INDEX.

TESTIMONY.

Complainant's Witnesses:

EXHIBITS.

Complainant's:

Defendants':

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant,
and
ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*,
Defendants.

On Bill &c.

TO THE HONORABLE EDWIN R. WALKER, CHANCELLOR OF THE STATE OF NEW JERSEY:

The complainant, C. Alexander Capron, of No. 41 Bradford Avenue, Upper Montclair, New Jersey, as executor of the last will and testament of Alexander Luchars, deceased, respectfully shows that:

1. Alexander Luchars died a resident of Upper Montclair, County of Essex, State of New Jersey, on or about February 19, 1931, leaving a last will and testament bearing date September 28, 1926, and a codicil thereto bearing date July 18, 1930, both of which instruments were admitted to probate as the last will and testament of the said decedent, by the Surrogate of the said County of Essex on March 2, 1931. Letters testamentary were issued by said Surrogate on or about the said date to C. Alexander Capron and Robert B. Luchars, the executors therein named.

2. On or about the 1st day of July, 1921, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, children of the said Alexander Luchars, deceased, by an instrument in writing bearing date the said day, duly sold, assigned and transferred unto the said Alexander Luchars, his executors, administrators, successors and assigns, 2,359 shares of the common capital stock of The Industrial Press, a corporation duly organized and existing under the laws of the State of New York IN TRUST NEVERTHELESS, for the uses and purposes in said written instrument more fully set forth.

In accordance with the conditions of said trust instrument, the trust thereby created was to continue during the lives of the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, and the survivors and survivor of them, unless sooner terminated, as provided for in said instrument, the net income therefrom or such portion thereof as the trustee should deem advisable, to be paid in quarterly instalments in the following proportions, to wit, to Robert B. Luchars, three-sevenths thereof, and to each of Elizabeth Y. Urban and Helen L. Ketchum, two-sevenths thereof. The said instrument further provided that in no year should the trustee distribute less than $6,000 of income nor more income than accrued during the said year, and also further provided that upon the death of any of the income beneficiaries before the termination of the trust leaving issue, such issue was to receive their parents' share by right of representation. The balance of the said income, in accordance with the terms of said instruments, was to be added by the trustee to the principal of the trust estate, and thereupon was to become a part of the corpus thereof.

Upon the death of the survivor of the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, unless the trust had sooner terminated, the trustee was directed to transfer, turn over and convey the entire principal and all the accumulations thereof unto the issue of said parties, such issue to take their parent's share by representation as follows: To the issue of Robert B. Luchars, three-sevenths thereof, and to the issue respectively of Elizabeth Y. Urban and Helen L. Ketchum each to receive two-sevenths thereof. It is further provided that if only two of the parties left issue then living, the issue of each should receive one-half of the trust estate *per stirpes,* and that in the event that only one of said parties left issue then living, such issue should receive the entire principal of the trust estate.

It was further provided by said instrument that the trust should terminate at any time, if in the opinion of the trustee it were wise and expedient so to do, such termination to be effected by the signing of an instrument of termination by the said trustee and delivery thereof to each beneficiary at that time entitled to receive income thereunder. Upon such termination thereof, the trustee was directed to transfer, turn over and convey the principal and undistributed income of the said trust then in his hands to the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and the issue by right of representation of any of said parties who might then have deceased, in the same proportions that they were then receiving income. A copy of said trust instrument is hereto annexed, marked "Exhibit A", and incorporated herein as a part of this bill.

3. Subsequently and on or about the 9th day of May, 1925, by an instrument in writing bearing date the said day, said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum modified the said trust agreement of July 1, 1921 to the extent of relinquishing, releasing and quitclaiming any and all rights which they had under said trust instrument to require the distribution among them of $6,000 or any other part of the income accruing from the said trust estate during any year, so that thereafter the said parties became entitled to so much of the income (subject to the proportions between the said parties, as set out in the said agreement) as the trustee should in his uncontrolled judgment deem advisable to pay to them. The said Alexander Luchars, as trustee, was authorized by said instrument to invest the income and any portion of the principal of said trust estate in additional shares of the common stock of The Industrial Press, or such other securities as he might deem proper. A copy of said instrument is hereto annexed, marked "Exhibit B", and incorporated in this bill as a part hereof.

4. The said Alexander Luchars, as trustee during the administration of the said trust estate, purchased 338 additional shares of common stock of the said The Industrial Press, and also received as trustee of said fund by assignment from Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum an additional 59 shares of said stock, so that there came into the hands of Alexander Luchars as trustee of said trust estate, a total of 2,756 shares of said stock.

5. Complainant is informed and believes that on or about the 15th day of May, 1930, the said Alex-

ander Luchars signed an instrument of termination, copy of which is hereto annexed marked "Exhibit C", and incorporated in this bill as part hereof, and forthwith delivered to the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, a copy thereof. Concurrently therewith, and at the foot of said instrument of termination, said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, executed a waiver of their right to receive the subject matter of the trust referred to in said instrument of termination, and thereby authorized and directed The Industrial Press to transfer the principal and accumulated income of the trust estate to the said Alexander Luchars, individually and in his own right.

6. Although said instrument of termination, bearing date the 15th day of May, 1930, a copy of which is hereto annexed marked "Exhibit C", by its terms refers to a document dated May 10th, 1922, and amended by document dated May 9th, 1925, by which Alexander Luchars established a certain trust for the benefit of his children, Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, and their issue, nevertheless the said Alexander Luchars by signing said instrument of termination and delivering a copy thereof to the said Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, intended thereby to terminate the trust established by said trust agreement made by the said Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, dated July 1st, 1921, as modified as aforesaid, and the said Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, upon receiving a copy thereof, understood that the said Alexander Luchars had so terminated

said trust so established by them by said instrument dated July 1st, 1921 as thereafter modified, and in executing the waiver and authorization subjoined thereto they thereupon intended to waive their right to receive the subject matter of said trust established by them by said instrument dated July 1st, 1921 as thereafter modified, and to authorize and direct The Industrial Press to transfer to the said Alexander Luchars individually and in his own right, all the shares of stock of said corporation theretofore held by him, as trustee under said instrument dated July 1st, 1921, as thereafter modified.

7. The reference in said instrument of termination, copy of which is hereto annexed marked "Exhibit C" to a document executed by Alexander Luchars, dated May 10th, 1922, instead of to the trust agreement executed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, dated July 1st, 1921 as thereafter modified, was through inadvertence and mistake on the part of said Alexander Luchars and the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

8. Prior to May 15th, 1930, the said Alexander Luchars individually had loaned and advanced to himself, as trustee under said trust agreement dated July 1st, 1921, certain sums of money which he had invested in shares of common stock of The Industrial Press, and on or about May 15th, 1930, there was due and owing from said trust estate to the said Alexander Luchars, individually and in his own right, the sum of $20,883.72, over and above all sums received by him as trustee and which he had paid to himself individually and in his own

right, on account of the moneys so loaned and advanced by him to said trust estate.

9. The said Alexander Luchars subsequently to the execution of the said instrument of termination dated May 15, 1930, and relying on the belief that he had thereby effectively terminated the trust agreement executed by the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum under date of July 1, 1921, and on the said waiver and direction executed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum as aforesaid, caused to be transferred to his individual name, the said 2,756 shares of the common capital stock of The Industrial Press, which at that time constituted the corpus of said trust fund subject to the indebtedness due to the said Alexander Luchars, individually and in his own right.

10. Subsequently to the date of death of the said Alexander Luchars, and on or about the 27th day of March, 1931, a reorganization of The Industrial Press was effected by the transfer of certain of the assets comprising, in part, surplus funds of said corporation, to The Industrial Corporation of New Jersey. It was provided in the said plan of reorganization that The Industrial Corporation of New Jersey should issue to or upon the order of, The Industrial Press, 1,908 shares of its capital stock, which shares of stock, The Industrial Press agreed to distribute to and among the holders of its common stock as a dividend payable out of surplus, without the surrender by any of the stockholders of any of their common stock in The Industrial Press. In pursuance of said agreement and said plan of reorganization, The Industrial Press

received 1,908 shares of the capital stock of The Industrial Corporation of New Jersey which it thereupon distributed as a stock dividend to the holders of its common stock.

11. There has been received by complainant and Robert B. Luchars as executors of the last will and testament of Alexander Luchars, a certificate for 1,908 shares of the capital stock of The Industrial Corporation of New Jersey as a stock dividend on the said 2,756 shares of the common capital stock of The Industrial Press, which latter shares were in the possession of the decedent on the date of his death as aforesaid. The complainant and Robert B. Luchars, as executors of said will, now have in their possession 2,756 shares of the common capital stock of The Industrial Press and 1,908 shares of the capital stock of The Industrial Corporation of New Jersey.

12. Complainant is advised by counsel and therefore alleges that he may not safely proceed with the execution of his duties as executor of the will of the said Alexander Luchars, and treat said shares of stock of The Industrial Press and The Industrial Corporation of New Jersey, as assets of the estate of the said Alexander Luchars, unless it is determined that the said Alexander Luchars, by signing said instrument of termination, copy of which is hereto annexed marked "Exhibit C", and delivering a copy thereof to the said Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, effectively terminated the trust established by said trust agreement executed by the said Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum dated July 1st, 1921, as thereafter modified, and by the instrument subjoined thereto,

the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum effectively waived their right to receive the subject matter of the trust established by said instrument dated July 1st, 1921 as thereafter modified, and authorized the transfer of said shares of stock of The Industrial Press to the said Alexander Luchars.

13. Robert B. Luchars, as one of the executors of the last will and testament of Alexander Luchars, deceased, is not joined as a complainant herein, because he has or may assert claims adverse to those of the complainant herein.

14. The only persons interested in this proceeding and who are hereby named as defendants herein, together with their post office addresses, to the best of complainant's knowledge, information and belief, are as follows:

Robert Barrie Luchars, individually, and as Executor of the last will and testament of Alexander Luchars, deceased, whose residence and post office address is 315 Upper Mountain Avenue, Upper Montclair, County of Essex, New Jersey;

Elizabeth Yarnell Urban, whose residence and post office address is 163 Western Drive, Longmeadow, Mass., County of Hampden, Massachusetts;

Helen L. Ketchum, whose residence and post office address is Atlantic Avenue, Cohasset, County of Norfolk, Massachusetts;

Adelaide L. Ketchum, whose residence and post office address is Atlantic Avenue, Cohasset, County of Norfolk, Massachusetts;

Elizabeth Y. Ketchum, whose residence and post office address is Atlantic Avenue, Cohasset, County of Norfolk, Massachusetts;

David Dow Ketchum, whose residence and post office address is Atlantic Avenue, Cohasset, County of Norfolk, Massachusetts;

Robert Luchars Urban, whose residence and post office address is 163 Western Drive Longmeadow, Mass., County of Hampden, Massachusetts.

John Trexler Urban, whose residence and post office address is 163 Western Drive, Longmeadow, Mass., County of Hampden, Massachusetts; and

The First National Bank & Trust Company, named in the said trust instrument dated July 1, 1921 as substitutionary or contingent trustee and described therein as First National Bank of Montclair, whose principal place of business is Montclair, County of Essex, New Jersey.

All of the above-named persons are of full age and sound mind, with the exception of Adelaide L. Ketchum and Elizabeth Y. Ketchum, who are infants over the age of fourteen years, and David Dow Ketchum, who is an infant under the age of fourteen years, and who reside with their father, Kenneth D. Ketchum at the address above set forth, and Robert Luchars Urban who is an infant over the age of fourteen years, and John Trexler Urban, who is an infant under the age of fourteen years, and who reside with their father, Reverend Leigh Roy Urban at the address above set forth.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That the defendants and each of them may answer this bill of complaint and each statement therein made.

2. That this court may by its decree find and determine that said Alexander Luchars by the execution of the termination instrument under

date of May 15, 1930, intended to and did thereby terminate the trust created by the instrument executed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum under date of July 1, 1921 as thereafter modified, and that the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum by the execution of the said waiver, authorization and direction subjoined to said instrument of termination executed under date of May 15, 1930, intended to and did thereby waive any right, title and interest which they possessed in and to the subject matter of the trust so created by them by the said trust instrument as aforesaid, and did thereby authorize The Industrial Press to transfer the principal and accumulated income of said trust estate, to wit, 2,756 shares of the common capital stock of The Industrial Press, to the said Alexander Luchars individually and in his own right, and that at the time of his death the said Alexander Luchars was the absolute owner of the shares of stock comprising the corpus of said trust of July 1, 1921, to wit, 2,756 shares of the common capital stock of The Industrial Press, and that the said shares, together with the 1,908 shares of the capital stock of The Industrial Corporation of New Jersey, are now assets of his personal estate, to be disposed of in accordance with the terms of his last will and testament.

3. That a writ of subpoena may issue demanding that said defendants answer this bill of complaint and abide by such decree as the court may make in the premises.

WALTER E. COOPER,
Solicitor for and of Counsel with
Complainant.

Exhibit "A".

KNOW ALL MEN BY THESE PRESENTS that we, Robert B. Luchars of Montclair in the State of New Jersey, Elizabeth Y. Urban of North Brookfield in the Commonwealth of Massachuetts, and Helen L. Ketchum of Cohasset in said Commonwealth, in consideration of one dollar and other good and valuable consideration to us paid by Alexander Luchars of said Montclair, the receipt whereof is hereby acknowledged, do hereby sell, assign and transfer unto the said Alexander Luchars twenty-three hundred fifty-nine (2359) shares of the common capital stock of The Industrial Press, a corporation duly organized under the laws of the State of New York.

TO HAVE AND TO HOLD to the said Alexander Luchars and his executors, administrators, successors and assigns, but in trust, nevertheless, for the purposes following, namely:

FIRST: The said Alexander Luchars is hereinafter called the Trustee, which term shall be construed as including his successors in said trust.

SECOND: The trust hereby created shall continue during the joint lives of us, the said Robert, Elizabeth and Helen, and the survivors and survivor of us, unless sooner terminated, as hereinafter provided.

THIRD: The fiscal year of the trust shall be the calendar year. For the period between this date and January 1, 1922, the distribution of income, as hereinatfer provided, shall be for the pro rata part of the year.

Exhibit "A".

FOURTH: During the term of this trust the Trustee shall hold and dispose of the net income and interest arising from the trust estate, as follows:

a. He shall pay to us, the said Robert, Elizabeth and Helen, and the survivors and survivor of us, in quarterly payments and in the proportion of three-sevenths (3/7) to the said Robert and two-sevenths (2/7) to each of said Elizabeth and Helen, the net income and interest arising from the trust estate, or such portion of such income as in the uncontrolled judgment of the Trustee he shall deem advisable to pay, except that in no year shall he distribute less income than six thousand (6000) dollars nor more income than accrues during that year, and except further, and if, prior to the termination of this trust, any or either of us shall die leaving issue, such issue shall receive their parents share by right of representation.

b. The balance of the net income and interest for any year not distributed, as aforesaid, the Trustee shall add to the principal and thereupon it shall become a part of the principal trust estate.

FIFTH: Upon the decease of the survivor of us the said Robert, Elizabeth and Helen, unless this trust has been sooner terminated as hereinafter provided, the Trustee shall transfer, turn over and convey the entire principal trust estate, with all the accumulations thereof, unto the issue of each of us, such issue taking their parents share by right of representation, in the manner following: If each of us has left issue then living the issue of the said Robert shall receive three-sevenths (3/7) and the issue of the said Elizabeth and Helen shall each receive two-sevenths (2/7) of the estate to be dis-

tributed; if only two of us have left issue then living the issue of each of those two shall receive, in addition to the portion above set forth, one-half of the remaining principal trust estate, and if only one of us has left issue then living such issue shall receive the entire principal trust estate.

SIXTH: In the event of the death, resignation or inability to serve of the said Alexander Luchars, as Trustee hereunder, the First National Bank of Montclair, New Jersey, together with ourselves, the said Robert, Elizabeth and Helen, or such of us as are then living, are hereby constituted and appointed the Trustees hereunder, under the designation of the "Trustee" as above provided.

If the said First National Bank of Montclair should refuse to act as Trustee hereunder, or, having accepted the trust hereby created, should for any reason cease to act as such Trustee, then we, the said Robert, Elizabeth and Helen, or such of us as are living at such time, shall have the right by an instrument under our hands and seals to nominate and appoint another National Bank or a Trust Company, which may be incorporated under the laws of the State of New Jersey or of any other State, to act in conjunction with us as Trustee hereunder. It is understood and agreed that, after the said Alexander Luchars, the first Trustee herein named, shall cease to act hereunder, there shall be at all times a corporate trustee to act with us, and that, except to nominate and appoint such corporate trustee as hereinbefore provided, we shall not have the power to act independently hereunder in the absence of such corporate trustee.

SEVENTH: No trustee hereunder shall be required to give bond as such trustee, nor shall any trustee

be individually liable for any money borrowed hereunder, nor for any act whatsoever as such trustees, except for his own wilful misfeasance.

EIGHTH: The Trustee is hereby given full power and authority:

a. To acquire additional property, which shall be subject to the terms of this trust, and, if necessary for the purpose of paying for the same, to borrow money upon such terms as the Trustee deems proper, and to give the note of the Trustee therefor and to pledge and mortgage the whole or any portion of the principal trust estate as security for the payment thereof, and to execute, acknowledge and deliver good and sufficient pledges, mortgages and other instruments necessary and proper for such purposes. All mortgagees, pledgees, payees and other persons dealing with the Trustee shall look only to the trust estate for the fulfillment of obligations entered into by the Trustee.

b. To invest and reinvest the trust estate and to sell, exchange and dispose of for all purposes, whether for reinvestment, distribution or otherwise, any and all real estate and personal property at any time in the hands of the Trustee at public or private sale, and to execute, acknowledge and deliver good and sufficient deeds and other instruments conveying and transferring the same to the purchasers. No purchaser, mortgagee or pledgee shall be bound to see to the application of the money or other property paid or turned over by him to the Trustee.

c. To terminate this trust at any time prior to the termination provided for in the fifth paragraph hereof, if in the opinion of the Trustee for the time being it is wise and expedient so to do, such termi-

nation shall be effected in the manner following: The Trustee shall sign an instrument of termination, copies of which shall forthwith be delivered to each beneficiary at that time entitled to receive income hereunder, and thereupon the Trustee shall transfer, turn over and convey the principal trust estate and undistributed income then in the hands of the Trustee unto us, the said Robert, Elizabeth and Helen, and the issue by right of representation of any of us who may then have deceased in the same proportions that we and our issue as aforesaid are then receiving income. The copy of the instrument of termination above referred to shall be deemed to have been delivered, within the meaning of this instrument, upon the same having been mailed postpaid and directed to the person entitled to receive the same at his last known residence or place of business.

NINTH: The Trustee hereunder shall, as soon as may be after the close of each fiscal year, prepare and submit to us or the survivors of us the Trustee's account for that year, and the assent in writing of us or of such of us as are then surviving to said account shall operate as a complete settlement up to the end of the period covered by said account and shall be binding and conclusive upon all persons interested in the trust estate.

TENTH: The Trustee is hereby authorized to employ counsel and to appoint agents whenever in the opinion of the Trustee it is advisable to do so and to pay such counsel and agents reasonable fees for their services. The Trustee shall be entitled to be reimbursed for all proper charges and expenses growing out of the administration of this trust.

Exhibit "A".

The said Alexander Luchars shall be entitled to reasonable compensation for his own services as Trustee hereunder. Neither the said Robert, Elizabeth nor Helen shall be entitled to compensation for their services as Trustees hereunder, but any corporate Trustee hereunder shall be entitled to the following commissions, which it shall receive in full for its compensation as such Trustee, to wit:

One per cent on the income collected by it, other than the income which has already been accumulated prior to its acting as Trustee, such commission on income to be deducted by such Trustee as said income is received by it.

Upon the final termination and distribution of the trust estate one per cent on the principal of the trust estate, including the income accumulated prior to its acting as Trustee, to be received by the corporate trustee acting hereunder at that time.

The acceptance of this trust by any corporate trustee shall be deemed to be an acceptance of the above provision for compensation.

ELEVENTH: Upon the termination of this trust the Trustee may reserve such portion of the trust estate and for such period as in the opinion of the Trustee may be necessary and proper to protect the Trustee and the trust estate from any obligations contracted by the Trustee, and, in such event, the corporate trustee, if any, shall be entitled to receive its compensation as and when the principal is paid over and distributed.

TWELFTH: Whenever in this instrument a distribution is directed among the issue of any of us, it is intended that the share to be distributed among such issue shall be distributed among them in equal shares per stirpes and not per capita.

Exhibit "A".

THIRTEENTH: Whenever there is more than one trustee hereunder the term Trustee shall be construed as meaning all of the trustees for the time being.

IN WITNESS WHEREOF, we, the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, hereunto and unto three other instruments of like tenor set our hands and seals this first day of July in the year one thousand nine hundred and twenty-one.

ROBERT B. LUCHARS (Seal)
ELIZABETH Y. URBAN (Seal)
HELEN L. KETCHUM (Seal)

Exhibit "A".

I, Alexander Luchars, named as Trustee in the foregoing instrument, hereby accept the trust therein created.

WITNESS my hand and seal this First day of July in the year one thousand nine hundred and twenty-one.

ALEX LUCHARS (Seal)

The First National Bank of Montclair, New Jersey, named provisionally as Trustee in the foregoing instrument hereby acepts the trust therein created upon the terms and conditions therein set forth.

DATED this First day of July in the year one thousand nine hundred and twenty-one.

(Seal)

THE FIRST NATIONAL BANK OF MONTCLAIR, N. J.
A. W. BALLANTINE
Trust Officer.

Exhibit "B".

KNOW ALL MEN BY THESE PRESENTS, that

WHEREAS, we, the undersigned, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, by an instrument in writing bearing date the 1st day of July, 1921, assigned and transferred 2359 shares of the common stock of the Industrial Press to Alexander Luchars, to have and to hold upon the trust therein set forth; and

WHEREAS, it was provided in the fourth paragraph of said deed of trust as follows:

"FOURTH: During the term of this trust the Trustee shall hold and dispose of the net income and interest arising from the trust estate, as follows:

"a. He shall pay to us, the said Robert, Elizabeth and Helen, and the survivors and survivor of us, in quarterly payments and in the proportion of three-sevenths (3/7) to the said Robert and two-sevenths (2/7) to each the said Elizabeth and Helen, the net income and interest arising from the trust estate, or such portion of such income as in the uncontrolled judgment of the Trustee he shall deem advisable to pay, except that in no year shall he distribute less income than six thousand (6000) dollars nor more income than accrues during that year, and except further, that if, prior to the termination of this trust, any or either of us shall die leaving issue, such issue shall receive their parents share by right of representation.

"b. The balance of the net income and interest for any year not distributed, as afore-

said, the Trustee shall add to the principal and thereupon it shall become a part of the principal trust estate."

and

WHEREAS, we the undersigned have heretofore waived our right to require the said Alexander Luchars, as trustee under said deed of trust, to distribute the sum of Six thousand dollars ($6,000.) or any part of the income from such trust estate during any of the years that have elapsed subsequently to the execution of said deed of trust, and at our request the said Alexander Luchars has invested all of the income received by him as trustee under said deed of trust in shares of common stock of the Industrial Press, and has added such shares of stock to the principal of the trust estate, and it is our desire to surrender and relinquish the right to require the distribution of any part of the income from said trust estate in any year;

NOW, THEREFORE, in consideration of the premises and in consideration of each of the other parties hereto joining in the execution of this instrument, we, the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and each of us:

I. Do hereby relinquish, release and quit claim any and all rights which we have or may have to require the distribution among us of Six thousand dollars ($6,000) or any other part of the income accruing from the trust estate created by said deed of trust during any year, and do hereby assign and transfer any and all such rights to the said Alexander Luchars as trustee under said deed of trust, so that hereafter the income of said deed of trust

shall be held and disposed of in the same manner as if the fourth clause of said deed of trust provided as follows:

"FOURTH: During the term of this trust the trustee shall hold and dispose of the net income and interest arising from the trust estate as follows:

"a. He shall pay to us, the said Robert Elizabeth and Helen, and the survivors and survivor of us, in quarterly payments and in the proportion of three-sevenths (3/7) to the said Robert and two-sevenths (2/7) to each the said Elizabeth and Helen, the net income and interest arising from the trust estate, or such portion of such income as in the uncontrolled judgment of the trustee he shall deem advisable to pay, except that if prior to the termination of this trust any or either of us shall die leaving issue, such issue shall receive their parents' share by right of representation.

"b. The balance of the net income and interest for any year, not distributed as aforesaid, and the whole thereof, if no part of said income is distributed, the Trustee shall add to the principal and thereupon it shall become a part of the trust estate."

II. Do hereby remise, release and forever discharge said Alexander Luchars, both individually and as Trustee under said deed of trust, his successors, heirs, executors or administrators, from all claims and demands of every kind and nature and from all further liability, or responsibility arising out of or in any way connected with the provisions

of said deed of trust providing for the distribution of Six thousand dollars a year among us, and arising out of or in any way connected with the failure of the said Alexander Luchars to distribute said sum of Six thousand dollars per annum or any other part of the income of said trust estate among us.

III. Do hereby ratify and approve of the investment of the income from said trust estate in the shares of common stock of the Industrial Press, purchased by the said Alexander Luchars under a contract entered into with Matthew J. O'Neill under date of April 28, 1922, and do hereby request and direct the said Alexander Luchars to invest the income hereafter accruing under said deed of trust, or so much thereof as may not be distributed among us pursuant to the power and authority conferred upon him by said deed of trust, and any part of the principal of said trust estate or any moneys loaned thereto, in said shares of common stock of the Industrial Press so being purchased by him under and pursuant to the terms of said contract entered into by him with Matthew J. O'Neill, under date of April 28, 1922, or in such other securities as in his discretion may be proper, and declare that in making such investments for said trust estate he shall not be limited to the investments in which trustees are by law authorized to invest trust funds. And we do hereby remise, release and forever discharge the said Alexander Luchars individually and as Trustee, as aforesaid, from any claims or demands and from all liability or responsibility for or by reason of his having invested the income of said trust estate or any part thereof in said shares of the common stock of the Industrial Press so purchased by him from the said Matthew J. O'Neill.

Exhibit "B".

IV. This instrument is executed and the right to require the distribution of said sum of Six thousand dollars ($6,000) per annum out of the income of said trust estate is released and relinquished upon the condition that the said Alexander Luchars as such Trustee under said deed of trust, shall have the right and be authorized to invest the income and any portion of the principal of said trust estate in said shares of common stock of the Industrial Press or in such other securities as he may deem proper, without his being limited in making investments to those securities in which trustees are authorized by law to invest trust funds.

This instrument is executed and the right to require the distribution of said sum of Six thousand dollars ($6,000) per annum out of the income of said estate is released and relinquished upon the further condition that in the event that any person should hereafter at any time or in any manner contest the right of the said Alexander Luchars to so invest the principal or income of said trust estate or any moneys loaned thereto, or should protest against his having so invested the principal or income of said trust estate or the moneys loaned thereto, the person so contesting or protesting shall have no right to share in any part of the income accumulated from said trust estate, or in any of the interest or income earned upon such accumulated income, which would have been distributed to us under the terms of this said deed of trust had we not waived our right to require the distribution of said sum of Six thousand dollars ($6,000) per annum out of such income, and such accumulated income and the interest and income earned thereon shall be distributed in the same manner as if the person so contesting or protesting had died before

the time of distribution of the principal of the trust estate, whether such principal is distributed under the Fifth clause or under subdivision (c) of the Eighth clause of said deed of trust.

IN WITNESS WHEREOF, we, the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, have hereunto set our hands and seals this 9th day of May 1925.

ROBERT B. LUCHARS L. S.
ELIZABETH Y. URBAN L. S.
HELEN L. KETCHUM L. S.

STATE OF NEW YORK,)
COUNTY OF NEW YORK,) ss.:

BE IT REMEMBERED that on this 9th day of May, 1925, before me personally appeared ROBERT B. LUCHARS, who, I am satisfied is one of the individuals described in the foregoing instrument; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

CHAS. P. ABEL
Notary Public Kings Co.
(Stamp and Seal)

Exhibit "B".

STATE OF MASSACHUSETTS }
COUNTY OF } SS.:

BE IT REMEMBERED that on this 9th day of May, 1925, before me personally appeared ELIZABETH Y. URBAN, who, I am satisfied is one of the individuals described in the foregoing instrument; and I having first made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the the uses and purposes therein expressed.

RAYMOND DRAPER
Notary Public
(Stamp and Seal)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

BE IT REMEMBERED that on this 9th day of May, 1925, before me personally appeared HELEN L. KETCHUM, who I am satisfied is one of the individuals described in the foregoing instrument; and I having first made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

CHAS. P. ABEL
Notary Public
(Stamp and Seal)

Exhibit "C".

To ROBERT B. LUCHARS, ELIZABETH Y. URBAN and HELEN L. KETCHUM:

WHEREAS by document dated May 10, 1922 and amended by document dated May 9, 1925, Alexander Luchars, of the Town of Montclair, County of Essex and State of New Jersey, established a certain trust for the benefit of his children, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and their issue, and

WHEREAS the said trust agreement of May 10, 1922 by subdivision (c) of Paragraph Eighth reserved to the said Alexander Luchars the power to terminate the trust in the following language "To terminate this trust at any time prior to the termination provided for in the fifth paragraph hereof, if in the opinion of the trustee for the time being it is wise and expedient so to do, such termination shall be effected in the manner following: The trustee shall sign an instrument of termination, copies of which shall forthwith be delivered to each beneficiary at that time entitled to receive income hereunder, and thereupon the trustee shall transfer, turn over and convey the principal trust estate and undistributed income then in the hands of the trustee, unto to said Robert, Elizabeth and Helen, and the issue by right of representation of any of them who may then have deceased in the same proportions as they and their issue as aforesaid are then receiving income. The copy of the instrument of termination above referred to shall be deemed to have been delivered, within the meaning of this instrument, upon the same having been mailed postpaid and directed to the person entitled to receive

the same at his last known residence or place of business", and

WHEREAS the said trustee desires to terminate the existing trusts,

NOW, THEREFORE, these presents are executed by the said Alexander Luchars as an instrument of termination as provided for in the said paragraph, it being his intention to forthwith transfer, turn over and convey the principal trust estate, and undistributed income, to you, the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

IN WITNESS WHEREOF, the said Alexander Luchars has set his hand and seal this 15th day of May, Nineteen hundred and thirty.

ALEX LUCHARS
(L. S.)

Signed, sealed and delivered in
the presence of:
CHARLES P. ABEL

Exhibit "C".

We, the undersigned, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, the children of the said Alexander Luchars, hereby waive our right to receive the subject matter of the trust hereinbefore referred to, and do hereby authorize and direct The Industrial Press, a corporation of the State of New York, and the said Robert B. Luchars, trustees, to transfer the principal and accumulated income of the trust estate to the said Alexander Luchars, individually and in his own right.

R. B. LUCHARS
HELEN L. KETCHUM
ELIZABETH Y. URBAN

Answer of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to Counterclaim of First National Bank and Trust Company of Montclair.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill, etc.

The answer of the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to the counterclaim of First National Bank and Trust Company of Montclair.

In answer to the counterclaim, the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, say:

1. The answering defendants admit the allegations of paragraphs 1, 2 and 3 of the counterclaim, concerning the execution of the agreement of trust, and refer thereto as to the contents thereof.

2. They admit the allegations of paragraph 4.

Answer of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to Counterclaim of First National Bank and Trust Company of Montclair.

3. The defendants admit the allegations of paragraphs 5 and 6.

4. In answer to paragraph 7 the defendants admit that Alexander Luchars took possession of the trust estate, but deny that he asserted any claims therein inconsistent with his agreements with these answering defendants, alleging that he merely postponed carrying out his agreement for reasons which were explained to these defendants, and was overtaken by death before completing them.

5. The defendants admit the allegations of paragraph 8, although they allege that there were no rights in the said trust fund belonging to the said infants which could not be terminated by the act of the trustee.

6. The allegations of paragraphs 9 and 10 are denied.

7. The allegations of paragraph 11 are admitted.

PHILIP GOODELL,
Solicitor for Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

Answer of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to Counterclaim of Theodore McCurdy Marsh, as Guardian *Ad Litem* of Adelaide L. Ketchum, *et al.*

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	}	On Bill &c.

The answer of the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to the counterclaim of Theodore McCurdy Marsh, as Guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, minors.

In answer to the First Count of the counterclaim, the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, say:

1. The allegations of paragraph 1, in regard to the execution of the trust agreement, are admitted, and the original thereof is referred to as to the contents thereof.

Answer of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to Counterclaim of Theodore McCurdy Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, et al.

2. The allegations of paragraphs 2 and 3 are admitted, but it is further alleged that any rights which the said infants may have had under the said trust document were subject to being defeated by a revocation thereof in the lifetime of the said Alexander Luchars, under the terms thereof.

3. The allegations of paragraphs 4 and 5 are neither admitted nor denied, but reference is made to the said trust agreement and to the terms thereof.

4. The allegations of paragraph 6 are admitted.

5. In answer to paragraph 7, the defendants admit that their waiver of their right to the subject matter of the trust, dated May 15th, 1930, was induced by an agreement of the said Alexander Luchars made with them individually, that he, the said Alexander Luchars, on becoming the temporary possessor, by reason of these defendants' waiver, of the trust estate, would forthwith put into effect a plan of reorganization of The Industrial Press (of New York) the capital stock of which comprised the trust estate, which would result in the said Alexander Luchars, as the owner of the major portion of the common stock of that corporation, becoming the owner of the entire, or substantially the entire capital stock of the New Jersey corporation, then already formed and known as The Industrial Corporation of New Jersey which, through the said process of reorganization, would have, by then, become the owner of the substantial part of the surplus assets of The Industrial

Press, to the value of some $700,000.00 or $750,000.00. The said Alexander Luchars agreed that he would, as a consideration for the surrender of these defendants' rights in the original trust fund, establish another trust, with the stock of the New Jersey corporation, which trust should be primarily for the benefit of these defendants and their issue and should be along the lines of the earlier trust, but with certain changes, the details of which were not expressly agreed upon. The allegations in paragraph 7 inconsistent with these statements are denied.

6. The allegations of paragraphs 8 and 9 are admitted, except that it is denied that Alexander Luchars took possession of the trust estate in his own right, it being alleged that until overtaken by death he took possession of the trust estate nominally in his own name but actually subject to his agreements as hereinbefore recited.

7. In answer to paragraph 10 the defendants say that the infants, grandchildren of the said Alexander Luchars, had no rights under the trust agreement that could not be terminated by the action of the trustee, according to the terms thereof, and they deny that the document of termination of the trust was not made in conformity with the said agreement, and deny that it was not executed in the exercise of an impartial and fair discretion, and deny that it was for the use and benefit of the trustee.

8. The allegations of paragraph 11 are denied.

Answer of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to Counterclaim of Theodore McCurdy Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, et al.

9. The answering defendants have no knowledge of the truth or falsity of the allegations of paragraph 12, but admit the allegations of paragraph 13.

The answering defendants pray that the counterclaim be dismissed.

In answer to the Second Count of the counterclaim, the defendants say:

1. They repeat their answers to the allegations in paragraphs 1 to 8 of the First Count, as applied to the Second Count.

2. In answer to paragraph 2 of the Second Count the defendants say that they admit that the said Alexander Luchars took possession of the trust estate, but allege that the New Jersey corporation and the plan of reorganization had already been determined upon. They admit that the plan of reorganization, however, was not consummated prior to the death of the said Alexander Luchars.

3. In answer to paragraph 3 the defendants say that they believe the statements therein contained are true and therefore admit the same.

4. They deny the allegations of paragraph 4, alleging, as they have alleged in their own counterclaim to this suit, that the subject matter of the trust and the avails thereof, including the stock of the New Jersey corporation, belong to them on account of the failure of the consideration promised them by the said Alexander Luchars for their sur-

Answer of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum to Counterclaim of Theodore McCurdy Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, et al.

render of their right to receive the subject matter of the trust upon its revocation.

5. The allegations of paragraph 5 are admitted.

The defendants pray that the Second Count of the said counterclaim be dismissed.

PHILIP GOODELL,
Solicitor for Defendants,
Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum.

Replication and Answer to Counterclaim of Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, Defendants.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant,
and
ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*,
Defendants.
On Bill &c.

The complainant joins issue on the answer of the above-named defendants.

As to the counterclaim contained in said answer, the complainant says:

1. He admits the allegations contained in paragraphs 1, 2, 3 and 7.

2. He has no knowledge or information sufficient to form a belief as to the facts alleged in paragraph 4.

3. He has no knowledge or information sufficient to form a belief as to the facts alleged in paragraph 5, except that he admits the execution of the

document attached to the bill of complaint and known as Exhibit "C".

4. He has no knowledge or information sufficient to form a belief as to the facts alleged in paragraph 6 except that he admits that Alexander Luchars is dead and that the said defendants have applied to him to transfer the stock of The Industrial Press and the avails thereof to them.

WALTER E. COOPER,
Solicitor of Complainant.

Replication and Answer to Counterclaim of First National Bank & Trust Company of Montclair, New Jersey, Defendant.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c.

The complainant joins issue on the answer of the defendant.

As to the counterclaim contained in said answer, the complainant says:

1. As to paragraphs 1, 2, 3 and 4, he admits the execution of the trust agreement dated July 1, 1921, and the instrument modifying the same, dated May 9, 1925, and refers to Exhibits "A" and "B" attached to the bill of complaint, for the exact wording and import thereof, and for the subject-matter of the said trust.

2. He has no knowledge or information sufficient to form a belief as to the facts alleged in paragraphs 5, 6, 7, 8, 9 and 11, except that he admits the

Replication and Answer to Counterclaim of First National Bank & Trust Company of Montclair, New Jersey, Defendant.

execution of the instrument attached to the bill of complaint and marked Exhibit "C".

3. He denies the allegations contained in paragraph 10, except that he admits that demand has been made by said defendant for the delivery of the subject-matter of the trust and admits that he has refused to turn the same over to said defendant, pending the determination of the ownership thereof by this Court.

WALTER E. COOPER,
Solicitor of Complainant.

Replication and Answer to Counterclaim of Theodore McC. Marsh, as Guardian *Ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c.

The complainant denies the allegations contained in paragraphs 1, 2 and 3 of the first separate defense, and joins issue on the answer of the said defendants.

As to the counterclaim contained in said answer, the complainant says:

AS TO FIRST COUNT.

1. As to paragraphs 1, 2, 3, 4, 5 and 6, complainant admits the execution of the trust agreement dated July 1, 1921, and the instrument modifying the same dated May 9, 1925, but refers to Exhibits "A" and "B" attached to the bill of complaint for

the exact wording and import thereof, and for the subject matter of said trust; and further admits that Adelaide L. Ketchum, Elizabeth Y. Ketchum and David Dow Ketchum are the children of Helen L. Ketchum and that John Trexler Urban and Robert Luchars Urban are the children of Elizabeth Y. Urban.

2. He has no knowledge or information sufficient to form a belief as to the facts alleged in paragraphs 7, 9, 10, and 13, and in paragraph 8 except that he admits the execution of the instrument attached to the bill of complaint, known as Exhibit "C".

3. He denies the allegations contained in paragraph 11.

4. He admits the allegations contained in paragraph 12.

AS TO SECOND COUNT.

1. The complainant repeats his answers hereinbefore set forth as to paragraphs 1 and 8 of the first count and realleged by the defendant in the second count.

2. He has no knowledge or information sufficient to form a belief as to the facts alleged in paragraphs 2 and 5.

3. He admits the allegations contained in paragraphs 3 and 4, except that he denies that the shares therein described are impressed with a trust as therein alleged.

WALTER E. COOPER,
Solicitor of Complainant.

Answer and Counterclaim of First National Bank and Trust Company of Montclair, Defendant.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c.

The First National Bank and Trust Company of Montclair, a corporation organized in accordance with the laws of the State of New Jersey, and having its principal office at 600 Valley Road, Upper Montclair, New Jersey, in answer to the bill of complaint of C. Alexander Capron, as Executor of the Last Will and Testament of Alexander Luchars, deceased, says:

1. That it admits the allegations of paragraph one of said bill of complaint.

2. That it admits the allegations of paragraph two of said bill of complaint insofar as the same set forth the provisions of the instrument of trust, a copy of which is attached to said bill, and to which it begs leave to refer should it be necessary so to do.

Answer and Counterclaim of First National Bank and Trust Company of Montclair, Defendant.

3. That it has no knowledge of the allegations of paragraphs three and four and leaves the complainant to such proof thereof as he may be able to make.

4. This defendant says that it has no specific knowledge of the facts alleged in paragraphs five, six and seven and leaves the complainant to such proof thereof as he may be able to make, but it denies that the instrument purporting to terminate the trust agreement, and referred to in said bill of complaint as Exhibit C, terminated said trust or that said trust has in any manner been terminated, but on the contrary says that the same was at the time of the death of Alexander Luchars, and still is, in full force and effect.

5. The defendant has no knowledge of the allegations of paragraph eight and leaves the complainant to such proof thereof as he may be able to make.

6. This defendant says that it has no knowledge of the facts alleged in paragraph nine, but it denies that the trust agreement has been validly or effectively terminated or that Alexander Luchars acquired any rights or title in and to the shares of stock therein referred to, in his own right by virtue of the actions therein set forth or in any other manner.

7. The defendant has no knowledge of the allegations of paragraphs ten, eleven, twelve and thirteen and leaves the complainant to such proof thereof as he may be able to make.

8. The defendant admits the allegations of paragraph fourteen.

Answer and Counterclaim of First National Bank and Trust Company of Montclair, Defendant.

COUNTERCLAIM.

The First National Bank and Trust Company of Montclair, a corporation of the State of New Jersey, by way of counterclaim, says:

1. That on or about the 1st day of July, 1921, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum executed a certain instrument or agreement of trust, a copy of which is attached to the bill of complaint, wherein and whereby it was provided that 2,359 shares of the common capital stock of the Industrial Press, a corporation of the State of New York, should be transferred by them to Alexander Luchars, and that the same should be held by Alexander Luchars for and during the term of his natural life in trust for the use and benefit of such grantors and their issue, and that he, as such trustee, should pay the income thereof to the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum during their respective lives and upon their death that the trust estate should be conveyed and transferred to their respective issue, a copy of which said agreement is attached to the bill of complaint, and to which agreement this defendants begs leave to refer should it be necessary so to do.

2. That in and by virtue of said agreement it was provided that Alexander Luchars should retain and manage the trust estate during his lifetime and that upon his death the First National Bank of Montclair, under which name this defendant is designated in said agreement, together with Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum should be constituted trustees in his place and stead.

3. This defendant further says that said agreement further provided that the trustee or trustees should have power to terminate the trust at any time if in the opinion of the trustee or trustees it were wise and expedient so to do.

4. This defendant further shows that on or about the 9th day of May, 1925, said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and said Alexander Luchars executed a certain other instrument modifying the said trust agreement, a copy of which is attached to the bill of complaint, and to which this defendant begs leave to refer should it be necessary so to do.

5. This defendant further says that shortly prior to the 15th day of May, 1930, Alexander Luchars, being the then acting trustee under said agreement entered into a contract with Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum wherein and whereby it was provided that the said trust agreement should be terminated, the trust fund delivered to the said Alexander Luchars, and that they, and each of them, should surrender to Alexander Luchars all their right in and to said trust estate, and that subsequently he would provide for the creation of a new trust fund for the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, and their descendants, having a value of about the sum of $750,000.00.

6. That following the making of said contract last mentioned, the said Alexander Luchars, as trustee as aforesaid, did on or about the 15th day of May, 1930, and upon the express condition and

understanding that Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum would surrender to him all their right in and to the trust fund, execute the instrument attached to the bill of complaint and known as Exhibit C, and the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum did thereupon, and in pursuance of such agreement, execute a waiver of their right to receive the subject matter of the trust.

7. That upon the execution of said instrument Alexander Luchars took possession of the trust estate claiming to hold it in his own right and continued so to do until his death, and that no other and further trust has since been established by either the said Alexander Luchars or anybody else in his behalf.

8. This defendant further says unless it be determined that Alexander Luchars still continued, after the purported termination of the trust, to hold the trust property as trustee under the deed of trust of July 1, 1921, as modified by said agreement of May 9, 1925, and the executors of his will shall be required to transfer the same to this defendant and Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, as successor trustees under that trust agreement, the defendants, Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban, John Trexler Urban, and all other descendants of the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, who may be born prior to the termination of said trust, will be deprived of their rights and interests therein.

9. This defendant further says and charges the fact to that the instrument hereinbefore referred to, made and executed by Alexander Luchars and purporting to terminate the trust was not made in conformity with the provisions of said agreement and in the exercise of an impartial and fair discretion, but for the use and benefit of the trustee, and hence was in equity void and of no effect.

10. This defendant further says that for the reasons aforesaid, the alleged termination of the trust agreement being of no effect, Alexander Luchars continued as trustee and died seized and possessed of the subject matter of the trust estate as trustee, and during all of said period held the same subject to all the provisions of said trust agreement as modified by the agreement of May 9th, 1925, attached to the bill of complaint, and that the complainant and Robert B. Luchars, as executors under the last will and testament of Alexander Luchars, deceased, are now seized and possessed of the subject matter of the trust fund as trustees, and by virtue of the provisions of said agreement this defendant, together with Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum are entitled to receive possession of said trust estate as successor trustee to said Alexander Luchars. This defendant has requested said executors to deliver the subject matter of the trust estate to it and the other successor trustees, but said executors have failed, refused and neglected so to do.

11. Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum are made defendants to this counterclaim as they have refused to act as complainants.

Answer and Counterclaim of First National Bank and Trust Company of Montclair, Defendant.

Defendant is without adequate remedy in the Courts of Law and, therefore, prays:

1. That the complainant and Robert B. Luchars, individually and as executors under the last will and testament of Alexander Luchars, deceased, Elizabeth Y. Urban and Helen L. Ketchum, who are hereby named as defendants to this counterclaim, may answer the same and each statement therein made.

2. That this court may decree that the instrument of termination dated May 15th, 1930, executed by Alexander Luchars, purporting to terminate the trust agreement is null and void and of no effect.

3. That the court may decree that the complainant and Robert B. Luchars, as executors under the Last Will and Testament of Alexander Luchars, deceased, hold the subject matter of the trust estate subject to all the provisions of said trust agreement and that they, and each of them, be directed to transfer and deliver the same to this defendant and Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum in accordance with the provisions of said trust agreement as successor trustees, so that said parties as such trustees may perform the terms and provisions of said trust.

RIKER & RIKER,
Solicitors of the Defendant, The First National Bank and Trust Company of Montclair.

THEO. MCC. MARSH,
Of Counsel.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian *Ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant,

and

ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*,
Defendants.

} On Bill &c.

Theo. McC. Marsh, residing at 20 East Highland Avenue, East Orange, County of Essex and State of New Jersey, as guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum and Robert Luchars Urban, minors above the age of fourteen years, and David Dow Ketchum and John Trexler Urban, minors under the age of fourteen years, in answer to the bill of complaint of C. Alexander Capron, as Executor of the last will and testament of Alexander Luchars, deceased, says:

1. That he admits the allegations of paragraph one of said bill of complaint.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

2. That he admits the allegations of paragraph two of said bill of complaint insofar as the same set forth the provisions of the instrument of trust, a copy of which is attached to said bill, and to which he begs leave to refer should it be necessary so to do.

3. That he has no knowledge of the allegations of paragraphs three and four and leaves the complainant to such proof thereof as he may be able to make.

4. This defendant says that he has no specific knowledge of the facts alleged in paragraphs five, six and seven and leaves the complainant to such proof thereof as he may be able to make, but he denies that the instrument purporting to terminate the trust agreement, and referred to in said bill of complaint as Exhibit C, terminated said trust or that said trust has in any manner been terminated, but on the contrary says that the same was at the time of the death of Alexander Luchars, and still is, in full force and effect.

5. The defendant has no knowledge of the allegations of paragraph eight and leaves the complainant to such proof thereof as he may be able to make.

6. This defendant says that he has no knowledge of the facts alleged in paragraph nine, but he denies that the trust agreement has been validly or effectively terminated or that Alexander Luchars acquired any rights or title in and to the shares of

stock therein referred to, in his own right by virtue of the actions therein set forth or in any other manner.

7. The defendant has no knowledge of the allegations of paragraphs ten, eleven, twelve and thirteen and leaves the complainant to such proof thereof as he may be able to make.

8. The defendant admits the allegations of paragraph fourteen.

FIRST SEPARATE DEFENSE.

1. This defendant says that the power reserved to the trustee in and by said agreement aforesaid to terminate the trust did not empower the trustee to revoke the trust but only to terminate the trust itself.

2. That by virtue of the acts of Alexander Luchars, as trustee, as set forth in the Bill of Complaint, the trust terminated and the legal and equitable estates thereby merged and that the vested interest of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban thereupon became a vested legal interest in the reversionary estate instead of an equitable interest as theretofore.

3. That Adelaide L. Ketchum, Elizabeth Y. Ketchum, Robert Luchars Urban and John Trexler Urban have a vested legal estate in remainder in

and to the shares of the common capital stock of the Industrial Press belonging to the trust fund as aforesaid, subject to the life estate of Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

COUNTERCLAIM.

Theo. McC. Marsh, as guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, minors, by way of counterclaim, says:

FIRST COUNT.

1. That on or about the 1st day of July, 1921, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum executed a certain instrument or agreement of trust, a copy of which is attached to the bill of complaint, wherein and whereby it was provided that 2,359 shares of the common capital stock of the Industrial Press, a corporation of the State of New York, should be transferred by them to Alexander Luchars, and that the same should be held by Alexander Luchars for and during the term of his natural life in trust for the use and benefit of such grantors and their issue, and that he, as such trustee, should pay the income thereof to the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum during their respective lives and upon their death that the trust estate should be conveyed and transferred to their respective

issue, a copy of which said agreement is attached to the bill of complaint, and to which agreement this defendant begs leave to refer should it be necessary so to do.

2. That the said Adelaide L. Ketchum, Elizabeth Y. Ketchum and David Dow Ketchum are the children of said Helen L. Ketchum, and by virtue of the trust agreement as aforesaid became entitled to receive a share of the principal of said trust estate upon the death of Helen L. Ketchum in accordance with the provisions of said agreement.

3. That the said John Trexler Urban and Robert Luchars Urban are the children of Elizabeth Y. Urban, and by virtue of the trust agreement as aforesaid became entitled to receive a share of the principal of said trust estate upon the death of Elizabeth Y. Urban in accordance with the provisions of said agreement.

4. That in and by virtue of the said agreement it was further provided that Alexander Luchars should retain and manage the trust estate during his lifetime and that upon his death the First National Bank of Montclair, under which name the defendant, The First National Bank and Trust Company of Montclair, is designated in said agreement, together with Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum should be constituted trustees in his place and stead.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

5. That the said agreement further provided that the said trustee or trustees should have power to terminate the trust at any time if, in the opinion of the trustee or trustees, it were wise or expedient so to do.

6. This defendant further shows that on or about the 9th day of May, 1925, said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and said Alexander Luchars executed a certain other instrument modifying the said trust agreement, a copy of which is attached to the bill of complaint, and to which this defendant begs leave to refer should it be necessary so to do.

7. This defendant further says that shortly prior to the 15th day of May, 1930, Alexander Luchars, being the then acting trustee under said agreement entered into a contract with Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum wherein and whereby it was provided:

(a) That the said trust agreement should be terminated, the trust fund delivered to the said Alexander Luchars and that Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, and each of them, shall surrender to Alexander Luchars all of their right in and to the said trust estate so that he, the said Alexander Luchars, should thereupon hold individually and in his own right the principal thereof, which then consisted of 2,735 shares of the common capital stock of the Industrial Press, a corporation of the State of New York.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

(b) That thereupon the said Alexander Luchars would cause to be organized a corporation under the laws of the State of New Jersey, and under a plan for the re-organization of said Industrial Press said corporation should transfer to said New Jersey corporation securities of the value of not less than $750,000.00 in exchange for all the capital stock of said New Jersey corporation, which said stock pursuant to such plan of re-organization should be distributed to the said Alexander Luchars as the holder of the common stock of the Industrial Press.

(c) That upon receipt of said stock of said New Jersey corporation, the said Alexander Luchars would then create a new trust for his children and their respective descendants similar to the trust established by his children, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum as hereinbefore referred to, except that the shares of his said children and their respective descendants should all be equal and not in the proportions provided in the original trust agreement, and also except that some bank or trust company other than the First National Bank and Trust Company of Montclair should be named as one of the successor trustees.

8. That following the making of said contrast last mentioned, the said Alexander Luchars, as trustee as aforesaid, did on or about the 15th day of May, 1930, and upon the express condition and understanding that Robert B. Luchars, Elizabeth Y.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

Urban and Helen L. Ketchum would surrender to him all their right in and to the trust fund, execute the instrument attached to the bill of complaint and known as Exhibit C, and the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum did thereupon, and in pursuance of such agreement, execute a waiver of their right to receive the subject matter of the trust.

9. That upon the execution of said instrument Alexander Luchars took possession of the trust estate claiming to hold it in his own right and continued so to do until his death, and that no other and further trust has since been established by either the said Alexander Luchars or anybody else in his behalf.

10. This defendant further says that unless this court shall decree that the said Alexander Luchars at the time of his death continued to hold said stock as trustee under the trust agreement bearing date the 1st day of July, 1921, as modified by the said agreement of May 9th, 1925, the grandchildren of the said Alexander Luchars will be deprived of their right and interest in the trust estate as established by said deed of trust, and further says and charges the fact to be that the instrument hereinbefore referred to purporting to terminate the trust was not made in conformity with the provisions of the said agreement, nor was it executed in the exercise of an impartial and fair discretion, but was for the use and benefit of the trustee and hence was in equity void and of no effect.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

11. This defendant further says that for the reasons aforesaid, the alleged termination of the trust agreement being of no effect, Alexander Luchars continued as trustee and died seized and possessed of the subject matter of the trust estate as trustee, and during all of said period held the same subject to all the provisions of said trust agreement as modified by the agreement of May 9th, 1925, attached to the bill of complaint, and that the complainant and Robert B. Luchars, as executors under the last will and testament of Alexander Luchars, deceased, are now seized and possessed of the subject matter of the trust fund as trustees, and by virtue of the provisions of said agreements the defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and the First National Bank and Trust Company of Montclair, are entitled to receive possession of said trust estate as successor trustees to said Alexander Luchars subject to the provisions of said trust agreement.

12. This defendant has requested said executors to deliver the subject matter of the trust estate to the successor trustees named in said agreement, but said executors have failed, refused and neglected so to do.

13. Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum are made defendants to this counterclaim as they have refused to act as complainants.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

Defendant is without adequate remedy in the Courts of Law and, therefore, prays:

A. That the complainant and Robert B. Luchars, individually and as executors under the last will and testament of Alexander Luchars, deceased, Elizabeth Y. Urban and Helen L. Ketchum, who are hereby named as defendants to this counterclaim, may answer the same and each statement therein made.

B. That this court may decree that the instrument of termination dated May 15th, 1930, executed by Alexander Luchars, purporting to terminate the trust agreement is null and void and of no effect.

C. That the court may decree that the complainant and Robert B. Luchars, as executors under the Last Will and Testament of Alexander Luchars, deceased, hold the subject matter of the trust estate subject to all the provisions of said trust agreement and that they, and each of them, be directed to transfer and deliver the same to the First National Bank and Trust Company of Montclair and Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum in accordance with the provisions of said trust agreement as successor trustees, so that said parties as such trustees may perform the terms and provisions of said trust.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

SECOND COUNT.

1. This defendant here repeats the allegations of paragraphs one to eight inclusive of the first count of said counterclaim and makes them a part hereof as though fully set forth.

2. This defendant further says that in pursuance of the agreement of May 15th, 1930, as hereinbefore referred to, the said Alexander Luchars took possession of the trust estate and subsequently caused to be organized a corporation known as the Industrial Corporation of New Jersey, and that thereupon a plan of reorganization was entered into between said corporation and the Industrial Press, but that the same was not consummated prior to the death of the said Alexander Luchars.

3. That subsequent to the death of the said Alexander Luchars the complainant and Robert B. Luchars, acting as executors under the last will and testament of Alexander Luchars, caused a further plan of re-organization to be made and entered into between the Industrial Press and the said Industrial Corporation of New Jersey, pursuant to which the Industrial Press has transferred to the Industrial Corporation securities of the market value of $750,000.00 and said Industrial Corporation of New Jersey has issued to the complainant and Robert B. Luchars, executors as aforesaid, 1,908 shares of its capital stock, being the entire amount with the exception of the qualifying direc-

tors shares, and that the said executors still hold all of said shares of stock of the Industrial Corporation in their possession.

4. These defendants further say and charge the fact to be that the said executors now hold said 1,908 shares of the capital stock of the Industrial Corporation of New Jersey, and the same are impressed with a trust for the benefit of Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, children of the said Alexander Luchars, and Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, grandchildren, and any other grandchildren hereafter born, upon the terms and provisions as hereinbefore set forth.

5. Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum are made defendants to this counterclaim as they have refused to act as complainants.

This defendant is without adequate remedy in the Courts of Law and, therefore, prays:

A. That the complainants, C. Alexander Capron and Robert B. Luchars, as executors under the last will and testament of Alexander Luchars, deceased, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, who are hereby named as defendants, may answer this counterclaim and each statement therein made.

Answer and Counterclaim of Theo. McC. Marsh, as Guardian Ad Litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

B. That this court may decree that C. Alexander Capron and Robert B. Luchars, as executors as aforesaid, hold the 1,908 shares of the capital stock of the Industrial Corporation of New Jersey in trust for the use and benefit of the children and grandchildren of said Alexander Luchars, deceased, and subject to the provisions of the trust agreement as hereinbefore stated, and that the said shares of stock be set aside in accordance with the said agreement and transferred to the trustees as designated in said agreement or to a proper trustee to be appointed by this court.

C. That this court may decree that Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Drexler Urban, and any issue hereafter to be borne to Helen L. Ketchum and/or Elizabeth Y. Urban and/or Robert B. Luchars have a vested interest in remainder in and to the trust fund so established in accordance with the provisions hereof.

THEO. MCC. MARSH,
Guardian *ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors, appearing *pro se.*

Replication of Defendant, First National Bank and Trust Company of Montclair, to Answer of Complainant to Its Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c.

The defendant, First National Bank and Trust Company of Montclair, joins issue on the answer of the complainant to its counterclaim.

RIKER & RIKER,
Solicitors for Defendant, First National Bank and Trust Company of Montclair.

Replication of Theodore McCurdy Marsh, as Guardian *Ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors, to Answer of Complainant to His Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c.

Theodore Mc Curdy Marsh, as Guardian *ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, minors, joins issue on the answer of the complainant to his counterclaim.

THEODORE MCCURDY MARSH,
Guardian *ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

Replication of Theodore McCurdy Marsh, as Guardian *Ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors, to the Answer of the Defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, to His Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant,
and
ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*,
Defendants.
} On Bill &c.

Theodore McCurdy Marsh, as Guardian *ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, minors, joins issue on the answer of the defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, to his counterclaim.

THEODORE MCCURDY MARSH,
Guardian *ad Litem* of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, Minors.

Replication of Defendant, First National Bank and Trust Company of Montclair, to Answer of Defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, to Its Counterclaim.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant,
and
ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*,
Defendants.
} On Bill &c.

The defendant, First National Bank and Trust Company of Montclair, joins issue on the answer of the defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, to its counterclaim.

RIKER & RIKER,
Solicitors for Defendant, First National Bank and Trust Company of Montclair.

Answer to Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill, etc.

In answer to the bill of complaint filed in the above entitled cause, the defendants, Robert B. Luchars, residing at No. 315 Upper Mountain Avenue, Upper Montclair, New Jersey, Elizabeth Y. Urban, residing at No. 99 School Street, Springfield, Massachusetts, and Helen L. Ketchum, residing at Atlantic Avenue, Cohasset, Massachusetts, respectfully say:

1. They admit the allegations of paragraph 1 of the complaint.

2. They admit the allegations of paragraph 2 of the complaint, except that they allege that the statement of the disposition of the trust fund on the death of the survivor of these answering defendants is not stated with entire accuracy, in that it alleges that in case only two of the three answering defendants should leave issue the fund should

be divided equally between the issue of such two, whereas the trust document provides that only that proportion of the corpus of the fund which would have gone to the issue of the answering defendants who left no issue should be divided among the other two. The answering defendants allege that this error is immaterial in the present matter, and admit that the copy of the trust document marked "Exhibit A" is a true copy.

3. The defendants admit the allegations of paragraph 3.

4. The defendants admit the allegations of paragraph 4, except that they allege that the number of additional shares purchased was 337, and that the number of shares afterwards assigned by these defendants to the trustee was 57, making a total number of shares in the trust 2753 instead of 2756.

5. The defendants admit the allegations of paragraph 5, but the answering defendants allege, each for themselves, that their several waivers of their right to receive the subject matter of the trust were induced and given in consideration of a representation by the said Alexander Luchars that he would set up forthwith a certain other trust fund for the benefit of the answering defendants. The defendants allege that the said Alexander Luchars, although they believe he intended to set up the said fund, died before accomplishing it.

6. The defendants admit the allegations of paragraph 6, and affirm that the recital in the document of revocation (known as "Exhibit C", attached to the bill) of May 10th, 1922 as the date of the trust

document was an error, and that the date intended to be inserted as the date of the trust document was July 1st, 1921, and that the document of revocation intended to refer, and did in fact refer to the trust document of July 1st, 1921, herein known as "Exhibit A", as amended by the document of May 9th, 1925, herein known as "Exhibit B".

7. The defendants admit the allegations of paragraph 7.

8. The defendants deny the allegations of paragraph 8 in so far as it is therein alleged that the advances made by Alexander Luchars were a loan. They deny that they were a loan, and allege that the said advances were a gift or contribution to the fund by the said Alexander Luchars.

9. The defendants admit the allegations of paragraph 9.

10. The defendants admit the allegations of paragraph 10, except that they deny that the distribution of 1908 shares of the capital stock of The Industrial Corporation of New Jersey to the holders of common stock of The Industrial Press was to be a dividend payable out of surplus, alleging that it was a division of the assets of The Industrial Press to its stockholders in pursuance of the plan of reorganization, and not a dividend.

11. The defendants admit the allegations of paragraph 11, except that they again deny that the 1908 shares of the capital stock of The Industrial Corporation of New Jersey, issued to the Executors of the Estate of Alexander Luchars, were a stock

dividend, alleging that the said stock was issued in pursuance of the said plan of reorganization.

12. The defendants admit the allegations of paragraph 12, alleging for themselves that, while they admit that the document of May 15th, 1930 terminated the said trust, they contend that their waiver of their right to receive the subject matter of the trust became wholly void by reason of the failure of the said Alexander Luchars to establish for the benefit of these defendants a new trust with the capital stock of The Industrial Corporation of New Jersey, according to their understanding with him at the time of their executing the waiver of their right to receive the proceeds of the trust fund created under the document dated July 1st, 1921, upon its revocation, as therein provided.

13. In answer to paragraph 13 of the complaint, the defendant Robert B. Luchars alleges that he has, and does hereby assert, claims adverse to those of the complainant, and the said defendants Elizabeth Y. Urban and Helen L. Ketchum allege that they have, and do hereby assert, claims adverse to those of the complainant.

14. The defendants admit the allegations of paragraph 14 of the complaint.

By way of counter claim against the complainant, the defendants Robert B. Luchars, individually, and Elizabeth Y. Urban and Helen L. Ketchum, say:

1. They are the children of the late Alexander Luchars, named in the several agreements of trust set forth in and attached to the bill of complaint,

and known as "Exhibit A" and "B", and that they are the parties who executed the consent or waiver attached to "Exhibit C".

2. Defendants allege that at the time of the establishment of the trust, the agreement concerning which is set forth and known as "Exhibit A", dated July 1st, 1921, they were the owners of 2359 shares of the common stock of The Industrial Press, which was the subject matter of the trust. The defendants allege that they, or some of them, were also the owners of 57 additional shares of the same stock which were later assigned to the said Alexander Luchars as trustee under the same agreement as set forth in paragraph 4 of the bill.

3. The said agreement provided, among other things, that if the said Alexander Luchars should see fit to terminate the trust he might do so, in writing, copies of which were to be delivered to these defendants, and that the subject matter of the trust, as it then stood, should belong to these defendants.

4. In the early part of the year 1930 the late Alexander Luchars stated to these defendants, separately and severally, that he intended to terminate the said trust, mentioning the fact that they would then each be entitled to their several proportions of the securities held in trust under the terms of the agreement of trust. He further explained to these defendants, separately and severally, that it was his wish that they would severally waive their right to receive the proceeds of the said trust and permit them to be transferred to the said Alexander Luchars.

He further explained that if this transfer was permitted, through a reorganization of The Industrial Press a large part of its surplus would be conveyed to a New Jersey corporation, which had even then been formed, or was in process of formation, and which was known as The Industrial Corporation of New Jersey, so that the capital stock of the New Jersey corporation would have a large value. The plan of reorganization discussed provided that the entire capital stock of the New Jersey corporation should be issued to The Industrial Press, the New York corporation, in exchange for a large amount in securities then belonging to and to be taken from the surplus of The Industrial Press, of New York. The stock of the New Jersey corporation, under the plan of reorganization, was to be given in exchange first to The Industrial Press, of New York, and by it distributed to its stockholders, so that the said Alexander Luchars, on receiving from these defendants a waiver of their right to receive the subject matter of the trust on its revocation, in his favor, and thereby becoming the owner of substantially the whole of the common stock of The Industrial Press, of New York, would, by operation of the plan of reorganization, become the owner of substantially the whole of the capital stock of The Industrial Corporation of New Jersey. The said Alexander Luchars said he would forthwith establish a new trust for the benefit of these answering defendants with the stock of the New Jersey corporation, along lines similar to, but different in detail, as the defendants understood, from the trust set forth in the bill of complaint and known as "Exhibit A", as amended, copies of which are attached to the bill of complaint in this matter.

5. Relying on the agreement and the promises of the said Alexander Luchars, the said defendants, on May 15th, 1930, executed the waiver attached to the document of revocation, a copy of which is attached to the bill of complaint and known as "Exhibit C".

6. After the revocation of the trust and the signing of the waiver hereinbefore referred to, the said Alexander Luchars caused the capital stock of The Industrial Press, the New York corporation, to be transferred to him, but before he carried out his plan and agreement, as above set forth, he died, being the owner of record of the said stock. These defendants have applied to the complainant, one of the Executors of the will of the said Alexander Luchars, to transfer the stock of the New York corporation, with the avails thereof, as of the date of May 15th, 1930, to them, alleging that the consideration for their waiver of their right to receive the said stock has failed.

7. The complainant has refused to make such transfer, being, as these defendants believe, uncertain of his rights in the matter, and has filed the bill of complaint in this cause.

These defendants therefore pray:

1. That the said complainant may answer this counterclaim and each statement therein made.

2. That the complainant, and the defendant Robert B. Luchars, as co-executor, with the complainant, of the will of Alexander Luchars, may be ordered by this Court, by its decree, to transfer the

capital stock of The Industrial Press, the New York corporation, and its avails since May 15th, 1930, less, however, any indebtedness which may have been due to the said Alexander Luchars at the time, to these defendants, or, in the alternative

3. That the said Executors of the will of Alexander Luchars be decreed to transfer the stock of the New Jersey corporation, The Industrial Corporation of New Jersey, which the Estate of Alexander Luchars has now received, in pursuance of their original plan, promised by the said Alexander Luchars, to a suitable trustee, to be appointed by the Court, or agreed on by the parties, under the terms of the trust, in accordance with the promise of the said Alexander Luchars.

PHILIP GOODELL,
Solicitor for Defendants
Robert B. Luchars, Elizabeth Y. Urban,
and Helen L. Ketchum.

Agreed Statement of Facts.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, deceased, ELIZABETH Y. URBAN, HELEN L. KETCHUM, ADELAIDE L. KETCHUM, ELIZABETH Y. KETCHUM, DAVID DOW KETCHUM, ROBERT L. URBAN, JOHN TREXLER URBAN, and THE FIRST NATIONAL BANK & TRUST COMPANY OF MONTCLAIR, NEW JERSEY, Defendants.	On Bill, Etc. 83/669

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled proceeding, that the following is an agreed statement of certain facts to be considered in the determination of the issues involved in said proceeding, to wit:

1. That the statement attached hereto, described as "The Industrial Press Balance Sheet April 30, 1930", is a correct and true balance sheet of said corporation on said date and may be considered by the court as a true statement of the condition of said corporation on said date for all purposes;

2. That the statement attached hereto, described as "The Industrial Press Balance Sheet May 31, 1930" is a correct and true balance sheet of said corporation on said date and may be considered by the court as a true statement of the condition of said corporation on said date for all purposes; and

3. That on May 15, 1930, the outstanding capital stock of The Industrial Press consisted of the following: 2460 shares of the preferred stock and 2767 shares of the common stock.

WALTER E. COOPER,
Solicitor of Complainant C. Alexander Capron, etc.

PHILIP GOODELL,
Solicitor of Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

RIKER & RIKER,
Solicitors of First National Bank & Trust Company of Montclair, New Jersey.

THEO. McC. MARSH,
Guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert L. Urban and John Trexler Urban, *pro se.*

Agreed Statement of Facts.

THE INDUSTRIAL PRESS

Balance Sheet—April 30, 1930

Assets

Cash		$ 37,898.79
Post Office Deposit & Stamps		2,080.48
Securities		883,259.00
Investments for Insurance Fund		4,806.25
Investments in other companies		46,905.71
Printing Plant—less Reserve		39,469.71
Accounts Receivable—less Reserve		157,606.33
Bills Receivable		2,078.29
Inventory Paper Stock & Books		23,306.27
Office Furniture & Fixtures—less Reserve		1,257.99
Book Plates—less Reserve		24,385.81
Good Will		300,000.00
Prepaid Expenses		7,068.27
		$1,530,122.90

Liabilities

Accounts Payable		$ 10,793.25
Bills Payable		.....
Insurance Reserve		4,520.03
Accrued expenses		4,116.80
Surplus		969,892.82
Capital Stock		
Authorized	1,000,000.00	
Less unused and in Treasury	459,200.00	
		540,800.00
		$1,530,122.90

EAB:LH
10-27-31

Agreed Statement of Facts.

THE INDUSTRIAL PRESS

Balance Sheet—May 31, 1930

Assets

	Cash		$ 32,891.00
	Post Office Deposit & Stamps		2,069.60
	Securities		893,229.00
10	Investments for Insurance Fund		4,806.25
	Investments in other Companies		46,755.71
	Printing Plant—less Reserve		38,967.29
	Accounts Receivable—less Reserve		156,412.90
	Bills Receivable		2,029.14
	Inventory Paper Stock & Books		27,725.23
	Office Furniture & Fixtures—less Reserve		1,257.99
	Book Plates—less Reserve		24,962.83
20	Good Will		300,000.00
	Prepaid Expenses		4,478.00
			$1,535,584.94

Liabilities

	Accounts Payable		$ 17,156.92
	Bills Payable		20,000.00
	Insurance Reserve		4,520.03
	Accrued Expenses		2,661.13
30	Surplus		968,546.86
	Capital Stock		
	Authorized	1,000,000.00	
	Less unused and in Treasury	477,300.00	
			522,700.00
			$1,535,584.94

40 EAB:LH
10-27-31

Stipulation as to Certain Evidence.

IN CHANCERY OF NEW JERSEY.

C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c.

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled proceeding, that the following is an agreed statement of certain facts to be considered in the determination of the issues involved in the said proceeding, to wit:

1. That if Amos L. Taylor were available as a witness in said proceeding, he would testify as follows:

(a) That he is an attorney at law admitted to practice in the State of Massachusetts, with offices in the City of Boston, State of Massachusetts, and is a resident of said State;

Stipulation as to Certain Evidence.

(b) That he received in the mails the attached letter dated April 23, 1930, signed by Alexander Luchars and addressed to the said Amos L. Taylor.

WALTER E. COOPER,
Solicitor of Complainant.

PHILIP GOODELL,
Solicitor of Defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

RIKER & RIKER,
Solicitors of First National Bank and Trust Company of Montclair.

THEO. McC. MARSH,
Guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, minors *pro se*.

Stipulation as to Certain Evidence.

April 23, 1930.

Dear Mr. Taylor:

On account of my absence in Bermuda during most of the winter and an attack of grippe which followed after my return, the work on our reorganization has been somewhat delayed; but we now have it all laid out and hope to push it to a conclusion without further delay.

We should like to have your opinion on the legality of the action represented by the enclosed memorandum—that is, whether or not we can make the transfer in accordance with the Revenue Act of 1928, without tax liability, which we are advised by our attorneys here we can do.

My intention, with the consent of the beneficiaries, is to terminate the original Trust Assignment If you have no copy convenient, I can send you one. This was executed on July 1, 1921.

There will be some other points that I should like your advice on, which I will send along within a few days.

Very truly yours,

ALEXANDER LUCHARS.

Amos L. Taylor, Esq.,
Messrs. Adams & Blinn,
40 Court St.,
Boston, Mass.

L:H

Stipulation as to Certain Evidence.

Amos L. Taylor, Esq.—2 April 23, 1930.

1. The facts in connection with the taxable status of our reorganization plan are as follows:

At the present time The Industrial Press has among its assets a very substantial amount of marketable securities accumulated by invested earnings. These securities and their income are not needed in the operation of the business, so we have created a New Jersey corporation to which we propose to turn over the greater part of the securities referred to above, in exchange for the stock of that corporation.

We then propose to have The Industrial Press issue to its common stockholders a special dividend, payable in stock of the New Jersey corporation. The surplus of The Industrial Press is sufficient to take care of such dividend distribution.

According to our understanding there will be no tax assessed until the stock of the New Jersey corporation is converted into cash. The Revenue Act of 1928, Sections 112B-G-11 and 12, a copy of which we enclose for your convenience, we believe fully covers the situation and permits us to make the transfer as suggested.

2. The purpose of the reorganization is to have the securities held by a corporation separate and distinct from The Industrial Press, so that if the business of the latter should eventually turn out unsuccessfully, the beneficiaries of the new Trust, which is to be created, will not be affected.

The Trust now in existence, with the full consent of all beneficiaries, will be dissolved and its

holdings distributed to the beneficiaries, who will turn over to me their holdings without any consideration. When The Industrial Press dividend above mentioned is declared and paid to me, I shall then create a new Trust for my children with the shares of the New Jersey corporation.

The situation then will be:

1. The new Trust, instead of holding the common stock of The Industrial Press as the old Trust did, will hold the stock of the New Jersey corporation, whose entire net worth consists of marketable securities.

2. I will own the common stock of The Industrial Press formerly held by the Trust.

Case.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of Alexander Luchars, deceased,
Complainant,

and

ROBERT B. LUCHARS, individually and as Executor of the Last Will and Testament of Alexander Luchars, deceased, *et al.*,
Defendants.

Transcript of stenographer's notes of proceedings in the above entitled cause before the Honorable Maja Leon Berry, Vice Chancellor, at the Chancery Chambers, Industrial Office Building, Newark, New Jersey, on Monday, the 19th day of October, 1931, at 10 A. M.

APPEARANCES:

WALTER E. COOPER, Esq., Solicitor of Complainant (also Mr. C. Alexander Capron of the New York Bar with him).

MESSRS. RIKER & RIKER, (Mr. Marsh, present), Solicitors of Defendant First National Bank and Trust Company of Montclair.

PHILIP GOODELL, Esq., Solicitor of Defendants Robert B. Luchars, and others.

THEODORE MCCURDY MARSH, Esq., Guardian ad litem of five infant defendants.

Mr. Cooper: I should like to offer in evidence at this time a certified copy of the will of Mr. Alexander Luchars to which is attached statement as to the appointment of the executors.

(Marked Exhibit C-1.)

I should also like to offer in evidence the original trust agreement dated July 1st, 1921, executed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketcham, to which is attached the consent of Alexander Luchars to act as Trustee, and the consent of the First National Bank of Montclair to act contingently as trustee.

Mr. Marsh: The agreement of July 1st, 1921?

Mr. Cooper: Yes, sir.

(Marked Exhibit C-2.)

I also offer in evidence the amendment of the July 1st, 1921 trust agreement, the amendment being dated May 9th, 1925, and executed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketcham.

(Marked Exhibit C-3.)

I also offer in evidence the instrument dated May 15, 1930, executed by Alexander Luchars, addressed to Robert B. Luchars. Elizabeth Y. Urban and Helen L. Ketcham which purports to revoke the trust agreement dated May 10, 1922, and to which is attached a waiver and assignment executed by Robert B. Luchars, Helen L. Ketcham and Elizabeth Y. Urban.

(Marked Exhibit C-4.)

If the Court please, I should like at this time to make a motion for the admission of Mr. C. Alexander Capron, the complainant in this cause, who is a member of the New York Bar, in order that he may participate in the trial of this matter.

The Court: You may have that privilege.

Mr. Cooper: Thank you.

E. A. Becker. Called by Complainant. Direct.

EDGAR A. BECKER, called as a witness in behalf of the complainant, being first duly sworn, according to law on his oath says:

DIRECT EXAMINATION BY MR. CAPRON:

Q. Were you associated with Mr. Alexander Luchars and the Industrial Press in any manner? A. Yes, sir.

Q. Will you please state in what manner you were associated with them? A. In the capacity of Treasurer of the company.

Q. Was Mr. Luchars an officer of that company? A. Yes, sir, President of it.

Q. Can you state whether Mr. Luchars had organized this company and had developed it into the condition in which it was at the time of his death? A. So far as I know I think he had, it dates back quite a few years.

Q. Mr. Luchars had his offices there in the same building? A. In the same building, 148 Lafayette Street, New York City.

Q. Did you act in any way as confidential adviser—financial adviser for Mr. Luchars? A. I presume you might call it that, for quite a few years, yes, sir.

Q. You discussed the various business matters he had under consideration from time to time involving the Industrial Press, and also from time to time his personal matters? A. Yes, sir.

Q. You were familiar with the trust, were you not, which had been established by Mr. Luchars, bearing dated July 1st, 1921, and which is Exhibit C-2 in this cause? A. Yes, sir.

Q. Did you keep any books of account relating to the trust for Mr. Luchars? A. I have a book of ac-

count of the income and expenses, the receipts and disbursements.

Q. It is my understanding that Exhibit C-2 refers to the assignment by the children to Mr. Luchars of 2359 shares of stock, and on May 9, 1925 there was an additional 57 or 59 shares transferred to Mr. Luchars by his children, also to be held upon the same trust? A. Yes, to go into trust number 1 as it was termed at that time.

Q. Can you state how many shares of stock, common stock, of the Industrial Press were held by Mr. Luchars as Trustee of this trust on May 15, 1930? A. 2756 I think was the amount—I can check that.

Q. If you will just verify that, I think there is some dispute in that concerning the exact number of shares? A. 2753 shares.

Q. Can you state how Mr. Luchars had acquired the additional shares of stock other than those which were assigned to him by these two instruments I have just referred to? A. He bought them from Mr. M. J. O'Neil, formerly General Manager of the Company, from time to time, five shares at once.

Q. Where did he get the proceeds, or the moneys, necessary to acquire that stock, that additional stock? A. Whenever there was not sufficient cash in the trust account, why he advanced the money himself, and that is where the loan here to him at times was created.

The Court: You mean he advanced it as a loan to the fund?

Witness: As a loan to the fund.

E. A. Becker. Called by Complainant. Direct.

Q. You referred to the acquisition of this additional stock from Mr. O'Neil, did you not, by Mr. Luchars as Trustee? A. Yes, sir.

Q. Did he or did he not buy any of that stock from Mr. O'Neil individually, in his own right? A. I don't think he bought any of it individually, I think he bought it all for the sake of the trust.

Q. Now you said that if there was not cash that he held as Trustee sufficient to pay for this stock from time to time he loaned to the trust, passed certain sums to the trust? A. Correct.

Q. Where did he get this cash? A. Out of his own funds.

Q. I mean where did he get the cash in the trust estate, did that represent income or principal? A. That represented income, a dividend on the stock held.

Q. In other words, that represented accumulation of income in the trust estate? A. Yes.

Q. Did he keep records in his books of account of sums he had advanced from time to time? A. Yes, a record was kept, I kept the record.

Q. Pursuant to his instructions? A. Correct.

Q. Were any payments made to him from time to time? A. Yes, at various times as the fund justified.

Q. That is, when I say any payments made to him, I mean, did he pay from the trust estate to himself individually any of the sums advanced? A. Part of them back from time to time.

Q. And where did he get the cash to repay himself? A. That was income just the same as before.

Q. Can you state how much had been advanced by Mr. Luchars to this trust and which, according to the records he kept as Trustee, was due and ow-

ing to him from the trust as of May 15, 1930? A. $20,883.72 I think is the exact amount.

Q. Have you the books of account there so that you can verify that? A. Yes (does so). $20,883.72.

Q. Mr. Becker, what was the proportion of the stock, the common stock of Industrial Press which was owned by Mr. Luchars as Trustee of this trust estate on May 15, 1930, you don't need to give the per cent, but I mean, was that practically all of the stock? A. Practically all of it.

Q. There were a few shares outstanding in other people's names? A. There were fourteen shares, I think, just a few shares.

Q. Did Mr. Luchars discuss with you the termination of this trust of July 1st, 1921? A. Yes.

Q. Did he at any time tell you that it was his intention to terminate the trust? A. Yes.

Q. Are you familiar with that instrument of termination, Exhibit C-4? A. Yes, sir.

Q. Is that Mr. Luchars' signature, Mr. Alexander Luchars' signature that is appended to it? A. Yes, sir.

Q. You had often seen Mr. Luchars write, had you not? A. Many a time.

Q. Can you explain the reference in that instrument to the trust of May, 1922, May 10th, 1922? A. Well, of course, there was no trust of May 10th, 1922, the only trust in existence at that time was the one of July 1st, 1921.

Q. Had there been in existence at some former time a trust relative to certain shares that had been purchased by Mr. Luchars on May 10th, 1922? A. I don't know the exact date, but there was what we called the number 2 trust, one that was in reference to the 57 shares which were subsequently

turned into trust number 1. Just the exact date of that I don't remember at the moment.

Q. At the time that you discussed the termination of this trust of July 1st, 1921 with Mr. Luchars, did you send to Mr. Luchars' attorney the trust agreement of July 1st, 1921 or did you send him another instrument? A. Yes, sir, apparently he got the smaller trust, but that was by accident because he was supposed to get trust number 1, in other words, the one dated July 1, 1921. I think we subsequently wrote him telling him that the wrong one had been sent to him, if I remember correctly.

Q. Did Mr. Luchars in any of your discussions with him relating to the termination of the trust, have reference to any trust other than this trust of July 1st, 1921? A. No.

Q. Now what happened to the stock of the Industrial Press standing in the name of Mr. Luchars as Trustee on May 15, 1930? A. Transferred to him individually.

Q. All of the shares? A. All of the shares in the trust.

Q. I understand, Mr. Becker, that there was a plan of reorganization at or about that time that was entered into between the Industrial Press and a corporation which had been organized in New Jersey known as the Industrial Corporation, are you familiar with that plan of reorganization and agreement? A. Yes, sir.

Q. Can you produce that for us? A. I have it in here (indicating), yes, sir.

Q. Can you give it to me? A. It is in those papers over there (indicating pile of papers on table).

E. A. Becker. Called by Complainant. Direct.

Q. Will you produce the plan of reorganization, Mr. Becker? A. (Does so.)

Q. Are you familiar with the signatures of Mr. Robert B. Luchars and Mr. Capron? A. I am.

Q. You have seen them both write? A. I have.

Q. Can you identify the signatures as being those of Mr. Luchars and Mr. Capron? A. I can.

Mr. Capron: I offer that in evidence.

(Marked Exhibit C-5.)

Mr. Marsh: The date?

Mr. Capron: It is dated the 25th day of March, 1931, being the plan of reorganization of the Industrial Press of New York, and the agreement between the Industrial Press and the Industrial Corporation of New Jersey.

Q. After these shares which you testified were held by Mr. Luchars in his name as trustee on May 15, 1930, were transferred to him, did they continue registered in his individual name until the time of his death? A. Yes.

Q. And what disposition has been made of them, if you know, after Mr. Luchars' death? A. They were transferred to the executors.

Q. And they now stand in the name of the executors of Mr. Luchars' will? A. Correct.

Q. Are you an officer of the Industrial Corporation of New Jersey? A. I am.

Q. What office do you occupy, Mr. Becker? A. Secretary and Treasurer.

Q. Can you state whether, pursuant to this plan of reorganization, any shares of stock of the Industrial Corporation were issued? A. Any shares were issued?

Q. Were any shares of the capital stock of the Industrial Corporation of New Jersey issued pur-

suant to this plan and agreement of reorganization? A. 1911 shares, if I remember correctly.

Q. To whom were those shares issued? A. To the executors of Mr. Luchars' estate.

Q. That was pursuant to this plan and agreement? A. Plan and agreeemnt.

Q. That plan and agreement then has been consummated? A. Yes, sir.

Mr. Marsh: Did you prove the date of the death?

Mr. Capron: No, we have not.

Q. Can you state the date of the death of Mr. Luchars, Mr. Becker, can you state whether he passed away on February 19th, 1931? A. February 19th, 1931.

Cross Examination by Mr. Marsh:

Q. Mr. Becker, prior to May 15, 1930, did you discuss with Mr. Alexander Luchars the termination of this trust? A. Yes, sir.

Q. And when did you discuss that, during what period of time? A. Well, I should say it was in 1930—probably 1929, I don't know, it was considerable back for one period.

Q. Can you tell us what he said to you and you said to him in reference thereto, did he explain his plans and purposes, in other words? A. Well, his plan was this, as I understood it. Of course, trust number 1 was originally created with the common stock of the Industrial Press, all of which he held as trustee. After that stock increased in value to such an extent he thought it would be better for the protection of the trust to divorce it from the

ownership of the trustees that might come into effect later on, thinking it rather inadvisable for them to come into the control of the business in any way, and as he had ample assets and ample reserve, then, you might say, to create a very substantial trust, he thought it would be better to have them in marketable securities rather than invested in the stock of the Industrial Press, subject to depreciation over a period of years, or fluctuations of one kind or another.

Q. And do you recall a conversation with Mr. Luchars around December 11th, 1929? A. Well, we had quite a few conversations, just the particular date it is hard to say.

Q. Well, do you recollect making any memorandum of that? A. I made many a memorandum.

Q. I show you a document dated December 11, 1929, and is that such a memorandum as you made? A. I made that memorandum.

Q. And referring to that memorandum, can you tell us what the discussion and plan as developed at that time were? A. In connection with this memorandum the plan was how to take the securities out and how to create a second—to create a new trust, really was the essence of the whole thing. This was the plan and procedure that had to be gone through preliminary to the transfer of these securities.

Q. Now can you just describe that, using this memorandum as the steps of it? A. Well, number 1 was to incorporate a New Jersey corporation and transfer to that corporation all the foreign securities now owned by the Industrial Press, accept stock of that corporation in exchange; number 2 was to buy Mr. O'Neil's shares; number 3 was to dissolve the existing trust, being careful to have

full releases signed by all the beneficiaries; number 4 was to have the children transfer to him all stock in the Industrial Press; number 5, have the Industrial Press declare a distribution payable in stock of the New Jersey corporation; number 6, when you have the stock of the New Jersey corporation in your name, make another gift of stock to the children with the understanding that they immediately create a trust along the lines of the one now existing.

Q. At the time of December 11th, 1929, you referred to the transfer of a number of securities, what proportion of the business was represented at that time by the securities? A. You mean the assets?

Q. I mean, if you took the net assets of the business, how much was securities and how much was in the business divorced from these securities, only approximately? A. I should say the securities were probably, according to the book value, which, of course, has to be considered at that time, they were in the neighborhood of 60% of the value of the securities at that time, but of course, that is not saying the assets of the company were fully valued on the books of the company, there are many ways that things could be interpreted.

Q. Yes, and after the securities should be divorced from the Industrial Press in accordance with this plan, there would be the business left, is that correct? A. Absolutely, the divorce of the securities would not in any way affect the operation or income of the business in any way at all.

Q. Therefore as a result of this plan did Mr. Luchars say to you anything as to what he planned about the ownership of that residue? A. Except that he would be able to get it back into his own hands, if that is what you mean.

E. A. Becker. Called by Complainant. Cross.

Q. He would get it back in his own hands and he would retain it in his own hands? A. Would retain it in his own hands, taking it out of the trust.

Q. Was the value of that which he was going to retain substantial in size? A. Very substantial.

Q. Did you have a further conference with Mr. Luchars on or about January 8th, 1930, I show you a document dated January 8th, 1930, and ask you if that is your memorandum with reference thereto? A. Yes, that is my memorandum.

Q. And will you tell us then, using that as a basis for your recollection, what the conference was? A. Well, it practically was the same as before, because this memorandum really in a sense more or less is a duplicate of the other memorandum. There was nothing but the one thing in mind in the whole transaction, that is, it was the same procedure all the time. We discussed this thing from time to time you might say, over a period of years, dating back, I should say, to probably 1928.

Mr. Marsh: May I offer this memorandum in evidence, I think perhaps that will cover it.

Mr. Capron: Do you want both of these?

Mr. Marsh: I will offer both, the memorandum of December 11th, 1929, and the memorandum of January 8th, 1930.

(Memorandum of December 11th, marked Exhibit D-1).

(Memorandum of January 8th marked Exhibit D-2).

Q. What were those memorandums, where did you get them from? A. Out of my files.

Q. Are those part of the office records? A. Yes, sir.

Q. And did Mr. Alexander Luchars see these memoranda himself? A. Yes, sir.

Q. And was familiar with the statements contained in them? A. Yes, sir.

Q. Was this plan in Exhibit D-2 accomplished in any way, Mr. Becker? A. Yes.

Q. What was that accomplishment and when? A. The transfer was effected, the transfer to him, the New Jersey company was incorporated and certain securities were transferred to him. So far as the creation of the new trust went, why, of course—

Q. Do you know whether or not Exhibits C-3 and C-4 had any relationship to the plans which were indicated on Exhibits D-1 and D-2, which are your memorandums? A. I don't know what that waiver refers to, that you speak of.

Q. The documents which are dated May 15th, 1930, which is the revocation—A. Yes, I would say they are related to that memorandum of mine, that is following out the plan in mind.

Q. So that Exhibit C-3, which is the revocation, was in pursuance of the plan which you have outlined? A. Correct.

Q. In this memorandum you refer to the creation of a new trust, did Mr. Luchars discuss that with you, the new trust which he was to create? A. He only discussed it with me in this way, he said he was going to create a new trust.

Q. Did he tell you what that trust was to be? A. He said it would be along the lines of the previous trust, of the one existing at that time, "on the same lines" I think, was the wording he used.

Q. And did he tell you who were to be the beneficiaries of the trust, and of the interests of the beneficiaries therein? A. No, because I figured when he said along the same lines it referred to ex-

actly the same beneficiaries as the other trust, so far as I knew, he made no mention of it himself.

Q. What was to be the subject matter of the trust? A. It would be the stock of the Industrial Corporation of New Jersey.

Q. Was there any discussion as to the trustee of that new trust? A. No.

Q. During Mr. Luchars' lifetime was an agreement and plan of reorganization prepared for the Industrial Press and the Industrial Corporation of New Jersey? A. Put that question again, will you please.

Q. During Mr. Luchars' lifetime was there an agreement and plan for the reorganization of the Industrial Press of New York and the Industrial Corporation of New Jersey completed? A. No.

Q. Will you look this document over and let me ask you whether that was prepared and signed? A. Yes, this was prepared during his lifetime.

Q. Do you know whether it was executed during his lifetime? A. I think it was, it is the New Jersey corporation, that is what it refers to. Probably that was incorporated before his death.

Q. And he was familiar then with the contents of that agreement? A. Yes, sir.

Mr. Marsh: Are you satisfied to have this marked?

Mr. Capron: I know the fact to be that it was actually executed, your Honor, and delivered to Mr. Luchars, we concede that was executed.

Mr. Goodell: That is an incomplete copy, we reserve the right to substitute the original showing the signatures.

Mr. Capron: If I may be permitted to slightly modify my concession I would like to do it. My recollection is that I have seen an instrument bearing Mr. Luchars' signature, and subject to verification—

Mr. Marsh: That is all right.

(Document marked Exhibit D-3).

Q. What steps were actually taken during Mr. Luchars' lifetime in accordance with this plan and agreement? A. Why, trust number 1 was dissolved and the New Jersey corporation was created.

Q. Was anything transferred from the Industrial Press to the Industrial Corporation of New Jersey during Mr. Luchars' lifetime? A. No, sir.

Q. Now what was the reason for that, if you know? A. Well, I don't know, of course. The only thing I can say in that connection was he wanted to be very careful before he actually carried out this transaction to make sure what he had in mind. I don't know of any particular reason for the delay.

Q. Was there any change of plan or purpose, so far as you know? A. No, the object was entirely the same.

Q. Following the death of Mr. Luchars, and in accordance with this plan, were securities actually transferred from the Industrial Press to the Industrial Corporation of New Jersey? A. They were.

Q. And were the securities that were transferred those that had been in contemplation by Mr. Luchars during his lifetime? A. Practically the same.

Q. What is the actual structure of the Indusrial Corporation of New Jersey with reference to the

amount which the estate now holds of the capital stock? A. They practically own all of it, practically, outside of a few qualifying shares.

FURTHER CROSS EXAMINATION BY MR. GOODELL:

Q. Mr. Becker you prepared this memorandum, which speaks of Mr. Luchars' desire to put his children in a position to institute a new trust with the New Jersey stock as the subject, I believe, was that his idea or yours? A. It was his idea, suggested by me, you might say originally. In other words, he said, see if we can do it, and I tried to work out some plan if he wanted to do it that way.

Q. Did you gather it was his idea to terminate the trust for his children? A. No, it was his idea to terminate the existing trust, though.

Q. With the object of forming a new one? A. Correct.

Q. That was his idea? A. Absolutely.

Q. And the new one, after discussing it with him and others took the form of the trust, the subject matter of which would be the New Jersey stock? A. Correct.

Q. And the New Jersey Company held the securities which had formerly been part of the surplus of the Industrial Press of New York? A. Correct.

The Court: In effect it was the same property except in another form?

Mr. Goodell: It was the same property except in another form. The Industrial Press of New York had two departments, you might say, the security department and the business department. By his plan of reorganization he

put the assets of the security department in the New Jersey corporation and then terminated the trust, the subject matter of which was the New York stock, and promised his children to set up a new trust with the New Jersey stock.

The Court: Yes, but I understood from your questions of this witness and his answers that the stock of the old corporation went to the new.

Mr. Goodell: No, the securities.

The Court: Oh, it was the securities.

Mr. Goodell: The surplus invested in securities, the business was left in the old.

The Court: I see, all right.

Mr. Goodell: Not all of the assets, at least it did not strip them, he reserved a fraction.

The Court: Of course, you must remember that I have not lived with this case as you have. I am trying to get the facts clearly in mind.

Mr. Goodell: Now, it was about, it was substantially $750,000 of securities owned by the Industrial Press and a part of the assets represented by their stock, Mr. Luchars wanted to put over in this new corporation and have the business itself operated free and clear of the trustees. That was the program, but he stopped in the middle of it.

The Court: All right.

Mr. Goodell: I offer in evidence the stipulation which has been signed by counsel.

(Marked Exhibit D-4).

E. A. Becker. Called by Complainant. Cross.

FURTHER CROSS EXAMINATION BY MR. MARSH:

Q. Mr. Becker, can you tell me what the book value of the stock of the Industrial Press was as of May 15th, 1930, the date of cancellation? A. Referring now to the common stock?

Q. The common stock of the Industrial Press, that is the stock that was part of this trust agreement, was the original trust agreement? A. I think it was approximately $440, that was after allowing $120 a share for the preferred stock (after consulting his records) $412, approximately.

Q. $412 a share? A. Yes.

Q. And can you tell me what part of that is represented by the securities which would be transferred under this plan to the Industrial Corporation of New Jersey? A. Why, I would say approximately not over half of it, anyway.

Q. And the balance then would have been retained by the Industrial Press and by Mr. Luchars through his ownership of the stock? A. Correct.

The Court: I have it now.

Mr. Marsh: About half and half.

FURTHER CROSS EXAMINATION BY MR. GOODELL:

Q. Mr. Becker, Mr. Luchars did not set up a second trust, did he, for his children? A. No, sir, not that I know of.

Q. Do you know whether he abandoned that idea permanently and definitely? A. I don't think he did, no.

Q. What did he tell you about it? A. He told me he fully intended to set up another trust. I don't think he ever gave up the idea. In fact, I am quite satisfied that he did not.

Q. But he died before he accomplished it? A. Correct.

REDIRECT EXAMINATION BY MR. CAPRON:

Q. Didn't Mr. Luchars after the termination of this, deal with this stock of the Industrial Press as if it was his own? A. I should say yes. In what way do you mean, did he deal with it?

Q. He did not carry out his plan to create a new trust? A. No, he received the dividends on it. So far as the company went, it was just the same as if it belonged to him personally.

Q. Didn't he discuss with you the advisability of setting up this new trust at that time? A. He never had any other thought in mind except the setting up of this new trust.

Q. Did he discuss with you the effect that the setting up or transfer of these securities to the Industrial Corporation would have upon the credit of the Industrial Press? A. He spoke about that, yes. He was a little bit, I might say, touchy on that point, he took a great deal of pride in the commercial rating we had gradually accumulated, and it was due to that fact, probably, to a certain extent that he did not want to make this transfer, looking forward to existing conditions as they were at that time, and seemed to be getting worse, and that probably was a deterring effect in his not wanting to carry out this other arrangement.

Q. In other words, you were in a financial—the world was in a financial crisis at the time? A. Yes.

Q. And he discussed this financial distress with you in connection with the question as to whether he should or should not, at least for the time being,

carry out this plan that he had? A. Yes, he had a hesitancy to do that because he did not see how it could be accomplished without reducing our commercial rating, of which he was, I might say, very jealous, he had taken a great deal of pride in it, he had built it up very high.

Q. Did he discuss with you the affairs of other publications, other publishing companies and the difficulties they were having at the time? A. Yes, he referred to one.

Q. Isn't it a fact that he was doubtful whether it was desirable to transfer as much of the surplus assets of the Industrial Press to another corporation or individual at that time? A. Well, that question was practically answered before when I said he was hesitant to make this transfer because naturally the minute it was transferred, and that asset in turn was taken out of the balance sheet, your commercial rating was going to be affected. Of course, that could very readily be done and the stock of the other company carried on the balance sheet, but it would have made no difference.

Q. The result was he did not do it because he felt more comfortable in his publishing company if he had those liquid assets during this period of distress? A. It made him feel a whole lot safer.

R. B. Luchars. Called by Complainant. Direct.

ROBERT BARRY LUCHARS, called as a witness in behalf of the complainant, being first duly sworn according to law on his oath says:

DIRECT EXAMINATION BY MR. COOPER:

Q. You are the donor of this trust created July 1st, 1921, represented by Exhibit C-2, you are one of the donors? A. Yes.

Q. That is your signature at the end? A. Yes.

Q. And you also signed this release appended to Exhibit C-4? A. Yes.

Q. This is your signature? A. That is mine, yes.

Q. Are you familiar with your father's signature? A. Yes, very.

Q. Seen him write it many times? A. Yes.

Q. Is this his signature? A. Yes.

Q. Appended to the end of the first part of this exhibit? A. Yes.

Q. Did you ever discuss with your father the question of the termination of this July 1st, 1921, agreement? A. Frequently.

Q. And what did he say about it? A. Do you mean what he had in mind in doing it?

Q. What did he tell you about his intentions? A. He had two purposes in mind, in the first place, my father wanted for a long time to set up a fund for his children which would absolutely insure them against any possible want in the future. This trust fund of 1921 having been set up, he became uneasy in his mind in 1929 when the stock market crash occurred because he saw not only the common stock of big industrials go down rapidly, but also he instanced that the stock of some of the large publishing corporations, especially those publish-

ing papers similar to ours in the engineering field, had gone down possibly more rapidly, the McGraw-Hill Company stock, the United Publishers Company stock, and the National Trade Journals Incorporated stock—

The Court: Mr. Luchars, I think you are going beyond the question. The question was, what did your father tell you, not what your idea is as to his idea.

Witness: I am telling you, your Honor, what he said to me.

The Court: All right, just so you confine your statement to what he told you.

Witness: I think you will find this relevant because it is the background of his purpose—

The Court: I am merely telling you to confine your answer to the question.

Witness: This bears directly upon it because it explains, your Honor—

The Court: I am not interested in that, what it bears on or what it does not. Just so long as you confine your answer to a recital of what your father told you it is all right.

Witness: Yes, sir, he mentioned all of those, not only once but several times.

The Court: You may proceed.

A. (Continuing) Having seen those stocks depreciate rapidly in value it made him feel uneasy because the entire corpus of the trust fund was composed of common stock of the Industrial Press, and therefore he had in mind changing this trust so that it would be composed of securities of diversified character that would not be in any way dependent on the welfare of the Industrial Press.

That was one purpose, and the major purpose, in revoking this trust and in undertaking to set up a new one. The secondary purpose was to divorce the Industrial Press from any possible control of hostile interests or of inexpert operators who might come in from banks or other interests. He had seen a great many businesses which had passed into such hands and been successful under the old management go rapidly down hill under those cases, and he spoke to me several times about the desirability of having the trust fund divorced from the Industrial Press, so that the Industrial Press would never get into the hands of anyone who was not experienced and capable That was the secondary purpose in his mind.

Q. Did he tell you he intended to revoke the trust of July 1st, 1921? A. Yes.

Q. Now when you first saw this instrument dated May 15, 1930, executed by your father, what was your understanding as to what he had accomplished by it? A. Let me see the instrument (after examining it). My understanding was that he had revoked the July 1st, 1921 trust as the first step in his plan to create a new one.

Q. Did he tell you that he had thereby revoked the trust of July 1st, 1921? A. Yes.

Q. Now when you signed this instrument, or this paragraph appended to that instrument, what did you thereby intend to do? A. Give him the complete ownership and control of the stock that was formerly in the trust.

Q. And when you say in the trust, you mean the July 1st, 1921, trust? A. July 1st, 1921.

Q. When you make mention here of the trust hereinbefore referred to, you were referring to the

trust of what date? A. The trust of July 1st, 1921.

Q. When you gave authority to the Industrial Press to transfer the principal and accumulated income of the trust estate you were referring to the July 1st 1921 trust? A. Yes, that was my understanding.

Q. And you intended to release your father as to all his acts and transactions in regard to the July 1st, 1921 trust? A. I did.

CROSS EXAMINATION BY MR. MARSH:

Q. Mr. Luchars, you said that your father gave to you certain objectives which he wished to accomplish, what was the method by which he was to accomplish those points? A. You don't want me to go through all the details of the New Jersey corporation in that, do you? A. Well, just outline what he told you he was going to do to get these securities out of the Industrial Press and to divorce the Industrial Press from all possible control of outside interests? A. The first step was the revocation of the trust, the second step was to waive our rights in the ownership of the common stock of the Industrial Press, which would place it in his hands. The surplus of the Industrial Press would then be distributed to the common stock owners. The portion of that surplus which he deemed proper would then be set aside as a corpus for the new trust, and that was roughly the process. There was an intervening step, the creation of the New Jersey corporation, which was a detail of the organization.

Q. And all this was part of one plan or scheme of your father, Mr. Luchars? A. Definitely so.

Q. What was to happen to the stock of the Industrial Press itself after this was accomplished? A. The common stock of the Industrial Press?

Q. Yes, where was its ownership to reside? A. It was my understanding that my father would continue to own the common stock of the Industrial Press.

Q. Free from any trust? A. Free from any restriction of any kind.

Q. Your signing of this notice waiving your right, was that in any way conditional or was that based upon any part of this plan? A. When that waiver was signed it was my understanding that at some future date a new trust was to be formed.

Q. Would you have signed this waiver if such an agreement had not been made by your father? A. Yes.

Q. You would have signed it. Did you in fact, however, sign this in reliance upon his agreement to create such trust for you and the other members of your family? A. That was definitely understood.

Q. And upon that understanding you signed this instrument? A. I did.

Q. What part of the original trust estate was represented by the securities which were to go into this second trust? A. I could not say exactly what part.

Q. Well, what I want to bring out— A. You mean whether it was a substantial part or whether there was a balance—

Q. Well, the securities were to go into the trust? A. Yes.

Q. And the stock ownership was to go to Mr. Alexander Luchars, that is, of the Industrial Press

itself, now what did these two elements represent in reference to the value of the corporate stock? A. The securities—there was an exact list of the securities made out, and a memorandum which Mr. Becker drew up which, on the values of 1929, amounted to about $750,000. Those securities I should say represented, well, only a fraction of the value of the actual assets value of the Industrial Press. Whether it was half of it or what, I don't know exactly.

Q. Can you give it to me approximately? A. I should say that the Industrial Press would have been at least worth twice that.

Q. Now when your father discussed with you the creation of a new trust after this plan was put into effect, what was the trust, what was the outline of the trust, the beneficiaries, the corpus of the trust and the trustee himself, was that discussed? A. Yes.

Q. What was it? A. The new trust was to be essentially the same as the trust of July 1st, 1921.

Q. In what particulars, if any, did it differ, or was it to differ? A. The only particular it was to differ in was that the corpus of the trust was to comprise the list of securities I have just mentioned, and not to include any of the stock of the Industrial Press. The details, all the rest of the details, so far as I know, were never put down in writing, but in our discussion of it, the purpose and the essential points in the trust itself were identical.

Q. How about the relative interests of the beneficiaries? A. There is that difference in the first trust, in the trust of July 1st, 1921, my two sisters were to participate on a 2/7ths basis and I on a 3/7ths basis, and it was agreed in the new trust

to be formed at the future date, the participation should be on an equal basis of one-third each.

Q. And the interest on a basis of one-third each was, so far as you or your issue were concerned, the same as in the original trust agreement of 1921? A. Yes.

Q. How about the trustee, was anything said in reference to the trustee? A. There was a change from the First National Bank, which had been designated as a trustee under the old trust. I know it was my father's intention to make a change there. He had thought of a New York trust company as the trustee for the new trust.

Q. There was to be a corporate institution? A. Yes.

Q. What part of this plan had actually been carried out, if anything? A. The organization of the New Jersey corporation, the Industrial Corporation of New Jersey had been completed in detail and the first steps taken, the plan had been presented to a stockholders' meeting of the Industrial Press and had been explained to them and the plan approved at that meeting. That is as far as it went, the transfer of the securities was not made.

Q. The trusteed stock, that is, the stock that had been trusteed under the agreement of 1921 had been returned to Mr. Luchars? A. That had been done, the revocation went through and the waiver and transfer of the stock.

Q. And the corporation had been organized in New Jersey? A. The Industrial Corporation of New Jersey had been organized.

Q. Do you know the reason why this was not carried out during the lifetime of Mr. Luchars, Sr.? A. I think largely for the reason that Mr. Becker described that because of the conditions in busi-

ness generally my father thought it advisable to keep that amount of reserve in the Industrial Press reserve fund.

Q. There was no change of plan or purpose so far as the trust was concerned? A. None whatever.

FURTHER CROSS EXAMINATION BY MR. GOODELL:

Q. Your understanding is that your father then temporarily postponed creating this new trust? A. I have a very definite idea on that.

Q. Postponed it because he did not have the stock of the New Jersey corporation to use as the corpus? A. He said so to me on several occasions, yes.

Q. That he postponed it only until conditions should change and then he died before he did it? A. Yes.

REDIRECT EXAMINATION BY MR. COOPER:

Q. Mr. Luchars, did your father deliver to you after he had executed it, a copy of this revocation agreement? A. Yes.

Q. Exhibit C-4? A. Yes, I had a copy of that.

Q. Your father delivered it to you? A. Yes.

E. Y. Urban. Called by Complainant. Direct.

ELIZABETH YARNALL URBAN, called as a witness in behalf of the complainant, being first duly sworn according to law, on her oath says:

DIRECT EXAMINATION BY MR. COOPER:

Q. This is your signature appended to this document? A. Yes.

Q. Exhibit C-2? A. Yes.

Q. You are one of the donors of that trust? A. Yes.

Q. Did you correspond with your father, Mrs. Urban? A. I did.

Q. Receive letters from him? A. Oh, yes.

Q. Is that, in your opinion, his signature? A. Yes.

Q. Referring to Exhibit C-4? A. Yes.

Q. Did your father write to you in regard to the termination of this trust, as to why he was doing it, as to his intention in doing it? A. Yes, he did.

Q. Did he tell you what trust he was revoking? A. Yes.

Q. What trust did he tell you he was revoking? A. Well, we called it the 1921 trust.

Q. And that is this trust represented by Exhibit C-2? A. Yes.

Q. Now is this your signature appended to the last paragraph of Exhibit C-4? A. Yes.

Q. What was your understanding when you signed that waiver and consent? A. I understood that he was creating—

Q. No, as to what you were doing; what was your understanding as to what you were doing? A. I understood that I was waiving all my rights to the property which would come to me under the first trust.

E. Y. Urban. Called by Complainant. Cross.

Q. Under the first trust, now when your father asked you to execute this revocation did you keep a copy of it? A. Yes, I have a copy.

Q. Who did you get it from? A. From him.

Q. How did you get it from him? A. By mail.

Q. When you executed that agreement and this instrument, Exhibit C-4, you intended to waive all your rights under the July 1st, 1921 trust, which you had created along with your brother and sister? A. Yes.

Q. It was your understanding that your father was revoking that trust when he executed that instrument? A. It was.

CROSS EXAMINATION BY MR. GOODELL:

Q. Was it your understanding, Mrs. Urban, that was the end of it or was your father to do something else in carrying out his plans? A. I knew very well that he had been planning to execute another trust.

Q. Had he told you that he was? A. He had told me, talked it over every time I came to visit him, he talked over the plans that he was making for this other trust.

Q. What did he tell you the plan was? A. Well, he told me the plan was to invest in securities outside of the business of the Industrial Press, because he felt that after his death something might happen which would lessen the value of that business and he wanted to make it absolutely sure, as sure as any human being could, that his three children would be provided for so long as they lived, and their children after them.

Q. Then when you signed that revocation, or that waiver attached to the revocation, you under-

stood that was a step in the whole of a plan? A. Yes.

Q. And that you—rather, were you to be made a beneficiary of the new trust? A. Yes, he told me that very clearly before I signed the waiver.

Q. Yes, and do you remember how you actually received that revocation agreement, did it come by mail? A. By mail, I am sure.

Q. Who did it come from, do you remember? A. Who did it come from?

Q. Yes, who mailed it to you? A. I cannot remember that.

Q. I show you a typewritten document purporting to be a copy of a letter to "Dear Helen", and I ask you to glance at it? A. Yes.

Q. What is that paper? A. The paper is a letter, or at least, a carbon copy of a letter—

Q. From whom? A. From my father.

Q. Who is Helen? A. My sister, Mrs. Ketcham, saying that he was sending these copies of the revocation to her to sign first and then she should send them on to me to sign.

Q. Do you now remember that you did so receive them? A. Yes, I recall that now.

Q. And this is a copy of a letter that you received from your father after this, do you know where the original is? A. No, I don't.

The Court: This is a copy that her sister received from her father.

The Witness: Yes, my sister received that.

Q. I don't know who actually received this one, but you also received a copy? A. Yes, there was a copy always enclosed to each one of us.

Q. Mr. Luchars wrote and gave a copy to each one?

The Court: That may be, but that has not yet—

Mr. Goodell: Has not yet appeared.

The Court: You asked about this letter which is addressed to "Dear Helen", who, she says, is her sister.

Mr. Goodell: They received a copy of this letter with the revocation agreement enclosed in quadruplicate.

The Witness Yes.

Q. You signed three of them, kept one and returned the other three, did you? A. I cannot remember, I may have signed them up and sent them on, and then had one sent back to me. Sometimes it was done that way.

Q. But when you received them you received a copy of this letter with them, explaining them, signed by your father? A. Yes.

Q. Your first name is what? A. Elizabeth.

Q. I show you a letter dated May 22nd, 1930, in whose handwriting is that? A. That is my father's handwriting.

Q. To whom is it addressed? A. It is addressed to me.

Mr. Goodell: I would like to offer this letter in evidence.

The Court: And that copy also?

Mr. Goodell: Yes, I would like to put the copy in.

(Marked Exhibit D-6.)

Mr. Goodell: I would also like to offer this copy of the first letter I referred to, dated May 16, 1930.

(Marked Exhibit D-7.)

The Court: Let me have that letter.

E. Y. Urban. Called by Complainant. Cross.

Q. To your knowledge did your father ever set up the new trust? A. He did not.

Q. Did he ever tell you that he was not going to do it? A. No, I understood from everything he said that he was expecting to do it in the near future.

Q. And death overtook him before he did it? A. Yes.

FURTHER CROSS EXAMINATION BY MR. MARSH:

Q. In your discussions with your father concerning the trust did he tell you what the trust was to consist of, and who were to be the beneficiaries? A. Yes, he said that the trust was to consist of approximately $750,000 worth of stock, which was to be transferred from the holdings of the Industrial Press, what he called "gilt-edged" securities.

Q. But who were to have the interests, who were the beneficiaries? A. His three children were to be the beneficiaries.

Q. Solely, their families were not interested? A. And their families, his three children and their children after them.

Q. Was the interest to be the same as in the trust of 1921? A. No.

Q. In what respect did it differ? A. In the 1921 trust it gave my brother 3/7ths and my sister and myself 2/7ths, and the new trust was to give each of us one-third.

Q. Were the interests so far as income and principal and the fact of the interests of your issue, to be the same? A. Yes.

Q. When you signed this waiver of May 15th, 1930, did you sign it in pursuance and reliance upon this general plan which you have referred to? A. Yes.

Q. Did you understand at that time that Mr. Alexander Luchars was to become the owner of the common stock of the Industrial Press and could retain the business part of that in his own right? A. Yes, I did.

Q. And it was only the interests that were represented by securities which were to go back into the trust? A. Yes.

Q. At the time you received Exhibit C-4 do you know whether or not the signature of Mr. Alexander Luchars was on it? A. I don't think it was.

Q. So that in fact, your signature, so far as you recollect, was placed upon this instrument prior to Mr. Luchars' signature of revocation? A. Yes, I think as I remember it, it was.

The Court: I suppose whether the new trust would have been more beneficial to the possible issue of the donors was dependent on the business of the Industrial Corporation thereafter, wasn't it?

Mr. Marsh: Well, that is, taking a dollar and cents basis, no. Maybe as business conditions developed it might be true. I don't know what happened, whether the Industrial Press has continued as successful today as it was—

The Court: I don't know either, but had the surplus still remained the property of the Industrial Press, it would, of course, be charged with the liabilities of the corporation which was actively in possession.

Mr. Marsh: That is true.

The Court: If they were set aside in a separate and distinct trust fund they could not be touched by the liabilities of the corporation.

Mr. Marsh: The effect of this thing is to free the securities of that possibility, but it reduced the value of the trust fund as it then existed by approximately 50%.

Mr. Goodell: So far as that possibility goes, the corporation had the right, as you say, to turn it into a liability, then it might have been worse.

The Court: The question might arise whether the trustee and the donors must accept an impending liability for the benefit or detriment to the possible issue.

Mr. Marsh: I presume that is possible.

The Court: That is mere argument, Mr. Marsh. It is possible, we will admit.

Mr. Goodell: I would like to ask Mr. Luchars one more question.

ROBERT B. LUCHARS, recalled for further CROSS EXAMINATION BY MR. GOODELL:

Q. Mr. Luchars, you said your father had the idea of substituting a New York trust company for the trustee named in the document of July 1st, 1921; is it your idea that had he gotten to the setting up of this trust that would have been the sole trustee after his death? A. No, decidedly no.

Q. And would the others have been the same as in the document of 1921? A. 1921.

Q. That was your understanding? A. Yes.

Mr. Goodell: To change the corporate trustee but not to change the individual trustee.

The Court: All right.

HELEN L. KETCHAM, called as a witness in behalf of the complainant, being first duly sworn according to law on her oath says:

DIRECT EXAMINATION BY MR. COOPER:

Q. Mrs. Ketcham, that is your signature attached to Exhibit C-2? A. Yes, that is.

Q. Which is the trust created under date of July 1st, 1921? A. Yes.

Q. You have corresponded with your father on many occasions? A. Yes, many times.

Q. You have received letters from him? A. Yes.

Q. In your opinion, is that his signature appended to Exhibit C-4? A. Yes, that is his signature.

Q. And that is your signature also appended at the bottom of Exhibit C-4? A. That is my signature.

Q. What was your father's intention upon the execution of this Exhibit C-4, which is the instrument of revocation? A. His intention was to take the first step in a new plan which he had in mind.

Q. As to the trust of July 1st, 1921? A. His intention was that we should give back to him and waive our rights in that first trust of 1921.

Q. I mean as to his intention when he signed this instrument, what did he intend to do?

Mr. Marsh: If she knows.

Q. If you know? A. I beg pardon.

Q. When your father executed this instrument what did he intend to do in regard to the July 1st, 1921, instrument, if you know?

The Court: The instrument itself evinces the intention, except, as you say, it refers to

some agreement other than the one meant, but what you want to get from this witness is what agreement was referred to, or what trust was referred to in that agreement.

The Witness: The revocation of the 1921 trust.

Q. That is the trust of July 1st, 1921? A. July 1st, 1921.

The Court: And not the trust of May 10th, 1922, as named therein.

Q. It was not intended to revoke the trust dated May 10th, 1922, when he executed this? A. No, the trust of July 1st, 1921.

Q. And you signed this upon that understanding? A. I did.

Q. Now when you refer in here to the subject matter of the trust hereinbefore referred to, you are referring to the trust of July 1st, 1921? A. That is right.

Q. And when later on you say the principal and accumulated income of the trust estate you are also referring to the trust of July 1st, 1921? A. That is correct, yes, sir.

Q. It was your intention to waive any interest which you may have had, either in the corpus or accumulated income of the trust created by you and your brother and sister under date of July 1st, 1921? A. Yes, sir.

CROSS EXAMINATION BY MR. GOODELL:

Q. That waiver, Mrs. Ketcham, was in pursuance of a plan and arrangement with your father? A. Decidedly.

Q. One step in that arrangement? A. The first step in that arrangement.

Q. And the final step was to be what? A. The final step was the creation of another trust which was to be composed of securities other than the common stock of the Industrial Press.

Q. And he told you in conversations before he asked you to sign this document that he would set up such a trust? A. Oh, yes.

Q. And you signed this document relying upon that promise? A. Yes.

Q. I show you a copy of a letter dated May 16, 1930, marked Exhibit D-7, addressed to "Dear Helen", are you the Dear Helen referred to presumably? A. Yes, I am.

Q. Is that a letter from your father? A. Yes, that is a copy of a letter.

Q. Did you receive the original of it in the due course of the mails? A. Yes.

Q. With the revocation agreement enclosed? A. Yes.

Q. I show you a letter dated June 19th, 1930, is that in your father's handwriting? A. Yes, that is.

Q. Is it addressed to you? A. That is addressed to me.

Q. By a nickname? A. Yes.

Q. That nickname refers to you? A. It does; always calls me that.

Q. And is this the list of securities attached to the letter and enclosed with it when you received it? A. Yes, that is the list enclosed with that letter.

Mr. Goodell: I would like to offer the letter in evidence with permission to use the copy instead of the original.

(Marked Exhibit D-8.)

Q. Did your father, after you made this revocation, did he ever tell you that he was not going to make the trust? A. No, not that I can remember.

Q. Did he ever talk to you about it? A. Yes, several times.

Q. What did he tell you? A. He told me that he was going to in some respects change the trust and in order to do that he would have to first revoke the trust of July 1st, 1921 and put through a certain machinery which would institute another trust.

Q. Now what changes did he tell you he was going to incorporate? A. He told me that he did not wish it to be bound up with the fortunes of the Industrial Press and therefore it would not consist of the common stock of that company, but the body of it would consist of securities other than that.

Q. He told you, did he not, about the New Jersey company, the securities were to be actually owned by the New Jersey company and the corpus of the trust would be the New Jersey stock? A. Yes, he explained all that.

Q. What were you referring to when I asked you the question about the period after you had executed this revocation, did he ever tell you then that he was not going to set up the trust? A. No.

Q. Did he tell you he had postponed it? A. He said he had postponed it temporarily.

Q. Did he assign a reason? A. Yes, because he thought it would be inadvisable at the time because of business conditions, to withdraw this amount from the Industrial Press, because of their standing, which as Mr. Becker said, he was very jealous of.

Q. And he spoke of it only as a postponement, did he? A. Oh, yes.

H. L. Ketcham. Called by Complainant. Cross.

FURTHER CROSS EXAMINATION BY MR. MARSH:

Q. In discussing the terms of the trust was anything said by Mr. Luchars as to the provisions of it, the interests of the persons who were to receive it as beneficiaries? A. Do you mean the new trust?

Q. The new trust? A. He said there would be this difference, that instead of my receiving 2/7ths and my sister 2/7ths and my brother 3/7ths, we should each receive one-third, and that was in accordance with my brother's wishes.

Q. And were the interests of your respective issue and yourself to be the same otherwise? A. Just the same otherwise.

Q. Do you know whether or not when you received the instrument of revocation it contained the signature of Mr. Alexander Luchars? A. So far as I now remember, I don't think it did.

Q. So that did you sign before or after your sister? A. I signed before my sister.

Q. Before your sister and then forwarded it to her? A. Yes.

Q. And to the best of your recollection his signature was not on it at the time? A. No, I don't think so.

Q. At the time you signed this instrument did you know that Mr. Alexander Luchars was to become the sole owner of the Industrial Press business and that part of the value of the stock of the Industrial Press that had originally been part of the trust? A. Yes, I knew that.

Q. You understood that? A. Yes.

Mr. Cooper: You finally did, however, receive a copy of this in complete form, did you not, this revocation agreement?

Witness: Yes, I have a copy.

Mr. Cooper: That is all.

The Court: Does it appear on the record, the number of shares of common stock of this corporation actually issued and outstanding?

Mr. Goodell: Which corporation do you mean, the Industrial Press?

Mr. Marsh: There were 14 shares, I think Mr. Becker testified, of the Industrial Press that were not part of the trust agreement, of common stock.

The Court: I understand that, but what was the total issue? 14 plus what was in the trust. What was that?

Mr. Cooper: 2767.

The Court: 2767, what was the number of shares of preferred stock outstanding?

Mr. Goodell: 2756 shares of common stock.

Mr. Marsh: The Court was asking about the preferred stock.

Mr. Becker: About 2460 shares, I think, is approximately correct.

Mr. Goodell: Of $100 par value.

The Court: I don't want guess work about this; I want the actual facts of what stock was issued, both preferred and common, because the claim is set up here that in getting this $750,000 worth of securities the new trust was getting only half the value of the old, which may or may not be so, depending upon how much of the assets of the corporation were owned by the preferred stockholders. It was only the common stock, as I understand it, that was in this trust.

Mr. Marsh: That is correct.

The Court: There may be no diminution of the value of the trust estate of the new as compared with the old.

Mr. Capron: We can stipulate, probably, the effect on the corpus.

Mr. Marsh: The corporate structure and the respective book values, the whole thing in the nature of a balance sheet or something of that kind.

Mr. Goodell: Mr. Becker, however, testified that after giving due allowance to the preferred stock—

The Court: $412 a share for the common.

Mr. Goodell: Yes.

The Court: That was based upon his recollection, I would prefer to have it in the form of a stipulation, as Mr. Marsh suggests.

Mr. Cooper: As of the date of revocation.

The Court: Yes.

Mr. Goodell: 2460 shares of preferred and 2756 shares of common.

Mr. Cooper: And 14 shares not owned by the trust.

Mr. Goodell: Three shares not owned by the trust.

Mr. Cooper: I thought Mr. Luchars said 11.

Mr. Goodell: That was transferred back before.

Mr. Robert Luchars turned in his 11 shares, there were three shares the others held. There were 2460 shares of preferred and 2756 common in the trust, and three shares in the hands of directors.

Mr. Capron: Mr. Becker, I think, can give you the balance sheet, if you want it here.

The Court: Let's not take the time now. I think you better have the testimony transscribed and you may present your views in the form of a brief. I will dispose of it after receiving your briefs. You are the moving par-

ties, suppose you serve your adversaries with a brief in ten days, will that be time enough?

Mr. Cooper: Yes.

The Court: You may have the same length of time in which to reply.

Mr. Marsh: After we get the transcript.

Mr. Goodell: I don't think the transcript makes any difference.

The Court: You ought to know what the rules require about ordering the transcript. If you want the transcript, order it.

Mr. Capron: There was one document that was omitted, I think, in the records, your Honor, that is, the assignment of 59 shares in the trust.

Mr. Cooper: That is dated May 29th, 1925, signed by the same three donors, assigning 59 more shares to the trust.

(Marked Exhibit C-6.)

The Court: It is understood then, that briefs are to be filed within ten days after receipt of the transcript of testimony by complainant. And your reply within ten days after the complainant's brief is served on you.

You understand, Mr. Cooper, that it is up to you to order the transcript, under our rules?

Mr. Cooper: I understand that, yes, sir.

Exhibit C-1.

This exhibit is the last will and testament of Alexander Luchars, omitted by agreement of counsel.

Exhibits C-2, C-3 and C-4.

These exhibits are included herein as Exhibits "A", "B" and "C", attached to Bill of Complaint.

Exhibit C-5.

PLAN OF REORGANIZATION OF THE INDUSTRIAL PRESS OF NEW YORK.

Agreement dated March 25, 1931, between The Industrial Press, a New York corporation, party of the first part, The Industrial Corporation of New Jersey, a New Jersey corporation, party of the second part, and Robert B. Luchars and C. Alexander Capron, as executors of the Last Will and Testament of Alexander Luchars, deceased, parties of the third part.

WITNESSETH:

WHEREAS The Industrial Press is a corporation duly organized and existing under the laws of the State of New York with 2460 shares of preferred stock of the par value of $100. per share and 3554 shares of the common stock of the par value of $100. per share issued of which 797 shares of common

stock are held in the treasury of said corporation leaving 2756 shares of common stock now issued and outstanding.

WHEREAS all of the said 2756 shares of common stock of The Industrial Press are owned by Robert B. Luchars, and C. Alexander Capron as executors of the Last Will and Testament of Alexander Luchars, deceased.

WHEREAS The Industrial Press has been for many years engaged in the publishing and printing business and the safe and proper management of such business has required and still requires a substantial surplus in order to meet the ever shifting business and economic business conditions, and

WHEREAS the said Industrial Press of New York has over a period of years built up a surplus which as of December 31, 1930 amounted to $977,279.50 which surplus has from time to time been invested and kept invested in stocks and other securities in order to obtain therefrom some reasonable return during such periods as the employment of such surplus in the publishing and printing business has not been required; and

WHEREAS it is desired by The Industrial Press and its stockholders that a portion of such surplus be segregated from said business by transferring the same to another corporation, which shall have the power to loan its funds to The Industrial Press should The Industrial Press desire to borrow the same, or some portion thereof, for its corporate purposes, and should the directors of such company

to which such surplus is transferred deem it advisable and appropriate to loan the same or some portion thereof to The Industrial Press

WHEREAS in order to effect a reorganization of the assets and business of said The Industrial Press of New York to this end a new corporation has been organized under the laws of New Jersey under the name of The Industrial Corporation of New Jersey with an authorized capital stock of 2,000 shares without nominal or par value and the said Alexander Luchars before his death subscribed as an incorporator for four shares of said stock and Robert B. Luchars and Edgar A. Becker each subscribed as incorporators for three shares each of said stock, all at the subscription price of $100 per share, and thereafter the said Robert B. Luchars and Edgar A. Becker each assigned to the said Alexander Luchars the subscription rights to two shares of the said capital stock and the said executors of the last will and testament of Alexander Luchars have assigned the subscription right to one share of said capital stock to Elizabeth Y. Urban.

NOW, THEREFORE, the parties hereto agree and consent as follows:

FIRST: The Industrial Press hereby offers to sell, assign and transfer to The Industrial Corporation of New Jersey the securities set forth in the schedule annexed hereto, in exchange and full payment for the issuance by The Industrial Corporation of New Jersey to or upon the order of The Industrial Press of 1911 shares of its capital stock, without nominal or par value, including the 10 shares of

Exhibit C-5.

capital stock subscribed for by the incorporators of The Industrial Corporation of New Jersey, said stock to be issued as full paid and non-assessable and to be represented by certificates expressed on their face to be full paid and non-assessable, and The Industrial Press hereby directs that The Industrial Corporation of New Jersey issue one share of said stock to each, Robert B. Luchars, Edgar A. Becker and Elizabeth Y. Urban to qualify them as directors of The Industrial Corporation of New Jersey.

SECOND: The parties of the third part, the executors of the Last Will and Testament of Alexander Luchars, deceased, agree to transfer and assign to or upon the order of The Industrial Press the subscription rights to seven shares of the capital stock of the Industrial Corporation of New Jersey, heretofore made by Alexander Luchars, Robert B. Luchars and Edgar A. Becker, which subscription rights are now held by said executors.

THIRD: The Industrial Corporation of New Jersey hereby accepts said offer and agrees that upon delivery to it of the said securities set forth in Schedule A annexed hereto it will issue one share of its capital stock to each of the said Robert B. Luchars, Edgar A. Becker and Elizabeth Y. Urban and will issue to or upon the order of the Industrial Press 1908 shares of its capital stock, the stock so to be issued to include the ten shares of said stock subscribed for by its incorporators, and will deliver a certificate for one share of stock to each of the said Robert B. Luchars, Edgar A. Becker and and will deliver to or upon the order of the Indus-

trial Press certificates for 1908 shares of said stock, all of which shall be fully paid and non-assessable.

FOURTH: The Industrial Press agrees that upon the issuance to it or upon its order of said 1908 shares of the capital stock of The Industrial Corporation of New Jersey as hereinabove set forth, it will distribute the same to or among the holders of its common stock, as a dividend payable out of surplus, without the surrender by any of said stockholders of any of their common stock in The Industrial Press.

FIFTH: The agreements hereinabove contained are conditioned upon the certificate of incorporation of The Industrial Corporation of New Jersey being amended so that the said New Jersey corporation will have power and authority under its certificate as so amended to lend at any time and from time to time any part of its capital and/or surplus to The Industrial Press with or without security, without any action on the part of its stockholders.

SIXTH: All of the parties hereto hereby agree to execute any and all consents, certificates and agreements and other documents and to take any and all action and do or cause to be done any and all further acts or things which may be necessary or desirable to carry out the plan of reorganization as above set forth and to carry out all of the terms of this agreement and to secure the amendment to the certificate of incorporation of The Industrial Corporation of New Jersey above referred to.

IN WITNESS WHEREOF the parties of the first and second parts have caused these presents to be

signed by their duly authorized officers and their corporate seals to be hereunto affixed and duly attested, and the parties of the third part have hereunto set their hands and seals, this 25th day of March, 1931.

THE INDUSTRIAL PRESS
By R. B. LUCHARS
President

THE INDUSTRIAL CORPORATION OF NEW JERSEY
By R. B. LUCHARS
President

R. B. LUCHARS
C. ALEXANDER CAPRON
As Executors of the Last Will and
Testament of Alexander Luchars

Exhibit C-5.

SCHEDULE "A"

Bonds

$9,000—Baltimore & Ohio R. R. 4½%—1960
10,000—Kingdom of Belgium 7/56
4,000—Chicago and Northwestern RR.
5,000—Kingdom of Denmark 6/42
5,000—Grand Trunk Railway Co. of Canada 6/36
10,000—Hudson & Manhattan R. R. Co. 5/57
49,000—Brooklyn-Manhattan Transit 6/68

Stocks

1100 Shares Southern Pacific R. R. Common
400 " American Telephone & Telegraph Co. Com
300 " Union Pacific R. R. Common
408 " Standard Oil of New Jersey Common
400 " " " " California Common
100 " American Can Common
100 " American Power & Light $6 Preferred
300 " " " " " $5 Pfd. A Stamped
200 " American Super Power 1st Preferred $6
300 " Brooklyn-Manhattan Transit Preferred
200 " Commonwealth & Southern Preferred
100 " Consolidated Gas Co. of New York Common
300 " Electric Power & Light $7 Preferred 1st
400 " Federal Mining & Smelting Preferred
300 " General Electric Common

Exhibit C-5.

100	"	Public Service of New Jersey $6 Pfd.
100	"	" " " " " $8 "
300	"	United Corporation $3 Preferred
100	"	United States Steel Common
200	"	National Power & Light $6 Preferred
200	"	Missouri, Kansas & Texas R. R. Preferred
200	"	Remington-Rand $7 Preferred
100	"	St. Regis Paper Preferred
200	"	Missouri-Pacific R. R. $5 Preferred
100	"	Otis Elevator Co.
100	"	N. Y., N. H. & H. R. R. 7% Preferred
100	"	Eastman Kodak Common

Exhibit C-6.

KNOW ALL MEN BY THESE PRESENTS, that we, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, for and in consideration of the sum of One dollar ($1.00) and other good and valuable considerations, receipt of which are hereby acknowledged, have assigned, transferred and set over, and do by these presents transfer and set over unto Alexander Luchars as Trustee under a certain Deed of Trust heretofore executed by us and bearing date the first day of July, 1921, fifty-nine shares of the common capital stock of the Industrial Press and the sum of One hundred eighty four and 26/100 dollars ($184.26) in cash. TO HAVE AND TO HOLD unto the said Alexander Luchars and his successors upon all the trusts, terms and conditions set forth in said Deed of Trust bearing date the first day of July, 1921.

IN WITNESS WHEREOF, we, the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum have hereunto set our hands and seals this 29th day of May, 1925.

R. B. LUCHARS (L. S.)
ELIZABETH Y. URBAN (L. S.)
HELEN L. KETCHUM (L. S.)

Exhibit C-6.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

On this 29th day of May 1925, before me personally came ROBERT B. LUCHARS, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

CHARLES P. ABEL
Notary Public
Kings County No. 153
Kings Register No. 7006
N. Y. County No. 49
N. Y. Register No. 7082
My Commission Expires March 30, 1927
(Notarial Seal)

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

On this 29th day of May 1925 before me personally came ELIZABETH Y. URBAN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

CHARLES P. ABEL
Notary Public
Kings County No. 153
Kings Register No. 7006
N. Y. County No. 49
N. Y. Register No. 7082
My Commission Expires March 30, 1927
(Notarial Seal)

Exhibit C-6.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } SS.:

On this 29th day of May 1925, before me personally came HELEN L. KETCHUM, to me known and known to me to be the individual described in and who executed the foregoing instrument, and she duly acknowledged to me that she executed the same.

CHARLES P. ABEL
Notary Public
Kings County No. 153
Kings Register No. 7006
N. Y. County No. 49
N. Y. Register No. 7082
My Commission Expires March 30, 1927
(Notarial Seal)

Exhibit D-1.

December 11, 1929.

1. Incorporate the New Jersey corporation and transfer to that corporation all or part of the securities now owned by The Industrial Press and accept stock of that corporation in exchange.

2. Buy Mrs. O'Neill's shares.

3. Dissolve the existing Trust, being careful to have full releases duly signed by all beneficiaries.

4. Have your children transfer to you by gift, all their holdings in the The Industrial Press.

5. After you hold the stock mentioned in No. 4, have The Industrial Press declare a special dividend, payable in stock of the New Jersey corporation.

6. When you have the stock of the New Jersey corporation in your name, make a gift of the entire shares to your children with the definite understanding that they immediately create a Trust of said shares along the lines of the one now existing.

Exhibit D-2.

Memo

Mr. Luchars January 8, 1930.

* * *

The two main objectives of the contemplated plan are:

1—To have the common stock of The Industrial Press held by other than a trustee or trustees;

2—To have the investments of the Trust in marketable securities rather than in the stock of The Industrial Press.

To accomplish the above objectives, the following plan is suggested:

1—Create a New Jersey corporation and exchange the securities now held by The Industrial Press in their Reserve Account for the stock of the New Jersey corporation.

2—When No. 1 has been accomplished, dissolve the present Trust in due legal form, being careful to get full releases from all beneficiaries. Then have it understood with the beneficiaries that they transfer to Mr. A. Luchars their holdings in The Industrial Press.

3—When all of the common stock of The Industrial Press is held by Mr. A. Luchars, a dividend can be declared, payable in stock of the New Jersey corporation.

4—When Mr. A. Luchars holds the stock of the New Jersey corporation, he can make a gift of such shares to his children with the

definite understanding that they create a Trust similar to the one now in existence, naming him as Trusee.

The above transactions are not to be put into effect until all legal points involved are taken care of to Mr. A. Luchars' satisfaction.

If there are no legal hitches and if the suggested plans are put in operation, the situation will be:

1—That the Trust will own, with the exception of a very few shares, all the stock of the New Jersey corporation, which corporation in turn owns all of the marketable securities now held in the Reserve Account of The Industrial Press.

2—Mr. A. Luchars will own all of the common stock of The Industrial Press now held by him as Trustee, and will be in a position to make any changes in the capital structure of The Industrial Press he deems advisable.

EAB:LH

Exhibit D-3.

AGREEMENT AND PLAN OF REORGANIZA- dated May 16, 1930, between THE INDUSTRIAL PRESS OF NEW YORK, a New York corporation, party of the first part, THE INDUSTRIAL CORPORATION OF NEW JERSEY, party of the second part, and ALEXANDER LUCHARS and ROBERT B. LUCHARS, hereinafter sometimes called the stockholders, parties of the third part.

The Industrial Press of New York (herein called the Industrial Press) is a New York corporation, and engaged in the business of printing and publication, and is also engaged in the business of managing certain investments in stocks and other securities. For greater convenience and for the more effective conduct of these activities, the parties desire to segregate the business of managing such investments in securities from such business of printing and publication.

With a view to such separate management the parties have caused The Industrial Corporation of New Jersey (herein called the New Jersey Corporation) to be formed with an authorized capital stock of two thousand (2,000) shares, all without nominal or par value, and said Alexander Luchars, Robert B. Luchars and Edgar A. Becker (herein called the Stockholders) have subscribed as incorporators for an aggregate of 10 shares of such stock in the New Jersey Corporation at the subscription price of One hundred dollars ($100) per share, and the parties desire that the New Jersey Corporation shall acquire the stocks and other securities hereinafter mentioned.

Exhibit D-3.

All the common stock of the Industrial Press is owned by said Alexander Luchars, except eleven shares owned by said Robert B. Luchars. The Industrial Press has a sufficient surplus, and has sufficient net profits, to permit the distribution hereinafter provided for, without impairing any rights of creditors or preferred stockholders of the Industrial Press; and such distribution will not affect the interests of such creditors and preferred stockholders in any way, inasmuch as the remaining assets of the Industrial Press after such distribution will be far more than adequate for the protection of their interests.

IN CONSIDERATION of the premises and of the further covenants, agreements and consents of the parties hereinafter contained, and in order to effectuate such reorganization, the parties hereto do hereby adopt this Plan of Reorganization and do hereby covenant and agree with each other (each for himself and not for the others), and do hereby consent, as follows:

FIRST: The Industrial Press hereby subscribes for and agrees to take the remaining one thousand nine hundred and ninety (1,990) shares of capital stock in the New Jersey Corporation without nominal or par value; and in full payment therefor the Industrial Press hereby agrees to assign and transfer to the New Jersey Corporation the stocks and other securities specified and described in Schedule A attached hereto, aggregating 5,766 shares of stock, and $93,000. principal amount of other securities.

SECOND: The New Jersey Corporation agrees to accept such stocks and other securities in full pay-

ment for the one thousand nine hundred and ninety (1,990) shares of its stock so subscribed, and agrees upon receipt of such stocks and other securities forthwith to issue and deliver to and in the name of the Industrial Press certificates for such 1,990 shares of the New Jersey Corporation, such certificates to be, and to be expressed as, full paid and non-assessable.

THIRD: The Industrial Press agrees that upon receiving the certificates for said 1,990 shares of stock in the New Jersey Corporation, the Industrial Press will assign, transfer and deliver said certificates and the 1,990 shares represented thereby to said Alexander Luchars (who is, as aforesaid, the holder of substantially all the common stock in the Industrial Press) for his own use and benefit, and will distribute the same to him without any consideration other than the covenants and agreements hereinbefore contained.

FOURTH: The stockholders, who include all the holders of common stock in the Industrial Press and all the holders of stock in the New Jersey Corporation, do hereby consent to the foregoing subscription and to such assignment and transfer of stocks and other securities, and do further consent that upon receiving said 1,990 shares of stock in the New Jersey Corporation the Industrial Press may and shall distribute the same by assigning, transferring and delivering the same to said Alexander Luchars, it being intended that said 1,990 shares shall thenceforth be held and/or disposed of by him for his own use and benefit.

FIFTH: The Industrial Press, the New Jersey Corporation and the stockholders hereby severally

covenant and agree to execute any and all consents, certificates, agreements or other documents and take any and all action and do or cause to be done any further acts or things, which may from time to time be necessary or expedient to effectuate the reorganization above described.

IN WITNESS WHEREOF the Industrial Press and the New Jersey Corporation have, pursuant to due corporate authorization, caused this Agreement and Plan of Reorganization to be executed in their corporate names and under their corporate seals, duly attested, and the stockholders have subscribed their names hereto, all as of the day and year first above written.

Executed in two counter parts.

THE INDUSTRIAL PRESS OF NEW YORK.
By A. LUCHARS,
President.

Attest:
R. B. LUCHARS,
Secretary.

THE INDUSTRIAL CORPORATION OF NEW JERSEY.
By A. LUCHARS,
President.

Attest:
R. B. LUCHARS,
Secretary.

..... (Seal)

..... (Seal)

Exhibit D-4.

This exhibit is a duplication of Stipulation of Counsel on page 79, etc.

Exhibit D-6.

(Copy)

May 22/30

315 Upper Mountain Avenue
Upper Montclair
New Jersey.

Dear Betty:

The Revocations of Trust were received this morning, but I had no time to ack'ldg. them. I took over to Mr. Becker the list of securities to be checked up and the book value attached to each one. The actual value, even at the present low prices will be greater in some cases, so that the total amount will probably be a little over $750,000. The copy of the Reorganization Agreement I enclosed to give you some idea of the red tape involved in this transaction to avoid, legally, 12½% taxes on the whole amount—taxes already paid years ago. Phil Goodell will be away all next week, and we shall not be able to conclude all the details till next month, but you will both get your monthly checks as usual and if you need any extra, let me know.

Please send this letter to Helen to save my writing another. We are highly delighted at the visits you have laid out.

Your loving

FATHER.

Mr. Becker is doing splendidly, and will be out in two days or so.

Exhibit D-7.

Copy made for Mrs. Ketchum and send to Mrs. Urban.

May 16, 1930.

Dear Helen:

As this is the day of our annual stockholders meeting, we are taking occasion to put through a number of papers in connection with the reorganization. I enclose four copies of a revocation of the Trust signed by Robert and myself, which you will please sign and send to Betty. When she has signed all her copies she will retain one for her own use.

You understand that the four copies of the revocation of the Trust sent to you are *all* to be signed by you and then sent to Betty for her signature. She will then return one copy to you, retain one for herself, and mail the other two copies here for Bob and me for our files. The one marked "Please return to L" should be one of those that are returned to me, as it is the original.

In the meantime we will have the other matters put through; and so far as we can see there will be no further delay in connection with carrying out the arrangement.

I enclose a carbon copy of this letter to send to Betty, so that she will understand the details without your having to write her a long letter.

Mrs. Helen L. Ketchum,
Cohasset, Mass.

L:H

Exhibit D-8.

315 Upper Mountain Avenue
Upper Montclair
New Jersey

June 15/30

Dear Coodie:

Enclosed find a list of securities to be transferred this week to a New Jersey Corporation, and by it later to me as Trustee for the same beneficiaries as those of the former trust. Mr. Becker is one of the officers of the new Corporation and has just recovered his strength enough to attend the meetings required by law. He has been ill over 9 weeks, and now we have had 5 others in the office down with appendicitis. To make the number even, Mrs. Bell has been laid up with neuritis and inflammatory rheumatism, so that the rest of us have had to pull through as best we could.

I started writing this letter about the securities, but have strayed off my subject.

You will see they are a much more desirable form for the basis of the trust, than a business like the I. P., which depends for its earnings and stability almost entirely on its management. When I pass away these securities will be handled by an institution of unquestioned reliability, and the income will be as secure as anything on earth can be, although you will not get quite as good a return on the investments as at present. You will see they are all of the best standing and while the market value is less on some than it was on Apr. 30, they all pay the same dividends, which I think averages over 6%.

The trust we have been forming is entirely independent of the I. P. and no matter what happens to

Exhibit D-8.

that, this trust will not be affected. As I before explained to you, the rest of the I. P. property remains with that corporation and you have no interest in it, but the active executives will be Bob, Becker and Obry, who have been about 20 years with the business. I shall give only a supervisory direction to it, but will try to find and train other younger men who will all be helped to acquire an interest in it.

We are looking for Betty and her family on Monday I will have a chance to go over this with her.

Your loving

FATHER.

Exhibit D-8.

SECURITIES TO BE EXCHANGED FOR STOCK OF THE INDUSTRIAL CORPORATION OF NEW JERSEY AT MARKET VALUE OF THE FOLLOWING SECURITIES ON APRIL 30, 1930

1000	Shares	Southern Pacific Railroad Common	$120,750.00
300	"	Union Pacific Railroad Common	67,725.00
350	"	B. & O. Railroad Common	39,593.75
400	"	Standard Oil of California Common	29,650.00
300	"	Standard Oil of New Jersey Common	25,050.00
250	"	American Telephone & Telegraph Co. Common	63,000.00
200	"	International Harvester Co. Common	21,800.00
161	"	Electric Bond and Share Common	18,394.25
105	"	Public Service of New Jersey Common	12,206.25
			($398,169.25)
300	"	United Corporation $3.00 Com. preferred	15,637.50
100	"	Public Service of New Jersey $8. Cum. preferred	15,125.00
100	"	Public Service of New Jersey $6. Cum. preferred	11,087.50
200	"	National Power & Light Co. $6. Preferred	20,550.00
100	"	American Power & Light Co. $6. Preferred	10,312.50
300	"	American Power & Light Co. $5. Preferred "A"	26,250.00
200	"	Electric Power & Light Corporation $7. preferred	22,150.00
400	"	Federal Mining & Smelting Co. $7 preferred	40,000.00
200	"	Missouri, Kansas & Texas Railroad $7 preferred	21,200.00
300	"	St. Louis & San Francisco Railway Co. Noncum. $6. preferred	29,400.00
100	"	General Gas & Electric $7. Cum. preferred	10,700.00
200	"	American Superpower Corporation 1st pfd. $6. Series	20,125.00
200	"	Commonwealth & Southern Corporation $6. pfd.	20,575.00
			($263,112.50)
			$661,281.75

Exhibit D-8.

Bonds

$ 9,000.	Baltimore & Ohio Conv. 4½s of 1960	9,112.50
10,000.	Kingdom of Belgium 7s of 1956	10,787.50
10,000.	Kingdom of Belgium 7½s of 1945	11,512.50
40,000.	Brooklyn-Manhattan Transit 6s of 1968	39,200.00
4,000	Chicago & Northwestern 5s of 1933	4,040.00
5,000.	Kingdom of Denmark 6s of 1942	5,250.00
5,000.	Grand Trunk Rwy. of Canada 6s of 1936	5,287.50
10,000.	Hudson & Manhattan 5s of 1957	9,762.50
		($94,952.50)
	TOTAL	$756,234.25

EAB:H
(6-16-30)

Opinion.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c. On Final Hearing. Docket 83, p. 669.

Mr. WALTER E. COOPER, for Complainant.

Mr. PHILIP GOODELL, for Defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum.

RIKER & RIKER, for Defendants First National Bank & Trust Company of Montclair, and Theodore McC. Marsh, Guardian ad litem of infant defendants.

SYLLABUS.

1. Where a trust agreement provides that the trust may be terminated by the trustees by written notice of such termination to the donor beneficiaries thereof and delivery to them of the corpus, the trust is effectually terminated by such notice

without delivery of the corpus, such delivery being waived in writing by those entitled to receive it.

2. A misdescription of a trust agreement by reference thereto by a wrong date in such a notice of termination, resulting from mutual mistake, will be corrected in equity where the intention of all the parties to the transaction is plain.

3. A valid agreement between a trustee and the donor beneficiaries of a trust providing for its termination and the creation of a new trust, fully performed by the beneficiaries, partially performed by the trustee, complete performance being arrested only by his death, may not be rescinded by the beneficiaries where there has been no refusal by the trustee to perform, no repudiation by his executors and no fraud. The filing of a bill for instructions by the executors is not a repudiation of such an agreement. In such case the executors will be directed to perform the agreement of their decedent.

4. Executors are bound by the covenants and contract obligations of their decedent.

5. While a trustee will not be permitted to use the trust estate for his own profit, and the donee of a power may not execute it for pecuniary gain to himself, this doctrine rests upon the existence of bad faith towards the donor of the power; so, where the exercise of such power is with the knowledge and express consent of the donor, and it is not tainted with fraud, it will be upheld although the donee derives a benefit from its exercise. In such case the rule referred to does not apply.

Opinion.

BERRY, V. C.

The bill is by C. Alexander Capron, one of the executors of the will of Alexander Luchars, deceased, who died February 19, 1931, and prays instructions. Robert B. Luchars, co-executor and son of the decedent, does not join as complainant, because his interests are adverse, but is made a defendant individually and as co-executor together with his sisters Elizabeth Y. Urban and Helen L. Ketcham, five grandchildren of the decedent, and the First National Bank and Trust Company of Montclair, New Jersey, which company was named as successor trustee of the trust agreement hereinafter mentioned.

The controversy concerns the ownership of 2753 shares of the common stock of "The Industrial Press" and 1908 shares of the stock of The Industrial Corporation of New Jersey, now in the possession of the executors.

On July 1st, 1921, Robert, Elizabeth and Helen, the three children of Alexander Luchars, assigned 2359 shares of the common stock of "The Industrial Press" to Alexander Luchars in trust, to collect the net income and distribute it amongst them and their survivors in quarterly payments in the proportion of three-sevenths to Robert, and two-sevenths each to Elizabeth and Helen "or such portion of such income as in the uncontrolled judgment of the trustee he shall deem advisable to pay, except that in no year shall he distribute less income than six thousand (6000) dollars nor more income than accrues during that year, and except further, and if, prior to the termination of this trust, any or either of us shall die leaving issue, such issue shall receive their parents share by right of representation", and upon the death of the sur-

vivor of the three children, unless the trust was formally terminated in the manner provided in the trust agreement, the corpus devolved upon such issue.

Paragraph 8c of the agreement empowers the trustee to terminate the trust at any time that in his opinion it is wise and expedient to do so; the termination to be effective by the trustee signing an instrument of termination, and delivering copies thereof to each beneficiary who is entitled at that time to receive income. Upon such termination, the trustee is to turn over the entire trust estate to the three creators thereof and the issue of any of them who may at that time be deceased.

By an instrument executed by Robert, Elizabeth and Helen on May 9, 1925, the requirement that the trustee distribute at least $6,000 per year was rescinded, but the other provisions of the trust agreement were confirmed.

The Industrial Press, the corporation above referred to, is engaged in the business of printing and publishing engineering trade journals and has been highly successful. The company is authorized to issue 2767 shares of common stock and 2460 shares of prefered stock; and on May 15th, 1930, 2753 shares of common stock were in the trust fund, 394 shares having been added to the original number by purchase with $20,883.72 lent to the trust by Mr. Luchars; and also, in part, with accrued income. On that day the company had assets of over $1,500,000. and a surplus of approximately $970,000. The common stock had a book value of $412.00 per share, giving the 2753 shares in the trust fund a value of $1,134,236. Approximately $890,000 of the company's assets was invested in marketable securities.

Opinion.

Several months prior to May 15th, 1930, Mr. Luchars took up with his three children the idea of separating the marketable securities from the other assets of The Industrial Press, and creating a new trust with only those securities; his thought being that if business depression should injuriously affect The Industrial Press the trust fund, consisting of only the marketable securities instead of the stock of The Industrial Press, would not be impaired, and his children and grandchildren would be secure and protected with the income from the securities. Under this arrangement the trust fund would be considerably less than theretofore, because it would consist only of the securities instead of the 2753 shares of common stock of The Industrial Press; but that was, nevertheless, the plan which he proposed to his children and which they approved. To put this plan into operation he laid out a program which he discussed fully with his son and daughters; and on several occasions he made memoranda of the various steps which he intended to take. He sent his memorandum notes to his lawyer, asking his advice and approval. These notes were introduced in evidence and they show that his plan was to be effected in the following manner:

1. Form a holding corporation under the laws of New Jersey.

2. Have The Industrial Press transfer to the holding company all or part of the securities in exchange for the stock of the holding company.

3. Terminate the trust by notice to the three children as provided by paragraph 8c.

4. Transfer to the children the shares of the common stock of The Industrial Press which constituted the trust fund.

5. Have the children immediately reassign the said common stock to him, transferring the same to his name on the books of the company.

6. Have the Industrial Press declare a dividend on its common stock, payable in the stock of the holding company.

7. With the stock of the holding company then in his possession by reason of its being turned over to him as the dividend above referred to, set up a trust along the same lines as the trust of July 1st, 1921, with the stock of the holding company as the corpus.

8. Mr. Luchars to retain and own outright the common stock of The Industrial Press.

In pursuance of this plan Mr. Luchars signed and delivered to his three children an instrument terminating the trust, appended to which was a writing subsequently executed by the three children, waiving their right to receive the subject matter of the trust and authorizing the transfer of the principal and accumulated income of the trust estate to Mr. Luchars individually and in his own right; and he incorporated The Industrial Corporation of New Jersey, with an authorized capital of 2000 shares of common stock of no par value. In the instrument by which he sought to terminate the trust he referred to the trust agreement as that of May 10, 1922, but intending, without doubt, that

of July 1st, 1921, and this is not in dispute. He delayed carrying out the remaining steps of his proposed plan, however, waiting for a more propitious time to take the securities from the treasury of The Industrial Press and on February 19, 1931 he died with his plan uncompleted. The executors then went on with the project. They had the common stock of The Industrial Press registered in their own names; they exchanged about $750,000 worth of securities owned by The Industrial Press for 1908 shares of stock of the Industrial Corporation of New Jersey, and they declared a dividend on the common stock of The Industrial Press, paying it in common stock of the New Jersey company. They have not, however, set up the new trust with the stock of the New Jersey company and the situation now is that the executors have in their name and possession the common stock of The Industrial Press, and the stock of the New Jersey company, the latter company owning marketable securities valued at $750,000 formerly owned by The Industrial Press.

The three children of Alexander Luchars, donors of the corpus of the trust of July 1st, 1921, all of whom are still alive and defendants herein, seek now to rescind their agreement whereby the alleged trust was terminated on the ground of the refusal of the trustee, their father, to perform, and they seek also a decree directing the executors to deliver to the successor trustee named in the trust agreement, all of the stock in controversy. But there has been no refusal to perform. The three children fully performed their part of the agreement in the trustee's lifetime; he partially performed and, with the acquiescence of his children, delayed full performance, and his executors, without objection by

the children, have partially performed since his decease. The agreement was never repudiated by any party to it. There is no ground for rescission now. The authorities cited in support of rescission are *O'Neill* v. *Supreme Council,* 70 N. J. Law 410; *Roberts* v. *James,* 83 N. J. Law 492; *Traurig* v. *Levin,* 102 N. J. Eq. 582; *Plotkin* v. *Galowitz,* 109 N. J. Eq. 304, but they are not in point.

In the *O'Neill* case, there was an express repudiation of the contract by one of the parties which gave the other an immediate right to rescind. In the other cases the rescission was based on fraud. In the instant case there is neither fraud nor repudiation. The filing of the present bill cannot be considered as a repudiation and defendants make no such claim. Undoubtedly, the executors are bound by the covenants and contract obligation of their decedent. *Chapman* v. *Holmes' Executors,* 10 N. J. Law 20, at page 32; *Petrie* v. *Voorhees' Executors, et als.,* 18 N. J. Equity 285; *Corle* v. *Monkhouse,* 50 N. J. Equity 537.

On behalf of the grandchildren it is claimed that they had a vested right under the trust agreement and that the attempted termination of the trust was ineffective, first, because the instrument by which such termination was attempted referred to an agreement of May 10, 1922, and not that of July 1st, 1921; second, that the requirements for the termination were not fully complied with because the corpus of the trust was not actually returned to the donors, such return being waived, but remained in the possession of the trustee after notice of termination given; and third, that the termination was void as a matter of law because it resulted in an advantage to the trustee. As to the first, the evidence is conclusive that the agreement

of July 1st, 1921, was the agreement in contemplation by all the parties at the time the agreement of termination was made and that the insertion of the date of May 10th, 1922, was by inadvertence and the result of the mutual mistake of all parties, and this is conceded. Such a mistake may be corrected. *Pomeroy's Equity Jurisprudence,* Vol. 2, Sec. 589.

As to the second, it is not denied that the trust was subject to termination in the manner provided in the trust agreement, and that upon such termination the vested interest of the infants would have been divested. *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. Equity, 475; *Sandford* v. *Blake,* 45 N. J. Equity, 248. But it is claimed that the mechanics of the termination were faulty and therefore ineffective; but if it is conceded that if the corpus of the trust estate had been actually delivered by Mr. Luchars to his three children, the donors, following the notice of the termination, that would have put an end to any rights which the grandchildren might have had. Their vested interest would then have been divested. It is also conceded that if a week, a month or a year later, these children, all of them being of full age and competent, decided to make a gift of the trust property to their father, it would have been competent for them to do so. Also that if within a like period they had decided to return the trust property or a portion of it to their father under a new trust agreement and make an absolute gift to their father of the remainder, it would have also been competent for them to do so. Under such circumstances it is obvious that the grandchildren would have no cause for complaint. And, in fact, that is exactly what was done in this cause, except that the termination of the trust and the making of the gift by the donors

to their father constituted a simultaneous transaction. Except for the mechanics of this transaction it could not be challenged, but equity looks to the substance rather than the form and in substance here no defect is perceived.

As to the third objection, it is true that a trustee will not be permitted to use the trust estate for his own profit, and that the donee of a power cannot execute it for pecuniary gain to himself, but this doctrine rests upon the existence of bad faith towards the donor of the power. *Thompson's Executors* v. *Norris,* 20 N. J. Equity, 489. In that case Chief Justice Beasley said:

> "In considering the legal maxim involved, it must be treated, then, as a case in which the donee of a power has agreed for a benefit moving to herself, to surrender her right to appoint."

Then, after citing authorities, the Chief Justice continued:

> "These authorities abundantly suffice to show that the principle is unquestionably established, that an appointment to further the selfish interest of the donee of the power will not stand. The doctrine rests upon the ground of the existence of constructive bad faith towards the donor of the power. * * *"

It follows naturally and logically that if the arrangement is made with the knowledge and consent of the donor of the power this principle cannot apply. Here there was no fraud practiced upon the donors and the trustee acquired a personal benefit only because the donors intended that he should

have it. In support of this contention of the infant grandchildren numerous authorities are cited, among these *Staats* v. *Berger,* 17 N. J. Equity, 297, in which the trustee became a purchaser at his own sale for his own benefit; *Van Alstyne* v. *Brown,* 77 N. J. Equity, 455, in which the trustee permitted a mortgage to be foreclosed and bought in the trust property for himself; *Hill* v. *Hill,* 79 N. J. Equity, 521, in which the executors of a will made a lease to themselves of certain real estate and then sublet it at a profit of 300%; and *Keely* v. *Black,* 90 N. J. Equity, 439, in which the president of the corporation became secretly enriched in dealing with the assets of the corporation. None of these authorities is applicable.

But it is further contended on behalf of the infant grandchildren, that assuming the original trust to have been effectively terminated, a new trust should now be set up in accordance with the declared intention of the deceased trustee, and this point is well taken. The establishment of a new trust was the avowed purpose of all the parties to the transaction pursuant to which the original trust was terminated and which remains uncompleted. A decree that the executors carry out that purpose would be but an application of the maxim that equity regards as done that which ought to have been done. It is settled in this state that a parol declaration of trust of personal property is valid and enforceable. *Hopper* v. *Holmes,* 11 N. J. Equity, 122; *Eaton* v. *Cook,* 25 N. J. Equity, 55; *Pitney* v. *Bolton,* 45 N. J. Equity, 639; affirmed 46 N. J. Equity, 610; *James* v. *Falk,* 50 N. J. Equity, 468.

In *Lewin on Trusts,* Vol. 1, page 136, the learned author says: "But chattels personal are not within

the act (Statute of Frauds), and a trust by averment will be supported".

Professor Pomeroy states the rule to be that "Where the subject matter is personal property, a parol declaration of trust, if otherwise sufficient, is effectual". *Pomeroy's Equity Jurisprudence,* Vol. 3, Sec. 998, Note. The rule is otherwise with respect to a voluntary trust which is incomplete or imperfect, as, for instance, in the case of a gift of money deposited in a bank, when the bank book and control of the fund are retained by the donor (*Nicelas* v. *Parker,* 71 N. J. Eq. 777); or where a bank deposit is made to become effective on the death of the donor. *McCullough* v. *Forrest,* 84 N. J. Equity, 101; *Johnson* v. *Savings Investment & Trust Co.,* 107 N. J. Equity, 547.

All of the elements which go to make up a valid trust are present in this case. There is a designated beneficiary, a designated trustee, actual delivery of the property to the trustee with the intention of passing the legal title thereto, and, furthermore, an unequivocal, explicit declaration of trust. The testimony of Mr. Becker, financial adviser to Mr. Luchars and of each of the three children of Mr. Luchars, leaves no room for doubt that it was the intention of all parties to create a new trust and that that intention continued down to the date of Mr. Luchar's death.

There will be a decree directing the executors to set up a new trust consisting of the stock in the New Jersey corporation and along the lines of the original trust, except that the shares of the *cestuis que trustent* should be equal instead of three-sevenths to Robert and two-sevenths to each of his two sisters, that being the intention of the parties as indicated by their testimony. I shall advise a

decree holding that the executors own, as a part of the estate of Alexander Luchars, the common stock of The Industrial Press; that a new trust be set up as above indicated.

There is some question as to who should be appointed trustee of the new trust. The original agreement provided that upon the death of Mr. Luchars the First National Bank and Trust Company of Montclair, New Jersey, together with the three children, or such of them as were then living, should be the trustees. Robert testified, however, that his father intended to have a New York Trust Company appointed and that is substantiated by the codicil to Mr. Luchar's will which was introduced in evidence. In the codicil he refers to the fact that he had appointed the First National Bank and Trust Company of Montclair as a trustee of one of the trusts created therein, and also in certain contingencies of certain other trusts provided for, and he substituted a New York trust company for the Montclair institution. Counsel will be heard before appointing a new trustee.

Decided April 18, 1932.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, Complainant, and ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et als.*, Defendants.	On Bill &c. On Final Hearing.

This cause coming on to be heard in the presence of Walter E. Cooper, Esq., solicitor of the complainant, Philip Goodell, Esq., solicitor of the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, Messrs. Riker & Riker, solicitors of the defendants First National Bank and Trust Company of Montclair, and Theodore McCurdy Marsh, guardian ad litem of the infant defendants Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, and the court having examined the pleadings and having taken proof orally and in open court and having considered the arguments of counsel thereon;

And it appearing therefrom that the bill of complaint in this cause was filed by C. Alexander Capron, one of the executors of the will of Alexander Luchars, who died a resident of Upper Montclair,

County of Essex and State of New Jersey, on February 19th, 1931, for the purpose of obtaining instructions of the court as to the duties of the executors with regard to the disposition of 2753 shares of the common capital stock of The Industrial Press in the possession of the said Alexander Luchars on the date of his death, and also of 1908 shares of the capital stock of The Industrial Corporation of New Jersey coming into the hands of the executors of the will of Alexander Luchars subsequently to his death, as a result of a reorganization plan conceived by the said Alexander Luchars and partially carried out before his death, whereby and in pursuance of which plan there was paid over from The Industrial Press, the parent company, to The Industrial Corporation of New Jersey, securities substantially in accordance with a list introduced in evidence in the case, attached to Exhibit D-8, a copy of which is attached hereto, in exchange for 1908 shares of the capital stock of The Industrial Corporation of New Jersey, which comprise the entire issue of that stock, and which stock, in pursuance of the plan of reorganization, was distributed by The Industrial Press to its stockholders; and praying for a decree finding and determining that the said shares of the stock of The Industrial Press were assets of the personal estate of said decedent to be disposed of in accordance with the terms of his last will and testament;

And it further appearing that the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, who were the donors of a certain trust governed by an agreement dated July 1st, 1921, and in pursuance of the terms of that agreement, the same having been, in accordance with the terms

thereof, revoked by the said Alexander Luchars by a written agreement dated May 15th, 1930, waived their right to receive the subject matter of the said trust fund, in accordance with the agreement, upon its revocation, in favor of the said Alexander Luchars, and surrendered the said subject matter to him;

And it further appearing that this surrender was made in reliance upon an agreement made by the said Alexander Luchars in his lifetime to forthwith set up a trust fund similar to and governed by the same provisions as governed and controlled the trust fund under the agreement of July 1st, 1921, saving and excepting that the said Robert B. Luchars, the son of the said Alexander Luchars, was, under the terms of the new trust fund, with his issue, to receive one-third of the income and ultimately one-third of the principal, instead of three-sevenths thereof, and that the said Elizabeth Y. Urban and Helen L. Ketchum, daughters of the said Alexander Luchars, were, under the terms of the new trust fund, with their issue, each to receive one-third of the income and ultimately one-third of the principal, instead of two-sevenths thereof, as provided in the said trust agreement of July 1st, 1921;

And it further appearing that the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum have requested the court to appoint The First National Bank & Trust Company, of Montclair, to serve as co-trustee with them of the new trust so agreed to be created by the said Alexander Luchars, and that such appointment is approved

by Theodore McCurdy Marsh, guardian ad litem of the infant defendants;

And it further appearing that the subject matter of the new trust was to be 1908 shares of the capital stock of The Industrial Corporation of New Jersey, after the said corporation had become the owner of the securities herein mentioned, as listed by the said Alexander Luchars on the list delivered to his children, a copy of which list is hereto attached;

And it further appearing that the said Alexander Luchars departed this life on February 19th, 1931, before completing the process of reorganization hereinbefore recited, but after receiving from his children the waiver of their rights under the agreement of July 1st, 1921, to the subject matter of the trust fund, and taking the said trust fund and the securities comprising the same into his own possession;

And it further appearing that the trust fund established July 1st, 1921 was on May 15th, 1930, the date of the termination thereof, indebted to the said Alexander Luchars in the sum of $20,883.72 for money loaned to the trust fund;

And it further appearing that in the document of revocation dated May 15th, 1930, executed and delivered by the said Alexander Luchars to his children and accepted by them as a dissolution of the trust fund established and defined by the agreement of July 1st, 1921, the date of such agreement was erroneously recited as May 10th, 1922, the parties to the said document intending to have re-

cited the date July 1st, 1921 and to refer to the agreement so dated;

It is, on this 3rd day of May, 1932, ORDERED, ADJUDGED AND DECREED:

1. That the trust established by the agreement dated July 1st, 1921 was on May 15th, 1930 revoked and terminated, notwithstanding the erroneous recital of the date of the trust document, contained in the instrument of termination.

2. That the complainant and Robert B. Luchars, the executors of the last will and testament of Alexander Luchars, in so far as they have not already done so, complete the carrying out of the agreement made by Alexander Luchars with Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum by completing the reorganization of The Industrial Press, by causing The Industrial Press to transfer to The Industrial Corporation of New Jersey, a New Jersey corporation chartered in the lifetime of Alexander Luchars for such purpose, the securities set forth in the list attached to Exhibit D 8 herein, or securities of equal value, in exchange for 1908 shares of stock of The Industrial Corporation of New Jersey, being all of the capital stock of such company other than qualifying directors' shares, and by causing The Industrial Press in pursuance of the said plan of reorganization, to transfer to themselves, as executors, if they have not already done so, the said 1908 shares of the capital stock of the said The Industrial Corporation of New Jersey.

3. And it is further ORDERED, ADJUDGED AND DECREED that there shall be forthwith established a

trust with the said 1908 shares of the capital stock of The Industrial Corporation of New Jersey as the subject matter, the terms and conditions of which trust shall be in all respects similar to the plan of the trust outlined and established by the trust agreement dated July 1st, 1921, a copy of which is attached to the bill of complaint in this cause, excepting that wherever reference is made in the said trust agreement dated July 1st, 1921 to a three-sevenths share of either income or principal, payable to the said Robert B. Luchars or after his death to his issue, the word "one-third" shall be substituted for the word "three-sevenths", and wherever reference is made therein to a two-sevenths share of either income or principal, payable to the said Elizabeth Y. Urban or after her death to her issue, the word "one-third" shall be substituted for the word "two-sevenths", and wherever reference is made therein to a two-sevenths share of either income or principal, payable to the said Helen L. Ketchum or after her death to her issue, the word "one-third" shall be substituted for the word "two-sevenths".

4. And it is further ORDERED, ADJUDGED AND DECREED that Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum and The First National Bank & Trust Company of Montclair, a corporation organized under the laws of the United States of America be and the same are hereby appointed trustees of the new trust to administer the same in accordance with the terms and conditions thereof, as herein provided or as this court may from time to time hereafter direct and decree upon proper application made to it.

5. And it is further ORDERED, ADJUDGED AND DECREED that no bonds be required of the said trustees, or any of them, for the faithful performance of their duties.

6. And it is further ORDERED, ADJUDGED AND DECREED that the agreement of Alexander Luchars to establish said new trust did not embrace any understanding or agreement that the sum of $20,883.72 advanced by him to the trust estate established by the agreement of July 1st, 1921, should be repaid to him out of the new trust which he so agreed to set up;

7. And it is further ORDERED, ADJUDGED AND DECREED that the trustees of said new trust shall hold said 1908 shares of The Industrial Corporation of New Jersey free from any obligation to pay to the executors of the will of Alexander Luchars said sum of $20,883.72, or any part thereof;

8. And it is further ORDERED, ADJUDGED AND DECREED that the executors of the will of Alexander Luchars transfer and deliver to the trustees of the said new trust the said 1908 shares of the capital stock of The Industrial Corporation of New Jersey;

9. And it is further ORDERED, ADJUDGED AND DECREED that the said executors pay to The Industrial Corporation of New Jersey an amount equal to the avails and income received by The Industrial Press from the securities transferred by it to The Industrial Corporation of New Jersey from May 15th, 1930 until March 25th, 1931, the date of the consummation of the reorganization plan.

Final Decree.

10. And it is further ORDERED, ADJUDGED AND DECREED that, on the setting up of the new trust, the executors of the will of Alexander Luchars pay over to the trustees thereof, and as herein named, the corpus thereof, as herein described, after paying to The Industrial Corporation of New Jersey an amount equal to all avails and income received from the securities held by The Industrial Corporation of New Jersey from May 15th, 1930 to March 25th, 1931, the date of the consummation of the reorganization plan.

11. And it is further ORDERED, ADJUDGED AND DECREED that there be paid to Theodore McCurdy Marsh, guardian ad litem of the infant defendants, his taxed costs, including $46.00, representing the stenographic cost of the record, and a counsel fee of $2,000.00, and to Philip Goodell, solicitor for the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, his taxed costs in this matter, including $10.00, representing the stenographic cost of the record, and a counsel fee of $2,500.00, the said taxed costs and counsel fees to be charged on the estate of the said Alexander Luchars.

12. And it is further ORDERED, ADJUDGED AND DECREED that the parties in this cause have leave to petition the court for further relief and direction in the matters brought before the court by the bill filed herein.

E. R. W.,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

SECURITIES TO BE EXCHANGED FOR STOCK OF THE INDUSTRIAL CORPORATION OF NEW JERSEY AT MARKET VALUE OF THE FOLLOWING SECURITIES ON APRIL 30, 1930.

	1000	Shares	Southern Pacific Railroad Common	$120,750.00
	300	"	Union Pacific Railroad Common	67,725.00
	350	"	B. & O. Railroad Common	39,593.75
10	400	"	Standard Oil of California Common	29,650.00
	300	"	Standard Oil of New Jersey Common	25,050.00
	250	"	American Telephone & Telegraph Co. Common	63,000.00
	200	"	International Harvester Co. Common	21,800.00
	161	"	Electric Bond and Share Common	18,394.25
	105	"	Public Service of New Jersey Common	12,206.25
				($398,169.25)
	300	"	United Corporation $3.00 Cum. Preferred	15,637.50
	100	"	Public Service of New Jersey $8 Cum. Pfd.	15,125.00
20	100	"	Public Service of New Jersey $6 Cum. Pfd.	11,087.50
	200	"	National Power & Light Co. $6 Preferred	20,550.00
	100	"	American Power & Light Co. $6 Preferred	10,312.50
	300	"	American Power & Light Co. $5 Preferred "A"	26,250.00
	200	"	Electric Power & Light Corporation $7 Pfd.	22,150.00
	400	"	Federal Mining & Smelting Co. $7 Pfd.	40,000.00
	200	"	Missouri, Kansas & Texas R. R. $7 Pfd.	21,200.00
	300	"	St. Louis & San Francisco Ry. Co. Non-Cum. $6 Pfd.	29,400.00
30	100	"	General Gas & Electric $7 Cum. Pfd.	10,700.00
	200	"	American Superpower Corporation 1st Pfd. $6 Series	20,125.00
	200	"	Commonwealth & Southern Corporation $6 Pfd.	20,575.00
				($263,112.50)
				$661,281.75

40

Bonds

$ 9,000	Baltimore & Ohio Conv. 4½s of 1960	$9,112.50
10,000	Kingdom of Belgium 7s of 1956	10,787.50
10,000	Kingdom of Belgium 7½s of 1945	11,512.50
40,000	Brooklyn-Manhattan Transit 6s of 1968	39,200.00
4,000	Chicago & Northwestern 5s of 1933	4,040.00
5,000	Kingdom of Denmark 6s of 1942	5,250.00
5,000	Grand Trunk Rwy. of Canada 6s of 1936	5,287.50
10,000	Hudson & Manhattan 5s of 1957	9,762.50
		($94,952.50)
	TOTAL	$756,234.25

EAB:H
(6-16-30)

Amended Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between
C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant,
and
ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased, *et al.*,
Defendants.

On Bill, &c.

The defendants, Adelaide L. Ketcham, Elizabeth David Dow Ketchum, Robert Luchars Urban and John Trexler Urban by Theodore McCurdy Marsh, guardian *ad litem,* hereby appeal from the final decree made in the above entitled cause on May 3rd, 1932, by the Chancellor of the State of New Jersey on the advice of the Honorable Maja Leon Berry, Vice Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: May 12th, 1932.

THEO. MCC. MARSH,
Guardian *Ad Litem,* Appearing *Pro Se.*

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

ROBERT S. POLLARD,
Of Counsel.

Amended Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, Deceased,
Complainant-Appellee,

and

ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, deceased, ELIZABETH Y. URBAN, HELEN L. KETCHUM, and the FIRST NATIONAL BANK AND TRUST COMPANY OF MONTCLAIR,
Defendants-Appellees,

and

ADELAIDE L. KETCHUM, ELIZABETH Y. KETCHUM, DAVID DOW KETCHUM, ROBERT LUCHARS URBAN and JOHN TREXLER URBAN,
Defendants-Appellants.

On Appeal from the Court of Chancery.

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

The petition of Theodore McCurdy Marsh, as guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, infants, and the appellants in the above entitled cause, respectfully shows that:

1. Petitioner, as guardian ad litem of said infant defendants, finds himself aggrieved by a final

decree made in the Court of Chancery by His Honor, Edwin Robert Walker, Chancellor, bearing date May 3rd, 1932, in a certain cause in the said Court of Chancery wherein the said C. Alexander Capron, as Executor of the Last Will and Testament of Alexander Luchars, deceased, was the complainant, and Robert B. Luchars, Individually and as Executor of the Last Will and Testament of Alexander Luchars, deceased, Elizabeth Y. Urban, Helen L. Ketchum, Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban, John Trexler Urban, and the First National Bank and Trust Company of Montclair, a corporation, were defendants, in this respect, to wit, the said decree adjudges that the trust agreement made and executed on the 1st day of July, 1921, by and between Robert B. Luchars, Elizabeth Y. Urban, Helen L. Ketchum and Alexander Luchars was revoked and terminated on the 15th day of May, 1930, and that the interest of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, the infant defendants and appellants, in said trust became and was thereby terminated and ceased as of such last mentioned date.

2. Petitioner appeals from the decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous in that:

a. The action of Alexander Luchars in terminating the trust agreement of July 1st, 1921, on May 15th, 1930, was illegal, invalid and void.

b. The action of said Alexander Luchars in terminating the trust agreement of July 1st, 1921, was the result of a bargain made by and between the said Alexander Luchars as Trustee and Robert B.

Luchars, Elizabeth Y. Urban and Helen L. Ketchum wherein and whereby the said Alexander Luchars, individually, derived a benefit, and that said termination was thereby illegal, void and of no effect.

c. The interest of the said Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, infants, in and to the trust fund established by the agreement of July 1st, 1921, was not terminated by the act of Alexander Luchars on May 15th, 1930, whereby he attempted so to do, as the attempt of said Alexander Luchars was in violation of his duties as Trustee and was, therefore, void and of no effect.

d. The interest of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, infants, in and to the trust fund established by the agreement of July 1st, 1921, was not terminated by Alexander Luchars on May 15th, 1930, or at any other time as the acts of the said Alexander Luchars in attempting so to do were not performed in accordance with the provisions of said agreement and of the powers granted to him thereby, and that such attempted termination was, therefore, void and of no effect.

Petitioner, therefore, prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as to this court shall seem proper.

THEO. McC. MARSH,
Petitioner appearing *Pro Se.*

ROBERT S. POLLARD,
Of Counsel.

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

New Jersey Court of Errors and Appeals

C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of ALEXANDER LUCHARS, deceased,
Complainant-Appellee,

and

ROBERT B. LUCHARS, Individually and as Executor of the Last Will and Testament of ALEXANDER LUCHARS, deceased, ELIZABETH Y. URBAN, HELEN L. KETCHUM, and the FIRST NATIONAL BANK AND TRUST COMPANY OF MONTCLAIR,
Defendants-Appellees,

and

ADELAIDE L. KETCHUM, ELIZABETH Y. KETCHUM, DAVID DOW KETCHUM, ROBERT LUCHARS URBAN and JOHN TREXLER URBAN,
Defendants-Appellants.

On Appeal from the Court of Chancery.

Memorandum in Behalf of Robert B. Luchars, Jr.

MEMORANDUM IN BEHALF OF ROBERT B. LUCHARS, JR.

By order of this court entered on the 2nd day of November, 1932, Robert B. Luchars, Jr., the infant son of Robert B. Luchars, who was born pending the appeal, was made a party to the cause, and Theodore McC. Marsh was duly appointed his Guardian *Ad Litem.*

Robert B. Luchars, Jr., is the only child of Robert B. Luchars, one of the above-named defendants, and is one of the several grandchildren of Alexander Luchars. All of these other grandchildren of Alexander Luchars were living at the time of the filing of the bill and were made parties defendant thereto, and are now represented by Theodore McC. Marsh as Guardian *Ad Litem.* They are the appellants before this court.

Argument has been had on the appeal and briefs have been filed in behalf of these grandchildren by their Guardian *Ad Litem.* The status and rights of Robert B. Luchars, Jr., are exactly the same as those of all the other grandchildren.

It is, therefore, requested that appearance in the cause be now entered for Robert B. Luchars, Jr., by Theodore McC. Marsh, as Guardian *Ad Litem,* and that the arguments set forth in the main brief and reply brief filed on behalf of the appellants be considered as applicable to the rights of said Robert B. Luchars, Jr., so that he may be entitled to any benefits of and be bound by such decree as may be entered in the cause to the same effect as if he had been a party thereto throughout.

Respectfully submitted,

THEODORE McC. MARSH,
Guardian *Ad Litem* of
Robert B. Luchars, Jr.

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New Jersey Court of Errors and Appeals

BETWEEN

C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of Alexander Luchars, deceased,
Complainant-Respondent,

and

ROBERT B. LUCHARS, individually and as Executor of the Last Will and Testament of Alexander Luchars, deceased, ELIZABETH Y. URBAN, HELEN L. KETCHUM, and the FIRST NATIONAL BANK AND TRUST COMPANY OF MONTCLAIR,
Defendants-Respondents,

and

ADELAIDE L. KETCHUM, ELIZABETH Y. KETCHUM, DAVID DOW KETCHUM, ROBERT LUCHARS URBAN and JOHN TREXLER URBAN,
Defendants-Appellants.

On Appeal from the Court of Chancery.

REPLY BRIEF OF DEFENDANTS-APPELLANTS.

In our main brief we dealt with the acts of the trustee in attempting to terminate the trust. The argument of the respondents, the settlors of the trust, suggests that they, being not only the settlors but also the persons entitled to receive the property in the event of termination, could, in conjunction with the trustee, effectively defeat the

rights of these infant remaindermen. We, therefore, pray the indulgence of the court to briefly consider the rights of the children as distinguished from the rights and powers of the trustee.

The argument of the respondents fails to distinguish between the rights of the children of Alexander Luchars as settlors of the trust and their rights as beneficiaries thereof. The argument seems to assume that because of this dual relationship to the trust estate, the rights of these settlor-beneficiaries are larger than the sum total of the rights of the settlors of the trust plus the rights of all of the beneficiaries thereof. We submit that such a view is fallacious.

First let us consider their position and the powers which they had, if any, as settlors of the trust. As set forth in Point II of our brief in main, these children of Alexander Luchars irrevocably assigned and transferred the property constituting the trust estate to their father as trustee. That transfer completely divested their ownership of the property. Their purpose in creating the trust was finally and irrevocably expressed in the deed of trust. The trustee's duties were fixed by that instrument as were also the rights and interests of the beneficiaries therein named or described. They reserved no power to vary in the slightest degree the duties and responsibilities of the trustee, or the rights and interests of the beneficiaries. Thereafter, no consent on the part of the settlors could have rendered valid an otherwise invalid act of the trustee.

So far as the argument relates to the consent of the settlors, it may be tested by considering the situation which would have been presented if the trust had been created by a third person, not one of the beneficiaries of the trust. After the execution of the deed of trust, he would have

had no right to control the conduct of the trustee or, by giving any consent, to enlarge the powers of the trustee or relieve him of fulfilling the obligations cast upon him by the deed of trust and the rules of conduct controlling trustees. If the act of the trustee, when measured by such rules of conduct was void although it might be for the direct benefit of the settlor, the consent or direction of the settlor could not render such act on the part of the trustee valid.

We submit that the conclusion is inescapable that as settlors the children of Alexander Luchars had no rights whatsoever after the execution of the deed of trust to vary, regulate, or control the conduct of the trustee.

Let us next briefly consider the rights of these children of Alexander Luchars as beneficiaries of the trust. As such, they had only such rights as were expressly conferred upon them by the deed of trust. They had no other or different rights than those which would have adhered to them had the trust been created by a third person. The cases cited in our brief in main establish conclusively, we submit, that the agreement of these children made previously to the termination, to transfer part of that property to the trustee, rendered the termination void. A prospective appointee may not bribe a trustee or donee of a power to execute such power in favor of such appointee by agreeing before its execution to give to the trustee or donee of the power a part of the property to be received. This seems to be recognized by their counsel who states:

> "*It would undoubtedly be conceded that if an outside party had been the donor of the trust, the guardian's point would be well taken,* but it is respectfully insisted that under this particular set of circumstances

there could be no criticism of the revocation, that it is valid." (Italics ours.)

While we recognize that the rights of the appellants, the infant remaindermen, were subject to be defeated by a termination of the trust, their rights could only be defeated by a *valid* termination thereof. Since the attempted termination was invalid, the rights of the infants as conferred upon them by the deed of trust, must be declared to be the same as if such invalid termination of the trust had not been attempted.

In discussing *Thomson's Executors* v. *Norris,* 20 N. J. Eq. 489, counsel for these respondents seems to have some doubt concerning the basis of the decision in that case. We submit that the remarks of the court appearing at page 529 should leave no possible doubt upon this subject. The court had first reached the conclusion that in the absence of the special act of the legislature in confirming the agreement, the agreement pursuant to which the power of appointment was executed would have been void. Some doubt was then expressed concerning the power of the legislature to meddle with vested rights. After pointing out that the children and grandchildren, whose rights alone were affected by the statute in question, had no interest which was capable of being enforced by any court unless they should first obtain an appointment in their favor, the Chief Justice, speaking of the special act of the legislature, said (p. 530):

"The decision of the Chancellor is in favor of its efficiency for the purpose designed; and leaning, in a great measure, on that opinion, I shall, on this ground, vote for the affirmance of the decree rendered in the Court of Chancery."

We shall not burden the court with further discussion, as we believe that the other arguments are sufficiently dealt with in our main brief.

Respectfully submitted,

THEODORE MCCURDY MARSH,
Guardian ad litem of infant
Defendants-Appellants, pro se.

New Jersey Court of Errors and Appeals

BETWEEN

C. ALEXANDER CAPRON, as Executor of the Last Will and Testament of Alexander Luchars, deceased,
Complainant-Respondent,

and

ROBERT B. LUCHARS, individually and as Executor of the Last Will and Testament of Alexander Luchars, deceased, ELIZABETH Y. URBAN, HELEN L. KETCHUM, and the FIRST NATIONAL BANK AND TRUST COMPANY OF MONTCLAIR,
Defendants-Respondents,

and

ADELAIDE L. KETCHUM, ELIZABETH Y. KETCHUM, DAVID DOW KETCHUM, ROBERT LUCHARS URBAN and JOHN TREXLER URBAN,
Defendants-Appellants.

On Appeal from the Court of Chancery.

POINTS OF DEFENDANTS-APPELLANTS.

This is an appeal from a final decree of the Court of Chancery entered on May 3, 1932 in pursuance of an opinion of Vice-Chancellor Berry, in the above-entitled cause, filed on behalf of five

NOTE: References are to the State of the Case unless otherwise noted.

infant defendants by Theodore McC. Marsh, their duly appointed guardian ad litem.

This appeal involves equitable principles of fundamental and far-reaching importance. Simply stated the first question involved is this.

Will a trustee in whom there reposed a power to terminate a trust and transfer the trust property to the life beneficiaries, be permitted to terminate that trust pursuant to a prearranged agreement with the life beneficiaries under the terms of which he received a substantial portion of the trust property of large financial value?

A further question is also involved. Will the courts of this state require compliance with the essential elements prescribed in the trust instrument, with respect to the means to be employed to exercise such a power, before effect will be given to an attempted exercise of such power?

Statement of Facts.

There is no dispute concerning the facts.

The trust in question was established through the execution of a trust agreement dated July 1st, 1921 (Exhibit C2, pp. 12, 127). By this deed of trust the defendant-respondent, Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, being the three children of Alexander Luchars, assigned 2359 shares of the common stock of The Industrial Press to the said Alexander Luchars in trust, to collect the income and to distribute such portion of the net income as the trustee should deem advisable, but not less than $6,000 per annum, in the proportion of three-sevenths to Robert and two-sevenths each to Elizabeth and Helen. It was further provided that the issue of any who should die should receive the parent's share of the income so distributed. The

trust was to continue during the joint lives of the three children of Alexander Luchars, the donors, unless sooner terminated as provided in the trust agreement (Article Second, p. 12). Upon the decease of the survivor, the principal of the trust, with all accumulations, became distributable, three-sevenths to the issue of Robert and two-sevenths each to the issue of Elizabeth, and Helen.

The provisions of the trust agreement concerning the termination thereof are as follows (p. 15):

> "EIGHTH: The Trustee is hereby given full power and authority:
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> * * * * * *
>
> c. To terminate this trust at any time prior to the termination provided for in the fifth paragraph hereof, if in the opinion of the Trustee for the time being it is wise and expedient so to do, such termination shall be effected in the manner following: The Trustee shall sign an instrument of termination, copies of which shall forthwith be delivered to each beneficiary at that time entitled to receive income hereunder, and thereupon the Trustee shall transfer, turn over and convey the principal trust estate and undistributed income then in the hands of the Trustee unto us, the said Robert, Elizabeth and Helen, and the issue by right of representation of any of us who may then have deceased in the same proportions that we and our issue as aforesaid are then receiving income. The copy of the instrument of termination above referred to shall be deemed to have been delivered, within the meaning of this instrument, upon the same having been mailed postpaid and directed to the

person entitled to receive the same at his last known residence or place of business''.

By an instrument dated May 9, 1925, the said Robert, Elizabeth and Helen, the children of Alexander Luchars, waived their right to require the distribution by the trustee of $6,000 per annum; conferred upon the trustee complete discretion as to the amount of income which should be distributed, and authorized the trustee to invest any accumulated income and any portion of the principal of the trust in the common stock of The Industrial Press (p. 20 *et seq.*).

On or about May 15, 1930, Alexander Luchars purported to terminate the trust. This was sought to be accomplished by the execution of a so-called instrument of termination which is printed at page 27 *et seq.* of the State of the Case. This instrument consisted of two parts, one a statement signed by Alexander Luchars that he thereby executed it as an instrument of termination of the trust therein previously mentioned. The other part consisted of a statement signed by the said Robert, Helen and Elizabeth, in which they purported to waive their right to receive the subject matter of the trust. The trust which is referred to in the instrument of termination was an entirely different trust from that here involved. The trust described in the so-called instrument of termination was one established by a declaration of trust dated May 10, 1922, executed by Alexander Luchars for the benefit of his children. It is clear from the evidence, however, that both Alexander Luchars and his children, when they executed this paper, intended to refer to the trust created by the deed of July 1st, 1921. At the time of this purported termination of the trust, no part of the trust es-

tate was transferred or delivered to Robert, Elizabeth, or Helen, as required by the deed of trust. Instead, they merely signed the waiver above mentioned.

The instrument of termination was executed by Alexander Luchars and his children pursuant to a plan and agreement under which approximately forty per cent. of the trust estate was to become the property of Alexander Luchars, freed from the trust, and the remainder was to be the subject of a new trust, which was to be established by Alexander Luchars or his children, substantially along the lines of the old trust but with certain variations, the most important of which was that each child should share equally, Robert having requested that there should be no preference in his favor.

At the time of the purported termination of the trust it consisted only of stock in The Industrial Press. The facts relating to that company, and the acts of the parties preceding the termination of the trust, were clearly stated by the Vice-Chancellor as follows:

> "The Industrial Press, the corporation above referred to, is engaged in the business of printing and publishing engineering trade journals and has been highly successful. The company is authorized to issue 2767 shares of common stock and 2460 shares of preferred stock; and on May 15th, 1930, 2753 shares of the common stock were in the trust fund, 394 shares having been added to the original number by purchase with $20,883.72 lent to the trust by Mr. Luchars; and also, in part, with accrued income. On that day the company had assets of over $1,500,000. and a surplus of approximately $970,000. The common stock had a book value of $412.00

per share, giving the 2753 shares in the trust fund a value of $1,134,236. Approximately $890,000 of the company's assets was invested in marketable securities.

"Several months prior to May 15th, 1930, Mr. Luchars took up with his three children the idea of separating the marketable securities from the other assets of The Industrial Press, and creating a new trust with only those securities; his thought being that if business depression should injuriously affect The Industrial Press the trust fund, consisting of only the marketable securities instead of the stock of The Industrial Press, would not be impaired, and his children and grandchildren would be secure and protected with the income from the securities. Under this arrangement the trust fund would be considerably less than theretofore, because it would consist only of the securities instead of the 2753 shares of common stock of The Industrial Press; but that was, nevertheless, the plan which he proposed to his children and which they approved. To put this plan into operation he laid out a program which he discussed fully with his son and daughters; and on several occasions he made memoranda of the various steps which he intended to take. He sent his memorandum notes to his lawyer, asking his advice and approval. These notes were introduced in evidence and they show that his plan was to be effected in the following manner:

"1. Form a holding corporation under the laws of New Jersey.

"2. Have The Industrial Press transfer to the holding company all or part of the securities in exchange for the stock of the holding company.

"3. Terminate the trust by notice to the three children as provided by paragraph 8c." (It should be noted that termination of the trust also required that the trust property be transferred and delivered to the donors.)

"4. Transfer to the children the shares of the common stock of The Industrial Press which constituted the trust fund.

"5. Have the children immediately reassign the said common stock to him, transferring the same to his name on the books of the company.

"6. Have The Industrial Press declare a dividend on its common stock, payable in the stock of the holding company.

"7. With the stock of the holding company then in his possession by reason of its being turned over to him as the dividend above referred to, set up a trust along the same lines as the trust of July 1st, 1921, with the stock of the holding company as the corpus.

"8. Mr. Luchars to retain and own outright the common stock of The Industrial Press."

The securities to be transferred to the new corporation, the stock of which was to be held upon the new trust, were to be of the value of about $750,000 (pp. 109, 145).

It was pursuant to this plan that the so-called instrument of termination was signed. After it was signed, Mr. Luchars caused the Industrial Corporation of New Jersey to be incorporated with an authorized capital of 2,000 shares of common stock of no par value, but he delayed carrying out the remaining steps of the proposed

plan, fearing that the withdrawal of securities of the value of $750,000 from The Industrial Press might affect its credit. He also feared the result of withdrawing these liquid assets during the financial crisis through which the business world was passing (pp. 102, 103). He died on February 19, 1931, with the plan still uncompleted.

After his death, his executors proceeded with the execution of the plan to the extent of going forward with the plan of reorganization of The Industrial Press. Pursuant thereto, it exchanged about $750,000 worth of securities for 1,908 shares of stock of the Industrial Corporation of New Jersey, which the executors thereupon received from The Industrial Press by way of dividend. They then held the 2,753 shares of common stock of The Industrial Press formerly held by Mr. Luchars as trustee, and all of the stock of the New Jersey corporation with the exception of qualifying directors' shares. This latter corporation was then the owner of the $750,000 of securities.

Statement of the Issues.

Thereupon, the complainant, one of the executors of the will of Alexander Luchars, filed this bill for the purposes of having the ownership of said shares of stock of The Industrial Press and the Industrial Corporation of New Jersey determined. The complainant contended that by the execution of the instrument of termination the parties had intended to and did thereby terminate the trust created by the trust agreement of July 1st, 1921; that Mr. Luchars' children had intended to and did thereby intend to waive their right to receive any part of the trust estate, and that Mr. Luchars became the owner thereof individually and in his own right.

The defendants-respondent, Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, the children of the said Alexander Luchars, contended that while the trust had been validly terminated, the waiver of their right to receive the trust estate should be rescinded and set aside, because of the failure of Alexander Luchars to carry out his agreement to set up a new trust with respect to the stock of the Industrial Corporation of New Jersey. They claimed that the consideration for their waiver having failed, both the common stock of The Industrial Press and the stock of the New Jersey corporation should be transferred and delivered to them. The Vice-Chancellor refused to sustain this claim on the ground that Alexander Luchars had not refused to perform; that his children had acquiesced in the delayed full performance; that the agreement had never been repudiated by any party to it; and that there was no ground for rescission. The children have not appealed.

The defendants-appellants who are the children of the said Elizabeth Y. Urban and Helen L. Ketchum, maintain, first, that the trust was not validly terminated, and second, that if it were validly terminated, then the executors of Alexander Luchars should be required to carry out his agreement to establish the new trust with respect to the stock of the Industrial Corporation of New Jersey. The court below sustained the view of the complainant that the old trust had been validly terminated, but, holding with the second contention of these defendants, directed that the agreement concerning the establishment of the new trust with respect to the stock of the Industrial Corporation of New Jersey, should be performed by Mr. Luchars' executors.

These defendants-appellants have appealed from the decree entered in the court below in so far as it determines that the original trust created by the agreement of July 1st, 1921, was validly terminated.

POINT I.

The Trustee having attempted to terminate the trust pursuant to an agreement by which he was to derive some personal benefit, the attempted termination of the trust was void.

The trust agreement provides that the trustee may terminate the trust "if in the opinion of the trustee * * * it is wise and expedient so to do". It then proceeds to define the method of termination, which included the transfer and turning over of the trust property to the children of the trustee, the defendant, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, the issue of any of them deceased at the time of termination to take their parent's share.

This power, although denominated a power of termination, was in effect a power of appointment. Its effect was the same as if the trust agreement had provided that the trustee might appoint the property to the children and the issue of deceased children and that thereupon the trust should terminate. By terminating the trust, the trustee had the power to appoint outright to the children the principal which, after the death of the children, was given by the trust agreement to their issue.

Moreover, the power was not beneficial to the trustee. It could be exercised only for the benefit

of others. The trust instrument required, if the trust were terminated and as part of the act of termination, that the trustee should transfer and convey the trust property to the said Robert, Elizabeth and Helen, and the issue of any of them who might predecease such termination. It cannot be construed as conferring any right on the trustee to exercise the power in favor of himself or in any manner for his own benefit. He was required either to hold the property in trust or to transfer it to his children and the issue of any deceased children, in the same proportions as such children and issue were then entitled to receive the income from the trust estate.

This power of termination was given, not to a stranger, but to the trustee himself. The rules governing the conduct of a trustee apply to the execution of this power as much as to the exercise of any other power conferred upon a trustee.

The rule in equity, as established by many cases, is that the exercise of a power by a trustee is void when it is used for the benefit of the trustee, and this regardless of whether the trustee's motives in so exercising the power are laudable or otherwise.

> "The donee of a power cannot execute it in favor of himself or his family unless the terms of the power especially authorize him so to do." *Perry on Trusts,* 7th Edition, Volume 1, page 453.
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> "The donee of a power cannot execute it for any pecuniary gain directly, or indirectly, to himself." *Perry on Trusts,* 7th Edition, Volume 2, page 863.
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> "There is no doubt that a person having a power must execute it in good faith for the end and purposes designed, or the act of exe-

> cution will be void. * * * Where a power of appointment is given to a person for the benefit of others, any transaction between the donee of the power and the beneficiaries in pursuance of which the donee of the power is to exercise the appointment for his own benefit will vitiate such an appointment.'' 21 R. C. L., page 807.

The leading case in New Jersey on this subject is *Thomson's Executors* vs. *Norris* (20 N. J. E., 489). We quote from the opinion of Chief Justice BEASLEY at page 526 *et seq.*, as follows:

> ''Both the bill of complaint and the articles of agreement state that Mrs. Thomson consented to extinguish the power of appointment in consideration of the division of the residue of the estate, after the payment of specific and pecuniary legacies, by which division two-thirds of such residue became her own, absolutely. The children of the sisters of the testator are no parties to this contract. In considering the legal maxim involved it must be treated, then, as a case in which a donee of a power has agreed, for a benefit moving to herself, to surrender her right to appoint.
>
> ''Can any plausibility be given to such a claim? A power to appoint is not a technical trust it is true, because the possible beneficiary has not the capacity to call for its execution. But it has never been doubted that such a function was a confidence, and as such cannot be made the subject of barter. Courts of equity have very characteristically exercised the keenest vigilance over this class of agents. The principle which I regard as established is, that they shall gain no profit by force of their position. Any other rule would be impracticable. If it be lawful for the

donee of a power to bargain for his own personal ends with a part of the appointees to exercise his authority in a certain mode, or to stipulate with the heirs-at-law or the next of kin to disappoint the expectations of the appointees by a surrender of his power, it is obvious in numerous cases the bulk of the fiduciary property would enure to the benefit of the donees themselves. It is on this obvious ground that courts everywhere have been strenuous in enforcing the utmost good faith on the part of donees of powers. I think no case can be found in which such donee has been allowed to make his position, by any device, profitable to himself. * * *

"These authorities abundantly suffice to show that the principle is unquestionably established, that an appointment to further the selfish interest of the donee of the power will not stand. The doctrine rests upon the ground of the existence of constructive bad faith towards the donor of the power. And a gainful agreement to refrain altogether from the exercise of the power is necessarily equally fraudulent; it involves, no matter how pure the intentions of all parties may be, a constructive fraud. In *Cunynghame* vs. *Thurlow,* (note to *West* v. *Berney*), 1 Russ. & My. 431, the case of a release of a power to appoint was prevented, the donee gaining an advantage from such release. In this case, a fund was limited to a father for life, with remainder to his children in such shares as he should appoint, and in default of appointment, to the children equally; the father released the power as to a portion of the fund, so as to vest a share of it in himself, as executor of a deceased son, who in default of appointment, took a vested interest, but the court refused to order the transfer of this share to the father. It will be observed that in the

case cited the father had the undoubted right to extinguish his power of appointment; but as he did this in consideration of a benefit to himself the act was declared illegal. The principle of this case applies, with entire aptness, to the facts contained in the bill now before this court. I feel constrained to say, therefore, that in my opinion, a court of equity cannot sanction the contract which these parties have entered into, on any of the principles which usually regulate the relations of parties having an interest under a power of appointment. *And as an evidence of the strength of my own conviction on this subject, I may remark that I have been led to this result notwithstanding my most perfect confidence that the agreement thus impeached in point of law, has been entered into in entire good faith by all the parties to it. I am entirely satisfied that the interest of the other appointees has not in the least degree been sacrificed, but has been scrupulously considered. Nor have I entertained the faintest suspicion that the donee of the power in this case has taken any advantage whatever of the position in which she was placed by her husband. I am persuaded that the agreement in question was intended to be, what it purports to be, a fair family settlement. My difficulty has been to find any legal general ground of equity on which to rest a claim in favor of the case made by the bill.''* (Italics ours.)

It required a special act of the legislature to give validity to the agreement to extinguish the power there in question (see p. 529 of that opinion).

This great principle of equity, so eloquently expounded by Chief Justice Beasley, to prevent the temptation of self-interest from entering into

the exercise of a power either by a trustee or the donee of such a power, should be maintained in all its integrity.

The exercise of powers, analogous to that with which we are now dealing, has been considered many times by many courts. They have without exception applied this principle and declared void any attempted exercise of such a power as soon as they have discerned that, through the attempted exercise, the donee of such a power has secured any benefit or advantage. This is so notwithstanding the remoteness of the benefit secured by the donee, and without regard to the device employed by the donee to secure such advantage. We shall briefly review some of the authorities dealing with this subject.

> "The whole transaction is an agreement between the husband and wife. No point is better established than that a person having a power must execute it bona fide for the end designed, otherwise it is corrupt and void. The power here was intended for a jointure, not to pay the husband's debts. The motive that induced Edmund to execute it was not a provision for his wife. * * * If a father has a power to appoint amongst children and agrees with one of them for a sum of money to appoint him the appointment would be void." *Aleyn* vs. *Belcheir,* 1 Eden 132, English Reports Reprint, Volume 28, page 634.

In *Cunninghame* vs. *Anstruther,* L. R. 2 H. L. Sc. 223, 21 Eng. Rul. Cas. 512, the syllabus reads:

> "Where a father was by his marriage settlement empowered to divide at discretion the funds in which the children had an expectant interest—held that he could not deal or negotiate with them in executing the power."

In this case, it appeared that a father bought the interest of his children in the exercise of a power of appointment. The release given by the children was declared invalid.

In *re Kirwan,* L. R. 25 Ch. Div. 373; 52 L. J. Ch. N. S. 952; 49 L. J. N. S., 292, the following facts were presented. A decedent had a power of appointment among his children as he should see fit. He had two children. When his daughter married he appointed in favor of her in consideration of her marriage with the understanding that if his wife should survive him, part of the property appointed should be set aside for a trust for the remainder of her life for her support and at her death revert to his daughter. Also in a codicil to his will he restated these arrangements and stated that if the trust for his wife wasn't carried out, then his son should have one-half of the property so appointed.

> KAY, *J.,* said: "It is clear that the codicil is a void appointment in equity, that is to say supposing it to be otherwise a good appointment, equity would not allow it to stand because it proceeds upon a bargain which is contrary to the nature of the power. The same is to be said of the appointment made by the settlement."

In *Cooper* vs. *Cooper,* L. R. 8 Eq. 312 (at 321), it appeared that certain property was settled in pursuance of a marriage settlement agreement upon A and B in trust for themselves and their children, their children's interest to be appointed by the parents. Upon the marriage of two of the children, articles of agreement were entered into whereby the property subject to the original trust was subjected to a further trust for the

children in pursuance of the power of appointment in the parents. They, however, stipulated that in the event of there being no issue of the marriage of the children, the fund should revert to them. In other words, there was a possibility of the power of appointment being exercised so as to benefit the donees in power. As to this, the Court said:

> "The sinister purpose is that, that it was agreed by those articles of agreement that there should be a marriage settlement, by which in certain not very probable events, or a remote event at all events, the fund so appointed should come back to the father. The fund was settled on the daughter for life with remainder to the husband for life, remainder to the children and issue of the marriage, and then an ultimate trust in default of issue to the donee of the power, the appointor, which, no doubt, if it stood alone would be a very grave ground for impeaching the settlement. I do not mean in the slightest degree to question those cases which hold that if a donee of a power directly or indirectly seeks for himself a personal benefit by reason of the execution of the power, that will not do."

In *Bostick* vs. *Winton,* 33 Tenn. 524 (at 539), the following were the facts. A father had left property in trust for his son with power of appointment by deed or will among the sons' children. The donee of the power conveyed the property to one son to the exclusion of his other children in order that the son might be in a position to supply bail to the father who was confined on a murder charge. A suit was thereafter instituted to determine the validity of the execution of the power. The court held that the exercise of said power was invalid, saying:

"Then was this power so exercised as to pass the estate to John G. and defeat the contingent remainder to the complainants? The question is answered in Story's Eq. S. 255: "A person having a power of appointment for the benefit of others, shall not by any contrivance use it for his own benefit. Thus if a parent has power to appoint to such of his children as he may choose, he shall not, by exercising it in favor of a child in consumption, gain the benefit of it himself, or by a secret agreement with the child in whose favor he makes it, derive a beneficial interest from the execution of it."

"This position is well sustained by the cases referred to by the commentator, and we regard it as unquestionable law. In the case before us, the power was avowedly exercised in favor of John G. for the benefit of Littleberry, and was to enable him, by becoming the owner of the land, to become security or bail, for the fees. It was then a fraud upon the power, and cannot be maintained. It did not therefore disturb, or in the least affect the rights of complainants which depended upon the contingency of a valid and bona fide exercise of the power."

In *Cruse* vs. *McKee,* 39 Tenn. 1 (at 5), it appeared that a decedent had left property in trust during the lifetime of his wife and had given her a power of appointment among "Any one or more of my children she may think proper at her decease." Although there was apparently no benefit to the widow in the exercise by her of power of appointment, the court nevertheless entered into the following discussion:

"There is no doubt but that a person having a power, must execute it in good faith for

the end and purposes designed, or it will be void. In the leading case of *Aleyn* vs. *Belcher,* 1 White and Tudor, 290, this principle is illustrated, and in the notes, the cases are collected. In that case, the power of appointing was given, but it was exercised in favor of the wife, upon an agreement on her part that she should receive only a part as an annuity, and that the residue should be applied to the payment of the husband's debts. This was held to be a fraud upon the power, and set aside, except so far as related to the annuity. A Court of Equity will guard the exercise of these powers, so as to prevent any fraud upon the donor of the power. In all cases where a discretion is given in the selection of the objects amongst a class, good faith must be observed, and if discriminations are made to secure advantage to the trustee himself, or a stranger, his act will be held vicious and corrupt. If there be a secret understanding that the appointee shall assign a part of the fund to a stranger, or pay the debts of the appointor, or loan him the fund, the appointment would, thereby, be vitiated and declared void. Notes to the same case, 295, citing 8 Iredell's Eq. R. 55, 59; 1 Sim. 343, and other authorities; also *Bostick* v. *Winton,* 1 Sneed, 538. Any exercise of such a power in fraud of the original intention with which the power was created, would, in equity, render the appointment void."

In *Holt* vs. *Hogan,* 58 N. C. R. 82 (at 87), the following facts were presented. A decedent had left the residue of his estate in trust during the life of his wife with the privilege to her of disposing of the same by will or otherwise among her children. Thereafter she entered into an

agreement with a son, as to which the court made the following observations:

> "The compromise shows, that in order to relieve herself from a liability to Pleasant, which he was about to enforce by suit, she agreed so to exercise the power as to give him a double share; and, in pursuance of that agreement, she does give him a double share. It is settled that a person having a power of appointment for the benefit of others, is not at liberty to use it for his own benefit; and, if he does so, it makes the exercise of the power entirely inoperative. Thus, if a parent has a power of appointment to such of his children as he may choose, he cannot appoint it to one of the children upon a bargain *beforehand* for his own benefit; Adams' Eq. 185. The grounds upon which this doctrine is based, are too obvious to require comment, and its application to the case under consideration, is manifest."

In *Ferre* vs. *American Board,* 53 Vt. 162 (at 172), it appeared that a decedent gave a life estate in certain lands to his wife, with the remainder to the American Foreign Missionary Society, including a further direction to the executors to sell so much of the land as might be necessary for the support of the said wife and decedent's mother. He named his dead wife and his brother, his executors. After the death of the co-executor, the said wife, conveyed portions of the land to another, for what appeared to be a valid consideration, but upon her death the remainderman corporation moved to have the exercise of the power set aside. The court held that the deed so executed by the wife was void on several grounds,

among which were the fact that she was in effect exercising the power in favor of herself. The court said:

> "It is well established, that a power cannot be executed in favor of the donee of the power or of his family unless the instrument specially authorized him so to do. The donee of a power cannot exercise it for any pecuniary gain directly or indirectly to himself. Nor can he exercise it for any other purpose personal to himself. The will authorized the two to execute the power on the happening of the contingency named, but does not authorize Miriam Stickles (the wife) if she should survive James to execute it in her own behalf."

See also Note 64 L. R. A., at page 910.

The Court of Appeals of Kentucky, in *Chenoweth, et al.* v. *Bullitt, et al.*, 6 S. W. 2nd Series, 1061, held to the view that an exercise of a power of appointment for an advantage to accrue to the appointor, was fraudulent, since the power is in the nature of a trust. In support of its conclusion, the court referred to many other authorities bearing upon this subject, saying at page 1064:

> In Bispham's Principles of Equity, § 256, it is said:
>
> " 'If a power is not exercised in good faith and for the purposes for which it was created, its exercise will be deemed fraudulent in equity and will be set aside upon a bill filled by a party in interest. A case in which a power is thus improperly exercised is said to be a case of "a fraud upon the power". The plainest case of a fraud upon a power is where

the power is exercised for the personal advantage of the appointer'.

"In *Degman* v. *Degman,* 98 Ky. 717, 34 S. W. 523, 17 Ky. Law Rep. 1310, this Court expressed the rule thus:

" 'It is likewise well settled that the power of appointment must be exercised for the benefit of the parties entitled thereto, and not with a view of benefiting the appointor or donee of the power to appoint, and that an appointment or division made for the purpose of benefiting the appointor is in law fraudulent and void.' "

Also, on page 1067, the court quoted from the opinion of SUGDEN (then Lord St. Leonards) in his opinion in *Duke of Portland* v. *Lady Mary E. Topham,* 11 H. C. L. 32, 11 English Reprint 1242, as follows:

" 'A party having a power like this must fairly and honestly execute it without having any ulterior object to be accomplished. He cannot carry into execution any indirect object or acquire any benefit for himself directly or indirectly. It may be subject to limitations and directions, but it must be a pure, straightforward, honest dedication of the property as property to the person whom he affects or attempted to give it in that character.' "

Further, on page 1067 is found the following quotation from *In re Cohen,* 1911 L. R. 1 Ch. 37:

" 'There is no doubt that, where an appointment is made for the benefit of the appointor, that appointment may be a fraud upon or an abuse of the power, even though there

> may have been no bargain between the appointor and appointee and no previous communication to the appointee of any intention that the appointee should apply the appointed fund in any way at variance with the terms or objects of the power.' ''

Also, on page 1068:

> ''The case of in re Wright [1920] L. R., 1 Ch. 108, probably falls under the classification of a bargain behind; but in that case the court said:
>
> '' 'What the court looks to is the intention or purpose of the appointor in making the appointment, and, if it can be shown that the intention or purpose of the appointor was such that if it were carried out it would operate as a fraud on the donor of the power in the sense of benefiting some person not an object of the power, the court will avoid the appointment, though the appointee was no party to and did not know of the corrupt intention or purpose, and although the corrupt intention or purpose in fact fails to take effect.' ''

The facts in the case at bar definitely establish that the trustee exercised the power of termination pursuant to an agreement previously entered into with his children, under which they agreed that he should retain, individually and in his own right, and free from the trust, a large proportion of the trust estate.

By stipulation, the parties have agreed as to the accuracy of the balance sheet of The Industrial Press, which shows as of May 15, 1930, the

date of the attempted exercise of the power of termination, as follows:

Surplus	$969,892.82	
Capital Stock	540,000.00	
		$1,509,892.82
Preferred Stock		
2,460 shares at $100.00		246,000.00
Net Value of Common Stock		$1,263,892.82
Deduct value of securities to be transferred to new trust as per list of June 13, 1930 (Exhibit D-8)		756,234.25
		$ 507,658.57

The total amount of common stock issued was 2,767 shares, of which the trust held 2,753. So that, in carrying out the proposed plan, the trust fund would have been depleted by practically $500,000.00.

Even if we eliminate from consideration the item of good-will, carried on the balance sheet at $300,000.00, the loss to the trust would have been approximately $200,000.00. From any point of view, the plan of divorcing the business from the trust entailed a loss to the trust of a very substantial sum.

Moreover, the evidence clearly establishes that it was the definite intent and purpose of Alexander Luchars to vest in himself, freed from the trust, the common stock of The Industrial Press after the $750,000 of securities had been transferred from that business to another corporation. He was careful to see that no slip might occur to prevent his owning that common stock after the termination of the trust.

Mr. E. A. Becker was the treasurer of The In-

dustrial Press, and also acted as a financial adviser to Mr. Luchars and discussed with him his personal matters (p. 86). He testified that he had discussed with Mr. Luchars the matter of the reorganization of The Industrial Press, and that he had prepared memoranda with reference thereto and discussed these with Mr. Luchars (p. 95). In one of these memoranda, addressed to Mr. Luchars and dated January 8, 1930, the following is stated (pp. 139, 140):

> "When No. 1 (organization of New Jersey corporation) has been accomplished, dissolve the present trust in due legal form, being careful to get full releases from all beneficiaries. Then have it understood with the beneficiaries that they transfer to Mr. A. Luchars their holdings in The Industrial Press. * * *"
>
> "If there are no legal hitches and if the suggested plans are put in operation, the situation will be: * * *
>
> "2. Mr. A. Luchars will own all of the common stock of The Industrial Press now held by him as Trustee, and will be in a position to make any changes in the capital structure of The Industrial Press he deems advisable."
>
> Exhibit D-2 (State of Case, page 139, line 26).

On April 23, 1930, Mr. Luchars wrote to his attorney, Mr. Amos L. Taylor of Boston, asking his opinion concerning certain aspects of the plan of reorganization, and enclosed in that letter a full outline of his plan (pp. 79, 80, 81, 82, 83). The memorandum concludes as follows (p. 83):

> "The situation then will be:
>
> "1. The new Trust, instead of holding the common stock of The Industrial Press as the

old Trust did, will hold the stock of the New Jersey corporation, whose entire net worth consists of marketable securities.

"2. I will own the common stock of The Industrial Press formerly held by the Trust."

Having adopted the plan, he proceeded to secure the consent and agreement of his children to the consummation thereof, and he did not proceed to terminate the trust until he had a definite understanding with his children with respect to the whole plan, and specifically that after it had been carried out he should own, in his own right, the common stock of The Industrial Press. Each of the children testified to this effect. Testimony of Mr. Robert B. Luchars (p. 107, line 22, *et seq.*).

Testimony of Elizabeth Y. Urban, page 116, line 37, *et seq.*

Testimony of Helen L. Ketchum testified, page 120, line 38.

See also letters to his daughters, Exhibit D-6, D-7 and D-8, pp. 145, 146, 147.

Having secured the consent of his children, Alexander Luchars had his counsel prepare an instrument of termination, attached to it a waiver and consent to the transfer of the stock to him personally, and sent it to them for signature.

Although Mr. Luchars' letter to Mrs. Ketchum, transmitting the revocation of trust for signature (Exhibit D-7, p. 146), speaks of it as having been signed by Mr. Luchars, both Mrs. Ketchum and Mrs. Urban testified that their recollection was that their father had not signed it before they signed the waiver subjoined thereto (p. 117, lines 11-17 and p. 123, lines 26-28).

After the waiver and instrument of termination had been signed, the stock was transferred on the books of the company to the name of Alexander Luchars and he received the dividends and acted as sole owner thereafter until his death. Mr. Becker's testimony, p. 102, lines 8-15.

In connection with the execution of other powers, the courts of New Jersey have rigidly applied the rule that, any exercise of a power pursuant to which the trustee may gain any personal advantage, will be set aside at the instance of a beneficiary of the trust.

> "The rule is one of public policy. The trustee is not prevented from bidding for property which he himself sells, on the ground simply of a supposition of actual fraud, but because the law has established, as an inflexible rule, applicable to every emergency, that he shall not place himself in a situation in which he will be tempted to take advantage of his *cestui que* trust. This is a wise public regulation, intended to protect a species of property, which, otherwise would be constantly exposed to peculiar hazard. The trustee, therefore, must submit to this regulation, and if he does an act in violation of it, no matter how pure his intention may be, such act is voidable at the instance of the person whom he represents. * * * The *cestui que* trust is not bound to prove that the trustee has made a bargain advantageous to himself." *Staats* vs. *Bergen,* 17 N. J. E. 554, 558.

> "When such private interests and trust duties conflict in a single person, it is the defined policy of the law to set aside in behalf of the beneficiaries of the trust all trans-

actions whereby the trustee has acquired title to property over which the trust duly extended even though it may be found that the transaction has been without thought of wrong and beneficial to the beneficiary under the trust, public policy requires that the transaction be held to be voidable, at the instance of the *cestui que* trust for the defined policy of the law arises from the necessity of removing temptations for self gain from all persons having trust duties to perform." *Van Alsyne* vs. *Brown,* 77 N. J. E., 455, 458.

"The established policy of the law is that a trustee shall not make a penny-piece of personal profit out of his trust, and the rule, based upon this salutary policy, is inexorable, and the courts tolerate not the least encroachment, whatever the circumstance may be. The duty of a fiduciary first and all the time is to his trust. It is not only foremost, but his self-interest must be entirely eliminated. It would be a difficult task to find in the books a principle more uniformly upheld and rigorously enforced than the one that a trustee shall not enrich himself by the use of his trust." (Citing cases.) *Keely* vs. *Black,* 90 N. J. E. 439.

See also *Hill* vs. *Hill,* 79 N. J. E. 521.

The good motives of the donee of such a power are of no significance, if, as a result of the execution thereof, he secures any personal benefit or advantage.

It has been urged by the complainant that in so planning the reorganization of The Industrial Press, and the reconstitution of the trust, Alexander Luchars was motivated solely by the desire to secure the greatest benefit for his chil-

dren and grandchildren; that he had no selfish desire to secure a benefit for himself. It is asserted, first, that Mr. Luchars deemed it highly desirable that the trust should be entirely divorced from the business; that he believed that his children and grandchildren would be assured of a much more permanent and lasting benefit if the trust consisted solely of securities having a sound market value, and was relieved of the liabilities which might attach to an active publishing business such as that conducted by The Industrial Press; second, that he deemed it unwise that a corporate trustee should have any voice in the management of the active publishing business of The Industrial Press.

These matters were testified to at some length by Robert B. Luchars, one of the children (p. 105, line 30 *et seq.;* p. 106, lines 1-18). This purpose of Mr. Luchars is also set forth in the memorandum of January 8, 1930, stating the objectives of the contemplated plan (Exhibit D-2, p. 139); in the letter to Mrs. Urban (D-8, p. 147) and in the memorandum which he sent to Mr. Taylor (p. 82, line 30 *et seq.*).

There is no desire on our part to dispute these assertions or to suggest for a moment that Mr. Luchars was not actuated by the loftiest motives, but those motives are entirely unavailing. The evidence clearly establishes that it was Mr. Luchars' definite intent to secure the undisputed ownership of the stock of The Industrial Press after $750,000 of securities had been divorced from it. Undoubtedly he believes that he could secure greater benefits for his children if he owned that stock absolutely and free from the trust, and thus continue in the active control of the business of The Industrial Press. That, however, cannot relieve him from the operation of those

principles of equity which have been heretofore enunciated.

If his motive was only to secure for his children and grandchildren a trust which should not be subject to the vicissitudes of an active publishing business, he could have accomplished this purpose by causing The Industrial Press to be reorganized, and the marketable securities, held in its reserve, transferred to a separate corporation. It was not necessary that the trust should be terminated in order to accomplish this. The old trust would have been protected as well if this plan of reorganization had been consummated while he held the stock as trustee, in which event the trust would have consisted of the stock of the new corporation, as well as the stock of The Industrial Press. The failure of The Industrial Press would not have resulted in a failure of the new corporation, any more than the failure of The Industrial Press today would affect the Industrial Corporation of New Jersey. But this would not have accomplished his purpose which involved the securing of the ownership of the stock of The Industrial Press entirely free from the trust. Moreover, if he had deemed it desirable, he could have terminated the trust and transferred the stock of The Industrial Press to his children. It may be that he could have so transferred it to them subject to an agreement that they would place in trust the stock of the new corporation after the plan of reorganization had been consummated. But he did none of these things. The whole plan involved the ownership by him, free from the trust, of the stock of The Industrial Press, thus vesting in him the control of the active operations of that company. He retained that stock so long as he lived.

The courts will not and cannot consider why he wished to secure and retain the ownership of this stock. They will not endeavor to delve into his motives for the purpose of ascertaining whether he was persuaded that he could manage that business better than his children and in the end confer greater benefits upon them. They will accept the facts as they find them, and apply the principles of law and equity to those facts.

In *Thomson's Executors* v. *Norris, supra,* Chief Justice BEASLEY expressly stated that he had the "most perfect confidence that the agreement" which he condemned had "been entered into in entire good faith by all the parties to it". He further stated: "I am entirely satisfied that the interest of the other appointees has not in the least degree been sacrificed, but has been scrupulously considered. Nor have I entertained the faintest suspicion that the donee of the power in this case has taken any advantage whatever of the position in which she was placed by her husband. I am persuaded that the agreement in question was intended to be, what it purports to be, a fair family settlement." But, nevertheless, he condemned it and said that it could not be sustained under the principles of equity, concluding his remarks upon this branch of the case by saying:

> "My difficulty has been to find any legal ground of equity on which to rest a claim in favor of the case made by the bill."

As we have heretofore pointed out, these principles which require that, in executing a power, a trustee shall never be permitted to secure a personal advantage, have universal application. The courts have recognized that it is impossible to

plumb the mind and conscience of a trustee for the purpose of determining whether the motives were good or bad, and have stated that the value of the rule lies in its rigidity; that once it is determined that possibly conflicting interests of the trustee were such that in exercising the power he might have secured some advantage for himself, the inquiry stops there, and that they will not endeavor to ascertain whether the trustee did secure such an advantage, but will, upon the request of any interested party, set aside the transaction.

As applied to powers of appointment, this thought was clearly expressed by Chief Justice Beasley as heretofore stated. It was also expressed by the highest court of Kentucky in *Chenoweth* v. *Bullitt, supra,* wherein, at page 1067, it is stated:

> "*While it is true that the courts will not inquire into the motive which actuated the donee of a power in its exercise,* yet they will inquire into the intention of the donee in such exercise; * * * if it is plain that the intention of the donee in the exercise of the power is not to benefit the appointee unless and except benefit to himself or to someone not an object of the power result, then the appointment itself is bad." (Italics ours.)

As applied to the execution of other trust powers, it was stated by Mr. Justice Knapp in *Marshall* v. *Carson,* 38 N. J. Eq. 250, 252, as follows:

> "It (the rule) recognizes the difficulty, if not impossibility, of tracing actual fraud in every case, and the frequent failure of justice and success of wrong that must be consequent thereon, and it attempts to apply a method that will remove all temptation from the mind of the trustee to profit by infidelity

> in the discharge of trust duties of every sort, and which will remove all inducement to act otherwise than faithfully toward the beneficiary, by *utterly refusing to consider the question of good or bad faith,* and holding the trustee, who attempts to deal with the trust property as an individual, to all the chances of loss and denying to him all possible gain." (Italics ours.)

Judge ANDREWS of the Court of Appeals of New York, in *Munson, et al.* v. *S. G. & C. R. R. Co., et al.,* 103 N. Y. 58, 73, expressed this principle in forceful and unmistakable language, saying:

> "He (Munson) stood in the attitude of selling as owner and purchasing as trustee. The law permits no one to act in such inconsistent relations. *It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed,* and sets aside the transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, *without undertaking to deal with the question of abstract justice in the particular case.* It prevents frauds by making them as far as may be impossible, knowing that *real motives often elude the most searching inquiries, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages,* whether a contract made under such circumstances shall stand or fall. * * * The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry, in an action by the trustee in his private capacity, to enforce the contract in the making of which he participated. *The value of the rule of equity, to which we have averted, lies to a great extent in its stubborn-*

> *ness and inflexibility.* Its rigidity gives it one of its chief uses as a preventative or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating, without attempt at discrimination, all transactions from which they assume the dual character of principal and representative." (Italics ours.)

It having been established that Alexander Luchars received a benefit from the attempted execution of the power of termination, the transaction must be set aside upon the request of the infant remaindermen, who were not and could not be parties to it. Once having established the benefit to the trustee, no further inquiry into his motives or the advantages or disadvantages resulting from the attempted execution of the power is within the province of the Court. The inquiry closes with the establishment of profit to the trustee regardless of the device used, the relationship of the parties, or even the possibility of ultimately greater advantage to those in interest.

The rules controlling the conduct of trustees which have been erected by courts of equity and have been enforced for countless years, should be upheld, and not be undermined by the "disintegrating erosion" of particular exception.

The necessity of courts of equity being ever on their guard against the relaxation of the great principles of equity applicable to trustees was forcefully expressed by Mr. Justice Cardozo in a recent case in the New York Court of Appeals. He said in *Meinhard* v. *Salmon,* 249 N. Y. 458, 464:

> "Many forms of conduct permissible in a workaday world for those acting at arm's

> length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (*Wendt* v. *Fischer,* 243 N. Y. 439, 444). Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this Court.''

The equity reports of this state present a record of faithful adherence to these great principles of equity, and of their wise development. We are confident that this court will preserve these principles in all their vitality and integrity.

The attempted execution of the power of termination should be set aside upon the request of these infant remaindermen.

These appellants are the grandchildren of Alexander Luchars. They are the children of his daughters, Helen L. Ketchum and Elizabeth Y. Urban. As such, they have a vested interest in the property constituting the trust. *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. E. 475.

This interest was subject to partial divestment by the birth of other grandchildren. It was also subject to divestment upon the valid exercise of the power of termination.

> ''The intervention of a power of appointment, whether the estate be real or personal,

> and whether the power be merely to distribute or fix shares, or to select and exclude any of the objects of a class, and whether the power be general or special, will not prevent the vesting of an estate given in default of the exercise of the power, if apart from the existence of the power, the estate would be a vested estate. In such cases the estate will vest subject to be divested by the exercise of the power."
>
> *Sanford* vs. *Blake,* 45 N. J. E. at 250.

The grandchildren having vested interests in the trust estate, those interests could only be divested in the manner prescribed in the trust agreement, *i. e.,* through the valid exercise of the power of termination. Being infants, neither they nor anyone acting in their behalf could effectively waive any requirement of the trust instrument concerning the manner in which such trust should be terminated.

Therefore, the attempted execution of that power should be declared void upon their demand.

POINT II.

The fact that the children of Alexander Luchars, the donors of the trust, consented to the termination thereof, and the receipt of trust property by him, does not validate his acts or mitigate the application of the equitable doctrine declaring these acts to be void.

It appears from the opinion of the Vice-Chancellor, that he recognized in some degree, the doctrine of the authorities heretofore cited,

but held them inapplicable on the ground that the children of Alexander Luchars, the settlors of the trust and donors of the power of termination, had fully consented to the action of the trustee. He quoted with approval from *Thomson's Executors* v. *Norris,* 20 N. J. E. 489, "The doctrine rests upon the ground of constructive bad faith towards the donor of the power. * * *" The Vice-Chancellor then asserted: "It follows naturally and logically that if the arrangement is made with the knowledge and consent of the donor of the power, this principle cannot apply." This is the sole ground upon which the Vice-Chancellor refused to declare void the attempted execution of the power of termination. It is a frail foundation upon which to repudiate a doctrine of such strength and antiquity, as that which is here involved.

We submit that this view of the Vice-Chancellor is utterly unsound and will not bear even casual analysis.

Let us first consider what the court meant by the statement quoted from *Thomson's Executors* v. *Norris.* In that case the power had been created by will. The donor of the power was dead. His wishes and purpose in creating the power were irrevocably and unalterably expressed and declared in his will. The fraud or bad faith toward the donor, to which the court referred, was the violation of the purpose and intent of the donor in creating the power as thus expressed in his will.

Precisely the same doctrine applied where a power is created by deed *inter vivos.* Unless the deed or declaration of trust is revocable at the will of the donor, his purpose and intent in creating the power are irrevocable and unalterably

expressed in that deed or declaration. Once the deed or declaration is executed he has no greater power to change that purpose and intent than he has to revoke the trust or otherwise interfere with or change the rights which, by the deed or declaration, he has conferred upon the beneficiaries.

Unless the settlor reserves the right so to do, after he has executed such a deed or declaration of trust, he has no greater power to alter or affect the rights which he has conferred or the duties therein imposed upon the trustee, than a stranger. This is elementary. It is true whether the rights are conferred directly by the deed or declaration or are to arise, or are made contingent, upon the exercise of a power created by such deed or declaration. The power thus created can no more be altered or affected by the donor thereof, than any other estate or right created by the deed or declaration.

Though the settlor's wishes may change, except to the extent that he has expressly reserved the power to do so, he may not vary or alter any right or estate created. If the deed or declaration directs the payment of money to A and the trustee pays it to B, such payment will be a violation of the trust and a fraud upon the donor, although the donor may expressly request that the payment be made to B. This is so because the intent of the donor to confer the benefit upon A has been unalterably expressed in the deed or declaration.

By the same token, if the trustee is given power to appoint property to A and B and he appoints the property to C or to himself, or to A or B in consideration of an agreement to pay a part thereof to him, such action is still a violation of his

trust and a fraud upon the donor, although the donor may expressly request that the trustee should so act. It would be equally fraudulent should the trustee appoint the property, not to A or B, but to the donor of the power himself. It would still be a fraud on the donor, as that expression is used in the authorities. The fraud consists in the violation of the purpose and intent of the donor at the time of the creation of the power, and as expressed in the deed or declaration of trust, not the intent or wish of the donor at the time of its execution.

That it is the intent of the donor of the power at the time of its creation which is controlling was clearly stated in *Cruse* v. *McKee, supra.* The court said: "A court of equity will guard the exercise of these powers. so as to prevent any fraud upon the donor of the power", but added: "*Any exercise of such a power in fraud of the original intention with which the power was created, would, in equity, render the appointment void.*"

This was recognized also by the courts of Pennsylvania in *Slifer* v. *Beates,* 9 Sergeant & Rawles Reports, 166. There the court was called upon to consider a faulty execution of a power. Although it was the donor of the power who had attempted to execute it, the court held that this could not alter the requirement that the power should be executed in the manner prescribed in the trust instrument, saying at page 181:

> "Where forms are imposed on the execution of a power, the circumstances must be strictly adhered to: and where a man imposes them on himself, the court cannot dispense with the forms and solemnities he has required. To do so, would be to deprive a man of the bridle he has thought proper to im-

> pose on his weakness or frailty of mind, to take from his friends the reins he has put into their hands, to restrain him in his moments of intemperance, folly and thoughtfulness, from making beggars of his children, and stripping his heirs of that which came to him from their common ancestor. *Sugden's Powers,* 211, 213."
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> * * * * * *

The foregoing seems obvious, but let us test the doctrine promulgated by the Vice-Chancellor by considering its implications and the paths and wilderness to which it leads.

Suppose that the trust had been established by Alexander Luchars instead of by his children, that he had executed a declaration of trust with respect to the securities found in his hands as trustee at the time of the termination thereof. In view of the fact that he was both the donor and trustee, it would follow, were the doctrine sound, that nothing he could do could be deemed a fraud upon himself. If he had power to sell property of the trust estate, it would follow that he could sell to himself at such price as he might choose. If he had power to appoint property among his children, he could appoint the property to any one of them in consideration of their re-transferring either all or a part of the property to himself.

A somewhat similar situation was presented. *Easley* vs. *Little,* 145 N. E. 625 (Illinois). In that case, Sarah Little conveyed the title to certain property to one Josephine Little, an infant, reserving to herself a life estate and the power to sell and dispose of the estate if she desired. Subsequently she did execute a warranty deed to one Capps for the expressed consideration of $2,000.00, and on the same date Capps reconveyed to Sarah Little the same premises for the same ex-

pressed consideration. Upon the death of Sarah Little, her heirs claimed title under the conveyance by Capps, and Josephine Little claimed under the original deed to her. The court found the transaction with Capps and the conveyances void, saying in part:

> "It is clear that the deed to Capps and the deed from him back to Mrs. Little were both without any real consideration, and were made solely for the purpose of trying to revest the title in Mrs. Little and defeat the estate conveyed to appellant (Josephine Little). This was not an exercise of the power reserved in Mrs. Little's deed to appellant to sell and dispose of the property. The grantor having divested herself of the fee to the property, unless she exercised the power reserved to sell and dispose of it, she could not convey it as a gift to her son-in-law, and then have him reconvey it to her without consideration. The deeds, therefore, were void. * * *"

If the courts had there applied the doctrine here enunciated by the Vice-Chancellor, they must have reached a contrary conclusion. Since Sarah Little had created the power it would follow that she had the right to execute as she chose. There could be no constructive fraud against her, for she consented to it and performed the act for herself.

The fraud in the Little case was directed to the estate of the beneficiary who could not be divested of her property, save by a proper exercise of the power in accordance with the intention of the grantor as expressed in the deed in which she reserved that power.

In the instant case, the trustee was given full

power to buy and sell property for the trust estate. Would the fact that he bought and sold from his children, the settlors, relieve him from the necessity of exercising his own discretion in good faith in making such investments? Suppose his children had come to him and said: "The stock in The Industrial Press which you now hold is worth a million dollars, please sell it to us for a half million." Could it be argued that, because the trustee dealt with the settlors, the trustee would not commit a fraud by selling the property to the children at half its value, thus defeating the trust to that extent?

While the courts have occasionally attempted to explain their condemnation of an abusive execution of a power, by saying that such execution would be fraudulent as against the donor, it is obvious that they have meant that the abusive exercise of the power is in fraud of the rights of the beneficiaries of the trust as expressed and declared in the trust instrument, and is therefore in fraud of the purpose and intent of the donor as expressed and declared therein.

An examination of the authorities cited in Point I of this brief demonstrates that this is the meaning of the courts.

We submit that, after the execution of a deed or declaration of trust, except to the extent that the donor thereof has expressly reserved the right and power to give validity to the acts of the trustee by giving his consent thereto, the donor's consent to a breach of the duties and obligations of the trustee can have no other or different effect than the consent of an entire stranger to the trust.

There having been no such power reserved in the deed of trust, it follows that the acts of Alex-

ander Luchars must be judged in precisely the same manner, as if the trust had been created by a third person. The fact that it was his children who created the trust, does not alter the fact that the deed of trust required that upon the termination thereof, the property should be transferred to them, and that he executed the power of termination only in pursuance of a plan and agreement that part of the property should be transferred to him freed of the trust.

Unless the principles of equity, which have been erected to prevent the temptation of self-interest from entering into the execution of discretionary powers by a trustee, are to be utterly disregarded, this attempted termination of the trust by Alexander Luchars cannot be permitted to stand.

The consent of the children to the termination of the trust is unavailing, for the objection that the power was executed by the trustee for his own benefit cannot be waived by one participating in the benefit arising therefrom. This rule was definitely stated by the court in *McQueen* v. *Farquhar,* 11 Ves. 567, Eng. Rep. Vol. 32, p. 1168:

> "But it is stated, that if a person executes a power for his own benefit, that is an objection that cannot be waived by a person participating in the benefit arising from the transaction; and therefore the circumstances that the eldest son waives the objection, is not sufficient, if the younger children are discontented; for they are entitled to the benefit of the settlement; unless the interest, vested in them, has been dislodged and devested. It is truly said, this Court will not permit a party to execute a power for his own benefit."

POINT III.

Equity should not grant the relief prayed for by complainant or attempt to remedy the defect in the execution of the power of termination. The trust was not terminated as required by the trust instrument.

There was a defect in the attempted exercise of the power of termination. This is not disputed; but it is urged that a court of equity may and should relieve the parties of their admitted mistake in referring to another trust in the instrument of termination.

At law, the instrument of termination is ineffective, so far as the trust in question is concerned. It is only through the extraordinary powers of a court of equity that the parties may be relieved of their mistake. At law, Alexander Luchars was still chargeable with the trust property at the time of his death.

We submit that the circumstances in the instant case are not such as to lead a court of equity to interpose its extraordinary powers, but should leave the parties where it finds them and declare that at his death Alexander Luchars held the property as trustee. There are two reasons leading to this conclusion. First, because the trustee derived a personal benefit pursuant to the agreement and understanding which he entered into before attempting to terminate the trust. Second, the attempted execution of the trust was defective, in that the trustee failed to fulfill the prescribed requirements for such termination. We shall here discuss only the defective execution of the power.

In saying that there was a defective exercise of the power of termination, we refer not only to the mistake in the instrument of termination. This was serious, but of more importance was the entire disregard of the requirement that the trust property should be transferred and turned over to the beneficiaries entitled thereto upon and as part of such termination.

The trust instrument prescribed in detail precisely the acts which were to be done to terminate the trust. These were as follows:

> (1) The trustee was required to sign an instrument of termination, copies of which were to be delivered (or mailed post-paid) to each beneficiary then entitled to receive income.
>
> (2) The trustee was also required to transfer, turn over and convey the principal and undistributed income to the children, Helen, Elizabeth and Robert, the issue of any deceased child to take the parents' share, in the proportions in which they were then entitled to the income of the trust.

No attempt was made to comply with this second provision. We submit that it was an essential element of the valid termination of the trust and that a waiver of the right to receive the property was ineffective. We shall discuss this further hereafter.

It may be stated generally that powers in trust can be executed only in the mode, and at the time, and upon the conditions prescribed in the instrument creating the power. Perry, in his treatise on the law of Trusts and Trustees, 7th Edition, Volume 2, Par. 511 (b), states:

"The execution of a power requires careful consideration. If the manner of its execution is not pointed out, it must be executed in good faith in the usual manner of doing the business to be done under the power; and there must be a strict adherence, not only to the substance of the power, but also to all the formalities required in its execution by the instrument. These formalities and solemnities are required for the protection of those persons whose rights may be defeated by the exercise of the power, and to prevent the donee of the power from acting with haste and without proper consideration. If it is to be by deed, nothing but a deed will execute the power, even though it is to be executed by a married woman; and it must be signed, sealed, acknowledged, delivered, and recorded. If the number of witnesses is named, that number must witness to the instrument that purports to execute the power. If notice is to be given of the execution of the power, such notice must be shown, and so of the slightest formality prescribed.

* * * * * * *

"The general rule is rigidly adhered to, that powers can be executed only in the mode, and at the time, and upon the conditions prescribed in the instrument creating the power or trusts."

The following statements from the cases of the courts of this state indicate an adherence to the above rule.

In *Booraem* v. *Wells* (1868), 19 N. J. E., 87, we find the following statement of the court at page 96:

"It is well settled, that a power to sell must be strictly executed in regard to time,

> as well as all other particulars, when express directions are given."

In the opinion in *Ferry* v. *Laible,* 31 N. J. E., 566, we find the following statement (p. 573):

> "Where the creator of a power defines the method of its execution, that method must be strictly followed, so far, at least, as may be necessary to give effect to his intent and design. This rule is fundamental."

Recognition of the above rule was given by the Court of Chancery in 1930, in *Oak Investment Corp.* v. *Martin,* 107 N. J. E., 123, where the court stated (p. 125):

> "That a power of sale must be strictly executed in respect to the time of its exercise, when express directions are given by the testator, is a principle of law now well settled."

The courts of other states have adhered to this rule. See *O'Brien* v. *Flint* (Sup. Ct. of Errors of Conn.), 51 Atl. 547, in which it was held that a power to sell did not include a power to mortgage, and that (p. 549), "A power must be exercised in strict accordance with its terms."

A power to appoint by will may not be executed by a deed or by a contract to make a will. *The Farmers' Loan and Trust Company* v. *Mortimer* (Court of Appeals, N. Y.), 219 N. Y. 290. See also *Thompson* v. *Pew* (Sup. Jud. Ct. of Mass.), 102 N. E. 122.

An old English case of some importance is authority for the principle that where a power was required to be executed under seal, it was void "for want of being sealed." *Dormer* v.

Thurland, 2 Peere Williams' Reports, 506. The foot note to this case stated "that where there is no *meritorious* consideration for the execution of such a power, the form must be strictly pursued." See *Refs* v. *Ewer,* 3 Atk. 156.

Even though the requirement may appear unnecessary or arbitrary, nevertheless there must be strict compliance with the conditions in the exercise of the power. See *Slifer, et als.* v. *Beates, supra,* wherein the court said at page 181:

> "The circumstances may be perfectly arbitrary, unessential in point of effect, to the validity of the instrument by which the power may be exercised: but being required by the creator of the power, they can only be satisfied by a strictly literal and precise performance, and without recapitulating the cases in which it has been decided, there must be this literal adherence, it may be said, that in every case the ingeunity of man can devise, the terms of the power must be strictly complied with. *Sugden's Powers,* 211, 213.

The intent to execute a power in trust is undoubtedly vital to the execution of such power, but an intention to execute such a power is not sufficient. Such intent must be translated into action and the trustee of the power in trust must perform those acts which the instruments creating the power prescribes as essential to its execution.

As heretofore stated, the instrument of termination refers to an entirely different trust. It is not only the date of the trust instrument that is wrong. It refers to a trust established by Alexander Luchars, not that established by the trust agreement executed by his children. The power of termination quoted in the instrument of ter-

mination, while similar, is obviously not a copy of the provision contained in the trust agreement.

However, the evidence clearly establishes that in executing that instrument all the parties understood that it referred to the trust in question, and, it may be that if all other requirements had been fulfilled, a court of equity would have deemed it appropriate to correct this mistake.

But it is admitted that no attempt was made to comply with the requirement that the property be delivered to those entitled thereto. The parties relied solely on the waiver signed by the children.

We submit that this waiver was ineffective, that the actual transfer and delivery of the trust property was an essential requirement of a valid termination. Suppose that this had not been an harmonious family; that it was not the desire of the settlors to follow their father's advice; that he was endeavoring to coerce them into yielding to his wishes with regard to the disposition of the trust property. It would then become apparent that the actual transfer and delivery of the property to the settlors was a most important element in the termination of the trust. After the trustee had once terminated the trust by transferring and delivering the property to the persons entitled thereto, he could not thereafter have coerced them into yielding to his wishes.

Moreover, we submit, that the settlors had no right or power to waive any of the conditions prescribed with respect to the termination of the trust. Upon the transfer of the property to the trustee their rights in said property, except in so far as specifically reserved, ceased. No attempted waiver of any act prescribed with respect to

the termination of the trust was or could be effective as against the infant remaindermen. The rights of these infant remaindermen were definitely established upon the execution of the trust agreement. Thereafter, the rights conferred upon them by that agreement could not be cut off or defeated except in the manner and to the extent prescribed in the trust agreement. The settlors could no more waive the requirements that the property be delivered to them than they could waive the provision calling for the execution of an instrument of termination by the trustee.

In the court below, the complainant cited various authorities in which it is stated as a general proposition that where there are mere defects in the form of the execution of a power, equity will relieve by remedying the same. But there are few authorities where the courts have granted such relief. It would appear that the courts recognize that such relief should be granted only where to do otherwise would result in injustice or hardship. For example, in *Coates* v. *Lunt,* 96 N. E. 685, the court held that an instrument, although informal in character, was effective as an execution of a power of sale, as the purchaser of the property had parted with a valuable consideration.

In *Thackwell* vs. *Gardiner,* 5 DeG. & S. 58, the court refused to hold the execution of a power valid where there had not been a sufficient compliance with the provisions of the instrument creating the power.

In *Justis* v. *English,* 71 Va. 565, the court refused to hold a conveyance valid where there had not been a strict compliance with the mode directed in the instrument creating the power, on

the ground (p. 571) that "* * * she can dispose of that only in the mode, if any, prescribed in the instrument creating the estate." The following quotation is also pertinent (p. 573):

> "I do not perceive on what ground it can be maintained that the execution of the deed to Watkins was such a disposition of the property as is authorized by the deed of settlement. The writing contemplated is a writing under the hand and seal of the *cestui que trust,* attested by at least three credible witnesses, directing the trustee to convey or transfer the property as may be appointed. The deed executed has none of the requisites, except that it is a writing under the hand and seal of the *cestui que trust.* * * *"

Under the above authorities, we submit that where the instrument creating a power specifies the precise manner of its execution, the essential requisites for such execution are matters of substance with which there must be a strict compliance.

Under all the circumstances of this case, therefore, we submit that equity should refuse to remedy the defects in the attempted execution of the power of termination.

Conclusions.

The decree of the Court of Chancery should be reversed and it should be declared and decreed that the trust of July 1st, 1921, is still in effect; and the executors should be directed to deliver to Robert B. Luchars, Elizabeth Y. Urban, Helen L. Ketchum and the First National Bank and Trust Company of Montclair, to be held by them subject to the provisions of the trust agreement

of July 1, 1921, 2,753 shares of The Industrial Press and all dividends and property derived by Alexander Luchars, or his executors, therefrom.

Respectfully submitted,

THEODORE MCCURDY MARSH
Guardian ad litem of Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban, appearing pro se.

CPY8402

New Jersey Court of Errors and Appeals

Between C. Alexander Capron, as Executor of the Last Will and Testament of Alexander Luchars, deceased, Complainant-Respondent, and Robert B. Luchars, individually and as Executor of the Last Will and Testament of Alexander Luchars, deceased, *et al.*, Defendants-Respondents, and Adelaide L. Ketchum, Elizabeth G. Ketchum, David Dow Ketchum, Robert L. Urban and John Trexler Urban, Minors, by Theodore McCurdy Marsh, Guardian Ad Litem, Defendants-Appellants.	On Appeal from the Court of Chancery.

POINTS OF DEFENDANTS-RESPONDENTS.

Facts.

As appellants say, there is no dispute as to the facts. They are stated briefly as follows: By document dated July 1st, 1921 the defendants-respondents, children of Alexander Luchars, established a trust fund, with Alexander Luchars as trustee during his lifetime and the children

themselves, with a corporate trustee named, successor trustees. The subject matter of the trust was in the beginning a controlling interest in the common stock of The Industrial Press, a New York corporation. This corporation was the business of the said Alexander Luchars. The essence of the trust was a division of the income, in the discretion of the trustee, with certain minimum requirements, among the donors, and their issue, by representation, until the death of the last donor, when the principal of the fund was to be divided among the issue, unless the trust had been sooner terminated, as in the document provided.

As appears by inference through all the testimony and through all argument of counsel, the Luchars family enjoyed and still enjoy an ideal family harmony. Robert B. Luchars, a bachelor until after his father's death, lived with his father and mother in the family home, and was associated with his father in the management of The Industrial Press. The two daughters, with their families, exchanged frequent visits with their father and mother. Although perhaps it makes no difference in the law of the case, this background is brought out to make it evident from the start of the discussion that no friction has appeared or can appear. Possible rights of infants in substantial sums of money being involved, the questions raised must be adjudicated to accurately determine those interests.

In 1925, by agreement with the donors, the trust document was modified, and Alexander Luchars, the trustee, was released from all responsibility for the distribution of a minimum of $6,000.00 a year income to the donors, as provided in the trust agreement, and was authorized to

invest the income and a portion of the principal of the trust estate in additional shares of the common stock of the said company. This plan was adopted, and at the time of the revocation hereinafter referred to the trust owned substantially the whole of the common stock of The Industrial Press. The Industrial Press had been prosperous and had a surplus, approximately $890,000.00 of which was invested in securities, and the balance of its capital assets were employed in operating its business in New York City.

During the months preceding May 15th, 1930 Mr. Alexander Luchars, in daily touch with his son Robert, and in frequent communication, by visit or letter, with his daughters, conceived and developed, partly by discussion with them, a plan to change this financial set up. The idea was, through a corporate reorganization, to divorce the security holdings, or a large part of them, owned by The Industrial Press, from the balance of its capital funds, and to have the trust, or a new trust along similar lines, own, operate and manage the securities (a carefully purchased and conservative group—see pages 172 and 173 of the book), while the control and management of the business carried on by The Industrial Press should be taken out of the trust and go into individual ownership. He proposed to his children a further step in the plan (which step the appellants argue must bring about the undoing of the whole): that his children, for whose benefit he had built up this substantial financial structure, give him back the common stock of The Industrial Press, he to arrange the financial reorganization of that company, and to set up a new trust, similar to the old, with $750,000.00 of securities. His reasoning apparently seemed sound to his children and they acceded to the entire plan.

Mr. Luchars then proceeded to carry it out. The provisions of the trust agreement concerning the termination thereof are as follows:

> "Eighth: The Trustee is hereby given full power and authority:
>
> * * * * *
>
> "c. To terminate this trust at any time prior to the termination provided for in the fifth paragraph hereof, if in the opinion of the Trustee for the time being it is wise and expedient so to do, such termination shall be effected in the manner following: The Trustee shall sign an instrument of termination, copies of which shall forthwith be delivered to each beneficiary at that time entitled to receive income hereunder, and thereupon the Trustee shall transfer turn over and convey the principal trust estate and undistributed income then in the hands of the Trustee unto us, the said Robert, Elizabeth and Helen, and the issue by right of representation of any of us who may then have deceased, in the same proportions that we and our issue as aforesaid are then receiving income. The copy of the instrument of termination above referred to shall be deemed to have been delivered, within the meaning of this instrument, upon the same having been mailed postpaid and directed to the person entitled to receive the same at his last known residence or place of business."

Mr. Luchars caused to be prepared a document (Exhibit C, page 27 of the book) which was intended to be in strict accord with the provisions of paragraph Eighth, quoted above. By inadvertence, May 10th, 1922 was given therein as the date of the trust document instead of July 1st, 1921. None of the parties noticed this, however,

and the document was used to revoke the trust of July 1st, 1921, as is agreed by all and admitted in the pleadings.

One of the steps provided by the trust document for revoking the trust was that the subject matter should be delivered to the donors. The plan involved turning the stock back to Mr. Luchars, with a view to having him immediately put through corporate changes, involving the transfer of the securities listed to a New Jersey corporation, already formed for the purpose and known as The Industrial Corporation of New Jersey, the capital stock of which was to be the subject matter of the new trust for the benefit of the donors and their children. To expedite the matter, or for some other reason, instead of actually taking delivery of the stock, the donors, all *sui juris,* waived that delivery in writing and delivered their signed waiver to their father.

At this point, due to the black cloud of industrial depression which had spread over the heavens, Mr. Luchars, conceiving that it might be to the detriment of The Industrial Press to make radical changes in its statement, temporarily abandoned the reorganization plan, with the tacit or spoken consent of his children, and a few months later death overtook him. His executors, one of whom is the complainant (the other, being his son Robert, joined as defendant because his individual interest is with the defendants-respondents) carried out the plan of reorganization after Mr. Luchars' death. They were faced with the situation involving the equities in the matter, were requested by the children to return the subject matter of the trust to them as of the date of revocation, since Mr. Luchars' agreement to set up a separate trust with the stock of The In-

dustrial Corporation of New Jersey, owning $750,000.00 of securities, had not been carried out, and on the other hand they were confronted with the questions herein involved. Hence the filing of this bill.

In the Court of Chancery the guardian for the infants argued strenuously that since Alexander Luchars, the trustee, made as a condition precedent to the revocation of the trust, that he receive back part of the subject matter of the trust from those entitled to take it, the revocation was void. Counsel for the defendants-respondents, the children of Alexander Luchars, argued that it was not void, but good, that since Mr. Luchars had failed to carry out his agreement to set up the new trust in consideration of the waiver of their right to receive the subject matter, the children were entitled to receive back the subject matter or, in the alternative, were entitled to have the executors set up the new trust with the stock of The Industrial Corporation of New Jersey, now the owner of the securities, a list of which was given by Mr. Luchars to his children before the revocation. The Vice Chancellor found that the revocation was good, and it is from this that the appeal is taken in behalf of the infants. The Vice Chancellor found, however, that the consideration for the surrender of the subject matter by the children had not failed, but had been postponed, that the details were all arranged, that the children, the defendants-respondents, were not entitled to a recission but to a performance of the contract made with their father, and has ordered the trust to be set up with the securities promised, using The Industrial Corporation of New Jersey as a holding company. On this point no appeal was taken.

The appellants argue that the revocation was void from two angles: first, being "a fraud on the trust" because the trustee took personal benefit therefrom, and second, because the machinery provided in the trust document was not properly and accurately operated. Defendants-respondents address themselves to these two points.

LAW.

POINT I.

The acts of revocation carried out by the trustee and the donors in combination, as provided in the trust document, were not a fraud on the trust.

No quarrel can be had or issue taken with the doctrine so fully set forth by the appellants that a trustee must not operate a trust for his own benefit beyond such benefits as are permitted to him by the trust document, but it is urged that the facts in the instant case do not bring the situation within that rule. The purpose of the rule is to prevent a fraud on the donor. This can be perhaps more accurately stated by saying that it is to prevent a fraud on the trust, i. e., the purposes of the donor. This is clearly brought out in 21 R. C. L., page 807:

> "There is no doubt that a person having a power must execute it in good faith for the end and purposes designed, or the act of execution will be void. A court of equity will guard the exercise of these powers so as to prevent any fraud on the donor. In

> all cases where a discretion is given in the selection of the objects among a class, good faith must be observed, and if discriminations are made to secure advantage to the trustee himself or a stranger, his act will be held vicious and corrupt. Where a power of appointment is given to a person for the benefit of others, any transaction between the donee of the power and the beneficiaries in pursuance of which the donee of the power is to exercise the appointment for his own benefit will vitiate such an appointment."

We can see this brought out again by Chief Justice Beasley in a New Jersey case which is leading on the subject, *Thomson's Executors* vs. *Norris,* 20 N. J. Eq. 489, at page 528:

> "These authorities abundantly suffice to show that the principle is unquestionably established, that an appointment to further the selfish interest of the donee of the power will not stand. The doctrine rests upon the ground of the existence of constructive bad faith towards the donor of the power."

With the point then in mind that a fraud on the trust means a fraud on the donor, i. e., a disruption of the purposes of the trust against the donor's wishes, or interference with fixed and inviolable rights acquired under the trust, let us examine the appellants' authorities. Practically all the cases cited have to do with the power of appointment of a beneficiary, while the criticism in our case is directed to a revocation of the trust, a right which the donors vested in the trustee. *Thomson's Executors* vs. *Norris,* supra, dealt with the action of the executors under a will and the exercise of a power of appointment therein contained. The donor was dead and any change

or alteration in his wishes resulted, at least technically, in bad faith toward him. As a matter of fact, the arrangement attacked in the *Thomson* case was sustained both by the Court of Chancery and the Court of Errors. It is hard to make out from the printed report whether it was because it was confirmed by the Legislature (the Chief Justice expressed doubt of the ability of the Legislature to interfere with vested rights) or because the rights of the objectors were so remote, contingent and shadowy. As in the instant case, the arrangement was purged of any bad faith whatever.

Staats vs. *Bergen,* 17 N. J. Eq. 297, deals with another theory, that a trustee cannot become the purchaser at his own sale for his own benefit.

Van Alstyne vs. *Brown,* 77 N. J. Eq. 455, advances the same principle. The defendant was trustee under a will, and she permitted the mortgage on a piece of real estate to be foreclosed and bought it in herself. There was no question of the exercise of the power or revocation of the trust, and the donor or testator was dead.

Hill vs. *Hill,* 79 N. J. Eq. 521, was another case not at all similar to ours. The executors of a will had leased to themselves certain real estate, and then sub-leased it at a three hundred per cent profit. The court charged them with the extra rent, enunciating the principle that a trustee could not enrich himself.

Keely vs. *Black,* 90 N. J. Eq. 439. This is a decision by Vice Chancellor Backes. The president of a corporation had dealt for the corporation to its advantage, but he had secretly enriched

himself. Under well known principles, he was made to disgorge his profit to the company.

Cuninghame vs. *Anstruther,* L. R. 2 H. L. Sc. 223, 21 Eng. Rul. Cases, 512, is an interesting case. Here a man, about to marry, entered into an ante-nuptial agreement with his intended. After his wife's death, she being the principal donor of the fund, he made arrangements with his daughters which resulted in an increased interest in the fund to him, and this arrangement was successfully attacked. It is to be noted that the principle donor had died.

In *Bostick* vs. *Winton,* 33 Tenn. 524, the donor was dead. The question involved was the favoring of one son by the donee of the power of appointment for the donee's benefit.

Cruse vs. *McKee,* 39 Tenn. 1.
Holt vs. *Hogan,* 58 N. C. R. 82.
Ferre vs. *American Board,* 53 Vt. 162.
Chenoweth et al. vs. *Bullitt et al.,* 6 S. W. 2nd Series (224 Ky. 698).

In all these cases cited by the appellants the donor had died.

The instant case differs from all of those cited in that the arrangement attacked was an arrangement the main part of which, namely, the revocation, was contemplated by the parties. It was arranged that the trust might be revoked and the subject matter returned to the children, the donors. It is specifically conceded by the guardian that this is so and that any interest that the grandchildren had was liable to be thereby divested. In other words, the trust could be undone during the lifetime of Mr. Luchars, the parties

put back where they started, and the grandchildren could raise no objection. This element or feature is not present in any case cited by the appellants. It is believed that he can cite no case containing it because it is obvious that such a provision in the trust agreement was valid. The guardian's argument then is based solely on the fact that the plans that Mr. Luchars and his children made contemporaneously with the revocation and the new arrangement involved a benefit to Mr. Luchars. It would undoubtedly be conceded that if an outside party had been the donor of the trust the guardian's point would be well taken, but it is respectfully insisted that under this particular set of circumstances there could be no criticism of the revocation, that it is valid. As Vice Chancellor Berry put it in his opinion, "There was no fraud practised upon the donors and the trustee acquired a personal benefit only because the donors intended that he should have it," and in another place in the opinion he says:

> "It is conceded that if the corpus of the trust estate had been actually delivered by Mr. Luchars to his three children, the donors, following the notice of the termination, that would have put an end to any rights which the grandchildren might have had. Their vested interest would then have been divested. It is also conceded that if a week, a month or a year later, these children, all of them being of full age and competent, decided to make a gift of the trust property to their father, it would have been competent for them to do so. Also that if within a like period they had decided to return the trust property or a portion of it to their father under a new trust agreement and make an absolute gift to their father of the remainder, it would have also been compe-

> tent for them to do so. Under such circumstances it is obvious that the grandchildren would have no cause for complaint. And, in fact, that is exactly what was done in this cause, except that the termination of the trust and the making of the gift by the donors to their father constituted a simultaneous transaction. Except for the mechanics of this transaction it could not be challenged, but equity looks to the substance rather than the form and in substance here no defect is perceived."

Or, to put it another way, since it cannot be gainsaid that the power of revocation could have been exercised by the trustee and the subject matter of the trust returned to the donors to become their own personal property, free to deal with as they might choose, so that individually or collectively they could have given it all to their father or anyone else, of what moment is it that their arrangement to restore part of the value of the trust fund to him was discussed and arranged before the revocation of the trust? It could have been done a year later, a month later, or a day later. The grandchildren donated nothing to the trust, took no rights in it which were not subject to being defeated, and are no worse off than if that part of the arrangement, which it is claimed will defeat the whole, had not been made.

It is contended that the focus of the case is here, that the trust agreement left the donors and the trustee free to deal as they liked with the subject matter, that the donors could sanction any arrangement they saw fit, that the rights of the grandchildren were subject to this arrangement, and it is therefore insisted that the revocation, as carried out, was in no sense a fraud on

the trust, but was valid and properly exercised and not made defective by the family plan arranged between the donors and their father.

POINT II.

The mechanics of the revocation were entirely effective.

Appellants take issue with them on two points. First, that the document sought to be revoked is incorrectly described because its date was incorrectly cited. It should be noted, and it is conceded by the respondents, that no one concerned doubted the intention. This is admitted in their answer by the appellants and by the respondents, and there is no question whatever as to the intention of everyone involved. The error was not the result of an attempted departure from the prescribed method of revocation, but an accidental and harmless, because not misleading, mistake. At law as well as in equity a mistake in date can always be corrected, but it is not the date of the document itself that is in question. It is the identification of the document which is to be revoked. It is otherwise described, and there was no other document in force that could possibly be revoked (the date used was the date of a later trust agreement between the same parties, which trust agreement had been earlier revoked). To apply the quotation from Perry on the Law of Trusts, cited by the appellants in support of this point, there was a strict adherence not only to the substance but to the formalities. The error

complained of is no different in effect than if a name had been misspelled.

The appellants make a second point that the whole arrangement must fall because the three children, instead of taking their stock and handing it back, waived in writing their right to take it and authorized their father to have it transferred to hmself. The appellants submit the argument that if they had not been an harmonious family the waiver might have in some way been used to coerce them into yielding to his wishes, whereas, had the stock once been delivered, they could have no longer been coerced. The answer to this is that if they had not been an harmonious family they would presumably have not signed the waiver. It is contended that the method of using the waiver instead of delivery and return needs no defense, that it was in exact compliance with the letter of the situation in legal effect.

It would seem that appellants' point as to the form of the revocation might be considered to have weight, if the trustee had adopted, or attempted to adopt, some radically different method of revoking the trust as if, for instance, he had requested his children each to write him a letter that they considered the trust revoked, or as if he had failed to deliver to the children the notice of revocation, as provided in the trust document. But such is not the fact. He scrupulously followed the plan set forth in every detail. The error in the date is quite beside the point. Vice Chancellor Berry disposes of this argument as follows: "Equity looks to the substance rather than the form and in the substance here no defect is perceived."

Conclusion.

From all of which it is respectfully urged that Alexander Luchars' revocation of the trust of July 1st, 1921, carried out in accordance with the letter of the trust document, involved no breach, even of the strictest technical propriety, because he dealt with the donors, his children, all *sui juris,* to their entire satisfaction, and deprived the grandchildren of nothing, and for these reasons the decree of the Court of Chancery in the premises should be affirmed.

Respectfully submitted,

PHILIP GOODELL,
Counsel for Defendants-Respondents.

E. W. Stillman, Pompton Plains, N. J., Tel, Pompton Lakes 500

New Jersey Court of Errors and Appeals

Between

C. Alexander Capron, as Executor of the Last Will and Testament of Alexander Luchars, deceased,
Complainant-Respondent,

and

Robert B. Luchars, individually and as Executor of the Last Will and Testament of Alexander Luchars, deceased, Elizabeth Y. Urban, Helen L. Ketchum, and the First National Bank and Trust Company of Montclair,
Defendants-Respondents,

and

Adelaide L. Ketchum, Elizabeth Y. Ketchum, David Dow Ketchum, Robert Luchars Urban and John Trexler Urban,
Defendants-Appellants.

On Appeal from the Court of Chancery.

POINTS OF COMPLAINANT-RESPONDENT.

We shall not burden the court with a restatement of the facts set forth in the opinion of the Vice-Chancellor and the appellants' brief but we call attention to the following:

Note: References are to the State of the Case unless otherwise noted.

The settlors of the trust were the three children of Alexander Luchars, the trustee.

The actions of Alexander Luchars, with respect to the termination of the trust, were pursuant to the freely given consent and full approval of his children. Before proceeding in any manner he discussed his plans of reorganizing The Industrial Press and reconstituting the trust by setting aside sound marketable securities entirely divorced from the active publishing business of The Industrial Press, thus relieving the trust and the beneficiaries thereof from the vicissitudes which might overtake such a business. His children were in complete sympathy with his views concerning the desirability of his plan being consumated. They had complete confidence in him and in his judgment. His proposal was the result of careful thought on his part as to how best to secure protection and permanency for the trust estate, and thus assure his children of a permanent income. They were fully aware of this, and co-operated in every way to the consummation of those plans.

These facts are demonstrated by the testimony of his children and the letters which were written to them. The evidence in this case will permit of no other interpretation.

The decree of the Vice-Chancellor accomplishes a just and reasonable result. Pursuant thereto the plans and purpose of Alexander Luchars and his children will be fully accomplished. A new trust consisting of sound and marketable securities, divorced from the active business of The Industrial Press, will be set up and established, thus securing appropriate protection for the children and their issue. The opinion of the Vice-Chancellor forcefully sets forth the reasons sup-

porting such a determination. We submit that, in the absence of some compelling authority to the contrary, the plans and wishes of Alexander Luchars and his children, the settlors of this trust, should not be defeated.

POINT I.

It was the intent of Alexander Luchars, in executing the instrument of termination dated May 15, 1930, to terminate the trust established by the agreement dated July 1st, 1921, and it was the intent of Robert B. Luchars, Elizabeth Y. Urban, and Helen L. Ketchum, to surrender to Alexander Luchars, individually and in his own right, all the property held by him as Trustee under the agreement of July 1st, 1921, at the date of the termination of the trust thereby created.

This respondent-executor recognizes that the instrument of termination dated May 15, 1930, Exhibit C-4 (pp. 127-27), incorrectly describes the trust, to terminate which that instrument was executed. Such mistake rendered it necessary for the complainant to seek relief in a court of equity to have that mistake corrected.

The trust agreement of July 1st, 1921, in the eighth article thereof, gave the trustee power to terminate the trust if in the opinion of the trustee it should be wise and expedient so to do, and further provided in subdivision (c) of said article:

> "* * * The Trustee shall sign an instrument of termination, copies of which shall

> forthwith be delivered to each beneficiary at that time entitled to receive income hereunder, and thereupon the Trustee shall transfer, turn over and convey the principal trust estate and undistributed income then in the hands of the Trustee unto us, the said Robert, Elizabeth and Helen, and the issue by right of representation of any of us who may then have deceased in the same proportions that we and our issue as aforesaid are then receiving income. The copy of the instrument of termination above referred to shall be deemed to have been delivered, within the meaning of this instrument, upon the same having been mailed postpaid and directed to the person entitled to receive the same at his last known residence or place of business."

Alexander Luchars signed an instrument of termination as required by the foregoing provisions, and copies thereof were delivered to each beneficiary at that time entitled to receive income thereunder. The requirement that the principal of the trust estate and undistributed income in the hands of the trustee should be transferred to the beneficiaries was waived by them. They were all *sui juris* and competent to execute such a waiver.

The operative part of the instrument of termination reads (Exhibit C, p. 28):

> "Now, therefore, these presents are executed by the said Alexander Luchars as an instrument of termination, as provided for in the said paragraph, it being his intention to forthwith transfer, turn over, and convey, the principal trust estate, and undistributed income, to you, the said Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum."

The instrument was addressed to the last named persons.

The waiver endorsed at the foot of the instrument of termination and which was signed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, the three children, reads as follows (Exhibit C, p. 29):

> "We, the undersigned, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, the children of the said Alexander Luchars, hereby waive our right to receive the subject matter of the trust hereinbefore referred to, and do hereby authorize and direct The Industrial Press, a corporation of the State of New York, and the said Robert B. Luchars, trustees, to transfer the principal and accumulated income of the trust estate to the said Alexander Luchars, individually and in his own right."

The evidence clearly establishes that Alexander Luchars intended to terminate the trust established by the agreement of July 1st, 1921, and that in signing the instrument of termination and causing it to be delivered to his children he intended to so terminate that trust; further, that it was the intention of Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, upon signing the waiver endorsed at the foot of the instrument of termination, to surrender to Alexander Luchars all their rights in the property which was then held by him as trustee under the agreement of July 1st, 1921, so as to vest in him in his own right, free from the trust, all of such property.

The evidence that the instrument of termination incorrectly described the trust to which it related due to a mistake, is clear, convincing and

uncontroverted. The instrument of termination could have referred to no other trust than that of July 1st, 1921, for that was the only trust, of which Alexander Luchars was the trustee, which was in existence on May 15, 1930, the date of the instrument of termination.

The trust of May 10, 1922, mistakenly referred to in the instrument of termination, was not then in existence. We shall briefly review the evidence upon this subject.

Mr. Edgar A. Becker, the treasurer of The Industrial Press, who acted as the confidential adviser of Mr. Luchars (p. 86), testified that he was familiar with the trust established by the agreement dated July 1st, 1921, and that he kept the books of account relating to that trust. He stated that Mr. Luchars discussed with him the termination of the trust of July 1st, 1921 (p. 89), and told him, Becker, that it was his, Alexander Luchar's, intention to terminate that trust (p. 89). He explained the mistake in the instrument of termination. He said that at the time this instrument of termination was executed there was no trust of May 10th, 1922, and further that "the only trust in existence at that time was the one of July 1st, 1921" (p. 89). He further testified that there had been in existence at some former time a trust "in reference to 57 shares, which was subsequently turned into Number 1". He had previously testified that the trust of July 1st, 1921, was referred to as Trust Number 1 (p. 87). Apparently the trust relating to the 57 shares was called Trust Number 2 (p. 89). He further testified as follows (p. 90):

> "Q. At the time you discussed the termination of this trust of July 1st, 1921 with

> Mr. Luchars, did you send to Mr. Luchars' attorney the trust agreement of July 1st, 1921, or did you send him another instrument?
>
> "A. Yes, sir, apparently he got the smaller trust, but that was by accident because he was supposed to get Trust Number 1, in other words, the one dated July 1st, 1921 * * *."

He further testified that in his discussions with Mr. Luchars, relating to the termination of the trust, Mr. Luchars never referred to any other trust than that established by the agreement of July 1st, 1921 (p. 90). This testimony of Mr. Becker's is supplemented by contemporaneous letters and memoranda.

The defendants introduced in evidence two memoranda, one dated December 11, 1929, and the other January 8, 1930 (Exhibits D-1 and D-2, pp. 138, 139), and on cross-examination Mr. Becker testified that he had prepared these memoranda, that they were part of the office records, that Mr. Luchars had seen them and was familiar with the statements contained in them (pp. 96, 99).

In the memorandum of December 11th, 1929 (Exhibit D-1) the following is stated:

> "3. Dissolve the existing trust, being careful to have full releases duly signed by all beneficiaries.
>
> 4. Have your children transfer to you by gift all their holdings in The Industrial Press."

In the memorandum dated January 8, 1930, Exhibit D-2 it is stated:

> "2. When Number 1 has been accomplished, dissolve the present trust in due legal

> form being careful to get full releases from all beneficiaries, then have it understood with the beneficiaries that they transfer to Mr. A. Luchars their holdings in The Industrial Press.
>
> "3. When all of the common stock of The Industrial Press is held by Mr. A. Luchars, a dividend can be declared payable in the stock of the New Jersey corporation."

These references to the trust can relate to none other than the trust of July 1st, 1921, for the trust of July 1st, 1921, owned practically all the common stock of The Industrial Press (p. 87).

On April 23, 1930, Mr. Luchars wrote to his attorney, Mr. Amos L. Taylor, asking his advice concerning the plans for the reorganization of The Industrial Press, which were then being considered. In that letter he enclosed a memorandum setting forth these various plans. In this memorandum it was stated (Ex. D-4, p. 82):

> "The trust now in existence, with the full consent of all beneficiaries, will be dissolved and its holdings distributed to the beneficiaries, who will turn over to me their holdings without any consideration."

A perusal of that memorandum will further show that the trust referred to can be none other than that of July 1st, 1921, for the memorandum also refers to the fact that the "old trust", referring to the one which was to be terminated, held the common stock of The Industrial Press.

In the letter of March 22, 1930, from Alexander Luchars to his daughter "Betty" (Elizabeth Y. Urban), he acknowledged the revocations of

the trust. He then refers to the securities which were to be transferred to the Industrial Corporation of New Jersey, and enclosed a copy of the reorganization agreement. This letter, in connection with the statement in the memoranda which he had sent to Mr. Taylor under date of April 23rd, 1930, clearly shows that Mr. Luchars understood that the revocations of the trust, receipt of which he then acknowledged, were revocations of the trust of July 1st, 1921. He wrote to Mrs. Ketchum under date of May 16, 1930, enclosing "four copies of the revocation of the trust". In this letter he also referred to the "reorganization" which again ties up the revocation of the trust with his plans for the reorganization of The Industrial Press.

We believe that this evidence clearly establishes the understanding and intent of Mr. Luchars, when he signed the instrument of termination, Exhibit C-4 to terminate the trust of July 1st, 1921.

The testimony makes it equally clear that upon receiving copies of these instruments of termination, his children, the defendants Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, all understood that Alexander Luchars thereby terminated the trust of July 1st, 1921, and further, that in executing the waiver of their rights appended to the instrument of termination, they intended to surrender to Alexander Luchars their entire interest in the property which had been held by him as trustee under this trust agreement of July 1st, 1921. Mr. Robert B. Luchars was questioned and testified as follows (p. 106):

> "Q. Did he tell you he intended to revoke the trust of July 1st, 1921? A. Yes.

Q. Now when you first saw this instrument dated May 15, 1930, executed by your father, what was your understanding as to what he had accomplished by it?

A. Let me see the instrument (after examining it) My understanding was that he had revoked the July 1st, 1921 trust as the first step in his plan to create a new one.

Q. Did he tell you that he had thereby revoked the trust of July 1st, 1921?

A. Yes.

Q. Now, when you signed this instrument, or this paragraph appended to that instrument, what did you thereby intend to do?

A. Give him the complete ownership and control of the stock that was formerly in the trust.

Q. And when you say in the trust, you mean the July 1st, 1921, trust?

A. July 1st, 1921.

Q. When you make mention here of the trust hereinbefore referred to, you were referring to the trust of what date?

A. The trust of July 1st, 1921.

Q. When you gave authority to The Industrial Press to transfer the principal and accumulated income of the trust estate you were referring to the July 1st, 1921 trust?

A. Yes, that was my understanding.

Q. And you intended to release your father as to all his acts and transactions in regard to the July 1st, 1921 trust? A. I did."

Elizabeth Y. Urban testified to the same effect (pp. 112, 113), as did also Helen L. Ketchum (p. 120).

These defendants, Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, also testified that their father had sent or delivered to them copies of this instrument of termination

(Robert B. Luchars, p. 111; Elizabeth Y. Urban, p. 113; Helen L. Ketchum, p. 123).

The evidence concerning the understanding and intention of the parties being clear and convincing, we submit that that intention and understanding should control.

POINT II.

This Court should reform the instrument of termination and the waivers subjoined thereto, to express the real intention of the parties and declare that the trust of July 1st, 1921, was terminated and the entire trust estate released and surrendered to Alexander Luchars in his own right.

(a) **Assuming there was a defect in the execution of the power of termination, equity will supply the defect by reforming the instrument of termination so as to correctly refer to the Trust Agreement of July 1, 1921, which Alexander Luchars intended to terminate.**

It has long been recognized that courts of equity have the right to supply defects in the execution of a power where the evidence it clear concerning the intent of the donee of the power to execute the same. The following excerpts from Story's Equity Jurisprudence, 11th Edition, support this proposition. In speaking of the right of a court of equity to relieve parties from defects in the execution of a power, it is stated at page 100:

> "Sec. 97. As to the defects which may be remedied, they may generally be said to be

any which are not of the very essence or substance of the power. (b) Thus, a defect by executing the power by *will,* when it is required to be by a deed, or other instrument, *inter vivos,* will be aided. So, the want of a seal, or of witnesses, or of a signature, and defects in the limitations of the property, estate, or interest, will be aided. * * *."

At page 177:

"SEC. 169. There is also another marked instance of the application of the remedial authority of courts of equity; that is, to the execution of powers. In no case will equity interfere where there has been a non-execution of a power, as contradistinguished from a trust; for if a trust be coupled with a power, there (as we shall presently see) the trust will be enforced, notwithstanding the force of the power does not execute it. But, if there be a defective execution, or attempt at execution of a mere power, there equity will interpose, and supply the defect, not universally, indeed, but in favor of parties for whom the person intrusted with the execution of the power is under a moral or legal obligation to provide by an execution of the power. * * *."

At page 179:

"* * * On the contrary, when the party undertakes to execute a power, but, by mistake, does it imperfectly, equity will interpose to carry his very intention into effect, and that, too, in aid of those who are peculiarly within its protective favor; that is, creditors, purchasers, (b) wives, (c) and children."

At page 180:

"* * * And a court of equity will not attempt to exercise this discretion for the

party. But when all has been done to perfect the right, except a mere formal omission in the instrument, courts of equity interfere to supply the defect, upon the principle of reforming instruments, and correcting mistakes, generally, for the purpose of preventing fraud and injustice, of which the party would be guilty, by claiming a benefit, under a mere mistake. * * *."

At page 180:

"SEC. 171. What shall constitute an execution, or preparatory steps or attempts towards the execution of a power; entitling the party to relief in equity, on the ground of a defective execution, has been largely and liberally interpreted. It is clear that it is not sufficient that there should be a mere floating and indefinite intention to execute the power, without some steps taken to give it a legal effect. Some steps must be taken, or some acts done, with this sole and definite intention, and be such as are properly referable to the power. * * *."

In *Union & New Haven Trust Co.* v. *Bartlett* (Sup. Ct. of Errors of Conn.), 122 Atl. 105, the court said:

"* * * The Trial court held that:

'Whether or not an instrument operates as an execution of a power of appointment depends upon the intention of the donee of the power.'

"This is the unquestioned law; and this intention must appear from the express words or necessary implication. 31 Cyc. 112, and cases cited under note 59. Whether a power of appointment has been exercised is a question of intention and a question of intention

> only. *Re Rickman,* 80 L. T. N. S. 519. If the circumstances make the intention to exercise the power doubtful, it must be held that the power has not been executed. 1 Story on Equity Jurisprudence, 14th Ed.) p. 245. * * *.

In that case the court found that it was not clear that the donee of the power had intended to exercise it by the draft of a will which she had drawn up and signed, but as above noted, it recognized that if it had been clear that it was her intention to thus execute the power, equity would have granted relief.

In *Coates* v. *Lunt* (Sup. Jud. Ct. of Mass.), 96 N. E., p. 685, it appeared that certain property had been given in trust for the benefit of the trustees during their natural lives, with power in case of misfortune to sell and convey "by good and sufficient deeds any and all of decedent's real estate". One of the trustees, a daughter of the decedent, needed more than the income and received from the other trustee $1,250. for which she gave an instrument, reading as follows:

> "I have received $1,250 from Ellen M. Carter in payment for the quarter interest in store number 32 Market Square, which I own and relinquish to her.
>
> HER
> "SARAH X LUNT."
> MARK
>
> "Witness, Jan. 17, 1905;
> "MARGARET S. COATES.
> "MARY F. COLLINS."

Upon the death of both trustees a suit was instituted which in effect prayed for the determination of whether the above-quoted note was a valid exercise of the power of sale. The court held that

there was a valid exercise of the said power on the grounds that the omissions and incompleteness of the instrument were not of such a nature as to negative the inference that it was intended and assumed by all of the parties to operate as a complete execution. The decision is authority for the following statement of the law. Page 687:

> " * * * Relief in equity is sought to perfect an execution of the power. Defective execution of powers constitutes a ground for equitable relief. The elements necessary for its exercise are that there should be a fixed intent to execute the power upon a sufficient consideration and an attempt to effectuate that intent, partial in its nature and falling short of accomplishing the purpose by reason of some defect in the instrument by which the attempt is made. Where these elements exist equity will compel complete performance of the power, provided no rights of other persons with superior equities have intervened."

In *Justis* v. *English,* 71 Va., p. 565, the court, although refusing to grant relief in that case, and holding that an alleged attempted execution of the power was ineffective, recognized that in a proper case, a court of equity may grant such relief, saying (p. 574):

> "* * * It is certainly true that in some cases in favor of certain classes, equity will give such aid. It will do so in behalf of *bona fide* purchasers for value and some other parties, where the instrument by which the execution is attempted is informal or inappropriate, or being formal or appropriate, the execution is informal, as where a certain number of witnesses is required and a less

> number is present, or where the instrument is required to be signed and sealed, and it is signed only, and so on."

In *Wooster* v. *Cooper* (Ct. of Chan.), 59 N. J. Eq. 204, the court was called upon to consider whether a will which did not contain an express reference to a power of appointment which the testator had, should be deemed a valid exercise of such power. The court said at page 223:

> "No express recital of the power is however required, if the devise, or other act done in execution of the power, shows that the donee, in acting, had in view the subject of the power, and intended to act with relation thereto.
>
> This intention may be collected from attending circumstances, as that the will includes something the testatrix did not have, otherwise than under the power, or that part of the will would be wholly inoperative unless applied to the power."

There are some expressions in other cases to the effect that the intent to exercise a power of appointment by will must be found in the will itself, and that the court may not go beyond the testament for the purpose of learning the intention of the testator. We submit, however, that this rule applies only to the execution of powers of appointment by will and that the court in these instances is simply following the general rules applying to wills and that in the instant case, involving a transaction *inter vivos,* the rules of evidence relating to the reformation of contracts are applicable. In this connection we refer to the authorities hereafter cited with respect to the reformation of the waiver executed by the children of Alexander Luchars.

We submit that the instant case is one where equity should grant relief in the defective execution of the power of termination. The evidence is clear that the trustee, Alexander Luchars, intended to terminate the trust in question and through inadvertence the instrument of termination referred to a trust which no longer existed. It is only necessary for the court to reform the instrument of termination to correctly refer to the trust which the trustee sought to terminate. Moreover, the trustee was dealing with his children who had themselves established the trust. At the time of the delivery of the copies of the instrument of termination to them, they understood that their father was terminating the trust which they had created.

(b) **The court should also reform the waiver executed by Robert B. Luchars, Elizabeth Y. Urban and Helen L. Ketchum, to conform to their intent and that of Alexander Luchars, which was to vest in him, the said Alexander Luchars, all rights in the property theretofore held by him in trust under the Agreement of July 1, 1921.**

The evidence concerning the intention of the parties in this regard is clear. The rights of courts of equity to relieve persons of their mistakes of fact and to reform written instruments to conform to the actual intention of the parties, has been recognized by eminent text writers, and by the courts of this state.

In Pomeroy's Equity Jurisprudence, 4th Edition, paragraph 852, it is stated:

> "The general doctrine is firmly settled as one of the elementary principles of the equitable jurisdiction, that a court of equity will grant its affirmative or defensive relief,

> as may be required by the circumstances, from the consequences of any mistake of fact which is a material element of the transaction, and which is not the result of the mistaken party's own violation of some legal duty, provided that no adequate remedy can be had at law. It has been said, 'No person can be presumed to be acquainted with all matters of fact connected with a transaction in which he engages'. This general doctrine is applied in a great variety of forms and under a great variety of circumstances. It presents but few *theoretical* difficulties; its practical difficulties arise from its application to particular instances of relief, and this application must be largely controlled by the circumstances of each case."

Parol evidence may be admitted to correct mistakes of fact incorporated in written instruments. See *Pomeroy's Equity Jurisprudence,* Fourth Edition, Paragraph 858, wherein it is stated:

> "Parol evidence may, in proper modes and within proper limits, be admitted to vary written instruments, upon the ground of mistake, fraud, surprise, and accident. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy. Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong."

See also, *Hupsch* v. *Resch,* 45 N. J. Eq. 657, and *Conover* v. *Wardell,* 20 N. J. Eq. 266.

The Court of Chancery of this State has said: "To correct or cancel deeds on the ground of mistake, when the mistake is clearly shown, is one

of the familiar duties of a court of equity." (*Wirsching* v. *Grand Lodge, etc.*, 67 N. J. Eq. 711.)

In *Sloss-Sheffield Steel & Iron Co.* v. *Aetna Life Insurance Co.*, 74 N. J. Eq. 635, a bill was brought to reform an instrument on the ground of mutual mistake, and the usual collateral issues were presented. The following excerpts from the opinion are here pertinent (pp. 644-5):

> "Parol evidence is admissible on this class of issues for the plain reason that in most cases no other evidence exists. To deprive the court of the benefit of the parol evidence on an issue as to what the contract is, would be to destroy its jurisdiction to reform contracts and to avoid them for fraud or mistake."

Again at page 645:

> "Contracts *interparties* may be reformed by this court whenever by reason of a mutual mistake the written instrument fails to express the agreement on which the minds of the parties met, * * *."

Reference is also suggested to the decision in *Green* v. *Stone* (Court of Errors and Appeals), 54 N. J. Eq. 387, wherein it was stated (p. 396):

> "To warrant reformation, there must be a mutual mistake—that is, a mistake shared in by both parties."

Also at page 396:

> "But in the case of the reformation of a contract or deed by altering or expunging some of the terms contained in it on the ground of mistake, the part improperly introduced into it will be altered or expunged, and the instrument will stand as reformed."

It is true that the evidence of such mistake must be clear, satisfactory and convincing. (*Whelen* v. *Osgoodby,* 62 N. J. Eq. 571, and *Rowley* v. *Flannelly,* 30 N. J. Eq. 612.)

That the evidence in the instant case satisfies these requirements has not, and cannot, be disputed by the appellants.

It is respectfully urged that the above rules should be applied by this court in the instant case, and the instrument of termination reformed. The instrument may be reformed by inserting therein the correct date of the instrument sought to be terminated, and by similarly reforming the waiver subjoined thereto, so that it will also refer to the trust of July 1st, 1921.

POINT III.

The court should not only reform the instrument of termination and the release and waiver endorsed thereon, but should give full effect to the intention of the parties by declaring that the trust was validly terminated.

It is clear that if Alexander Luchars had terminated the trust and transferred the trust estate to his children, and it had again become their property, free and discharged of the trust, the children might thereupon have assigned and transferred that property to Alexander Luchars and, under such circumstances, no one could have attacked his title thereto. The question presented, therefore, is simply this. Does the fact that the agreement of transfer was made prior, instead of subsequently to the termination of the

trust, render abortive the intent and purpose of these parties, all of whom were *sui juris* and who were intent upon making a fair family settlement of the property in which they were chiefly interested? The Vice-Chancellor answered that question in the negative. We submit that his opinion shows that that determination was just and reasonable.

POINT IV.

The trust estate, on May 15, 1930, was indebted to Alexander Luchars in the sum of $20,883.72.

The facts in regard to this indebtedness were explained by Mr. Becker. He testified that he had kept the books of account for Mr. Luchars; that, from time to time, Mr. Luchars purchased on behalf of the trust estate various shares of stock of The Industrial Press; that when the cash in the trust account was not sufficient to pay for such shares he advanced as a loan to the trust the requisite amount in order to make the purchases, and then from time to time reimbursed himself out of the income of the trust estate, as it was received. He testified further that the sums advanced by Mr. Luchars to the trust, and for which the trust estate was indebted to him on May 15, 1930, amounted to $20,883.72 (pp. 87, 88, 89).

By the decree of the Chancery Court it was found and determined that the agreement of Alexander Luchars to establish the new trust did not embrace any understanding or agreement that the said sum of $20,883.72 should be repaid to him and further determined that the trustees

of the new trust held the said shares free from any obligation to repay the said sum to the executors of the will of Alexander Luchars (p. 170).

However, it is submitted that this determination was based upon the finding that the 2,753 shares of the common stock of The Industrial Press were the property of Alexander Luchars by virtue of the execution of the termination instrument. In the event, therefore, that this court should reverse the decree of the Chancery Court and determine that the trust agreement of July 1, 1921 was not validly terminated and that the said 2,753 shares of the common stock of The Industrial Press are still a part of the corpus of the said trust, the complainant executor submits that the corpus of said trust should be charged with the amount of the said indebtedness of $20,883.72, and that the new trustee should be directed forthwith to refund the said amount to the executors of the will of Alexander Luchars, deceased.

Conclusion.

The decree of the Chancery Court, which is the subject of this appeal, should be affirmed.

Respectfully submitted,

WALTER E. COOPER,
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INDEX.