On Bill for Account.

ORDER POSTPONING APPLICATION.

Filed August 3, 1906.

This matter being opened to the Court by Herbert A. Drake and Howard M. Cooper, of counsel with the defendants, in the presence of Francis D. Weaver, of counsel with the complainant, on this thirtieth day of July in the year nineteen hundred and six, and it appearing to the Court that notice has been given to the complainant by the defendants for leave to withdraw the answer already filed by the defendants in this cause, for the purpose of making an application to strike out the complainant's bill, under the 213th Rule of this Court, which was followed by an appended notice of an application to strike out the complainant's bill in this cause, and containing the grounds of the said application to strike out; and it further appearing, that the said notice to withdraw

said answer and strike out the complainant's bill had been served on the eleventh day of July nineteen hundred and six, and the said counsel for the defendants having presented a supplimentary notice containing further grounds for the said application to strike out, dated and served on the thirteenth day of July nineteen hundred and six, and the said notice to withdraw said answer and strike out said bill, of the eleventh day of July, nineteen hundred and six, and the supplementary notice of July thirteenth, nineteen hundred and six, having been duly presented and filed; and it further appearing to the Court that the said answer was filed on or about the third day of July nineteen hundred and six, and that a replication was filed thereto on the eleventh day of July nineteen hundred and six, and the counsel for for the defendants having brought on the said application:

IT IS, on this thirtieth day of July in the year nineteen hundred and six, on motion of Herbert A. Drake, Solicitor for the defendants, by the Chancellor, ORDERED, that the said applications to withdraw the answer and to strike out the bill of complaint of the complainant, be postponed to the final hearing of this cause.

By the Statute,

LINDLEY M. GARRISON,
Master.

A true copy,

Vivian M. Lewis,
Clerk.

IN CHANCERY OF NEW JERSEY

Between
RICHARD G. STEVENSON,
Administrator of Mary Markley-Stevenson,
Complainant
and
PAUL H. MARKLEY, and CAMDEN SAFE DEPOSIT and TRUST COMPANY, Executors of the Last Will and Codicils of Mrs. M. Josephine Markley, deceased,
Defendants

On Bill for Account.

ORDER OF REFERENCE TO A VICE CHANCELLOR.

Filed August 22, 1906.

It is, on this Twenty-second day of August in the year nineteen hundred and six, ORDERED, that the above stated cause be referred to Hon. Lindley M. Garrison, one of the Vice Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

W. J. MAGEE,
C.

We consent to the foregoing order of reference.

F. D. WEAVER,
Solr. for Complt.
H. A. DRAKE,
Solr. for Defts.

8, 3, 06.
A true copy,
Vivian M. Lewis,
Clerk,

IN CHANCERY OF NEW JERSEY.

Between RICHARD G. STEVENSON, Administrator of Mary Markley Stevenson, Complainant, and PAUL H. MARKLEY and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of the Last Will and Codicils of Mrs. M. Josephine Markley, deceased, Defendants.	On Bill for Account.

NOTICE OF SETTING FINAL HEARING.

Served August 31, 1906.
Filed September 10, 1906.

TO FRANCIS D. WEAVER, ESQUIRE,

SOLICITOR FOR THE COMPLAINANT,

Please Take Notice, that on Monday the tenth day of September next, at Chancery Chambers, Camden, at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard thereon, the defendants in the above stated cause, will apply to the Honorable Lindley M. Garrison, the Vice Chancellor to whom the above stated cause has been refer-

red, for an order setting down the above cause for final hearing.

Dated, August 31, 1906.

H. A. DRAKE,
Solicitor for Defendants.

IN CHANCERY OF NEW JERSEY

Between

RICHARD G. STEVENSON,
Administrator of Mary M. Stevenson, decd.,

Complt. On Bill For Account.

and

PAUL H. MARKLEY and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of Mrs. M. Josephine Markley, decd.

ORDER SETTING DOWN CAUSE FOR FINAL HEARING

Filed September 11, 1906

This cause being opened to the Court on this Tenth day of September in the year nineteen hundred and six, by Herbert A. Drake, Counsel with the defendants, in the presence of Francis D. Weaver of Counsel with the complainant, and it appearing to the Court that due notice of this application has been given and filed:

It is thereupon, by the Court ordered, that this cause be set down for Final Hearing at Chancery Chambers Camden, on the First day of October, A. D., nineteen hundred and six at seven o'clock in the forenoon, or as soon thereafter as Counsel can be heard thereon.

LINDLEY M. GARRISON,
V. C.

IN CHANCERY OF NEW JERSEY

Between
RICHARD G. STEVENSON,
Administrator of Mary M. Stevenson, decd.,
Complt.

and

PAUL H. MARKLEY and CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors &c.,
Defendants.

On Bill For Account.

NOTIICE OF FINAL HEARING
Served September 10, 1906.
Filed September 10, 1906

TO FRANCIS D. WEAVER, Esq.,
Solicitor for Complainant.

Please Take Notice: That the above entitled cause has been set down for hearing at Chancery Chambers, Camden, by an order, a copy of which is hereto annexed.

And please take further notice, that the defendants will move the Final Hearing of the above stated cause, at Chancery Chambers, Camden, on the first day of October, A. D., nineteen hundred and six, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard thereon.

And please take further notice, that at the same time, the applications heretofore made in this cause by the defendants to withdraw their answer and to strike out the bill of complaint of the complainant, and postponed to the Final Hearing of this cause, will be brought up on the said First day of October, nineteen hundred and six, before the examinations of witnesses are proceeded with.

Dated, September 10, A. D., 1906.

Respectfully,

H. A. DRAKE,

Solicitor for Defendants.

IN CHANCERY OF NEW JERSEY.

Between
Richard G. Stevenson, Admr., of Mary Markley Stevenson,
Complt.,
and
Paul H. Markley, et als, Executors of M. Josephine Markley,
Defts.

On Bill For Account.

STIPULATION.

Filed October 18, 1906.

WHEREAS, the above stated cause was set for a final hearing before the Honorable Lindley M. Garrison, Vice Chancellor, at Chancery Chambers, Camden, on this First day of October A. D., nineteen hundred and six, and

WHEREAS, it was provided by an order made in this cause that on the coming on of said final hearing, before the production of witnesses therein, motions to withdraw the answer of the defendants and to apply, on motion, to strike out the complainant's bill, under Rule 213, should be first heard, and

WHEREAS, owing to the non-attendance of the Honorable Lindley M. Garrison, Vice Chancellor, the said hearing of October first, nineteen hundred and six, must be postponed, and

WHEREAS, certain other causes, namely, the Executors of Mrs. Markley vs. Richard G. Stevenson Administrator, &c. and the Executors of Mrs. Markley vs. Richard G. Stevenson and Anna M. Schellinger, which are largely between the same parties, are pending on demurrer, to come up for hearing on the sixteenth day of October nineteen hundred and six, the first day of the October Term of this Court;

THEREFORE, IT IS HEREBY STIPULATED, by the said Richard G. Stevenson, Administrator as aforesaid, and Dr. Paul H. Markley and Camden Safe Deposit and Trust Company, Executors as aforesaid, that the final hearing of this cause shall come up for hearing, before the Honorable Lindley M. Garrison, Vice Chancellor, on the first day of the October Term of this Court, at the State House in the City of Trenton, at eleven o'clock in the forenoon, or as soon as Counsel can be heard thereon; and it is further stipulated, that if the hearing of the said two causes on demurrer be then postponed, that this cause, of Stevenson, Administrator, vs. Executors of Mrs. Markley, be also postponed to the same time and place.

WITNESS the hands of the solicitors of the parties aforesaid, this First day of October, A. D., nineteen hundred and six.

HERBERT A. DRAKE,
Solicitor for the
Executors of M. Josephine
Markley, deceased, Defendants.

F. D. WEAVER,
Solicitor for
Richard G. Stevenson,
Admr., &c., Complt.

IN CHANCERY OF NEW JERSEY.

Between
Richard G. Stevenson, Adm'r. &c.
Compl't.
and
Paul H. Markley, et al, Exec's., &c.,
Def't's.
} On Bill, &c.

ORDER.

Filed December, 22, 1906.

This matter coming on to be heard in the presence of Francis D. Weaver, of counsel with the complainant, and Herbert A. Drake and Howard M. Cooper, of counsel with the defendants, and the counsel for the defendants having asked leave of the Court for permission to withdraw the answer, heretofore filed by the defendants in this cause, and thereupon moving to strike out the complainants bill of complaint.

And the defendants pressing their motion to strike out the said bill on the ground that there is not proper case shown for the interposition of this Court, on the face of the bill, and it appearing to the Court that upon the face of the bill the complainant is in laches. And the Court, having inspected the objections to the bill of complaint set forth in the notice thereof given by the defendants to the complainant, and not finding therein any spceific objection based on laches. And thereupon the counsel for the com-

plainant having moved to amend his bill by inserting therein, such charges as he may be advised or able to do concerning the reasons for the delay in the bringing of his suit.

It is hereupon on this tenth day of December, one thousand nine hundred and six, on motion of Francis D. Weaver, of counsel with the complainant ,ordered that the complainant have leave to amend his bill, upon his paying costs thereof to the defendants, provided that he shall file and serve a copy of his amended bill upon the defendants, or to their solicitor of record, within twenty days from the date of this order. And it is further ordered that all other proceedings in this cause shall remain in statu quo until twenty days have elapsed from the date of this order.

And it is further ordered that if the said complainant shall amend his bill of complaint in pursuance with the permission given the defendants may then plead, answer or demur to said amended bill as if it were an original bill.

LINDLEY M. GARRISON,

V. C.

IN CHANCERY OF NEW JERSEY.

Between, Richard G. Stevenson, Adm'r., &c., Complainant, and Paul H. Markley and Camden Safe Deposit and Trust Company, Executors, &c., Defendants.	On Bill, &c.

AMMENDMENT TO BILL.

Filed December 29, 1906.

The complainant, in this cause, pursuant to an order of this Court, heretofore made, wherein leave is given to the complainant to amend his bill of complainant, if he shall elect so to do, hereby amends his bill of complainant by inserting after paragraph fourteen (14) the following allegations, et seq., and before paragraph fifteen (15), viz:

(14A.) And your orator further shows that the partition proceedings set forth in paragraph five(5) took place and were had upon an arrangement between Hamilton Markley and said Mary J. Markley in order to effect a sale of the premises described in paragraph four(4), the said Mary J. Markley having first released her dower therein, for the purpose of vesting in the said Mary J. Markley, as guardian of

her minor children, and in trust for all her children, the proceeds of said property, and for the purpose of vesting in said Mary J. Markley the title to the property known as 420 Cooper Street, Camden, New Jersey, to have and to hold the same in trust for her minor children, and in trust for all her children; that said Mary J. Markley took title to the premises known as 420 Cooper Street, Camden, New Jersey, by virtue of the conveyances set forth in paragraph five (5), and also secured the proceeds of the land situate in Shamong township, for the benefit, and continued to hold the same in trust, for her minor children, and in trust for all her children, and that when the said Mary J. Markley subsequently sold the premises known as 420 Cooper Street, Camden, New Jersey, she received the consideration therefor as set forth in paragraph six(6) and continued to hold or have the proceeds thereof, until the day of her death. That the consideration of three thousand and twenty-five dollars mentioned in the deeds of conveyance recited in paragraph five (5) for the purchase price of 420 Cooper Street, Camden, New Jersey, was never advanced by Mary J. Markley, but your orator shows that the sale was in form only, for the purpose of vesting title in Mary J. Markley as an undisclosed trustee or guardian for all her children. That the deed of trust set forth in paragraph seven (7) contained, inter alia, recitals to the following effect;

AND WHEREAS, the said partition proceedings in the said Court of Chancery by which the said M. Josephine Markley became seized of said lands as aforesaid were inaugurated and completed as aforesaid in conformity to and in compliance with a family

arrangement for that purpose.

AND WHEREAS, the said Hamilton Markley had died, and neither he in his lifetime nor his estate since his death has made any claim upon the said real estate of the party of the first part hereto, since the beginning of her seisen thereof aforesaid.

That the codicil and the last will and testament of Mary J. Markley contained a recital as follows:

WHEREAS under a family arrangement between my children, and myself, I became the owner of all the real estate of which my late husband Albert W. Markley died seized.

(14B) That immediately after the death of said Mary Markley Stevenson, your orator made an arrangement, and entered into an agreement with said Mary J. Markley, to the effect that said Mary J. Markley should hold, and not be called on by your orator to account for his wife's share of her father's estate during the life of the said Mary J. Markley, that this agreement was made in order to enable said Mary J. Markley to hold and enjoy the use of the property known as 420 Cooper Street, Camden, New Jersey, and in order to enable said Mary J. Markley to hold said property until such time as the same could be disposed of and sold to advantage, and without sacrifice, and in order to enable said Mary J. Markley to have the use of the investments which she then held in trust, and in order to enable said Mary J. Markley to continue have and maintain the station in life which she had hitherto maintained, and in order to maintain her family in the same manner

as she had hitherto done, and in order that the family of said Mary J. Markley should not be broken up, that in consideration therefor said Mary J. Markley faithfully promised to account to your orator for his wife's share of her father's estate so held in trust, at her death, and by means of her last will and testament to be duly made, declared and published as the law directs, that the children of the said Mary J. Markley made an agreement, or family arrangement with said Mary J. Markley whereby she was to have and to hold all the proceeds of her husband's estate until her death. That on or about the first day of June, one thousand nine hundred and three, said Mary J. Markley caused to be prepared and delivered to your orator a release, the purpose of which was to release said Mary J. Markley for the sum of nine thousand, nine hundred and thirty-two dollars and five cents, from any claims your orator had against her for and on account of the estate of said Mary Markley Stevenson, and requested your orator to execute the same, that your orator took said release to his counsel, Henry M. Snyder, who advised him not to execute the same for the reason that the estate of said Mary J. Markley exceeded one hundred thousand dollars, and that he should receive a larger sum than above mentioned before executing any release to said Mary J Markley.

And the same is hereby amended accordingly.

F. D. WEAVER,

Sol'r for and of Counsel for Compl't.

IN CHANCERY OF NEW JERSEY.

Between RICHARD G. STEVENSON, Administrator of Mary Markley Stevenson, Complt. and PAUL H. MARKLEY, et al. Executors of Mrs. M. Josephine Markley, Defts.	On Bill for Account. Notice of Objections to Bill and Amendments to Bill, with Motion to Strike out

Served January 12, 1907,
Filed January 21, 1907,

To Francis D. Weaver, Esquire,

Solicitor for Complainant:

Please take notice, that on Monday the Twenty-first day of January, instant, at Chancery Chambers, Jersey City, at eleven o'clock in the forenoon or as soon thereafter as counsel can be heard thereon, the defendants in this cause will make objections to the said bill and amendments thereto, and move the Court to adjudicate thereupon on motion to strike out the said bill and the parts of the bill to which objections were made, under Rule 213 of this Court. And take further notice that the parts and portions of the said bill objected to and the particular grounds of said objections are as follows, namely:

First. For that the whole Paragraph 5 of the said bill and the whole of the amendments to Paragraph 5, as stated in the amendment to the said bill, and the whole of Paragraph 5, as amended by the said amendment, are immaterial, irrelevant and impertinent.

Second. For that the portion of the said amendment which reads: "The said Mary J. Markley having first released her dower therein for the purpose of vesting in the said Mary J. Markley as guardian of her minor children, in trust for all her children, the proceeds of said property," is immaterial, irrelevant and impertinent, and no issue affecting or influencing the decision of this case or of any benefit to the rights of the complainant could be found or established thereon.

Third. For that whereas the said Fifth Paragraph contains the allegation that said 420 Cooper Street was sold and conveyed by Alden C. Scovel, Special Master, to Mary Josephine Markley, as to part thereof by deed dated July 29, A. D. 1876, at a consideration therein mentioned of Three Thousand Dollars, and as to the other part thereof, by deed dated December 1, A. D. 1877, at a consideration therein mentioned of twenty-five dollars, absolutely and unconditionally, it cannot now be stated by amendment to Paragraph 5, that Mary J. Markley took title to said 420 Cooper Street by virtue of those conveyances, and continued to hold the same in trust for her minor children, and that if any such trust existed separately from said two Master's Deeds, it has not been pleaded in the amendment to Paragraph 5, or in that paragraph as amended.

Fourth. For that the portion of said amendment which is as follows:

"And that when the said Mary J. Markley subsequently sold the premises known as No. 420 Cooper Street, Camden, New Jersey,, she received the consideration therefor as set forth in Paragraph 6, and continued to hold and to have the proceeds there of until her death," is immaterial, irrelevant and impertinent, said Mary J. Markley not being alleged to hold the same in trust and she being entitled to hold said proceeds, no facts being shown to the contrary, as her very own, and no statement being contained in the portion of said amendment quoted in this objection, to show that the same were held or received in trust.

Fifth. For that the portion of said amendment which reads as follows:

"That the consideration of three thousand and twenty-five Dollars, mentioned in the deeds of conveyance, recited in Paragraph 5, for the purchase price of 420 Cooper Street, Camden, New Jersey, was never advanced by Mary J. Markley, and your orators shows that the sale was in form only, for the purpose of vesting the title in Mary J. Markley as the undisclosed trustee or guardian for all her children," is immaterial, irrelevant and impertinent, because the said Mary J. Markley being the guardian of her children, the consideration money of her purchase in her own hands, and not the real estate conveyed to her by absolute deeds as set forth in Paragraph 5, was the subject matter of her trust as guardian, and because the said Paragraph under criti-

cism states a conclusion of law and not facts from which a conclusion maybe drawn, and because the claim of complainant in Paragraphs 13 and 15 of his bill, is against the testatrix of the defendants as guardian of personality and not as trustee of real estate.

Sixth. For that the portion of said amendment relating to Paragraph 7, and the said Paragraph 7 itself, and the said Paragraph as amended by the said amendment thereto, are immaterial, irrelevant and impertinent.

Seventh. For that Paragraphs 4, 5, 6 and 7 of said bill, and the said amendments thereto, and said Paragraphs 4, 5, 6 and 7 as amended, are immaterial, irrelevant and impertinent, in that the trusts sought to be therein suggested are not alleged to have been or to be in writing and are alleged to be contained in deeds in the original bill alleged to be absolute made by an officer of this Court publicly selling land in a partition suit, in which infants were interested, and in that said trusts were alleged to have been established when the beneficiaries were infants of tender age and could not have taken part in any family arrangement, and in that said Paragraphs 4, 5, 6 and 7, especially Paragraph 7 of said bill, set up and plead a conveyance of real estate, alleged to be the body of a trust, in which the complainant claims an interest as embracing his claim against the defendants, which conveyance conveyed said alleged trust estate in May 1903,with notice to complainant, to Mrs. M. J. Markley's four children and grandchild Markley Stevenson, (the son of the complainant) one-fifth to each, the complainant thus pleading that the trust

estate comprising his claim was conveyed away by Mrs. Markley in her lifetime, and in that the property thus claimed by the complainant is by the complainant's own allegation, in his spurious bill, in the possession of others than the defendants, as practically admitted by the complainant in the concluding words of Paragraph 15 of his bill, which are as follows:

"And the said Mary Josephine Markley has attempted to dispose of all the estate of the said Mary M. Stevenson without settling the same upon your orator, as she is lawfully bound to do", and the same is held in trust for his son Markley Stevenson.

Eighth For that all that part of Paragraph (14B) of the amendment to the said bill, which is as follows, viz:-

"(14B) That immediately after the death of said Mary Markley Stevenson, your orator made an arrangement, and entered into an agreement with said Mary J. Markley, to the effect that said Mary J. Markley should hold, and not be called on by your orator to account for his wife's share of her father's estate during the life of the said Mary J. Markley, that this agreement was made in order to enable said Mary J. Markley to hold and enjoy the use of the property known as 420 Cooper Street, Camden, New Jersey, and inorder to enable said Mary J. Markley to hold said property until such time as the same could be disposed of and sold to advantage, and without sacrifice, and in order to enable said Mary J. Markley to have the use of the investments which she then held in trust, and in

order to enable said Mary J. Markley to continue have and maintain the station in life which she had hitherto maintained, and in order to maintain her family in the same manner as she had hitherto done, and in order that the family of said Mary J. Markley should not be broken up, that in consideration therefor said Mary J. Markley faithfully promised to account to your orator for his wife's share of her father's estate so held in trust, at her death, and by means of her last will and testament to be duly made, declared and published as the law directs, that the children of said Mary J. Markley made an agreement, or family arrangement with said Mary J. Markley whereby she was to have and hold all the proceeds of her husband's estate until her death", is immaterial, irrelevant and impertinent, in that it sets up a contract void for want of verity, for want of consideration, for impossibility of performance, for impossibility of proof, for non-conformity with the statute of frauds, which agreement the complainant, as he had not become the admistrator of Mary Markley Stevenson, deceased until the first of March 1906, more than a year after Mrs. Markley's death, had in no way qualified himself to make, and for utter falsity and incongruity to and inconsistency with the claim set up in paragraphs 13 and 15 of said bill, and is a development of paragraphs 4, 5, 6 and 7 as amended, in which the complainant pleads an interest in real and per sonal estate passed by a conveyance in which he is neither party nor privy, which cannot be questioned in this suit for want of proper and necessary parties, and in that said allegations are an attempt to avoid the laches to which the portion of

the bill of the complainant, embraced in paragraphs 13 and 15, pleading the real claim of the complainant sworn to according to the statute and served on the defendants on the twenty-seventh day of April, nineteen hundred and six, is repugnant.

Ninth. For that the complainant, if he had any interest in the trust property mentioned in the trust deed pleaded in paragraph 7 of said bill, should have asserted his claim thereto while the body of said trust remained in the possession and enjoyment of Mrs. Markley in her lifetime, and it is false and fraudulent to set up such claim now, against her executors, and not against the persons in whose possession said property now is, and for that such claim is void for laches.

Tenth. For that the remaining portion of the said paragraph (14B) of the said amendment, which reads;-

"That on or about the first day of June, one thousand nine hundred and three, said Mary J. Markley caused to be prepared and delivered to your orator a release, the purpose of which was to release said Mary J. Markley for the sum of nine thousand, nine hundred and thirty-two dollars and five cents, from any claims your orator had against her for and on account of the estate of said Mary Markley Stevenson, and requested your orator to execute the same, that your orator took said release to his counsel, Henry M. Snyder, who advised him not to execute the same for the reason that the estate of said Mary J. Markley exceeded one hundred thousand dollars, and that he should receive a

larger sum than above mentioned, before executing any release to said Mary J. Markley", are immaterial, irrelevant and impertinent, in that they are in part vagu,e uncertain and ambiguous, with no clear, definite or intelligible facts therein stated or pleaded, and in part contain facts, on which if issue were joined and found, could have no influence on this suit, as the same relate to claims the complainant had against Mrs. Markley for and on account of the estate of Mary Markley Stevenson, while the claim presented and sworn to and for which the bill is filed, relates as alleged to moneys owing by Mrs. Markley as guardian, of Mary Markley Stevenson, and which the complainant qualified himself to deal with and to claim against Mrs. Markley's estate a year and more after her death, on the first of March nineteen hundred and six, when he became the administrator of Mary Markley Stevenson.

Eleventh. For that the bill of the complainant pleads against the defendants two incongruous and utterly irreconcilable claims, one the claim sworn to and served on the defendants, pleaded in paragraphs 13 and 15 of the bill and unamendid, which as pleaded, set up a claim definite in amount, certain as to time and quantity, due to Mary Markley Stevenson as the ward of Mary J. Markley, on which as pleaded an action at law on contract accrued to the complainant's wife in her lifetime on the thirteenth of January eighteen hundred and eighty-three, and to the complainant in succession, as her surviving husband, on her death on the Twenty-fifth of December 1885, on his qualifying as administrator, which claim is stale, is barred by acquiescense,

by laches and by the statute of limitations, and is in no way pleaded so as to entitle the complainant to found thereon the prayer in his bill, for an account against the defendants, and the other, the claim of the complainant set up in the amended portion of said bill, in paragraphs 4, 5, 6 and 7, uncertain in amount, indefinite as to time, alleged to exist against Mrs. Markley as trustee of Mary Markley, of land and personality which Mrs. Markley conveyed away to her grandson, the son of the complainant, in June, 1903, of which he, complainant, had full notice, and having no reference to or connection with the claim made against these defendants as executors of a deceased guardian.

Twelfth For that any property upon which Mary J. Markley as trustee imposed a trust on or before the year 1877, for the benefit of her minor daughter Mary Markley of property coming to Mrs. Markley by absolute deed at a partition sale, would remain and continue to be the seperate equitable property and estate of the said Mary Markley Stevenson, to which the complainant could not claim, have or assert, in law or equity, any right or possession whatever, and therefore all of paragraphs 4, 5, 6 and 7 should be struck bodily out of the bill as false and fraudulent and intended for delay, and contrary to and intended to contravent the policy of the law which favors the prompt and speedy administration and distribution of the estates of decedents.

Thirteenth. For that the complainant, had, (if he had soon enough qualified himself to bring it) an action at law for the claim now made in para-

graphs13 and 15 of his bill, which paragraphs he has in no wise modified or amended, which has since become barred by the statue of limitations, and he cannot now claim an action in this Court therefor, because the statute of limitations would become a dead letter, if those who had become barred thereby at law, could avoid the bar of the statute by going into equity; and for that paragraphs 13 and 15 are the only portions of the bill, standing unchanged by the amendments thereof, and they and the prayer of the bill as well, there being no allegations in the bill on which the relief prayed for can stand, should be struck out, and the whole bill therewith.

Fourteenth. For that the said bill and all and every part thereof should be struck out, in that it is an attempt to enforce a stale claim, and in that the said claim is illegal, invalid and void because of laches in suing for or collecting the same, and because of total want of equity, and because it is intended to hinder and delay the defendants in the distribution of the estate of their testatrix, and to damage and delay the devisees and legatees under her will from receiving their distributive shares.

Fifteenth. For that the trust alleged and pleaded and sought to be sustained by the complainant, as between Mary Josephine Markley, guardian for Mary Markley,and Richard G. Stevenson, administrator of Mary Markley Stevenson, is not an express and continuing trust within the peculiar and exclusive jurisdiction of a Court of Equity; that under an Act of the Legislature of New Jersey, entitled, "An Act concerning the Action of Account", passed December 1, 1794, and the Act entitled, "An Act for the Limitation of Actions" Revision approved

March 27, 1874, the said complainant, administrator as aforesaid, could not bring an action for account, in law or equity, after the lapse of six years from the time the said action arose.

Sixteenth. For that the said trust pleaded as between Mary Josephine Markley, guardian of Mary Markley and Richard G. Stevenson, administrator of Mary Markley Stevenson, if any existed, was not a technical and continuing trust; that the claim thereunder was cognizable at law, and that the remedy at law of the complainant, administrator as aforesaid for the claim set up in his said bill, is barred by the statute of limitations and has been lost, and for that as between the complainant and Mary J. Markley, no trust ever existed.

Seventeenth. For that, by the order permitting the same, of December10th, 1906, the complainant wsa directed to file an amended bill, whereas, he has filed amendments to his bill, which he had no permission to do.

Dated January 11th, 1907.

Respectfully yours, &c.,

H. A. DRAKE,

Solicitor for the Executors of
Mrs. M. Josephine Markley, Defts.

APPEAL NO. 1.

IN CHANCERY OF NEW JERSEY.

Between Richard G. Stevenson, Admr., &c and Complt. Paul H. Markley, et al, Excrs, &c Defendants.	On Bill For Account.

NOTICE OF APPEAL.

SERVED JANUARY 26, 1907
FILED JANUARY 26, 1907

The defendants, Paul H. Markley and Camden Safe Deposit and Trust Company, Executors of the Last Will and Testament of Mary Josephine Markley, deceased, hereby appeal from the interlocutory order made in the above stated cause, that the complainant have leave to amend his bill, &c., dated on the Tenth day of December in the year nineteen hundred and six, entered and filed on the twenty-second day of December in the year nineteen hundred and six, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in all Causes.

DATED, January 26, A. D., 1907.

H. A. DRAKE,
Solicitor for Defendants.

H. A. DRAKE,
HOWARD M. COPER,
Of Counsel.

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

H. A. DRAKE,
HOWARD M. COOPER,
Of Counsel.

APPEAL NO. 1.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Richard G. Stevenson, Administrator of Mary Markley Stevenson, deceased,

(Appellee), Complainant,

and

Paul H. Markley, et al, Executors, &c., (Appellants,) Defts.

PETITION OF APPEAL.

Served February 11, 1907.
Filed February 11, 1907.

TO THE HONORABLE, THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Paul H. Markley and Camden Safe Deposit and Trust Company, Executors under the Last Will and Testament of Mary Josephine Markley, deceased, the appellants in the above stated cause, respectfully shows, that your petitioners find themselves aggrieved by an interlocutory order made in the Court of Chancery by the Honorable William J. Magie, Chancellor of New Jersey, bearing date on the Tenth day of December in the year

one thousand nine hundred and six, and filed on the Twenty-second day of December in the year one thousand nine hundred and six, wherein the said Richard G. Stevenson, administrator of Mary Markley Stevenson, deceased, is complainant and appellee, and the said Paul H. Markley and Camden Safe Deposit and Trust Company, Executors under the Last Will and Testament of Mary Josephine Markley, deceased, are defendants and appellants, in this respect, to wit:

That the said order adjudges and orders, that the complainant and appellee have leave to amend his bill upon his paying costs thereof to the defendants, provided that he file and serve a copy of his amended bill upon the defendants or their solicitor of record within twenty days from the date of said order, and that all other proceedings in said cause should remain in statu quo until twenty days had elapsed from the date of said order, and that if the complainant and appellee should amend his bill of complaint in pursuance with the permission in said order given, the defendants and appellants, might then plead, answer and demur to said amended bill as if it were an original bill.

And your petitioners humbly appeal from the said order and all parts thereof upon the ground that the same is erroneous, and for that the same should have ordered that paragraphs 6 and 7 and paragraphs 13 and 15 of said bill be struck out, and for that the said bill and all parts thereof be struck out; and because the said order should have imposed upon complainant, not only costs upon amending his said bill, but also costs on defendants' motion to strike out.

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

DATED, February 11, 1907.

H. A. DRAKE,

Solr. for Appellants and Defendants.

H. A. DRAKE,

HOWARD M. COOPER,

Of Counsel.

APPEAL NO. 2.

IN CHANCERY OF NEW JERSEY.

Between RICHARD G. STEVENSON, Administrator of Mary Markley Stevenso, deceased. Complt.	On Bill For Account.
and	
Paul H. Markley, et al, Ex's of Mrs. M. Josephine Markley, decd. Defendants.	On Motion to Strike Out.

ORDER OVER-RULING OBJECTIONS.
Filed January 31st, 1907.

This matter being opened to the Court on the Twenty-first day of January in the year of our Lord one thousand nine hundred and seven, by Herbert A. Drake and Howard M. Cooper, of counsel with the defendants, no one attending for the complainant, and it appearing to the Court that under the order of this Court, dated on the Tenth day of December nineteen hundred and six, giving the complainant leave to amend his bill to explain his laches the complainant has filed amendments to the said bill and has dseignated the paragraphs thereof (14A) and (14B), and the defendants have given notice of objections to the said amendments, and to said bill

and particular portions of said bill, which notice returnable the day aforesaid, with acknowledgement of service thereon endorsed, has been duly filed, by which notice the defendants applied to the Court to adjudicate on said objections, and strike out the said amendments and the said bill as thereby amended and particular portions of said bill, and the Court having considered the said objections, and the arguments of counsel thereupon;

IT IS THEREUPON, on this Thirtieth day of January in the year of our Lord one thousand nine hundred and seven, by the Chancellor, ORDERED, that there be struck out of said bill paragraph (14A) of said amendments, being the portion thereof which reads as follows:

"(14A). And your orator further shows that the partition proceedings set forth in paragraph five (5) took place and were had upon an arrangement between Hamilton Markley and said Mary J. Markley in order to effect a sale of the premises described in paragraph (4), the said Mary J. Markley having first released her dower therein, for the purpose of vesting in the said Mary J. Markley, as gaurdian of her minor children, the proceeds of said property, and for the purpose of vesting in said Mary J. Markley the title to the property known as 420 Cooper Street, Camden, New Jersey, to have and to hold the same in trust for her minor children, and in trust for all her children; that said Mary J. Markley took title to the premises known as 420 Cooper Street, Camden, New Jersey, by virtue of the conveyance set forth in paragraph five (5) and also secured the proceeds of the land situate in Shamong Township,

for the benefit, and continued to hold the same in trust, for her minor children, and in trust for all her children, and that when the said Mary J. Markley subsequently sold the premises known as 420 Cooper Street, Camden, New Jersey, she received the consideration therefore as set forth in paragraph six (6) and continued to hold, or have the proceeds thereof, until the day of her death. That the consideration of three thousand and twenty-five dollars mentioned in the deeds of conveyance recited in paragraph five (5) for the purchase price of 420 Cooper Street, Camden, New Jersey, was never advanced by Mary J. Markley, but your orator shows that the sale was in form only, for the purpose of vesting title in Mary J. Markley as an undisclosed trustee or guardian for all her children. That the deed of trust set forth in paragraph seven (7) contained, inter alia, recitals to the following effect:

AND WHEREAS, the said partition proceedings in the said Court of Chancery by which the said M. Josephine Markley became seized of said lands as aforesaid were inaugurated and completed as aforesaid in conformity to and in compliance wtih a family arrangement for that purpose.

AND WHEREAS, the said Hamilton Markley, has died, and neither he in his lifetime nor his estate since his death has made any claim upon the said real estate of the party of the first part hereto, since the beginning of her seisen thereof aforesaid.

That the codicil and the last will and testament of Mary J. Markley contained a recital as follows:

WHEREAS under a family arrangement between

my children, and myself, I became the owner of all the real estate of which my late husband Albert W. Markley died seized."

And it is further ordered, that the said objections in said notice other than to said paragraph (14A) be overruled, and that the motion to strike out paragraph (14B) of said amendments and said bill and particular portions of said bill, be, and the same is hereby denied.

And it is further ordered, that no costs be taxed in favor of either party as against the other party, on this application.

WM. J. MAGIE,
C.

Respectfully endorsed,
L. M. Garrison.
V. C.

APPEAL NO. 2.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD G. STEVENSON,
Administrator of Mary Markley Stevenson, deceased,
Complt.

and

PAUL H. MARKLEY AND CAMDEN SAFE DEPOSIT AND TRUST COMPANY, Executors of the Last Will and Testament of Mary Josephine Markley, de-
Defendants.

On Bill For Account.

NOTICE OF APPEAL.

Served and Filed, February 11, 1907.

The defendants, Paul H. Markley and Camden Safe Deposit and Trust Company, Executors of the Last Will and Testament of Mary Josephine Markley, deceased, hereby appeal from the interlocutory order made in the above stated cause, dated the Thirtieth day of January in the year of our Lord one thousand nine hundred and seven, and filed on the First day of February in the year nineteen hundred and seven, overruling the objections of the defendants to the bill of complaint of the complainant and denying the motion to strike out Paragraph (14B) of said am-

endments, and the said bill, and particular portion of the said bill, and from the whole and every part thereof, except the part or portion of said order, which relates to and orders to be stricken out the portion of the amendments to the said bill known and designated as Paragraph (14A), to the Court of Errors and Appeals in the Last Resort in all Causes.

DATED, February 9, 1907.

H. A. DRAKE,
Solicitor for Defendants.

H. A. DRAKE,
HOWARD M. COOPER,
Of Counsel.

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

H. A. DRAKE,
HOWARD M. COOPER,
Of Counsel.

APPEAL NO. 2.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
Richard G. Stevenson,
Administrator of Mary Markley Stevenson, deceased.
Respondent
(Appellee) Complainant.,
and
Paul H. Markley, et al, Ex's. &c.,

PETITION OF APPEAL.
Served February 11, 1907.
Filed February 11, 1907.

TO THE HONORABLE, THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of Paul H. Markley and Camden Safe Depost and Trust Company, Executors under the Last Will and Testament of Mary Josephine Markley, deceased, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggreived by an interlocutory order made in the Court of Chancery by the Honorable William J. Magie, Chancellor of the State of New Jersey,

bearing date the Thirtieth day of January in the year of our Lord one thousand nine hundred and seven, and filed on the first day of February in the year nineteen hundred and seven, wherein the said Richard G. Stevenson, administrator of Mary Markley Stevenson, deceased, is complainant, and the said Paul H. Markley and Camden Safe Deposit and Trust Company, Executors under the Last Will and Testament of Mary Josephine Markley, deceased, are defendants, in this respect, to wit:

That the said order adjudges and orders, that the objections in the notice to strike out the complainan't bill, other than the objections to paragraph (14A) be overruled and that the motion to strike out paragraph (14B) of the amendments to the complainant's bill, and the said bill, and particular portions of said bill, be, and the same were thereby denied, and that no costs be taxed in favor of either party as against the other party on said application.

And your petitioners humbly appeal from the said order and all parts thereof except the part or portion thereof by which paragraph (14A) of said amendments is struck out, upon the ground that the same is erroneous, and for that the said order should have ordered that paragraphs 4, 5, 6 and 7, and 13, and 15 of said bill be struck out, and that the said bill and all parts thereof be struck out, and that paragraph (14B) of said amendments be struck out, and the said bill or any part thereof as amended by paragraph (14B) be struck out, and for that the said order should have imposed costs upon the complainant and appellee.

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

DATED, Februarp 11, 1907.

H. A. DRAKE,
Solicitor for Defendants.

H. A. DRAKE,
HOWARD M. COOPER,
Of Counsel.

APPEAL NO. 1.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Richard G. Stevenson,
Administrator of Mary Markley
Stevenson, deceased.

Respondent.

and

Paul H. Markley, et al, Ex's. &c.,

Appellants.

ANSWER TO PETITION OF APPEAL.
Filed, February 13, 1907.

The answer of the above named respondent to the petition of appeal of the above named appellants.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits, that an order was, on the tenth day of December last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with cost to be adjudged to this respondent.

F. D. WEAVER,
Solr. for Respondent.

APPEAL NO. 2.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

Richard G. Stevenson,
Administrator of Mary Markley Stevenson, deceased.

Respondent.

and

Paul H. Markley, et al, Ex's. &c.,

Appellants.

ANSWER TO PETITION OF APPEAL.
Filed, February 13, 1907.

The answer of the above-named respondent to the petition of appeal of the above-named appellants.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits, that an order was, on the thirtieth day of January last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with cost to be adjudged to this respondent.

F. D. WEAVER,
Solr. for Respondent.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD G. STEVENSON,
Adm'r.,
Complainant.
and
PAUL H. MARKLEY, et al.
Exc'rs., &c.,
Defendants.

Conclusions

Heard on motion, under Rule 213, to strike out bill.

For the Complainant, F. D. Weaver, Esq.
For the Defendants, H. M. Cooper and
H. A. Drake, Esqs.

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GARRISON, V. C. (orally);

This is a hearing upon a motion made by the defendants for leave to withdraw their answer to the original bill, and to move to strike out the bill for want of equity, and various parts of the bill for specific reasons stated.

Upon a hearing had on the tenth day of December, 1906, it appeared to the Court that the face of the bill disclosed a cause of action so old that, in default of explanation, the Court would be inclined to dis-

miss the same for laches if the defendants had so moved the Court. The Court, not finding among the reasons or objections of the defendants any one basedupon laches, and the complainant moving for leave to amend by setting up the facts explaining the laches, the latter motion was granted, and an order of the tenth of December, 1906, was entered. That order, in so far as it is now material, provided that the complainant "have leave to amend his bill by inserting therein such charges as he may be advised or able to do concerning the reasons for the delay in the bringing of his suit." And it was further therein ordered that all other proceedings should remain in **statu quo.**

Thereafter the complainant filed amendments, which he has numbered 14-A and 14-B, and upon the amended bill the defendants have now moved under Rule 213, to strike out this bill and various parts thereof.

I am inclined to the opinion that the Amendment numbered 14, A is not within the permission of the order of the tenth of December. It does not seem in any way to set forth, or could it be considered as giving, a reason for delay; it apparently is some additional allegation concerning some of the previous matters alleged in the bill, and is evidently intended to strengthen the charges of the bill in these respects. That was not within the purview of the order made on the tenth of December, and the complainant under that order cannot claim the right to make this amendment. If he has the right it must be asserted in a proceeding where that matter comes directly under consideration.

I will, therefore, grant the motion to strike out

the Amendment numbered 14, A.

The other general heads are that the bill does not show equity; that because the thing sued for is a sum of money due the representative of a deceased ward by the representative of a deceased guardian, and is, therefore, an action of account, it is claimed by the defendants that suit must be brought thereon within six years, under the Statute of Limitations. It is also claimed that the complainant is in laches unexplained, and that there is therefore no equity in the bill.

It is further claimed that by the Amendment 14, B the complainant sets out another cause of action than that previously pleaded, and an incongruous one with respect to the latter.

I do not find that the complainant has changed his prayer in the least, nor that he prays any relief with respect to this matter as alleged in this paragraph. That matter seems to have been inserted wholly under the permission of the court as a reason or explanation of his delay in bringing suit upon the cause of action which is urged in the bill and for which appropriate relief is prayed in the prayer thereof.

With respect to the matter of the Statute of Limitations applying, I have examined this matter with great care, and have read most, if not all, of the authorities, and considered them very carefully. The matter is an open one in New Jersey and is in grave doubt. I am rather inclined to think that our courts should follow the English and New York courts in holding that the relation of guardian and ward is a continuing trust, and that until the guardian settled with the ward or the ward's representatives it

must be held to be a continuing, direct trust which is not affected by the Statute of Limitations. This of course, is in a case where the guardian has not denied the ward's right and has not taken a position of antagonism, from the time of which open expression of antagonism the statute of limitations or imputations of laches are always held to run. Therefore I am not going to strike this bill out either for want of equity or because barred by the Statute of Limitations, or because the allegations of the Amendment 14, B are incongruous with the main cause of action set up in the original bill.

The defendants have answered so much as was in the original bill, and their answer may stand, if they so desire, or they may make a totally new answer to this bill as amended.

I do not wish by this decission to be understood as determining that the matter in 14, B which is permitted to stay in the bill as an amendment is a satisfactory answer to the charge of laches, or that the court may not, on final hearing, reach the conclusion that there was laches. But I am disinclined to absolutely deprive the complainant of his day in court upon the ground of laches, in the face of a charge in the bill that there was some sort of an agreement or understanding between him and the person whom he seeks to hold as trustee concerning the subject-matter of the trust which, when disclosed in detail, may explain or excuse the delay.

Whether a court will strike out a bill-or sustain a demurrer, which is the same thing-upon the allegation of laches is of course a matter of discretion, and I do not think it would be discreet, legally speaking, to prevent this complainant from proving

the facts, after which it will be entirely open to the court to determine whether such facts excuse or fail to excuse the long delay which has ensued in the asserting of his rights. I do not mean his rights as administrator but his right, as husband of the deceased wife, to take all her personality and to have administration. He had this right from the date of her death in 1885 and did not actually take out letters until 1906. It may be that upon final hearing the Court will hold that his delay in this respect defeats his right. But, as just said, I think it more appropriate to consider and decide this upon final hearing and after he has had opportunity to make proof of the excuses for delay that he offers.

The above was the oral deliverance of the Court at the time of disposing of the motion at the argument. Having been notified that an appeal has been taken by the defendants, I think it due the reviewing Court, that a more extended statement of facts and law be given with respect to the important question disposed of.

The essential facts are as follows: Mary Josephene Markley was the mother of Mary Markley, and was appointed her guardian by the Orphans Court of Camden County about October 6th, 1876, and, as such guardian, there was paid to her for the ward the sum of $4,087.14. Mary Markley, the ward, came of age on the 13th day of January, 1883. She married Richard G. Stevenson on the 26th day of March 1885. She died on the 25th day of December, 1885. There was no accounting between her and her guardian. Her mother, the guardian, died on the 26th day of February, 1905.

Richard G. Stevenson, the husband of the deceased ward, was appointed her administrator on March 1, 1906.

This suit is for an accounting and was brought by Richard G. Stevenson, the administrator of the deceased ward, against the executors of the deceased guardian, sometime in the summer of 1906.

It is the contention of the defendants that this suit is barred, either directly by the Statute of Limitations, or by the application by a court of equity of principles in analogy to the said Statute.

It should first be observed that there are two periods to be considered and two different sets of parties, and that different principles are therefore applicable. First, there is the period between the coming of age of Mary Markley, the ward, on the 13th of January, 1883, and the time of her death on the 25th of Decebmer, 1885. During that period the parties concerned were the ward and the guardian. If the Statute of Limitations had begun to run then, the death of the ward would not toll the same. This is too well settled to require citation. After the last-named date, and up until the death of the mother, the guardian, on the 26th of February, 1905, there was no one in existence in whom was vested the rights of the deceased ward against her guardian. Such a period did not exist until the 1st of March, 1906, when an administrator was appointed for the estate of the deceased ward. At that time the guardian had also died, so that the parties had completely changed, and the parties were as above stated, an administrator of a deceased ward on one side, and the executors of a deceased guardian upon the other. If the Statute began to run at the death

of the ward notwithstanding that no administrator was appointed, then this suit is barred.

There are certain well-settled principles of equity which it is only necessary to refer to briefly.

A court of equity undoubtedly has jurisdiction over the accounts of guardians under the general jurisdictions over trustees, a guardian being held to be a trustee in the fullest sense of the word. **In Re Hannah Barry, 61 N. J. Eq., 135, (Emery, V. C., 1900); Sleeman v. Wilson, L. R. 13 Eq.,36; Perry on Trusts, Vol. 1, p. 526, sec. 430; 16 Am. & Eng. Ency of Law, 2 Ed., p. 75.**

It is true that this jurisdiction will not be exercised saving in exceptional cases; and, ordinarily, an accounting between guardian and ward should take place in the Orphans Court. But I apprehend that the same rule with respect to the application or non-application of the statute would apply in the Orphans Court as in this Court.

But the suit at bar is not one properly cognizable by the Orphans Court, because it is not between a guardian and a ward, or between a guardian and the representatives of a deceased ward, but is between the representatives of a deceased ward and of a deceased guardian.

The determination of the whole question depends, in my view, upon whether the relation between a guardian and ward is held to be a trust relation, that is, a direct, continuing, subsisting trust. If it is, then the authorities are clear that the Statute of Limitations does not apply. There can be no doubt I think that the relation between guardian and ward is a trust and is a direct, subsisting, continuing trust.

Some courts, however, hold that the trust termin-

ates at the majority of the ward. **15 AM. & Eng. Ency. of Law, p. 82, note 1**; and others have even fixed the period of the termination of the trust, with respect to a female ward, at the date of her marriage. **Ibid.**

In some purisdictions, therefore, it is held that when the ward comes of age, or marries, the trust relationship ceases, and the Statute of Limitations, or principles in analogy thereto, apply, and an action will not lie for an accounting after the period of limitation provided. **Ibid.**

But other courts hold, that the relation is one of trust, and is direct, subsisting and continuing until there is an accounting, **Mathew v. Brise, 14 Beav., 341; Matter of Camp, 126 N. Y., 377 (Ct. of Appeals 1891)** although in a previous cause in New York an opposite view had been distinctly taken and held in the case of **Bartine v. Varien, 4 Edw. Ch., 343 (1832)**. This case was cited to the Court in the Camp case, and was of course disregarded. **See also Pyatt v. Pyatt, 46 N. J. Eq., 285 (Ct. of Er. 1889)**

The principle upon which thes last-cited cases go is that where the guardian receives property belonging to the ward he becomes a trustee for the ward with respect to such property, and remains such trustee, subject to all the incidents thereof, until a proper account is had between him and the ward; and that the fact that the ward acquires the right to call for an accounting at a particular time, considered of course in connection with the concurrent right of the trustee or guardian to go into court of his own volition and account, does not fix such time as a period from which either a statute of limitations applies or equitable principles in analogy

thereto are applicable.

There being no discreet decision in this state upon this subject, we are free to adopt whatever view seems best. I think it best to assimilate this trust with all other like trusts, and to hold that so long as the guardian has the property of the ward-that is, so long as he had not accounted for it- he should be held as a trustee with a direct, subsisting, continuing trust unaffected by statutes of limitations or principles in analogy thereto.

I think the reasoning of the cases taking this view is more satisfactory than that of those which take an opposite view. I am also of opinion that the rule that I have laid down is the wiser one. It is certainly more equitable to each of the parties concerned. I seee no reason why a guardian having property of the ward confided to his care should be treated in any different aspect than any other trustee to whom is confided the property of a **cestui que trust.** He has it in his power, when the ward comes of age, of ridding himself of the burden of the trust by taking the proper proceedings either in a probate court or in this court, or, of course, by a direct settlement with the late ward. I do not see that any good purpose is served by holding that the right which the ward had has of calling the guardian to account should be construed as a strict legal right subject to the Statute of Limitations, and I do not think that it is is within the spirit of such.

Speaking generally, those actions which are within the spirit of the Statute of Limitations are such as lie with an actor; and if he neglects or fails to take advantage of the legal procedure open to him for a fixed period, it is the policy of this legislation to end

the right.. But where trusts are concerned the situation is radically different. There there is no one who must be the exclusive actor. Either party may, at any proper time, apply to the court and obtain full relief. Under such circumstances I can see no reason why a trustee should have protection after a stated period because the other party has not proceeded, it having been all the time within the power of the trustee to have himself proceeded had he seen fit.

Succinctly stated, the argument of the defendants is that the Statute of Account of this state **(Gen. Stat., p. 5)**, gives the right of action for an account against a guardian, and that the Statute of Limitations **(Gen. Stat. 1974, sec. 8)**, provides **inter alia,** that all actions of account shall be commenced within six years next after the cause of action shall have accrued; therefore they argue that we have a case in which there is a concurrent remedy at law and in equity, and the legal remedy is barred by the Statute, whereupon a court of equity will hold that an action in equity is likewise barred. It is unnecessary to cite any of the numerous cases which affirm this doctrine. But the doctrine is not applicable to the case in hand. The doctrine just contended for applies where the courts of law originally had jurisdiction and courts of equity subsequently obtained or were held to have concurrent jurisdiction. There, as has been just stated, a statute of limitations which barred the right of action at law equally barred it in equity. But where the court of law did not originally have jurisdiction the fact that it subsequently acquired it, and the action in it was barred by the statute, does not result in finding that

the suit in the court of equity is likewise barred.

In the case of **Hedges v. Norris, N. J. Eq., 192, (Runyon, Chan. 1880)**, it was held that the Statute of Limitations is not a bar to a suit in equity for the recovery of a legacy payable out of the personal estate only. In that case the Chancellor held that an executor was a trustee with respect to the sum of money due the legatee, and that while that trust subsisted the Statute of Limitations did not run in favor of the trustee. The trustee insisted that the legislature, by the Act of March 11, 1774, had provided for the recovery of legacies by actions at law, and that thereafter courts of equity and courts of law had concurrent jurisdiction, and what would bar the action in one would have a similar effect in the other. To this the Chancellor replied that equity had jurisdiction over legacies before the courts of law assumed it, and he pointed out that where a court of equity has jurisdiction and a court of law subsequently acquires concurrent jurisdiction, this will not serve to deprive the court of equity of its jurisdiction, nor to bind it by limitations which affect the action at law.

With respect to the matter of account at law, it will be found that the action only lay, so far as guardians are concerned, against guardians in socage. **Bouvier's Law Dic. Rawle's Ed., Vol. 1, p. 64, Ency. of Pl & Pr. Vol. 1, p. 84.**

An interesting and instructive history of guardianship at **common** law will be found in **Foley vs. Mut. L. Ins. Co., 138, N. Y., 333 (Ct. of Appeals, 1893.**

In the case of **Green vs Johnson, 3 Gill. & J., (Md.) 389**, it is said that "this action of account for rents and profits maintained by the heir after he had at-

tained the age of fourteen against the guardian in socage was the only one, other than an action on the bond, that could be brought against a guardian, as guardian, in a court of law."

Ordinarily proceedings to require guardians to account must be brought in a probate court. **In Re Hannah Barry, supra;** or in a court of equity if there was anything exceptional in the case requiring the interposition of a court of equity. It therefore appears that at a time when courts of equity, under their peculiar jurisdiction respecting trusts, undoubtedly had jurisdiction over the accounts of guardians, the common law courts only had a limited jurisdiction respecting guardians in socage. The effect, therefore, of the act of our Legislature passed in 1794 vesting jurisdiction in the common law courts of actions of accounts against guardians generally was not to divest the court of equity of its jurisdiction with respect thereto, and any limitations placed upon such common law action do not, directly or by analogy, bind the court of equity.

Determining, then, that the relationship between a guardian and ward is a direct, subsisting, continuing trust, the conclusion is reached that, as between this ward and her mother down to the time of the death of the ward, there was no running of the statute and no application of principles of limitation analogous thereto.

The next question to be considered, therefore, is whether the statute began to run at the date of the death of the ward.

It will be observed that the second period previously spoken of by me is now under consideration.

I am of the opinion that if, in this State, a cause

of action, arising upon the death of a person and not until his death, is barred if the statutory period begins to run at the date of his death, then this action or suit is barred; but I do not find that this is the law. In fact, the decisions are to the contrary. The authorities hold that where the cause of action did not exist during the life of the party and came into existence subsequent to the party's death, the statute does not begin to run until the appointment of a representative. **DeKay v. Darrah, 14 N. J. L., 288, at 296 (Sup. Ct., 1834); 19 Am. & Eng. Ency. of Law, 219, Note 3, p. 220.** The time between the death of the party and qualification of personal representative is not counted. **Ibid, p. 220, Note 3, 2 Eng. Rul. Cas., p. 133, Note; Murray vs East India Co., 5 B. & Ald. 204 (1821); Pratt vs Swaine, 8 B. & C. 285; 6 L. J., K. B., 6 (1828). Atkinson vs Bradford Soc., 25 L. J. Q. B., 360 (1890); Rhodes vs Smethurst, 6 M. & W., 351, 16 Eng. Rul. Cas., 146 (1840); Pinckney v. Burrage, 31 N. J. L., 21, at p. 24.**

My conclusions, therefore, are that as between guardian and ward there is a direct, continuing, subsisting trust until the guardian accounts: That the statute or implication of limitations does not apply thereto: That during the lifetime of this ward, after her coming of age and until her death, the Statute had not begun to run: That at her death it may be proper to hold that the relation between the living guardian and the person entitled to call her to account was not a direct, subsisting, continuing trust outside the statute, but was a trust by implication and, therefore, within the purview of limitations. But the limitation does not begin to run until there is a person entitled as representative of the deceased

ward to call the guardian to account, and such a person in this case did not come into being until the appointment of the administrator of the deceased ward's estate in March 1906. As this suit was brought almost immediately thereafter, it is, of course, not barred by the running of the statutory time against the administrator.

The motion to strike out the bill, therefore, fails.