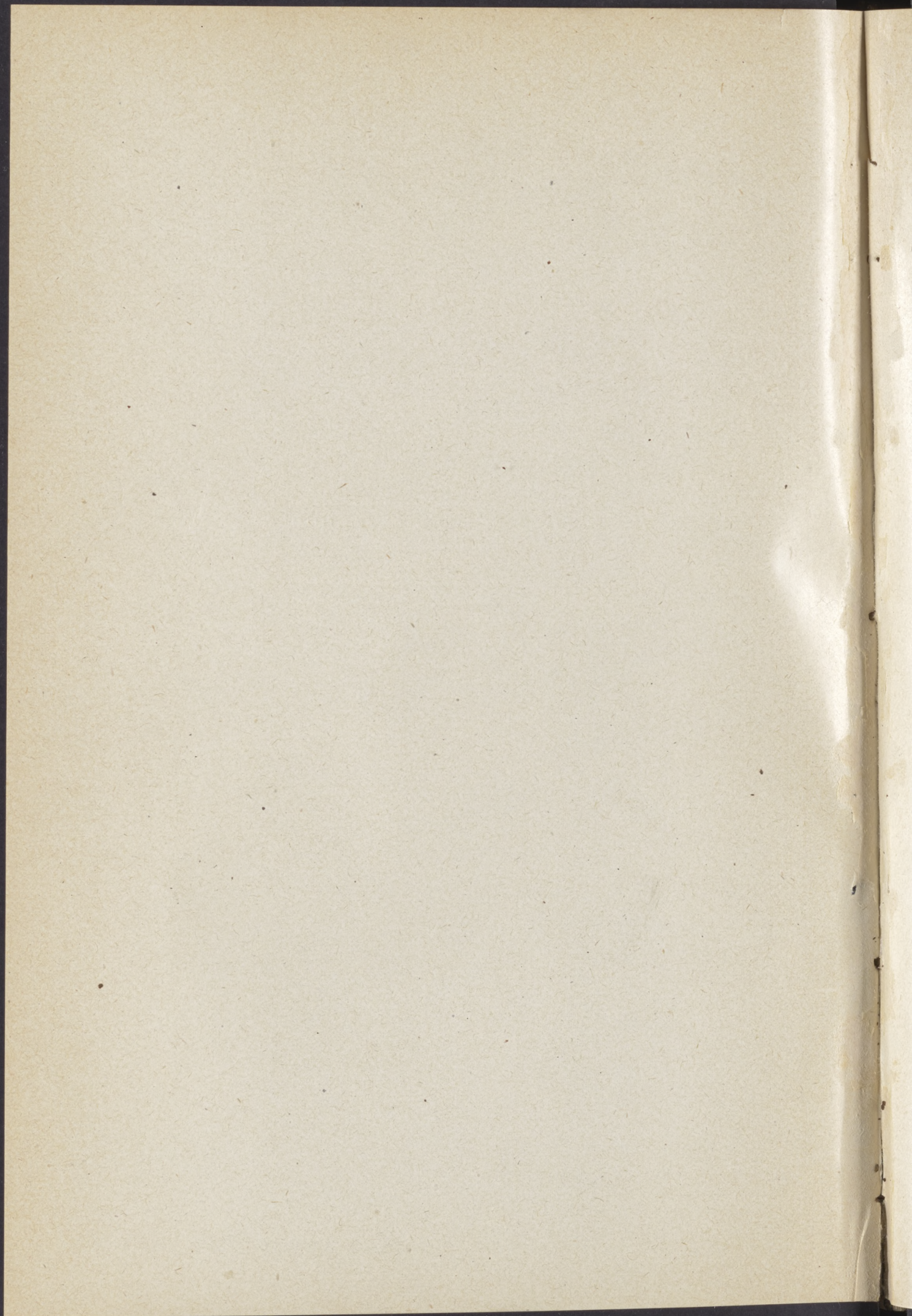


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NEW JERSEY
Court of Errors and Appeals.

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN AND
ALBERT J. FEYL, TRUS-
TEES UNDER THE LAST
WILL AND TESTAMENT OF
DERESTUS B. STEELMAN,
Complainants,

AND

MILLARD F. STEELMAN ET AL.,
Defendants.

10

BILL FOR CONSTRUCTION OF A WILL.

(Filed February 28, 1917.)

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

The complainants, Albert D. Cuskaden and Albert J. Feyl, of the city of Atlantic City, County of Atlantic and State of New Jersey, respectfully show unto your Honor that:

I. Derestus B. Steelman, late of Atlantic City, in the **20**
County of Atlantic and State of New Jersey, made his
last will and testament, dated the twenty-fourth day

of May, in the year 1912, and a codicil thereto, dated the eighteenth day of February, in the year 1914, and having made such last will and testament and codicil thereto, departed this life on the twenty-ninth day of November, A. D. 1914; that on the tenth day of December, 1914, the said last will, and codicil thereto attached, were duly admitted to probate by the Surrogate of the County of Atlantic and letters testamentary issued thereon to the complainants, Albert D. Cuskaden
10 and Albert Feyl.

2. That the terms and provisions of said last will and codicil are as follows:

"I, Derestus B. Steelman, of Atlantic City, in the County of Atlantic and State of New Jersey, do make and publish this my last will and testament, in manner following:

First: It is my will and I do direct that all of my just debts and funeral expenses be paid as soon as may be after my decease.

20 *Second:* It is my will and I do direct that my beloved wife, Marietta Steelman, be permitted to occupy my home, known as No. 12, South Ohio Avenue, in said Atlantic City, during her lifetime, and I hereby make a charge upon my estate the cost of the up-keep, carrying charges and all municipal assessments which may be imposed upon my said home during the lifetime of my said wife.

30 *Third:* I give and devise unto Albert D. Cuskaden and Albert J. Feyl all my property real, personal and mixed, subject to item two hereof, in trust as follows:

A. To manage, sell, invest and reinvest the same, and to pay the rents, issues and profits thereof to my said beloved wife, Marietta Steelman, and my children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman, during their respective lifetimes, share and share alike, hereby directing my trustees and executors to pay to each, his or her respective share monthly, beginning six months after my decease.

B. Upon the death of my said wife I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them during their lifetime.

C. Upon the death of any or either of my said children, leaving issue him or her surviving, then and in such event I direct that such share of my estate upon which he or she shall have been receiving the rents, issues and profits, shall become the absolute property of the issue of such deceased child; should 10
either of my said children die without issue, him or her surviving, then and in such event I direct my executors and trustees to pay the share theretofore paid to said deceased child to the survivor or survivors of my said children, share and share alike during the life or lives of said survivor or survivors.

D. Should any or either of my said children die without issue leaving him or her surviving a wife or husband then and in such event I direct that one-half of such share of my estate upon which he or she shall 20
have been receiving the rents, issues and profits, shall become the absolute property of such wife or husband, and that the rents, issues and profits arising from the other one-half of said share theretofore paid to said deceased child be paid to the survivor or survivors of my said children, share and share alike, during the life of said survivor or survivors.

Fourth: Should my trustees and executors at any time, subject to item two hereof, deem it for the best advantage of my estate that any or all of my property 30
be sold, I hereby empower them to sell the same without liability on the part of the purchaser or purchasers to see to the application of the purchase money and invest the proceeds thereof in good approved securities, and to disburse the income therefrom as hereinabove provided.

Fifth: Should either or both of my trustees and executors die before the final execution of the trust

herein imposed or before the final administration of my estate, or should either or both of them renounce his or their right of administration, or fail or neglect to take upon himself or themselves the burden of the administration of my estate or the execution of said trust, then and in either of which said events I hereby constitute, substitute and appoint The Atlantic Safe Deposit and Trust Company, of Atlantic City, New Jersey, trustee and executor, joint or sole as the case
10 may be, hereof, with the same powers and authority hereinabove given to the said Albert D. Cuskaden and Albert J. Feyl.

Sixth: The share of my estate hereinabove directed to be paid by my trustees to my said beloved wife is intended to be in lieu of her dower, but should she elect to have her dower assigned to her, I direct that the trust hereinabove created shall be otherwise undisturbed.

Seventh: I hereby appoint Albert D. Cuskaden and
20 Albert J. Feyl executors of this will, revoking all former wills and codicils by me made.

In witness whereof, I have hereunto set my hand and seal this twenty-fourth day of May, in the year of our Lord one thousand nine hundred and twelve.

(Signed) DERESTUS B. STEELMAN. [SEAL.]

Signed, acknowledged and declared by the said Derestus B. Steelman, as and for his last will and testament, in the presence of us (both being present at
30 the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

JOSEPH F. CRANDALL,
MINNIE A. OBERGFELL,
C. C. SHINN.

This is a codicil to be added to the last will and testament of me, Derestus B. Steelman, of Atlantic City, in the County of Atlantic and State of New

Jersey, which bears date on or about the twenty-fourth day of May, in the year one thousand nine hundred and twelve.

First: I do hereby ratify and confirm my said last will and testament in all respects, save so far as any part thereof shall be revoked or altered by this present codicil, and in particular, save so far as the same relates to the giving and devising of any part or portion of my estate in trust for my son, John D. Steelman, during his lifetime, as to which particular I do hereby revoke and alter my said will as follows: It is my will and I do direct that the part or share of my estate in and by my said will given and devised in trust to my said son, John D. Steelman, shall be held in trust for Edna Feyl and Marion Steelman (children of my said son, John D. Steelman), and the rents, issues and profits thereof paid to them during the lives of my beloved wife, Marietta Steelman, and my children, Annie M. Cuskaden and Mildred F. Steelman, or the survivor of them, and upon the happening of the last mentioned event the said Edna Feyl and Marion Steelman shall be entitled to receive the principal so held in trust for them, share and share alike.

Second: Should either the said Edna Feyl or Marion Steelman die without issue before receiving her share of said principal, then and in such event the share of said decedent, both principal and interest, shall be paid to the survivor in accordance with the terms of my said will and of this codicil thereto.

In witness whereof, to this present writing, which I hereby declare to be a codicil to my last will and testament, and which I direct to be added thereto, and to be taken as part thereof, I have set my hand and seal this eighteenth day of February, in the year of our Lord one thousand nine hundred and fourteen.

(Signed) DERESTUS B. STEELMAN. [SEAL.]

Signed, sealed, published and declared by the said Derestus B. Steelman, as and for a codicil to his last

will and testament, and to be taken as part thereof, in the presence of two several persons, whose names are hereunder subscribed as witnesses to the signing, sealing and publishing the same; which said two persons did so hereunder subscribe their names, at the request and in the presence of the said Derestus B. Steelman and in the presence of each other.

ANNIE LEE,

C. C. SHINN,

Atlantic City, N. J.

10

3. That the said Derestus B. Steelman died, leaving him surviving his wife, Marietta Steelman; a son, John D. Steelman; a daughter, Annie M. Cuskaden; and a son, Millard F. Steelman; that the said John D. Steelman had two children, a daughter, Edna Feyl, and a daughter, Marion Steelman, an infant under the age of twenty-one, the wife of the said John D. Steelman being deceased; that the said Annie M. Cuskaden was married, her husband's name was Albert D.

20 Cuskaden, one of the complainants in this bill, and the said Annie M. Cuskaden had two children, to wit, Millard E. Cuskaden and Frederick E. Cuskaden; that Millard F. Steelman was unmarried.

4. That Annie M. Cuskaden, a daughter of Derestus B. Steelman, deceased, testator, and one of the persons mentioned in sub-division A of paragraph three of said last will and testament, departed this life on the thirtieth day of March, A. D. 1916, leaving her surviving and still living, her husband, Albert D. Cuskaden, complainant, and two sons, Millard E. Cuskaden
30 and Frederick E. Cuskaden.

5. That Marietta Steelman, widow of the said Derestus B. Steelman, departed this life on the fifth day of December, A. D. 1916; that at the time of her death the said Annie M. Cuskaden had departed this life, but the said Marietta Steelman left her surviving a son, John D. Steelman, a son, Millard F. Steelman, two grandchildren, the children of her daughter,

Annie M. Cuskaden, namely, Millard E. Cuskaden and Frederick E. Cuskaden; and two grandchildren, the children of her son, John D. Steelman, namely, Edna Feyl and Marion Steelman; that the said Edna Feyl is the wife of Albert H. Feyl, one of the complainants in this bill.

6. That your orators prior to and up to the date of the death of Annie M. Cuskaden, to wit, the thirtieth day of March, 1916, had been paying and did pay to the said Marietta Steelman one-fourth of the income of said estate; one-fourth thereof to Annie M. Cuskaden; one-fourth thereof to Millard F. Steelman; and one-eighth each to Edna Feyl and Marion Steelman, children of the said John D. Steelman, as provided in sub-division A, paragraph three, of said will, and paragraph one of the codicil thereto. 10

7. That after the death of the said Annie M. Cuskaden, to wit, on the thirtieth day of March, 1916, up to and including the date of the death of Marietta Steelman, to wit, the fifth day of December, 1916, your orators continued to pay one-fourth of the income of said estate to Marietta Steelman; one-fourth of the income thereof to Millard F. Steelman; one-eighth of the income of said estate to Edna Feyl; one-eighth of the income of said estate to Marion Steelman; one-eighth of the income of said estate to Millard E. Cuskaden, and one-eighth of the income of said estate to Frederick E. Cuskaden. 20

8. That from and after the death of Marietta Steelman, to wit, on the fifth day of December, 1916, down to the time of the filing of this bill, your orators have paid one-third of the income of said estate to Millard F. Steelman; one-sixth thereof to Edna Feyl; one-sixth thereof to Marion Steelman; one-sixth thereof to Millard E. Cuskaden; and one-sixth thereof to Frederick E. Cuskaden; that said payments were made by your orators in the proportions aforesaid under their belief, acting under advice of counsel, that the true 30

interpretation, construction and meaning of said will was that the said Derestus B. Steelman desired that the income from his estate be divided equally between his children, or such of them as might be living from time to time, and the children of such deceased child, such children of deceased children to take the share that their parent would have been entitled to had he remained alive. The corpus of said estate to be distributed to the children of testator's children per stirpes, that is to say, the children of testator's children were to receive the portion of the estate that their parent would have taken or would have been entitled to had the testator died intestate, so that there would be absolute equality between the child or children of each of testator's children in the distribution of testator's said estate, and that when the testator used the words as set forth in sub-division B of paragraph three of his will, to wit, "Upon the death of my said wife I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them during their lifetime," he meant by the word "survivor or survivors" his living children or children of deceased children, so that the children of the deceased child who predeceased his wife, Marietta Steelman, should take the share that their mother would have taken had she survived testator's wife; and that the application of said sub-division B of paragraph three of the testator's will as applied to the circumstance of the said Annie M. Cuskaden, having predeceased Marietta Steelman, leaving her two sons living, namely, Millard E. Cuskaden and Frederick E. Cuskaden, did not operate so as to deprive Millard E. Cuskaden and Frederick E. Cuskaden of such share of their grandfather's estate, to wit, the estate of said Derestus B. Steelman, as they would have taken if their mother, Annie M. Cuskaden, had survived Marietta Steelman, the wife of the testator, but that on the contrary said Millard E. Cuskaden and

Frederick E. Cuskaden took that portion of the income of the testator's estate as they would have taken had their mother survived the said Marietta Steelman, and die leaving them surviving her.

9. Your orators further show unto your Honor that they have at all times believed they were authorized and justified in distributing said estate as above set forth by the virtue of the various provisions of said will, believing and understanding and being advised to that end, that the said Derestus B. Steelman did not intend that the issue of any one of his children should be barred from participating in part of the estate merely because of the fact that their parent happened to predecease one of testator's other children, or the testator's widow; that the whole aim and intentment of the testator, Derestus B. Steelman, in his will was to preserve absolute equality between his children and the children of any deceased child, whether that child predeceased one of his other children or his widow; that such intention is manifested by sub-division A of the third paragraph of his will, wherein he directs that his widow, Marietta Steelman, and his children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman, during their respective lifetimes are to share and share alike in the income derived from his estate; that such intention is further manifested from sub-division C of paragraph three, wherein he provides that the children of a deceased child is to take the share of their parent; that said intention is further manifested from paragraph one of the codicil to the testator's said last will and testament, in which paragraph the testator revokes the provision for his son, John D. Steelman, and provides that the part or share of his said estate, held in trust for his son, John D. Steelman, should be held in trust for Edna Feyl and Marion Steelman, children of the said John D. Steelman, and the rents, issues and profits thereof paid to them during the lives of testator's wife, Marietta Steelman, and testator's

children, Annie M. Cuskaden and Millard F. Steelman, and upon the death of the survivor the said Edna Feyl and Marion Steelman to receive the principal so held in trust for them; that said intention is further manifested in the second paragraph of the codicil to the said last will and testament, wherein it is provided that if the said Edna Feyl or Marion Steelman die without issue before receiving her share of said principal, then, and in such event the share of such decedent, principal
10 and interest, shall be paid to the survivor in accordance with the terms of testator's said will and of his said codicil.

10. Your orators further show unto your Honor that Millard F. Steelman, the son of Derestus B. Steelman, and one of the persons mentioned in sub-division A of paragraph three of said last will and testament, claims and pretends that the true and correct meaning of said last will and testament is that the word survivor or survivors, as mentioned in sub-division B of
20 paragraph three of said last will and testament, applies only to such of the children of the said Derestus B. Steelman as shall survive the widow of the said Derestus B. Steelman, or the other children of the said Derestus B. Steelman, and does not apply to the children of the deceased child of the said Derestus B. Steelman who predeceased the widow or any of the other children; that the said Millard F. Steelman also claims and pretends that by virtue of this construction the said Millard E. Cuskaden and Frederick E. Cuskaden are each entitled to only one-eighth of the income of the estate of the said Derestus B. Steelman, and are
30 only entitled to one-eighth each of the principal thereof, or, in other words, that the said Millard E. Cuskaden and Frederick E. Cuskaden are only entitled to the share of the income of said estate that their mother, Annie M. Cuskaden, received during her lifetime, to wit, one-fourth of the income of the estate of said Derestus B. Steelman, and are entitled only to such

portion of the principal of the estate of said Derestus B. Steelman as their mother received the income on during her lifetime, to wit, one-fourth of the principal, and that the share of the income theretofore paid to the widow of the testator, Marietta Steelman, should all be paid to him, the said Millard F. Steelman, and that the principal of the estate of the said Derestus B. Steelman from which the said widow, Marietta Steelman, received her said one-fourth, to wit, one-fourth of the principal of said estate, was the absolute property of him, the said Millard F. Steelman; that the effect of such contention of the said Millard F. Steelman, if the correct and true interpretation of said will would be that the said Millard F. Steelman would receive one-half of the income derived from the estate of said Derestus B. Steelman, the said Millard E. Cuskaden one-eighth thereof; the said Frederick E. Cuskaden one-eighth thereof; the said Edna Feyl one-eighth thereof; and the said Marion Steelman one-eighth thereof.

10

20

11. Your orators further show unto your Honor that they are advised and informed that the said Millard E. Cuskaden, Frederick E. Cuskaden, Edna Feyl and Marion Steelman are desirous that the estate of the said Derestus B. Steelman, and the income thereof be distributed in accordance with the provisions of said last will and testament as construed and interpreted by your orators so that the income from said estate would be paid as it has heretofore been paid by your orators, namely, one-third to Millard F. Steelman, one-sixth to Millard E. Cuskaden, one-sixth to Frederick E. Cuskaden, one-sixth to Edna Feyl, and one-sixth to Marion Steelman.

30

12. Your orators further show unto your Honor that doubts have arisen concerning the proper construction to be given said will and its various provisions, and that your orators are unable to properly administer the trust imposed upon them under the terms of said will without the aid of this court in construing the same.

13. Your orators further show unto your Honor that the principal of said estate amounts to approximately one hundred and twenty thousand dollars, from which an income of approximately seven thousand dollars a year is derived.

14. Your orators further show unto your Honor that they are each ready and willing to pay and desirous of paying and distributing the income from the estate of said Derestus B. Steelman to such persons, and in such
10 amounts or proportions as such persons shall be found legally entitled thereto, in order that they might properly and legally perform the duties and obligations imposed upon them as trustees under said last will and testament; that neither of your orators have any personal interest in the distribution of said estate, or the income thereof, excepting to see that the estate and income thereof is properly distributed in proper proportions to and among those persons legally entitled thereto.

15. Your orators further show unto your Honor that
20 they have been accustomed in the past to distribute the income from said estate monthly; that in pursuance of said custom another monthly installment of the income is distributable on February twenty-eighth, 1917, and that your orators are uncertain as to the proportions of said income that each of the persons entitled thereto should receive, and that they feel that they cannot safely make distribution of said income without the further aid, instruction and direction of this court as to the proportions of said income that each of the defendants herein
30 named are entitled to receive.

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

1. That Millard F. Steelman, Edna Feyl, Marion Steelman, Millard E. Cuskaden and Frederick E. Cuskaden, who are the defendants to this suit, may answer this bill of complaint without oath, and each statement therein made.

2. That the said will and codicil may be construed

by this Honorable Court, and your orators as trustees and executors under said last will and testament be directed to whom, and in what proportion the income arising from the estate of the said Derestus B. Steelman be distributed.

3. That said last will and testament of said Derestus B. Steelman be construed by this Honorable Court, and your orators, as trustees and executors thereof, be directed to whom, and in what proportion the income of said estate heretofore paid to Marietta Steelman, 10 widow of the said Derestus B. Steelman, should be paid and distributed.

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

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with the
Complainants.

20

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN AND
OTHERS, TRUSTEES, &C.,*Complainant,*

AND

MILLARD F. STEELMAN AND
OTHERS,*Defendants.*

} On Bill, &c.

30

ANSWER OF MILLARD F. STEELMAN.

(Filed March 15, 1917.)

Millard F. Steelman, of Brooklyn, New York, one of the defendants, answering the bill of complaint, says:

1. He admits the allegations in Paragraph 1 of the bill.
2. He admits the allegations in Paragraph 2 of the bill.
3. He admits the allegations in Paragraph 3 of the bill, with the averment that he is unmarried and without issue.
4. He admits the allegations in Paragraph 4 of the bill.
- 10 5. He admits the allegations in Paragraph 5 of the bill.
6. He admits the allegations in Paragraph 6 of the bill so far as the payments to him are concerned.
7. He admits the allegations in Paragraph 7 of the bill so far as the payments to him are concerned.
8. He admits the allegations in Paragraph 8 of the bill so far as they refer to the payments to him, but is not advised save by the bill touching the belief of the complainants and the advice they received touching the true interpretation of the will of Derestus B. Steelman.
- 20 9. Touching the numerous allegations in the bill as to the belief of and advice to the complainants touching the true meaning and interpretation of the will of Derestus B. Steelman, defendant is without information save by the bill, and prays proof thereof if the same be deemed necessary.
- 30 10. This defendant admits that contentions have arisen touching the true meaning, interpretation and intent of the will of Derestus B. Steelman, and joins with complainants in the appeal to this court to determine the same, and avers that at the least he is entitled to one-third of the income of the estate for life, with power and right of disposition of one-third of the principal of the same.

C. L. COLE,
Solicitor and of Counsel for
Defendant, Millard F. Steelman.

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN AND
ALBERT J. FEYL, TRUS-
TEES, ETC.,

Complainants,

AND

MILLARD F. STEELMAN ET
AL.,

Defendants.

On Bill for Construc-
tion of Will.

10

ANSWER.

(Filed March 29, 1917.)

The joint and several answer of Millard E. Cuskaden and Frederick E. Cuskaden to the bill of complaint in the above case.

These defendants, answering said bill of complaint, 20
say:

1. They admit the matters and things set forth in Paragraph 1.

2. They admit the matters and things set forth in Paragraph 2.

3. They admit the matters and things set forth in Paragraph 3.

4. They admit the matters and things set forth in Paragraph 4.

5. They admit the matters and things set forth in 30
Paragraph 5.

6. They admit the matters and things set forth in Paragraph 6.

7. They admit the matters and things set forth in Paragraph 7.

8. They admit the matters and things set forth in Paragraph 8, and particularly do they admit it to be true that the true interpretation, construction and mean-

ing of said will was that the said Derestus B. Steelman desired that the income from his estate be divided equally between his children, or such of them as might be living from time to time, and the children of such deceased child, such children of deceased children to take the share that their parent would have been entitled to had he remained alive. The corpus of said estate to be distributed to the children of testator's children *per*
10 *stirpes*, that is to say, the children of testator's children were to receive the portion of the estate that their parent would have taken or would have been entitled to had the testator died intestate, so that there would be absolute equality between the child or children of each of testator's children in the distribution of testator's said estate, and that when the testator used the words as set forth in subdivision B, of paragraph three, of his will, to wit, "Upon death of my said wife I direct that the share theretofore paid to her shall be equally divided among
20 and paid to my said children, or the survivor or survivors of them during their lifetime," he meant by the words "survivor or survivors" his living children or children of deceased children, so that the children of the deceased child who predeceased his wife, Marietta Steelman, should take the share that their mother would have taken, had she survived testator's wife; and that the application of said subdivision B, of paragraph three, of the testator's will, as applied to the circumstance of the said Annie M. Cuskaden, having predeceased
30 Marietta Steelman, leaving her two sons living, namely, Millard E. Cuskaden and Frederick E. Cuskaden, these two answering defendants, did not operate so as to deprive these answering defendants, Millard E. Cuskaden and Frederick E. Cuskaden, of such share of their grandfather's estate, to wit, the estate of Derestus B. Steelman as they would have taken if their mother, Annie M. Cuskaden had survived the wife of the testator; but on the contrary these two answering defend-

ants, Millard E. Cuskaden and Frederick E. Cuskaden, are entitled to receive such portion of the income of the testator's estate as they would have taken had their mother survived the said Marietta Steelman and then died leaving them surviving her.

9. These defendants answering Paragraph 9 of said bill of complaint say that they are advised and believe that the complainants believe they were authorized and justified in distributing said estate as set forth in said bill of complaint, for the reasons set forth in said Paragraph 9 and for the further reason that the said Derestus B. Steelman did not intend that either his wife or his two children, Annie M. Cuskaden and Millard F. Steelman, should have any part of the principal of the said estate, but should receive the income only. 10

10. These defendants answering Paragraph 10 admit the matters and things therein contained to be true.

11. These defendants answering Paragraph 11 admit the matters and things therein to be true. 20

12. These defendants answering Paragraph 12 admit the matters and things therein contained to be true and join with said complainants in their prayer that this Court construe the will of said Derestus B. Steelman.

13. These defendants answering the Paragraph 13 admit the matters and things therein contained to be true.

14. These defendants answering Paragraph 14 admit the matters and things therein contained to be true.

15. These defendants answering Paragraph 15 admit the matters and things therein contained to be true. 30

16. These defendants further answering said bill of complaint, say that they admit it to be true that such doubts have arisen concerning the true construction of the said will as require the direction of this Court to finally construe the same and admit it to be true that the executors and trustees, to wit, the complainants in said bill, named, cannot safely make distribution of said

income without the further aid, instruction and direction of this Court as to the proportions of said income that each of the-defendants therein named is entitled to receive. These defendants therefore join with said complainants in their prayer that the said will and codicil of the said Derestus B. Steelman may be construed by this Honorable Court and the said complainants as trustees and executors under said will and testament be directed to whom and what proportion of the

10 income arising out of the estate of the said Derestus B. Steelman be distributed, and the further prayer that the said last will and testament of the said Derestus B. Steelman be construed by this Honorable Court to whom and what proportion the income of said estate heretofore paid to Marietta Steelman, widow of Derestus B. Steelman should be paid or distributed.

These defendants pray that they be awarded counsel fee and costs out of said estate as may be agreeable to equity and good conscience.

21

JOSEPH A. CORIO,
Solicitor for and of Counsel with Defendants, Millard E. Cuskaden and Frederick E. Cuskaden.

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN ET AL.,
 EXECUTORS, &C.,

Complainants,

AND

30 MILLARD F. STEELMAN ET AL.,

Defendants.

ANSWER.

(*Filed April 11, 1917.*)

The answer of Edna Feyl, individually, and as guardian *ad litem* of Marion Steelman, to the bill of complaint in this cause.

This defendant, in both capacities, by this answer:

1. Admits the facts set forth in paragraph one of said bill.
2. Admits the facts set forth in paragraph two of said bill.
3. Admits the facts set forth in paragraph three of said bill.
4. Admits the facts set forth in paragraph four of said bill.
5. Admits the facts set forth in paragraph five of said bill. 10
6. Admits the facts set forth in paragraph six of said bill.
7. Admits the facts set forth in paragraph seven of said bill.
8. Admits that since the 5th of December, 1916, the day of the death of Marietta Steelman, the widow of Derestus B. Steelman, the complainants paid one-third of the income of the estate to Millard F. Steelman, one-sixth thereof to this defendant, individually, one-sixth thereof to Marion Steelman, one-sixth thereof to Millard E. Cuskaden, and one-sixth thereof to Frederick E. Cuskaden. 20
9. Avers that it is the belief of this defendant that the said Derestus B. Steelman desired, and intended by his said will to provide, that upon the death of his widow the share of the income from his estate, theretofore paid to her, should be divided equally between his children, or such of them as might be living from time to time, and the children of such deceased child, such children of deceased children to take the share to which their parent would have been entitled had he or she remained alive, so that in the distribution of said income there would be absolute equality between his surviving children and the child or children of any deceased child or children. 30
10. Avers that it is the belief of this defendant that the said Derestus B. Steelman, when he used the words set forth in Subdivision B, Paragraph 3, of his said

will, to wit, "Upon the death of my said wife I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them, during their lifetime," he meant by the words "survivor or survivors of them" his living children and children of deceased children, so that the children of the deceased child, who predeceased the testator's wife, should take the share their mother would have taken had she survived the testator's wife, and that the application of said paragraph, as applied to the decease of Annie M. Cuskaden before her mother, Marietta Steelman, leaving two sons living, to wit, Millard E. Cuskaden and Frederick E. Cuskaden, did not operate to deprive the latter of their proper share in the income of said estate.

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11. Avers that by the codicil of the will of the said Derestus B. Steelman, the latter intended to substitute for his son, John D. Steelman, this answering defendant and her sister, Marion Steelman, as the recipients of his bounty, and that a proper interpretation of said will requires that whatever right, title or interest, either principal or income, which the said John D. Steelman was to receive in accordance with the terms of said will, either as an original taker or legatee under the terms thereof, or as the survivor of his sister or his mother, became vested in this answering defendant and her sister, share and share alike, in accordance with the provisions of said will and codicil.

30
12. Avers that if it be determined by this Honorable Court that the language employed by the said testator, in Subdivision B, of Paragraph 3, of said will, is not appropriate to vest in the said Millard E. Cuskaden and Frederick E. Cuskaden the share or interest in the income to which their mother was entitled, or in the corpus of the estate as claimed by them, according to the averments of said bill of complaint, then the said will and codicil should be construed as follows.

A. That the share of said estate of said testator, upon which the said Annie M. Cuskaden during her life received the income, became the absolute property of her two children, Millard E. Cuskaden, and Frederick E. Cuskaden, free, clear and discharged of the terms of the trust created by said will, which would remove from the control of said trustees one-fourth of the corpus of said estate, and vest the same in said Millard E. Cuskaden and Frederick E. Cuskaden.

B. The income on the balance of said estate, after the distribution of one-fourth of the entire corpus, in accordance with the last preceding paragraph, is to be distributed as follows: One-half to Millard F. Steelman, one-fourth to this answering defendant, and one-fourth to Marion Steelman. **10**

C. The trust estate, created by said will and codicil, to continue during the life of Millard F. Steelman, and the share of the corpus, upon which he at the time of his death is receiving the income, is to be distributed to his children, and if he leaves no children, but a wife, the latter is to receive one-half of such share absolutely, and the other one-half is to be distributed between this answering defendant and Marion Steelman, share and share alike. **20**

D. If the said Millard F. Steelman dies without children, or without leaving a wife, then the entire balance of the corpus of said estate is distributable between this answering defendant and her sister, share and share alike.

E. If either this answering defendant or her sister Marion die without children, the income from the share to which each is then entitled should be paid to the survivor as long as Millard F. Steelman lives. **30**

F. If either this answering defendant or Marion die leaving children, the latter will take their mother's share of income during the life of the said Millard F. Steelman, and the corpus after his death.

13. Avers that the property No. 12 South Ohio Avenue, referred to in the second paragraph of the

will of the said Derestus B. Steelman, is to be considered as part of the residuary estate, and the income therefrom distributable pursuant to the provisions of said will and codicil as interpreted and construed in accordance with this answer.

LEWIS STARR,

Solicitor for and of Counsel with Edna Feyl, who answers individually and as guardian ad litem for her sister, Marion Steelman.

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IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN ET AL.,
TRUSTEES, &C.,

Complainants,

AND

MILLARD F. STEELMAN ET AL.,
Defendants.

On Bill, &c., to
Construe Will.
Final Hearing.

20 Before his Honor, E. B. Leaming, Vice Chancellor, at the Chancery Chambers, Atlantic City, New Jersey, on Thursday, June 7th, 1917.

Appearances—Bourgeois & Coulomb, Esqs., for complainants; Hon. C. L. Cole, for Millard F. Steelman, one of the defendants; Hon. Lewis Starr, Esq., for Edna Feyl, individually and as guardian *ad litem* of Marian Steelman, one of the defendants.

Mr. Bourgeois—We want to put in a little testimony unless we can stipulate the facts contained in this stipulation.

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Mr. Cole—I am content that this stipulation states the facts, but I want the record to show that we object on the theory that it is not relevant, and no testimony can be taken in this case to construe this will.

The Vice Chancellor—I cannot very well rule on it

until I hear what you have there read. Read your stipulation as testimony.

Mr. Starr—I am perfectly willing to stipulate, if your Honor please, but, unfortunately, I represent the guardian of a minor. I agree to the facts to the extent that I can agree.

The Vice Chancellor—I do not imagine your stipulation will bind the minor, will it?

Mr. Bourgeois—Well, we have stipulated so as to avoid the taking of testimony, if your Honor please. **10**
If they want we will take the testimony. We have got the witnesses here.

Mr. Starr—I represent Edna Feyl, who is one of the children of John D. Steelman and a defendant.

The Vice Chancellor—John D. is still alive?

Mr. Starr—John D. is still alive. And she is also the guardian appointed in this cause for her minor sister, Marian.

The Vice Chancellor—Another child?

Mr. Starr—Another child of John D. **20**

The Vice Chancellor—Well, they have no present interest, have they?

Mr. Starr—Oh, yes,; they are substituted by the codicil for their father.

(Stipulation read by Mr. Bourgeois.)

The Vice Chancellor—I will let this stipulation be filed subject to any objections which counsel may desire to make touching its relevancy and competency. You do not say here when Mrs. Cuskaden died.

Mr. Starr—That appears in the bill and is admitted **30**
by everybody.

The Vice Chancellor—When did she die?

Mr. Starr—March 30th, 1916.

Mr. Bourgeois—And Mrs. Steelman died when, Judge—the widow?

Mr. Starr—December, 1916. Mrs. Cuskaden died in March, 1916, and Mrs. Steelman in December, 1916.

The Vice Chancellor—Now, is there any other testimony to be taken?

Mr. Bourgeois—No.

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN ET AL.,
TRUSTEES,*Complainants,*

AND

MILLARD F. STEELMAN ET AL.,
Defendants.

STIPULATION.

10 It is stipulated, admitted and agreed between the parties and their respective counsel hereto that at the time of the making of the will in this cause by Derestus B. Steelman, to wit, on the 24th day of May, 1912, the only children of Derestus B. Steelman were John D. Steelman, the eldest, and Annie M. Cuskaden and Millard F. Steelman, twins.

That at the time of the making of said will in 1912 John D. Steelman was engaged in the shoe business in Atlantic City, the conduct of which was not a financial success, and thereafter the said John D. Steelman, in
 20 the spring of 1912, was indebted for merchandise to the amount of about \$4,000, and appealed to his father for financial assistance, which was refused. Finally the father agreed to advance the moneys if John D. Steelman would close out the shoe business that same fall of 1912. The money was advanced but the shoe
 30 business was not closed out at the time promised, and later, to wit, during the winter of 1913 and January of 1914, demand was made upon Derestus B. Steelman, the father, to pay a number of promissory notes which had been discounted in bank and by individuals for the son, John D. Steelman, who had received the money therefrom, and when said notes fell due he left for parts unknown. These notes contained the name as endorser of Derestus B. Steelman, purporting to be the signature of Derestus B. Steelman, the father. The

father repudiated any liability and denied the signature. Suits were threatened and after much hesitation the father, Derestus B. Steelman, took all the notes up, paying the money necessary therefor.

That Millard F. Steelman has for fifteen years past resided in New York City, where he is engaged in the practice of his profession, and spending only about three weeks of each year in Atlantic City, the home of his parents.

That prior to four or five years before the death of the said Derestus B. Steelman his business affairs had all been transacted by himself, but that during the later years of his life his health became impaired, and he called upon his daughter, Annie M. Cuskaden, to assist him more and more in the transaction of his business affairs, until the last two or three years of his life, during which period almost his entire business was transacted by his daughter, Annie M. Cuskaden, she acting as his secretary, confidential clerk and business agent up to the time of his death.

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IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN ET

AL., TRUSTEES,

Complainants,

AND

MILLARD F. STEELMAN ET

AL.,

Defendants.

} Final Hearing on Bill
for Construction of
Will of Derestus B.
Stelman, deceased.

CONCLUSIONS.

Bourgeois & Coulomb, for complainants.

Clarence L. Cole, for Millard F. Steelman, defendant.

Lewis Starr, for defendant Edna Feyl, individually,
and as guardian *ad litem* of Marion Steelman.

30

Joseph A. Corio, for Millard E. Cuskaden and Frederick E. Cuskaden.

LEAMING, V. C. :

In this suit the executors and trustees under the last will and testament of Derestus B. Steelman, deceased, seek a construction of his will to the end that they, as executors and trustees, may receive the aid of this court in performing the duties arising from their trust.

Testator died November 29th, 1914, leaving a will bearing date May 24th, 1912, and a codicil to that will bearing date February 18th, 1914.

At the dates of both the will and the codicil and also at the date of the death of testator, his next of kin were his three children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman. Marietta Steelman, testator's wife and mother of his children, also survived him. At the dates of the will and codicil and at the date of testator's death he had two grandchildren, children of his son John D. Steelman, named, respectively, Edna Feyl and Marion Steelman, both of whom are still living, and also two grandchildren, the children of his daughter Annie M. Cuskaden, named, respectively, Millard E. Cuskaden and Frederick E. Cuskaden, both of whom are still living. Testator's son Millard F. Steelman is still alive and has never married.

The provisions of the will, material for present consideration, are as follows:

“Second: It is my will and I do direct that my beloved wife, Marietta Steelman, be permitted to occupy my home, known as No. 19 South Ohio Avenue, in said Atlantic City, during her lifetime, and I hereby make a charge upon my estate the cost of the upkeep, carrying charges and all municipal assessments which may be imposed upon my said home during the lifetime of my said wife.”

“Third. I give and devise unto Albert D. Cus-

kaden and Albert J. Feyl all my property real, personal and mixed, subject to item two hereof, in trust as follows:

A. To manage, sell, invest and re-invest the same and to pay the rents, issues and profits thereof to my said beloved wife, Marietta Steelman, and my children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman, during their respective lifetimes, share and share alike, hereby directing my trustees and executors to pay to each, his or her respective share monthly six months after my decease. 10

B. Upon the death of my beloved wife, I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them during their lifetime.

C. Upon the death of any or either of my said children, leaving issue him or her surviving, then and in such event I direct that such share of my estate upon which he or she shall have been receiving the rents, issues and profits, shall become the absolute property of the issue of such deceased child, should either of my said children die without issue, him or her surviving, then in such event I direct my executors and trustees to pay the share theretofore paid to said deceased child to the survivor or survivors of my said children, share and share alike, during the life or lives of said survivor or survivors. 20 30

D. Should any or either of my said children die without issue leaving him or her surviving a wife or husband and in such event I direct that one-half of said share of my estate upon which he or she shall have been receiving rents, issues and profits, shall become the absolute property of such wife or husband and that the rents, issues and profits arising from the other one-half

of said share theretofore paid to said deceased child be paid to the survivor or survivors of my said children, share and share alike, during the lifetime of said survivor or survivors."

The codicil provides as follows:

10 "First: I do hereby ratify and confirm my said last will and testament in all respects, save so far as any part thereof shall be revoked or altered by this present codicil, and in particular, save so far as the same relates to the giving and devising of any part or portion of my estate in trust for my son John D. Steelman during his lifetime, as to which particular I do hereby revoke and alter my said will as follows: It is my will and I do direct that the part or share of my estate in and by my said will given and devised in trust to my said son, John L. Steelman, shall be held in trust for Edna Feyl and Marion Steelman (children of my said son, John D. Steelman) and the rents, issues and profits thereof paid to them during the lives of my beloved wife, Marietta Steelman and my children, Annie M. Cuskaden and Millard F. Steelman, or the survivor of them, and upon the happening of the last-mentioned event the said Edna Feyl and Marion Steelman shall be entitled to receive the principal so held in trust for them share and share alike."

20
30 "Second: Should either the said Edna Feyl or Marion Steelman die without issue before receiving her share of said principal, then and in such event the share of said decedent, both principal and interest, shall be paid to the survivor in accordance with the terms of my said will and of this codicil thereto."

The stipulated facts disclose that John D. Steelman had become financially involved between the date of testator's will and the date of the codicil to that will.

It also now appears that Annie M. Cuskaden, testator's daughter, died March 30th, 1916, and Marietta Steelman, testator's widow, died December 5th, 1916. These two deaths have occasioned the necessity for the present bill.

Had testator's widow died before his daughter, Annie M. Cuskaden, as testator probably contemplated, no controversy would exist at this time, for in such case the widow's one-fourth share of the income would have then become payable one-third to testator's son, Millard, one-third to his daughter, Annie M. Cuskaden, and the other third to the two children of testator's son, John D. Steelman, John having been in effect disinherited by the codicil and his children substituted in his place to receive the income that would have been payable to John under the will. That would have made the share on which testator's daughter, Annie M. Cuskaden, would have been receiving income at the time of her death one-third of the entire estate, and by the terms of subdivision C of the third item of the will that share would have become the absolute property of the two children of Annie.

But Annie M. Cuskaden died before the widow, and the share on which Annie was receiving income at the time of her death was but one-fourth of the estate. It is therefore contended at this time that subdivision C of the third item of the will limits the interest of the children of Annie to one-fourth of the estate, and that that interest is not enhanced by the death of the widow after the death of Annie. It is accordingly urged that the remaining three-fourths of the income is now payable under the provisions of subdivision B of the third item of the will, either wholly to testator's son, Millard, who is the only surviving son entitled to take in view of the provisions of the codicil, or paid one-half to Millard and one-half to the two children of the disinherited son, John D. Steelman.

The present inquiry therefore necessarily involves the ascertainment whether some of the language of

the will was intended by testator to be used and understood in its ordinary and natural sense, or whether it was used by testator with a different purpose and intent.

It is reasonably certain that testator intended that his widow should receive one-fourth of the income of the estate during her lifetime. Even though it should be thought that at the death of testator's daughter Annie one-fourth of the corpus should have been
10 then set off to Annie's children in severalty pursuant to the strict letter of subdivision C of the third item of the will, that procedure would not have been operative to reduce the widow's share of the income, for one-third of the income of the remaining three-fourths of the corpus would theoretically have been the same as one-fourth of the income of the whole corpus.

The mooted question therefore is what disposition is now to be made of the widow's share which represents one-fourth of the income of the estate.

20 Subdivision B of the third item of the will says it "shall be qually divided among and paid to my (testator's) said children, or the survivor or survivors of them during their lifetime." This provision of the will must, of course, be read in connection with the modification embodied in the codicil. By that instrument testator's son, John D. Steelman, is clearly disinherited and his two children are substituted to receive the income which the will bestows upon him for his life. In view of these provisions of the codicil it is im-
30 possible to regard John D. Steelman as a surviving son to whom any part of the widow's share of the income becomes payable under subdivision B of item three of the will, or to regard Millard F. Steelman as a sole surviving son of testator who is entitled to receive the widow's share of the income to the exclusion of the children of John D. Steelman who have been substituted in his place to receive the share of the income otherwise payable to him. It therefore seems clear that the children of John D. Steelman share equally

with Millard F. Steelman in the one-fourth of the income which was payable to the widow at her decease.

It remains to consider, however, whether the one-fourth of the income which was payable to the widow at the time of her decease has now become payable one-half to Millard and one-half to the two children of John D., to the exclusion of the children of testator's deceased daughter Annie, thus denying to Annie's children an equal share of the income of the estate with the son Millard and the two children of John D., because of the fortuitous circumstance of the death of Annie before the death of the widow, or whether the widow's share of the income is to be enjoyed equally by the three several stocks of testator, as it would have been had the widow predeceased Annie. 10

I am unable to escape the latter view. It is true that subdivision B of the will by its terms directs the distribution of the widow's share of the income to surviving children, and subdivision C by its terms gives to the issue of testator's children the share on which the parent was receiving the income at the time of the parent's death, but it seems to me that these two provisions of the will when read together, and when considered in connection with the provisions of the codicil, adequately disclose the intent of testator that the widow's share of the income shall fall into the estate for the benefit of the children of testator, John being excluded and his children substituted in his place, and that the share contemplated to pass to the issue of testator's children under subdivision C at the death of their parent is the children's share as enhanced by the death of the widow. In reading the will without contemplating the possibility of the death of the widow before the death of a child of testator, and especially when considering the provisions of the will in the order in which testator has arranged them, the view above expressed as to testator's intent is at once impressed; it is only when the circumstance of the death 20 30

of Annie prior to the death of the widow is considered and applied to the strict letter of the will that any doubt as to testator's intent in that respect can be indulged.

I am accordingly unable to escape the conclusion that the intention of testator is sufficiently obvious and unmistakable from an examination of the entire will and codicil to impress upon the language thus used a meaning consistent with that obvious purpose.

10 Considering the provisions of the will, without the codicil, it seems entirely clear that its general scheme and obvious purpose was to preserve equality to testator's three children and to their respective stocks. The exclusion of the children of a deceased child of testator from the augmented income arising by the widow's death is wholly inconsistent with that scheme of equality and introduces a discrimination which testator could not have intended. In such circumstances the word survivor should be understood in the sense of surviving *stirps*.

20 This view is adequately sustained by the authorities reviewed by Vice Chancellor Howell, in *Short v. Clark*, 77 *N. J. Eq.* 153, to which may be added *In re Fox Estate (Penna.)* 70 *Atl. Rep.* 954. The decree in *Short v. Clark* was reversed by our Court of Errors and Appeals in 79 *N. J. Eq.* 573, but for the primary reason that the absolute gifts to the children male was inconsistent with any general intent of equality.

30 I am also unable to conclude that the provisions of the codicil in any material way modify that general intent of equality found in the will. One son is there wholly disinherited and the children of that son are substituted in his place. That circumstance tends to accentuate rather than repel the intention of preserving for the issue of children the shares of their parents. It cannot, however, be overlooked that the provisions made in the codicil for the children of the disinherited son are not precisely the same as those made for the issue of the other children of testator, for the enjoyment of a share of the corpus by the issue of the disinherited

son is not conditioned on the death of their father, but on the death of others, and a survivorship right is also introduced by the codicil as between these two children of the disinherited son. But it seems to me that this difference as to time or event of taking a share of the corpus cannot be properly regarded as a discrimination which relates to or in any way modifies the general intent disclosed by the will and codicil to secure equality in amount to the stock of each child of testator.

I am measurably impelled to these conclusions by the fact that if the language of the will should be enforced in its literal significance, results will be necessarily reached which are obviously contrary to any natural or reasonable purpose of testator, and inconsistent with the purpose which, I think, the whole will and codicil, considered together, disclose. Such literal interpretation would have required the trustees to set off to the children of Annie M. Cuskaden one-fourth of the corpus of the estate at her death and would deny them any further benefits thereafter. The widow's share of the income would have then been one-third of the remaining three-fourths, and at her death that share of the income would have fallen to Millard F. Steelman to the exclusion of all others, or, if not wholly to him then, assuming one-fourth of the corpus to be set off to the children of Annie as of a date prior to the widow's death, one-half to Millard F. Steelman and one-half to the two children of John D. Steelman, thus giving to Millard or to Millard and the children of John D. an income far in excess of that of the children of Annie M. Cuskaden, deceased; and at the death of Millard F., without issue, three-fourths of the corpus would fall to the children of John D. Steelman.

My conclusion is that at the death of the widow the children of Annie became entitled to one-third of the estate, and from that date one-half of the income of the remaining two-thirds became payable to Millard F.

Steelman and the other half to the two children of John D. Steelman.

The bill also seeks instructions touching various future contingencies which may arise, and the arguments of counsel have also been directed to those possible contingencies. That is not the province of a bill of this nature. The contingencies suggested may never arise, and if they arise other interests may have then intervened which a court might desire represented and heard.

10 It is accordingly inappropriate to here determine what may be the effect of the death of Millard without issue at some future time. The present controversy only involves the ascertainment whether the children of Annie take to the same extent they would have taken had the widow predeceased Annie, and whether the children of John D. share with Millard in the distribution of income at this time.

Submitted July 19th, 1917.

Determined September 12th, 1917.

20

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN AND ALBERT
J. FEYL, TRUSTEES, &C.,
Complainants,

AND

MILLARD F. STEELMAN ET AL.,
Defendants.

} On Bill, &c.

FINAL DECREE.

(Filed October 2, 1917.)

30 This cause coming on to be heard in the presence of Bourgeois & Coulomb, Solicitors for Albert D. Cuskaden and Albert J. Feyl, Trustees, and Millard E. Cuskaden and Frederick E. Cuskaden, devisees; and

C. L. Coe, Solicitor for Millard F. Steelman, devisee; and Lewis Starr, Solicitor for Edna Feyl, devisee, and for Edna Feyl, guardian *ad litem* of Marion Steelman, devisee, for the construction of the last will and testament of Derestus B. Steelman, deceased, who departed this life on November 29, 1914, leaving a will bearing date May 24, 1912, and a codicil thereto bearing date February 18, 1914, as to the interest or share of the said Millard F. Steelman, son of the decedent, and Millard E. Cuskaden and Frederick E. Cuskaden 10
children of Annie M. Cuskaden, who departed this life March 30, 1916, daughter of decedent, and Edna Feyl and Marion Steelman, children of John D. Steelman, a son of decedent, touching and concerning the distribution of said estate and of one-fourth of the income thereof which, prior to the death of Marietta Steelman, the widow of said decedent, on the 5th day of December, 1916, was distributed to said widow; and the pleadings and proofs having been read, and the arguments of the respective counsel having been 20
heard and considered, and the Court having duly considered the said pleadings and proofs and arguments, and being of the opinion that at and upon the death of the widow, Marietta Steelman, on the 5th day of December, 1916, Millard E. Cuskaden and Frederick E. Cuskaden became entitled to one-third of the estate of the said Derestus B. Steelman, to wit, one-sixth part thereof to Millard E. Cuskaden and one-sixth part thereof to Frederick E. Cuskaden, and that from the date of the decease of the said widow, one-half of 30
the income from the remaining two-thirds of said estate became payable to Millard F. Steelman, and the other half of said income became payable to Edna Feyl and Marion Steelman, children of John D. Steelman, share and share alike, and that the ultimate disposition of the one-third of the estate of the said Derestus B. Steelman from which the said Millard F. Steelman is entitled to income during life should not at this time be determined.

It is on this first day of October, 1917, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this court, doth hereby order, adjudge and decree that Millard E. Cuskaden and Frederick E. Cuskaden are entitled to one-third of the estate of the said Derestus B. Steelman, to wit, one-sixth part thereof to Millard E. Cuskaden and one-sixth part thereof to Frederick E.

10 Cuskaden.

It is further ordered, adjudged and decreed that said Trustees, Albert D. Cuskaden and Albert J. Feyl, do distribute the equal one-third part of said estate to the said Millard E. Cuskaden and the said Frederick E. Cuskaden, in equal parts.

It is further ordered, adjudged and decreed that from and after the death of the widow of the said Derestus B. Steelman, to wit, the 5th day of December, 1916, the said Trustees, Albert D. Cuskaden and
20 Albert J. Feyl, do pay to the said Millard F. Steelman one-half of the income derived from the remaining two-thirds part of said estate during the term of the natural life of the said Millard F. Steelman.

It is further ordered, adjudged and decreed that from and after the death of the widow of the said Derestus B. Steelman, to wit, the 5th day of December, 1916, the said Trustees, Albert D. Cuskaden and Albert J. Feyl, do pay to Edna Feyl and to the guardian of the said Marion Steelman during her minority,
30 and thereafter to the said Marion Steelman, one-half of the income derived from the remaining said two-thirds part of the estate of the said Derestus B. Steelman.

It is further ordered, adjudged and decreed that during the lifetime of the said Millard F. Steelman the question of the ultimate disposition of the one-half of the two-thirds of the estate of the said Derestus B. Steelman on which the said Millard F. Steelman receives the income during life, be reserved.

It is further ordered, adjudged and decreed that a counsel fee of fifty dollars be allowed to solicitors of trustees, five hundred dollars to solicitor of Millard F. Steelman, five hundred dollars to solicitor of Edna Feyl and Marion Steelmen, and five hundred dollars to solicitor of Millard E. Cuskaden and Fred E. Cuskaden, and be paid by the trustees together with the taxed costs of all the parties.

E. R. WALKER, C.

Respectfully advised.

10

E. B. LEAMING, V. C.

IN CHANCERY OF NEW JERSEY.

BETWEEN

ALBERT D. CUSKADEN AND
OTHERS, TRUSTEES,

Complainants,

AND

MILLARD F. STEELMAN AND
OTHERS,

Defendants.

20

NOTICE OF APPEAL.

(Filed October 8, 1917.)

The defendant, Millard F. Steelman, hereby appeals from the final decree in this cause made on the first day of October, 1917, from the whole and every part thereof, and particularly so much thereof as decrees that said defendant is entitled only to one-third of the income under the will of Derestus B. Steelman, deceased, to the Court of Errors and Appeals, the court of last resort in all causes.

C. L. COLE,

30

*Solicitor for and of Counsel with
Millard F. Steelman.*

October 2d, 1917.

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

C. L. COLE,
Solicitor for and of Counsel with
Millard F. Steelman.

IN CHANCERY OF NEW JERSEY.

BETWEEN
ALBERT D. CUSKADEN AND
OTHERS, TRUSTEES, ETC.,
Complainants,
10 AND
MILLARD F. STEELMAN AND
OTHERS,
Defendants.

AMENDED PETITION OF APPEAL.

(Filed October 17, 1917.)

To the Honorable, the Court of Errors and Appeals,
the Court of Last Resort in All Causes:

20 The petition of Millard F. Steelman, appellant in the
above-stated cause, respectfully shows that he finds him-
self aggrieved by the final decree made in the Court of
Chancery of His Honor Edwin Robert Walker, Chan-
cellor of the State of New Jersey, bearing date the first
day of October, 1917, wherein the said Albert D. Cus-
kaden and others, trustees, etc., were complainants and
appellant, and others were defendants, in this respect, to
wit, that the said decree adjudges that appellant is en-
titled to have only one-half of the income of the estate
of Derestus B. Steelman, deceased, after payment of
30 one-third to children of Cuskaden and that Cuskaden
children are entitled to one-third of corpus. And your

petitioner humbly appeals from the whole and every part of the decree of the Chancellor which decrees as aforesaid, on the ground that the same is erroneous, for that by the proper construction of the will of said Derestus B. Steelman, deceased, appellant is entitled to the whole of the income and Cuskaden children to one-fourth of corpus.

And your petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside, and for nothing holden. 10

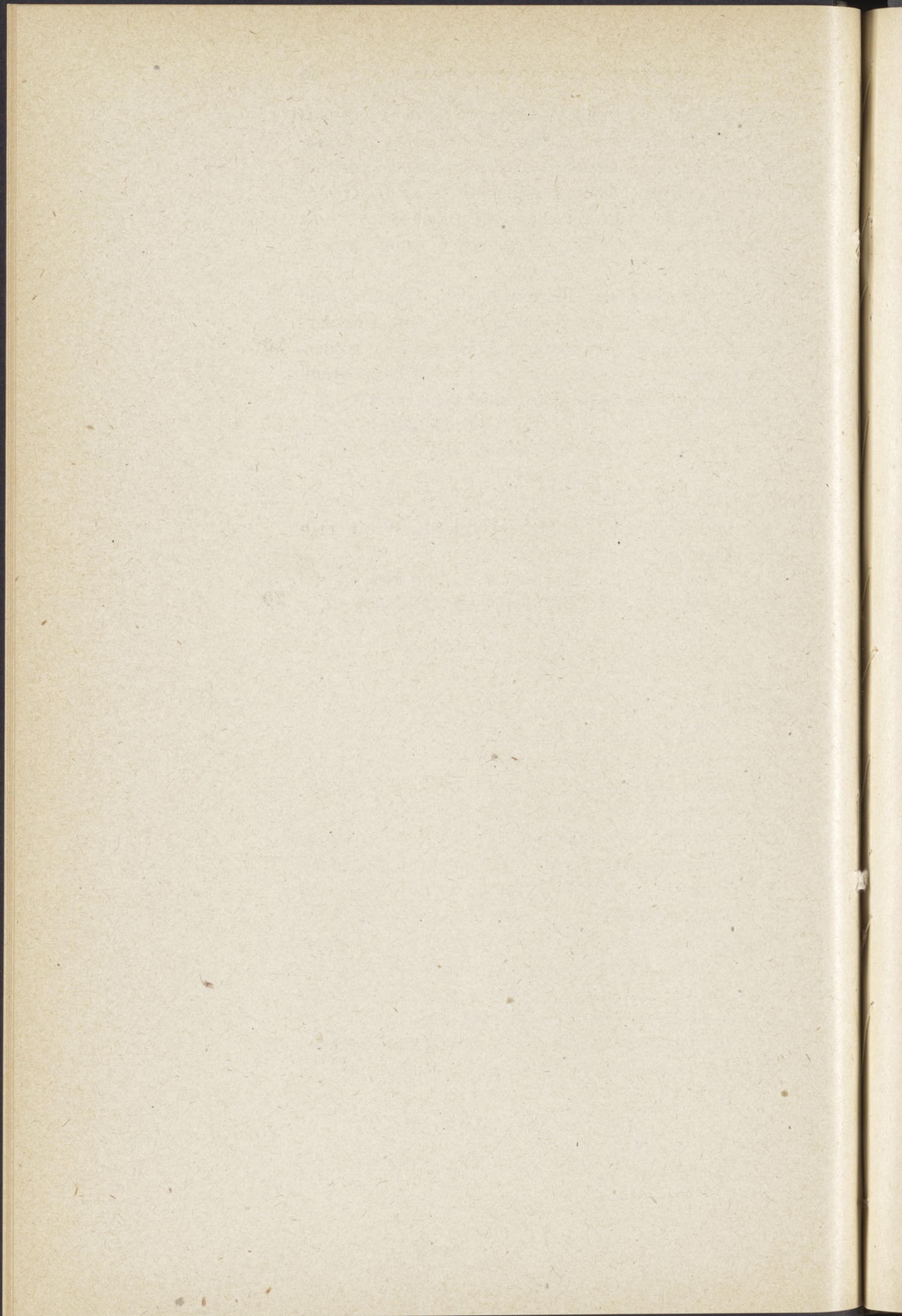
And your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

C. L. COLE,

*Solicitor for and of Counsel with
Millard F. Steelman.*

Service of copy of within acknowledged this 11th day of October, 1917, by

BOURGEOIS & COULOMB,
Solicitors of Complainant. 20



NEW JERSEY Court of Errors and Appeals

BETWEEN

ALBERT D. CUSKADEN ET AL., TRUS-
TEES, &C.,

Complainants-Respondents,

AND

EDNA FEYL, MARION STEELMAN,
MILLARD E. CUSKADEN AND FRED
S. CUSKADEN,

Defendants-Respondents,

AND

MILLARD F. STEELMAN,

Defendant-Appellant.

}
On
Appeal.

Brief of Millard E. Cuskaden and Fred S. Cuskaden.

This appeal is taken from a final decree construing the will of Derestus B. Steelman, advised by Vice Chancellor Leaming, made on the first day of October, 1917.

FACTS.

The will construed was executed on the 24th day of May, 1912, at which time the objects of testator's bounty, all living, were Marietta Steelman, his wife; John D. Steelman, widower, his eldest son; Annie M.

Cuskaden and Millard F. Steelman, twins; Edna Feyl and Marion Steelman, the children of John D. Steelman, and Millard E. Cuskaden and Fred S. Cuskaden, the children of Annie M. Cuskaden.

The trustees appointed by the testator were Dr. Albert D. Cuskaden, the husband of Annie M. Cuskaden, and Albert J. Feyl, the husband of Edna Feyl, the daughter of testator's son, John D.

Subsequent events indicated that the said testator at the time of his death was possessed of an estate of approximately \$120,000.00.

John D. Steelman for some years prior to the date of the execution of the will had been engaged in the shoe business in Atlantic City. Millard F. Steelman for twelve or more years had been following his profession in the City of New York, and spending not more than three weeks of each year with his parents. Annie M. Cuskaden had during her entire married life lived with her husband in Atlantic City, near the home of the testator.

At the time of the execution of the will the testator was in failing health, and for two years prior thereto his daughter, Annie M. Cuskaden, had been acting in the capacity of his secretary, confidential clerk and business agent, and after the execution of the will and until the date of his death, she transacted his entire business for him.

Soon after the execution of the will, to wit, in the spring of 1912, the financial affairs of John D. Steelman became involved, and he appealed to his father for financial assistance to liquidate an indebtedness of \$4,000. This assistance the father for a time refused, but upon the importuning of his son, finally agreed to advance said sum, upon condition that John D. would close out the shoe business in the fall of the same year, 1912. The money was advanced, but John D. failed to close out the business as promised, but afterwards, during the year 1913, abandoned said business and left

for parts unknown, and afterwards, during said winter of 1913 and January of 1914, demands were made upon Derestus B. Steelman, the father, to pay a number of promissory notes as they fell due, which had been discounted for his son, John D., who had received the money thereon. These notes contained the name as endorser of the testator, Derestus B. Steelman, purporting to be the signature of said testator. These signatures were repudiated by the testator, and liability thereon was denied by him. Suits were threatened; the whereabouts of the son, John D., were unknown; and after much hesitation the testator, without admitting liability, but desiring to protect the family name, paid them.

Immediately thereafter the testator added a codicil to his will, disinheriting his son, John D.

The pertinent clauses of the will and codicil are as follows:

WILL.

First: It is my will and I do direct that all of my just debts and funeral expenses be paid as soon as may be after my decease.

Second: It is my will and I do direct that my beloved wife, Marietta Steelman, be permitted to occupy my home, known as No. 12 South Ohio avenue, in said Atlantic City, during her lifetime, and I hereby make a charge upon my estate the cost of the up-keep, carrying charges and all municipal assessments which may be imposed upon said home during the lifetime of my said wife.

Third: I give and devise unto Albert D. Cuskaden and Albert J. Feyl all my property, real, personal and mixed, subject to item two hereof, in trust as follows:

A. To manage, sell, invest and reinvest the same, and to pay the rents, issues and profits thereof to my said beloved wife, Marietta Steelman, and my children, John D. Steelman, Annie M. Cuskaden and Mil-

lard F. Steelman, during their respective lifetimes, share and share alike, hereby directing my trustees and executors to pay to each, his or her respective share monthly, beginning six months after my decease.

B. Upon the death of my said wife I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them during their lifetime.

C. Upon the death of any or either of my said children, leaving issue him or her surviving, then and in such event I direct that such share of my estate upon which he or she shall have been receiving the rents, issues and profits, shall become the absolute property of the issue of such deceased child; should either of my said children die without issue, him or her surviving, then and such event I direct my executors and trustees to pay the share theretofore paid to said deceased child to the survivor or survivors of my said children, share and share alike, during the life or lives of said survivor or survivors.

D. Should any or either of my said children die without issue, leaving him or her surviving a wife or husband, then and in such event I direct that one-half of such share of my estate upon which he or she shall have been receiving the rents, issues and profits, shall become the absolute property of such wife or husband and that the rents, issues and profits arising from the other one-half of said share theretofore paid to said deceased child be paid to the survivor or survivors of my said children, share and share alike, during the life of said survivor or survivors.

Fourth: Should my trustees and executors at any time, subject to item two hereof, deem it for the best advantage of my estate that any or all of my property be sold, I hereby empower them to sell the same without liability on the part of the purchaser or purchasers to see to the application of the purchase money and invest the proceeds thereof in good approved securities

and to disburse the income therefrom as hereinabove provided."

CODICIL.

This is a codicil to be added to the last will and testament of me, Derestus B. Steelman, of Atlantic City, in the County of Atlantic and State of New Jersey, which bears date on or about the twenty-fourth day of May in the year of one thousand nine hundred and twelve.

First: I do hereby ratify and confirm my said last will and testament in all respects, save so far as any part thereof shall be revoked or altered by this present codicil, and in particular, save so far as the same relates to the giving and devising of any part or portion of my estate in trust for my son, John D. Steelman, during his lifetime, as to which particular I do hereby revoke and alter my said will as follows: It is my will and I do direct that the part or share of my estate in and by my said will given and devised in trust to my said son, John D. Steelman, shall be held in trust for Edna Feyl and Marion Steelman (children of my said son, John D. Steelman) and the rents, issues and profits thereof paid to them during the lives of my beloved wife, Marietta Steelman, and my children, Annie M. Cuskaden and Millard F. Steelman, or the survivor of them, and upon the happening of the last mentioned event the said Edna Feyl and Marion Steelman shall be entitled to receive the principal so held in trust for them, share and share alike.

Second: Should either the said Edna Feyl or Marion Steelman die without issue before receiving her share of said principal, then and in such event the share of said decedent, both principal and interest, shall be paid to the survivor in accordance with the terms of my said will and this codicil thereto.

The will was executed May 24, 1912.

The codicil was executed February 18, 1914.

The testator died November 29, 1914, leaving him surviving his widow, Marietta; his son, John D.; his daughter, Annie M.; his son, Millard F.; two granddaughters, the children of his son, John D., to wit, Edna Feyl and Marion Steelman, and two grandsons, the children of Annie M. Cuskaden, to wit, Millard E. Cuskaden and Fred S. Cuskaden.

The will was duly probated, and Albert D. Cuskaden and Albert J. Feyl entered upon the execution of the trusts therein contained.

Annie M. Cuskaden died on March 30, 1916, leaving her surviving her two children, Millard E. Cuskaden and Fred S. Cuskaden.

Marietta Steelman, the widow, died on December 5, 1916.

At the time of the widow's death there were and still are living of the persons named in said will and codicil John D. Steelman, Millard F. Steelman, Edna Feyle and Marion Steelman, the daughters of John D., and Millard E. Cuskaden and Fred S. Cuskaden, the children of Annie M. Cuskaden.

Upon the death of the widow, Marietta Steelman, on December 5, 1916, Millard F. Steelman demanded of the trustees that they pay to him the entire income that had previously been paid to the widow, claiming that by reason of Annie M. Cuskaden predeceasing the widow, her children were entitled to no part or portion of said income, and that because his father, the testator, had disinherited his brother, John D., that neither John D. nor his children were entitled to any part thereof.

The trustees were advised that the income theretofore paid to the widow should be divided into three equal parts; one part thereof paid to Millard F.; one part to the children of John D. Steelman, and one part to the children of Annie M. Cuskaden.

So that the trustees should be advised by the Court of the manner of distribution, the bill was filed.

The Court of Chancery decreed that Millard F. Steelman should receive one-third of the income that had previously been paid to the widow; the two children of John Steelman should receive one-third of the income that had been previously paid to the widow, and that the Cuskaden children should receive one-third of the estate. From this decree this appeal is taken.

ARGUMENT.

The same contention that was made by Millard F. Steelman in the Court of Chancery is made before this Court, and the final result of it all is stated in the concluding paragraph and tabulation of the brief of the appellant, Millard F. Steelman, in which he states:

"True he (Millard F. Steelman) would receive approximately the income on \$60,000.00, while the children of Annie M. Cuskaden receive absolutely approximately \$30,000.00, and the children of John D. Steelman the income on \$30,000.00, and ultimately the principal thereof. As to the ultimate distribution of the above mentioned \$60,000.00 (on which Millard receives the income), the will makes no provision. If the testator died intestate as to this, it would vest as follows:

Millard E. Cuskaden, Fred S. Cuskaden, one-third, \$20,000.00.

John D. Steelman, one-third, \$20,000.00.

Millard F. Steelman, one-third, \$20,000.00.

Thus the Cuskaden children would ultimately receive five-twelfths of the estate; John D. Steelman's children, three-twelfths; John D. Steelman could devise two-twelfths, and Millard F. Steelman could devise two-twelfths."

This conclusion of Millard F. Steelman, appellant, is the logical conclusion that results from the application

of the rules which he contends control the construction of this will. There are a number of objections to this conclusion, however, which respondents contend are of such force as to rebut the construction placed upon the will by Millard F. Steelman, appellant, and to drive one to some other conclusion of it, which other conclusion respondents contend is the construction hereinafter urged by them.

OBJECTIONS TO CONSTRUCTION OF APPELLANT.

I.

The intention of the testator, as evidenced by the whole will, clearly shows that he intended that each of his children should, during their respective lives, receive one-third of the income from his estate after the death of the widow, and prior to her death that each should receive one-fourth of the income; that he intended none of his children to possess any portion of the corpus of his estate, but that the corpus should vest in his grandchildren, unless one or more of his children should die without leaving issue, but leaving a husband or wife, in which event one-half of the corpus from which such child should have been receiving the income should vest absolutely in such husband or wife.

The construction urged by appellant and the conclusion to which it leads frustrates this intention.

“The intention of the testator is the law of wills, and where that intention can be ascertained, if not in violation of the rules of law, it will prevail over technical rules and words in their technical or even ordinary meaning.”

Provost v. Provost, 27 Eq. 296.

Stokes v. Filly, 9 Eq. 310.

Sinnickson v. Snitcher, 14 L. 53.

Mullany v. Mullany, 4 Eq. 16.

From the face of the will it clearly appears that the testator intended equality among his beneficiaries. The construction urged by appellant and the conclusion to which it leads destroys equality.

Paragraph 3 of the will, after the devise to Albert D. Cuskaden and Albert J. Feyl of all of testator's property in trust, is as follows:

"A. To manage, sell, invest and reinvest the same, and to pay the rents, issues and profits thereof to my beloved wife, Marietta Steelman, and my children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman, during their respective lifetimes, share and share alike."

"B. Upon the death of my said wife I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them, during their lifetime."

"C. * * * I direct my executors and trustees to pay the share theretofore paid to said deceased child to the survivor or survivors of my said children, share and share alike."

Paragraph D of said will provides:

"In such event, I direct that one-half of such share of my estate upon which he or she shall have been receiving the rents, issues and profits, shall become the absolute property of such wife or husband, and that the rents, issues and profits arising from the other one-half of said share theretofore paid to said deceased child, be paid to the said survivor or survivors of my said children, share and share alike."

From which provisions, it is contended by respondents, that the testator intended his estate to be enjoyed by the beneficiaries equally.

The construction urged by appellant and the conclusion to which it leads creates an intestacy admittedly as to one-half the testator's entire estate. This result of intestacy is against the policy of the law.

In the case of *Lee v. Savage*, 14 *Eq.* 124, at page 134, the policy of the law regarding intestacy is stated as follows:

"The natural and reasonable presumption is that when a will is executed, the testator designs to dispose of his entire estate and does not intend to die intestate as to any part of his property."

That case was cited with approval in the United States Supreme Court in the case of *Hardenbergh v. Ray*, 151 *U. S.* 112. At page 126 the Court said:

"It is furthermore settled by the authorities that when one undertakes to make a will, it will be presumed that his purpose is to dispose of his whole estate," citing in addition to the case of *Lee v. Savage*, the cases of:

Phelps v. Phelps, 143 *Mass.* 570.

James v. Pruden, 14 *Ohio St.* 251.

Gourley v. Thompson, 2 *Snead.* 387.

United Presbyterian Board, 91 *Pa.* 507.

The same principle was enunciated in the case of *Tyndale v. McLaughlin*, 84 *Eq.* 652, at page 657, in the following language:

"The testator's intention must be gathered from within the four corners of his will. What he has there laid down, either expressly or by implication, the Court construes and the leaning will always be towards a construction to prevent intestacy."

From the face of the will it clearly appears that the testator intended to limit his children to a life interest

in his estate. By the construction urged by appellant and the conclusion to which it leads, appellant and John D. Steelman (except for the codicil) would each receive one-third of the income from the estate for life, and in addition thereto, by intestacy, one-sixth each of the corpus of the estate in fee, which each can sell or otherwise dispose of, subject only to the collection of the income therefrom by the trustees, which income would be paid them as part of their income from the estate, thus nullifying the testator's will that they should not participate in the corpus of the estate.

5.

The testator by the codicil to his will disinherited his son, John D. It is clear that the testator intended that John D. should never benefit by his estate. By the construction urged by appellant and the conclusions to which it leads, John D., though disinherited by the will, inherits one-sixth of the estate through intestacy.

6.

The construction urged by appellant and the conclusion to which it leads, deprives the Cuskaden children from ever participating in the distribution or ownership of the homestead property, which was, by the terms of the will, withdrawn from the estate during the life of the widow.

7.

The construction urged by appellant and the conclusion to which it leads is based upon the particular intention as gathered from each several paragraph and not from the general intention of testator as expressed in the whole will.

The particular intention must give way to the general intention.

McMurtrie v. McMurtrie, 15 L. 277.

Graydon v. Graydon, 25 Eq. 561.

Pennington v. VanHouten, 8 Eq. 272.

Tuttle v. Howell, 17 Eq. 176.

8.

If the Court should conclude that the construction contended for by appellant should prevail, except as to the Steelman children, and should conclude that as to them the construction contended for by them should prevail, then the Cuskaden children would receive one-fourth of the estate and the Steelman children would ultimately receive three-fourths of the estate.

CONSTRUCTION URGED BY RESPONDENTS.

In order to properly construe this will and codicil, it is important to consider the testator and his surroundings at the time the will was drawn. As stated by the appellant upon the argument, the testator at that time was about seventy years of age, and from the will and stipulation and the reasonable inferences drawn therefrom, it will appear that the objects of the testator's bounty at that time were his widow; his son, John D. Steelman; his two children, Edna Feyl and Marion Steelman; John being engaged in the shoe business in Atlantic City; his son, Millard F., a lawyer, practicing his profession in the City of New York, and who spent about three weeks only of each year with his father; a daughter, Mrs. Cuskaden, being a twin sister of Millard, who lived in Atlantic City, near her father, and her two children, Millard E. and Fred S.; she having acted for the two years past as testator's confidential clerk, secretary and business agent.

It is quite clear that the dominant thought in the mind of the testator was equality, both as among his widow and his children and also as among his grandchildren.

His son John had a home which presumably was maintained from the shoe business. His son Millard had a home, or its equivalent, in New York City. His daughter Annie had a home with her husband, and the first thought of the testator was to place the widow and each of his children on an equal footing, and to accomplish this, before making any devise to the trustees or any other disposition of his estate except to require the debts to be paid, he provided:

“*Second*: It is my will, and I do direct that my beloved wife, Marietta Steelman, be permitted to occupy my home * * * during her lifetime.”

Then, assuming that this provision alone did not put her on an equal footing with his three children, he further provided in the same paragraph:

“and I hereby make a charge upon my estate the cost of the upkeep, carrying charges and all municipal assessments which may be imposed upon my said home during the lifetime of my said wife.”

and then, having placed her upon an equal footing with all of his children, as regards a home, he proceeds to provide for a distribution of the income of his estate in Clause 3, Paragraph A, as follows:

“(Trustees) To pay the rents, issues and profits thereof to my said beloved wife, Marietta Steelman, and my children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman, during their respective lifetimes, share and share alike.”

In this paragraph, carrying out the dominant thought of equality, he limits each and every of them to an equal portion of the income for life, and after

having gone thus far, he contemplates the death of his wife and provides:

"B. Upon the death of my said wife, I direct that the share theretofore paid to her shall be equally divided among and paid to my said children, or the survivor or survivors of them, during their life."

(a) The question arises, What was in testator's mind, and what thought did he intend to express by this language contained in Paragraph B? Had he intended, as is contended for by appellant, that the income from his estate should be enjoyed equally by his widow and three children during their lifetime, and did not intend that the surviving stirps of his children should participate therein, he would not have written Paragraph B at all. In Paragraph A he had directed his executors to pay the rents, issues and profits from his estate to his beloved wife, Marietta, and his children, John D., Annie M. and Millard F., during their respective lifetimes, share and share alike. Under that paragraph, after the death of the widow the entire income from his estate would have been paid to the children then living. The direction to the executors is that they shall pay the rents, issues and profits of his estate, not until the death of his wife, but during the lifetime of the wife and each of the children, so that to carry into effect the thought urged by the appellant Paragraph B was mere surplusage, but if Paragraph B be construed as a modification of Paragraph A in that the testator intended the children of a deceased child to succeed to the share of such deceased child, not only in the corpus but in the income, and by "survivor" intended "surviving stirps or stock," then Paragraph B performs a useful function.

He then, in Paragraph C, contemplates the death of either or any of his children. If his widow had predeceased his children, as he apparently contemplated, then upon her death one-third of her share of the in-

come, or one-twelfth, would have gone to each of the children, which, in addition to the one-fourth each was then receiving, would have made one-third thereof for each. If Annie M. Cuskaden had afterwards died, her share would have gone under the will to the two Cuskaden children, to wit, one-third thereof, which is the share for which the Cuskaden children are now contending, and the happening of the death of Mrs. Cuskaden prior to the death of the widow gives rise to the controversy, appellant contending that his sister having predeceased his mother, the sister's children took only one-fourth of the corpus from which their mother had received the income during her lifetime, and are entitled to no interest or portion of the income of the corpus from which it was derived that was paid to the widow. If the construction is placed upon this will for which the Cuskaden children contend, the clear intention of the testator is carried into effect irrespective of whether the death of a child happens before or after the death of the widow.

The testator never intended his grandchildren to be deprived of any portion or interest in his estate by the loss of their parent before the death of his widow. His codicil proves that.

A very similar case arose in Pennsylvania, *In re Fox Estate*, 70 Atl. 954, in which case a testator gave his estate in trust for his four daughters, each to receive one-fourth of the income for life, and on the death of any daughter leaving issue, the principal to be assigned to such issue, and on the death of any of the daughters without issue, the share of such daughter to be held in trust for her surviving sisters in the same manner. Two of the daughters died leaving children, among whom their shares were distributed. A third daughter afterwards died leaving no children. *Held*, that the share of the third daughter did not go to the surviving sister, but should be distributed one-third to her and the remainder to the children of the deceased sister, *per stirps*.

Chief Justice Mitchell, in writing the opinion, held:

"The words 'survivor or survivors' will be understood as the equivalent of the word 'other' where in any other sense it would lead to intestacy or inequality among those standing in the same degree of relationship to the testator, or to a distribution not in accordance with the general scheme of the will."

It has already been seen that to adopt the technical construction contended for by appellant would lead to inequality not contemplated by the testator, and would lead to intestacy as to one-half of the estate, likewise not contemplated by the testator, and further would lead to the vesting of a portion of the corpus of the estate in appellant, who by the terms of the will was given only a life interest in the income, and who the testator clearly intended should never participate in the corpus of the estate, and further would vest at least one-sixth of the corpus of the estate in John D., whom the testator, for good and sufficient reasons, had disinherited. If, on the other hand, the word "survivor" is construed as "surviving stirps or stock," the testator's intention of equality is carried into effect throughout.

Paragraph A of Clause 3 provides for the distribution of the income among the widow and his children, John D., Annie M. and Millard F., during their respective lifetimes, share and share alike.

Paragraph B provides that upon the death of the widow the share theretofore paid to her shall be equally divided among and paid to his said children or their survivor (stock or stirps).

Paragraph C provides: "Upon the death of either or any of my children leaving issue him or her surviving, then and in such event I direct that such share of my estate upon which he or she shall have been receiving the rents, issues and profits shall become the absolute property of the issue of such deceased child," thus preserving equality.

From this paragraph it is entirely clear that the testator intended that his grandchildren should stand in the place of their parent.

Continuing, the paragraph reads:

“Should either of my said children die without issue him or her surviving, then and in such event I direct my executors and trustees to pay the share theretofore paid to said deceased child to the ‘surviving stock or stirps’ of my said children, share and share alike.”

thus preserving equality.

Paragraph D provides:

“Should any or either of my children die without issue * * * but leaving a wife or husband, one-half of the share of my estate upon which he or she shall have been receiving the income * * * shall become the absolute property of such wife or husband, and the rents, issues and profits arising from the other half of said share theretofore paid to my said deceased child be paid to the ‘surviving stock’ of my said children, share and share alike.”

thus preserving equality throughout as between the widow and his three children as one class and preserving equality as between his grandchildren as another class.

By applying this same construction of the words “survivor or survivors” to Paragraph D as is applied to the previous paragraphs, it leads (independent of the codicil) to a construction that the testator intended the income to be divided not only during the lifetime of his widow and children, but also during the lifetime of his grandchildren, per stirps, and the question arises, is there evidence in the case to support this contention sufficient to overcome the force of the language in Paragraph C, wherein he uses the following language:

“Upon the death of any or either of my said children leaving issue him or her surviving,

then and in such event I direct that such share of my estate upon which he or she shall have been receiving the rents, issues and profits shall become the absolute property of the issue of such deceased child."

It will be observed that by the provisions of the original will, testator's grandchildren, to wit, the children of John D. and the children of Annie M., were placed upon an equal footing, the language used by the testator applying to both sets of grandchildren; in fact, to all the issue of testator's children.

A year and a half after this will was made the testator added a codicil thereto in which he disinherited his son John D. Thereafter to him that son was to all intents and purposes *dead*. Then arose an occasion where the testator himself was called upon to interpret the language of his own will and to designate when the corpus of his estate should vest in the grandchildren, as well as to designate whether the income intended for a child during life should after death and before the death of the widow be paid to the surviving stirps, or should be paid to his surviving children. There can be no doubt but that if the testator had intended the property to vest in the grandchildren immediately upon the death of their parent, he would in that codicil have provided that John's share should vest in John's children immediately, to wit, upon the taking effect of the will, because so far as the will was concerned and the scheme of the will was concerned, John was then to him *dead*, and the fact that the Cuskaden grandchildren and the Steelman grandchildren had been put upon an equal footing by the testator in his original will and had been treated throughout that will upon an equal basis shows that when he came to the point where he was to decide when the grandchildren were to receive the corpus he did not adopt the construction that the appellant now contends for, but he adopted a construction apparently adopted by the

Court of Chancery in its opinion, and gave John's children the income that John was to have received.

(b) The testator exercised the utmost care that his widow should be placed upon an equal footing with his children, in providing a home and its upkeep for her during life.

If the contention of appellant be applied to the will, then, upon Annie's death, one-fourth of the corpus is withdrawn from the estate. That fourth is no longer burdened with any portion of the upkeep of the property, and the upkeep must then be borne by the other three-fourths, which immediately produces an inequality to the extent of such upkeep, and if it had happened, as it might have, that John had died and Millard had died, leaving issue surviving, then three-fourths of the corpus would have been withdrawn from the estate, and the widow would have had the income from one-fourth of the estate from which would have been deducted the trustees' fees and expenses and the upkeep of the homestead property, and she would have had only what then remained, the result of which would have been that the testator, after the exercise of his great care to see that she shared equally with each of his children, would in effect have given preference to the children of each child over the widow.

(c) There is no direction contained in the will to the trustees to divide the corpus of this estate. There is no method pointed out to them as to how it should be divided, and it seems quite clear that if the testator had intended the corpus of this estate to be split up on the installment plan, he would have indicated some means to guide the trustees in the division thereof. He constituted as his executors and trustees the husband of one of the Steelman children, and the father of the two Cuskaden children, and it is hardly likely that if he had contemplated an installment division of the corpus of the estate, that he would have left it entirely in the hands of trustees who were so vitally interested in

these grandchildren, so that upon a view of the whole will, considering the fact that the upkeep of the homestead property was charged upon the whole estate, it is contended that the testator did not intend that the corpus of this estate should be carved on the installment plan, but that it should remain intact so long as the income was being divided among the beneficiaries under the will or any of them, pursuant to the terms of the will, and he certainly did not intend that the estate should be divided on the installment plan during the lifetime of his widow.

Continuing the argument as to the testator's intention to preserve equality throughout the will, the codicil must not be overlooked.

It is contended by the appellant that upon the death of the widow the income that she received was to go to the surviving child or children, or under Paragraph C, upon the death of a child without issue, the portion of the income paid to such child should go to the surviving child.

It will be noticed that the testator by the codicil provided for the devolution of his estate even as to his grandchildren in the event of the death of one of them without issue, and yet if the construction contended for by appellant be adopted, no provision is made by the testator for the corpus of the estate at the death of Millard, on which he receives the income during life, in the event of his dying unmarried and without issue, and no disposition whatever is made of the corpus of one-half of the estate on which Millard receives the income during life. In view of the fact that the testator has seen fit to provide for the devolution of the small portion of his estate that would vest in a grandchild, can it be assumed that he intended to die intestate as to the large portion, to wit, one-fourth of one-half of his entire estate? Should a construction be placed upon this will that would give a life interest in the estate to a surviving child when no provision is made for the cor-

pus of such estate upon the death of such surviving child? The testator certainly never contemplated any such result, and the question is, Will this Court by a technical construction decree such a result, or will this Court by a construction that will carry into effect the testator's will, follow other Courts under similar conditions and decree "survivor" to mean "surviving stock or stirps?"

Appellant makes the same contention as to Paragraphs B and C. We contend that such was not the intention of the testator. If such had been the intention of the testator, when he executed the codicil he would have given the income taken from John to his living children, Annie and Millard, because John was to all intents and purposes dead to him. Contrary to this contention, he provided that the corpus which John's children would have received under the will at John's death, had John not been disinherited, should be held in trust for them. John, of course, was disinherited before the death of the widow. His children, as soon as he was disinherited, stood in a like position as the Cuskaden children after the death of their mother prior to the death of the widow, and the fact that when the testator was dealing with that condition he did not give the income to Millard and Annie M. shows that he did not intend upon the elimination of a child by reason of death or otherwise, to give the income which would otherwise have gone to such child to his surviving children, but does show that he intended equality throughout, and that he intended his grandchildren to stand in the place of their parent, not only with regard to the corpus, but also with regard to the income from his estate. It also shows that he did not intend that the income of the children should be increased above the one-third provided for in Paragraphs A and B, that is, one-fourth of the income given to each plus one-third of one-fourth that each would get upon the death of the widow.

(d). The contention claimed by appellant in the event of the death of Mrs. Cuskaden and John, eliminating the codicil, prior to the death of the widow, would give three-fourths of the income to Millard and one-fourth of the income to the widow. In view of the extreme care exercised by the testator to see that his widow should be placed upon an equal footing with them, can it be for a moment believed that the testator ever intended such a condition? It would seem rational to assume, in view of his care to provide an equal bounty to her, that if he had intended any augmentation to the income of any of the objects of his bounty mentioned in Paragraph A, where he provides for the amount to each, that he would have provided that his widow, if living, should participate therein so that she would continue to be upon an equal footing with his children, and this fact, coupled with the fact that when he wrote the codicil he gave the income to the children of John, and not to the brother and sister of John, seems conclusive that the testator did intend equality among his widow and children; that he intended equality among his grandchildren, and that he did not intend that the income of any of his children should be increased by the death of a child under any circumstance.

By the codicil the testator somewhat changed the time when the corpus of the estate should vest in the grandchildren. His language is:

"It is my will, and I do direct that the part or share of my estate in and by my said will given and devised in trust to my said son, John D. Steelman, shall be held in trust for Edna Feyl and Marion Steelman (children of my said son John D. Steelman) and the rents, issues and profits thereof paid to them during the lives of my beloved wife, Marietta Steelman, and my children, Annie M. Cuskaden and Millard F. Steelman, or the survivor of them,

and upon the happening of the last mentioned event, the said Edna Feyl and Marion Steelman shall be entitled to receive the principal so held in trust for them, share and share alike."

There was in fact no estate held in trust for John under the original will, but assuming that the testator meant the corpus from which his son John was to have received the equal share of the income, and that this share was to be held in trust for Edna and Marion, the question arises, When was this trust to terminate and the property be delivered to Edna and Marion?

The Cuskaden children contend that the trust terminates upon the death of the last lived of Marietta Steelman, Annie M. Cuskaden and Millard F. Steelman, which indicates, in view of the equality maintained between these grandchildren by the testator, that the testator did not intend that the Cuskaden children should receive their portion of the corpus of the estate prior to the death of the widow or Millard. Whether the Court should determine that the corpus vested in the Cuskaden children upon the death of their mother and the widow, or upon the death of the widow, freed of all charge and burden, or whether it vested in them subject to the charge and burden of the income being paid to the trustees during the life of any of the testator's children, is immaterial to the Cuskaden children.

The Court of Chancery, following the case of *In re Fox*, apparently concluded that the one-fourth of the estate from which Mrs. Cuskaden had received the income vested in the Cuskaden children free of charge or burden upon their mother's death, and that one-third of the estate on which the widow had been receiving income, vested in the Cuskaden children free of charge upon the widow's death, thus putting one-third of the entire corpus in the children at the widow's death.

It further appears from the stipulation that after the making of the will and until the testator died, An-

nie M. Cuskaden attended to all his business transactions. She was his reliance in all matters of business, and while so relying upon her, and only about six months before his death, he executed the codicil. It is not at all likely that at his age of life, with one son gone bad to such an extent that he disinherited him; another son a lawyer, practicing in New York, who apparently gave no consideration to him, and relying entirely upon this daughter, that he would have at that time contemplated or intended to be more generous with the children of the disinherited son than with the children of his faithful daughter.

In the case of *In re Palmer's Settlement Trusts*, L. Rep. 19 Eq. 320, it was held that the word "survivor" in one of the clauses of the settlement may be read "other" in order to effectuate the intention of the parties, notwithstanding the same word may require to be read in its natural sense in other clauses of the same settlement.

In the case of *Winterton v. Crawford*, 1 Russ. & M. 407, 39 Reprint 157, it was held that to effect the expressed intention of the testator the word "survivor" may receive a different sense in different parts of the will.

"Survivor" was construed "surviving stirps" in the following cases similar to ours.

In the case of *Lucena v. Lucena*, L. Rep., 7 Ch. Div. 255, wherein the word "survivor" was construed, it was construed as referring to surviving stock and not survivor of the particular children of the testator. In that case there were two daughters and two sons. The two daughters first died leaving issue, then a brother died without issue. The living brother claimed the entire estate of the deceased brother. The Court held that the brother was not entitled to the whole thereof, but the share of the deceased brother should be divided among the living brother and the children of the two deceased daughters, per stirpes.

In the case of *In re Fox Estate*, 70 Atl. 954, the testator gave his estate in trust for his four daughters, each to receive one-fourth of the income for life, and on the death of any daughter leaving issue the principal to be assigned to such issue, and on the death of any of the daughters without issue, the share of such daughter to be held in trust for her surviving sisters in the same manner. Two of the daughters died leaving issue, and thereafter a third daughter died leaving no issue, thus upon the death of the third daughter without issue there remained living one of the original sisters and the issue of the two deceased sisters. The one living sister claimed the entire estate of the sister dying without issue, and claimed that the issue of the deceased children had received the share enjoyed by their mothers during their lifetime, and by receiving that share were concluded. Thus the facts in that case are practically parallel with the facts in this case.

Chief Justice Mitchell wrote the opinion of the Court, and at page 955 said:

“The general intent apparent throughout the scheme of the will was to make equality among his daughters during their lives, with remainder to the children of those leaving issue. In pursuance of this intent the estate was to be held as a unit until the oldest daughter should come of age and then severed as to her, and so on to each daughter in turn until the youngest reached full age, when there would be four separate trusts, one for each daughter in severalty. If one of the daughters had died without issue before any severance, there can be no doubt that the others would have taken her share as survivors by the express terms of the will; if such daughter died after her share had come to be held separately, the direction of the will is the same, and the others would have taken as survivors; but, if the daughter first dying left

issue, her share would be distributed to them, and it is argued that then they would have received their full share, their claims under the will would have ended, and they would be excluded from participation in the share of another daughter subsequently dying without issue. As was forcibly said by Judge Penrose: "If the word 'surviving' as used by the testator is to be understood in its precise, literal sense, it necessarily follows that while he made careful provision for his grandchildren, giving to them the 'inheritance in fee simple' of the shares originally held in trust for their mother, whose interest was expressly confined to the term of her life, he intended that only the children of a daughter who survived a sister who left no issue should share in the distribution of the part held in trust for her, and to exclude all others; and it also follows that he must have intended, if the last survivor of his daughters should die without issue, even though all his other daughters had left children still surviving, there would be an intestacy."

"But this result is clearly not in harmony with the general intent and scheme of the testator. He treated all his daughters alike, and gave each one-fourth of his estate for life, with remainder to her issue. Not one of them was vested with power to break the succession of her issue in remainder, and nowhere is there any indication that he intended to make any distinction among his descendants of the second generation as to their ultimate share in his estate. That the issue of a sister dying first should thus be cut-off from participation in the share of a sister dying subsequently without issue would be giving as accidental and irrelevant fact an effect contrary to the manifest general

intent, and an exercise of the power withheld from the daughters themselves.”

In the case of *Hodge v. Foot*, 34 *Beav.* 349, 55 *Reprint* 669, a testator gave one-third of his real and personal estate to each of his three daughters for life, and after their respective deaths to their respective children, but in case any or either of the three daughters should die without leaving any children, or if all should die under twenty-one, then the share of the daughter so dying should be for the separate use of the surviving daughter or daughters and their children per stirps. *Held*, that “surviving” ought to be construed “other,” and, consequently, one having died leaving children in 1803, and the second in 1837 leaving a child, and the third in 1849 leaving no children, it was held that the share of the last was divisible per stirps among the children of the two former.

In the matter of *Walker's Estate*, *Church v. Tyacke*, *L. Rep.*, 12 *Ch. Div.* 205, a testator gave the residue of his real and personal estate to trustees in trust, after paying the income unto his wife for her life, for his son and five daughters during their respective lives, equally, to be divided between them as tenants in common (except that his oldest daughter should have a double share); the share of each daughter to be for her separate use, and after the respective decease of each of his children, the share or shares to which he, she or they might be entitled of and in his estate should be in trust for his, her or their child or children, equally, to be a vested interest at twenty-one years of age, and there was a proviso that if any or either of his children should die without leaving issue him or her surviving who should live to attain the age of twenty-one years, the share or shares to which any or either of his children should be entitled of and in his estate should thereupon be held in trust for his then surviving child or children in such manner and form in all respects as declared with regard to the share or shares

originally given to him, her or them. The testator left him surviving his son, Samuel M. Walker, and five daughters, Mary Walker, Margaret Jenkins, Eleanor Elgee, Josephine Tyacke and Frederica Frances Church. Margaret died in 1868 without issue; Samuel M. died in February, 1874, leaving three children surviving, who were still living at the time of the decision; Mary died in October, 1874, without issue; Eleanor died in 1875 without issue; Josephine was still living and had five children living; Frederica was still living and had two living children. The action was to have the trusts carried into execution by the court. Vice Chancellor Hall rendered the decision and held that the children of the son Samuel were entitled to a third part of the share of Mary and Eleanor, who died without issue after the brother Samuel, the share of Margaret, who first died, having previously vested in the remaining five.

In the case of *Hawkins v. Hamerton*, 16 *Sim.* 410, 60 *Reprint* 933, a leasehold estate was bequeathed by the testator to his son Charles with direction that if his son should die without issue, the leasehold should be considered as part of his residuary estate and be divided among the children of his three daughters, Isabella, Matilda and Mary, and he gave the residue of his estate to trustees in trust for his son and three daughters, or such of them as should be living at the death of his wife, equally, during their lives, and he directed that after their deaths the whole of the residue should be divided among all the children of his said son and daughters in equal parts, and in case any of his said son and daughters should die without leaving issue, that the share of him, her, or them, so dying should be divided among the survivors of his said children and their issue, in like equal parts. Isabella died in the lifetime of the testator's widow, leaving children; Mary died after the widow, leaving children; then Charles died without issue; Matilda was still liv-

ing and had children. *Held*, that Isabella's children were entitled to one-fourth of the residue, notwithstanding their mother died before the widow; Mary's children were entitled to one-fourth, and Matilda, the remaining sister, was entitled to one-fourth for her life with the remainder to her children, and that as Charles had died without issue, the remaining one-fourth was divisible into three parts, one of these belonged to Isabella's children, another to Mary's children and the remaining to Matilda for life, with remainder to her children.

In the case of *Whytehead v. Bolton*, *L. Rep.* 41 *Ch. Div.* 525, Kay, J., in a very similar case, after reviewing the adjudications upon the subject, concludes as follows:

"It seems to me that the decisions establish the following propositions: Where the gift is to A, B and C equally for their respective lives, and after the death of any, to his children, or if any die without issue, to the survivors for life, with remainder to their children, only children of survivors can take under the gift over. If to similar words there be added a limitation over, if all the tenants for life die without children, then the children of a predeceased tenant for life participates in the share of one who dies without children after their parent. They also participate, although there is no general gift over, where the limitations are to A, B and C equally for their respective lives, and after the death of any, to his children, and if any die without children, to the surviving tenant for life and their respective children in the same manner as their original shares."

The Court, at page 530, further said:

"Where a gift is to two designated devisees, that is, the testator's two daughters, as tenants in common entail, and if either should die with-

out issue, then to the surviving daughter and the heirs of her body, unless the word 'surviving' is to be taken here to mean 'other,' the intention cannot be carried into effect, for he means his gift over to come into operation if either of his daughters dies without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'surviving' shall be read as to be rendered capable of being applied to the predeceasing daughter and to which the gift over to the testator's right heirs is only in default of such issue."

In the case of *Ridgely v. Ridgely*, 59 *Atl.* 731, the Court of Appeals of Maryland, at page 733, said:

"Where a will discloses no partiality for any particular son or daughter, but shows an intention to treat all the children equally, a construction of the will which might not preserve the contemplated equality should be rejected if it is possible to do so and at the same time give proper effect to the language of the instrument."

And at page 734, said:

"A court will struggle against a construction of a will that may produce—although such result is improbable—a partial intestacy, especially where such result is not in harmony with the testator's general intent."

In the case of *Carter v. Bludgood's Executors*, 3 *Sand. Ch. (N. Y.)* 293; 7 *Reprint* 858, a testator having a son and five daughters, all infants, gave the residue of his estate to trustees with direction to pay the annual income to his six children in equal portions during their lives, and at the death of either of them without leaving issue, his or her share to continue as a part of the residue, the income of which was to be

equally divided among the surviving children, and if either of his children should die leaving issue, his or her share should be equally divided among his or her children. One daughter died without issue, then another died leaving one child, a son, and then two other daughters died without issue. The Court held that the words "surviving children" were to be construed "other children," and that the son of the deceased daughter was equally entitled to share with the testator's surviving children the portion of the daughters who died after the décease of his mother.

At page 293 the Court said:

"In the various specific legacies which he gave to his children in the previous portion of the will, he evidently made all the distinction and indulged all the partiality which he intended to make or exhibit amongst the different branches of his family. The residuary clause makes no distinction whatever. The grossly unequal distribution which might ensue from the defendant's construction is the work of chance, and the distressing consequences might well have been visited upon the family of the testator's only son as upon the issue of either of his daughters. The residuary clause shows that he had the issue of his children in view and that he intended to provide for them without any distinction or preference except the natural one, that the issue of each of his children, whether more or less numerous, should receive their parent's share. I think that the true construction of the will does not sustain defendant's claim. The words 'surviving children' are mainly relied upon to exclude the complainant from any participation in the shares of those of his sons who had died since his mother's death, and it is not to be denied that the literal signification of these words lead directly to that

result. Mr. Powell says, 'It is now settled, after some fluctuation of authority, that where property is given to the plurality of persons with the devise or bequest over in certain events of the shares of dying objects to the survivors, the word "survivors" is construed "others," so that as well those who die before as those who survive the objects in question are entitled, provided of course that their deaths did not happen under circumstances which subjected their shares to the operation of the limitation over,' and he puts the case of a bequest over to survivors on one dying under twenty-one years of age. The share of one so dying, he says, will vest in the person surviving and in the representatives of those who have previously died after having attained that age." Citing *2 Powell on Devises by Jarman*, 723.

The case put by the Court of Chancery above is very similar to the case at hand. Here, as there, the testator provided for the grandchildren, and his will showed clearly that he intended equality between them.

The case of *Stout v. Cook*, in the Court of Chancery, 77 *Eq.* 153, holds the contention for which the Cuskaden children contend, and we do not understand from the reversal by this Court, reported in 79 *Eq.* 573, that this Court repudiates the law applied in the Court of Chancery, but only adjudges that it is not applicable to the facts in that case.

It is therefore respectfully submitted that the decree in the Court of Chancery should be affirmed.

Respectfully,

BOURGEOIS & COULOMB,

*Sols. of Millard E. Caskaden
and Fred S. Caskaden.*

NEW JERSEY
Court of Errors and Appeals.

ALBERT D. CUSKADEN ET AL.,
Complainant-Respondents, }
vs. }
MILLARD F. STEELMAN ET AL., }
Defendants-Appellants. }

Brief for Appellant.

FACTS.

By the Last Will and Testament of Derestus B. Steelman, deceased, he appointed the complainants as Executors and Trustees. A controversy or dispute arose as to the distribution of the income and the complainants as Trustees and Executors filed their bill in the Court of Chancery asking for advice and instructions. An answer was filed by Millard F. Steelman, one of the legatees, and Edna Feyl and others, the other legatees named in the will. The case came on before the Vice Chancellor on pleadings and a written stipulation. He reached the conclusion that the appellant, Millard F. Steelman, was entitled to have only one-half of the income after paying one-third of the *corpus* to the heirs of Mrs. Annie M. Cuskaden. From this

decree Millard F. Steelman appeals and insists that he is entitled to have the entire income after payment of one ~~part~~^{fourth} of the *corpus* to the children of Mrs. Annie M. Cuskaden.

DISCUSSION.

It may aid in arriving at a true construction of the controverted sections of the will in dispute, if its general structure and plan is examined before proceeding to consider more specifically those sections therein which are the immediate subject of controversy, and which were passed upon by the court below. After providing for the payment of debts in clause "First" (page 2), testator by clause "Second" (page 2), devised to his widow, Marietta Steelman, the use and occupation of his dwelling house during her lifetime. He then by clause "Third" (page 2) devised all his property to the complainants herein upon certain trusts.

By said clause "Third," subdivision A (page 2), the Trustees are "to manage, sell, invest and re-invest the same and to pay the rent issues and profits thereof to my said beloved wife, Marietta Steelman, and my children, John D. Steelman, Annie M. Cuskaden and Millard F. Steelman, during their respective lifetimes, share and share alike, hereby directing my trustees and executors to pay to each his or her respective share monthly, beginning six months after my decease."

Thus are created four distinct life estates in the income, derived from a common property. This clause affects only life incomes and does not touch upon the distribution of the *corpus*, or any redistribution of income in the event of the death of any one of the four life beneficiaries. Such changes in the event of death are provided for in the succeeding subdivisions of this clause. Testator by Subdivision B (Clause "Third"), page 3, provides by *specific* language for the death of the widow thus: "Upon the death of my said wife I

direct that the SHARE *theretofore paid to her* shall be equally divided among and paid to my *said children*, or the survivor or survivors of them during their lifetime." It will be noted that this affects only *income*; "the share theretofore paid to her." It provides for a redistribution of her share of the income, viz., one-fourth. The devolution or vesting of any part of the *corpus*, in severalty or in common is not affected by the widow's death at all. The redistribution of this one-quarter of income is to be among the testator's children or the survivors of them, life beneficiaries, not remainder-men. The present controversy largely turns on the question of the meaning of "survivor or survivors" in this clause, one of the three said children having predeceased the testator's widow, and the other having been cut off by the codicil. Counsel for respondents, Millard E. Cuskaden and Fred S. Cuskaden, contends that this clause is to be construed as though Annie M. Cuskaden had survived her mother, thus doing violence to the express meaning of the word "survivor" both in its ordinary and in its legal sense. He claims that the testator contemplated that all his children would survive the widow. There is nothing in the will itself to justify such a notion. Whenever testator provides for redistribution of income, he provides life estates only which excludes the idea of stirpes, see subdivision "C" and "D." Testator was a man of mature years, a grandfather, having three grandchildren of full age, and we must impute to him a knowledge of the uncertainties of the duration of human life. The language of this and other clauses in the will dealing with survivorship plainly shows this. Why impute to testator a design to frustrate the will of Providence in such matters, without language showing such intention. The Court of Chancery has no jurisdiction to reverse the decree of Providence as to the relative deaths of persons whose decease affects property rights cognizable before it. It has not even

jurisdiction to consider an appeal from such decree. It must deal with facts as they are, and not as they might have been. Counsel for the Cuskaden defendants argues that this clause refers to stirpes, and they therefore participate in the income formerly received by the widow as their mother would had she survived the widow. There is no suggestion or stirpes or stocks in this clause, as there is in the other clauses of the will, the clauses dealing with the *corpus* or principal. The language is "my *said children*," which is as specific as though he had used their names.

Testator then by subdivision "C" provides for the vesting of shares of the *corpus*, upon the death of any of his "said children." And here the vesting is by stirpes or stocks without reference to the number of the issue of said children. The issue are to take the share (fractional) of principal or *corpus* on which their parent received income. The language would seem to be plain enough—"such share * * * shall become the *absolute property* of the issue of such deceased child." The share of *corpus* vests in the issue. If it were conceded that the share of *income* received by a child of such testator vested in the issue, there would be an intestacy as to that share of *corpus* since there is no other provision in the will for the vesting of the *corpus*.

In this subdivision "C" testator also provides for the death of any of his children without issue, leaving brothers or sister. But as in subdivision "B"—"*survivors*," "life beneficiaries" take *income* only, not *corpus*. It is manifest that the life beneficiaries can get income only, the issue of life beneficiaries only get *corpus* (except as modified by the codicil with reference to one life beneficiary). As testator had deprived his children from sharing in the *corpus*, it thus becomes plain why he preferred his children, the natural objects of his affection, to participate in the income received by the widow to the exclusion of grandchildren.

The appellant herein is unmarried and without issue. Subdivision "D" provides in general language for his marriage and death leaving a widow or surviving brother or sister. What becomes of the *corpus* on which he receives income in case of his death, without a widow or surviving brother or sister, is not germane to the controversy before the Court, though counsel for all defendant-respondents have wasted reams of paper and much ink on the subject. It would seem to be prudent to defer crossing that bridge until it is reached. The Court presumably is not interested in hypothetical questions. The rule is well stated in the syllabus to *Stewart v. Stewart*, 61 *N. J. Equity* 25: "Upon a bill by executors and trustees for instructions the action of the Court should be confined to instructions as to present duty, or duty likely to arise under present conditions." Citing *Bonnell v. Bonnell*, 2 *Dickinson* 540; *Griggs v. Veghte*, 2 *Dickinson* 179; *House v. Erwen*, 10 *Stewart* 368.

The balance of the will deals with the administration of the trust about which there is no controversy before the Court.

The codicil ratifies the will in all respects except as to John D. Steelman and the devise of one-fourth of the income to him is revoked and given to his children. The share of any of the other life beneficiaries as to income, and the shares of *corpus* dependent thereon is not affected or referred to in any way in the codicil. The construction of this codicil with reference to matters before the Court will be considered later

POINTS.

FIRST POINT.

THE COURT BELOW ERRED IN DECIDING THAT MILLARD E. CUSKADEN AND FRED S. CUSKADEN ARE ENTITLED TO ONE-THIRD OF THE PRINCIPAL ON THE DEATH OF TESTATOR'S WIDOW.

In the foregoing examination of the will it is shown that upon the death of the widow there is only a re-

distribution of income hitherto received by her. It is also clear from Subdivision "D" that upon the death of any of testator's children, without issue, and without a widow, there is also only a provision for a redistribution of income. A devolution or vesting of part of principal or *corpus* happens only on the death of one of testator's children leaving issue, or leaving a wife or husband and no issue, and in the latter case it is only partial as to the share on which said child of testator was receiving income; but in such case there is no redistribution of income—*corpus* is substituted for income. If the Cuskaden children did not become entitled to a share in the *corpus* on the death of their mother, then they never partake thereof *by the will* and there is an intestacy as to that one-fourth. But can it be doubted that on her death they had an immediate right of action for that one-fourth of the *corpus*, on which their mother received income? What defense could have been interposed to such action, had it been commenced immediately after death? Obviously none, as the right was perfect and not at all contingent on the death of testator's widow. Could they have recovered one-third of four-twelfths of the *corpus* at that time? The death of Annie M. Cuskaden did not affect the shares of the other life beneficiaries who were receiving three-fourths or nine-twelfths of the income. It would thus require a unit of thirteen-twelfths to satisfy the requirements of the opinion of the Court below. The action of the Cuskaden children in accepting one-fourth of the income after their mother's death is not conclusive as to their rights or the rights of the other parties, as it was simply the exercise of an option to receive one-fourth of the income, instead of one-fourth of the *corpus* in severalty; such option could have been revoked at any time. The bill shows (page 7) that at the time of filing they were still exercising the option as to receipt of income instead of principal. The Court below

rightfully decided that they are entitled to *corpus*, but erred as to fractional part thereof, and as to the time when the right became complete. Together they are entitled to one-fourth of the *corpus*, and the right became complete immediately upon their mother's death.

SECOND POINT.

THE COURT BELOW ERRED IN DECIDING THAT EDNA FEYL AND MARION STEELMAN WERE ENTITLED TO PARTICIPATE IN THE ONE-FOURTH INCOME FORMERLY RECEIVED BY TESTATOR'S WIDOW.

If John D. Steelman had not been cut off in the codicil he would obviously have been entitled to participate in the income formerly received by testator's widow. Counsel for Edna Feyl and Marion Steelman contends that they stand in their father's place in the subdivision relating to the widow's income. Did the testator so intend? The language of the codicil is, "I do direct that the part or share of my estate in and by my said will given and devised in trust to my said son, John D. Steelman, shall be held in trust for Edna Feyl and Marion Steelman."

The only "part or share so mentioned in the will is in subdivision A," by which John D. Steelman took one-fourth of the income. The right to participate in the income received by the widow was at all times contingent on surviving her, and "part or share" does not seem apt language to describe such contingent interest which was of an indefinite nature, while "part or share" imports something definite. To place these two children in place of their father in subdivision B is obviously greatly to the disadvantage of the others of said children on the chances of survivorship, injecting two lives in place of one, and of a younger instead of older generation. Nor can it be construed that possible survivorship rights under the clause in question is to be measured by the life of John D. Steelman, in-

stead of their own. His continued existence or death is taken out of the will altogether, as a further reading of the codicil shows Edna Feyl and Marion Steelman participate in the *corpus*, not as provided in the will upon the death of their father, but upon the death of the other three beneficiaries. This would lead to the conclusion that his life or death was of no importance in the vesting of this estate. It is submitted that testator did not intend that they should take their father's place in his clause.

THIRD POINT.

THE APPELLANT HEREIN IS ENTITLED TO ALL THE INCOME FORMERLY RECEIVED BY TESTATOR'S WIDOW, AS THE ONLY SURVIVOR OF TESTATOR'S SAID CHILDREN, WITHIN THE MEANING OF THE CLAUSE RELATING THERETO.

The meaning of the word "survivor" in similar cases has been repeatedly before the Courts of New Jersey and has been the subject of numerous decisions, which respondents' counsel did not discuss in the court below.

In *Stevens v. Edson*, 82 *Equity* 105, 106, the Court per Leaming, V. C. (and it is to be noted that the language is strikingly similar to that of the will under consideration), says:

"The language of the will is as follows:

"I devise unto my wife, Emily, the rents, issues and profits of all my real estate * * * for and during her natural life, and then to my *surviving* children of whom there are now three."

"Three children of testator survived him, *only* one of them surviving the life tenant. If therefore the words "surviving children" testator referred to the children who survived him, the remainder vested in interest in his

three children at his decease; if he referred to the children who survived the widow the remainder was contingent until the decease of the widow and then vested in the surviving child who is the complainant herein.

"In this State the rule of construction which controls cases of this class is too firmly established to permit further consideration. Briefly stated, that is that where the gift to the survivors is preceded by a particular estate for life or years, words of survivorship in the absence of anything indicating a contrary intention refer to the termination." (Citing numerous cases.)

See particularly

Holcomb v. Lake, 24 *N. J. L.* 686, at p. 689.

Ashurst v. Potter, 53 *N. J. Equity* 608, Affirmed 54 *N. J. Equity* 699, on the opinion of the Vice Chancellor.

Stout v. Cook, 79 *N. J. Equity* 573, reversing same case, 77 *N. J. Equity* 153.

Trenton Trust Co. v. Robinson, 83 *N. J. Equity* 226.

It is thus difficult to see how the children of Annie Cuskaden can participate or derive any right through the death of the widow. If they derive any right at all it is to a participation in the income only, where as if they derive any right through their mother's death it is to *corpus* only. Can they take both the cake and the penny?

Can the children of John D. Steelman take a part of the widow's income as survivors of said children? John D. Steelman is eliminated from participation in the income by the codicil. The effect is just as though his name was erased from Subdivision "A" of this clause "Third." As shown above, neither his continued life nor death becomes of any importance. If, there-

fore, his name is struck out of Subdivision "A," he is similarly erased from Subdivision B, which refers back to Subdivision A. Are "grandchildren" introduced in place of "children?" The words do not mean the same in ordinary parlance and the decisions in this State follow the plain dictate of common sense in declining to give them the same meaning in legal controversies.

Van Geisen v. Howard, 7 N. J. Equity 462.

Brokaw v. Peterson, 15 N. J. Equity 194.

Fert v. Vanatta, 21 N. J. Equity 84.

Dunn v. Cory, 56 N. J. Equity 507.

Steward v. Knight, 62 N. J. Equity 232.

Nor is this conclusion so inequitable, as it would seem at first blush, as the appellant who constitutes the whole of one stirpes in his own person is deprived from participation in the *corpus*. True, he would receive approximately the income on \$60,000, while the children of Annie M. Cuskaden receive absolutely approximately \$30,000, and the children of John D. Steelman the income on \$30,000, and ultimately the principal thereof. As to the ultimate destination of the above-mentioned \$60,000 the will makes no provision. If the testator died intestate, as to this it would vest as follows:

Millard E. Cuskaden)

Fred S. Cuskaden) $\frac{1}{3}$, \$20,000.00

John D. Steelman, $\frac{1}{3}$, 20,000.00

Millard F. Steelman, $\frac{1}{3}$, 20,000.00

Thus the Cuskaden children would ultimately receive $\frac{5}{12}$ of the estate, the John D. Steelman children $\frac{3}{12}$, John D. Steelman could devise $\frac{2}{12}$, and Millard F. Steelman could devise $\frac{2}{12}$.

The following cases support this view:

Holcomb v. Lake, 24 N. J. L. 686.

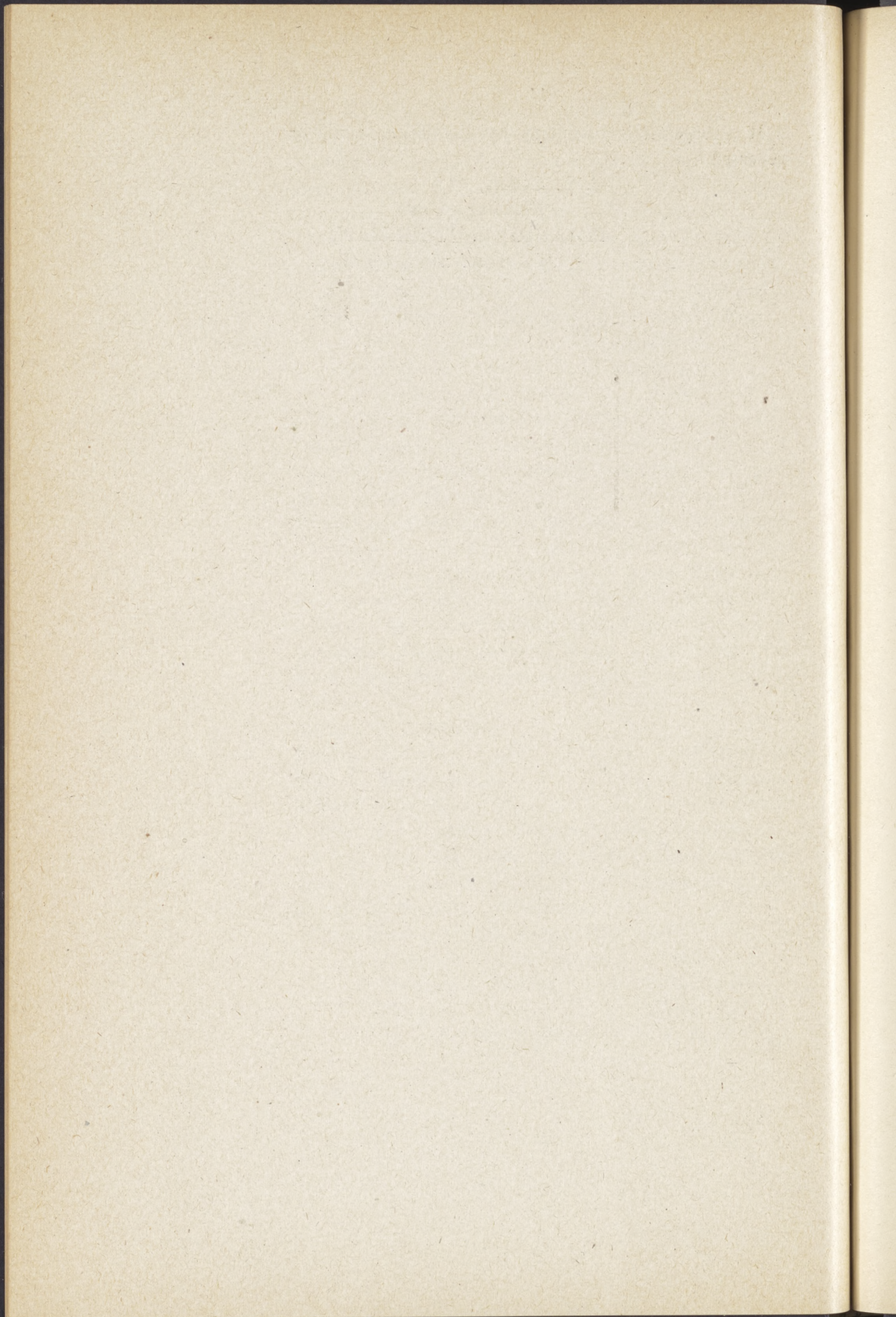
Mulford v. Mulford, 42 N. J. Equity 68.

Voorhees v. Suger, 73 N. J. Equity 532.

In re Peterson's Estate, 85 N. J. Equity 135.

It is respectfully submitted that the decree should be reversed.

C. L. COLE,
Solicitor of, and
MILLARD F. STEELMAN,
Of Counsel with, Appellant.



NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between
ALBERT D. CUSKADEN, *et al.*,
Executors, etc.,
Complainants-
Respondents,
and
MILLARD F. STEELMAN,
Defendant-Appellant,
EDNA FEYL AND MARION
STEELMAN,
Defendants-Respondents.

NOV. TERM, 1917.
ON APPEAL FROM
CHANCERY.

BRIEF ON BEHALF OF EDNA FEYL,
Individually, and as Guardian ad litem of Marion
Steelman.

There can be no doubt that the provisions of the will of Derestus B. Steelman, as well as the codicil thereto, copies of both of which are included in the bill of complaint (Will, pp. 2, 3 and 4, Codicil, pp. 4, 5 and 6) are of such a character as to require the interpretation thereof by the proper court, for the instruction and guidance of the complainants in the administration of the estate of the testator.

FACTS.

The following facts, set out in the pleadings and contained in the stipulation agreed upon, are undisputed:

The will is dated May 24, 1912.

The codicil thereto is dated May 18, 1914.

Testator died November 29, 1914.

The will and codicil were probated December 10, 1914.

The testator left him surviving his wife, Marietta Steelman, two sons, John D. Steelman and Millard F. Steelman, and a daughter, Annie M. Cuskaden. John D. Steelman had two children, Edna Feyl and Marion Steelman.

The daughter, Annie M. Cuskaden, died March 30, 1916, leaving her surviving a husband, Albert D. Cuskaden, one of the complainants, and two sons, Millard E. and Frederick E. Cuskaden.

Marietta Steelman, the widow of the testator, died December 5, 1916.

The will of said testator provided as follows:

“Second: It is my will and I do direct that
“my beloved wife, Marietta Steelman, be permitted to occupy my home, known as No. 12
“South Ohio Avenue, in said Atlantic City, during her life time, and I hereby make a charge
“upon my estate, the costs of the upkeep, carrying charges and all municipal assessments
“which may be imposed upon my said home during the lifetime of my said wife.

“Third: I give and devise unto Albert D. Cuskaden and Albert J. Feyl, all my property, real, personal and mixed, subject to item two hereof, in trust as follows:

“A. To manage, sell, invest and re-invest the
“same and to pay the rents, issues and profits
“thereof to my said beloved wife, Marietta
“Steelman, and my children, John D. Steelman,
“Annie M. Cuskaden and Millard F. Steelman,
“during their respective lifetimes, share and
“share alike, hereby directing my trustees and
“executors to pay to each, his or her respective
“share monthly six months after my decease.

“B. Upon the death of my beloved wife, I
“direct that the share theretofore paid to her
“shall be equally divided among and paid to my
“said children, or the survivor or survivors of
“them during their lifetime.

“C. Upon the death of any or either of my
“said children, leaving issue him or her surviv-
“ing, then and in such event I direct that such
“share of my estate upon which he or she shall
“have been receiving the rents, issues and
“profits, shall become the absolute property of
“the issue of such deceased child, should either
“of my said children die without issue, him or
“her surviving, then in such event I direct my
“executors and trustees to pay the share there-
“tofore paid to said deceased child to the sur-
“vivor or survivors of my said children; share
“and share alike during the life or lives of said
“survivor or survivors.

“D. Should any or either of my said children
“die without issue leaving him or her surviving a
“wife or husband and in such event I direct that
“one-half of said share of my estate upon which
“he or she shall have been receiving rents, issues
“and profits shall become the absolute property
“of such wife or husband and that the rents,
“issues and profits arising from the other one-

“half of said share theretofore paid to said de-
“ceased child be paid to the survivor or survi-
“vors of my said children, share and share alike,
“during the lifetime of said survivor or survi-
“vors.”

The codicil to said will provided as follows:

“First: I hereby ratify and confirm my said
“last will and testament in all respects, save so
“far as any part thereof shall be revoked or
“altered by this present codicil, and in partic-
“ular, save so far as the same relates to the giv-
“ing and devising of any part or portion of my
“estate in trust for my son, John D. Steelman,
“during his lifetime, as to which, particular, I
“do hereby ratify and alter my said will as fol-
“lows: It is my will and I do direct that the part
“or share of my estate in and by my said will
“given and devised in trust to my said son, John
“D. Steelman, shall be held in trust for Edna
“Feyl and Marion Steelman (Children of my
“said son, John D. Steelman) and the rents,
“issues and profits thereof paid to them during
“the lives of my beloved wife, Marietta Steel-
“man, and my children Annie M. Cuskaden and
“Millard F. Steelman, or the survivor of them
“and upon the happening of the last mentioned
“event the said Edna Feyl and Marion Steelman
“shall be entitled to receive the principal so held
“in trust for them, share and share alike.

“Second: Should either the said Edna Feyl
“or Marion Steelman die without issue before
“receiving her share of said principal then and
“in such event the share of said decedent, both
“principal and interest, shall be paid to the sur-
“vivor in accordance with the terms of my said
“will and of this codicil thereto.”

The circumstances which caused testator to disinherit his son, John D. Steelman, and substitute the latter's children as objects of the testator's bounty, are shown by the following stipulation of facts (C. p. 24, 1. 18):

“That at the time of the making of said will in
“1912 John D. Steelman was engaged in the shoe
“business in Atlantic City, the conduct of which
“was not a financial success, and thereafter the
“said John D. Steelman, in the spring of 1912,
“was indebted for merchandise to the amount of
“\$4,000. and appealed to his father for financial
“assistance which was refused. Finally the
“father agreed to advance the moneys if John
“D. Steelman would close out the shoe business
“that same fall of 1912. The money was ad-
“vanced but the shoe business was not closed
“out at the time promised, and later, to wit, dur-
“ing the winter of 1913 and January of 1914,
“demand was made upon Derestus B. Steelman,
“the father, to pay a number of promissory
“notes which had been discounted in bank and
“by individuals for the son, John D. Steelman,
“who had received the money therefrom, and
“when said notes fell due he left for parts un-
“known. These notes contained the name as
“endorser of Derestus B. Steelman, purporting
“to be the signature of Derestus B. Steelman,
“the father. The father repudiated any liabil-
“ity and denied the signature. Suits were
“threatened and after much hesitation the
“father, Derestus B. Steelman, took all the
“notes up, paying the money necessary there-
“for.”

Under the terms of said will, and prior to the death of Annie M. Cuskaden, the testator's daughter, the trustees distributed the income of the estate as follows: To the widow, Marietta Steelman, one-fourth; to Annie M. Cuskaden, daughter, one-fourth; to Millard F. Steelman, son, one-fourth; to Edna Feyl and Marion Steelman, children of John D. Steelman, a son, each one-eighth.

After the death of the daughter, Annie M. Cuskaden, and up to and including the date of the death of Marietta Steelman, the complainants, as trustees, continued to pay one-fourth of the income to Marietta Steelman, one-fourth to Millard F. Steelman, one-eighth each to Edna Feyl and Marion Steelman, and one-eighth each to Millard E. Cuskaden and Frederick E. Cuskaden, children of Annie M. Cuskaden, deceased.

After the death of Marietta Steelman, and up to the time of the filing of the bill of complaint, the trustees applied the income as follows: One-third to Millard F. Steelman, son; one-sixth each to Edna Feyl and Marion Steelman, children of John D. Steelman; and one-sixth each to Millard E. Cuskaden and Frederick E. Cuskaden, children of Annie M. Cuskaden.

After the death of the widow, Marietta Steelman, a question arose as to whether or not the disposition of the estate, last above referred to, was in accordance with the terms of said will. The bill exhibited in this proceeding was filed to settle these questions.

The several contentions are as follows:

There are three distinct interests represented in this litigation: Millard F. Steelman, Edna Feyl and Marion Steelman, children of John D. Steelman,

and Millard E. and Frederick E. Cuskaden, children of Annie M. Cuskaden.

1. Millard F. Steelman, by his answer, contends that he is entitled to one-third of the estate for life with the power of disposition of one-third of the principal thereof.

2. Millard E. and Frederick E. Cuskaden claim that they are entitled to one-third of the income as long as the trust estate continues, and that the corpus is to be distributed to the children of the testator's children *per stirpes*, that is to say, that the children of the testator's children are to receive the portion of the estate that their parent would have taken had the testator died intestate.

3. Edna Feyl and Marion Steelman assert the belief that the said testator, in the use of the language set forth in subdivision B, paragraph 3 of his will, to wit: "Upon the death of my said wife, I direct that the share theretofore paid to her shall be equally divided among and paid to my children, or the survivor or survivors of them during their lifetime," meant, by the words "survivor or survivors," his living children and children of deceased children, and that the application of said paragraph as applied to the situation caused by the decease of Annie M. Cuskaden prior to her mother, Marietta Steelman, leaving two sons living, did not operate to deprive the latter of their proper share in the income of said estate.

The respondents, Edna Feyl and Marion Steelman, accept, without question, the decision of the learned

Vice-Chancellor with reference to the interpretation of the language contained in the testator's will and are content that the terms of the final decree, providing for distribution of income and present payment of corpus to the children of Annie M. Cuskaden, be affirmed.

If, however, it be determined by this Court that the language above referred to, in subdivision B of paragraph 3, is not appropriate to vest in the said Millard E. Cuskaden and Frederick E. Cuskaden the share or interest in the income to which their mother was entitled, or in the corpus of the estate, as claimed by them, according to the averments of said bill, then we insist that the will and codicil should be construed in accordance with the averments contained in the answer of Edna Feyl, as follows:

"A. That the share of said estate of said testator, upon which the said Annie M. Cuskaden during her life received the income, to wit, one-fourth, became the absolute property of her two children, Millard E. Cuskaden and Frederick E. Cuskaden, free, clear and discharged of the terms of the trust created by said will, which would remove from the control of said trustees one-fourth of the corpus of said estate, and invest the same in said Millard E. Cuskaden and Frederick E. Cuskaden.

"B. The income on the balance of said estate, after the distribution of one-fourth of the entire corpus, in accordance with the last preceding paragraph, is to be distributed as follows: One-half to Millard F. Steelman, one-fourth to this answering defendant, and one-fourth to Marion Steelman.

"C. The trust estate, created by said will and codicil, to continue during the life of Millard

F. Steelman, and the share of the corpus, upon which he at the time of his death is receiving the income, is to be distributed to his children and if he leaves no children but a wife, the latter is to receive one-half of such share absolutely, and the other one-half is to be distributed between this answering defendant and Marion Steelman, share and share alike."

Edna Feyl and Marion Steelman desire to have it distinctly understood that the construction of the will, for which they contend as above set forth, is only to be made if the Court determines that the claims of the children of Annie M. Cuskaden are not to be supported.

Assuming, therefore, that the conclusions of the Vice-Chancellor, as to the interpretation upon the word "survivors," are correct, the only matter in which the respondents, in whose behalf this brief is presented, are interested is the present disposition of the income of the estate, after payment of the appropriate portion of the corpus to the Cuskaden children. Millard Steelman contends that no portion of the income distributable to the survivors upon the death of Marietta Steelman, the testator's widow, is now payable to the children of John D. He admits, however, that the latter are entitled to one-fourth of the income, which was originally given to John D. by the terms of the will.

WE CONTEND THAT EDNA FEYL AND MARION STEELMAN, JOINTLY, TAKE THE RIGHT, TITLE AND INTEREST OF EVERY DESCRIPTION, BOTH AS TO INCOME AND CORPUS, DIRECT OR CONTINGENT, VESTED IN THEIR FATHER, JOHN D. STEELMAN, PURSUANT TO THE TERMS OF THE ORIGINAL WILL.

By subdivision A of paragraph 3, the trustees were obliged to pay the income to the widow and three children, John D., Annie M. and Millard F., during their respective lives, share and share alike.

By the codicil, the testator confirmed the will in all respects, save as altered by the codicil, and save so far as the same related "to the giving and devising of any part or portion of my estate in trust for my son, John D. Steelman, during his lifetime as to which particular," he directed, "I do hereby ratify and alter my said will as follows: It is my will, and I do direct that the part or share of my estate in and by said will given and devised in trust to my said son, John D. Steelman shall be held in trust for Edna Feyl and Marion Steelman, children of my said son, John D. Steelman, and the rents, issues and profits thereof paid to them during the lives of my beloved wife, Marietta Steelman, and my children, Annie M. Cuskaden and Millard F. Steelman, or the survivor of them, and upon the happening of the last mentioned event, the said Edna Feyl and Marion Steelman shall be entitled to receive the principal so held in trust for them share and share alike," and "Should either the said Edna Feyl or Marion Steelman die without issue before receiving her share of said principal,

“then and in such event the share of said decedent, both principal and interest, shall be paid to the survivor, in accordance with the terms of my said will and of this codicil thereto.”

Under these provisions, undoubtedly it was the purpose of the testator to substitute for John D. Steelman his two children, within the meaning of the word “survivors,” both as to the income and principal, as set forth in the will.

Furthermore, it was the undoubted intention of the testator to create a trust estate which should continue as long as any of his children should live. This is apparent from the following language in subdivision C of the third paragraph, to wit:

“Should either of my said children die without issue him or her surviving, then and in such event I direct my executors and trustees to pay the share theretofore paid to said deceased child to the survivor or survivors of my said children, share and share alike during the life or lives of said survivors.”

The first part of this paragraph provides upon the death of any or either of his children leaving issue, then the share of the estate upon which such child should have been receiving income should become the absolute property of the issue of such deceased child.

This language in the will is entirely consistent with the intention of the testator, as expressed in the codicil, that the income should be paid to Edna and Marion during the lives of the testator's wife and his two children, Annie and Millard. This construction confers upon Edna and Marion the same rights in the estate as originally given to their father, both as to income and principal.

Furthermore, it applies not only to the share or portion of the estate originally given to John D., under subdivision A of the third paragraph, but also to such contingent portion or share of income or principal to which he would be entitled upon the death of the testator's widow, and this would necessitate the construction, if the Court finds that the testator did not by the use of the word "survivor" intend to mean issue, that the income paid to Marietta Steelman in her lifetime would become payable at her death one-half to Millard and one-half jointly to Edna and Marion, after deducting the appropriate portion of the principal which is payable to the children of Annie.

The language, used to substitute for John D. his children, is general. It is, "I do direct that the part "or share of my estate in and by said will given "and devised in trust to my son, John D. Steelman, "shall be held in trust for Edna Feyl and Marion "Steelman."

This not only applies to the original one-fourth held in trust for John D., but also to any additional share held in trust which would have become vested in him as the survivor of his mother, under the terms of the will.

The share upon which Annie Cuskaden during her life received the income became the absolute property of her two children, Millard and Frederick, at her death. This is manifest from the following in subdivision C of the third paragraph of the will:

"Upon the death of any or either of my said
"children leaving issue him or her surviving,
"then and in such event I direct that such share
"of my estate, upon which he or she shall have
"been receiving the rents, issues and profits,

“shall become the absolute property of the
“issue of such deceased child.”

The purpose of this is apparent. The testator desired the trust estate to continue during the life of his widow and three children. If, however, any of the children should die leaving issue, then the portion upon which the parent had been paid income should become the absolute property of the issue. This removes from the trust estate the part upon which Annie M. Cuskaden was paid the income during her life. Such part becomes vested absolutely in her children, and it would seem that they do not inherit or become possessed of any further interest in their grandfather's estate.

Our claim as to present disposition of income.

After deducting from the corpus the proper part thereof payable absolutely to the children of Annie, the balance is to be held in trust during the life of Millard, and one-half paid to Millard, and the other half divided equally between Edna and Marion.

ANSWER TO BRIEF PRESENTED ON BE-
HALF OF MILLARD STEELMAN AND
COVERED BY THE SECOND AND THIRD
POINTS THEREOF.

The claim of the appellant seems to be that when the testator, by the codicil, directed “that the part
“or share of my estate in and by my said will, given
“and devised in trust to my son, John D. Steelman,
“shall be held in trust for Edna Feyl and Marion
“Steelman,” he intended to restrict such gift, for the benefit of the children of John, to that portion of his estate referred to in subdivision A, by which John took one-fourth of the income.

The claim is made that such language did not confer a right to participate in that portion of the income paid to the widow, during her life, upon condition that John should survive the latter.

We contend that there is nothing in the codicil to show that the gift to the children of John, so far as concerned the income, was limited to such income as was payable to the latter under the clause above mentioned, thereby excluding the right of his children to participate in income which may be payable to John, should he survive his mother. It would seem that the language employed by the testator to substitute, for John, his children, is sufficiently comprehensive to cover every possible interest which the parent might have under the terms of the will, either by direct gift or by right of survivorship. It is manifest that such was intended by the testator, because of the following language used in the beginning of the first paragraph of the codicil, whereby he ratifies his will, except so far as it might be altered by the codicil, then providing: "And in particular, "so far as the same relates to the giving or devising "of any part or portion of my estate in trust for "my son, John D. Steelman, during his life." This language applies to any part held in trust for John and certainly includes that which might at sometime be vested in him should he survive his mother. The will and codicil must be read together, and the effect of the codicil was to couple with the will the provisions of the latter as applicable to the children of John.

There seems to be no just ground for concluding that the testator intended, by the use of the definite and specific language incorporated in the codicil, to confer upon the children of John, the interest

which the latter took under subdivision A of the will and excluded them from participation in such interest as John might receive under subdivision B, in case he survived his mother.

The authorities cited under the third point in the brief on behalf of Millard F. Steelman, to the effect that the use of the word "children" does not include grandchildren, have no application to the question here under consideration. Undoubtedly, as hereinbefore demonstrated, the testator intended to disinherit John D. Steelman, for the reasons as shown by the facts contained in the stipulation agreed to, when this case was tried, and substitute therefor his children, and the latter, we contend, became entitled to all the rights which would have accrued to their father if he had not been disinherited.

One of the privileges conferred upon the Steelman children, by way of substitution, was the right to participate in the share of income enjoyed by the widow during life, and given under subdivision B, of the will, to the survivors after her death. The language of the codicil, we contend, is sufficiently broad to substitute for John his children, to the rights created by said subdivision. The very act which eliminated John as a recipient of the testator's bounty, both as to principal and income, substituted the children in his stead.

Substantially the same provision, as to the distribution of income, exists by reason of the codicil, as was created by the will itself, except that the children of John take in his place. If John survived his mother, a portion of the corpus held in trust for her, which created the income paid to her, would then be held in trust for him, and under the terms of the codicil, would be held in trust for his children. It

seems to us that the language of the codicil, which is as follows:

“It is my will and I do direct that the part
“or share of my estate in and by said will given
“and devised in trust for my said son, John D.
“Steelman, shall be held in trust for Edna Feyl
“and Marion Steelman, children of my said son,
“John D. Steelman, and the rents, issues and
“profits paid to them during the lives of my
“beloved wife, Marietta Steelman, and my chil-
“dren, Annie M. Cuskaden and Millard F. Steel-
“man, or the survivor of them,”

created in the children an interest, not only in the one-fourth, but a part of the one-fourth held in trust for the widow.

Furthermore, the following language:

“And upon the happening of the last men-
“tioned event ‘which was the death of the widow
“and Mrs. Cuskaden and Millard F. Steelman),
“the said Edna Feyl and Marion Steelman shall
“be entitled to receive the principal so held
“in trust for them, share and share alike,”

shows that the testator intended to substitute the children for John in the distribution of the corpus.

It must be remembered that intestacy is not favored, and we feel that there is undoubtedly sufficient in the codicil to show that all interest in the estate, given to John, passed to his children by the right of substitution. The codicil applied to every interest and estate vested in John by the original will.

The following cases support the proposition that the Court will never, except in a very clear and em-

phatic case, construe a will so as to create a condition of intestacy:

Leigh vs. Savidge, 14 Eq. 124;
Woodruff vs. White, 79 Eq. 225;
Ib Ib Affd, 78 Eq. 410;
Yawger vs. Yawger, 37 Eq. 216;
Carter vs. Gray, 58 Eq. 411.

The theory, upon which the learned Vice-Chancellor interpreted this will, was one of absolute equality, for the reason that nothing appeared in the will itself to indicate that the testator intended that his property should be distributed in any other manner than would confer upon his children, and their children, equal portions thereof.

By the Vice-Chancellor's interpretation and the construction for which we contend, there would be created a situation of absolute equality, *i. e.*: The children of Annie Cuskaden, a daughter of the testator, are entitled to one-third of the income, after the death of the testator's widow, and one-third of the corpus; Millard Steelman, as one of three children, is entitled to what in effect would be one-third of the income for life, and the children of the third child are also entitled to one-third of the income of the estate for life. This interpretation preserves the condition of absolute equality, which the Vice-Chancellor found was the manifest intention of the testator.

We submit, therefore, that the decree appealed from should be affirmed.

LEWIS STARR,
Of Counsel with Edna Feyl.

