

INDEX

	PAGE
Bill of Complaint.....	1
Schedule 1—Will	5
Schedule 2—Order Granting Probate..	12
Answer in Lieu of Plea.....	15
Answer of Defendant Laura J. French....	18
Replication	20
Replication	21
Order of Reference.....	22
Designation	24
Opinion of Vice-Chancellor.....	26
Substitution of Attorney.....	33
Final Decree	34
Amended Notice of Appeal.....	37
Petition and Grounds of Appeal.....	39

INDEX

Introduction 1

Chapter I. The History of the Church 15

Chapter II. The Doctrine of the Church 35

Chapter III. The Ministry of the Church 55

Chapter IV. The Sacraments of the Church 75

Chapter V. The Moral Teaching of the Church 95

Chapter VI. The Church in the World 115

Chapter VII. The Church and the State 135

Chapter VIII. The Church and the Future 155

Appendix 175

Index 195

Bill of Complaint.

BILL OF COMPLAINT.

Filed October 18, 1933.

In Chancery of New Jersey

To His Honor, Luther A. Campbell,
Chancellor of the State of New Jersey:

10

The complainants, Lissa L. McCabe Cross and Ethel M. Atkinson, two of the executrices of the Last Will and Testament of Jane Ann McCabe, deceased, respectfully show that:

1. The testator, Jane Ann McCabe, departed this life on or about the 10th day of June, 1931, resident in East Orange, Essex County, New Jersey, leaving a last will and testament, a copy whereof is hereto attached and made a part hereof and marked "Schedule 1."

20

2. Said decedent left her surviving three children, to-wit, the complainants Lissa L. McCabe (now Cross) and Ethel M. Atkinson, and the defendant Laura J. French, who were her next of kin.

3. The defendant Laura J. French, on or about June 19, 1931, filed a caveat against the probate of said will in the Office of the Surrogate of the County of Essex. The complainants, as executrices aforesaid, offered the said will for probate, and thereafter citations were issued by the Orphans' Court of Essex County, on or about July 15, 1931. The contest against the probate of said will, instituted by the said defendant's caveat thereafter proceeded to final hearing and determination by said Orphans' Court. On or about February 14, 1933, said

30

40

Bill of Complaint.

Orphans' Court did order, adjudge and decree that the said will be admitted to probate, and ordered that letters testamentary thereon be issued to Lissa L. McCabe and Ethel M. Atkinson, and Laura J. French, executrices in said will named, upon their duly qualifying as such.

10 A copy of said decree of the Orphans' Court is hereto attached and made part hereof and marked "Schedule 2."

4. Said will was duly admitted to probate, and on or about February 20, 1933, the complainants duly qualified as executrices hereof and letters testamentary were issued to them by the Surrogate of said County. Thereafter said Laura J. French filed in said Orphans' Court her notice of appeal from the said decree of said Orphans' Court, and every part thereof. On or about April 12, 1933, said Laura J. French filed her petition of appeal in the Prerogative Court, whereby she appealed from only certain parts of said decree, to-wit,—that part which recited and held that said caveatrix had no reasonable cause for contesting the validity of the will, that part which allowed a counsel fee to the proctor for the Essex County Trust Company, and that part which denied to the caveatrix her costs and expenses of litigation out of the estate. On or about May 15th, 1933, said Laura J. French withdrew her said appeal in the Prerogative Court and qualified as executrix, and letters testamentary were issued to her by the Surrogate of Essex County.

5. The defendant Laura J. French, the caveatrix to said will, offered on the trial or hearing of the contest thereof evidence other than that of the subscribing witnesses to the will, and the

Bill of Complaint.

said Orphans' Court found, by its said decree of February 14, 1933, that said caveatrix had no reasonable cause for contesting the validity of said will.

6. The testatrix' estate consisted solely of personal property. By paragraph *Ninth* of her said will, she provided as follows: 10

“NINTH: Each and every provision, bequest or devise to my said daughters or to their issue or issue of any deceased child contained in this will is made upon the distinct proviso that none of my said daughters or their issue or issue of a deceased child shall contest, dispute or question any of the provisions of this my last will and testament and I hereby expressly will and declare that in case any of them shall contest or question any of the provisions of this my last will and testament, then and in that event, any devise or bequest herein contained for the benefit or advantage of any one so contesting or questioning my said will, shall be and the same hereby is revoked, annulled and cancelled and I specifically will and declare that any part or share of my estate in this my last will and testament devised or bequeathed to or for the benefit of the one so contesting, shall be added to and divided among my remaining children, their issue or the issue of any deceased child of them, per stirpes and not per capita, upon the same terms and provisions as hereinbefore provided for the benefit and advantage of my children who accept and do not contest or question this will and to the same purport and effect as if no devise or bequest had been made herein for the benefit of the one so contesting.” 20 30

7. Notwithstanding the aforesaid contest and litigation commenced and prosecuted without reasonable cause, by the defendant Laura J. 40

Bill of Complaint.

French against the probate of the said last will and testament of said decedent, and the gift over to the testatrix' other children of the share bequeathed to or for the benefit or advantage of the one contesting, the defendant Laura J. French claims to have some interest in the income from
 10 or corpus of the one-third of the residuary estate of the testatrix mentioned in the *Eighth* paragraph of said will, and the defendant Essex County Trust Company also claims some like interest as a trustee under said *Eighth* paragraph. On the other hand, complainants are advised that said one-third share was given over to them, and that the defendants have no interest under said *Eighth* paragraph. By reason of the defendants' said claims, the complainants as
 20 executrices aforesaid require the instructions, advice and directions of this court as to the meaning and construction of said will and concerning their duties in the administration and settlement of the estate.

8. Complainant Lissa L. McCabe Cross was recently married, and is without issue. Complainant Ethel M. Atkin is married, and without issue. Defendant Laura J. French is married, and without issue. Said parties and the defendant
 30 Essex County Trust Company, are the only persons who now may have an interest in the subject-matters of this suit.

9. Complainants are without adequate remedy in the courts of law, and therefore pray—

(1) That Laura J. French, individually and as executrix of the Last Will and Testament of Jane Ann McCabe, deceased, and the Essex County Trust Company, a corporation of New
 40 Jersey, who are the defendants to this suit, may

Bill of Complaint.

answer this bill of complaint, without oath, and each statement therein made.

(2) That this Court may construe the said Last Will and Testament of Jane Ann McCabe, deceased, and may ascertain, declare and decree whether the said defendant, Laura J. French, individually, or the defendant Essex County Trust Company, as a trustee, have any interest in the income or corpus of the residuary estate of said decedent, and if so, what such interest may be; and that the complainants may, by decree of this Court, be advised, directed and instructed as to their duties in the premises. 10

(3) That the complainants may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience. 20

(4) That a writ of subpoena may issue, commanding the defendants to answer this bill of complaint and to abide by such decree as the court may make in the premises.

JOHN M. EMERY,
Solicitor and of Counsel with Complainants.

SCHEDULE 1.

WILL. 30

I, JANE ANN McCABE, of the City of East Orange, County of Essex and State of New Jersey, being of sound mind and disposing memory do hereby make, publish and declare this to be my last Will and Testament in manner and form following, hereby revoking all prior wills and codicils by me at any time heretofore made.

FIRST: I direct my executrices hereinafter named to pay all my just debts, funeral and 40

Bill of Complaint.

administration expenses as soon after my decease as possible.

10 SECOND: I give and bequeath to my daughters, ETHEL M. ATKINSON and LISSA L. McCABE, all my wearing apparel, furniture, rugs, pictures and all other household effects contained in my residence, 60 North Munn Avenue, East Orange, New Jersey.

THIRD: I give and bequeath to ROSEDALE CEMETERY CORPORATION the sum of Five hundred dollars (\$500.) in trust for the perpetual care and maintenance of my burial lot known as No. 5 of Hillcrest Plot in the cemetery of said corporation located in Orange, New Jersey.

20 FOURTH: I give and bequeath to THE McCABE HANGER MANUFACTURING COMPANY, a corporation organized under the laws of the State of New Jersey, all the shares of the capital stock of said corporation owned by me at the time of my death, and I direct my executrices to properly endorse and deliver all certificates for such capital stock. My intention in making this bequest is that the said stock so bequeathed to said corporation shall become treasury stock of said corporation.

30 FIFTH: After making the payments and bequests hereinbefore mentioned, I direct my executrices to divide all the rest, residue and remainder of my estate, real, personal and mixed, into as many equal parts or shares as there may be daughters of mine, or children of deceased children of deceased daughters of mine, per stirpes and not per capita then living at the time of my decease.

40 SIXTH: I hereby give, devise and bequeath one of such equal parts or shares to my daughter,

Bill of Complaint.

ETHEL M. ATKINSON, absolutely as her separate property and estate, in case she be living at the time of my demise, or in case my said daughter be then dead leaving lawful issue or lawful issue of any deceased child, then in that event I give, devise and bequeath said equal part or share to the lawful issue or lawful issue of any deceased child of my said daughter, ETHEL M. ATKINSON, in equal parts or shares per stirpes and not per capita, but in case my said daughter, ETHEL M. ATKINSON, shall die in my lifetime without leaving lawful issue or lawful issue of any deceased child, then this provision of my will shall be null and void and the property devised and bequeathed in this paragraph of my will shall be considered as part of my residuary estate and be divided into as many parts or shares as there shall then be daughters of mine or issue representing them, per stirpes, living at the time of my demise.

SEVENTH: I hereby give, devise and bequeath another of such equal parts or shares to my daughter, LISSA L. McCABE, absolutely as her separate property and estate in case she be living at the time of my demise, or in case my said daughter be then dead leaving lawful issue or lawful issue of any deceased child, then and in that event I give, devise and bequeath said equal part or share to the lawful issue or lawful issue of any deceased child of my said daughter, LISSA L. McCABE, in equal parts or shares per stirpes and not per capita, but in case my said daughter LISSA L. McCABE shall die in my lifetime without leaving lawful issue or lawful issue of any deceased child, then this provision of my will shall be null and void and the property devised and bequeathed in this paragraph of my

Bill of Complaint.

will shall be considered as part of my residuary estate and be divided into as many parts or shares as there shall then be daughters of mine or issue representing them, per stirpes, living at the time of my demise.

10 EIGHTH: I hereby give, devise and bequeath another of such equal parts or shares to the ESSEX COUNTY TRUST COMPANY of East Orange, New Jersey, and to its successors, IN TRUST, NEVERTHELESS, to invest the same and keep the same invested in good and sufficient income bearing securities, to receive the income thereof and to collect the rents, issues and profits of any real estate devised to said trustee under this clause of my will, and after paying the necessary and reasonable charges and expenses of the ad-
 20 ministration of this trust, including taxes, assessments and maintenance of any such real estate, then to pay over the net income of the said trust estate to my daughter, LAURA J. FRENCH, for and during the period of her natural life, and upon the further trust upon the death of my said daughter, LAURA J. FRENCH, leaving lawful issue or lawful issue of a deceased child her surviving, then and in that event to subdivide all real and
 30 personal property at the time held by the said trustee for the benefit of the said LAURA J. FRENCH, as above set forth, into as many separate and distinct parts or shares as there may then be issue or issue of a deceased child of the said LAURA J. FRENCH per stirpes and not per capita, then surviving, and in the event herein contemplated the said trustee shall hold each of said separate and distinct subdivisions, parts or shares in trust to invest each of such separate and distinct subdivisions, parts or shares and to
 40 keep each of the same invested and to pay the

Bill of Complaint.

income derived from one of such separate and distinct subdivisions, parts or shares to each of the issue of said LAURA J. FRENCH, or to the issue of any deceased child of said LAURA J. FRENCH, per stirpes, during minority, paying over the corpus thereof to each of such issue or issue of a deceased child of said LAURA J. FRENCH upon its attaining majority. And upon the further trust, in case at the death of the said LAURA J. FRENCH she shall leave no issue or issue of any deceased child of her surviving, then to pay over absolutely the corpus of said trust estate and all accumulations thereof to my then surviving daughters, or in case any one of them be then dead, then to her lawful issue or lawful issue of any deceased child of my said daughter so dying, in equal parts or shares per stirpes and not per capita. 10 20

NINTH: Each and every provision, bequest or devise to my said daughters or to their issue or issue of any deceased child contained in this will is made upon the distinct proviso that none of my said daughters or their issue or issue of a deceased child shall contest, dispute or question any of the provisions of this my last will and testament and I hereby expressly will and declare that in case any of them shall contest or question any of the provisions of this my last will and testament, then and in that event, any devise or bequest herein contained for the benefit, or advantage of any one so contesting or questioning my said will, shall be and the same hereby is revoked, annulled and cancelled and I specifically will and declare that any part or share of my estate in this my last will and testament devised or bequeathed to or for the benefit of the one so contesting, shall be added to and 30 40

Bill of Complaint.

divided among my remaining children, their issue or the issue of any deceased child of them, per stirpes and not per capita, upon the same terms and provisions as hereinbefore provided for the benefit and advantage of my children who accept and do not contest or question this will and to
 10 the same purport and effect as if no devise or bequest had been made herein for the benefit of the one so contesting.

TENTH: I hereby nominate, constitute and appoint my daughters, ETHEL M. ATKINSON, LISSA L. McCABE and LAURA J. FRENCH, executrices of this my Last Will and Testament, and I hereby direct that they be not required to give any bond or security for the performance of their duties as such executrices.

20 AND I DO FURTHER AUTHORIZE and empower my said executrices and the survivors or survivor of them, or such of them as may qualify, to sell any and all real property of which I may die seized, at public or private sale, and to such person or persons, upon such terms and conditions as to them may seem best, and to execute and deliver to the purchaser or purchasers thereof, good and sufficient deed or deeds for the same.

30 IN WITNESS WHEREOF, I have hereunto set my hand and seal this 4th day of February, in the year One Thousand Nine Hundred and thirty, in the presence of these attesting witnesses, at the same time declaring this to be my Last Will and Testament.

JANE A. McCABE (l. s.)

Bill of Complaint.

Subscribed by the said testatrix and declared by her at the time of making such subscription to be her last will and testament, whereupon we, at her request, in her presence and in the presence of each other, subscribed our names as witnesses attesting the execution hereof, this attestation clause having been read by the said testatrix in an audible voice in our presence immediately before our subscription hereto. 10

GERTRUDE C. GREULOCK,
residing at 875 East 35 St. Brooklyn, N. Y.

PAULINE GINSBURG,
residing at 2132-72 St., Brooklyn, N. Y. 20

W. IRVING TAYLOR,
residing at 151 W. 105th St. Manhattan
N. Y. City, N. Y.

30

40

Bill of Complaint.

SCHEDULE 2.

ESSEX COUNTY ORPHANS' COURT.

10	In the matter of the probate of a paper purporting to be the last will and testament of JANE A. McCABE, deceased.	}	<i>On Petition for Probate.</i>
----	----------------------------------------------------------------------------------------------------------------------------	---	----------------------------------------------

ORDER GRANTING PROBATE.

This matter being opened to the court by John
 M. Emery, Esq., proctor for Lissa L. McCabe
 and Ethel M. Atkinson, executrices and propo-
 nents, and in the presence of Henry J. Camby,
 Esquire, proctor for Laura M. French, caveatrix,
 20 and J. Howard Conover, Esquire, proctor for
 the Essex County Trust Company, and it appear-
 ing that Lissa L. McCabe and Ethel M. Atkinson,
 two of the executrices named in the last will and
 testament of Jane A. McCabe, late of the County
 of Essex, deceased, duly presented the said
 paper to the Surrogate of the County of Essex
 aforesaid for probate, and it appearing that a
 caveat against the probate of said will had been
 30 duly filed by Laura M. French with the said
 Surrogate, and citations having been issued to
 all persons in interest, and returned duly served,
 and the matter coming on to be heard before J.
 Henry Harrison, Esquire, one of the advisory
 masters of this court, to whom it was referred,
 who has taken the testimony and examined into
 the matters, and filed his report; and the court
 being of the opinion that the said paper writing
 was duly executed by the said Jane A. McCabe
 40 as and for her last will and testament in the

Bill of Complaint.

manner and form prescribed by the statute in such case made and provided, that the said Jane A. McCabe at the time of making said will was of sound and disposing mind, memory and understanding, and that said will was not the product of fraud or undue influence;

And it appearing that said caveatrix herein, Laura M. French, offered on the trial or hearing evidence other than the subscribing witnesses to the said will, and the court being satisfied that said caveatrix had no reasonable cause for contesting the validity of said will: 10

IT IS THEREUPON, on this 14th day of February, 1933, ORDERED, ADJUDGED and DECREED that the aforesaid paper writing be, and the same hereby is established as the last will and testament of the said Jane A. McCabe, deceased, and that the same be admitted to probate, and it is further ordered that letters testamentary thereon be issued to the said Lissa L. McCabe and Ethel M. Atkinson, and Laura M. French, executrices in said will named, upon their duly qualifying as such. 20

And it is further ordered that a counsel fee of four thousand five hundred dollars (\$4,500) be allowed to John M. Emery, Esquire, proctor for proponents, out of said estate, and that the National Newark and Essex Banking Company, the administrator *pendente lite* appointed herein, do pay the same to him out of the estate in its hands; and that there be allowed to the proponents the sum of six hundred and sixty-three dollars and ninety-five cents (\$663.95), out of said estate, for the expense of a transcript of the testimony, and that the said administrator *pendente lite* do pay them the said sum out of the estate in its hands. And it is further ordered 30 40

Bill of Complaint.

that a counsel fee of seven hundred and fifty dollars (\$750.00) be allowed to J. Howard Conover, Esq., proctor for Essex Co. Trust Co. out of said estate.

10 And it is further ordered, that the said caveatrix, Laura M. French, be and hereby is denied her costs and expenses of the litigation out of the estate.

And it is further ordered, that upon the said executrices qualifying as such, the National Newark and Essex Banking Company, the administrator *pendente lite*, do state and settle its account as such administrator *pendente lite*, and turn over the balance in its hand to the said executrices.

20

RICHARD HARTSHORNE,
Judge.

Respectfully advised,

J. HENRY HARRISON,
Advisory Master.

30

40

Answer in Lieu of Plea.

ANSWER IN LIEU OF PLEA.

Filed November 28, 1933.

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices of the Last Will
and Testament of Jane Ann
McCabe, deceased,

Complainants,

and

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane Ann
McCabe, deceased, and ES-
SEX COUNTY TRUST COM-
PANY, a corporation,

Defendants.

On Bill, etc.

*Answer in
Lieu of
Plea.*

20

This defendant, Essex County Trust Company, banking corporation organized under the laws of the State of New Jersey with its principal place of business in the City of East Orange, County of Essex and State of New Jersey, answering the bill of complaint says that:

30

1. The statements in paragraphs 1, 2 and 3 are admitted.

2. The defendant admits the said will was admitted to probate as alleged, and that the said notice of appeal was filed as alleged, but as to

40

Answer in Lieu of Plea.

the other statements in paragraph 4 it has no knowledge or information sufficient to form a belief.

10 3. The defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph 5.

4. The defendant admits that paragraph "NINTH" of said will reads as so alleged, but as to the other statements in paragraph 6 it has no knowledge or information sufficient to form a belief.

5. As to paragraph 7 of the Bill of Complaint:

20 (a) The defendant has no knowledge or information sufficient to form a belief as to whether or not "Notwithstanding the aforesaid contest and litigation commenced and prosecuted without reasonable cause, by the defendant Laura J. French against the probate of the said last will and testament of said decedent, and the gift over to the testatrix' other children of the share bequeathed to or for the benefit or advantage of the one contesting, the defendant Laura J. French claims to have some interest in the income from or corpus of the one-third of the residuary estate of the testatrix mentioned in the
30 Eighth paragraph of said will"; and

(b) As to whether or not the defendant claims some "like interest" as alleged in said paragraph, defendant has no knowledge or information sufficient to form a belief; but

40 (c) As to the allegation that the said one-third was given over to them and that the defendants have no interest under said "Eighth" paragraph is denied; and

Answer in Lieu of Plea.

(d) All other statements in said paragraph 7 are denied.

6. As to paragraph 8:

(a) The defendant has no knowledge or information sufficient to form a belief as to the fact that Lissa L. McCabe Cross was recently married, and is without issue. 10

(b) The defendant has no knowledge or information sufficient to form a belief as to the fact that Ethel M. Atkinson is married, and is without issue.

(c) The defendant has no knowledge or information sufficient to form a belief as to the fact that Laura J. French is married, and is without issue.

(d) The defendant has no knowledge or information sufficient to form a belief as to whether or not "said parties and the defendant Essex County Trust Company are the only persons who now may have an interest in the subject-matters of this suit." 20

EDWARD L. STASSE,
Solicitor for Defendant
Essex County Trust Company.

30

I hereby consent to the filing of the within answer in lieu of plea as of time.

JOHN M. EMERY,
Solicitor for Complainants.

40

Answer of Defendant Laura J. French.

**ANSWER OF DEFENDANT
LAURA J. FRENCH.**

Filed January 13, 1934.

IN CHANCERY OF NEW JERSEY.

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices of the Last Will
and Testament of Jane Ann
McCabe, deceased,

Complainants,

and

20

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane Ann
McCabe, deceased, and ES-
SEX COUNTY TRUST COM-
PANY, a corporation,

Defendants.

On Bill, etc.

*Answer of
Defendant
Laura J.*

*French,
Individually
and as
Executrix,
etc.*

30 The answer of the defendant Laura M. French,
sued herein as Laura J. French, individually, and
as executrix of the last will and testament of
Jane Ann McCabe, deceased.

Laura M. French, sued herein as Laura J.
French, individually, and as executrix of the last
will and testament of Jane Ann McCabe, de-
ceased, answering the bill of complaint herein
says that:

40 1. Paragraphs 1, 2, 3, 4, 5, 6 and 8 are ad-
mitted.

Answer of Defendant Laura J. French.

2. Paragraph 7 is denied, except as herein-
 after admitted, and this defendant alleges that
 she did not commence and prosecute the said
 will contest and litigation without reasonable
 cause, but on the contrary, alleges that she had
 reasonable cause therefor, and she claims that
 she is entitled to have established the trust as
 provided in the 8th paragraph of the will, and
 that the defendant Essex County Trust Company
 had an interest as trustee under the said para-
 graph. This defendant admits that there is some
 doubt in the minds of the complainants and that
 for that reason they refuse, or will refuse, to con-
 sent to the establishment of the said trust, but
 this defendant nevertheless alleges that she be-
 lieves, after having been advised by counsel, that
 the said trust fund should be established and
 that she is entitled to have the said fund set up,
 as provided in the 8th clause of the will, notwith-
 standing the provisions in the 9th clause.

This defendant further alleges that the said
 9th clause is contrary to the public policy of this
 State, and that it cannot affect this defendant or
 any issue that she may have as a result of her
 marriage.

Defendant, therefore, joins in the prayer of the
 complainants and desires the advice and instruc-
 tions of this court as to the meaning and con-
 struction of the said will and concerning her
 duties in the administration and settlement of
 the estate, insofar as it relates to the said 8th
 clause, but this defendant denies that the com-
 plainants have the right to have the instructions
 of this court concerning their duties in the ad-
 ministration and settlement of the general estate
 including the trust clause of the will.

HENRY J. CAMBY,
 Solicitor of Defendant
 Laura J. French, etc.

Replication.

REPLICATION.

Filed November 28, 1933.

IN CHANCERY OF NEW JERSEY.

98/907

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices under the Last
Will and Testament of Jane
A. McCabe, deceased,
Complainants,

and

20

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane A. Mc-
Cabe, deceased, and another,
Defendants.

*On Bill, &c.
Replication.*

The complainants join issue on the answer of
the defendant Essex County Trust Company.

30

JOHN M. EMERY,
Solicitor of Complainants.

40

*Replication.***REPLICATION.**

Filed January 20, 1934.

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
 ETHEL M. ATKINSON, Ex-
 ecutrices under the Last
 Will and Testament of Jane
 A. McCabe, deceased,
Complainants,

and

LAURA J. FRENCH, individu-
 ally and as Executrix of
 the Estate of Jane A. Mc-
 Cabe, deceased, and another,
Defendants.

On Bill, &c.
Replication.

20

The complainants join issue on the answer of
 the defendant Laura J. French, individually, and
 as executrix of the Last Will and Testament of
 Jane Ann McCabe, deceased. 30

JOHN M. EMERY,
 Solicitor of Complainants.

40

Order of Reference.

ORDER OF REFERENCE.

Filed December 18, 1933.

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices under the Last
Will and Testament of Jane
A. McCabe, deceased,
Complainants,

and

20

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane A. Mc-
Cabe, deceased, and another,
Defendants.

*On Bill, &c.
Order of
Reference.*

30

On motion of John M. Emery, Esquire, solicitor and of counsel for the complainants, and with the consent of Henry J. Camby, Esquire, solicitor and of counsel for the defendant Laura J. French, individually and as Executrix of the Estate of Jane A. McCabe, deceased, and of Edward L. Stasse, Esquire, solicitor and of counsel for the defendant Essex County Trust Company,

40

It is, on this 18th day of December 1933, ORDERED that the above-stated cause be referred to A. A. Stein, one of the Vice-Chancellors, to hear the same for the Chancellor, and to report

Order of Reference.

thereon to him, and advise what order or decree should be made therein.

LUTHER A. CAMPBELL,
C.

We consent to the above order. 10
December 1, 1933.

HENRY J. CAMBY,
Solicitor of Defendant Laura J. French, individually and as Executrix of the Estate of Jane A. McCabe, deceased.

EDWARD L. STASSE,
Solicitor of Defendant Essex County Trust Company. 20

30

40

*Designation.***DESIGNATION.**

Filed June 26, 1934.

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
 ETHEL M. ATKINSON, Ex-
 ecutrices under the Last
 Will and Testament of Jane
 A. McCabe, deceased,
Complainants,

and

20

LAURA J. FRENCH, individu-
 ally and as Executrix of
 the Estate of Jane A. Mc-
 Cabe, deceased, and another,
Defendants.

On Bill, &c.
Designation.

30

The Nineteenth day of November 1934, at ten
 o'clock in the forenoon at the Chancery Cham-
 bers, No. 1060 Broad street, Newark, New Jersey,
 is hereby fixed and designated as the time and
 place for the final hearing of the above cause.
 Dated June 26, 1934.

ALFRED A. STEIN,
 V.-C.

40

Designation.

We consent to the foregoing designation.

McDERMOTT, ENRIGHT & CARPENTER,
Solicitors of Complainants.

HENRY J. CAMBY,
Solicitor of Defendant Laura J.
French, individually and as 10
Executrix of the Estate of
Jane A. McCabe, deceased.

EDWARD L. STASSE,
Solicitor of Defendant Essex
County Trust Company.

20

30

40

*Opinion.***OPINION.**

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices of the Last Will
and Testament of Jane Ann
McCabe, deceased,

*Complainants,**and*

20

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane Ann
McCabe, deceased, *et al.*,

*Defendants.**On Bill, etc.**Opinion.*

(Decided March 13, 1935.)

Appearances:

Mr. Pierre P. Garven, solicitor for complain-
ants.

30

Mr. Henry J. Camby, solicitor for the defend-
ant, Laura J. French.

Mr. Edward L. Stasse, solicitor for the de-
fendant, Essex County Trust Company.

1. A testatrix may dispose of her estate
(within the law) as she pleases and may provide
that if any beneficiary under her will contests
the validity of her testament, the share to which
such beneficiary would be entitled is thereby
40. revoked.

Opinion.

2. Contest of a will by a beneficiary for life, which, under the terms of the will effects a forfeiture of the life tenant's rights, does not work a forfeiture of the remainderman's interest.

STEIN, *V. C.*

Complainants, Lissa L. McCabe Cross and Ethel M. Atkinson, two of the executrices of the last will and testament of Jane Ann McCabe, by their Bill of Complaint pray the Court to construe and decree whether the defendant, Laura J. French, individually, and the defendant, Essex County Trust Company as Trustee, have any interest in the income or corpus of the residuary estate of said decedent. 10

The matter is submitted on Bill, Answer and Replication. 20

The testatrix died June 10th, 1931, and the defendant, Laura J. French on June 19th, 1931, filed a caveat against the probate of her will. Proceedings followed which resulted in a decree of the Essex County Orphans' Court admitting the will to probate and ordering letters testamentary issued thereon to complainants and the defendant, Laura J. French, as executrices.

In the fifth clause of the will, the testatrix after making the payments and bequests therein mentioned, directs that the rest, residue and remainder of the estate be divided "into as many equal parts or shares as there may be daughters of mine, or children of deceased daughters of mine, or children of deceased children of deceased daughters of mine, per stirpes and not per capita, then living at the time of my decease." 30

By the Eighth clause, the share of defendant, Laura J. French, is given in trust to the Essex 40

Opinion.

County Trust Company of East Orange, to invest the same and

10 “to pay over the net income of the said trust estate to my daughter, Laura J. French, for and during the period of her natural life, and upon the further trust upon the death of my said daughter, Laura J. French, leaving lawful issue or lawful issue of a deceased child her surviving, then and in that event, to subdivide all real and personal property at the time held by the said trustee for the benefit of the said Laura J. French, as above set forth, into as many separate and distinct parts or shares as there may then be issue or issue of a deceased child of the said Laura J. French, per stirpes and not per capita, surviving, and in the event herein contemplated, the said trustee shall hold each of said separate and distinct subdivisions, parts or shares in trust, to invest each of such separate and distinct subdivisions, parts or shares, and to keep each of same invested and to pay the income derived from one of such separate and distinct subdivisions, parts or shares to each of the issue of said Laura J. French, or to the issue of any deceased child of said Laura J. French, per stirpes, during minority, paying over the corpus thereof to each of such issue or issue of a deceased child of said Laura J. French upon its attaining majority, and upon the further trust, in case at the death of the said Laura J. French she shall leave no issue or issue of any deceased child of her surviving, then to pay over absolutely the corpus of said trust estate and all accumulations thereof to my then surviving daughters, or in case any one of them be then dead, then to her lawful issue or lawful issue of any deceased child of my said daughter so dying, in equal parts or shares per stirpes and not per capita.”

20

30

40

Opinion.

The Ninth clause provides:

“Each and every provision, bequest or devise to my said daughters or to their issue or issue of any deceased child contained in this will is made upon the distinct proviso that none of my said *daughters* or *their issue* or *issue* of a deceased *child* shall contest, dispute or question any of provisions of this my last will and testament and I hereby expressly will and declare that in case *any of them* shall contest or question any of the provisions of this my last will and testament, then and in that event, any devise or bequest herein contained for the *benefit* or advantage of *anyone so contesting* or questioning my said will, shall be and the same is hereby revoked, annulled and cancelled and I specifically will and declare that any part or share of my estate in this my last will and testament devised or bequeathed to or for the *benefit of the one so contesting*, shall be added to and divided among my remaining children, their issue, or the issue of any deceased child of them, per stirpes and not per capita, upon the same terms and provisions as hereinbefore provided for the benefit and advantage of my children who accept and do not contest or question this will and to the same purport and effect as if no devise or bequest had been made herein for the *benefit of the one so contesting.*” (Italics mine.)

The estate consists entirely of personal property. The defendant, Laura J. French, is married, but without issue. She claims the right, notwithstanding the contest over the probate of her mother's will, to the income from the corpus of one-third of the residuary estate left in trust for her. The defendant, Essex County Trust Company, claims an interest as trustee under the provisions of the will. Complainants contend that neither of the defendants have any interest

Opinion.

or benefit in said estate because of the forfeiture clause contained in the ninth paragraph of the will.

10 The bill of complaint alleges that the Essex County Orphans' Court decreed (copy of the decree being annexed to the bill of complaint) that the caveatrix "had no reasonable cause for contesting the validity of said will," and "denied her costs and expenses of the litigation out of the estate."

20 The answer of defendant alleges that she had reasonable cause for her contest. I am bound, however, by the decree of the Essex County Orphans' Court, that there was no reasonable cause for contest, since it is not denied that such was the decree of that Court.

30 The intention of the testatrix clearly expressed was that if any of her daughters or their issue or issue of a deceased child of her shall contest any provision of her will, any *benefit* under the will of *the one* so contesting shall be revoked, annulled and cancelled, and that the *benefit* of the one so contesting, shall be added to and divided among her remaining children, their issue, or issue of any deceased child of them, upon the same terms as provided in her will for those who accept and do not contest her will.

40 The testatrix possessed the undoubted right (within the law) to dispose of what she possessed as she pleased, and to impose the condition subsequent contained in her will against contest, and the defendant, Laura J. French, because of her contest, lost all benefit under her mother's will. She acted in the face of notice that if she attempted to strike down any of its provisions, that the income from the trust cre-

Opinion.

ated for her benefit would be annulled and cancelled.

In *Hoit v. Hoit*, 42 E. 388; 7 Atl. 856, the will provided that "if any or either of my children shall enter a caveat against this my will, he or they shall pay all expenses of both sides." Our Court of Errors and Appeals held that since the appellee had taken the benefit of the devise, there was no reason why he should not reimburse the appellant for the expenses incurred on the entry of the caveat against the will, and took occasion further to say: "Upon another and a broader principle of equity, the appellee should not be allowed to defeat the intention of the testator that there should be no litigation over the will at the expense of the estate." And again where the will provided that if any devisees shall aid in an attempt, or attempt to prevent the proof of the will, the expenses of probating it shall be taken from their shares thereunder, we held such provision was valid. *Kayhart v. Whitehead*, 77 E. 12; Atl. 241. *Guaranty Trust Co. v. Blume, et al.*, 92 E. 538; 114 Atl. 423.

Where the will provided as here that in case a beneficiary contest the validity of the will, the share that such beneficiary would take under the will is revoked, we held the contestants lost their right to share in the estate by their contest. *O'Donnell, et al. v. Jackson*, 102 E. 470; 141 Atl. 450.

Presently the defendant, Laura J. French is without issue. The facts before me do not reveal her age, and indeed that fact is of no consequence here. The possibility of issue is always supposed to exist unless extinguished by the death of the parties. It was so held In re *Smith*,

Opinion.

94 E. 1. There is no period in the life of a woman when it is presumed in law that she may not possibly bear children. *Riley v. Riley*, 92 E. 465; *Graves v. Graves*, 94 E. 268.

10 Contest of a will by a beneficiary for life, which, under the terms of the will effects a forfeiture of the life tenant's rights, does not work a forfeiture of the remainderman's interest.

The trust was created alike for the benefit of the defendant's issue or the issue of any deceased child of her. Such persons provided for and not yet in being receive the benefit of the income from the trust upon the defendant's death and the principal upon attaining majority. The trust therefore is not ended.

20 The decree will be in accordance with the foregoing conclusions.

30

40

Substitution of Attorney.

SUBSTITUTION OF ATTORNEY.

Filed June 26, 1935.

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices of the Last Will
and Testament of Jane Ann
McCabe, deceased,

Complainants,

and

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane Ann
McCabe, deceased, *et al.*,

Defendants.

On Bill, etc.

*Substitution
of Attorney.*

20

It appearing to the Court that PIERRE P. GAR-
VEN, Solicitor for and of Counsel with the com-
plainants in the above entitled cause, consents
hereto.

30

It is, on this 26th day of June, 1935, ORDERED,
that P. HENRY STRAZZA and JOSEPH C. PAUL be
and they are hereby substituted as Solicitors for
said complainants in the place and stead of the
said Pierre P. Garven.

LUTHER A. CAMPBELL,

C.

I hereby consent to the above order.

PIERRE P. GARVEN.

40

*Final Decree.***FINAL DECREE.**

Filed May 27, 1935.

IN CHANCERY OF NEW JERSEY.

18/609.

10

Between

LISSA L. McCABE CROSS and
 ETHEL M. ATKINSON, Ex-
 ecutrices of the Last Will
 and Testament of Jane Ann
 McCabe, deceased,

*Complainants,**and*

20

LAURA J. FRENCH, individu-
 ally and as Executrix of
 the Estate of Jane Ann
 McCabe, deceased, *et al.*,

*Defendants.**On Bill, etc.**Final
Decree.*

30

This cause coming on to be heard in the pres-
 ence of Henry J. Camby, solicitor of the defend-
 ant Laura J. French, individually and as execu-
 trix of the estate of Jane Ann McCabe, de-
 ceased, and of Edward L. Stasse, solicitor of the
 defendant Essex County Trust Company, and in
 the presence of the complainants Lissa L. Mc-
 Cabe Cross and Ethel M. Atkinson, executrices
 of the last will and testament of Jane Ann Mc-
 Cabe, deceased, and the court having examined
 the pleadings, and having heard and considered
 the arguments of counsel on the issues which
 were submitted to the court on the said pleadings
 without oral argument in open court;

40

Final Decree.

It is thereupon, on this 27th day of May, 1935, on motion of Henry J. Camby, solicitor of the defendant Laura J. French, individually and as executrix of the estate of Jane Ann McCabe, deceased,

ORDERED, ADJUDGED AND DECREED, that any and all benefit which Laura J. French was to derive under the trust established under the provisions of the Eighth clause of the last will and testament of Jane Ann McCabe, deceased, be and the same hereby is revoked, annulled and cancelled; and it is further

ORDERED, ADJUDGED AND DECREED, that the complainants, Lissa L. McCabe Cross and Ethel M. Atkinson, and the defendant, Laura J. French, executrices of the estate of Jane Ann McCabe, deceased, be and they are hereby directed to proceed to settle their account as executrices of said estate and to pay, transfer and deliver to the Essex County Trust Company of East Orange, New Jersey, as trustee, the distributive share of the estate of Jane Ann McCabe, deceased, as provided in the Eighth clause of the last will and testament of said Jane Ann McCabe, deceased; and it is further

ORDERED, ADJUDGED AND DECREED, that the Essex County Trust Company of East Orange, New Jersey, be and it hereby is directed, upon receipt of the distributive share of said estate of Jane Ann McCabe, deceased, herein directed to be paid to it, to hold said share in trust for the benefit of any issue of Laura J. French, or any issue of any deceased child or children of said Laura J. French who may be born during her lifetime, per stirpes and not per capita, and to administer said trust fund and distribute the income and principal thereof in accordance with

Final Decree.

the provisions of the Eighth clause of the said last will and testament of Jane Ann McCabe, deceased; and it is further

10 ORDERED, that a counsel fee of \$250 be allowed to Henry J. Camby, solicitor of the defendant Laura J. French, individually and as executrix of the estate of Jane Ann McCabe, deceased, said
counsel fee, together with the costs of this suit, to be paid by the complainants and the defendant Laura J. French, executrices of the estate of Jane Ann McCabe, deceased, out of the funds in their hands as such executrices; and it is further

20 ORDERED, that copies of this decree, which may be certified as true by the solicitor of the defendant Laura J. French, be served upon the complainants, Lissa L. McCabe Cross and Ethel M. Atkinson, two of the executrices of the last will and testament of Jane Ann McCabe, deceased, within 10 days after the date hereof.

LUTHER A. CAMPBELL,
C.

Respectfully advised,

30 ALFRED A. STEIN,
V.-C.

I certify the foregoing to be a true copy of the original.

HENRY J. CAMBY,
Solicitor of Defendant Laura J.
French, individually and as
executrix, etc.

Amended Notice of Appeal.

AMENDED NOTICE OF APPEAL.

Filed August 13, 1935.

IN CHANCERY OF NEW JERSEY.

98/609

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices of the Last Will
and Testament of Jane Ann
McCabe, deceased,

Complainants,

and

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane Ann
McCabe, deceased, *et al.*,

Defendants.

On Bill, etc.

*Amended
Notice of
Appeal.*

20

Sat below:

CAMPBELL, C.

STEIN, V.-C.

The complainants hereby appeal from the final
decree made in the above entitled cause on May
27th, 1935 and from the whole and every part
thereof to the Court of Errors and Appeals in
the last resort in all causes.

30

Dated: July 27, 1935.

JOSEPH C. PAUL,
P. HENRY STRAZZA,
Solicitors for and of
Counsel with Complainants.

40

Amended Notice of Appeal.

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

JOSEPH C. PAUL,
P. HENRY STRAZZA.

10 Service of a copy of the within is hereby acknowledged this 27th day of July, 1935.

HENRY J. CAMBY,
Solicitor for Defendant.

Service of a copy of the within is hereby acknowledged this 21st day of August, 1935.

20 EDWARD L. STASSE,
For Essex County Trust Co.

30

40

*Petition and Grounds of Appeal.***PETITION AND GROUNDS OF APPEAL.**

Filed August 22, 1935.

**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

10

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, Ex-
ecutrices of the Last Will
and Testament of Jane Ann
McCabe, deceased,
Complainants-Appellants,

and

LAURA J. FRENCH, individu-
ally and as Executrix of
the Estate of Jane Ann
McCabe, deceased, *et al.,*
Defendants-Respondents.

*On Appeal
from Court
of Chancery.*

20

Sat below:

CAMPBELL, C.

STEIN, V.-C.

30

*To the New Jersey Court of Errors and Appeals
in the last resort in all causes:*

The petition of appeal of the appellants, Lissa L. McCabe Cross and Ethel M. Atkinson, executrices of the last will and testament of Jane Ann McCabe, deceased, respectfully shows that:

1. The appellants are aggrieved of the whole of a final decree made by the Chancellor on the advice of Honorable Alfred C. Stein, Vice-Chan-

40

Petition and Grounds of Appeal.

10 cellor, on May 27th, 1935 in a cause wherein Lissa L. McCabe Cross and Ethel M. Atkinson, executrices of the last will and testament of Jane Ann McCabe, deceased, were complainants and Laura J. French, individually and as executrix of the estate of Jane Ann McCabe, deceased, et al., was defendant.

2. The appellants state the following grounds of appeal:

(a) The decree of the Court of Chancery should be reversed because under the terms of the Will the entire Trust Fund fails by reason of the contest by anyone.

20 (b) The decree of the Court of Chancery should be reversed because it provides for the income from the Trust created to be placed in said Trust Account and to become part of the principal thereof and to be distributed to the Trust Beneficiary, if any, whereas under the terms of the ninth clause of the Will, the income was to be distributed to the complainants herein by reason of the contest of the said Laura J. French, the defendant, and her share having lapsed by reason of said contest.

30 (c) The decree of the Court of Chancery should be reversed because of the allowance of counsel fee to the Solicitor of the defendant-respondent, Laura J. French.

(d) The decree of the Court of Chancery should be reversed because it is contrary to law.

(e) The decree of the Court of Chancery should be reversed because it does not properly construe the eighth and ninth clause of the Will of the said Jane Ann McCabe, deceased.

Petition and Grounds of Appeal.

(f) The decree of the Court of Chancery should be reversed because the relief granted is contrary to settled and established law.

JOSEPH C. PAUL,
P. HENRY STRAZZA,
Solicitors for and of Counsel 10
with Complainants-Appellants.

6/26/35.

20

30

40

The first part of the book is devoted to a general survey of the history of the law of contract, and to a discussion of the principles which govern its development.

The second part is devoted to a detailed examination of the law of contract in its various branches, and to a discussion of the principles which govern its development.

11

12

13

14

Answer to Petition of Appeal.

**ANSWER OF LAURA J. FRENCH, ETC.
TO PETITION OF APPEAL.**

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, execu-
trices of the last will and
testament of Jane Ann Mc-
Cabe, deceased,

Complainants-Appellants,

and

LAURA J. FRENCH, individu-
ally and as executrix of
the estate of Jane Ann
McCabe, deceased, *et al.*,

Defendant-Respondent.

10

*On Appeal
from Court
of Chancery.*

*Answer of
Laura J.*

French, etc.

*to Petition
of Appeal.*

20

Sat Below: CAMPBELL, C.

STEIN, V. C.

*To the New Jersey Court of Errors and Appeals
in the Last Resort in All Causes:*

30

The answer of the defendant-respondent, Laura J. French, individually and as executrix of the estate of Jane Ann McCabe, deceased, to the petition of appeal of the appellants, Lissa L. McCabe Cross and Ethel M. Atkinson, executrices of the last will and testament of Jane Ann McCabe, deceased, shows that:

1. She denies Paragraph 1 of the petition.

40

Answer to Petition of Appeal.

2. Under the terms of the last will and testament of Jane Ann McCabe, deceased, the entire trust fund does not fail by reason of the contest by anyone, as alleged in Paragraph 2, clause (a), of the petition, and for that reason the decree of the Court of Chancery should not be reversed.

10

3. She denies the remainder of Paragraph 2 of the said petition, and alleges that the decree of the Court of Chancery should be affirmed for the reason that it is not erroneous or contrary to law.

She further alleges that the allowance of counsel fee to her was made after full and careful consideration by the Court of Chancery and that the said allowance was justified.

20

WHEREFORE, she prays that the appeal of the complainants-appellants may be dismissed and that the decree of the Court of Chancery should be affirmed, together with costs.

HENRY J. CAMBY,
Solicitor for and of Counsel with
Defendant-Respondent, Laura
J. French, Individually, etc.

30

40

122OCT.T.1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, execu-
trices of the last will and
testament of Jane Ann
McCabe, deceased,
Complainants-Appellants,

and

LAURA J. FRENCH, individu-
ally and as executrix of the
estate of Jane Ann Mc-
Cabe, deceased, et al,
Defendant-Respondent.

*On Appeal
from Court
of Chancery.*

Sat Below: CAMPBELL, C.
STEIN, V.-C.

BRIEF ON BEHALF OF COMPLAINANTS-APPELLANTS.

The issues involved in this action were submitted to the Court below on bill and answer.

The gist of the action has to do with the construction of a Will.

Briefly, the facts are that the decedent died on June 10th, 1931, leaving three daughters, all over twenty-one years of age. Two of the daughters are the complainants-appellants and the third one is the defendant-respondent, Laura J. French. The decedent left a Will which was probated, but not until after there was a determination of proceedings under a caveat brought by the defendant-respondent, Laura J. French.

A copy of the Will is annexed to the complaint and will be found on page 5, of the State of Case.

Under the Will, the decedent left the complainants all wearing apparel, furniture and other household effects in the decedent's home in East Orange, N. J.; a small bequest to a cemetery corporation and the capital stock owned by her to the company issuing the same. The Will named the three daughters as executrices and directed them to divide all of the residue of the Estate, "* * *" into as many equal parts or shares as there may be daughters of mine, or children of deceased children of deceased daughters of mine, per stirpes and not per capita, then living at the time of my decease."

Under the sixth paragraph, the decedent gave to Ethel M. Atkinson, one of the complainants one of such equal parts or shares absolutely as her separate property and estate and under the seventh paragraph, the decedent made a like bequest to Lissa L. McCabe, now Lissa L. McCabe Cross, the other complainant. Under the eighth paragraph, the decedent devised and bequeathed the third and final share to the Essex County Trust Company of East Orange, New Jersey and to its successors, in trust for Laura J. French, the defendant for life, to receive the income therefrom and "* * *" upon the death of my said daughter, Laura J. French, leaving lawful issue or lawful issue of a deceased child her surviving, then and in that event to subdivide all real and personal property at the time held by the said trustee for the benefit of the said Laura J. French, as above set forth, into as many separate and distinct parts or shares as there may then be issue or issue of a deceased child of the said Laura J. French. * * * then to pay over absolutely the corpus of said trust

estate and all accumulations thereof to my then surviving daughters * * *”

Because of its importance, we quote the ninth clause of the Will in full:

“Each and every provision, bequest or devise to my said daughters or to their issue or issue of any deceased child contained in this will is made upon the distinct proviso that none of my said daughters or their issue or issue of a deceased child shall contest, dispute or question any of the provisions of this my last will and testament and I hereby expressly will and declare that in case any of them shall contest or question any of the provisions of this my last will and testament, then and in that event, any devise or bequest herein contained for the benefit or advantage of any one so contesting or questioning my said will, shall be and the same hereby is revoked, annulled and cancelled and I specifically will and declare that any part or share of my estate in this my last will and testament devised or bequeathed to or for the benefit of the one so contesting, shall be added to and divided among my remaining children, their issue or the issue of any deceased child of them, per stirpes and not per capita, upon the same terms and provisions as hereinbefore provided for the benefit and advantage of my children who accept and do not contest or question this will and to the same purport and effect as if no devise or bequest had been made herein for the benefit of the one so contesting.”

At the death of the decedent June 10th, 1931, Laura J. French was without issue and still is. Lissa L. McCabe Cross and Ethel M. Atkinson were the two other daughters.

Under the “Order granting probate”, page 13, line 14, State of Case, the Court found “that said caveatrix had no reasonable cause for contesting the validity of the said Will.”

ARGUMENT.

POINT I.

The decree of the Court of Chancery should be reversed because under the terms of the Will the entire trust fund fails by reason of the contest by anyone.

The opinion of the Court below held the forfeiture clause good insofar as the life estate of Laura J. French was concerned by virtue of her contest of the validity of the Will. An examination of the cases in New Jersey reveals only a few reported ones touching on the same subject.

The first case we have is that of *Hoit v. Hoit*, reported in 43 Eq. 388, 7 Atl. 856, where the Will provided:

“If any or either of my children shall enter a caveat against my Will, he or they shall pay all expenses of both sides.”

It was held:

“* * * is a good condition in a will.”

In the case of *Guaranty Trust Co. v. Blume et al.*, reported in 114 Atl. 423, 92 N. J. Eq. 538, the Court held:

“A provision that, should any of the legatees or devisees under a will contest it, or file a caveat, they should pay the expenses of both sides, is valid.”

In the case of *O'Donnell et al. v. Jackson et al.*, reported in 141 Atl. Reporter, page 450, 102 N. J. Eq. 470, it was held:

“Under will providing, in case any of beneficiaries or legatees under will should contest validity, share of such beneficiary or legatee was to be revoked, contestants lost their right to share in estate by their contest, since testator can dispose of his

property as he deems fit, with any conditions not contrary to law.”

The cases in other States supporting the forfeiture rule, without admitting any exceptions are as follows: *Bradford vs. Bradford*, 19 Ohio State 546; *Ray Miller*, 156 California 119, 103 Pacific 842; *Moran vs. Moran*, 144 Iowa 451, 30 L. R. A. (N. S.) 898, 123 N. W. 202; *Tate vs. Camp*, 245 S. W. 839 (Tenn.); 40 Cyc. 1705; 2 Redfield Wills 679; 2 Jarmin Wills 682; Ann. Cas. 1918 E 1090; *King vs. Rockwell*, 93 N. J. E. 46, 115 A. 40.

The Vice-Chancellor below held that the contest of the Will by Laura J. French, a beneficiary for life, effected a forfeiture of her rights under the life estate, but her conduct did not work a forfeiture of the remainderman's interest.

It is our contention that the “issue” of Laura J. French, not being in esse, have merely a contingent remainder and that the complainants, Ethel M. Atkinson and Lissa L. McCabe Cross have a vested remainder so that no estate or right passed to the “issue” at the death of the decedent, and the conduct of Laura J. French in filing a caveat, caused a forfeiture of the entire life estate and same vested absolutely in the said Ethel M. Atkinson and Lissa L. McCabe Cross.

In the case of *Wunderlich v. Bleyle*, reported in 125 Atl. Rep. page 386, 96 N. J. Eq. 135, the Court held:

“Where testator devised property to two of his daughters for their lives, and ‘from and after the death of my daughters’ to their children then living, the devise over, after the death of the life tenants or either of them, created a contingent remainder.”

In the case of *Sadler et al. v. Bergstrom et al.*, reported in 168 Atl. Rep. page 50, 113 N. J. Eq. 567, it was held:

“Generally, gift of remainder to class of which some members are in esse, and unconditional, will vest at testator’s death in members in esse subject to open and let in any future members coming into being during continuance of prior estate.

Where gift of remainder interest is to class whose members cannot be determined until termination of prior estate, remainder will generally not vest until that occurs.”

In *Durand v. Ward*, 105 N. J. E. 274, 147 Atl. Rep. 548, Vice-Chancellor Church in quoting Chancellor Walker, said:

“In the case sub judice, upon the death of the life tenant without issue, the residuary gift over is to the testator’s next of kin. They therefore took a vested remainder in the fund, defeasible upon the death of the legatee for life leaving issue. The fact that the enjoyment is uncertain never interferes in the vesting of an estate. When the contingency is not in the person, but in the event or in the time of enjoyment, the interest is vested.”

A remainder is contingent, if the persons who are to take are not definitely ascertained (*Randolph v. Wilkinson*, 294 Ill. 508, 128 N. E. 525).

A contingent remainder arises, either where the person to whom it is limited is not in esse, or where the particular estate may be determined before the remainder can take place.

Schly v. Williamson, 153 Ga. 245, 111 S. E. 917;

Williamson v. Youngs, 200 Iowa 672, 203 N. E. 28;

Home Bank v. Fox, 113 So. Car. 378, 102 S. E. 644;

Lewin v. Bell, 285 Ill. 227, 120 N. E. 633;
Aldrich v. Aldrich, 43 R. I. 179, 110 Atl.
 626.

In *Mickey's Appeal*, 46 Pa. 347, it was held:
 "Condition-subsequent defeats an estate
 already vested."

The above doctrine was approved and followed
 in the case of *Drace vs. Klinedinst*, 25 A. L. R.
 1520, 275 Pa. 266, 118 Atl. 907.

A good explanation of a contingent remainder
 is given by Underhill on the Law of Wills, Vol-
 ume No. 2, page 1286, where he says:

"A contingent remainder is one which is
 limited to vest upon the happening of some
 event which is dubious and uncertain, and
 hence may never happen at all, or may only
 happen after the particular estate is at an
 end; or which is given to a non-existent
 person or to a non-existent class of per-
 sons."

On page 1296, Mr. Underhill defines a vested
 remainder in the language of Chancellor Kent
 as follows:

"When there is an immediate right of
 present enjoyment or a present fixed right
 of future enjoyment, the uncertainty that
 the remainder will ever vest in possession
 in the remainderman named will not render
 it contingent if there be a person in being
 in whom it would vest if the precedent estate
 were to come at once to an end."

In the case of *Adams vs. Adams* (English)
 reported in 45 Chancery Division at page 426,
 1890, it appears that the testator gave his Free-
 hold estate to two trustees to pay certain annu-
 ities to the plaintiff during life and after his
 death, for the plaintiff's unborn sons in fee; the
 Will provided that the plaintiff should not in
 any way interfere or attempt to meddle with

the management of the trustees of the estate and if he did, the annuities should immediately cease. Later, the plaintiff brought an action against the two trustees alleging that his annuities had not been paid. The Court held on the evidence that none of the charges against the trustees were established and that the action was groundless and an attempt to interfere with the management of the estate and that the plaintiff forfeited his annuities.

In the case of *Hodgson v. Halford* (English) reported in 11 Chancery Division at page 959, Hall, V.-C. said:

“When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?”

And he refused to construe the clause of forfeiture separately from the gift over.

In the case of *Perry vs. Rodgers*, reported in 114 S. W. at page 897 (Texas), it appeared that the Will devised land to testator's children by his first, third and fourth marriages and to his surviving wife, but provided that if any should attempt or should proceed in breaking or changing his Will, then all his property should go to his present wife for the benefit of his sons by her. The attempt of any devisees to change the Will would vest the rights of all of them so that a suit to try title to the devised land by his children by his first wife would also prevent those who did not join in the attack from taking under the Will. The specific language used in the Thirteenth Paragraph of the Will in the Perry case is as follows:

“If at any time, any should attempt or should proceed in changing or breaking my aforesaid Will, then it is my wish and desire that the half interest that I hold and

possess in all my estate, both real and personal, be given and I here bequeath the same to my present wife for the benefit of my sons Oscar G. and Louis Perry, sons of my present wife by me.”

The suit was by children of the first marriage against the children of that marriage and against the surviving wife and children of the fourth and third to try the title to and for a partition of the land devised. Robert Perry, a child of the fourth marriage, born after the death of his father, Oscar and Louis, children of the same marriage, and appellant, being minors, a guardian *ad litem* was appointed to defend the suit as to them. The appellant insisted that because he did not join in the attempt to change or break the Will, there should be no forfeiture as to him, but the Court held otherwise.

In the case of *Sackett vs. Mallory*, 42 Mass. 355, it appeared that the testator devised to B and C, his children, his real estate in fee upon condition that if either of them should make any claim against his estate after his decease, he should have no right by virtue of the Will, and it was held that B and C had an estate as tenants in common and that in breach of the condition by either, his estate would go to the heirs at law.

It is elementary that in construing any legal document, you must read the entire paper as one and get the intention of the maker, drawer or testator. As was said by Vice-Chancellor Berry, in the case of *Clausen v. Leary*, reported in 166 Atl. Rep. 623, 113 N. J. Eq. 324:

“Even though the words are in form of a condition precedent, the general intention of the testator, as collected from the four corners of the Will, if showing a different purpose, will prevail.”

In view of the foregoing, let us read the ninth clause of the Will:

“Each and every provision, bequest or devise to my said daughters or to their issue or issue of any deceased child contained in this will is made upon the distinct proviso that none of my said daughters or their issue or issue of a deceased child shall contest, dispute or question any of the provisions of this my last will and testament and I hereby expressly will and declare that in case *any of them* shall contest or question any of the provisions of this my last will and testament, then and in that event, any devise or bequest herein contained *for the benefit or advantage of any one so contesting or questioning* my said will, shall be and the same hereby *is revoked, annulled and cancelled* and I specifically will and declare *that any part or share of my estate* in this my last will and testament devised or bequeathed *to or for the benefit of the one so contesting*, shall be added to and divided among my remaining children, their issue or the issue of any deceased child of them, per stirpes and not per capita, upon the same terms and provisions as hereinbefore provided for the benefit and advantage of my children who accept and do not contest or question this will and to the same purport and effect *as if no devise or bequest had been made herein for the benefit of the one so contesting.*”

What do the words “for the benefit of the one so contesting * * *” mean? Is it not true that the “issue” of Laura J. French had a “benefit” or “advantage” through the said Laura J. French? It surely would be to the “advantage” of Laura J. French to have her “issue” cared for at her death by receiving the income and at majority to get the corpus of the

estate. What stronger language could be used than "revoked, annulled and cancelled"? In ordinary language the words "that any part or share of my estate" means life income or corpus. The testator uses the words "to or for the benefit of the one so contesting" a second time in the same paragraph, clearly indicating an intention that the share shall lapse and that intention is clinched in the last line of the paragraph "as if no devise or bequest had been made herein for the benefit of the one so contesting." In other words, the testator had in mind that the life estate bequested to the Trust Company should lapse and be "as if no devise or bequest had been made." The life estate failing, of course the "issue" failed and the share goes to the other children remaining. Just as soon as decedent died, there arose a contingent remainder in the "issue" of Laura J. French, subject to be divested upon a contest of the will and the will was contested and hence the life estate failed.

POINT II.

The decree of the Court of Chancery should be reversed because it provides for the income from the trust created to be placed in said trust account and to become part of the principal thereof and to be distributed to the trust beneficiary, if any, whereas under the terms of the Ninth Clause of the Will, the income was to be distributed to the complainants herein by reason of the contest of the said Laura J. French, the defendant, and her share having lapsed by reason of said contest.

The decree of the Vice-Chancellor below provides that the Trust Company upon receipt of

the distributive share shall hold same in trust for the benefit of any issue of Laura J. French or any issue of any deceased child or children of the said Laura J. French who may be born during her lifetime and the Trust Company is to distribute the said fund and distribute the income and principal thereof in accordance with the provisions of the Eighth Clause of the Will. An examination of the Eighth Clause of the Will provided for the distribution of the income to Laura J. French during her lifetime and in her death to her issue until said issue attains majority and if there are no issue, then the Trust Company is to pay over absolutely the corpus of the Trust Estate and all accumulations to the surviving daughters.

It is the contention of the complainants-appellants that the Ninth Clause of the Will provides how this income shall be distributed and by a strict interpretation of the present decree, the Court already having found Laura J. French forfeited her right to the income, the income would accumulate for the benefit of her issue, but the Ninth Clause specifically says, "that any part or share of my estate in this my last will and testament devised or bequeathed to or for the benefit of the one so contesting, shall be added to and divided among my remaining children * * *." In other words, the complainants herein are entitled to the income from the trust fund until the death of the said Laura J. French.

POINT III.

The decree of the Court of Chancery should be reversed because of the allowance of counsel fee to the solicitor of the defendant-respondent, **Laura J. French.**

The decree allows a counsel fee of Two hundred and fifty dollars (\$250.) to the solicitor of the defendant, Laura J. French, individually and as executrix of the Estate and the costs of the suit, together with the fee are charged against the Estate. There was no allowance for counsel fees on behalf of complainants and since the defendant was defeated in the action, there is no justification for the allowance of counsel fees and costs in the matter.

POINT IV.

The decree of the Court of Chancery should be reversed because it is contrary to law.

The decree of the Court of Chancery should be reversed because the relief granted is contrary to settled and established law.

We have argued the two points above mentioned under Point I and Point II, and therefore will not repeat the argument in this point.

For these reasons, we respectfully urge this Court to modify the decree of the Court of Chancery so as to absolutely defeat the life estate created under the Will for the reason of the contest by the said Laura J. French and to decree that the life estate is revoked, annulled and cancelled as if no devise or bequest had been made.

Respectfully submitted,

JOSEPH C. PAUL,
P. HENRY STRAZZA,
Solicitors for and of Counsel
with Complainants-Appellants.

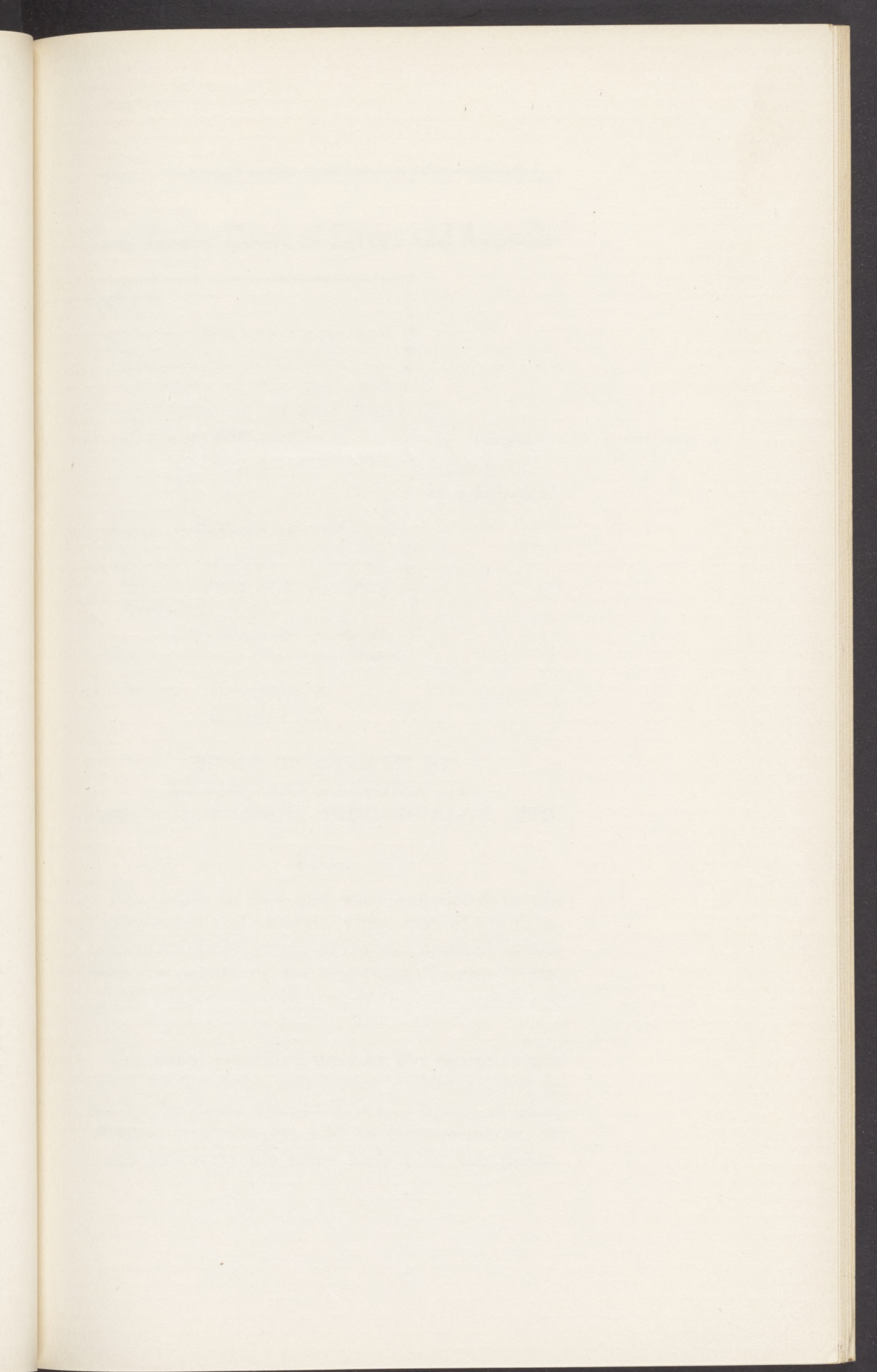
The first of the four parts of the report is a general survey of the situation of the world economy. It is followed by a detailed analysis of the economic situation in the United States, and then by a discussion of the economic situation in the other major industrial countries. The report concludes with a series of recommendations for the United States and for the world economy.

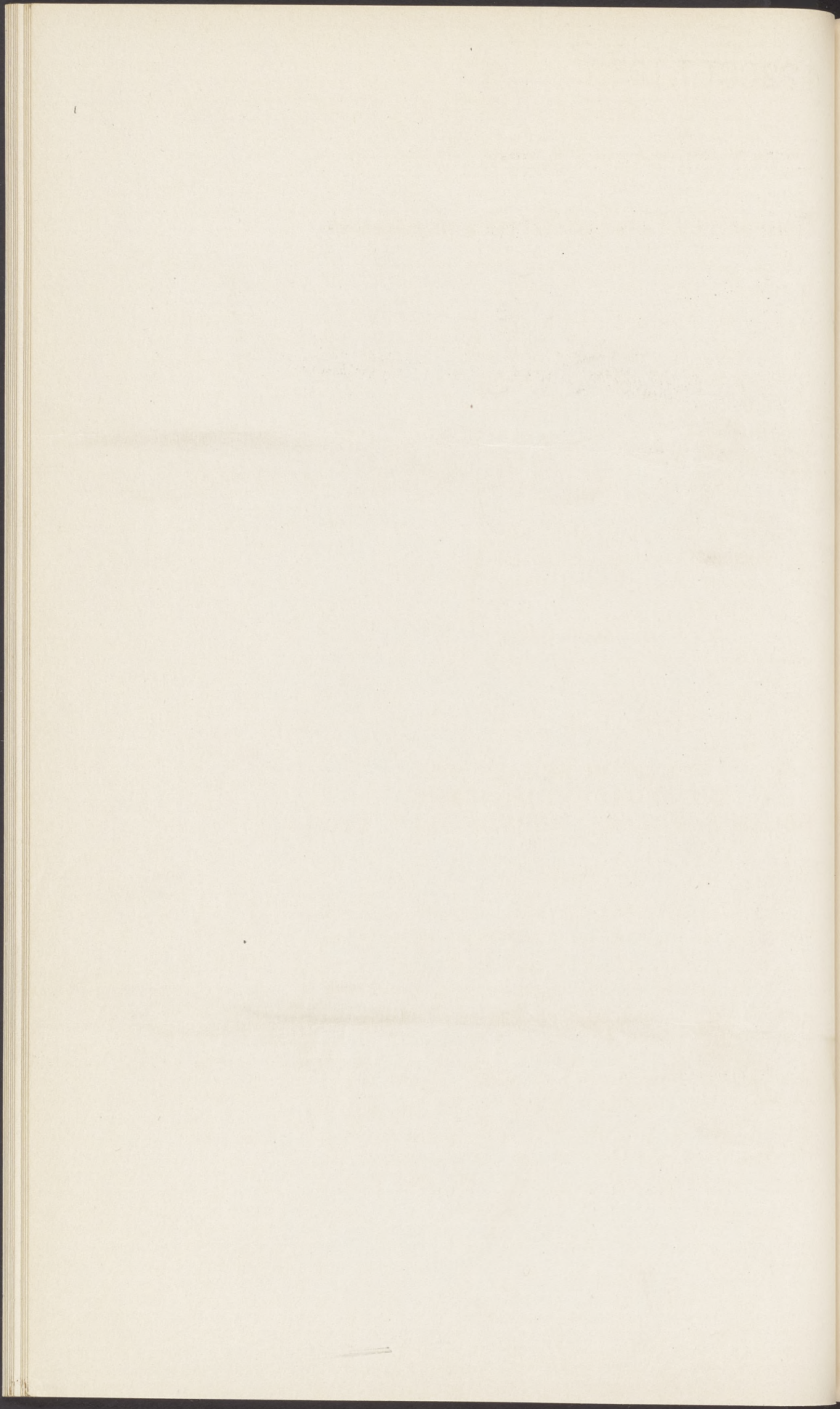
APPENDIX

The appendix contains a series of tables and charts which provide a more detailed analysis of the economic data presented in the main body of the report. These include tables showing the growth of the world economy, the United States economy, and the economies of the other major industrial countries. There are also charts showing the distribution of income and wealth in the United States and in the other major industrial countries.

INDEX

The index provides a list of the subjects covered in the report, and indicates the pages on which they are discussed. This is a useful reference for those who wish to find specific information in the report.





I
-
M
7

-
S

I

c
a
h
a
h

g
l
C
t

New Jersey Court of Errors and Appeals

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, ex-
ecutrices of the last will
and testament of Jane Ann
McCabe, deceased,
Complainants-Appellants,

and

LAURA J. FRENCH, individually
and as executrix of the es-
tate of Jane Ann McCabe,
deceased, *et al.,*
Defendant-Respondent.

*On Appeal
from Court
of Chancery.*

Sat below: CAMPBELL, C.
STEIN, V.-C.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT, LAURA J. FRENCH, INDIVIDUALLY, ETC.

Facts.

The issues in this suit were submitted to the court on bill and answer. Only such of the facts as are not fully given, or as are omitted in the brief in behalf of the complainants-appellants, and which it is deemed proper to recite, are given here.

The equal one-third part of the estate is not given to the defendant Laura J. French, but is left to the Essex County Trust Company of East Orange, New Jersey, and to its successors, in trust, to invest the same and, after the deduc-

tion of necessary charges, "to pay over the net income of the said trust estate to my daughter, Laura J. French (one of the defendants-respondents), for and during the period of her natural life, and upon the further trust upon the death of my said daughter, Laura J. French, leaving lawful issue or lawful issue of a deceased child her surviving, then and in that event to subdivide all real and personal property at the time held by the said trustee for the benefit of the said Laura J. French, as above set forth, into as many separate and distinct parts or shares as there may then be issue or issue of a deceased child of the said Laura J. French, per stirpes and not per capita, then surviving, * * *, paying over the corpus thereof to each of such issue or issue of a deceased child upon its attaining majority." There was a further trust that "in case at the death of the said Laura J. French she shall leave no issue or issue of any deceased child of her surviving, then to pay over absolutely the corpus of said trust estate * * * to my then surviving daughters * * *."

The will names all three of the children—the two complainants-appellants and the defendant-respondent Laura J. French—Executrices of the will.

After the admission of the will to probate the surrogate issued letters testamentary thereunder to the complainants-appellants and the defendant-respondent Laura J. French. They qualified as such and have partly administered the estate.

It is important that attention be called to the fact that the Ninth clause of the will is to the effect that "each * * * bequest * * * to my said daughters * * * is made upon

the distinct proviso that none of my said daughters * * * shall contest * * * *any of the provisions* of this my last will and testament and I hereby expressly will and declare that in case any of them shall contest * * * any of the provisions of this my last will and testament then * * * any * * * bequest * * * for the benefit * * * of any one so contesting * * * shall be and * * * is revoked." It will be seen from this that the reference in the Ninth clause to bequest to "my said daughters" presupposes a bequest to the defendant Laura J. French when, as a matter of fact, there is no bequest to her. The bequest is to the Essex County Trust Company as trustee. It is apparent from the said clause that the testatrix intended that if upon her death, there were issue of one of the deceased daughters and such issue contested "any of the provisions of the will," the condition might be effective against such issue to the same extent as it might be against any of the daughters. In this case, however, the three children survived the decedent, and still survive. As the Eighth clause directs the trustee to pay the net income of the trust to the defendant Laura J. French, for and during her natural life, and upon her death, "leaving lawful issue," to pay the same to the said lawful issue, her surviving, the question is whether, even if the Ninth clause is held to be valid and effective as against the defendant Laura J. French, it can affect any possible issue of Mrs. French, who, under the said Eighth clause, would be entitled to the income from the trust upon the death of Mrs. French.

ARGUMENT.**POINT I.**

The decree of the Court of Chancery should be sustained for the reason that under the Ninth clause of the will the "issue" of Laura J. French are entitled to have the trust set up.

A careful reading of the entire will, and particularly of the Eighth and Ninth clauses, leads one to the conclusion that the will was re-drafted a number of times and that the Ninth clause was possibly intended to be a part of one of the original drafts which differed in terms with the will as finally drawn. This conclusion is fortified by the language of the Ninth clause. The intention of the testatrix can be determined only from the "four corners of the will," but her intention as to the effect of the Ninth clause is not as clear as it might be. It does seem to be sufficiently clear, however, to indicate one of two things: One, that the clause was inadvertently inserted in the will after having been intended to be inserted in some prior will or draft of will which was different from the one before the court, or, two, that it was not intended to affect Mrs. French, but rather directed at either Mrs. Cross or Mrs. Atkinson. If either Mrs. Cross or Mrs. Atkinson contested the will and had succeeded in having the will rejected, they would have obtained more of the mother's estate than they would if the will were admitted to probate. The point, however, is not what Mrs. Atkinson or Mrs. Cross might have done, but rather what the testatrix contemplated. This contemplation can be determined only from an analysis of the Ninth clause.

I shall now quote the Ninth clause, and after each part thereof I shall give my analysis or interpretation in parentheses. The clause reads as follows:

“Each and every provision, bequest or devise to my *said* daughters”

(*The testatrix meant Mrs. Atkinson and Mrs. Cross, then Miss McCabe, as she referred to “bequests” and as she referred to “provision, bequest or devise to,” and there is no bequest to Mrs. French. If the testatrix intended to include the bequest to The Essex County Trust Company, trustee, she would have said so, by stating, for example: “Each and every provision, bequest or devise to my said daughters and the provision, bequest and devise to The Essex County Trust Company”.*)

“or to their”

(*Mrs. Atkinson and Mrs. Cross*)

“issue or issue of any deceased child”

(*Of Mrs. Atkinson and Mrs. Cross. It is significant that in the Sixth clause the testatrix provided that if Mrs. Atkinson predeceased her leaving lawful issue, her share should go to the latter's issue, and in the Seventh clause the testatrix provided that if Mrs. Cross predeceased her leaving lawful issue, then her share goes to the latter's issue, but in the Eighth clause there is no provision that if Mrs. French predeceased the testatrix her share goes to her issue. In other words, the immediately above quoted clause “or to their issue or issue of any deceased child” cannot be intended to refer to Mrs. French's issue as, first, the bequest is to The Essex County Trust Company and second, it does not provide for a trust for Mrs. French's issue in the event she predeceased testatrix leaving issue.*)

“contained in this will is made upon the distinct proviso that none of my said daughters”

(Mrs. Atkinson and Mrs. Cross, for the same reasons as stated above)

“or their issue or issue of a deceased child”

(Those of Mrs. Atkinson and Mrs. Cross, for the same reasons as above stated)

“shall contest, dispute or question any of the provisions of this my last will and testament and I expressly will and declare that in case any of them”

(“them” refers to Mrs. Atkinson and Mrs. Cross and/or their respective issue or issue of deceased children)

“shall contest or question any of the provisions of this my last will and testament, then and in that event, any devise or bequest herein contained for the benefit or advantage of any one so contesting or questioning my said will”

(This refers to Mrs. Atkinson and Mrs. Cross, but not to their issue or issue of either, or to the issue of Mrs. French, for whom the trust provided in case Mrs. French survived the testatrix; in other words, the trust is as much for the benefit of Mrs. French’s issue as it is for her own benefit, and the clause does not affect the issue of Mrs. French as it refers to “any bequest for the benefit or advantage of any one so contesting.” If Mrs. French or her issue were intended, the testatrix would have said “any bequest for the benefit or advantage of any one so contesting, or the issue of such contestant or issue of deceased issue.” The silence is significant.)

“shall be and the same is hereby revoked, annulled and cancelled and I specifically will and declare that any part or share of my estate in this my last will and testament devised or be-

queathed to or for the benefit of the one so contesting”

(This can only refer to Mrs. Atkinson and Mrs. Cross and their issue and issue of deceased issue, as herein above stated.)

“shall be added to”

(To what? It does not say. Does it mean residuary estate? It does not appear.)

“and divided among my remaining children”

(This means either Mrs. Atkinson or Mrs. Cross and Mrs. French.)

“and issue or issue of any deceased child of them”

(This means issue of either Mrs. Atkinson and Mrs. Cross and of Mrs. French, and the issue of their deceased children, as provision is made for issue of both of said daughters in case they survive testatrix.)

“per stirpes and not per capita, upon the same terms and provisions as hereinbefore provided”

(This might mean that Mrs. Atkinson's share or Mrs. Cross' share, as the case may be, goes one-half to either Mrs. Atkinson or Mrs. Cross, as the case may be, depending on which one contested the will, and the other half to The Essex County Trust Company for Mrs. French. If this clause contemplated Mrs. French within its provision, it would have read “upon the same terms and provisions as hereinbefore provided, according to the manner, nature and extent of division of the same for my said daughters as hereinbefore provided,” but it likely referred to either Mrs. Atkinson or Mrs. Cross, as their bequests were each left in the same manner.)

“for the benefit and advantage of my children*”

*(*Note the testatrix did not say “my said children” as she did in the beginning, thus, if she had Mrs. French in mind as a*

contestant, limiting it to Mrs. Atkinson and Mrs. Cross, but she used the broader term "my children" so as to include Mrs. French. Here again it is significant that the testatrix used the word "children." She did not say "for the benefit or advantage of my children or issue or issue of deceased issue"; in other words, assuming that this clause is valid and that either Mrs. Atkinson or Mrs. Cross were to die tomorrow either one leaving issue, there is no provision in the will for the inheritance of Mrs. French's share. Would Mrs. French's share be held by the trustee for the benefit of any possible issue, or would it go to the issue of Mrs. Cross or Mrs. Atkinson, or would it be suspended?)

"who accept and do not contest or question this will"

(Does not mean Mrs. French, for the reason stated.)

"and to the same purport and effect as if no devise or bequest had been made for the benefit of the one so contesting."

(That is, the share "bequeathed" for the benefit of the one so contesting (Mrs. French) shall be divided among my remaining children and issue or issue of any deceased child of mine; in other words, Mrs. French's share should go to her issue, just as if no bequest had been made originally for the benefit of the "one so contesting" (Mrs. French), and the trust had been left for the benefit of any issue of Mrs. French whether in esse or not in esse at the time of the death of the decedent.)

POINT II.

The decree of the Court of Chancery should be affirmed for the reason that the forfeiture clause in the will does not affect the issue of the beneficiary thereof named in the will.

There is only one reported case in this state which decides the validity of a forfeiture clause in a will, and that decision is based upon the language of the particular clause before the court at the time. In the case of *O'Donnell vs. Jackson*, 102 N. J. Eq. 470, 141 Atl. 450, which is cited by counsel for the complainants-appellants, the clause before the court read as follows:

“In case any of the beneficiaries or legatees under this, my last will and testament, shall contest the validity of this will, then the share that such beneficiary or legatee would take under the will is hereby revoked.”

The difference between this clause and the clause in the Ninth paragraph of the McCabe will is readily seen. In the cited case the language of the clause is quite different from the language in the Ninth clause of the McCabe will. In the McCabe will the reference is to “a bequest” to Mrs. French, whereas no bequest is made to her, and consequently there is nothing, insofar as Mrs. French is concerned, which the said “distinct proviso” in the Ninth clause can affect; in other words, Mrs. French not receiving anything under the will as it stands, the condition cannot affect the trust fund. In the second place, in the *O'Donnell* will the bequest was made to the contestant, while in our case the bequest is made to a trustee, and is for the benefit of not only the defendant Mrs. French, but of her issue. It is the well-settled rule of

law that there is possibility of issue, and that rule is applicable to this trust. In the *O'Donnell case* neither the question of a trust nor the possibility of issue was involved; and it well may be that if those questions arose in that case the conclusion of the court would have been otherwise.

In the same case Vice-Chancellor Church said that "clauses of exactly this character have not, as far as I can find, ever been construed by our courts."

A careful reading of the case of *Hoit v. Hoit*, 42 N. J. Eq. 388 (erroneously cited in brief on behalf of complainants-appellants as being in 43 Equity), 7 Atl. 856, discloses that the case is not in point, for the following reasons: That there the provision against the caveat was directed specifically against persons *in esse*, namely, "any or either of my children"; there was no forfeiture clause involved in this case, the clause in question merely requiring the caveator to "pay all the expenses of both sides"; and that the question was limited to whether the clause for the payment of expenses applied to a devisee of real estate. The question of whether such a clause would apply to a legacy of personalty was not decided. On the question of the payment of the costs, it seems that the decision was based upon the equitable principle that the contestant should not be allowed to defeat the intention of the testator as to costs when he took "a benefit under the will" and attempted to relieve himself of the obligation (for costs) thereunder.

Nor is the case of *Guaranty Trust Co. vs. Blume, et al.*, 92 N. J. Eq. 538, 114 Atl. 423, in point, for the reason that this case also refers

specifically to definite persons, namely, "legatees or devisees." There was no question in the case cited, as there is in the case before the court, of a trust clause and the effect of a forfeiture of the trust by the named beneficiary upon unborn issue of the beneficiary.

There being no authority in this state to support the contention of the complainants-appellants, the question of whether this court will enforce the forfeiture becomes of paramount importance. We are confronted with the rule that a court of equity will never enforce a penalty or a forfeiture. In the case of *Callender vs. Cloud*, 140 Atl. 568, decided by the late Vice-Chancellor Ingersoll, the situation was somewhat parallel to that as appears in this case. In the cited case there was a bequest to a beneficiary "to remain in the hands of the executors * * * to be used in providing" for him "a proper and suitable education at their discretion." A bill was filed to construe the will as the executors had failed to provide a proper and suitable education for the beneficiary, and that beneficiary claimed that, notwithstanding, he was entitled to the bequest. The court held that "the language used by the testatrix in making provision for Harry Callender (the beneficiary) was sufficient to vest an equitable estate in him immediately upon her death and, unless qualified by the remaining part of the clause, is absolutely conclusive of the intention so to do. The form of the gift 'shows that a present, and not a future, estate was intended.' *Ellicott vs. Ellicott*, 40 Maryland 321, 45 Atl. 183; *Skillman vs. Van Pelt*, 1 N. J. Eq. 511."

In the cited case the beneficiary was "vested with an equitable estate immediately upon the

death of the testatrix": In our case the complainants-appellants, under the respective clauses of the will, were certainly "vested with an equitable estate immediately upon the death of the testatrix." In both the cited cases and our case "the form of the gift 'shows that a present, and not a future, estate was intended.'" The court then cited the case of *Bird v. Hawkins*, 58 N. J. Eq. 229, p. 243, 42 Atl. 588, 594, as follows:

"It is stated to be a rule of universal application that a court of equity will never enforce a penalty or a forfeiture. 2 *Story Eq. Jur.*, sec. 1319; *Livingston vs. Tompkins*, 4 Johns. Ch. 431 (8 Am. Dec. 598)."

The court then said:

"Are these principles changed because the executors refused or failed, either for a valid cause, 'or at their discretion' to provide 'for the said Harry Callender a proper and suitable education'? I think not."

We might well paraphrase that question by asking:

"Are these principles (equitable principles against enforcement of forfeiture) changed because Mrs. French contested the will which contained the clause establishing a trust for her benefit?" According to the principles just enunciated, we might well say, "We think not."

In determining that the said beneficiary is entitled to the bequest mentioned in the will, the court cited the case of *Redmond vs. Burroughs*, 63 N. C. 242, 40 *Cyc.*, p. 1708, note 14, as follows:

"Where testator bequeathed to R., a boy of 11 years, \$2,000, 'to be put at interest for the purpose of giving him a classical education,' and testator lived some 10 years after the making of the will, but R., who at the death of the testator was a married man, never received the education designated for

him, it was held that he was entitled to the legacy, and that the fact that he was placed at school by testator in his lifetime, and that he left school of his own accord without completing his education, made no difference."

There is no limitation or condition for the bequest to The Essex County Trust Company in the Eighth clause. On the contrary, the gift is clear. The Ninth clause, however, contains doubtful expressions and it is not clear as to whether Mrs. French is intended to be affected by that clause. A clear gift in one clause cannot be taken away or cut down by doubtful expressions in another clause but only by express words or by clear implication. *Johnson v. Haldane*, 124 Atl. 63, by Vice-Chancellor Backes, citing 40 *Cyc.* 1415. In the same case it is held that "In construing a will the predominant idea of the testator's mind, if apparent, is heeded as against all doubtful and conflicting provisions which might of themselves defeat it," and *Schouler on Wills*, sec. 476, *Carter v. Gray*, 58 N. J. Eq. 411, 40 Atl. 711, and *Burroughs v. Jamieson*, 62 N. J. Eq. 651, 53 Atl. 688, are cited.

The general intent of the testatrix was to provide for her three daughters and their issue. There is doubt as to what the particular intent was. Whatever the particular intent was it related to forfeiture, but the clause relating thereto is not clear. General intent in a will should overrule particular intent, if it becomes necessary in order to carry the former into complete effect; and technical words shall have their legal effect, unless from subsequent inconsistent words, it is very clear the testator meant otherwise. *McMurtrie v. McMurtrie*, 15 N. J. L. 276; *Brown v. Mugway*, 15 N. J. L. 330. In *Fidelity Trust Co. v. Bobloski*, 76 Atl. 720, 228 Pa. 52, 28 L. R.

A. (N. S.) 1093, it is stated that "In case of doubt, a will should be construed in favor of a general or primary intent, rather than a particular or secondary one."

The question of issue is important in this case as it relates to the Eighth and Ninth clauses. In theory and contemplation of law, it is possible for a woman of any age to have issue, and the courts cannot speculate as to a claimed impossibility. *Application of Smith*, 118 Atl. 271, 94 N. J. Eq. 1; *Riley v. Riley*, 113 Atl. 777, 92 N. J. Eq. 465; *Graves v. Graves*, 120 Atl. 420, 94 N. J. Eq. 268.

There is no question that the trust should be set up for any possible issue of Mrs. French.

An examination of the other cases cited by the complainants-appellants in their brief (pages 5, 6, 7, 8 and 9) discloses that the question of the effect of the declaration of a forfeiture of the life tenant's interest in an estate upon the right of the remainderman to share therein, was not the issue, nor was it determined in any of the said cases. For example, the *Wunderlich case* (cited at the bottom of page 5 of the brief) was a bill to quiet title and the question involved the true construction of a clause in the will. It involved, of course, real estate only. There was no trustee as there is in this case. In the *Sadler case* (at the top of page 6 of the brief), there was a direct devise to the life tenant with remainder to others. The *Durand case* (the second one cited on page 6 of the brief) is not applicable either, as it was for the construction of a will relating to a devise of real estate. The *Clausen case* (at the bottom of page 9 of the brief) did not relate to a trustee or a trust, and is merely a case involving the construction of language in a will.

It is respectfully submitted that the ultimate determination of the intent of the testatrix depends upon the interpretation of the language used in the clause in question. The argument, therefore, that the complainants-appellants have a vested remainder (in the third part of the estate now in dispute) "so that no estate passed to the 'issue' at the death of the decedent," and that the "conduct of Laura J. French * * * caused a forfeiture of the entire life estate and the same vested absolutely in" the complainants-appellants, is untenable, for the reason that in her will, the testatrix plainly says that "in case any (any of her daughters *or* any of their issue, *or* any of the issue of any deceased child) shall contest the will * * * any * * * bequest * * * *for the benefit or advantage of anyone so contesting* (Mrs. French) shall be revoked * * *." The omission by the testatrix to add that in case any of her daughters shall contest the will the issue of such contestant shall also forfeit his or her interest in the trust estate is significant.

Under these circumstances the cases relating to estates in remainder cited from pages 5 to 8 of the complainants-appellants' brief, have no bearing on the issues in this case.

In the *Adams vs. Adams case*, cited at page 7 of the brief, the language used by the testator to create a forfeiture was plain and there was no room for doubt.

The case of *Perry vs. Rodgers*, 114 S. W. 897 (Texas), is clearly distinguishable from the case before this court. In that case the language of forfeiture was much broader than that in the will in this case. The clause in the Perry will was against "any" attempt to break the will, and

it affected even non-contestants, while in our case, as stated before, the forfeiture related only to the interest of the one *contesting* the will. Besides, counsel for the complainants-appellants omit to use the language of the court in determining the issue in that case and attempt to justify their citation by stating that the court held that the forfeiture would apply to one of the infant defendants. It is now emphasized that the question of the rights of unborn children is here involved. It is respectfully submitted that the law relating to the rights of unborn children is the same as it is with respect to infants *in esse*. In the *Perry case* Chief Justice Willson, at page 899, said:

“It is further urged on behalf of appellant (infant defendant who did not join in the attempt to break the will) that a forfeiture of the devise to him could not be accomplished, as determined by the judgment, because he was a minor. *If the forfeiture urged depended upon some act, or failure to act, on his part, there might be force in the contention.* But it does not. It was accomplished as a result of the conduct of others, which *by the terms of the will, was to have that effect.*”

It will be seen, therefore, that the clause in the *Perry case* is entirely different than the clause in our case as there is the definite and conclusive provision for a forfeiture against everyone interested, which provision does not appear in the case now before the court.

In the case of *Sackett vs. Mallory*, 42 Mass. 355, there was no question involved relating to the rights of infants or persons not yet *in esse*.

In 67 A. L. R. Ann., p. 65, it is said:

“A distinction between adults and infants, as to the validity of a condition against the

contest of a will, is made in *Bryant vs. Thompson* (1891), 59 Hun. 545, 14 N. Y. Supp. 28 (appeal dismissed in 128 N. Y. 426), the court taking the view that while such a provision is valid as to adults, it is void as against infants, because against public policy. The case was one of unsuccessful contest of the will by the special guardian of the infant, who was about 19 years of age. It was said: 'A testator cannot be permitted to thus obstruct, by any clause in his will, the necessary steps prescribed by law for the conduct of judicial proceedings in the case of infants, where the paramount duty of the court is to act in behalf of its wards, and for their best interests. No penalty or forfeiture can be worked against such a party who has done nothing more than to submit his rights to the adjudication of the courts. Any other rule, as applicable to infants, would work serious mischief. On the other hand, the court would be required, through its officers, to examine into and ascertain the rights of the infants, and determine whether a contest by the ward should be made, and after so deciding, if the contest was had and it proved unsuccessful by a judgment of the same or another court, the provisions of the will for the infant would become inoperative though every step in the contest was taken intelligently and in good faith, and without the consent of the infant. No such restraint upon the independence of the officers charged with the duty of their wards can safely be tolerated in last wills. With adults the case is different. They may give away their rights; they may waive the provisions made for them; they are at liberty to enter upon a contest of a will or not at their pleasure. But with infants the case is otherwise. They have no voice in the matter. The court acts for them and it would be against the policy of the State to permit its action to be stayed or trammelled by a testamentary paper imposing a forfeiture upon

its ward in case it should exercise its judicial functions in that particular instance.' ”

The words “for the benefit of the ones so contesting” are, of course, to be taken in a material sense rather than a moral sense as the questions asked by the complainants-appellants at the bottom of page 10 suggest. The benefit which Mrs. French would have received under the will is the “income of the trust.” If Mrs. French had issue at the time of the death of the decedent, whether or not that issue and not Mrs. French had contested the will during Mrs. French’s lifetime, the latter would obviously have had no “benefit” or “advantage” to have her issue cared for at her death. The suggestion is certainly farfetched.

POINT III.

The decree of the Court of Chancery should be affirmed for the reason that the Court was warranted in making the allowance of a counsel fee to the solicitor of the defendant-respondent **Laura J. French.**

This Honorable Court will take judicial notice of the fact that in cases of this sort the Court of Chancery does not make allowance to counsel unless an affidavit of his services performed in the case is filed with the court and unless, in addition, the court is satisfied that reasonable grounds exist for the allowance. The complainants-appellants made no application for allowance for counsel fee. The state of the case (page 34) indicates that the final decree was prepared by the solicitor of the defendant-respondent French, and that the decree was presented by the said solicitor in the presence of the complainants-appellants personally. The

attention of this Honorable Court is called to the fact that while the case was decided and the opinion made and filed on March 13, 1935, the complainants-appellants did not present the final decree in accordance with the opinion within thirty days (or within any later time) to the court for settlement, as is required by rule 132a of the Court of Chancery, and from the opening paragraph of the final decree (State of Case p. 34) this court will see that on May 27, 1935, the solicitor of the respondent-defendant prepared the decree and appeared in court on the presentation thereof for settlement, and that thereby he was of assistance to the court and was therefore compensated for his services. It is also fair to assume that the solicitor of the defendant-respondent filed a brief in the cause as the issues were submitted to the court on the pleadings.

This suit was not only against Laura J. French, individually, but as executrix of the estate. The principal prayer of the bill was for a construction of the will and that the court "may ascertain whether the said defendant-respondent or the defendant-respondent Essex County Trust Company, as trustee, have any interest in the income or corpus of the residuary estate of the said decedent and if so, what such interest may be" (State of Case pp. 4 and 5, paragraph 9, prayer 2 of bill). The defendant-respondent did not question the jurisdiction of the court, but on the contrary, the last paragraph at page 2 of her answer (State of Case p. 19) recites that she "*joins* in the prayer of the complainants and desires the advice and instruction of this court as to the meaning and construction of the said will * * *."

By filing the particular answer which she did, defendant-respondent French put herself in no antagonistic or different position from that assumed by the other two executrices; and, so far as the presentation of this particular question to the court for determination is concerned, the situation is no different than if all three executrices joined as complainants-appellants and presented the same question to the court for determination either in the manner in which the present action was instituted or by bill for instructions under the declaratory judgments act, or otherwise as provided by law. Under the frequently cited maxim of the court of equity, the substance of the matter is considered rather than the form.

From the bill of complaint it is clear that the complainants-appellants' contention embraced more than the view that by reason of the contest the defendant-respondent forfeited her right to participate in the trust, and that their contention was that the trust should not be established in any event and that, as stated in paragraph 7 of the bill, the "said one-third share was given over to them and that the *defendants* have no interest under said Eighth paragraph."

In behalf of Mrs. French, individually and as executrix, it was contended that the trust should be established for her benefit, the brief went further and it was there contended that "in any event there is no question that it (the trust) should be set up for any possible issue of Mrs. French."

The effect of the answer and the joinder by the defendant-respondent French in the prayer for relief, as well as the contention of the defendant-respondent French, clearly indicates the cooperation on the part of the defendant-re-

spondent French in presenting the question for determination and her further cooperation in determining what the law on the subject is. In short, the complainants-appellants executrices claimed that no trust should be established at all, while the defendant-respondent French claimed that the trust should be established. It seems to me that that is the more important question. The court decided that the trust should be established. I respectfully submit that whether the trust should be established for the benefit of the defendant-respondent French or whether it should be established for the benefit of any possible issue of hers, is not important for the reason that the main point made by the complainants-appellants as executrices that the trust should not be established at all was not sustained. While it is true that the complainants-appellants were successful in upholding the forfeiture clause in the will against the defendant-respondent French, the forfeiture clause, as the court has held, does not affect possible remaindermen, and, for the reasons stated, the complainants-appellants were not successful in that particular.

As the defendant-respondent French was named and brought into the suit in her representative capacity and as her pleadings and appearance assisted the court in determining the question, it is submitted that she, as such executrix, should not be separately considered from the other two and that, for all practical purposes, it should be considered that the effect of the institution of the suit should be the same as though all three executrices had been complainants-appellants. As such executrix the defendant-respondent French was serving the interests of the estate in acting in this suit as she did, and the estate has now a definite determination which

is the result of the defendant-respondent's cooperation in her capacity as executrix. The fact that the defendant-respondent, executrix, appears to be the same person as the one who contested the will, it is submitted, should make no difference as, in this suit, she was acting for the estate.

The mere fact that the defendant-respondent, as an individual, contested the will and was not successful, was not the question, nor did it necessitate the filing of the bill. What necessitated the filing of the bill, if anything did, was the language of the forfeiture clause and the language of the trust clause, for which, obviously, the defendant-respondent, either in her capacity as an individual or in her capacity as executrix, was not responsible. If there had been no doubt on the part of the executrices from the language of the will, the suit would not have been necessary.

In 2 *Kocher and Trier*, N. J. Ch. Pr., sec. 1852, at p. 1335, it is said:

“As a general rule, when executors or trustees come into court to settle the true construction of the will, or for directions as to their duties, they are entitled to costs out of the estate. (Citing the cases to which reference will hereafter be made.) And where no factious or unnecessary opposition or costs are occasioned by *any defendant*, costs and proper counsel fees for all parties will be allowed out of the estate. (Citing cases to which reference will hereafter be made.)”

In the matter before the court, the fund is not administered by the court, and I think, because of the language of the will, it will be agreed that it was necessary and proper, that a declaration should be had determining the rights of the parties. In this application for a declaration

the defendant-respondent joined, in her capacity as executrix, not because of the fact that she as an individual had contested the will and lost the contest, but because she agreed with the complainants-appellants executrices that the language of the will needed explanation and rights had to be determined. On this point the question of *Annin's executors v. Vandoren's administrator*, 14 N. J. Eq. 135, in which the bill was filed by the executors of a surviving executor against an administrator for a construction of the will, is an authority. In that case, at p. 146, Chancellor Green said:

“As to costs, the general rule is well settled, that where executors come into court to settle the true construction of the will, or for directions as to their duty, they are entitled to costs out of the estate, and although the general rule is, that where a bill is dismissed no costs are allowed to the plaintiff, *yet there are cases where he has his costs although he fails to recover.* One case, as stated by Lord Langdale, is where the fund is administered by reason of the suit of the plaintiff and the rights of all parties have been ascertained and determined, and the fund divided accordingly. Another is where in fact the fund is not administered by the court, but *where the court is of opinion that it is either necessary or proper, at the instance of some person, that a declaration should be made determining the rights of the parties,* and in that case the court makes a decree and saves the plaintiff his costs. *Merlin v. Blgrave*, 25 Beav. 136. ‘The rule in the Court of Chancery is, that *where the will raises a doubt,* you make the estate pay the costs of the litigation.’ *Knight v. Boughton*, 11 Clark & Fin. 555.

There costs would be a proper charge upon the estate of the complainants' testator; and *had the bill been filed either by the executors or by the legatee while the estate*

*remained in the hands of the executors, the costs would have been directed to be paid out of his estate * * *."*

In *Feit's Executors v. Vanatta*, 21 N. J. Eq. 84, which was on a bill for construction of the will, Chancellor Zabriskie held that it was "A proper case for the executor to ask directions and the costs of the parties must be paid out of the estate; also, a counsel fee to the executors."

In *Stenneck v. Kolb*, 91 N. J. Eq. 382, 111 Atl. 277, also a suit to construe a will, Vice-Chancellor Lewis held that "The costs of administration and the counsel fees obviously should be paid out of the estate in the hands of the executor."

Jacobus' Executor v. Jacobus, 20 N. J. Eq. 49, was a suit by the executor for directions as to his duties and for a determination of the rights of the parties. The Chancellor held that it was "a proper case for an executor to ask the direction of the court. *The difficulty grew from the want of definite directions in the will*, and no factious opposition has been made or costs occasioned by any defendant. I shall, therefore, direct the costs and proper counsel fees for both parties to be paid out of the estate."

In our case the difficulty, as stated, grew from want of definite directions in the will. If the directions had been definite it would not have been necessary to file the bill. There was "no factious or unnecessary opposition"; on the contrary, although as previously stated, there was cooperation. Besides, the complainants and the defendant-respondent French, in her representative capacity, were acting in the nature of class representatives, whose interests, as representatives of the estate, were identical.

In *Bateman's Executor v. Bateman and others*, the bill was filed by the executor for the construction of the will. The court decreed that the trusts in the will be executed and that a trustee be appointed to administer the fund. The costs were ordered to "be paid out of the estate."

In *Attorney General v. Moore's Executors*, 19 N. J. Eq. 503, which was a bill to construe a will, the Court of Errors and Appeals, speaking through Justice Depue said, at page 506:

"The right of an executor, or trustee, or any other person interested in the execution of a trust, to come into the Court of Chancery to have the trust established and the construction of the instrument by which it is created authoritatively settled, is a familiar doctrine of this court."

In the light of that law, it was the duty of the defendant-respondent French, as executrix, to join in the prayer to have the will construed.

Later on in the same case, at page 519, the court said:

"The bill was filed at the instance of the executors, with the view of having the construction of the will settled by a decree of the court for their guidance, * * *. Where the duty of a trustee is a matter of doubt, it is his undoubted right to ask and receive the aid and direction of a court of equity in the execution of his trust. *Kearney v. Macomb*, 1 C. E. Green, 189. In such cases, if reasonable grounds exist for coming into the court to obtain the construction of the instrument creating the trust, the practice is to allow the costs and expenses, as it respects all the parties, and as between attorney and clients, out of the trust fund. *1 Redfield on Wills*, 493; *3 Daniell's Ch. Pr.* 1554. This case comes within the application of this principle. The costs and a rea-

sonable counsel fee on both sides, both in this court and in the Court of Chancery, should be allowed out of the trust estate, the amount of counsel fees to be settled by the Chancellor."

In *Larkin v. Wykoff*, 75 N. J. Eq. 462, 72 Atl. 98, the then Vice-Chancellor Walker, in a suit for instructions, said at the conclusion of the opinion:

"As this proceeding is in good faith and requires a construction of the trust instrument under which the property is held, it would appear to be a case for the allowance of costs and counsel fees to *both parties* under the authority of *Attorney General v. Moore's Executors*, 19 N. J. Eq. 503, 519."

The case just cited is cited and followed in *Cooke v. Woman's Medical College*, 82 N. J. Eq. 179, 87 Atl. 131.

In *40 Cyc.*, page 1864, title Wills, it is said that:

"In suits for the construction of wills, as in other suits in equity, the matter of costs rests largely in the discretion of the court, unless regulated by statute * * *. This discretion however, is ordinary exercise in accordance with certain general rules which have been established by a long line of decisions. Thus, where a suit for construction is rendered necessary by the ambiguous manner in which testator has expressed his intention in his will, the costs of all parties will be charged against the estate or the particular fund or property in controversy; and otherwise where the suit proved beneficial to the estate."

It is obvious that the present suit had to be based on something more than the mere will contest and its result, and that the basis of which was the uncertainty and indefiniteness of the language of the will.

The Court of Errors and Appeals in *Grunstra v. New-ark Petroleum Corporation*, 111 N. J. Eq. 451, 162 Atl. 746, on an application for counsel fees said:

“It is well settled that the allowance of counsel fees in a Chancery suit is within the sound discretion of the Chancellor, and will not be disturbed on review unless there is an abuse of the discretion * * *.”

POINT IV.

The decree of the Court of Chancery should be affirmed for the reasons hereinbefore given.

Because the decree of the Court of Chancery was correct and based upon settled and established law, it is respectfully urged that it should be affirmed.

Respectfully submitted,

HENRY J. CAMBY,
Attorney for and of Counsel with
Laura J. French, individually and
as executrix, etc., defendant-re-
spondent.

THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO
THE UNIVERSITY OF CHICAGO

122 OCT. T. 1935

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

LISSA L. McCABE CROSS and
ETHEL M. ATKINSON, ex-
ecutrices of the last will
and testament of Jane Ann
McCabe, deceased,
Complainants-Appellants,
and

LAURA J. FRENCH, individu-
ally and as executrix of
the estate of Jane Ann Mc-
Cabe, deceased, *et al.,*
Defendant-Respondent.

*On Appeal
from Court
of Chancery.*

BRIEF ON BEHALF OF ESSEX COUNTY TRUST COMPANY, DEFENDANT-RESPONDENT.

ARGUMENT.

POINT I.

The trust fund set up under the Eighth clause of the will of Jane Ann McCabe for the benefit of the issue, or issue of a deceased child, of Laura J. French is valid.

In the opinion filed by the learned Vice-Chancellor below, it was held (State of Case, page 32):

“Contest of a will by a beneficiary for life, which, under the terms of the will effects a forfeiture of the life tenant’s rights, does not work a forfeiture of the remainder man’s interest.

The trust was created alike for the benefit of the defendant’s issue, or the issue of

any deceased child of her. Such persons provided for and not yet in being receive the benefit of the income from the trust upon the defendant's death and the principal upon attaining majority. The trust therefore is not ended."

It is respectfully submitted that this language of the Court below is controlling and clearly sets forth the proper interpretation of the will.

The rules of construction applicable in the case of a forfeiture clause are very clearly and concisely stated in 69 Corpus Juris, page 674, Section 1782 as follows:

"A forfeiture clause in a will is strictly construed against a forfeiture and reasonably construed in favor of the beneficiary. The Courts will construe a provision in a will in a way to avoid a forfeiture if it is possible to do so without rendering the use of the language fantastic, or without putting an unauthorized construction on the words. No wider scope is to be given the language employed than is plainly required. Nevertheless, a forfeiture clause, when valid, is to be given effect according to the intent of the testator, and the Court is not required to put a strained or over-technical construction on the language employed." (See cases cited.)

Applying these rules of construction to the Eighth clause of the will, it is obvious that the testatrix intended that her daughter, Laura J. French, should have a life estate in the income of one-third of the residue of her estate, which was given to the Essex County Trust Company as trustee for such purpose. However, this clause also provided

"And upon the *further trust* upon the death of my said daughter, Laura J. French, leaving lawful issue or lawful issue of a deceased child her surviving, then and in

that event to subdivide all real and personal property at the time held by the said trustee for the benefit of said Laura J. French as above set forth into as many separate and distinct parts or shares as there may then be issue or issue of a deceased child of the said Laura J. French, per stirpes and not per capita then surviving."

This clause further provided that the trustee should hold each of said separate and distinct subdivisions in trust and that they pay over the income to each of the issue of said Laura J. French or to the issue of any deceased child of said Laura J. French during minority and to pay the corpus to such issue or issue of a deceased child upon majority.

There were thus two parts to the Eighth clause of this will. The first of which consists of the life estate given to Laura J. French, and the second, the remainder, to her issue or issue of a deceased child. In applying the rules above set forth, it seems clear that there is no cause to claim a forfeiture of the second part of this clause, insofar as the issue of Laura J. French is concerned, merely because their mother forfeited her rights under the will by contesting the same. Certainly it could not be claimed that the unborn issue of Laura J. French had anything to do with the contest and their rights should be protected by this Court to the fullest extent, and not abrogated.

The cases cited in the brief submitted on behalf of the complainants-appellants contain no authority contrary to the views above stated and there are no cases which have been found substantiating the contention by the complainants-appellants that the entire trust fund fails by reason of the contest by the life tenant. Such

reasoning, it is submitted, is contrary to logic, contrary to the generally accepted rules of construction in a case of this sort, and contrary to the intention of the testatrix as gathered from the four corners of the will.

The only other question to be considered in this connection is whether or not under the Ninth clause of the will the trust fund set up for the benefit of the issue of Laura J. French or the issue of a deceased child can be construed as a forfeiture of their interest in said trust fund. It is submitted in this connection that no rules of construction are necessary to get a clear understanding of the meaning of this clause. There is no ambiguity, and if the language is taken in its ordinary sense, it is difficult to see how any claim could be made that this trust fund set up for persons not now in esse is forfeited by reason of the contest of the will by the life tenant.

The Ninth clause of the will is set forth in full on pages 9 and 10 of the State of Case. It is not deemed necessary to repeat it here again in full; all that is necessary to inquire is: Did any of the issue or issue of a deceased child of Laura J. French contest, dispute or question any of the provisions of the will? If they did not, and, of course, they could not as they are not yet in being, obviously any devise or bequest contained for their benefit is not forfeited.

POINT II.

Assuming the entire trust fund does not fail, the trustee is bound to administer the same pursuant to the decision of this Court.

The language used in the final decree filed on May 27, 1935, in regard to the administration of

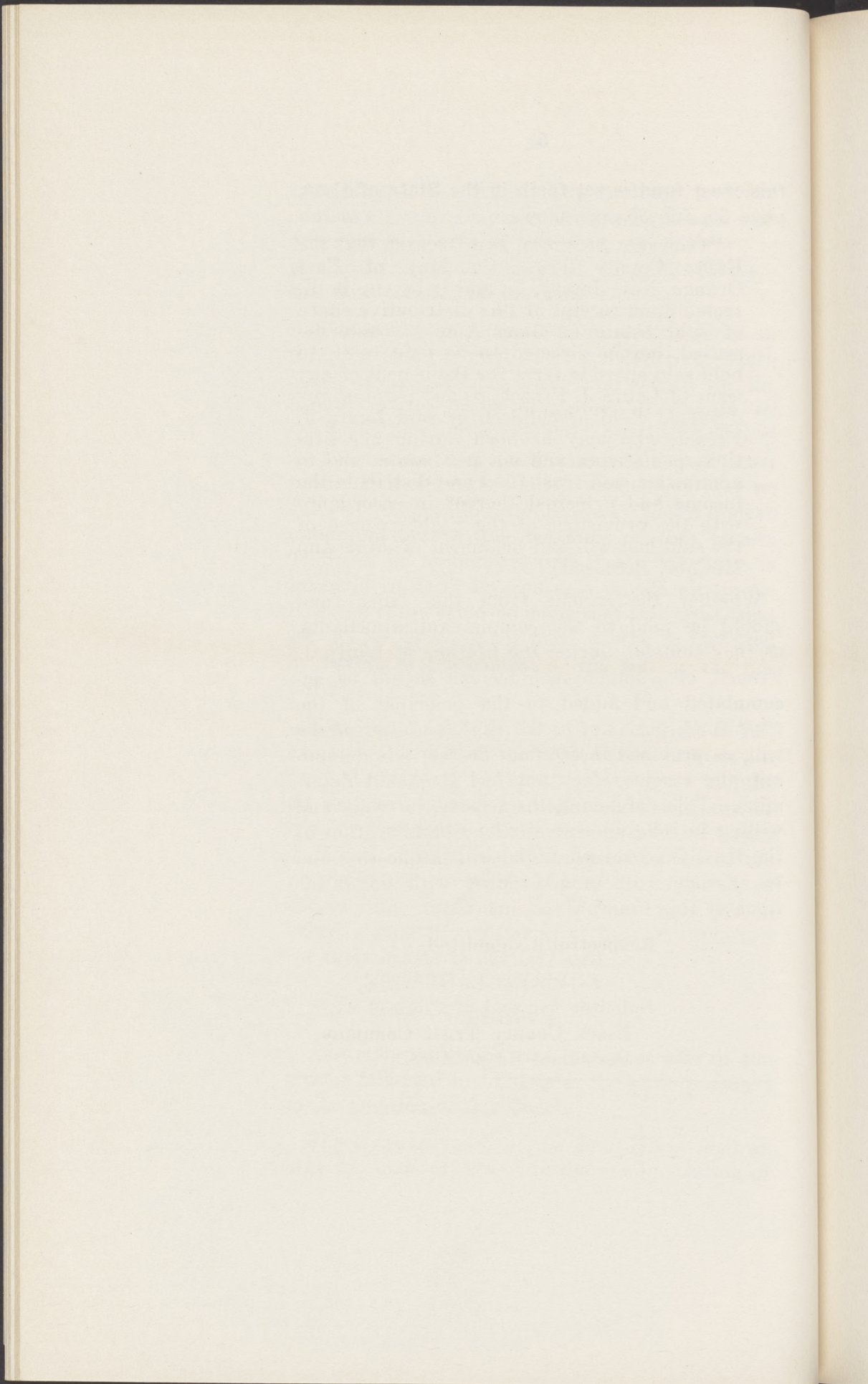
this trust fund is set forth in the State of Case, page 35, fol. 30, as follows:

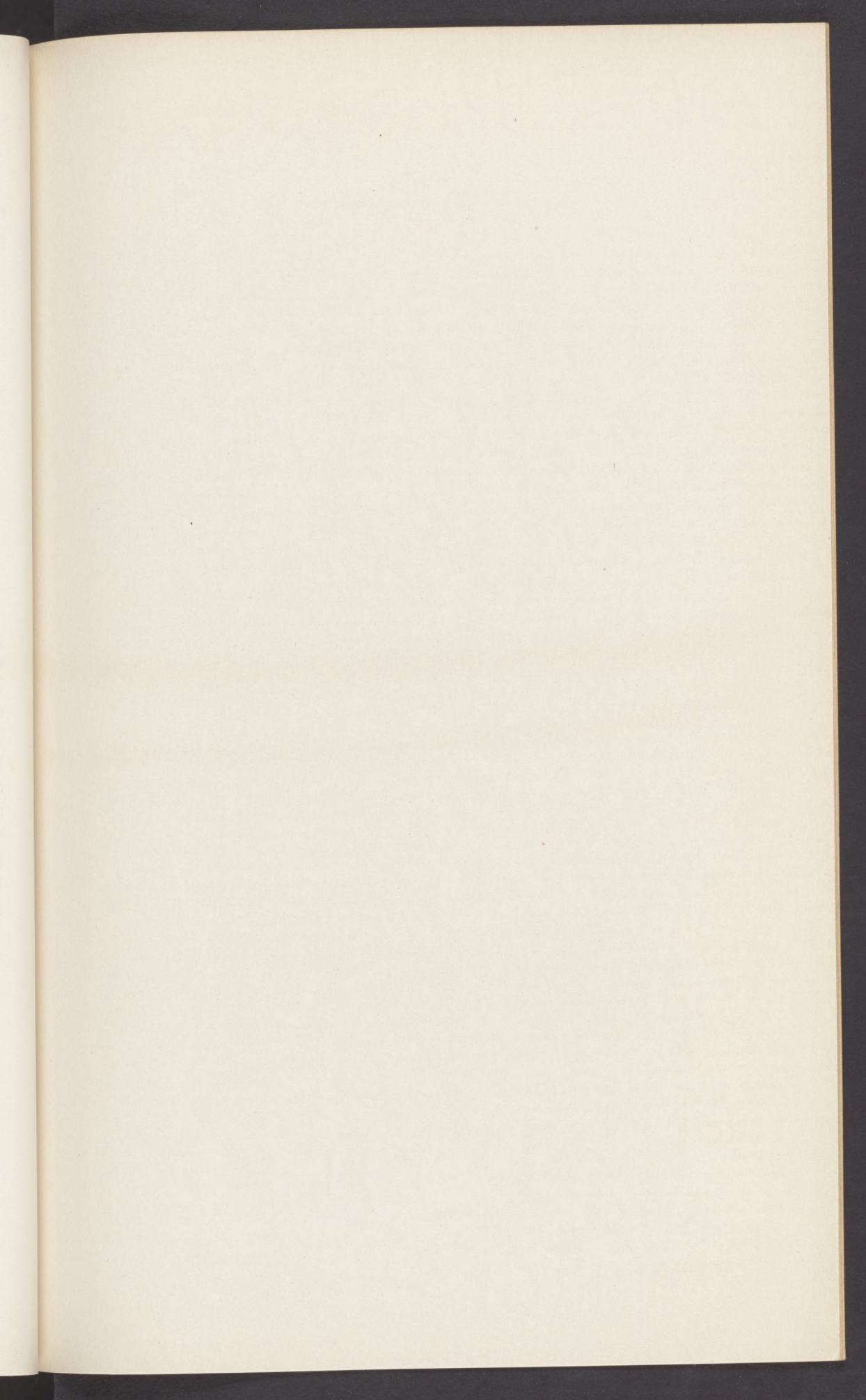
“ORDERED, ADJUDGED AND DECREED that the Essex County Trust Company of East Orange, New Jersey, be and it hereby is directed upon receipt of this distributive share of said estate of Jane Ann McCabe, deceased, herein directed to be paid to it, to hold said share in trust for the benefit of any issue of Laura J. French, or any issue of any deceased child or children of said Laura J. French who may be born during her lifetime, per stirpes and not per capita, and to administer said trust fund and distribute the income and principal thereof in accordance with the provisions of the Eighth clause of the said last will and testament of Jane Ann McCabe, deceased;”

Whether the income from this trust fund should be paid to the complainants-appellants, as they contend, during the lifetime of Laura J. French, or whether such income should be accumulated and added to the principal of the trust fund, pursuant to the Eighth Clause of the will, as provided in the final decree, this defendant, the trustee, does not feel it should determine. This defendant, the trustee, is ready and willing to take upon itself the administration of the trust fund set up in the will in question and to administer it in accordance with the directions of this Court.

Respectfully submitted,

EDWARD L. STASSE,
Solicitor for and of Counsel with
Essex County Trust Company,
Defendant-Respondent.





1874

1875

1876

INDEX

	PAGE
Act of Parliament	
Amendment of Statute	1
Change of Name	2
Minors, Report, and Affidavit of Parent	10
Statute	12
Trust Deed	14
Writ of Habeas Corpus	22
Writ of Mandamus	23
Writ of Prohibition	24
Writ of Quo Warranto	25
Writ of Scire Facias	27
Writ of Summons	28
Writ of Subpoena	29
Writ of Supplicavit	30
Writ of Testes	31
Writ of Vexatious Litigant	32
Writ of Habeas Corpus Ad Testandum	33
Writ of Habeas Corpus Ad Respondendum	34
Writ of Habeas Corpus Ad Satisfaciendum	35
Writ of Habeas Corpus Ad Testandum	36
Writ of Habeas Corpus Ad Respondendum	37
Writ of Habeas Corpus Ad Satisfaciendum	38
Writ of Habeas Corpus Ad Testandum	39
Writ of Habeas Corpus Ad Respondendum	40
Writ of Habeas Corpus Ad Satisfaciendum	41
Writ of Habeas Corpus Ad Testandum	42
Writ of Habeas Corpus Ad Respondendum	43
Writ of Habeas Corpus Ad Satisfaciendum	44
Writ of Habeas Corpus Ad Testandum	45
Writ of Habeas Corpus Ad Respondendum	46
Writ of Habeas Corpus Ad Satisfaciendum	47
Writ of Habeas Corpus Ad Testandum	48
Writ of Habeas Corpus Ad Respondendum	49
Writ of Habeas Corpus Ad Satisfaciendum	50
Writ of Habeas Corpus Ad Testandum	51
Writ of Habeas Corpus Ad Respondendum	52
Writ of Habeas Corpus Ad Satisfaciendum	53
Writ of Habeas Corpus Ad Testandum	54
Writ of Habeas Corpus Ad Respondendum	55
Writ of Habeas Corpus Ad Satisfaciendum	56
Writ of Habeas Corpus Ad Testandum	57
Writ of Habeas Corpus Ad Respondendum	58
Writ of Habeas Corpus Ad Satisfaciendum	59
Writ of Habeas Corpus Ad Testandum	60
Writ of Habeas Corpus Ad Respondendum	61
Writ of Habeas Corpus Ad Satisfaciendum	62
Writ of Habeas Corpus Ad Testandum	63
Writ of Habeas Corpus Ad Respondendum	64
Writ of Habeas Corpus Ad Satisfaciendum	65
Writ of Habeas Corpus Ad Testandum	66
Writ of Habeas Corpus Ad Respondendum	67
Writ of Habeas Corpus Ad Satisfaciendum	68
Writ of Habeas Corpus Ad Testandum	69
Writ of Habeas Corpus Ad Respondendum	70
Writ of Habeas Corpus Ad Satisfaciendum	71
Writ of Habeas Corpus Ad Testandum	72
Writ of Habeas Corpus Ad Respondendum	73
Writ of Habeas Corpus Ad Satisfaciendum	74
Writ of Habeas Corpus Ad Testandum	75
Writ of Habeas Corpus Ad Respondendum	76
Writ of Habeas Corpus Ad Satisfaciendum	77
Writ of Habeas Corpus Ad Testandum	78
Writ of Habeas Corpus Ad Respondendum	79
Writ of Habeas Corpus Ad Satisfaciendum	80
Writ of Habeas Corpus Ad Testandum	81
Writ of Habeas Corpus Ad Respondendum	82
Writ of Habeas Corpus Ad Satisfaciendum	83
Writ of Habeas Corpus Ad Testandum	84
Writ of Habeas Corpus Ad Respondendum	85
Writ of Habeas Corpus Ad Satisfaciendum	86
Writ of Habeas Corpus Ad Testandum	87
Writ of Habeas Corpus Ad Respondendum	88
Writ of Habeas Corpus Ad Satisfaciendum	89
Writ of Habeas Corpus Ad Testandum	90
Writ of Habeas Corpus Ad Respondendum	91
Writ of Habeas Corpus Ad Satisfaciendum	92
Writ of Habeas Corpus Ad Testandum	93
Writ of Habeas Corpus Ad Respondendum	94
Writ of Habeas Corpus Ad Satisfaciendum	95
Writ of Habeas Corpus Ad Testandum	96
Writ of Habeas Corpus Ad Respondendum	97
Writ of Habeas Corpus Ad Satisfaciendum	98
Writ of Habeas Corpus Ad Testandum	99
Writ of Habeas Corpus Ad Respondendum	100

1884

1884