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BILL OF COMPLAINT.

In Chancery of New Jersey

Between

MAURICE J. SWETLAND, *et al.*,
Complainants,

and

HATTIE SWETLAND, *et al.*,
Defendants.

To the HONORABLE EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

The complainants, Maurice J. Swetland of Redlands, California, Ernest M. Corey, of Flushing, in the City and State of New York, Frederic C. Stevens, of the City and State of New York, and Maurice J. Kane, of the Town of Montclair, County of Essex and State of New Jersey, as Executors of and Trustees under the last will and testament of Horace M. Swetland, deceased, respectfully show that:

1. Horace M. Swetland, late of the Borough of Verona, in the County of Essex and State of New Jersey, departed this life on June 15, 1924, leaving a last will and testament bearing date the 12th day of January, 1922, which was duly admitted to probate by the Ordinary of this State on the 30th day of June, 1924. A true copy of said will is annexed hereto and made part hereof, and marked "Exhibit A."

2. By the fourth clause of said will, said Horace M. Swetland appointed the complainants,

Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane as Executors and Trustees of his said will, all of whom have accepted said trusts and have duly qualified as such Executors. Letters testamentary were duly issued to them at the time of the probate of said will and they have entered upon the discharge of their duties, and are still acting as such Executors.

3. Doubts and difficulties have arisen in the minds of the complainants as to the true construction and effect of the said will of Horace M. Swetland, and more particularly of the portions and provisions thereof hereinafter referred to, and as to the rights of the various parties interested; and in the administration and distribution of the estate of said Horace M. Swetland under his said will, and in execution of the trusts created therein, divers questions have arisen and will arise, and the said complainants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors of and Trustees under said will are advised and believe that it is necessary to the proper execution of their duties that they should receive the advice and instructions of this Court, and that the rights of the persons interested be declared.

4. The first clause of said will provides as follows:

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

a. In his lifetime, the said Horace M. Swetland executed a bond to the Union Dime Savings

Bank, dated February 5, 1909, to secure the sum of $300,000.00, which at the time of his death had been reduced by payment to the sum of $210,000.00, the principal of which became due and payable November 1, 1924. Said bond was secured by a mortgage in the sum of $300,000.00, which at the time of decedent's death had been reduced as aforesaid, to the sum of $210,000.00, which mortgage was then a lien upon premises situated at and known as Numbers 157 to 163 West 47th street, in the City, County and State of New York, which were owned by the said Horace M. Swetland in fee simple at the time of his death.

b. The said Executors are in doubt as to whether or not it is their duty to pay said bond and mortgage from the funds of the estate in their hands, or whether they may, in their discretion, carry said obligation and permit the same to remain unpaid.

5. The second clause of said will provides as follows:

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

It will be noted from an inspection of said will that in the provisions of the will preceding said clause the testator made no devises or bequests. The Executors are in doubt as to whether or not the Federal estate tax and such transfer, inheritance or other succession taxes as may be due upon the devises and bequests made by the testator in his said will, should be paid by the Executors from the residuary estate.

6. Said Horace M. Swetland in and by said will, makes provision for his wife, Clara A. Swetland, in the following manner:

> "*Third:* All of my estate, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, I give, devise and bequeath to my Executors hereinafter named, IN TRUST NEVERTHELESS, and for the following uses and purposes, and subject to the terms, conditions, powers and agreements as herein provided:
>
> "(A) To have and to hold and possess the same, to collect the rent, issues and income and the profits thereof, and to pay from the net income therefrom the following amounts:
>
> * * * * * * *
>
> "2. To deliver and pay over to my wife, CLARA A. SWETLAND, the sum of Fifteen Thousand Dollars, ($15,000) per year during her life, in equal monthly payments, the first of which shall be paid by my Executors immediately after my decease.
>
> "The provisions herein contained for the benefit of my wife, I hereby declare are intended to be and are so given to her in full satisfaction and in lieu of and for her dower and thirds, which she may or can in any wise claim or demand out of my estate.
>
> "It is my will, and I direct my Trustees in the exercise of their absolute discretion to increase, as they may consider necessary or advisable, the amount to be annualy paid to my said wife, if any misfortune should befall her whereby it should become necessary to provide for her competent and comfortable support and maintenance.
>
> "It is my will, and I direct that my Trustees shall permit my said wife to have the use of, and to occupy free of rent or other charges, except as herein specifically otherwise provided, my dwelling house and the grounds attached thereto situated in the

> Township of Verona, Town of Montclair, County of Essex, State of New Jersey, and all the furniture and articles of use and ornament of every kind and naturet herein contained at the time of my decease, together with all personal property and equipment located upon said premises during the term of her life.
>
> "It is my will, and I direct my Trustees to pay and discharge, during the life of my wife, all taxes, assessments, insurance charges and charges of every kind and nature except as herein otherwise specifically provided, which may be imposed upon any of the lands and premises used and occupied by my wife, as herein provided, from the income received by them from the principal of the trust herein created, except that my said wife shall personally pay for all repairs to and improvements upon the said property while used and occupied by her, and that in the event of her failure so to do, and if it shall become necessary for the proper maintenance and protection of said property and premises, I authorize and empower my said Trustees to make such repairs or improvements thereon as they in the exercise of their absolute discretion may consider proper and necessary and to charge the costs thereof to the Trust account."

Near the end of the will the following clause appears:

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

a. The income from the residuary estate of the said Horace M. Swetland is and will be far in excess of the sums necessary to pay to Hattie Swetland $1,200.00 per year, and to pay to said Clara A. Swetland $15,000.00 per year, and for the payment of all charges upon the property, the use of which is devised to the widow.

b. Said Horace M. Swetland in his lifetime was a man of wealth and he and his wife, the said Clara A. Swetland, lived on a scale in keeping with his income. At the time of his death and for many years prior thereto they lived in a handsome residence situated in the Borough of Verona and in the Town of Montclair, in the County of Essex, the use of which he devised to his wife, as by reference to said will more particularly appears. In his lifetime said Horace M. Swetland maintained a number of automobiles and kept a number of servants, and in order to properly maintain said home it is necessary to employ a number of servants for work both in the house and on the grounds, and also to have a chauffeur to take care of and run the automobiles which the decedent maintained prior to his death. The said Clara A. Swetland, during the lifetime of her said husband, Horace M. Swetland, was accustomed to travel both in this country and in Europe, and in general lived in comfort and luxury. The death of her husband was a great shock to her and affected her nerves and general health, and she is now in a sanitarium in California seeking to regain a portion of her lost health and strength. She is upwards of sixty-four years of age and has no substantial income of her own apart from the provisions made for her by her said husband's will. If the payments to her from this estate

are not substantially increased in excess of $15,000.00 a year, she will not have sufficient income to keep up said home and continue to seek to regain her health and live in the comfort and manner in which she has become accustomed, and in which she could well afford to live in view of her husband's large income. The Trustees of said will are of the opinion that it would be a great shock and hardship to her, and that it would be a misfortune to her if she should have to change her mode of living, and said Trustees are of the opinion that it is necessary and advisable to substantially increase from $15,000.00 the amount to be paid annually to the said Clara A. Swetland in order to provide for her comfortable support and maintenance. In view of the language used by the testator there may be doubt as to their power and authoity to increase such payments.

7. The decedent at the time of his death owned the "dwelling house and the grounds attached thereto" in Montclair, New Jersey, referred to in the will. Upon said premises three buildings were erected. (1) The main dwelling house containing 14 rooms and 4 baths, in which decedent and family resided. (2) A two-story garage with accommodations for 3 cars and chauffeur's quarters of 4 rooms and bath. (3) A residence facing "Afterglow Way" containing 10 rooms and 3 baths, which was vacant at the time of testator's death. The Executors and Trustees are in doubt as to whether, by the provisions of the will, the widow is given the life use of all of said premises, with all of the buildings thereon. And should said premises, with the consent of the widow, be sold, whether the widow is entitled to the income on the proceeds

of the sale thereof in addition to other provisions made for her under the will.

8. The buildings hereinabove referred to in paragraph 7 are constructed of stone and stucco. From time to time they become in need of extensive and expensive repairs. The grounds are large and the annual expense of keeping them in proper condition is considerable. The Trustees of said will are in doubt as to the extent of their authority to make and pay for repairs and improvements upon said property, and in case said repairs and improvements become necessary for the proper maintenance and protection of said property they are in doubt as to whether the expense thereof should be charged to the income payable to the said Clara A. Swetland, or whether the same may be paid from the surplus income of said estate. During the past year the wind and rain was beating in one side of the main residence so that in order to protect said property it became necessary to expend a large sum of money to put the house in proper condition. The Executors and Trustees are in doubt as to whether or not this expense may be charged to the surplus income of the estate.

9. The income from the residuary estate of said Horace M. Swetland is very greatly in excess of the amounts which can ever be required for the comfortable support, care and maintenance of Hattie Swetland and Clara A. Swetland, even if the specific amounts designated by the testator in his said will to be paid to the said Hattie Swetland and Clara A. Swetland respectively are very materially increased, and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which

was devised to Clara A. Sweetland, and for the usual expenses of administration of the Trust Estate. Said testator in his said will made no specific direction as to the disposition of such surplus income.

a. The Executors and Trustees are in doubt as to whether said surplus income should be accumulated or whether it should be distributed from time to time, and if distributed, when and to whom distribution should be made.

b. The Executors and Trustees are in doubt as to whether the surplus income of said estate should be used for the payment of administration expenses, or whether the whole of said expenses should be charged to the corpus of the estate.

10. Said will of Horace M. Swetland also contains the following provisions:

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

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

a. After the death of the said Horace M. Swetland, there was found with his will two trust agreements, one bearing date July 14, 1917, and the other January 3, 1922, true copies of which are hereunto attached and made part thereof, and marked ''Exhibit B'' and ''Exhibit C.''

b. The Executors and Trustees are in doubt as to whether or not said trust agreement dated July 14, 1917, should be considered as a part of said will, and they are in doubt as to their duties with reference to said provision for said Maurice J. Swetland, Trustee, and the beneficiaries under said trust agreement, and as to the rights of the said Maurice J. Swetland and the beneficiaries under said trust agreement.

11. In the clause of said will above quoted in paragraph 10, the following language is used:

''The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein provided.''

Said complainants are in doubt as to the true meaning and construction of said language, and as to the rights and duties of the respective parties interested in said estate and said trust fund.

12. Said will also makes provision as follows:

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

a. In view of the provisions of said will preceding and following in the paragraph last above quoted, the Executors and Trustees doubt whether the language last above quoted should be taken literally, and whether the will should not be construed as though it read ''*without regard* to the question whether such investments or reinvestments so made by them are of a character permitted by law to fiduciaries'' instead of ''*with regard* to the question whether such investments or reinvestments so made by them are of a character permitted by law to fiduciaries.''

13. Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane and Dorothy A. Johnson, beneficiaries mentioned in said will, are all living. Velma I. Stevens is the wife of the complainant, Frederic C. Stevens; Ruth D. Kane is the wife of the complainant, Maurice J. Kane; Dorothy A. Johnson is married; her husband's name is Clare Peter Johnson. The wife of

Maurice J. Swetland referred to in said trust agreement dated July 14, 1917, is living. Her name is Grace E. Swetland.

The said Maurice J. Swetland and Grace E. Swetland have three children now living, to wit: Henry Monroe Swetland, an infant over the age of fourteen years; Florence A. Swetland, an infant under fourteen years of age; and Carolyn G. Swetland, an infant under the age of fourteen years.

The said Velma I. Stevens and Frederic C. Stevens have two children now living, to wit: Velma I. Stevens, an infant over the age of fourteen years, and Frederic Cushing Stevens, Jr., an infant over the age of fourteen years.

The said Ruth D. Kane and Maurice J. Kane have three children now living, to wit: Ruth Dorothy Kane, an infant under the age of fourteen years; Elizabeth Adele Kane, an infant under the age of fourteen years, and John Swetland Kane, an infant under the age of fourteen years.

The said Dorothy A. Johnson and Clare Peter Johnson have one child now living, to wit: Clare Peter Johnson, Jr., an infant under the age of fourteen years.

No persons, now living, other than those hereinbefore mentioned have or may have any interest under the will of the testator.

Complainants are without adequate remedy in the courts of law and can only obtain relief in this court where matters of this nature are properly cognizable and relievable, and therefore pray:

1. That Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane, and Dorothy

A. Johnson, and Grace E. Swetland, Henry M. Swetland, Florence A. Swetland, Carolyn G. Swetland, Frederic C. Stevens, Jr., Velma I. Stevens, Ruth Dorothy Kane, Elizabeth Adele Kane, John Swetland Kane, and Clare Peter Johnson, Jr., and Maurice J. Swetland, individually and as Trustee under the trust agreement dated July 14, 1917, hereinabove referred to, who are defendants to this suit, may answer this bill of complaint without oath, and each statement made therein.

2. That the said complainants, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as Executors of and Trustees under the last will and testament of Horace M. Swetland, deceased, may receive the advice and direction of this Court in the premises, and that the doubts and difficulties herein suggested or that arise in connection with their duties under and by virtue of the last will and testament of Horace M. Swetland, deceased, may be resolved.

3. That the will of Horace M. Swetland, deceased, may be construed, and the true meaning and legal effect of the various provisions hereinabove more particularly referred to may be determined, and the rights of the respective parties interested may be declared by the decree of this Court.

4. That the complainants may have such further or other relief in the premises as the nature of the case may require.

5. 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.

Solicitors for and of Counsel with Complainants.

"EXHIBIT A"

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

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

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

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

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

1. To deliver and pay over to my half sister, HATTIE SWETLAND, if she shall survive me, the sum of Twelve Hundred Dollars ($1,200) each year, during her life, in semi-annual instalments of Six Hundred Dollars ($600) each, and I direct my Executors to make the first of such payments immediately after my decease.

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

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

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

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

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

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

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

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

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

It is my will, and I direct my Turstees to pay and discharge, during the life of my wife, all taxes, assessments, insurance charges and charges of every kind and nature except as herein otherwise specifically provided, which may be imposed upon any of the lands and premises used

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

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

In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per stirpes and not per capita, the share its parent

would have taken under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her or me surviving, the share such child of mine would have received under the provisions hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purpose therein provided.

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

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

any securities or property in which I may have invested my estate in my lifetime, even if such securities and investments are not of a character in which fiduciaries are authorized to invest trust funds, and that no liability shall attach to such Trustees by reason of any loss occasioned by such acceptance or retention.

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

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

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

In case of the death or resignation or inability to act of any one of the Executors and Trustees above named, the three remaining Executors and Trustees shall act without the appointment of a fourth, but thereafter in the event of the death or disqualification of any of the remaining

Executors or Trustees, I nominate and appoint as substituted Executor and Trustee, in the place of Maurice J. Swetland, EMERSON P. HARRIS, and as substituted Executor and Trustee in the place of F. C. Stevens, I nominate, constitute and appoint my daughter, Mrs. VELMA I. STEVENS; and as substituted Executor and Trustee in the place of M. J. Kane, I nominate, constitute and appoint my daughter, Mrs. RUTH D. KANE; and as substituted Executor and Trustee in the place of E. M. Corey, I nominate, constitute and appoint EMERSON P. HARRIS.

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

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

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

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

HORACE M. SWETLAND

WITNESSES:

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

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

"EXHIBIT B"

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

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

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

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

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

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

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

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

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

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

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

Witness:

L. J. Montgomery

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

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

Notary Public, New York County.

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

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

Witness:

"EXHIBIT C"

DECLARATION OF TRUST

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

WITNESSETH THAT

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

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

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

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

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

AGREE

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

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

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

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

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

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

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

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

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

(b) It is expressly agreed by and between the parties hereto that any and all additions to the

TRUST ESTATE shall be received by the said TRUSTEE for the purposes and uses and subject to all the terms and conditions of the TRUST hereby created, without the execution of any further or additional instrument of agreement.

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

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

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

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

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

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

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

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

(e) In the event of the death of all the beneficiaries hereunder, namely, the wife and children and the living issue of such children of the party of the second part, prior to the termination of the TRUST hereby created, then and in that event the net principal of this Trust Estate shall revert to and be paid over to the Corporation known as the Publishers Securities Company

of Montclair, New Jersey, with the exception noted in Paragraph (a), that the number of shares of stock of said Publishers Securities Company forming a part of this trust estate, shall be delivered to and become the property of MAURICE J. SWETLAND, if living, otherwise said shares shall revert to and become a part of the net trust estate, reverting to said Publishers Securities Company, as aforesaid.

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

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

of any kind or character upon the part of said beneficiaries or their respective children against the said TRUST fund.

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

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

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

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

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

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

L. F. DAY
Notary Public

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

PETITION TO APPOINT GUARDIAN AD LITEM FOR INFANT DEFENDANT.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*Petition to Appoint Guardian Ad Litem for Infant Defendant.*

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

The petition of Clare Peter Johnson respectfully showeth that your petitioner, Clare Peter Johnson, is the father of Edith Patricia Johnson, a minor under the age of fourteen years; that said minor is one of the defendants named in the bill of complaint exhibited in this honorable court by Maurice J. Swetland, *et al.,* against the said minor and others; that the said minor was one month old the twenty-second day of June, nineteen hundred and twenty-six; and your petitioner respectfully prays that your petitioner may be appointed guardian *ad litem* to defend said minor, Edith Patricia Johnson, against the said bill of complaint of the said Maurice J. Swetland and others.

CLARE PETER JOHNSON,
Residing at 302 West 86th Street,
New York City, N. Y.

Dated June 28, 1926.

Petition to Appoint Guardian ad litem.

Present
KENNETH C. HAND,
Prudential Building, Newark, N. J.

I, CLARE PETER JOHNSON, of the City, County and State of New York, do hereby declare and express my assent and willingness to accept the appointment of guardian *ad litem* above prayed for.

CLARE PETER JOHNSON.

Dated, June 28, 1926.

Present
KENNETH C. HAND.

STATE OF NEW JERSEY, *ss.*

CLARE PETER JOHNSON, the petitioner named in the foregoing petition, having been duly sworn according to law, on his doath saith: That the above petition truly expresses the age of Edith Patricia Johnson in the said petition named, according to the best recollection and belief of this deponent.

CLARE PETER JOHNSON.

Sworn and subscribed before a Notary Public in and for the State of New Jersey, this 28th day of June, 1926.

WM. H. OSBORNE, JR.,
Notary Public of New Jersey.

Petition to Appoint Guardian ad litem.

STATE OF NEW JERSEY, *ss.*

KENNETH C. HAND, of Newark, in the County of Essex, of lawful age, being duly sworn according to law, on his oath saith— That he was present and saw Clare Peter Johnson, the petitioner named in the foregoing petition, duly sign the same by subscribing his name thereto. And this deponent further saith that he was present and saw the said Clare Peter Johnson subscribe his name to the consent and agreement written at the foot of the above-written petition.

KENNETH C. HAND.

Sworn and subscribed before me a Notary Public in and for the State of New Jersey, this 28th day of June, 1926.

WM. H. OSBORNE, JR.,
A Notary Public of New Jersey.

Order Appointing Guardian ad litem.

ORDER APPOINTING GUARDIAN AD LITEM FOR INFANT DEFENDANT.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*Order Appointing Guardian Ad Litem for Infant Defendant Under 14.*

Upon reading the petition filed herein by Clare Peter Johnson, the father of Edith Patricia Johnson, a party defendant in the above-entitled cause, setting forth that the said Edith Patricia Johnson is an infant under the age of fourteen years, and praying that the petitioner may be appointed her guardian *ad litem* by whom she may answer and defend this suit, and upon the written consent of the said petitioner annexed to the said petition to accept the said appointment and the affidavit of said Clare Peter Johnson, verifying the age of said Edith Patricia Johnson, and the affidavit of Kenneth C. Hand, stating that the said petition and consent were signed in his presence.

It is on this day of September, 1926, ORDERED, that the said Clare Peter Johnson be assigned and appointed guardian *ad litem* for the said infant defendant, Edith Peterson Johnson, by whom he may answer and defend this suit.

It is FURTHER ORDERED, that this decree be entered *nunc pro tunc* as of the 28th day of June,

Petition to Appoint Guardian ad litem.

1926, and that said decree shall have the same effect as if it had been entered on said last mentioned date.

Vice-Chancellor.

PETITION TO APPOINT GUARDIAN AD LITEM FOR INFANT DEFENDANT.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*Petition to Appoint Guardian Ad Litem for Infant Defendant.*

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

The petition of Clare Peter Johnson respectfully showeth that your petitioner, Clare Peter Johnson, is the father of Clare Peter Johnson, Jr., a minor under the age of fourteen years; that said minor is one of the defendants named in the bill of complaint exhibited in this honorable court by Maurice J. Swetland *et al.*, against the said minor and others; that the said minor was fourteen months old on the 20th day of September, 1925; and your petitioner respectfully prays that your petitioner may be appointed guardian *ad litem* to defend said minor, Clare Peter John-

son, Jr., against the said bill of complaint of the said Maurice J. Swetland and others.

CLARE PETER JOHNSON,
Residing at 302 West 86th Street,
New York City, N. Y.

Dated, October 20th, 1925.

Present
CHARLES R. HARDIN.

I, CLARE PETER JOHNSON, of the City, County and State of New York, do hereby declare and express my assent and willingness to accept the appointment of guardian *ad litem* above prayed for.

CLARE PETER JOHNSON.

Dated, October 20, 1925.

Present
CHARLES R. HARDIN.

STATE OF NEW JERSEY, *ss.*

CLARE PETER JOHNSON, the petitioner named in the foregoing petition, having been duly sworn according to law, on his oath saith: That the above petition truly expresses the age of Clare Peter Johnson, Jr., in the said petition named, according to the best recollection and belief of this deponent.

CLARE PETER JOHNSON.

Sworn and subscribed before me a Notary Public in and for the State of New Jersey, this 20th day of October, 1925.

DANIEL B. SMITH,
Notary Public of New Jersey.

STATE OF NEW JERSEY, *ss.*

CHARLES R. HARDIN, of Newark, in the County of Essex, of lawful age, being duly sworn according to law, on his oath saith that he was present and saw Clare Peter Johnson, the petitioner named in the foregoing petition, duly sign the same by subscribing his name thereto. And this deponent further saith that he was present and saw the said Clare Peter Johnson subscribe his name to the consent and agreement written at the foot of the above-written petition.

CHARLES R. HARDIN.

Sworn and subscribed before me a Notary Public in and for the State of New Jersey, this 20th day of October, 1925.

DANIEL B. SMITH,
Notary Public of New Jersey.

ORDER APPOINTING GUARDIAN AD LITEM FOR INFANT DEFENDANT.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*Order Appointing Guardian Ad Litem for Infant Defendant.*

Upon reading the petition filed in this cause by the defendant, Clare Peter Johnson, setting forth that the said Clare Peter Johnson is the father of Clare Peter Johnson, Jr., one of the defendants in this cause, and that his said child is a minor under the age of fourteen years, and praying that the said Clare Peter Johnson may be appointed guardian *ad litem* of the said minor; and upon reading the written assent of the said Clare Peter Johnson to said appointment, and the affidavit of the said
and the affidavit of said Clare Peter Johnson, the petitioner, father of said infant, verifying the age of said infant:

IT IS ORDERED, this 20th day of October, 1925, that the said Clare Peter Johnson be appointed guardian *ad litem* of the said Clare Peter Johnson, Jr., by whom said infant may appear and answer, and defend this suit.

ORDER APPOINTING GUARDIAN.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*On Bill, &c. Order Appointing Guardian.*

This matter being opened to the Court by Ira C. Moore, Jr., of counsel with the complainants, and it appearing to the Court that Velma I. Stevens, Frederic C. Stevens, Jr., Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, five of the defendants in the above-stated cause, were by an order of this Court made on the 2nd day of September last past, directed to appear, plead, answer or demur to the complainants' bill on or before the 4th day of November then next; that they are infants under the age of twenty-one years, and have neglected to apply for the appointment of a guardian to defend this suit. And it further appearing by affidavit that they still reside out of this state, and have no father, mother or guardian in this state to whom notice of this application can be given; IT IS THEREUPON, on this 8th day of December, 1925, on motion of Whiting & Moore, of counsel with the complainants,

ORDERED, that Thomas Barber, Clerk of this court, be assigned and appointed their guardian,

Order Appointing Guardian.

by whom they may appear and answer and defend this suit.

E. R. WALKER,
C.

Respectfully advised,

BAYARD STOCKTON,
A. M.

Infants' Answer.

INFANTS' ANSWER.

Filed December 8, 1925.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*On Bill, &c.* *Infant's Answer.*

The answer of Velma I. Stevens, Frederic C. Stevens, Jr., Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, infant defendants, by THOMAS BARBER, Clerk, guardian *ad litem.* These defendants, answering by their said guardian say that they are strangers to all and singular the matters and things in the said bill of complaint contained, otherwise than that these defendants are informed that they have some interest therein; and these defendants, being infants of tender years, submit themselves to the judgment of this honorable Court, and pray that their interest may be protected and saved to them.

THOMAS BARBER,
Clerk.
Guardian *ad litem.*

A true copy.

THOMAS BARBER,
Clerk.

ORDER APPOINTING GUARDIAN.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*On Bill, &c.* *Order Appointing Guardian.*

This matter being opened to the Court by Ira C. Moore, Jr., of counsel with the complainants, and it appearing that the defendants, Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane, infants under the age of twenty-one years, have been served with process to appear and answer the complainants' bill, and that they have neglected to apply for the appointment of a guardian to defend this suit; and it appearing by affidavit that said defendants are infants under the age of fourteen years and that due notice of this application has been given to Maurice J. Kane, the father of said infants; IT IS, on this 8th day of December, 1925, on motion of Whiting & Moore, of counsel with the complainants,

ORDERED, that Thomas Barber, Clerk of this court, be assigned and appointed their guardian, by whom they may appear and answer, and defend this suit.

E. R. WALKER,
C.

Respectfully advised,
BAYARD STOCKTON,
A. M.

INFANTS' ANSWER.

Filed December 8, 1925.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, *et al.*, *Complainants,* *and* HATTIE SWETLAND, *et al.*, *Defendants.*	*On Bill, &c.* *Infants' Answer.*

The answer of Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane, infant defendants, by THOMAS BARBER, Clerk, guardian *ad litem*. These defendants, answering by their said guardian say that they are strangers to all and singular the matters and things in the said bill of complaint contained, otherwise than that these defendants are informed that they have some interest therein; and these defendants, being infants of tender years, submit themselves to the judgment of this honorable Court, and pray that their interest may be protected and saved to them.

THOMAS BARBER,
Clerk.
Guardian *ad litem.*

A true copy.

THOMAS BARBER,
Clerk.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between

MAURICE J. SWETLAND, *et al.*, *Complainants,*

and

HATTIE SWETLAND, *et al.*, *Defendants.*

Answer.

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

The answer of Dorothy A. Johnson, and Clare Peter Johnson, Jr., an infant under the age of fourteen years, by Clare Peter Johnson, his guardian *ad litem,* both of the city, county and state of New York, to the bill of complaint of Maurice J. Swetland, and others, executors and trustees under the last will and testament of Horace M. Swetland, deceased; the said Dorothy A. Johnson being a daughter of the testator, and the said Clare Peter Johnson, Jr., being her son, answering respectfully, say that:

1. Paragraphs 1 to 5, inclusive, are admitted.

2. Paragraphs 6, except subdivision "b," is admitted.

Defendants admit that part of subdivision "b" which alleges that the said Horace M. Swetland in his lifetime was a man of wealth; that he and his wife resided in Montclair, New Jersey; that he maintained a number of automobiles and kept a number of servants; that in order to maintain said home properly it is necessary to employ a number of servants, including a chauffeur; that Clara A. Swetland, the widow, is given, by the will, the use of the Montclair residence; and that she is upwards of sixty-four years of age.

Defendants admit that said Clara A. Swetland during the lifetime of her husband, Horace M. Swetland, lived in comfort, but deny that she lived in luxury, and deny that they lived on a scale in keeping with his income.

Defendants deny that said Clara A. Swetland, during the lifetime of her husband, was accustomed to travel in this country and Europe, but allege that she did travel some in this country, and had been to Europe only twice. When traveling for any but brief periods the house was closed, and the servants, except the gardener, were dismissed.

Clara A. Swetland has a small separate income from securities given to her by the testator during his lifetime.

Defendants admit that the death of her husband was a shock to Clara A. Swetland, but deny its effects on her health alleged in said paragraph. They deny that she was in a sanitarium when the bill was filed, but allege that she was in a sanitarium, but for a brief period only, at an earlier time subsequent to the testator's death; and allege that during a period of years preceding the making of the will, and preceding the testator's death, she frequently went to sanitaria for rest, recuperation or treatment. Defendants allege that Clara A. Swetland's health is not now, and has not been, during the period since the testator's death, impaired to a greater extent than it was at the time the will was made, the time of the testator's death, and during a period of years preceding his death.

All other allegations of said subdivision "b" are denied.

Defendants allege that they are desirous of having the said Clara A. Swetland comfortably maintained and supported, and are willing at any time to enter into an agreement, with the other beneficiaries under the will, to contribute to her comfortable support out of any income distributed to these defendants from the estate of Horace M. Swetland.

3. Paragraph 7 is admitted, except that defendants deny that the residence facing "Afterglow Way" and grounds attached thereto were a part of the testator's dwelling house and grounds attached thereto, and deny that said residence is upon said premises.

Defendants say that the testator's widow, Clara A. Swetland, is given a life estate in the dwelling house of the testator, and grounds attached thereto; and that as life tenant she has the right either to occupy said premises or to rent them and receive the rents for her own use and benefit; or, if the property is sold by the trustees with her consent, she is entitled to the income from the proceeds of such sale.

4. Answering paragraph 8, defendants admit that said buildings are constructed of stone and stucco. Defendants deny that from time to time said buildings become in need of extensive and expensive repairs; and deny that the grounds are large and the annual expense of keeping them in proper condition is considerable.

Defendants are in doubt as to the extent of the authority of the trustees, under the will of Horace M. Swetland, to make and pay for repairs and improvements upon said property if

said repairs and improvements become necessary for the proper maintenance and protection of said property; and are in doubt as to whether the expense thereof should be charged to the income payable to the said Clara A. Swetland, or whether the same may be paid from the surplus income of the estate of said Horace M. Swetland.

Defendants have no knowledge or information sufficient to form a belief as to whether the repairs or improvements which have been made by the executors and trustees were necessary to protect said property or to put the house in proper condition.

Defendants are in doubt as to whether the expense of the repairs or improvements which have been made by the executors and trustees may be charged to the surplus income of the estate.

5. Paragraph 9 is admitted. Defendants say that the surplus income should be distributed at stated intervals to the daughters and son of the testator, to wit, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, Mrs. Dorothy A. Johnson, and Maurice J. Swetland, as in intestacy, except the income from the New York real estate which should be distributed to the said three daughters only, under the New York statutes: Laws of New York, 1909, Chapter 52. An Act relating to real property, constituting chapter fifty of the consolidated laws. (The New York Real Property Law, Consolidated Laws of New York, Chap. 50, Art. 3, Sec. 61; Consolidated Laws of New York, Vol. 4, page 3583); and Laws of New York, 1916, Chap. 364. An Act to amend the real property law, in relation to the disposition of undisposed profits. Section 1.; true copies of

which statutes are hereunto attached and made a part hereof, and marked "Schedule A" and "Schedule B."

6. Answering paragraph 10 of the bill of complaint, defendants admit that the will of Horace M. Swetland contains the provisions quoted in said paragraph.

Defendants deny that the Trust Agreements were found with said will after the death of said Horace M. Swetland, as set forth in subdivision "a" of said paragraph of the bill of complaint. Defendants have not sufficient information on which to form a belief as to the existence of said Trust Agreements, or as to whether, if they exist, said "Exhibit B" and "Exhibit C" are true copies of said Trust Agreements.

Defendants allege that said Trust Agreement is not part of the will of Horace M. Swetland.

Defendants say: (1) that said Trust Agreement being no part of the will, neither Maurice J. Swetland, trustee, nor Maurice J. Swetland, individually, nor the beneficiaries under said Trust Agreement, have any rights under the will; (2) that the complainants have no duties, under the provisions of the will, to Maurice J. Swetland, Trustee, or to the beneficiaries under said Trust Agreement; (3) that neither the rights of Maurice J. Swetland, trustee, nor the rights of Maurice J. Swetland, individually, nor the rights of the beneficiaries, under said Trust Agreement, can be declared in this suit to construe, and to declare the rights of the beneficiaries under, and to obtain the Court's advice and direction as to the duties of the executors and trustees under, this will; (4) that the provisions of the will set forth in said paragraph 10 of the bill of complaint, in so far as they contain a direction to distribute part of the estate of the testator to Maurice J. Swetland, as trustee, or his successor trustee, under the Trust Agreement referred to in said provisions, are void; (5) that as to that part of the estate of the testator to which said provisions relate, the testator died intestate; (6) and that that part of the estate of the testator should be distributed to the three daughters and the son of the testator, to wit, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane, Mrs. Dorothy A. Johnson, and Mr. Maurice J. Swetland. Defendants say that this Court should so decree.

One part of the language of the will quoted in paragraph 10 of the bill of complaint, provides for a gift over, in certain events, *i.e.*, the death of a daughter leaving no issue surviving the testator. The language is:

". . .; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her or me surviving, the share such child of mine would have received under the provisions hereof shall be equally distributed among my surviving daughters or their issue, as herein provided," etc.

Defendants allege that lawful issue of all of testator's daughters survived the testator; and say that, therefore, the gift over can never take effect.

7. Answering paragraph 11 of the bill of complaint, defendants admit that the language quoted in said paragraph is used in the part of the will quoted in paragraph 10 of the bill of complaint.

Defendants further say that said language needs no construction, that it is not ambiguous,

but simply incomplete, and of no legal effect, and that the deficiency cannot be supplied from sources outside of the will.

Defendants reallege paragraph 6 of this answer, except the allegations relating to the gift over.

8. Answering paragraph 12, defendants admit that the will contains the provision quoted in said paragraph of the bill of complaint.

Defendants allege that this provision can have but one meaning, and that that is the literal meaning, which is also the ordinary, everyday meaning, plainly expressed, that the investment and reinvestment of trust funds must be "with regard to the question whether such investments or reinvestments so made by them are of a character permitted by law to fiduciaries."

PITNEY, HARDIN & SKINNER,
Solicitors for Defendants.

ALFRED F. SKINNER,
CLARE P. JOHNSON,
(Of the New York Bar.)
Of Counsel with Defendants.

"SCHEDULE A"

Laws of New York, 1909, Chap. 52. An Act relating to real property, constituting chapter fifty of the consolidated laws. Consolidated Laws of New York, Chap. 50, Art. 3, Sec. 61 (Consolidated Laws of New York, Vol. 4, page 3583).

Sec. 61. Accumulations. All directions for the accumulation of the rents and profits of real property, except such as are allowed by statute, are void. An accumulation of rents and profits

of real property, for the benefit of one or more persons may be directed by any will or deed sufficient to pass real property, as follows:

1. If such accumulation be directed to commence on the creation of the estate out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at or before the expiration of their minority.

2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it must commence within the time permitted, by the provisions of this article, for the vesting of future estates, and during the minority of the deneficiaries, and shall terminate at or before the expiration of such minority.

3. If in either case, hereinbefore provided for, such direction be for a longer term than during the minority of the beneficiaries, it shall be void only as to the time beyond such minority. . . .

"SCHEDULE B"

Laws of New York, 1916, Chap. 364. An Act to amend the real property law, in relation to the disposition of undisposed profits.

Section 1. Section sixty-three of chapter fifty-two of the laws of 1909, entitled "An Act relating to real property, constituting chapter fifty of the consolidated laws," is hereby amended to read as follows:

Section 63. Undisposed profits. When, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of

alienation, or of the ownership, during the continuance of which the rents and profits are undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate. But any and all persons who legally shall have begun heretofore, or shall begin hereafter, to receive any such undisposed of rents and profits or any part thereof by virtue of this section or otherwise, shall continue to receive and enjoy the same notwithstanding the birth thereafter of a child or children to any person or persons receiving all or any part of such rents and profits.

Section 2. This act shall take effect immediately.

We consent to the filing of the within answer as of due time.

WHITING & MOORE,
Per F. JEFFREYS.

By order of December 9th, 1926 it was provided that the foregoing answer be deemed to be the answer of Clare Peter Johnson as guardian ad litem of Edith Patricia Johnson.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between

MAURICE J. SWETLAND, *et al.*, *Complainants,*

and

HATTIE SWETLAND, *et al.*, *Defendants.*

On Bill, &c.

The defendants, HATTIE SWETLAND, CLARA A. SWETLAND, VELMA I. STEVENS, RUTH D. KANE, GRACE E. SWETLAND, and MAURICE J. SWETLAND, individually and as trustee under trust agreement dated July 14, 1917, answering the bill of complaint, say:

1. They admit all of the allegations of the bill of complaint herein, and join in the prayer for relief as therein stated.

2. Answering paragraph 4 of the bill of complaint, they aver that, by a proper construction of the Last Will and Testament of Horace M. Swetland, deceased, his executors, in their discretion, may carry the bond executed by Horace M. Swetland in his lifetime to the Union Dime Savings Bank, dated February 5, 1909, and may permit the same or any part thereof to remain unpaid.

3. Answering paragraph 5 of the bill of complaint, they aver that, by a proper construction of the Last Will and Testament of Horace M. Swetland, deceased, the Federal Estate Tax and such other transfer inheritance or succession

taxes as may be due upon the devises and bequests made by the testator in his said will, should be paid by the executors from the corpus of the estate.

4. Answering paragraph 6 of the bill of complaint, they aver that by a proper construction of testator's said will, the Trustees thereunder are given the sole and absolute and uncontrolled discretion to determine if and when any misfortune should befall testator's widow, Clara A. Swetland, whereby it should become necessary to provide a sum in excess of $15,000 per year for her competent and comfortable support and maintenance, and, having thus found the existence of such misfortune, then to determine and pay to her such sums in excess of $15,000 per year as they in the exercise of their absolute discretion may consider necessary or advisable to provide for her competent and comfortable support and maintenance.

5. They further aver that since the death of Horace M. Swetland, the defendant, Clara A. Swetland, has become in such impaired health that she has been required to spend much of her time in sanitariums, in charge of skilled medical attendants, entailing a very large expense, and that her health is still impaired and she will require medical attendance and the care of nurses for some time to come, and that, by reason thereof, a misfortune has befallen her in accordance with the true intent and meaning of the testator's will. In view of such misfortune, the sum of $15,000 per year directed by paragraph 2 of said will to be paid to the defendant, Clara A. Swetland, annually for life, is wholly inadequate to maintain the said defendant in even

approximately that degree of comfort and well-being to which she was accustomed prior to the death of her said husband, and that even if she would forego her right to occupy the home situated in the Township of Verona, Town of Montclair, County of Essex, State of New Jersey, and live on a much more modest scale, said defendant would require at least $30,000 per year in addition to whatever may be required for rent and the physical upkeep of a house.

6. Answering paragraph 7 of the bill of complaint, the defendants aver that by a proper construction of the testator's said will, the defendant, Clara A. Swetland, is given the use of and the right to occupy the entire premises including all of the buildings thereon, described in paragraph 7 of the bill of complaint, together with all of the personal property and equipment found thereon at the time of the testator's death, for and during the term of her life, and should said premises be sold by the executors and/or trustees with the consent of the defendant, Clara A. Swetland, then upon such sale she is entitled to the income on the proceeds of said sale, during the term of her life, in addition to the other provisions made for her under the will; and under the broad powers given to the executors and/or trustees under the will they may lawfully in their discretion invest a portion of the proceeds of said sale in a more modest residence for the use and occupancy of the defendant, Clara A. Swetland, in such place as she may choose. They further allege that in view of the fact that the said Clara A. Swetland's children are all married and have homes of their own, it is distasteful to her to occupy alone such an elaborate estate requiring the maintenance and supervision of a

large staff of servants. Under these circumstances, these defendants contend and request that inasmuch as defendant, Clara A. Swetland, has the right to the use and occupancy during her lifetime of the entire premises described in paragraph 7 of the bill of complaint that this provision of the will be construed so as to confirm the power in the trustees to sell all of the real estate mentioned in paragraph 7 of the bill of complaint and to invest the proceeds and pay the income therefrom to the defendant, Clara A. Swetland, according to the construction of the will herein contended for.

7. Answering paragraph 8 of the bill of complaint, they aver that by a proper construction of testator's said will, the executors and/or trustees were and are authorized and empowered to make such repairs or improvements to and upon the buildings and premises described in paragraph 7 of the bill of complaint, and/or any part thereof as they in the exercise of their absolute discretion may consider proper and necessary, and to charge the costs thereof to the income account. They aver that heretofore and since the testator's death, it became necessary to make extensive repairs to the Main Residence as alleged in the bill of complaint, and it is probable that hereafter it will be necessary to make other repairs thereto and to the other buildings on said premises, and that the same have not been paid for by the defendant, Clara A. Swetland, for the reason that her income was and is insufficient to enable her so to do.

8. Answering paragraph 9 of the bill of complaint, they aver that by a proper construction of the said will, the surplus income of the estate

is undisposed of and that the testator died intestate in respect thereto, and that same should be distributed to his next-of-kin according to the provisions of the Statute of Distribution of the State of New Jersey, such distribution first to be made upon the final accounting of the executors, and thereafter annually by the trustees. They further aver that inasmuch as the said will, properly construed, does not direct the accumulation of any part of the income, no question as to the effect of the statutes of the State of New York hereinafter more particularly described, arises, but they say that even if the said will did direct the accumulation during the life of Clara A. Swetland of the surplus income, then the income from New York real estate only would, by virtue of the following statutes of New York, Laws of New York, 1909, Chapter 52; An Act relating to real property, constituting chapter fifty of the consolidated laws. (The New York Real Property Law, Consolidated Laws of New York, Chap. 50, Art. 3, Sec. 61; Consolidated Laws of New York, Vol. 4, page 3583); and Laws of New York, 1916, Chap. 364. An Act to amend the real property law, in relation to the disposition of undisposed profits; Sec. 1; be devisable between the testator's three daughters, Velma I. Stevens, Ruth D. Kane, Dorothy A. Johnson and Maurice J. Swetland, as trustee or beneficiary as hereinafter set forth in paragraph 10 of this answer.

9. Further answering paragraph 9 of the bill of complaint, they aver that, by a proper construction of the said will and in accordance with the applicable rule of law, the ordinary expenses of administration by the complainants as executors are payable and should be paid out of the principal of the estate and that ordinary ex-

penses of administration as trustees are payable and should be paid out of the income of this estate.

10. Answering paragraphs 10 and 11 of the bill of complaint, these defendants allege that it was the intention of the testator by his said will, to confirm the provisions he had previously made for his son, the defendant, Maurice J. Swetland, under the trust agreement of July 14, 1917, and aver that, by the proper construction of the said will, the language used therein had so incorporated the said trust agreement by reference thereto as to make it a part of the said will, thereby saving the necessity of repetition of its provisions and that this intention of the testator so manifestly expressed should be carried into effect by the executors and/or trustees under the direction of this Court. These defendants also allege that the gift to the defendant, Maurice J. Swetland, as trustee, in and by paragraph 3 of the said will is upon the same trusts as the trusts set forth in a certain trust agreement executed by the said Maurice J. Swetland, dated July 14, 1917, a true copy of which is Exhibit B attached to the bill of complaint. These defendants also allege that, in the event that the said gift to the defendant, Maurice J. Swetland, should be held to be not upon the trusts aforesaid, then the said gift in and by paragraph 3 of the said will is to Maurice J. Swetland beneficially and absolutely.

11. Answering paragraph 12, these defendants aver that, in and by a proper construction of the said Last Will and Testament, the complainants, as trustees, are empowered, in their absolute discretion, to invest and reinvest the properties which may come into their hands, in such

manner as they may deem most advisable, and without regard to the question whether such investments or reinvestments so made by them are of a character permitted by law to fiduciaries. In and by Clause Third, A. 3, of the said Will, the testator provided:

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

These defendants say that properly construed, the gift over of the share of any of the testator's three said daughters can take effect and will take effect if any of them should predecease her mother, Clara A. Swetland, and if the issue of such daughter so dying should not survive the said Clara A. Swetland.

WHEREFORE these defendants join in the prayer for relief stated in the bill of complaint.

McCARTER & ENGLISH,
Solicitors of said Defendants.

ARNOLD L. DAVIS,
(Of the New York Bar) Of Counsel.

Statement for Record.

By agreement of the parties, the following statement is printed in the record:

Maurice J. Swetland, one of the executors, is a son of the testator and the father of the defendants, Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland.

Frederic C. Stevens, one of the executors, is a son-in-law of the testator, being the husband of his daughter, Velma I. Stevens, and is the father of the infant defendants, Frederic C. Stevens, Jr., and Velma I. Stevens.

Maurice J. Kane, one of the executors, is a son-in-law of the testator, being the husband of his daughter, Ruth D. Kane, and is the father of the infant defendants, Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane.

Dorothy A. Johnson is the youngest daughter of the testator and the mother of the defendants, Edith Patricia Johnson, an infant daughter, and Clare Peter Johnson, Jr., an infant son, the daughter, Dorothy A. Johnson, and her two infant children being parties defendant and the appellants herein.

Excerpts from Testimony, Ernest M. Corey.

ERNEST M. COREY, sworn for complainants.

Direct examination by Mr. Whiting.

Q Where do you reside? A 146 Beach avenue, Flatbush, Long Island.

Q You knew the testator, Mr. Horace M. Swetland? A I did.

Q About how long? A Since 1895.

Q Won't you state generally what your relations with him were from that time on? A Mr. Swetland lived in Fredonia, New York—my previous home; we first engaged in business in Fredonia in 1900, when we organized the Citizens Trust Company of Fredonia, New York, Mr. Swetland taking the presidency, and myself cashier. Mr. Swetland was also publishing papers in New York—industrial papers, and he formed the Class Journal Company, and in 1905 I came to New York as treasurer of the company and was intimately associated with Mr. Swetland up to the time of his death.

Q Did you meet him in a domestic way; had you relations with his family? A I had; I knew all of his family when they lived in Fredonia. His family consisted at that time of himself, his wife Clara, his son Morris J., or Jack, as we knew him; his daughter Velma, his daughter Flossie, his daughter Ruth and Dorothy. His daughter Flossie was drowned in Lake Erie in about 1900.

Q So that he had how many children surviving him? A He had four children surviving him.

Q And those are the ones you have named? A Yes.

Q Did you ever visit the testator or his family in the Montclair residence? A I have on many occasions.

Q Will you describe it generally? A Mr. Swetland, I should say about fifteen years ago, purchased a very beautiful home in Upper Montclair; I think the property consisted of about four acres, which has been described here. Mrs. Corey and myself have visited in the home, and myself and wife have visited with the daughters, so that I know his domestic affairs as well as a good many of his business affairs.

Q Were you familiar with the social interests of Mr. Swetland, his club life? A Mr. Swetland was a member of a number of clubs at the time of his death; he was a member of the Union League Company of New York, the Engineers Club of New York, the Society of Automotive Engineers, the Engineers Country Club, the Montclair Golf Club, the U. P. C. Golf Club, and I think several other minor organizations. Mr. Swetland was an enthusiastic automobilist as well as a publisher of automobile papers.

Q Do you know how many automobiles he kept; are you familiar with that? A I know of at least three that he has had at one time. I know he provided Mrs. Swetland with a limousine and a chauffeur. I think he had a car to take him to the train, and then he had his personal runabout. He was very fond of driving.

* * * *

Q In the opening of counsel in this case reference has been made to a trust agreement in connection with the bequest to the son Jack, Morris J.; have you seen the original of that trust agreement? A I have.

Q Is it here in court? A It is.

Q Were you present when the will was read? A I was.

The Court: That trust agreement is Exhibit C attached to the bill of complaint?

Mr. Whiting: Exhibit B, on page 21.

* * * *

Q I want to prove figures as to the estate; what is the inventory value of the New York estate? A The gross inventory value is $585,875, against which there was a mortgage of $211,575, leaving a net inventory of $374,300. The mortgage has now been reduced to $200,000.

Q What does this property consist of? A Of a hotel on 47th street, New York City, known as the Hotel Manhattan.

Q What is the approximate net income of the New York estate? A Since the death of Mr. Swetland up to the present time?

Q Yes. A The net income is $54,037.95. That is from June 15, 1924, to April 30, 1926.

Q What is the inventory value of the remainder of the estate? A $1,130,745.31.

Q And the net income since the date of death? A The net income is $55,392.96.

The Court: That is during the same period?

The Witness: Yes, sir.

The Court: Counsel has asked for the gross income; I see no reason why he should not have it.

The Witness: The gross income is $119,593.53—no, that is the New Jersey estate; the gross income of the New York estate, $84,719.56.

* * * *

LESLIE JAMES MONTGOMERY, sworn for complainants.

Direct examination by Mr. Whiting.

Q Where do you live? A 135 West 47th street, New York City.

Q You were in the employ of the testator, Mr. Horace M. Swetland? A I was.

Q In what capacity? A As secretary, assistant.

Q How many years prior to his death? A From February, 1911, until October, 1923.

* * * *

Q You were a witness to Mr. Swetland's will, were you not? A I was.

Q Do you recall the matter of the preparation of that will? A I do, sir.

Q Had you any part in it physically? A I had all to do with it.

Q You did the typewriting? A I did the typewriting.

Q Won't you just tell us how it was constructed; who did it?

Mr. Johnson: I object.

The Court: Just the manner in which it was drawn.

The Witness: You want to know the physical production of the will?

The Court: Just the manner of the physical production of the will.

A Mr. Swetland had a previous will, which he took out on many occasions; he excerpted from that will, dictated, interlined, marked out, dictated, wrote himself from that will, in the preparation, sir, of his present will—of a will.

The Court: Did you say "excerpted" or "excepted"?

The Witness: Excerpted.

Q Was there more than one draft made in this process? A I suppose there were parts of it I wrote fifty times.

Q What became of these papers that you say were marked on and redrafted and excerpted? A I incorporated those in a complete connected story of his will; either he or I tore the parts copied from into shreds, so small that it would be impossible to put them together.

Q How about that old will you spoke of? A I do not know what became of the old will; I don't know anything about that.

Q Do you recall the Publisher Security Company? A I do.

Q Do you know yourself about the dispostion of the stock in that company? A I do, sir.

Mr. Johnson: I object; it is irrelevant, immaterial and incompetent.

Mr. Whiting: My purpose in producing this testimony is to show, in conformance with my opening, that there was a substantial division of property by the testator in his lifetime to the children.

Mr. Johnson: That is immaterial. How would that explain the construction of this will? That simply meant that the testator made this will cognizant of those things.

Mr. Whiting: My thought was that it would have a bearing on the Court's mind as to features of the will. According to the will all of the income is devoted to these

annuities to the widow and no provision is made for its disposition in the meantime.

The Court: I presume the real objection is that he doesn't want this witness to state the definite disposition of any property. What you want is to show that there was some outside provision or some previous provision made for the children. Do you dispute that?

Mr. Johnson: No.

The Court: It does not affect the will very much as I can see, either way; the statement which Mr. Whiting made was that there had been some provision made for the children previous to the making of the will.

Mr. Johnson: We admit that, and there is no objection to that.

The Court: I understand the admission is that there was some provision made for the children by the testator prior to the making of this will and prior to his death; what it was I don't know, and I don't care; I don't think it is material.

Mr. Whiting: This is an opportunity to show that it was substantial.

The Court: When I said "some provision," I mean a substantial provision.

Mr. Whiting: I would like to say that it is substantial.

The Court: That is not disputed.

Mr. Johnson: That there was a separate company called the Publishers Security Company, and some or all of the assets of this had come from the testator, and the stock of which was distributed among his children only, and that the testator took an

obligation from the company, which, we believe, from recollection, to have been about $200,000.

Mr. Whiting: I ask you if you will admit, Mr. Johnson, that there was approximately a value of $200,000 worth to each of the children?

Mr. Johnson: That would be a matter of appraisal; I don't think that is necessary.

The Court: You go on, Mr. Whiting, and prove it.

Q Do you know anything about the income of the Publishers Security Company?

The Court: Your original question was whether there had been some provision made by the testator for the children prior to the making of this will. You may repeat that question. Mr. Johnson hasn't made any admission which is clear to my mind.

Mr. Johnson: We admit that the value of the assets of that corporation are large, and aside from that obligation, that debt to the testator, between seven hundred and eight hundred thousand, I should say, that there was this substantial provision made.

The Court: The admission is that there was a substantial provision made for each of the children prior to the death of the testator and prior to the making of this will, and out of assets which are not disposed of by the will; is that correct.

Mr. Johnson: Yes; put it in the record that way.

Mr. Elkins: And the income from that amounts to practically $12,000 a year to each of the children.

The Court: I am not interested in that. The admission is that it is substantial.

Mr. Whiting: I want to show that the portion that went to Jack went to him in trust under the trust agreement. I ask the witness if that is not the fact.

Mr. Johnson: We object to that.

Mr. Whiting: I withdraw it. The trust agreement isn't in yet.

RECESS.

Q I show you a paper, Mr. Montgomery, purporting to have been executed on the 14th day of July, 1917, by Morris J. Swetland, witness, L. J. Montgomery, and I point to the signature of the witness and ask you if you recognize that signature?

Mr. Johnson: We object. That is the trust agreement, is it not?

The Court: The question that he is asked is not objectionable.

A Yes, sir; that is my signature.

Q And I now point to the signature, "Morris J. Swetland," and ask you if you recognize that? A I do; that is Morris J. Swetland's, whom I know well.

Q Did you see him sign that paper? A I did.

Q And you signed it as witness? A I did sign it as witness.

Q Will you examine the paper and say if you recognize it? A You don't want me to read it?

Q I want to be sure whether or not you know that paper. A I recognize the document, sir.

Q It purports to have been executed on the 14th day of July, 1917; do you recall that? A I do, sir.

Q Where was the transaction of the execution of this paper? A In the office of H. M. Swetland, at 239 West 39th street, New York City.

Q Do you know what became of it after its execution; where it was kept? A It was kept in the possession of H. M. Swetland, in his private safe, to the best of my recollection.

Q You had access to that safe? A I did, sir.

Q I think you testified this morning that you were working with Mr. Swetland in the preparation of the will which is proved in this case? A I was, sir.

Q Do you recall reference to a trust agreement? A I do.

Mr. Whiting: May this be marked for identification?

(Marked Exhibit C. 4 for identification.)

Q Do you know yourself whether or not the Exhibit C. 4 for identification, which you say you witnessed, is the trust agreement referred to in the will? I ask you if you know it.

Mr. Johnson: I object to that. That is one of the questions to be determined in the case.

Tne Court: I will admit that question; I am not admitting the document in evidence. We will come to that presently, perhaps.

A I do.

Q I understand your testimony is that this is— A That is the document, sir.

Mr. Whiting: We submit this witness to cross examination. I may have a question I want to recall him for.

(Cross examination reserved.)

ERNEST M. COREY, recalled for further

Direct examination by Mr. Whiting.

Q Reference has been made to a trust agreement referred to in the will of the testator; did you ever see the trust agreement of July 14, 1917? A I did.

Q And where did you see it? A Reference was made to this trust agreement in the will.

Mr. Johnson: I object to the witness testifying that the testator refers to this trust agreement in the will.

The Witness: To a trust agreement.

The Court: Strike that answer out; it is not responsive. The question was, did you ever see the trust agreement of July 14, 1917? Answer that question

The Witness: I did.

Q Where did you see it? A In my office, 239 West 39th street, New York.

Q Had that office any relation to Mr. Swetland's affairs? A It had.

Q State what it is. A It is the office of the Class Journal Company.

Q And are you an officer there? A I was an officer of the company.

Q I show you Exhibit C. 4 for identification, and ask you if that is the trust agreement to which you referred? A It is.

Q Where was it kept? A It was kept with the private papers of Mr. H. M. Swetland.

Q In what? A In his safe, with other private papers and bonds and securities.

Q And you have produced it here in court at the request of counsel? A I have.

Mr. Whiting: We offer the trust agreement of July 14, 1917, in evidence.

Mr. Johnson: We object to the admission of the trust agreement.

The Court: The offer and the objection are both on the record. I am myself uncertain as to whether this ought to be admitted or not. My inclination is that it is not admissible, on the general theory—I don't mean that this particular paper is not admissible, but I mean that the general rule is, that you cannot incorporate a separate and distinct document in a will. I will hold the matter, however, until you can both offer me some light on this subject; so neither of you will be injured by leaving the matter as it is now. In other words, it is a matter for the proof.

Mr. Davis: Would your Honor follow the practice, admit the document subject to exception, and then if you decide it is not admissible, strike it out, so that our record will be complete?

The Court: It was not my intention to admit it now.

Mr. Davis: Then it is not in the record, even though you decide to admit it?

The Court: What is in the record is the offer and objection and decision reserved on the offer.

Mr. Davis: Then, upon your Honor ruling, in case you should decide to admit it, it will receive an exhibit mark as in evidence?

The Court: If you can incorporate it in the will, then it is material; if you cannot, it is immaterial.

* * * *

Q You are familiar with the homestead property there, Mr. Kane? A Yes.

Q Did you ever examine the mansion house there with the idea of repairs in your mind? A Yes, I did.

Q When was that? A Of course, I had noticed several years, the gradual deterioration of the property in a number of places; I used to play billiards a great deal in the billiard room, and he often mentioned it was all crumbling away, the studding in the 2x4's in the lower end of the walls, and the plaster had all broken away, and I had noticed a number of things like that, but nothing had been done, but shortly after Mr. Swetland's death, Mrs. Swetland came to me and just practically begged of us to put the house in a livable condition, as she expressed it, so I discussed that with the other executors, and we decided to go ahead, and in the meantime I had examined the house very thoroughly; I had gone over it with Mrs. Swetland and Mrs. Kane, her daughter, and the gardner had called my attention to a number of things that were in very bad shape, so I went all over it, and after the executors decided to do something, we had a general contractor come up there and we went over it with him, and we decided to have the work done.

Q Have you any memorandum with you showing just what was done? A Yes, I have; I submitted it.

Q Will you produce it? A I have a copy.

Q One that you know yourself to be true at the time it was made? A Yes.

Q Produce it if you have it. A I have a copy, a typewritten copy that I struck off.

Mr. Whiting: Is there any objection to the use of the copy?

Mr. Johnson: I don't see any special harm, but it is not relevant except on the accounting.

Mr. Whiting: This will be evidence of the substantial expense which was required to keep up the house, and it will tend to show whether or not $15,000 a year is enough allowed to the widow, who has to take care of the house while she lives there. It gives some light on the nature of repairs and cost of them and expense of them. I am not seeking to justify that expense as a matter of accounting. That is probably premature, but it throws light on the expense thrown on the widow, if she had to maintain the house.

The Court: I will receive it.

Mr. Whiting: I will offer that statement in evidence.

The Court: This is a typewritten copy of the statement. Have you made up a statement of these expenditures?

The Witness: Yes, we have all the bills and everything here.

The Court: I suppose the original statement is the one which should go in, but if no objection is made to the copy, I will receive the copy.

Mr. Johnson: I consent to the use of the copy.

The Witness: This is also a description of the property, which I thought that you might want; it is incorporated here, the first part of it, and then the repairs are in after.

The Court: I don't think that is relevant. I will admit a statement of the expenditures.

"SWETLAND VS. SWETLAND.

Amount Paid for Repairs to Montclair Home.

1924			
Dec.	5	Walter D. Cole—Carpenter..	$ 126.18
"	"	Cornelius Bush—Plumbing ..	21.32
"	"	James B. McQuoid—Roofing.	52.20
"	"	A. W. Edgar & Son—Painting and Decorating	897.20
"	"	Julius Muller—Mason	987.92
1925			
Jan.	6	Julius Muller—Mason	1,019.68
"	"	A. W. Edgar & Son—Painting and Decorating	1,565.63
"	"	Walter D. Cole—Carpenter..	354.28
Feb.	21	A. W. Edgar & Son—Painting and Decorating	1,796.93
"	24	Otto H. Eberle—Plumbing..	148.33
Mar.	11	Walter D. Cole—Carpenter..	8.35
"	11	A. W. Edgar & Son—Painting and Decorating	748.00
1926			
Apr.	6	James B. McQuoid—Roofing.	127.26
			$7,853.28"

Mr. Whiting: I want to offer the bills. We offer the bills, and for your Honor's convenience, we will have them tabulated, but I ask that they be marked as one exhibit.

(Marked Exhibit C. 5.)

Mr. Whiting: We will offer the other side a copy and they can examine the bills at their leisure.

(Cross examination reserved.)

* * * *

LESLIE J. MONTGOMERY, heretofore sworn, recalled for

Cross examination by Mr. Johnson.

Q Mr. Montgomery, you testified, I believe, that you were present during at least some of the time when the testator was working on a will? A I did.

Q Are you a stenographer? A I am.

Q You testified, I believe, that he worked on it from time to time and you think that he—you say, "I suppose there were parts of it he wrote fifty times." Is that correct? A I did.

Q Over how long a period of time would you say he worked upon it? A Intermittently for a number of months.

Q Would there sometimes be long intermissions between the times that he worked on it? A There would.

Q Would you see it to the point to which he—you were typewriting it as he turned over material to you? A Yes.

Q How long would the intermissions be between the different periods when he worked on it, would you say? Give instances of, say, a week or month, or whatever it might be. A Perhaps for a week he would work very closely on it, and then possibly exigencies would come up, whereby he would have to let it go for a period

of perhaps two weeks or three weeks or thereabouts.

Q It may be a month or two? A I wouldn't say that long.

Q How would he compose it? Would he work on separate parts and bring them to you and have you typewrite those separate parts? A Yes.

Q By whom are you now employed? A United Publishers Corporation.

Q How long have you been in their employ? A Previous to last November—

Q I mean the present period of employment. A November 1, 1925.

Q Whom did you interview; who gave you the position? A I didn't interview anybody.

Q Whom did you first talk to about it—a position? A I didn't talk to anybody; they came to me.

Q Who came? A Mr. H. J. Redfield, secretary of the company.

I wish to clarify that answer. I did not seek the employment; but Mr. Redfield, who is a great friend of mine, called me on the telephone and we had a little conversation, and the result of it was that I was offered the position.

Q And what is your capacity there now? A Assistant to Mr. Redfield.

Q Are you working with Mr. Redfield? A I also work for the president of the company.

Q You were formerly employed by the testator, Mr. Swetland? A I was not employed by him directly.

Q Were you employed by the United Publishers Corporation? A I was not; by the Class Journal Company.

Q And as such I think you testified on your direct examination that you were secretary or

stenographer to Mr. Swetland; is that correct? A Yes.

Q You left his employment? A I did.

Q Were you discharged? A I was not.

Q Did you apply to Mr. Swetland for re-employment? Mr. Swetland has stated that you applied to him for re-employment and he refused to take you back; is that correct? A I did not; I applied by letter for his help to secure employment.

Q But you did not apply for re-employment? A I did not.

Q Are you working with Mr. Redfield in connection with the United Publishers Corporation? A United Publishers Corporation and the U. P. C. Realty Corporation.

Q Is Mr. Stevens connected with the United Publishers Corporation? A Mr. Stevens is president of the Federal Printing Company.

Q That is the printing unit, the printing plant of the United Publishers Corporation? A It is a subsidiary of the United Publishers Corporation.

Q By which you are employed? A By which I am employed.

Mr. Whiting: May I ask if counsel desires to call Mr. Montgomery again as his own witness or if you are through with him?

Mr. Johnson: I think I would like to call him again, but I am not sure. I won't bring him over unnecessarily.

Mr. Whiting: And the same thing applies to the other witnesses who have thus far testified. Here they are and here we all are; why don't you finish up with them, and if you need to recall them later, let us know.

Mr. Johnson: I will decide that later, as the Master suggested. I think we better wait until we finish the cross examination and then decide that.

* * * *

LESLIE JAMES MONTGOMERY, recalled for further

Cross examination by Mr. Johnson.

Q Mr. Montgomery, did you typewrite the trust agreement of July 14, 1917? A I believe I did, sir.

Q For Mr. Swetland? A Yes.

Q Did you sign that as a witness? A I did.

Q I believe you testified that after that time it was kept by Mr. Swetland in his safe with his other papers? A Yes.

Q You testified, I believe, also, that you had access to the safe? A I did not have access to that particular vault in which those papers were. It was a vault within the safe.

Q So far as you know, was that trust agreement in the possession of the testator, and in his safe, all the time you were employed by him? A As far as I know, it was.

Q Do you feel sure that there was just that one copy of the trust agreement, and that it remained in Mr. Swetland's possession? A That I cannot swear to.

Q You remember very distinctly that you did the typewriting of that for Mr. Swetland? A Yes.

Q And you made just the one copy, did you? A That I wouldn't swear to.

Q You don't remember? A I don't remember, no.

Q Can't you recall the circumstances in some way that will enable you to? Will you think a moment? A That was 1917; that is nine years ago.

Q Mr. Corey has testified as to, I believe, seeing it, and you testified to remembering the signing of it. A Yes.

Q Was the signing long after it was typewritten? A That I cannot swear to. It might be the same day; it might be two days or three days or a week.

Q Or it might be a long time after? A It might be ten days.

Q You have no recollection regarding that? A Excepting the copying of it and the signing of it, but as to whether I made a copy or how long, I cannot say.

Q Who took this trust agreement after it was signed? A It has actually remained in Mr. Swetland's—

Q That would be an inference. But just tell me, if you know, did Mr. Swetland take it? A That I cannot swear to.

Q Do you remember any of the other circumstances surrounding the time of this being signed by you as witness? A No.

Q Do you remember seeing Morris J. Swetland sign it? A Yes.

Q Who else was present? A I don't recall any other person was present.

Q You think no other person was present? A Except Morris J. Swetland and myself.

Q Where did that occur? A In the testator's office.

ERNEST M. COREY, recalled for further

Cross examination by Mr. Johnson.

Q Mr. Corey, you were not present at the time that trust agreement was signed by Morris J .Swetland and Mr. Montgomery? A No, sir, I was not.

Q You said you saw the trust agreement? A After Mr. Swetland's death.

Q Not again until after his death? A I never saw it until after his death.

Q You never saw it until after his death? A Correct.

* * * *

ERNEST M. COREY, heretofore sworn, called on behalf of Dorothy A. Johnson, *et als.*

Direct examination by Mr. Johnson.

Q For whom were you employed at the time the will of the testator is dated? A Employed by the Class Journal Company.

Q In what capacity? A Treasurer of the company.

Q What did your duties consist of as treasurer? A The ordinary duties as treasurer of a corporation.

Q Did you have charge of the bookkeeping? A I supervised it.

Q You are a bookkeeper or accountant? A Yes.

Q You originally were a bookkeeper? A Yes.

Q At what time do you mean? When you first knew the testator, say? A I was something more than a bookkeeper.

Q You were a bookkeeper? A You asked me if I ever kept books and I say I had.

Q What were your first duties when employed in a business in which the testator was interested? A I was treasurer of the Class Journal Company.

Q Were you not with him in a bank at Fredonia? A He was with me in the bank.

Q What do you mean by "he was with me"? A I explained in my previous testimony that I organized the bank and Mr. Swetland came in as a director and president.

Q Did you have a large interest in it—a large financial interest? A That is immaterial to you.

Q Had the testator a very large or controlling interest? A He did not have control.

Q He had a large interest? A He did.

Q Much larger than yours? A Quite a bit.

Q Not very much more? A A good deal more.

Q Yours was not large, was it? A I wasn't a wealthy man at that time, and I am not yet.

Q Did your duties—how long have you been with the Class Journal Company? A Twenty years.

Q And that is a subsidiary of the United Publishers Corporation? A Correct.

Q Of which the testator was president at the time of his death? A He was.

Q And had been all the time you were with him? A No, sir.

Q For many years? A Mr. Swetland was president for a number of years, but not for twenty years.

* * * *

Q Have you ever been a large investor? A Yes, sir.

Q What do you mean by that? A I have invested a good many thousands of dollars, principally when I was in the bank at Fredonia and up to the present time.

Q Do you know anything about a trust agreement of January 3, 1922, between H. M. Swetland and Morris J. Swetland, his son? A I have read it.

Q When? A Soon after Mr. Swetland's death.

Q You had not previously seen it? A I had not.

Q Where was it when you first saw it? A It was with other securities of Mr. Swetland.

Q Where? A In his safe.

Q And the safe was in his private office or in his office at the United Publishers Corporation? A In the United Publishers Corporation.

Mr. Johnson: That is all from this witness.

Cross examination by Mr. Whiting.

Q Have you the trust agreement to which you have just referred? A I have.

Q Will you produce it? A (Producing same.)

Mr. Whiting: I offer it in evidence.

Mr. Johnson: I offer the document in evidence. I still have the witness on the stand, but I have told him that was all to his last question, and I want now to ask to offer this trust agreement for a particular purpose. I still have the witness.

The Master: Mr. Johnson, the record shows that you said, "That is all from this

witness," and turned the witness over for cross examination, and Mr. Whiting can cross examine the witness at this time, and I will mark the document as an exhibit on the part of the complainants, and you may then re-examine the witness.

Mr. Johnson: I do not so understand it, and I object to the admission of the paper in evidence.

(Trust agreement marked Exhibit C. 8, June 24, 1926.)

Re-direct examination of ERNEST M. COREY by Mr. Johnson.

Q I show you paper dated the 3rd day of January, 1923, and headed "Declaration of Trust," and purporting to be between Horace M. Swetland and Morris J. Swetland.

Mr. Whiting: Is that the paper just described by the witness and produced?

Mr. Johnson: This is the trust agreement of January 3—

Mr. Whiting: I ask for a categorical answer.

The Master: I will state on the record that it is the paper which I have just marked Exhibit C. 8 today.

Q Is this the trust agreement that you found in Mr. Swetland's safe, among his papers, with his securities? A It is.

Mr. Johnson: I offer this, to be marked for identification. I intend to introduce it in evidence a little later, and it is relevant on

the question of the testator's habitual use of certain words that appear in the will.

(Paper heretofore marked Exhibit C. 8, 6-24-26, is now marked Exhibit D. 1, 6-24-26, for defendants represented by Clare P. Johnson.)

Mr. Johnson: I am through with my direct examination of this witness.

LESLIE JAMES MONTGOMERY, heretofore sworn, called on behalf of Dorothy A. Johnson, *et als.*

Direct examination by Mr. Johnson.

Mr. Johnson: I call for the production of the trust agreement of July 14, 1917.

(Paper produced by Mr. Corey.)

Q Mr. Montgomery, did you typewrite for the testator a trust agreement—I will show you the document here produced by Mr. Corey, one of the executors and trustees, and I ask you if you typewrote that for Mr. H. M. Swetland, the said paper having been heretofore marked Exhibit C. 4 for identification? A I did.

Q You remember it distinctly? A I remember it distinctly.

Q Did you see it signed? A I did; I witnessed it.

Q That is your signature? A That is my signature.

Q What was done with this paper, so far as you know, immediately after the signing, which you saw? A To the best of my recollection, the

original of this document was taken by the testator and placed in his private safe, a copy, duplicate of that original, was handed to Morris J. Swetland, trustee.

Q Why do you say "handed to Morris J. Swetland, trustee"? A Because he was present at the signing of it, and there were two copies made.

Q You say that because he is mentioned as trustee in the trust agreement? A Yes.

Q Was the duplicate signed? A To the best of my recollection; it was a duplicate copy in every respect, to the best of my recollection.

Q Do you remember very distinctly as to whether the copy or duplicate was signed at the same time? A I believe it was.

Q And witnessed by you at the same time? A I believe it was.

Q Are you positive about that? A I am as positive as a person could be at the end of some nine years.

Q You remember positively typewriting the document? A I do.

Q You remember the other circumstances? A I do.

Q You remember very distinctly that this was signed (referring to Exhibit C. 4 for identification)? A Yes, and I remember very distinctly that the other was signed, that the duplicate was signed.

Q Did you see that duplicate or copy at any subsequent time? A I believe I did.

Q Where? A I cannot remember now.

Q You don't remember having seen it at any subsequent time? A I cannot remember that detail.

Q You think you did? A I wouldn't be surprised that I did.

Q Are you familiar with the signature of Morris J. Swetland? A Very.

Q Is that Morris J. Swetland's signature? A That is Morris J. Swetland's signature.

Q That is found at the end of this trust agreement marked Exhibit C. 4 for identification, and dated July 14, 1917? A Yes.

Q You saw him place that signature there? A I did.

Mr. Johnson: I now offer in evidence paper heretofore marked Exhibit C. 4 for identification, and I offer it for a particular purpose, and for that only, which is to show, along with other evidence, the testator's habitual use of certain words which appear in the will. This offer is not to be considered in any way as admitting this document—as putting this document in evidence, for the purpose of construing or completing the language of the will that makes reference to some trust agreement of the same date.

(Marked Exhibit D. 2, 6-24-26, for defendants represented by Clare P. Johnson.)

Q I show you paper headed "Declaration of Trust," and purporting to be an agreement made the 3rd day of January, 1922, by and between Horace M. Swetland, of Montclair, New Jersey, and Morris J. Swetland, of Montclair, New Jersey. Did you typewrite this document for the testator?

Mr. Whiting: I direct attention to the fact that counsel is referring to Exhibit C. 8 today.

A To the best of my knowledge and belief, I did.

Q You were employed by the testator as stenographer at that time? A I was.

Q You have testified, I believe, that you are familiar with the signatures of Horace M. Swetland and Morris J. Swetland? A Very familiar.

Q Are the signatures at the foot of this document the signatures of Horace J. Swetland and Morris J. Swetland? A They are.

Q You know the signature of L. F. Day? A I do.

Q Is that his signature? A That is his signature.

Q Who is Mr. Day? A He was formerly assistant treasurer of the Class Journal Company and about—well, several years, he passed on to the great future.

Mr. Johnson: I offer this document in evidence, heretofore marked Exhibit D. 1 for identification, for defendants represented by Clare P. Johnson, dated January 3, 1922, for the purposes and with the reservations and within the limitations with which the other documents purporting to be a trust agreement, dated July 14, 1917, was introduced in evidence by me.

(Marked Exhibit D. 1, 6-24-26, for defendants represented by Clare P. Johnson.)

* * * *

Q During the period in which you were stenographer did he find your work usually accurate? Was it necessary for him to send work back to you for correction very often because you had made mistakes in your notes or copying? Were you an accurate stenographer? A I was, very.

Q Did he so consider you? A I think so.

Q Do you remember him sending back to you any of the parts of the will that he gave you to copy, any typewriting or any memo, to do over, because you had made a mistake? A No, I wouldn't say that it was because I made a mistake, but because he changed it himself.

Q But you think that you copied accurately all that he gave you? A I think so.

Q Did he at any time claim that the mistakes were made by you? A I don't recall any such circumstance.

Q What make typewriter did you use? A That would be hard to answer.

Q At the time the will was drawn? A I cannot swear to that, because I used a Smith Premier and I used an Underwood.

Q You had them both there at that time? A I had one machine one week—we had a large number of machines, and I took whatever I could get at the time, but I cannot say what machine I used.

Q You took a machine in the United Publishers Corporation's offices? A I would borrow a machine when I wanted it.

Q From whom? A From anybody that I could borrow it from.

Q You recall it was an Underwood or a Smith Premier? A I cannot recall whether it was Underwood or Smith.

Q Have you any preference? A No, one is just the same as the other, to me.

Q Did you use an old or new one? A Sometimes I could only get an old one, sometimes I might get a new one.

Q Remembering the circumstances surrounding the typewriting of the will and tearing into pieces of parts that had been copied, and the

various details, don't you remember what particular machine you did some of that typewriting on? A Some of it would be done, as I said before, on the Smith Premier and some on the Underwood.

Q From whom did you receive your paper supplies? A From the office, as I recall it.

Q What paper did you usually use, any particular paper? A I do not recall that; sometimes Manilla copy sheet, yellow paper, sometimes white sheets.

Q I mean for typewriting documents. A I am speaking for typewriting documents.

Mr. Johnson: I am through with Mr. Montgomery.

* * * *

ERNEST M. COREY, recalled for further

Direct examination by Mr. Johnson.

Q Was the testator at the time of his death president of the United Publishers Corporation? A He was.

Q Is that a large corporation? A It is.

Q What is its capitalization? A I think it is about $12,000,000—$12,000,000 or more.

Q Was he director of a large bank in New York, the Commercial Trust Company? A I am not sure whether he was a director at the time of his death.

Q Had he been at one time a director? A He had.

Q Was he president of the National Publishers Association? A At one time.

Q Had he been president of the Society of Automotive Engineers? A He had.

Q You would consider him an educated man, would you not? A I would.

Q Was he chairman of the Educational Committee of the New York Business Publishers Association? A I am not sure about that; he was connected with it.

Q You don't know whether he was? A I do not.

Q Was he chairman of the Education Committee of the Associated Business Papers, do you know? A He was connected with that organization.

Q Was Mr. Swetland formerly a school teacher, years ago? A He was.

Q Did you find him a man usually accurate in his diction and choice of words? A He had a large vocabulary.

Q And as you observed it, he was usually accurate and careful in his diction? A As much as an ordinary person would be, I think.

* * * *

Mr. Johnson: I offer in evidence the Laws of New York of 1909, Chapter 52, An Act relating to real property, constituting Chapter 50 of the Consolidated Laws (The New York Real Property Law); Consolidated Laws of New York, Chapter 50, Article 3, Section 61; Consolidated Laws of New York, Volume 4, page 3583;

Laws of New York, 1916, Chapter 364, An Act to amend the real property law in relation to the disposition of undisposed of profits, Section 1;

Laws of New York, 1909, Chapter 18, Section 47.

It is stipulated and agreed between counsel for the respective parties that counsel may quote from the public statutes of the State of New York, referred to, with the same force and effect as if the statutes were produced in open court.

Mr. Elkins: Are those the laws set up in your answer?

Mr. Johnson: This other statute which I will now offer, I will either plead in the answer of the infant defendant, for which I will answer as guardian *ad litem,* or we can simply agree to put them in evidence without the amendment, or without embodying it in a separate answer.

It is a statute practically declaratory of the common law and it provides that the law of New York governs as to all questions affecting New York real estate. Of course, that was the law by court decision, in the absence of statute, but there is this statute.

I also offer Laws of New York, 1909, Chapter 18, Section 47.

That is the only one not in the pleading.

Will you permit me to offer that in evidence without amendment of this pleading, in adding the additional defendant, or in a separate answer of the additional defendant; It will perhaps save time to do it this way; if not, I will plead it separately.

(No response.)

Mr. Whiting: You have made an offer, and so far there is no objection on the record.

* * * *

HERMAN JUDD REDFIELD, sworn for

Direct examination by Mr. Davis.

Q Where do you reside? A Montclair, New Jersey.

Q Were you acquainted with the testator, H. M. Swetland? A I was.

Q For what period of time? A My acquaintance dates from about 1914; he was a neighbor of mine; my business relations from 1919.

Q What were your business relations with him? A I was an officer and director of the company in which he was president.

Q Were your relations intimate up to the time of his death? A Quite intimate.

Q Was your office adjoining his place of business, 239 West 39th street? A Yes.

Q You know his son, Morris J. Swetland, referred to here as Jack? A Yes.

Q I hand you Exhibit C. 4, being a trust agreement, dated July 14, 1917, and ask you if you ever saw that before? A Yes.

Q Can you tell approximately when you first saw it? A I first saw this agreement sometime in the spring of the year 1918.

Q What was the occasion? A The occasion was that Jack was going abroad in the service; I saw this in 1918 sometime. I don't remember the date; I think it was in the spring of 1918.

Q Did he give it to you? A He gave it to me.

Q That was a duplicate original? A As my memory serves me, it was his copy, a duplicate original.

Q At that time did he hand you anything else? A He handed me 1,100 shares of U. P. C. preferred B stock.

Q Is that the stock referred to in the agreement? A Let me see if it refers to stock here—yes, two certificates, one for 500 and one for 600 shares.

Q Those certificates are each made out to Morris J. Swetland, trustee? A M. J. Swetland, trustee.

Q Did he deliver those certificates of stock and this agreement to you for safe keeping? A Yes.

Q What did you do with them? A Put them in my safe.

Q I hand you another document marked Exhibit C. 8, dated January 3, 1922, and ask you if you ever saw that before. A Yes.

Q When? A Either a day or two after it was executed—I don't remember exactly when, but very soon after it was executed.

Q What were the circumstances? A The circumstances were that Jack Swetland came into my office with this agreement and said to me that it took the place of the old agreement, and that the stock which he then had already delivered to me, with some more stock besides that, was to be held for him by me, and I noticed that I was one of the trustees herein; under certain circumstances I would be the trustee, and he handed me 1,998 shares of the stock of the Publishers Securities Company. I took that stock and, fortunately, I kept this envelope. I put it all in that envelope (producing envelope) and put it in my safe.

Q Was the endorsement now appearing on this envelope placed on there by you? A The day he handed it to me.

Q Prior to this date and after its delivery to Jack by his father had Jack delivered to you the

700 shares of Swetland Realty Company stock? A Yes.

Q Referred to on this envelope? A Yes.

Q When was that? A May I refer to these notes? Because I cannot remember it so far back without records.

Q Yes. A That stock was handed to me along about the 1st of August, 1920; it was issued July 28th, and if my memory serves me, it was immediately after the issuance of that stock that Jack gave it to me.

Q Handed it to you for safe keeping? A Yes.

Q And you placed it with the other stock, with Exhibit C. 4? A Yes, with that original—with the trust agreement.

Q Was it prior to or subsequent to that time that he handed you the 1,350 shares of Class B stock? A I already had 1,100, but on the 18th of July, 1918, I received from his father 250 shares more, made out to M. J. Swetland, trustee, which he requested me to put with Jack's stock. If my memory serves me, Jack was abroad at that time—I am quite sure he was; either there or in training camp.

Q And requested you to place it with the stock under the trust agreement of 1917? A That is right.

Q There is reference on this envelope to a $10,000 demand note. A That note for $10,000, demand note, was handed to me a few days after August 27, 1919.

Q By whom? A By Mr. Jack Swetland.

Q To whom was that note made? A M. J. Swetland, trustee.

Q That note had been received by him from his father, did he say? A He didn't say from whom.

Q And handed to you for safe keeping? A Yes.

Q And you placed that with the trust agreement of July 14, 1917? A Yes, it was from his father, because there is the record.

Mr. Davis: I offer in evidence the envelope produced by the witness.

(Marked Exhibit C. 9.)

Q What became of the stock and the note and the two agreements which were in this envelope? A I delivered them to M. J. Swetland sometime about June, 1925. The only thing I kept then was that envelope, which I put back into my safe, and forgot all about it.

Cross examination by Mr. Johnson.

Q Mr. Redfield, did you see the trust agreement executed? A No, sir.

Q The memo which you have in your hand and to which you have referred—from which you have read in testifying, when was that made? A It was made last week.

Q On what did you base the facts and dates and other facts in that memorandum? A The records of the company.

Q That is what company? A In what case do you mean?

Q On your memorandum. A Will you let me explain?

Q Certainly. A My memorandum shows that the 500 shares of stock referred to in the first trust agreement, Certificate No. 204, was issued to M. J. Swetland, trustee, on the 3rd day of May, 1916; it came from a voting trust certificate standing in Mr. H. M. Swetland's name.

The certificate for 600 shares of stock, Certificate No. 319, was transferred from Mr. H. M. Swetland's personal holdings to Jack Swetland on the 11th day of April, 1917; and the other certificate for 250, which Mr. Swetland handed me, was transferred to M. J. Swetland, trustee, on the 18th day of July, 1918. Manifestly, I could not carry these dates in my head, and I looked them up.

Mr. Johnson: I would like to ask that the memorandum be marked as an exhibit and put in the record.

(Marked Exhibit D. 6 for defendants represented by Clare P. Johnson, 6-25-26.)

EXHIBIT.

Laws of New York, 1909, Chapter 18, Section 47. An Act relating to estate of deceased persons.

"The validity and effect of a testamentary disposition of real property, situated within the state, or of an interest in real property so situated, which would descend to the heir of an intestate, and the manner in which such property or such an interest descends, where it is not disposed of by will, are regulated by the laws of the state, without regard to the residence of the decedent. Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any other property situated within the state, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the state or country, of which the decedent was a resident at the time of his death. Whenever a decedent, being a citizen of the United States, wherever resident, shall have declared in his will and testament that he elects that such testamentary dispositions shall be construed and regulated by the laws of this state, the validity and effect of such dispositions shall be determined by such laws."

CONCLUSIONS OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between	*On Bill, &c.*
MAURICE J. SWETLAND, *et al.*, *Complainants,*	*On Final Hearing.*
and	*Conclusions.*
HATTIE SWETLAND, *et al.*, *Defendants.*	56/689.

MESSRS. WHITING & MOORE (with whom was associated George M. Elkins, Esq., of the New York Bar), solicitors for complainants.

MESSRS. MCCARTER & ENGLISH (with whom was associated Arnold L. Davis, Esq., of the New York Bar), solicitors for the defendants Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane, Grace E. Swetland and Maurice J. Swetland, individually and as trustee.

MESSRS. PITNEY, HARDIN & SKINNER (with whom was associated Clare Peter Johnson, of the New York Bar), solicitor of defendant Dorothy A. Johnson, Clare Peter Johnson, Jr., and Edith Patricia Johnson.

BERRY, *V.-C.*

This bill is filed by the executors and trustees of the will of Horace M. Swetland, and seeks the construction of the will and instructions with reference to the duties of complainants thereunder. The testator died June 15, 1924. His will is dated January 12, 1922. For a complete understanding of the issues raised in this suit, it is necessary to quote the will in full. The

following is a copy of the will, and for convenience of reference I have arbitrarily given the several paragraphs marginal numbers.

1. "I, Horace M. Swetland, of the Township of Verona, County of Essex, State of New Jersey, do hereby make, publish and declare this my last will and testament, in manner and form following:

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

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

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

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

6. 1. To deliver and pay over to my half sister, Hattie Swetland, if she shall survive me, the sum of Twelve Hundred Dollars ($1,200), each year, during her life, in semi-annual instalments of Six Hundred Dollars ($600) each, and I direct my Executors to make the first of such payments immediately after my decease.

7. It is my will, and I direct my Trustees in the exercise of their absolute discretion, to increase as they may consider necessary, the amount to be paid to said Hattie Swetland, if any misfortune should befall her whereby

her necessities should require the payment of a larger sum.

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

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

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

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

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

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

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

15. It is my will, and I direct my Trustees to pay and discharge, during the life of my wife, all taxes, assessments, insurance charges and charges of every kind and nature except as herein otherwise specifically provided, which may be imposed upon any of the lands and premises used and occupied by my wife, as herein provided, from the income received by them from the principal of the trust herein created, except that my said wife shall personally pay for all repairs to and improvements upon the said property while used and occupied by her, and that in the event of her failure so to do, and if it shall become necessary for the proper maintenance and protection of said property, and

premises, I authorize and empower my said trustees to make such repairs or improvements thereon as they in the exercise of their absolute discretion may consider proper and necessary, and to charge the cost thereof to the Trust account.

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

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

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

19. It is my will, and I hereby expressly direct that my Executors and Trustees in their absolute and uncontrolled discretion, may retain for such period as they shall see fit, any investments of any nature or kind made by me in my lifetime, and that no liability shall attach to them by reason of any loss occasioned to my estate by reason of so doing. It is also my will, and I hereby direct that the Trustees of the trusts created by this will may accept from my said Executors and may retain for such period as they deem wise, any securities or property in which I may have invested my estate in my lifetime, even if such securities and investments are not of a character in which fiduciaries are authorized to invest trust funds, and that no liability shall attach to such Trustees by reason of any loss occasioned by such acceptance or retention.

20. I also expressly authorize and empower the Trustees of the Trusts hereby created in their absolute discretion to invest and re-invest the properties which may come into their hands in such manner as they may deem most advisable, and with regard to the question whether such investments or re-investments so made by them are of a character permitted by law to fiduciaries, and I

direct that no liability shall attach to said Trustees by reason of any investments or reinvestments so made by them.

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

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

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

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

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

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

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

HORACE M. SWETLAND.

I deem it also necessary to a complete understanding of the issues here presented to quote in full the trust agreement referred to in paragraphs 16 and 17 of said will. That agreement is as follows:

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

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

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

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

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

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

successors the trustee or trustees to carry out the trust herein provided for;

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

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

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of July, 1917.

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

Witness: L. J. Montgomery.

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

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

Notary Public, New York County.

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

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

Witness:

The testator was a publisher, actively engaged in a number of business enterprises at the time of his death. While he was a man of above the average education, he was not a lawyer, nor was he familiar with the language of the law or the legal niceties resulting from its use. He left an estate valued at upwards of $1,500,000, producing an income of over $50,000 a year. Notwithstanding his large estate and his unfamiliarity with legal terms, he drew his own will

without legal advice, using as a model an earlier will which had been prepared by able counsel. The complete will was composed of scraps from the earlier will, with crossedout parts and interlineations, original names, separate parts dictated at different times over a period of months with intervals of weeks between the different parts, and then the whole transcribed by testator's stenographer and incorporated into "a complete and connected story of his will." I think it clearly appears that the will as completed was the result of patchwork and piecemeal construction and obviously contains many errors in the use of words, rendering an interpretations and construction of some parts of the will difficult and making necessary a reconstruction of the will in order to give effect to the apparent intention of the testator.

A part of testator's estate consists of a hotel on 47th street, New York City, known as the Hotel Manhattan. In his lifetime, the testator executed a bond to the Union Dime Savings Bank, dated February 5, 1909, to secure the sum of $300,000, which, at the time of his death, had been reduced by payment to the sum of $210,000, and has now been reduced to $200,000. This bond was secured by a mortgage on said hotel property.

Numerous questions and issues are raised by the pleadings in this cause, but all of the defendants, with the exception of the defendants Johnson, are in entire agreement with the complainants on those questions and issues. All parties, however, join in requesting the Court to construe the will and to instruct the executors and trustees. The questions and issues raised may be stated as follows:

1. Should the $200,000 mortgage on the New York property be paid by the executors out of the personal estate?

2. Should the word "foregoing" in paragraph 3 of the will be construed to mean "following"?

3. Should the words "trust account" as used at the end of paragraph 15 of the will, be construed to mean "the income received by them from the principal of the trust account"? Or, stated in another way. What is the meaning of the words "trust account" as used at the end of paragraph 15 of the will?

4. Should the word "herein" as used at the end of the 16th paragraph of the will be construed to mean "therein"?

5. Should the word "or" as used in the phrase "leaving no lawful issue her or me surviving" in the 17th paragraph of the will be construed to mean "and"? In other words, is the word "or" used disjunctively or conjunctively?

6. Should the words "with regard" as used in paragraph 20 of the will be construed to mean "without regard"?

7. Have the trustees discretionary power under paragraphs 11 to 15, both inclusive, of the will, to increase the widow's allowance of $15,000 per annum, and if so, under what circumstances?

8. Is the house known as "Jack's house," situated on the homestead grounds at Montclair, part of "the dwelling house and grounds attached thereto," the use of which is given to the widow for life?

9. Can the Montclair residence, the use of which is given to the widow for life, be sold by the executors with her consent and a portion of

the proceeds invested in a smaller home for the widow?

10. Did the testator die intestate as to surplus income, and should that surplus income be presently distributed, or accumulated and held until the determination of the trust? And if presently distributable, to whom should it be distributed?

11. Should the annuities and expenses incident to the administration of testator's estate be paid first from the income from the personality and New Jersey real estate before resorting to the income from the New York realty?

12. Are the administration expenses payable out of the surplus income or out of the corpus of the estate?

13. Is the bequest to Maurice J. Swetland, as trustee, as contained in paragraph 16 and 17 of the will, valid?

I will consider these questions and issues in the order stated.

1.

This is a question of exoneration. At common law, the heir or devisee was entitled to exoneration of the real estate from a mortgage by the payment thereof out of the personal estate (*Hill* v. *Hill,* 95 N. J. Eq. 233), but Chapter 164, P. L. 1924, p. 375, directs that lands encumbered by mortgage pass to heirs or devisees subject to the mortgage, and unless the will expressly or impliedly directs otherwise, the heir or devisee is not entitled to exoneration. A will is effective as of the date of the death of the testator and is subject to laws then in force irrespective of the date of its execution. *Doty* v. *Teller,* 54 N. J. L. 163; *Holme* v. *Shinn,* 62 N. J. Eq. 1. The will here involved was executed under date of January 12, 1922. The testator died June 15, 1924.

The act above referred to became effective March 11, 1924, so that this question must be decided in view of the provisions of that act. It is contended, however, by the defendants Johnson that this New York real estate is subject to New York laws and that under the laws of that State, exoneration is imperative. But counsel for these defendants is in error as to the New York law. In *Smith* v. *Wilson,* 79 N. J. Eq. 314, Vice-Chancellor Stevenson said: "At an early period the State of New York abolished the right of the heir or devisee to exoneration in the class of cases under consideration," citing Revised Statutes (1829) p. 749, paragraph 4. That this was a correct statement of the law appears from the note, 29 A. L. R. p. 1247, where it is said: "In New York by express statutory provision, devisees or heirs, in the absence of a different direction by the will, take the real estate, subject to any encumbrances against it," citing *Farrell* v. *Farrell,* 206 App. Div. 209 (1923), 200 N. Y. Supp. 561; in *Re. McKinnon,* 182 App. Div. 277 (1918); 169 N. Y. Supp. 416. See also note, 5 A. L. R. p. 506, and New York cases therein cited. Irrespective, therefore, of which law governs, the executors are not obliged to pay this mortgage out of the personal estate.

2.

One of the general rules of construction is that words "are, in all cases, to receive a construction which will give to every expression some effect, rather than one that will render any of the expressions inoperative" (*Jarman's Twenty-four Rules of Construction, No. XVI*), "and words which it is obvious are miswritten may be corrected " (IBID, No. XX).

"It is not a *word,* it is the intent of the testator manifested in his will, that is sacred and must prevail."

Brown v. *Mugway,* 15 N. J. L. 330;

Elizabeth Trust Company v. *Clark,* 96 N. J. Eq. 550.

"The Court will look at the circumstances under which the devisor makes his will * * * as the state of his property, of his family, and the like."

Jarman's Twenty-four Rules of Construction, No. X.

"Where the testator's intention is manifest from the context of the will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language will be subordinated to the intention, and in order to effectuate such intention, as far as possible, the court may depart from the strict words and read a word or phrase in a sense different from that which is ordinarily attributed to it, and for such purpose may mold or change the language of the will, such as by rejecting superfluous, absurd or repugnant words or phrases, or restricting them in their application; by supplying omitted words or phrases; by transposing words, expressions or sentences; or by substituting one word or phrase for another. This rule, however, applies only where it is necessary in order to effectuate the testator's intention, which is clearly apparent, but which has been defectively expressed in the will."

40 Cyc, 1399;

See also 2 *Jarman on Wills,* pp. 840-843 (5th Ed.);

1 *Underhill on Wills,* p. 493, *et seq.* Secs. 361, *et seq.*

Schouler on Wills, Executors and Administrators, Secs. 873, *et seq;*

28 R. C. L. p. 225, Sec. 187.

The 2d, 3d, 4th, 5th and 6th questions should be considered in view of and governed by the rules of law above quoted, and it seems to me that upon a careful reading of the will it becomes too obvious for any argument that the 2d, 3d, 4th and 6th questions should be answered in the affirmative.

As to the second, the word "foregoing" is meaningless and the word "following" was obviously intended, as otherwise the paragraph in which the word "foregoing" appears would have no application. There are no "foregoing" devises and bequests," they are all "following."

3.

As to the third question, it is quite clear to me that the words "trust account" are used with reference to the income and not the principal. That this was the intent of the testator is evidenced by the language used in the preceding part of this 15th paragraph of the will, where the testator directs the trustees to pay taxes, assessments, etc., "from the income received by them from the prinicpal of the trust herein created." The words "trust account" as used at the end of this paragraph must be construed in the light of the preceding language. It is inconceivable that the testator would have provided for the payment of taxes, assessments, insurance, etc., out of the income and the payments of repairs out of the principal. These items are usually budgeted together and the words "trust account" in my judgment, are merely a concise repetition, in effect, of the above quoted language previously used in the same paragraph. I believe the testator in using the words "trust account" had in mind the same fund out of which

he directed taxes, etc., to be paid. It will be further noted that the whole income of the trust estate is charged with the support and maintenance of the widow and the home property, the use of which was devised to her for life. The items of expense mentioned come under the head of support and maintenance of the widow and of the home property.

4.

That the word "herein" should be read "therein", if it were not otherwise obvious, would conclusively appear from the use of the word "therein" under similar circumstances in the next succeeding paragraph.

5.

With respect to the 5th question, it would seem that this is prematurely raised, and a discussion of it would serve no useful purpose at this time. It is highly improbable that the question will ever be of any practical importance in the administration of this estate and until the necessity arises the question should be left open. It will never arise unless all the Johnson defendants predecease the widow.

6.

As to the 6th question, a consideration of the whole of paragraphs 18 to 21 of the will must be had in order to determine the intention of the testator. If the words here under consideration should be given the strict construction contended for by the Johnson defendants, then obviously much of the language of these paragraphs would be useless and meaningless. To my mind the

language used evidences an intention on the part of the testator to give his executors and trustees the widest latitude in the matter of investments and to absolve them from any liability whatever in the event of loss resulting from any investments either of the testator or his trustees. If the testator had not intended to use the word "without" instead of the word "with," so that this part of the will would read "and without regard to the question," etc., then the succeeding language in that paragraph is inapt, unnecessary and useless. If the testator had intended that the trustees should be restricted to legal securities in their investments, he would have used the word "but" instead of "and" so that this phrase would have read "but with regard to the question," etc., or the whole of paragraph 20 could have been omitted from the will.

But it is quite clear to my mind that the testator intended to use the word "without" and with this construction no question arises as to the meaning of this part of the will and there is no surplusage.

7.

A consideration of the 7th question raised in this suit involves the construction of the word "misfortune" as used in paragraph 13 of the will and in considering the meaning of the language there used "the entire will must be read in order to gather the testator's intention and no part is to be disregarded because it may be illegal. The first essential is to determine from everything in the testator's will what he meant should be done with his property and the second is to ascertain whether or not his meaning and intention can be given legal effect. A man can

do as he pleases with his own unless he runs counter to some rule of law or public policy." *Matter of Fowles,* 222 N. Y. 222. "It is because testators do not always express themselves as exactly and as properly as others might have done that so much litigation arises over wills, and has forced the courts to say that the intention of the testator, when this can be gathered from the four corners of the will, must be carried out if not contrary to some rule of law." IBID. As I read this will, it is apparent that the word "misfortune" as used, should be construed in its broadest possible sense. It is quite apparent to me that the testator, after having provided an annuity of $15,000 for his wife, in addition to the use of the homestead property, conceived the idea that that sum might be insufficient for "her competent and comfortable support and maintenance," and then decided to vest his trustees with absolute discretion to increase the amount of that annuity "as they may consider necessary or advisable," and in determining the intention of the testator in this connection, the objects and purposes of the will as a whole should be considered. The testator had an abundance of this world's goods and an inspection of his will discloses the purpose to devote the entire principal of his estate to the accomplishment of two primary objects or purposes during the lifetime of his widow and his half sister; first, the payment of an annuity of $1,200, or such larger sum as might be necessary to the half sister; and second, the payment of an annuity of $15,000, or such additional sum as might be necessary, to the widow during her lifetime. No disposition whatever of any portion of the principal of the estate is made during the lifetime of the widow. Even that portion of

the principal of the estate which is to produce the annuity for the half sister is not to be distributed until after the death of the widow. These facts, coupled with the value of the estate, are significant of testator's intention. I think it may be fairly stated that the principal object and purpose of the testator was to provide for the competent and comfortable support and maintenance of his widow and that all other considerations were subservient to this. The Johnson defendants contend that testator's intention was to vest his trustees with the power to increase his widow annuity only in the event of some great misfortune making such increase an absolute necessity. The construction of the word "misfortune" contended for by these defendants would restrict the meaning of the word to a great calamity or upheaval of nature, but if such restricted use of the word was intended by the testator, why was it necessary that this immense estate should be held intact during the lifetime of the widow? A misfortune is a miscarriage of fortune. One may be fortunate or unfortunate. If the latter, he suffers a misfortune. One may have the good fortune to have good health, or may suffer the misfortune of ill health. Any unfortunate illness, whether mental or physical, is a misfortune. If one's living expenses are greater than one's income, that one is unfortunate and thereby suffers a misfortune. If in the instant case, the testator did not provide out of his large estate ample means of support for his widow, she is unfortunate and as a necessary result has suffered a misfortune within the meaning of this word as used in the will. It is such a misfortune which, in my judgment, was in contemplation of the testator when he used that

word. The testator's apparent object was to provide for his widow's comfort in the fullest measure; otherwise he would not have allowed his trustees any discretion at all. It would be foolish to say that the trustees might have the discretion to increase the annuity in the event of an upheaval of nature or a great calamity affecting merely physical conditions at the homestead, and not in minor matters affecting the widow's comfort and health, and consequently putting her very life in peril; and yet, if the homestead were destroyed or swallowed up in an earthquake, I apprehend that even the Johnson defendants would admit that such a calamity would justify and increase of the annuity. If the word is to be used in the strict sense claimed for it by the defendants Johnson, where is the line to be drawn? What sort of a disaster would justify the trustees in the exercise of this discretion and who is to decide when such a catastrophe or upheaval of nature has occurred? Must the trustees on every occasion of this kind apply to the Court for its determination as to the existence of circumstances which are within the meaning of the word "misfortune?" If so, then the trustees have no discretion. But the broad terms of this clause containing the word "misfortune" are an indication to me that this word was likewise used in its broadest sense and in considering this question it must be borne in mind that this will was written by the testator himself without the aid of legal advice. *Hewitt* v. *Green,* 11 N. J. Eq. 345. This broad construction of the word "misfortune" is further indicated by the circumstances surrounding the testator and his family and the fact that he had made prior substantial provision for his children; and the pro-

visions for the half sister, as contained in this will, should also be borne in mind. It could hardly be said that the testator was less interested in making adequate provision for his widow's comfort than he was in making provision for the future comfort of his half sister, and yet it is admitted that full discretionary powers are given the executors and trustees with respect to increasing the annuity of the half sister. I think it may be reasonably inferred from the will itself that the testator intended to be no less liberal with his widow than with his half sister; and if this be so then this court ought to construe this will in a manner which will carry out that intention, if it can be done without doing violence to recognized legal rules of construction.

It appears that shortly after the testator's death and immediately after the reading of the will, the widow became nervous, wrought-up and hysterical over her apprehension that the provisions of the will for her were inadequate. Prior to testator's death, Mrs. Swetland had been an invalid for many years, and as a result of testator's death and her concern over the provisions of the will in her favor, she was obliged to go to a sanatorium. Her physical and mental condition prompted a hurried conference among the trustees and beneficiaries of the estate, as a result of which the trustees immediately increased the widow's allowance to $24,000 per annum. This was consented to by all parties except the Johnson defendants. The results of this increase were favorable to the widow's condition of health, particularly the mental condition, and were immediately apparent. Considerable testimony was taken on the question of whether

or not the necessities of the widow required this increase, which has * * * already been allowed by the trustees. The strong weight of the testimony indicates that the widow's reasonable requirements of support and comfortable maintenance are at least equal to this increased allowance; but, as I view it, even if the question were a debatable one, there being here no charge or proof of mala fides, and the action of the trustees being apparently the result of an honest exercise of discretion vested in them by the testator, this count cannot interfere. "Reference must always be had, in the execution of the power, *to the end or purpose intended* by the grantor of the power, and this end or purpose must be gathered from a construction of the written instrument; and a power must always be executed *bona fide for the end and purpose designed.*" *Perry on Trusts,* Sec. 511A. In this connection, it is significant that of the four trustees, two are sons-in-law and one a son of the testator and the widow, and whatever increase is allowed, it to that extent proportionately decreases the benefits which these three trustees or their families will ultimately receive from this estate.

The Johnson defendants, while denying the right of the trustees to increase the widow's allowance, assert that they are willing to enter into an agreement with the other heirs whereby the trustees may increase that allowance, but insist that this is a matter of grace rather than of right. As already indicated, however, I am of the opinion that the trustees may increase the widow's allowance in their absolute discretion, and so long as that discretion is exercised honestly, this Court has no power to interfere. *Larkin* v. *Wikoff,* 75 N. J. Eq. 462.

In the case last cited the Court aptly said, "Where a power is given to trustees to do or not to do a particular thing at their discretion, the Court has no jurisdiction to lay a command or prohibition upon them as to the exercise of that power, provided their conduct be bona fide and their determination is not influenced by improper motives." See also *Reed* v. *Patterson,* 44 N. J. Eq. 211.

8.

The Montclair property is the subject of one deed and was always used and assessed as a whole. "Jack's house" was built on these grounds by the testator for "Jack's" use, but it was occupied by him for only a short time. It is now vacant and has been vacant since 1921 except for a short period of time when it was rented to strangers. The rental was discontinued because the testator did not want strangers near him and from all that appears testator collected the rent. There is no dividing line between "Jack's house" and the homestead; no fence, nor in fact any physical mark indicating what portion of the grounds would be appurtenant to "Jack's house" if separated from the rest of the homestead property. No actual division or separation was ever made by the testator in his lifetime, and this indicates to me that no separation was ever intended. The defendants Johnson contend that "Jack's house" and the land appurtenant thereto are not included in the devise to the widow for life and desire the Court to separate "Jack's house" and a portion of the Montclair property from the homestead property. * * * This Court cannot assume the burden of dividing this property to suit the whim of some of the beneficiaries under the will, even if any division had been intended by the testator. It is, however, all too obvious to me to admit of any argument that "Jack's house" is a part of the homestead property and intended by the testator to be included in this devise. See *Ackerman* v. *Crouter,* 68 N. J. Eq. 49, affirmed 69 N. J. Eq. 839; *Lanning* v. *Sisters of St. Francis,* 35 N. J. Eq. 392; *Inhabitants* v. *Bruch's Ex'r.,* 37 N. J. Eq. 483; *Webs* v. *Carney,* 32 Atl. Rep. 705; *Jackson* v. *Roe,* 86 N. J. Eq. 373; *Hartfield* v. *Penna Co.,* 89 N. J. Eq. 45.

9.

As the executors and trustees are vested with complete power of sale, it requires only the consent of the widow to empower them to sell the Montclair property. All parties to this suit are agreed that in the event of a sale the widow is entitled to the income from the proceeds of such sale. With respect to the power of the executors and trustees to invest a portion of the proceeds in a smaller home for the widow, it is pertinent to consider the broad powers of investment given them by the will. They have the broadest latitude in this respect, and if, in their judgment, the estate will be benefited by a sale of the Montclair property and an investment of a portion of the proceeds in other real estate for the use of the widow, they have ample power to make this sale and investment. See *Smith* v. *Robinson,* 83 N. J. Eq. 384-389.

10.

It is conceded by all parties that the testator died intestate as to the surplus income, and this is plainly apparent from a reading of the will. The only dispute is as to whom this income is

distributable and to whom it should be distributed. The defendants Johnson make a distinction between the New York and the New Jersey income and contend that the surplus income on the personal estate and the New Jersey realty is immediately distributable to the next of kin under the statute of distribution; but, as to the income on the New York realty, it is claimed that such income is directed by the will to accumulate; that such direction is void under the New York law, and that by virtue of a New York statute this income is immediately distributable to the persons entitled to the next eventual estate under the will; namely, the three daughters, excluding the son on the theory that whatever share of the estate he gets is by virtue of the trust agreement, and that the trust agreement being incapable of incorporation in the will, as contended by the defendants Johnson, the son takes no share of the New York income.

The case of *Whittaker* v. *Whittaker,* 40 N. J. Eq. 33, is very similar in facts to the case at bar, except that there there were specific legacies of $15,000 to each of two brothers and a sister and one of $20,000 to another brother. The Court said that this indicated that it was not the testator's intention that these next of kin should further benefit from the estate until the final distribution. It will be noted that there is no provision in the will here involved for distribution of the income pending final distribution of the estate, nor is there anything whatever said with respect to the surplus income. It will also be noted that in the case at bar ample provision was made for the children prior to the testator's death by individual gifts to each. The testimony shows that approximately $1,000,000 was distributed in practically equal proportions amongst the children long prior to his death. This is a fact to be considered in determining the testator's intention with respect to surplus income, and, in connection with the fact that there is no mention in the will of surplus income, indicates to me that it was testator's intention that such income should be accumulated until the principal is distributable. In the last case of *Fell* v. *Spirling,* 3 Adv. Repts. 773, at page 775, Justice Campbell, speaking for the Court of Errors and Appeals, said:

> "The will is silent as to the income on retained shares or legacies, and there is nothing therein from which an intention of the testator can be inferred that it was his will and intention to distribute income and withhold principal of a share or legacy. In such a situation we think a reasonable construction must be that the income must be accumulated and paid at the time when the principal of the share or legacy is payable under the terms of the will."

Applying that language to the facts in the instant case, it would seem that there should be no distribution of surplus income until the principal is distributed. The will which was involved in the *Whittaker* case, above referred to, was again before our courts in the case of *Clement* v. *Creveling,* 83 N. J. Eq. 318, in 1914. This was after the death of the widow, but before the death of the niece, and the Court of Errors and Appeals then construed the portion of the will construed in the *Whittaker* case in connection with another clause, viz:

> "In case of the decease of my wife before that of Emma Chambers, I direct and require my executors to retain sixty shares of the said stock and to pay the interest

thereon to said Emma Chambers during her natural life.' ''

The Court held that distribution of the residuary estate should then be made, with the exception of the sixty shares of stock so directed to be held for the benefit of the niece. The Court said, at page 320:

> "We are of the opinion that the construction put upon this will by Chancellor Runyon was erroneous. We think it was not the testator's intent that the distribution of the whole of his residuary estate should be postponed until the death, both of his wife and her niece. Standing alone that would be the natural effect of the sixth paragraph of the will." (This is the paragraph considered in Mittaker *v.* Whittaker.
>
> "In our opinion, by the sixth paragraph of the will the testator's estate vested in his brothers and sisters at the time of the testator's death, subject to the life interest therein of his wife, and the interest of her niece; and upon the death of the wife such part of such estate as is not required to be retained for the benefit of the niece is distributable in equal parts to the respective personal representatives of the testator's brothers and sisters."

I do not understand the disapproval by the Court or Errors and Appeals of Chancellor Runyon's decision in the Whittaker case went to the extent of reversing him with respect to his construction of the 6th paragraph of the will, standing alone, but only to the extent that after the death of the wife the whole estate need not be held and that all but the sixty shares of stock retained for the benefit of the niece could be distributed. In fact, the Court said that standing alone the 6th paragraph of the Whittaker will would warrant the construction placed upon

it by the Chancellor, but also said that as the will, in a later paragraph, directed the retention of sixty shares of stock for the niece's benefit, that was, in effect, saying that the balance was to be distributed on the death of the wife. It would be much the same if in the instant case the wife predeceased the half sister, provision for which contingency has, however, been made by the testator.

With respect to all surplus income except that from the New York real estate, my conclusion is that it should be accumulated until the death of the widow, at which time it may be distributed amongst those entitled under the intestate laws. This I believe to have been the intention of the testator and that intention applies equally to the New York income. But Chapter 52, Session Laws of New York (1909) 358, (Consolidated Laws of New York, Vol. 4), apparently prohibits the accumulation of income on New York realty except for the sole benefit of minors in being when the accumulation is to commence and the accumulation must be determined at or before the expiration of such minority. This is conceded by all counsel. The directions for the accumulation of the New York income being void, such part of it as is not needed for the purposes of the trusts created by the will is distributable amongst those entitled to the next eventual estate. *United States Trust Company* v. *Soher,* 178 N. Y. 442; *Matter of Kohler,* 96 Misc. (N. Y.) 433. The "next eventuals" are named in the 15th paragraph of the will, and the clause comprises the three daughters, and the son, as trustee. *St. John* v. *Andrews Institute,* 191 N. Y. 254; *Matter of Kohler, supra.* Under the provisions of the will as here construed, however, all income, including that on the New York

realty, is first applicable to the purposes of the trusts created by the will for the benefit of the widow and half sister and before making any distribution of the surplus New York income, ample provision by way of reserve should be made for the contingent requirements for the life tenants above current annuities.

11.

Complainants contend that the annuties and expenses are first payable out of the income on the personalty and New Jersey realty and that resort to the New York income should be had only when the other income proves insufficient. My attention has been directed to no New Jersey cases dealing with this point, but counsel for complainants referred to *Decker* v. *Vreeland,* 220 N. Y. 326, in which case a New Jersey will affecting New York real estate was involved and which supports the complainant's contention. It seems to me that under the circumstances of this case and in view of the New York statute prohibiting the accumulation of income from the New York realty, the income from the personality and New Jersey realty should be first applied to the payment of annuities and expenses and the New York income should be next subject to these charges.

12.

In all cases where the will contains no directions as to commissions or expenses of administration, specific legacies and bequests are not charged with them but are paid in full and the commissions are taken from the residue or such assets as are not disposed of, *Fowler* v. *Colt,* 22 N. J. Eq. 44. If commissions are to be

taken from the residue or assets not disposed of, then all administration expenses should be thus paid and would be chargeable first, to the surplus New Jersey income and second, to the surplus New York income. They would be chargeable against the corpus only after the surplus income had been exhausted.

13.

Complainants contend that the gift to Maurice J. Swetland, Trustee, in paragraphs 16 and 17, can be sustained upon either of two theories, (a) upon the theory of incorporation by reference, and (b) upon the theory that the trust agreement is not testamentary in character and may therefore be referred to for the purpose of defining and making certain the persons to whom and the proportions in which the estate is to be distributed. Counsel for all of the defendants except the defendants Johnson agree with this proposition; but it is claimed on behalf of the Johnson defendants that the rule of incorporation by reference is not in force in New Jersey and that for this reason the gift cannot be sustained on that ground; and that the trust agreement referred to is testamentary in character and, as it is not executed in conformity with our statute of wills, it cannot be referred to for the purposes suggested by counsel for the complainants.

The English rule and the general rule in force in this country is that an extraneous document may be incorporated in a will by reference thereto whether or not the document is testamentary in character, provided (1) there is a testamentary reference in the will to the document; (2) that the document is described with sufficient

accuracy as to insure its identity; and (3) that the document is actually in existence at the date of the will. 28 R. C. L. 112, Sec. 64; 40 *Cyc.* (Wills) Paragraph 8; Note, 68 L. R. A. 353. *Allen* v. *Maddock,* 11 Moore, P. C. 427; 6 Equity Reports, 825, is the leading English case. One of the leading cases in this country is *Newton* v. *Seaman's Friend Society,* 130 Mass. 91; 39 Am. Reports, 433. It is contended on behalf of complainants and all defendants, except the defendants Johnson, that the English rule which "has been adopted" in most jurisdictions in this country is also in force in New Jersey, and in support of this proposition cite *McCurdy* v. *Neall,* 42 N. J. Eq. 333; *Smith* v. *Smith,* 54 N. J. Eq. 1, affirmed 55 N. J. Eq. 821; *Condit* v. *Reynolds,* 66 N. J. L. 242; *Magnus* v. *Magnus,* 80 N. J. Eq. 346; *Condit* v. *Dehart,* 62 N. J. L. 78; *Smith* v. *Runkle,* 97 Atl. 296; affirmed 98 Atl. 1085-86-87. On the other hand, counsel for the Johnson defendants insists that the doctrine of incorporation by reference is not in force in this state and cite in support of that contention, among other authorities, *Hartwell* v. *Martin,* 71 N. J. Eq. 157; *Murray* v. *Lewis,* 94 N. J. Eq. 681, and *Smith* v. *Smith, supra.*

But regardless of what the rule is in New Jersey with respect to the doctrine of incorporation by reference, and about which there seems to be some contrariety of view, I am of the opinion that this bequest is valid. By it the testator merely added additional property to a trust fund established by him years before the execution of his will under a valid, active trust and to which he had, from time to time during his lifetime, added securites. The trust to which this bequest is added is not theoretical, nebulous,

intangible or incapable of identification, but exists in fact, and the trustee-legatee is as distinct and definite an entity as would have been an individual or corporation legatee. In *Master of Fowles,* 222 N. Y. 222, two wills were involved, the will of the husband and the will of the wife. The case as considered on the basis of the wife's having survived the husband, although both lost their lives in the "Lusitania" disaster. It was held that under the husband's will the bequest was to the wife's executor. It was impossible to determine who were the beneficiaries of the bequest without consulting the wife's will. The gift was, nevertheless, sustained, notwithstanding the fact that New York does not recognize the doctrine of incorporation by reference. That case clearly held that a gift to an executor is a complete testamentary disposition. If this be true as to a gift to an executor, it must be equally true if the gift be to a trustee; and if the gift will pass to the beneficiaries under the will which the executor represents, it necessarily follows that the gift will pass to the beneficiaries under the trust agreement in the instant case.

If, during his lifetime, the testator had given certain moneys and securities to the X Bank, pursuant to an agreement providing that the subject of the gift should be held under certain trusts therein declared, and further providing that whatever property the testator should by will leave to the said bank should be added to said fund and held upon the said trusts, I apprehend that a bequest by that testator to that bank, without mention of the trust agreement, would be valid, and that the trust as applied to such bequest would be enforceable by the beneficiaries. It should be none the less so if the

testator had referred to the trust agreement in the will as indicative of the trusts under which the bequest was to be received and held; and if so, the bequest under consideration is also valid. *Smith* v. *Smith, supra,* held that "where the will fails to indicate what the purpose is, the Court will not disregard a statute to supply that which the will omits." A trust there declared by will was held void because of indefiniteness and this was in line with other decisions reaching the same result. Those decisions resulted from the inability of the Court to determine the identity of the ultimate beneficiaries of the trust with certainty; but we are confronted with no such difficulty here. The will itself points the way and removes the difficulty by referring to the document naming the ultimate beneficiaries of the bequest. Nor is it necessary for us to here determine who are the ultimate beneficiaries of the Maurice J. Swetland trust; it is sufficient that such a trust exists and that the beneficiaries thereof are capable of identification. The trust to which this bequest is added was not created by the will, and, therefore, legal rules applicable to testamentary trusts are not uniformly applicable here; but if it be necessary, in order to sustain this bequest to now determine the ultimate beneficiaries, authority is not wanting to warrant a reference to the trust agreement for that purpose. In *Condit* v. *Dehart, supra,* the testator devised his residuary estate to his son and by a codicil authorized his son to dispose by will of his (testator's) residuary estate. He then left his residuary estate to such person or persons as his son should designate and appoint by his will. The son died before the testator, but left a will in which, after reciting

the power of appointment, he designated his wife as the person to whom his father's residuary estate should go. After the death of the son the father executed a second codicil to his will, ratifying and confirming the former codicil and the disposition of his residuary estate by the son's will. It was held "the son having died in the lifetime of his father, the will of the former, although not transferring his father's residuary estate by appointment, is to be referred to for the purpose of ascertaining the person to whom that estate passes by the father's will. The latter instrument effectuates what the son attempted to do but could not do by his own will." If in that case the Court could refer to the son's will, in order to determine the beneficiary of the father's will, I see no reason why, in the case at bar, the trust agreement executed by the son cannot be referred to for the purpose of determining the persons who are to ultimately receive the bequest. In *Re: Piffard,* 111 N. Y. 410, was cited by the Court in support of the decision in *Condit* v. *Dehart.* The facts in that case are similar to the New Jersey case, the same result was reached, and in announcing its decision the Court said:

> "Her will, therefore, is referred to, not as transferring the property by appointment, but as definite and making certain the person to whom and the propositions in which the 1/5th should pass by the father's will in case of the death of the daughter in his lifetime; what she would have done by her will, but could not, that he did for her by his own will."

The same principle was involved in *Matter of Fowles, supra.* In the case at bar the trust agreement is not testamentary in character—it is not

even executed by the testator—it is declaratory merely, not dispositive. On the other hand, in the *Condit, Piffard* and *Fowles* cases, the documents there referred to were testamentary in *character* although not executed by the testator. They were dispositive, not declaratory. A *fortiori,* then, is the bequest now under consideration valid.

I will advise a decree in accordance with these conclusions.

Submitted August 4, 1926.

Decided October 16, 1926.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between	
MAURICE J. SWETLAND, *et al.*, *Complainants,*	*On Bill, &c.*
and	*Final Decree.*
HATTIE SWETLAND, *et al.*, *Defendants.*	56/689.

Complainants having filed their bill of complaint in the above-entitled cause and the infant defendants, Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane, having been duly served with supoena *ad respondendum* and this court having duly appointed Thomas Barber, Clerk of this court, as Guardian *ad litem* for said infant defendants, Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane; and notice to the absent defendants having been duly published and mailed pursuant to order of this court, and said absent defendants having been duly brought into court in accordance with law and the rules of this court, and this court having duly appointed Clare Peter Johnson, as Guardian *ad litem* of the infant defendant, Clare Peter Johnson, Jr., and having duly appointed Thomas Barber, Clerk of this court, as Guardian *ad litem* of the infant defendants, Velma I. Stevens, Frederic C. Stevens, Jr., Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland; and Messrs. McCarter & English, solicitors of this court, having appeared and filed an answer for the defendants, Hattie Swetland,

Clara A. Swetland, Velma I. Stevens, Ruth D. Kane, Grace E. Swetland and Maurice J. Swetland, individually and as Trustee, and Messrs. Pitney, Hardin & Skinner, solicitors of this court, having appeared and filed an answer for the defendants, Dorothy A. Johnson and Clare Peter Johnson as Guardian *ad litem* of Clare Peter Johnson, Jr., and Thomas Barber, Clerk of this court, having duly appeared and filed an answer as Guardian *ad litem* of the infant defendants, Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane, and said Thomas Barber, Clerk of this court, having also duly appeared and filed an answer as Guardian *ad litem* of the infant defendants, Velma I. Stevens, Frederic C. Stevens, Jr., Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland; and the infant defendant, Edith Patricia Johnson, having been born after the filing of said bill of complaint and while this cause was still pending and this court having duly appointed Clare Peter Johnson as Guardian *ad litem* of said infant, and it having been stipulated in open court by counsel for all parties in interest and ordered by the court by order duly entered that the answer filed on behalf of Clare Peter Johnson as Guardian *ad litem* of Clare Peter Johnson, Jr., be deemed to be the answer of said Clare Peter Johnson as Guardian *ad litem* of Edith Patricia Johnson, and all parties in interest being duly in court, and this cause coming on to be heard in the presence of Messrs. Borden D. Whiting, Ira C. Moore, Jr., and George W. Elkins, of counsel with the complainants, and Messrs. George W. C. McCarter and Arnold L. Davis, of counsel with the defendants, Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D.

Kane, Grace E. Swetland and Maurice J. Swetland, individually and as Trustee, and Messrs. Alfred F. Skinner and Clare Peter Johnson, of counsel with the defendants, Dorothy A. Johnson and Clare Peter Johnson as Guardian *ad litem* of Clare Peter Johnson, Jr., and as Guardian *ad litem* of Edith Patricia Johnson;

And it appearing that Horace M. Swetland, late of the Borough of Verona, Essex County, New Jersey, departed this life on June 15th, 1924, leaving a last will and testament which is as follows, the several paragraphs of which for convenience of references are herein given marginal numbers:

1. "I, Horace M. Swetland, of the Township of Verona, County of Essex, State of New Jersey, do hereby make, publish and declare this my last will and testament, in manner and form following:

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

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

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

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

6. 1. To deliver and pay over to my half sister, Hattie Swetland, if she shall survive me, the sum of Twelve Hundred Dollars ($1,200) each year, during her life, in semi-annual instalments of Six Hundred Dollars ($600) each, and I direct my Executors to make the first of such payments immediately after my decease.

7. It is my will, and I direct my Trustees in the exercise of their absolute discretion, to increase as they may consider necessary, the amount to be paid to said Hattie Swetland, if any misfortune should befall her whereby her necessities should require the payment of a larger sum.

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

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

10. Upon the decease of said Hattie Swetland, and in the event that a separate fund shall have been established for her

benefit as herein provided, I direct my Trustees to distribute the principal of said fund or the remainder thereof and all additions thereto, if any, in the same manner as hereinafter provided for the final distribution of my residuary estate.

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

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

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

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

15. It is my will, and I direct my Trustees to pay and discharge, during the life of my wife, all taxes, assessments, insurance charges and charges of every kind and na-

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

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

17. In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per stripes and not per capita, the share its parent would have taken

under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her and me surviving, the share such child of mine would have received under the provisions hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purpose therein provided.

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

19. It is my will, and I hereby expressly direct that my Executors and Trustees in their absolute and uncontrolled discretion, may retain for such period as they shall see fit, any investments of any nature or kind made by me in my lifetime, and that no liability shall attach to them by reason of any loss occasioned to my estate by reason of so doing. It is also my will, and I hereby direct that the Trustees of the trusts created by this will may accept from my said Executors and may retain for such period as they deem wise, any securities or property in which I may have invested my estate in my lifetime, even if such securities and investments are

not of a character in which fiduciaries are authorized to invest trust funds, and that no liability shall attach to such Trustees by reason of any loss occasioned by such acceptance or retention.

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

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

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

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

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

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

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

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

HORACE M. SWETLAND.

And it further appearing that at the time of the execution of said will and at the time of the death of the said Horace M. Swetland, there was in existence a certain Trust Agreement bearing date of July 14, 1917, referred to in said will, which Agreement is as follows:

"WHEREAS, heretofore and on the 25th day of September, 1916, Horace M. Swetland of Montclair, New Jersey, delivered to the undersigned Five Hundred (500) shares

United Publishers Corporation Preferred B Stock, and on April 10, 1917, Six Hundred (600) shares United Publishers Corporation, Preferred B Stock, to be held by the undersigned as trustee for the use and purposes expressed in the declaration of trust executed by the undersigned in connection therewith on the date aforesaid; and

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

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

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

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

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

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

4. That the founder of said trust, Horace M. Swetland, reserves at all times during his life time, the personal rights, power and privilege of terminating the aforesaid trust, and that upon his election so to do, the aforesaid shares of stock constituting the principal thereof shall be returned and reverted to him free and clear of any and all claims or demands whatsoever kind or nature, with the same force and effect as if the trust herein

provided for had never been created, any law to the contrary notwithstanding.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 14th day of July, 1917.

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

Witness: L. J. Montgomery.

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

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

Notary Public, New York County.

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

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

Witness:

And it further appearing that a part of said testator's estate consists of a lot of land on 47th street, in the City and State of New York, with a building thereon known as the Hotel Manhatten, and that in his lifetime, the testator executed a bond to the Union Dime Savings Bank dated February 5th, 1909, to secure the sum of $300,000, which at the time of his death, had been reduced by payment to the sum of $210,000, and was thereafter reduced to $200,000, and which bond was secured by a mortgage on said Hotel property;

And it further appearing that Clara A. Swetland, the widow of said Horace M. Swetland, survives him; that testator left an estate valued at upwards of $1,500,000 producing an income of over $50,000 a year; and that by his said will he devoted the entire principal of his estate to the payment of an annuity of $1,200 or such larger sum as the Trustees might consider necessary or advisable, to his half sister, Hattie Swetland, during her life time, and the payment to his widow during her life time of an annuity of $15,000 or such larger sum as the Trustees might consider necessary or advisable if any misfortune should befall her whereby it should become necessary to provide for her competent and comfortable support and maintenance; that prior to his death, he made substantial provisions for his children; and that the prinicpal object and purpose of the testator was to provide for the competent and comfortable support and maintenance of his widow; that the sum of $15,000 per year together with other provisions in the will for the benefit of said widow, is not sufficient to support her in the comfort and manner in which she has become accustomed to

live in view of her age and condition of health, the size of testator's estate and the provisions of said will; that shortly after testator's death and immediately after the reading of the will, she became nervous, wrought up and hysterical over her apprehension that the provisions of the will for her were inadequate; that prior to testator's death she had been an invalid for many years and as a result of his death and her concern over the provisions of the will in her favor, her physical and mental condition became a matter of grave concern; and it appearing that said widow was unfortunate and has suffered a misfortune within the meaning of said word as used in said will, and within the contemplation of the testator when he used that word; and it appearing that the Trustees in the exercise of the discretion given to them in and by said will increased the widow's allowance to $24,000 per annum; and it appearing that the widow's reasonable requirements of support and comfortable maintenance are at least equal to this increased allowance; and it appearing that the Trustees increased said allowance in good faith and in the honest exercise of the discretion vested in them by the testator;

And it further appearing that the decedent at the time of his death owned premises situated partly in the Borough of Verona and partly in the Town of Montclair, Essex County, New Jersey, upon which there were three buildings, viz., the main dwelling house in which the decedent and his family resided, a two-story garage and a smaller residence facing on Afterglow Way; and that there was never any division or separation and nothing indicating a division or separation of the smaller house from the remainder of said

premises; and that the whole of said premises, including the main dwelling house, the garage and the smaller house were considered as one property and referred to in said will as the dwelling house and grounds attached thereto situated in the Township of Verona, Town of Montclair, County of Essex, State of New Jersey;

And it further appearing that by said will, the use of said premises in the Township of Verona and the Town of Montclair, County of Essex and State of New Jersey, was given to testator's widow during the term of her life; and that except as otherwise provided in said will, the Trustees in the exercise of their absolute discretion were given power to sell the whole or any part of the real estate of which said testator died seized or possessed; and it appearing that the said widow is desirous that said premises in the Township of Verona and Town of Montclair be sold; and that a portion of the proceeds be invested in a smaller home for her;

And it further appearing that at the present time the income from the residuary estate of said Horace M. Swetland, is in excess of the amounts required for the comfortable support, care and maintenance of Hattie Swetland and Clara A. Swetland and for the maintenance, upkeep and repair of the dwelling house and grounds in the Town of Montclair; and it appearing that a substantial part of said income is derived from the real estate located in the City and State of New York; and that under the laws of the State of New York, a testamentary direction for the accumulation of income is void and such accumulated income should be distributed to those presumptively entitled to the next eventual estate;

And it further appearing that the said testator, by his bequest to Maurice J. Swetland, as trustee, in his said will contained, merely added and intended to add additional property to a trust fund establihsed by him years before the execution of his will under a valid, active trust, and to which he had, from time to time during his lifetime, added securities, said trust fund having been established under the declaration of trust hereinbefore set forth, dated July 14th, 1917; that the trust to which this additional bequest was added is not theoretical, nebulous, intangible or incapable of identification, but exists in fact, and that the trustee legatee is as distinct and definite an entity as would have been an individual or corporation legatee; that the trust exists and the beneficiaries thereof are capable of identification, and that the trust to which this bequest is added was not created by the will.

And the said complainants having applied to this court for the advice and direction of this court with respect to various provisions of said will and having prayed that said will may be construed and the true meaning and legal effect of various provisions and parts thereof determined, and the rights of the respective parties interested, declared by decree of this court;

And the pleadings and proof having been read and the arguments and briefs of the respective counsel having been heard, read and considered, and the court having duly considered said pleadings, proofs, agruments and briefs; and it appearing to the court that the complainants are entitled to relief;

It is, on this day of , 1926, 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 as follows:

1. The said Executors of the will of Horace M. Swetland, deceased, are not obliged to pay said bond executed to the Union Dime Savings Bank secured by a mortgage on said premises in New York City, but may carry the same or any part thereof, in their discretion. Any payments made on account of the principal of said bond and mortgage should be paid out of the corpus of the personal estate.

2. By the word "foregoing" in the paragraph of said will hereinabove marginally numbered 3, the testator meant and intended "following" and said word is hereby construed to mean "following."

3. By the provisions of the latter part of the paragraph of said will hereinabove marginally numbered 15, the testator meant and intended that the Trustees should properly maintain and protect the lands and premises, the use of which is given to testator's widow during her lifetime, and in so doing, they are by said will authorized and empowered to make such repairs and improvements thereon as they in the exercise of their absolute discretion may consider proper and necessary and to charge the costs thereof to the "Trust Account." By the words "Trust Account" as therein used, the testator meant and intended "the income received by the Trustees from the principal of the trust account" and said words are hereby construed to mean "the income received by them from the principal of the trust account."

4. By the words "herein provided" as used at the end of the paragraph of said will herein-

above marginally numbered 16, the testator meant and intended "therein provided" and said words are hereby construed to mean "therein provided."

5. By the words "with regard" as used in the paragraph of said will hereinabove marginally numbered 20, the testator meant and intended "without regard" and said words are hereby construed to mean "without regard."

6. By the provisions of the paragraph of said will hereinabove marginally numbered 13, the trustees are given absolute discretion and power to decide and determine if and when a misfortune befalls the testator's widow, Clara A. Swetland, and to determine the amount to be paid to her to provide for her competent and comfortable support and maintenance so long as that discretion is exercised honestly and in good faith. A "misfortune" has befallen said widow within the meaning of said word as used in the paragraph of said will hereinabove marginally numbered 13; that said widow's reasonable requirements of support and comfortable maintenance are at least equal to the sum of $24,000 per annum, and that the trustees increased her allowance to that amount in good faith and in the honest exercise of the discretion vested vested in them by the testator.

7. By the words "my dwelling house and the grounds attached thereto situated in the Township of Verona, Town of Montclair, County of Essex, State of New Jersey," as used in the paragraph of said will hereinabove marginally numbered 14, the testator meant and intended the entire premises owned by said testator partly in the Borough of Verona and partly in the Town of Montclair, Essex County, New Jersey, including the main dwelling house, in which testator resided, the garage and the smaller residence facing an Afterglow Way, and said words are accordingly so construed.

8. The Trustees of said will joining with the widow, Clara A. Swetland, may in their discretion, sell the premises partly in the Borough of Verona, and partly in the Town of Montclair, Essex County, New Jersey, referred to in the paragraph of said will hereinabove marginally numbered 14, and said Trustees in their discretion, may invest the proceeds of such sale or any part thereof in another home for the use of said widow during her lifetime at such place as she may select. In the event that said Verona and Montclair premises are sold, the widow, Clara A. Swetland, shall be entitled to the net income from the proceeds of such sale during the term of her life in addition to the annuity given her by said will, and in the event that said proceeds or any part thereof, are invested in another home for the use of said widow, said Trustees shall pay and discharge during the life of said widow, all taxes, assessments and insurance charges against the same, and shall hold the same upon the same trusts and terms as they now hold the said premises referred to in the paragraph of said will hereinabove marginally numbered 14 and 15.

9. As to all income not required for the comfortable support, care and maintenance of Hattie Swetland and of the widow, Clara A. Swetland, and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which was devised to Clara A. Swetland during her life, and for the expenses incident to said trusts including the charges and ex-

penses in connection with the New York real estate, and the expenses of administration, the said testator died intestate; and it was the intention of said testator that all of such surplus income should be accumulated until the death of the widow, at which time it should be distributed among those entitled under the intestate laws of this state.

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

11. The annuities and all taxes, assessments, insurance charges and other charges in connection with the real estate, the use of which was given to testator's widow during her life, and such repairs and improvements thereon as the Trustees may make, are payable first out of the income from the personal property of the estate and resort to the income from the New York real estate should be had only when other income proves insufficient.

12. All charges incident to holding, maintaining, operating and managing the New York real estate, including taxes, interest on mortgages, insurance, repairs, and all charges of every kind in connection with the same, are payable first out of the income from such New York real estate.

13. All administration expenses including commissions and counsel fees but excepting charges and expenses in connection with the New York real estate and the expenses and charges of the trustees in the administration thereof, are payable first, from any income from the personal property of the estate, not needed for the annuities and the taxes, assessments, insurance charges and other charges in connection with the real estate, the use of which was given to testator's widow during her life, and for such repairs and improvements thereon as the Trustees may make; provided, however, that before paying any of such administration expenses and fees from such surplus income, ample provision by way of reserve shall be made in an amount to be determined in the discretion of the Trustees for the contingent requirements of testator's widow, Clara A. Swetland, and testator's half sister, Hattie Swetland, above current annuities; and second, from the corpus of the personal estate.

Inheritance and Estate taxes should be paid from the corpus of the personal estate as directed by the will.

14. In the paragraphs of said will hereinabove marginally numbered 16 and 17, the testator referred to the Trust Agreement bearing date the 14th day of July, 1917, hereinabove set forth, and the bequests in said will to Maurice J. Swetland, as Trustee, are valid.

And It Is Further Ordered, Adjudged and Decreed, that a counsel fee of
Dollars be allowed and paid to Messrs. Whiting & Moore, and George W. Elkins; and that a

Final Decree.

counsel fee of
Dollars be allowed and paid to Messrs. McCarter & English, and Arnold L. Davis; and that a counsel fee of Dollars be allowed and paid to Messrs. Pitney, Hardin & Skinner; and that a counsel fee of
Dollars be allowed and paid to Clare Peter Johnson, Esquire; and that the costs of the complainants and of the defendants in this cause including such counsel fees and also the disbursements of the respective parties in connection with this suit, be and the same are hereby ordered to be paid by the complainants out of the estate of said Horace M. Swetland, deceased.

Respectfully advised,

Notice of Appeal.

NOTICE OF APPEAL.

Filed April 21, 1927.

IN CHANCERY OF NEW JERSEY.

Between MAURICE J. SWETLAND, and others, *Complainants,* *and* HATTIE SWETLAND, and others, *Defendants.*	*On Bill, Etc.* *Notice of Appeal.* *56—689*

To Messrs. Whiting & Moore, solicitors for complainants.

SIRS:

Please take notice that the defendants Dorothy A. Johnson and Clare Peter Johnson, Jr., an infant, by Clare Peter Johnson as Guardian *ad litem* and Edith Patricia Johnson, an infant by Clare Peter Johnson, as Guardian *ad litem* in the above-entitled cause, appeal to the Court of Errors and Appeals in the last resort in all causes in New Jersey from so much of the final decree made in this Court by the Chancellor on the advice of Vice-Chancellor Berry in the above-stated cause as declares that by the words "herein provided" as used at the end of the paragraph of said will therein above marginally numbered sixteen (16) the testator meant and intended "therein provided" and said words are thereby construed to mean "therein provided"; and that by the words "with regard" as used in the paragraph of said will therein above marginally numbered twenty (20) the testator meant and

Paragraph 4 of Decree

Paragraph 5

intended "without regard" and said words are thereby construed to mean "without regard";

Paragraph 6

Also from that part of the decree which adjudges that by the provisions of the paragraph of said will therein above marginally numbered thirteen (13), the trustees are given absolute discretion and power to decide and determine if and when a misfortune befalls the testator's widow, Clara A. Swetland, and to determine the amount to be paid to her to provide for her competent and comfortable support and maintenance so long as that discretion is exercised honestly and in good faith; and that a misfortune has befallen said widow within the meaning of said word as used in the paragraph of said will therein above marginally numbered thirteen (13); that said widow's reasonable requirements of support and comfortable maintenance are at least equal to the sum of $24,000 per annum, and that the trustees increase her allowance to that amount in good faith and in the honest exercise of the discretion vested in them by the testator;

Paragraph 9

Also from so much of said decree as adjudges that as to all income not required for the comfortable support, care and maintenance of Hattie Swetland and of the widow, Clara A. Swetland and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which was devised to Clara A. Swetland during her life, and for the expenses incident to said trusts including the charges and expenses in connection with the New York Real Estate and the expenses of administration, the said testator died intestate; and it was the intention of said testator that all of such surplus

income should be accumulated until the death of the widow, at which time it should be distributed among those entitled under the intestate laws of this State;

Paragraph 10

Also from that part of the decree which sets forth that those entitled to the next eventual estate include his son, Maurice J. Swetland as trustee;

Paragraph 11

Also from that part of the decree which adjudges that the annuities and all taxes, assessments, insurance charges and other charges in connection with the real estate, the use of which was given to testator's widow during her life, and such repairs and improvements thereon as the trustees may make, are payable first out of the income from the personal property of the estate, and resort to the income from the New York Real Estate should be had only when other income proves insufficient; and that all charges incident to holding, maintaining, operating and managing the New York Real Estate including taxes, interest on mortgages, insurance, repairs and all charges of every kind in connection with the same such as are properly chargeable to income are payable first out of the income from such New York Real Estate;

Paragraph 12

Paragraph 13

Also from that part of the decree which excepts from the administration expenses payable first from any income from the personal property of the estate, the charges and expenses in connection with the New York estate and the expenses and charges of the Trustees in the administration thereof;

Paragraph 14

Also from that part of the decree which determines that in the paragraphs of said will therein above marginally numbered sixteen (16) an infant, by Clare Peter Johnson as Guardien

and seventeen (17), the testator referred to the Trust Agreement bearing date the 14th day of July, 1917, therein above set forth, and that the bequests in said will to Maurice J. Swetland, as trustee, are valid.

The parts of the decree above cited from which an appeal is taken are all or part of paragraphs four, five, six, nine, ten, eleven, twelve, thirteen and fourteen of said decree.

Dated—April 11, 1927.

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with defendants, Dorothy A. Johnson and Clare Peter Johnson, Jr., an infant by Clare Peter Johnson, Guardian *ad litem* and Edith Patricia Johnson, an infant by Clare Peter Johnson, as Guardian *ad litem.*

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

ALFRED F. SKINNER,
Of Counsel with Defendants, Dorothy A. Johnson and Clare Peter Johnson, Jr., an infant by Clare Peter Johnson, Guardian *ad litem* and Edith Patricia Johnson, an infant by Clare Peter Johnson, as Guardian *ad litem.*

A true copy.

THOMAS BARBER,
Clerk.

Service of the within notice of appeal is hereby acknowledged this 14th day of April, 1927.

WHITING & MOORE,
Solicitors for Complainants.

McCARTER & ENGLISH,
Solicitors for defendants, Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane, Grace E. Swetland and Maurice J. Swetland, individually and as trustee.

Guardian *ad litem* of the infant defendants, Velma I. Stevens, Frederick C. Stevens, Jr., Henry M. Swetland, Florence A. Swetland and Carolyn G. Swetland, and Ruth Dorothy Kane, Elizabeth Adele Kane and John Swetland Kane.

PETITION OF APPEAL.
Filed July 18, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	
MAURICE J. SWETLAND, and others, *Complainants,*	*On Appeal from Chancery.*
and	
HATTIE SWETLAND, and others, *Defendants.*	*Petition of Appeal.*

The petition of Dorothy A. Johnson and Clare Peter Johnson, Jr., an infant by Clare Peter Johnson, as guardian *ad litem* and Edith Patricia Johnson, an infant by Clare Peter Johnson, as guardian *ad litem,* the appellants in the above-stated cause, respectfully shows:

That your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 14th day of December, 1926, in a certain cause wherein Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as executors of and trustees under the last will and testament of Horace M. Swetland, deceased were complainants, and Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane and Dorothy A. Johnson and Grace E. Swetland, Henry M. Swetland, Florence A. Swetland, Carolyn G. Swetland, Frederic C. Stevens, Jr., Velma I. Stevens, Ruth Dorothy Kane, Elizabeth Adele Kane, John Swetland Kane and Clare Peter

Johnson, Jr., Edith Patricia Johnson and Maurice J. Swetland, individually and as trustee were defendants, in the respects hereinafter set forth; and your petitioners humbly appeal therefrom for the following reasons, to wit:

1. The final decree, in paragraph four thereof, declares that by the words "herein provided" as used at the end of the paragraph of the will of Horace M. Swetland, deceased thereinabove marginally numbered sixteen (16), the testator meant and intended "'herein provided" and said words are thereby construed to mean "therein provided"; and your petitioners appeal therefrom on the ground that said interpretation of the said words is contrary to the commonly-accepted meaning of said words, contrary to the intent of the testator, Horace M. Swetland as expressed in this will under construction by the Court, and contrary to law.

2. The decree, in paragraph five thereof, adjudges that by the words "with regard" as used in the paragraph of said will thereinabove marginally numbered twenty (20), the testator meant and intended "without regard" and that said words are thereby construed to mean "without regard"; and your petitioners appeal therefrom on the ground that said interpretation of said words is contrary to the commonly accepted meaning of said words, contrary to the intent of the testator as expressed in said will and on the ground that the Court should have decreed that the discretion given by the testator to invest properties which might come to their hands was one to be exercised within the limits of investments authorized or permitted by law.

3. The decree, in paragraph six thereof, adjudges that by the provisions of the paragraph of said will thereinabove marginally numbered thirteen (13), the trustees are given absolute discretion and power to decide and determine if and when a misfortune befalls the testator's widow, Clara A. Swetland, and to determine the amount to be paid to her to provide for her competent and comfortable support and maintenance so long as that discretion is exercised honestly and good faith; and that a misfortune has befallen said widow within the meaning of said word as used in said paragraph of said will on the ground that said widow's reasonable requirements of support and comfortable maintenance are at least equal to the sum of $24,000 per annum, and that the trustees increased her allowance to that amount in good faith and in the honest exercise of the discretion vested in them by the testator;

And your petitioners humbly appeal therefrom on the ground that said decree is erroneous in that the absolute discretion given by the testator to his executors and trustees was not intended to be exercised in the ascertainment of what was reasonable provision for her competent and comfortable support and maintenance in correction of the testator's determination of that amount under ordinary circumstances of life; that the testator intended that the discretion should only be exercised in case a misfortune should befall his said wife; that the testator did not intend that the trustees should have an absolute discretion to determine whether a misfortune had befallen testator's wife which made the amount that testator had directed should be paid to his wife insufficient for her comfortable

support and maintenance; and on the further grounds that the evidence fails to show any such misfortune had befallen her and that the Court should have so decreed; and that the increase in the allowance for the competent and comfortable support and maintenance of said widow to the sum of $24,000 per annum was not made by the trustees in good faith and in the honest exercise of the discretion vested in said trustees by the testator; and that approval by the Court of past expenditures for the support of said widow was outside the scope of the bill of complaint and was not the proper subject of decision in this suit.

4. The decree in paragraph nine thereof adjudges that as to all income not required for the comfortable support, care and maintenance of Hattie Swetland and of the widow, Clara A. Swetland and for the maintenance, upkeep and repair of the dwelling house and grounds, the use of which was devised to Clara A. Swetland during her life, and for the expenses incident to said trusts including the charges and expenses in connection with the New York Real Estate and the expenses of administration, the said testator died intestate; and it was the intention of said testator that all of such surplus income should be accumulated until the death of the widow, at which time it should be distributed among those entitled under the intestate laws of this State. Said decree is erroneous in that it should not have so ordered but should have adjudged and decreed that all of such surplus income should be distributed at stated intervals in accordance with the laws governing intestacy to the daughters and son of the testator, to wit, Velma I. Stevens, Ruth D.

Kane, Dorothy A. Johnson and Maurice J. Swetland, except that the income from the New York Real Estate should be distributed in accordance with the laws of the State of New York governing accumulations and undisposed profits from real estate, to testator's three daughters, Velma I. Stevens, Ruth D. Kane and Dorothy A. Johnson.

5. The decree, in paragraph ten thereof, adjudges that those entitled to the next eventual estate include Maurice J. Swetland, as trustee, or his successor trustee, and that the said Maurice J. Swetland as trustee is entitled to share in the next eventual estate with the other persons named in the paragraph of said will thereinabove marginally numbered sixteen (16). And in paragraph fourteen (14) the decree adjudges that in the paragraphs of said will thereinabove marginally numbered sixteen (16) and seventeen (17) the testator referred to the Trust Agreement bearing date the 14th day of July, 1917, thereinabove set forth, and that the bequests in said will to Maurice J. Swetland as trustee are valid.

Said decree is erroneous in that the right of the said Maurice J. Swetland as trustee to share in the next eventual estate is dependent on the incorporation by reference of said Trust Agreement, which is not executed with the formalities required by the statute of wills and which cannot, therefore, be incorporated into the will by reference; and the inclusion of the said Maurice J. Swetland, as trustee as one of these persons entitled to the next eventual estate and in the distribution as attempted by the testator in the aforementioned paragraphs of said will is of no effect and contrary to law.

6. The decree, in paragraph eleven thereof, adjudges that the annuities and all taxes, assessments, insurance charges and other charges in connection with the real estate, the use of which was given to testator's widow during her life, and such repairs and improvements thereon as the testator may make, are payable first out of the income of the personal property of the estate, and resort to the income from the New York Real Estate should be had when other income proves insufficient. Said decree is erroneous in that it should have adjudged and decreed that the above-mentioned annuities and charges in connection with the real estate are properly chargeable first to the income from the personal property of the estate and if such income proves insufficient, to the corpus of the personal estate.

7. The decree, in paragraph twelve thereof, adjudges that all charges incident to holding, maintaining, operating and managing the New York Real Estate, including taxes, interest on mortgages, insurance, repairs and all charges of every kind in connection with the same such as are properly chargeable to income are payable first out of the income from such New York Real Estate. And in paragraph thirteen thereof, the decree excepts charges and expenses in connection with the New York Real Estate and the expenses and charges of the trustees in the administration thereof, from the charges payable first from any income from the personal property of the estate not needed for the annuities and taxes and certain other charges. Said decree is erroneous in that it should have adjudged and decreed that the income from such New York Real Estate accruing after the death

of the testator is not part of the personal estate and hence is not a primary fund for the payment of such charges and that the aforesaid charges in connection with holding and managing the New York Real Estate are properly payable first out of the income from the personal property of the estate and second from the corpus of the personal estate.

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

PITNEY, HARDIN & SKINNER,
Solicitors for Appellants.

ALFRED F. SKINNER,
Of Counsel with Appellants.

A true copy.

JOSEPH B. FITZPATRICK,
Clerk.

Service of a copy of the within petition of appeal is hereby acknowledged and consent to the filing thereof, as within time, is given this 14th day of July, 1927.

(Signed) WHITING & MOORE,
Solicitors for Complainants.

(Signed) McCARTER & ENGLISH,
Solicitors for the Defendants, Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane, Grace E. Swetland, Maurice J. Swetland, individually and as trustee.

(Signed) THOMAS BARBER,
Guardian *ad litem*, of the Infant Defendants, Ruth Dorothy Kane, Elizabeth Adele Kane, Velma I. Stevens, Frederic C. Stevens, Jr., Henry M. Swetland, Florence A. Swetland, Carolyn G. Swetland.

ANSWER TO PETITION OF APPEAL.

Filed September 17, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between	*On Appeal from Chancery.*
MAURICE J. SWETLAND, *et al.*, *Complainants,*	*Answer to Petition of Appeal of Dorothy A. A. Johnson, et al., Appellants.*
and	
HATTIE SWETLAND, *et al.*, *Defendants.*	

The answer of the respondents, Hattie Swetland, Clara A. Swetland, Velma I. Stevens, Ruth D. Kane, Grace E. Swetland, and Maurice J. Swetland, individually and as trustee under trust agreement dated July 14, 1917, to the petition of appeal of the appellants, Dorothy A. Johnson and Clare Peter Johnson, Jr., an infant, by Clare Peter Johnson, as guardian *ad litem,* and Edith Patricia Johnson, an infant, by Clare Peter Johnson, as guardian *ad litem.*

These respondents, not acknowledging any or all of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless say and admit, that a decree was, on the 14th day of December, 1926, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated, but as to the substance and form thereof, these respondents pray to refer

thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

McCARTER & ENGLISH,
Solicitors for Respondents.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

MAURICE J. SWETLAND, *et al.*, *Complainants,*

and

HATTIE SWETLAND, *et al.*, *Defendants.*

On Bill, &c.

On Petition of Appeal.

Answer.

The answer of the respondents, Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, as executors of and trustees under the last will and testament of Horace M. Swetland, deceased, to the petition of appeal of the appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the 14th day of December, 1926, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

WHITING & MOORE,
Solicitors for above-named Respondents.

78 OCT.T.1927

Filed after the Oral Argument by leave of Court.

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

New Jersey Court of Errors and Appeals

Between

MAURICE J. SWETLAND, *et al.*, *Complainants-Respondents,*

and

HATTIE SWETLAND, *et al.*, *Defendants-Respondents,*

and

DOROTHY A. JOHNSON, CLARE PETER JOHNSON, JR., an infant, by Clare Peter Johnson, as guardian *ad litem,* and EDITH PATRICIA JOHNSON, an infant, by Clare Peter Johnson, as guardian *ad litem,*

Defendants-Appellants.

(Italics, etc., except where otherwise noted, are ours.)

REPLY BRIEF OF APPELLANTS.

I.

Both in the original (pp. 48, 49, 50) and in the Supplemental Brief (p. 2) counsel for defendants-respondents, Hattie Swetland, *et al.*, argue that appellants are barred from raising, in this court, the matter of the proof of identity of the trust agreement referred to by testator in the will, and they point to the fact that the document was offered in evidence by appellants (p. 86) and they say that the matter is not raised in the petition of appeal.

They misapprehend, we submit, the purpose of the reference to the proof of the trust agreement of July 14, 1917, Exhibit C. 4.

There is no doubt but that, if suit were brought to establish rights, &c. under the document of July 14, 1917 (Exhibit C. 4), it might be held that, upon the proof submitted, the document might be admitted in evidence, but that is not the question here. We are here dealing with the devolution of a deceased's estate, and the law has prescribed certain formalities which must be attendant upon the execution of a will. The underlying purpose, of course, of the Statute of Wills is, like the Statute of Frauds, to prevent fraud, but, with respect to wills, the legislature has not been content merely to require *a* writing, as in the case of instruments *inter vivos* within the Statute of Frauds, but has required additional formalities, the view undoubtedly being, that, inasmuch as a testator will be deceased when the matter of his will comes in question, it is not sufficient merely to require that the instrument be in writing, signed &c., as is in the case with certain instruments *inter vivos* required to be in writing by the Statute of Frauds.

We point to the kind of proof, upon which the identity of the trust agreement of July 14, 1917 (Exhibit C. 4), depends, to indicate that it in nowise approaches the kind of proof which is required by the Statute of Wills, and to indicate that this is not a case in which the court can say that the instrument sought to be read into the will is such an instrument, executed with such formalities, &c., as that there is no opportunity for fraud.

We reiterate what we said with respect to the testimony on page 40 &c. of the original brief,

and that "no amount of words can avoid the effect that the ultimate disposition of this testator's property rests upon the oral testimony of Corey, Redfield and Montgomery, and, indeed, *really only upon the oral testimony of Montgomery* for he is the *only* one who says he saw the instrument drawn and signed by Maurice Swetland, * * * ," and we repeat that, if a testator's property can be disposed of according to the provisions of a document, proven as the agreement of July 14, 1917 (Exhibit C. 4), was proven in the case at bar, the Statute of Wills *is repealed and the door is opened to the widest fraud.*

On page 3 of the supplemental brief counsel, after quoting from page 13 of our original brief to the effect that "the trustee may have executed any number of documents of a similar kind. The door is opened wide for fraud," say "To indulge in such an assumption is to do such violence to the record as to be almost inconceivable. It overlooks the fact that however many of 'similar documents' the trustee may have executed, unknown to the testator, this particular document was the one which evidenced the trust founded by the testator and was the one to which he referred in the third paragraph of his will." How does this appear? The document is not authenticated in anywise by testator; there is nothing peculiar about it by which it can be identified, through something intrinsive in it, from any number of documents which may have been signed by Maurice J. Swetland *at any time and dated July 14, 1917*. For ought that appears from the document itself, it may have been signed many years after July 14, 1917, and after the death of testator. The statement by counsel that "this particular document was the one which

evidenced the trust founded by the testator, and was the one to which he referred in the third paragraph of his will'' must rest upon nothing more substantial than the oral testimony of Corey, Redfield and Montgomery, and in reality, *only upon the oral testimony of Montgomery,* as indicated on pages 13 and 14 of our original brief.

If this is *not* the trust agreement referred to in testator's will, it is impossible for appellants to prove that it is not, for the proof lies wholly within the control of those who have the assumed trust instrument and benefit under it. The very purpose of the Statute of Wills, in requiring that a will should be executed by the testator, in the presence of two witnesses, who shall thereupon, in the presence of the testator and of each other, subscribe their names, is to make the execution of a will of so formal a nature as that opportunity to foist upon a deceased a fraudulent will, is well nigh nil, and yet, notwithstanding these precautions, cases have arisen where fraudulent wills have been foisted upon deceased persons.

Under the Statute of Wills, a will must be signed by the testator. Forgery, of course, may be resorted to. The witnesses must sign at the time of the execution. It is *possible* that, having forged the testator's signature, two witnesses may fraudulently sign, but, if a testator's property may be devolved in accordance with the terms of an instrument such as that of July 14, 1917 (Exhibit C. 4) it is not necessary to resort to forgery to perpetrate fraud. The testator's signature does not appear upon the instrument. It is only necessary, if there be an instrument, as in the case at bar, identified by the testator, *only by the date July 14, 1917,* for the trustee, if

he be dissatisfied with the devolution of the testator's property as provided for by the instrument actually in existence, to tear up that instrument and sign another, giving it the same date.

The testator in his will identifies the trust agreement as one ''heretofore mentioned and created by me under date of July 14, 1917,'' but does not in terms say whether he signed the trust agreement or not. If there *had* been a trust agreement signed by the testator, and if the testator meant by the language ''created by me'' to imply ''signed by me,'' it would only be necessary for those in control to destroy *that* instrument and to create the trust agreement now offered in evidence as Exhibit C. 4.

The important thing is *not* whether any one of these acts *was* done, it is, could any one of these acts have been done? and, if any one of the acts could have been done, is there any way by which proof that it had been done, could be obtained? Under some circumstances such proof would be forthcoming, as if, someone in the conspiracy should tell about it, but that would be an unusual case. In the ordinary case fraud could be perpetrated without detection.

It is to prevent the *possibility* of a thing of this kind that the Statute of Wills requires the formalities it does require, those formalities being greater in degree than those required by the Statute of Frauds in the case of instruments *inter vivos.*

Counsel for Hattie Swetland, in their original brief (p. 22), in referring to the fact that, in the cases in which the courts have permitted devolution of property in accordance with the will of another &c., say:

> ''It so happens that in the three cases referred to the extrinsic document was a will

> or a codicil, but the reasoning of the court could apply as well to any other formal document such as a declaration of trust, especially when it is not of testamentary character, is definite in all its terms and can be identified from its earmarks in the will beyond all reasonable doubt. Upon this feature of the case we will have more to say hereinafter.''

The ''earmarks'' in the case at bar appear to be one—*a date.*

One may, we submit, as well say, that a testator should be permitted to dispose of his property by *any* formal document. It is hard to say that the proof of a will, or codicil, which must be by two witnesses to the signature of the testator, their signatures having been written on the will or codicil at the same time the testator wrote his, and in his presence, does not establish *that* document, with greater certainty than proof of ''*any* other formal document,'' which may be made by proving the signature of the person signing it, by any method by which proof of a signature is permitted.

Certainly the oral testimony in the case at bar of Montgomery to the execution of the document, not by the testator but by Maurice J. Swetland, does not prove *that* instrument so as to place it upon the footing of the will of another, or of a codicil, executed with all the formalities the Statute of Wills requires.

It would be wholly immaterial whether appellants offered the instrument (Exhibit C. 4) in evidence or not. When the instrument was offered by appellants, it was offered ''for the particular purpose, and for that only, which is to show, along with other evidence, the testator's habitual use of certain words which appear in

the will. This offer is not to be considered in any way as admitting this document—as putting this document in evidence, for the purpose of construing or completing the language of the will that makes reference to some trust agreement of the same date,'' *and there was no objection to this qualified offer.*

And the question was, and is, *not* whether the agreement of July 14, 1917 (Exhibit C. 4) should be received *in evidence.* It may have been a proper piece of evidence in the case. The question was and is whether it could be so incorporated in the will as that testator's property could devolve in accordance with its terms. For *that* purpose it was not received in evidence until the Vice-Chancellor filed his conclusions. At the time it was offered for *that* purpose (p. 71), it was objected to and that objection persisted throughout the entire record, and the petition of appeal raises the question as to the propriety of the Vice-Chancellor's holding that the trust agreement, bearing date July 14, 1917, could be considered as influencing the devolution of testator's property. (See paragraph 5 of petition of appeal, p. 166.)

In the original brief counsel for Hattie Swetland say (on page 34):

> ''Even the appellants concede that this agreement was in existence when the will was executed.''

No such concession was or is made. Appellants say that if it was not in existence at that time, it is impossible for appellants to prove that it was not in existence, and that to permit it to be proven in the manner in which it was proven is to repeal the Statute of Wills.

The question here involved is much more important as a matter of public policy than as a

factor in the devolution of *this* testator's estate because of the influence of its determination upon other cases, for, if an instrument of this kind may be referred to, then the language of Judge Pound, in *Reynolds* v. *Reynolds,* 121 N. E. 61, 224 N. Y. 429, is opposite:

> "The reasoning is plausible, but uncertainty of designation and uncertainty of proof of designation are not far apart. Moreover, if this principle is applied, we may incorporate into a written will, not a writing alone, but even oral statements based on the slippery memory of a single witness."

Counsel seem to attribute some importance to this document as a paper. They call it a "formal document." Whatever may be its form, its proof rests upon the oral testimony of Montgomery, Redfield and Corey, (the trustee Maurice J. Swetland was not called and remained without the jurisdiction at his home in California, p. 49 of counsels' original brief) and that proof can rise no higher than that which it is, *i. e.,* oral testimony.

II.

In their supplemental brief (pp. 10-11) counsel refer to the arguments of counsel for appellants on page 67, of our main brief, and on page 11 say:

> "Here there was no oral testimony of any act by the testator with respect to the identification of this trust agreement. It was limited to the identification of the document as the one mentioned in the will, viz., to the signature of the trustee, the witness thereto, the placing of it in testator's safe and its removal therefrom subsequent to his death."

Carried to its logical conclusion, this argument of counsel would mean that if, in the case

of *Murray* v. *Lewis,* 94 N. J. Eq. at page 684, reference in the will had been to a letter signed by the niece, Clara Seidensticker, as for instance, if the will had read: "A sealed letter or paper addressed *to* me will be found with this my will, expressing my wishes as to the said sum * * * ," and there had been found with the will, not a letter signed by the testatrix, addressed in her handwriting to the niece, Clara Seidensticker, but a letter addressed *to* the testatrix, signed by Clara Seidensticker, in which she, Clara said to the testatrix: "I have received your instructions as to how the legacy provided for in your will which you direct to be paid to your executors should be applied and I agree to receive said sum from said executors and distribute it in the following manner * * * ,"—such a letter could be included in the will by reference, because the oral proof would only go to the signature to the letter by Clara. The argument answers itself. To permit oral testimony with respect to an act of a third party under such circumstances, would be to increase the opportunity for fraud. True, there might be oral proof that the letter *was found* with the will, just as there was oral proof here that the trust agreement of July 14, 1917, *was* executed by Maurice J. Swetland *prior* to the execution of the will, but, notwithstanding the oral proof in the first case, the letter might have been prepared and slipped into the will after testator's death and, in the second case, Maurice J. Swetland may have executed this agreement of July 14, 1917 (Exhibit C. 4), at any time.

As stated in our brief at page 67 &c., while the oral proof *does* go to the signing of the trust agreement of July 14, 1917, by Maurice J. Swetland, trustee, the *effect* of the oral proof goes to the act of the testator, *i. e., the creation of the*

trust, as he has termed it in his will. It was the act of the testator in delivering the securities to Maurice J. Swetland, under the agreement of July 14, 1917, the receipt of that trust agreement by the testator (if he did receive it) which gave life and vitality to the paper. The paper, as such, notwithstanding the oral proof of the signature of Maurice J. Swetland, is nothing without the proof that the trust was established by the testator, and that depends upon oral proof of the delivery of the securities to Maurice J. Swetland, as trustee, or in other words, the oral proof *does* go to an act of the testator, *i. e.,* the creation of the trust.

III.

Running throughout the supplemental brief of counsel for Hattie Swetland, *et als.,* are statements to the effect that: testator had no power to modify any of the terms or change the beneficiaries under the agreement of July 14, 1917 (p. 4); the beneficiaries were absolutely fixed (p. 9); the founder of the trust was the testator—the declarant of its terms and the namer of the beneficiaries thereunder was another person, the trustee, and over it or him the testator at no time had any control. He could only revoke in its entirety, but did not (p. 11); the revocable provision of this agreement about which counsel for the appellants have so much to say, gave to the founder of the trust power to revoke the trust in its entirety, and no other power whatsoever (p. 14); in the case at bar the gift by testator, evidenced by his will, was to the trustee named in an instrument specified by exact date, and that gift is not made subject to any power of revocation or control by testator (p. 14); so far as the testamentary gift is concerned, it could

only be revoked by a subsequent codicil or will, neither of which was executed, and finally we must bear in mind that not only was this power of revocation reserved to the founder actually released prior to the execution of his will, but regardless of that it was never exercised (pp. 14-15).

To say that the power expressly reserved to testator by the instrument of July 14, 1917, was to terminate or revoke the trust rather than to change its terms is, we submit, to beg the question.

It is just as offensive to the Statute of Wills that a bequest should be revoked otherwise than in pursuance of its terms as that the terms of the bequest or the beneficiaries be changed.

Having the power to revoke under the instrument of July 14, 1917, testator had the lesser power to change. If he revoked the instrument of July 14, 1917, he would change the devolution of his estate and that in a manner not prescribed by the Statute of Wills. He might revoke the instrument of July 14, 1917, and, by so revoking, change the devolution of his estate, by a mere oral statement, a telegram or cablegram, or whatnot. Certainly, where the testator has the right to revoke, it can hardly be said that the rights of the beneficiaries are *absolutely* fixed "by a pre-existing document identified by the will" (p. 9).

It is immaterial whether the power of revocation "was never exercised" as suggested on page 15 of the supplemental brief. *Power* of testator to change the devolution of his estate in a manner otherwise than as prescribed by the Statute of Wills is offensive to the provisions of that Statute

of Wills whether he has exercised that power or not.

If other statements contained in the supplemental brief are to be taken as correct, the testator *had* exercised the power for (p. 4) they say:

> "That statement wholly disregards the fact that the power of revocation reserved to the founder of the trust under the agreement of July 14, 1917, was expressly cancelled by that founder under the provisions of the supplemental agreement of January 3rd, 1922, which was executed before the will was executed."

The cancellation of the power of revocation, if that power was cancelled, by what counsel call the "supplemental agreement of January 3, 1922," was itself a change in the agreement of July 14, 1917.

But, if the agreement of January 3, 1922, is to be considered as supplemental to the agreement of July 14, 1917, there was a further change by that agreement in the agreement of July 14, 1917, a radical change in the devolution of testator's property, for, as stated in the original brief (p. 11), by the trust declaration of July 14, 1917, upon the youngest child of the trustee becoming the age of thirty years the principal of the trust is to be divided equally between the trustee's "present" wife, and his children, the living issue of any deceased child or children to take, in equal parts, the share of the parent; in the event of the death of the trustee's wife, before his youngest child should reach the age of thirty years and of the death of all his children before reaching the age of thirty years without leaving issue them surviving, then the principal of the said trust is to revert "and become a part of the residuary estate of the aforesaid founder thereof, Horace M. Swetland," while by the

agreement of January 3, 1922, upon the youngest living child of the trustee attaining the age of thirty years, the principal of the trust is to be divided (1) that portion of the trust estate represented by 1,998 shares of the Publishers Securities Company common stock is to become the personal property of the trustee, Maurice J. Swetland, (2) the balance of the estate to be divided equally between the wife (any wife) of the trustee if then living and his children, the living issue of any deceased child taking the share of its parents; in the event of all the beneficiaries thereunder dying prior to the termination of the trust, then and in that event "the net principal of this Trust Estate shall revert to and be paid over to the Corporation known as the Publishers Securities Company of Montclair, New Jersey, * * * ."

And there are other differences.

If, therefore, the agreement of January 3, 1922, is to be considered as supplemental to the agreement of July 14, 1917, as indicated on p. 4 of the supplemental brief, there *was* a change in the devolution of such property, as might be under the trust, accomplished by the testator otherwise than as prescribed by the provisions of the Statute of Wills.

Counsel cannot treat the agreement of January 3, 1922, as cancelling the power of revocation contained in the agreement of July 14, 1917, without also treating it as changing the devolution of the property as provided by the agreement of July 14, 1917.

In reality the effect of the agreement of January 3, 1922, was not to supplement the agreement of July 14, 1917, but to supplant and revoke it.

The agreement of January 3, 1922, by its terms, is in no respect supplemental to the declaration of trust of July 14, 1917. It recites that the parties desire to "establish a *new* trust by *substituting this agreement for the one now in effect.*" It then proceeds, without reference to the terms of the agreement of July 14, 1917, to delineate a new trust and to set forth its terms and conditions.

The property which was delivered under the trust declaration of July 14, 1917, was taken out of that trust and re-delivered to the trustee under the terms of the agreement of January 3, 1922. Counsel direct attention to the fact that the statement on page 12 of our original brief "that 1,100 of the 1,998 shares of Publishers Securities Company stock mentioned in Exhibit C were included in Exhibit B" is incorrect. Counsel add, "one is common and the other Class B stock." It is a fact that the 1,998 shares of Publishers Securities Company stock referred to in the agreement of January 3, 1922, is common stock, and that the 1,100 U. P. Co. stock referred to in the agreement of July 14, 1917, is United Publishers preferred "B" stock, but it is likewise a fact that *this 1,100 shares* of United Publishers Company preferred "B" stock, which was the *only* property delivered under the agreement of July 14, 1917, was re-delivered under the agreement of January 3, 1922, and *it is a fact* that, after the making of the agreement of January 3, 1922, the instrument of July 14, 1917, controlled nothing. If, after that date, it was a trust, it was a trust without property. It was, as argued in the original brief (pp. 48, &c.), a dead piece of paper which was revived by testator by the terms of his will solely for the purpose of governing the devolution of his property after death (in other

words, even in the strict sense, the paper as reviewed was *solely* of a testamentary nature) and the result of permitting the devolution of the property of testator to be so governed is clearly to incorporate the instrument into the will.

Counsel say on page 9 of the supplemental brief that we "admit that the agreement of July 14, 1917, was still in effective existence." We do not. On the contrary, we say that, as evidence of a trust, the agreement of July 14, 1917, was without existence for there can be no trust without property subject to the trust and there was no property subject to this trust.

We agree with counsel that "whether or not the property listed therein had been increased or decreased by mutual agreement betwen trustor and trustee is of no moment whatever here" but we do *not* agree that it is of no moment that *all* of the property had been taken from under the trust agreement for this left nothing in existence which could be called a trust or trust entity. Even if it were true that the trustee named therein could function, it would make no difference, for the trust was not in fact a trust being without property.

But could the trustee function in view of the agreement of January 3, 1922?

It is not argued, in the supplemental brief or elsewhere, that the devolution of testator's property is to be governed by the provisions of the agreement of January 3, 1922. It could not be so argued, because the reference of testator is specifically to the agreement of July 14, 1917, and this could not have been, as argued in the original brief, an oversight, for the agreement of January 3, 1922, had been executed but nine days before the making of testator's will. Nor can

it be argued that testator had reference in his will to a trust *as such,* rather than to an agreement. There are two answers to any such argument: first, reference by testator is *not* to a trust, but to a trust agreement, specifically referred to by date; second, if the reference was intended to be to a trust as such, rather than to an agreement, the reference would have been to the 25th of September, 1916, for, by the agreement of July 14, 1917 it appears that the 1,100 shares of stock referred to in the agreement of July 14, 1917, was first trusteed under an agreement of September 25, 1916, which is not in evidence (p. 21 of the record).

Counsel seem, on page 3 of the supplemental brief, to indicate that there is no such difference in the final devolution of testator's property, between the agreement of July 14, 1917 and the agreement of January 3, 1922, as appears upon the face of the agreements, and they say that, in the event of the death of the son's children, who were the beneficiaries under the agreement of July 14, 1917, the principal and unexpended income would pass in equal shares to the testator's children either under the provisions of the agreement of July 14, 1917, or the agreement of January 3, 1922.

How this can be said when, under the agreement of July 14, 1917, in such an event, the property was to revert to and become part of the residuary estate of the founder, Horace M. Swetland, which placed it within the power of Horace M. Swetland to, at any time, change the devolution of that property by changing the provisions of his will, while, under the agreement of January 3, 1922, the property is to go, in such an event, to a corporation known as the Publishers Securities Company of Montclair, with the exception of the shares of stock of the Publishers Securities, forming a part of the trust estate, which should become the property of Maurice J. Swetland, if living, otherwise to go to the Publishers Securities Company, it is hard to say.

Reference to pages 66 and 67 of the Record, referred to by counsel on page 3 of the supplemental brief, will disclose that there is no proof whatever that there was any *equal* division of the company's stock among testator's children. Even if there had been such proof, under the provisions of the agreement of July 14, 1917, testator might have completely changed the devolution of the property, for it became a part of his residuary estate, while, under the agreement of January 3, 1922, part of the property, at least, goes to the trustee, Maurice J. Swetland.

IV.

In the supplemental brief, there is again expressed, in varying words, the idea that the trust is an entity. Counsel say (p. 7):

> "The trust agreement was executed nearly five years before the testator's death, and under its terms he deposited with the trustee a substantial fund with respect to the management or use of which he reserved to himself no control or interest whatsoever. Title to the property passed to the trustee immediately. The trustor did not even retain the voting power on the stock. He could revoke the whole trust but never did. No one is here claiming any interest in any part of that fund."

But as stated above, the trustor *had* taken the securities or "that fund" from under *that* trust and had placed them under the trust of January 3, 1922.

On page 11 counsel say:

> "The situation in the instant case is even stronger, for there can be no distinction between the executor of another and the trustee or custodian of a fund * * * ."

There is *this* distinction—that the executor of another is appointed by an instrument executed in strict conformity with the Statute of Wills, whereas, a trustee may be appointed by any kind of an informal document, or even by word of mouth, or, as in the case at bar, by a mere written declaration by the trustee that he is such trustee. There is the further distinction, as pointed out in the original brief, that all of the cases involving gifts to the executor of another, depend upon the law with respect to the exercise of powers of appointment. Judge Cardozo, whose legal learning was so highly praised by counsel for respondents on the oral argument, in referring to our own case of *Condit* v. *DeHart,* 62 N. J. L. p. 81, said:

> *"For the purpose of the rule against incorporation, the substance of the situation is thus the same as it always is when a will creates a power. The substance is that a power which would otherwise have lapsed has been kept alive by the declaration that its execution however premature, is ratified, and approved. But the execution of a power does not violate the rule against incorporation."*

See page 32 of our original brief.

The argument made by counsel that the bequest is valid upon the ground that it may be considered as to an entity, was met by the Circuit Court of Appeals, 1st Circuit, in *Atwood* v. *Rhode Island Hospital Trust Co.,* 275 Fed. 513

(p. 66 of our original brief) by the following language:

> "In our view this is a distinction without any legal difference. The real question is whether the residue of this estate was disposed of by Mr. Davis' will. Plainly it was not. *No additional sanctity attaches to this trust because as to the property vested in the same trustee by Mr. Davis during his lifetime it had duties enforceable either in a court of equity or to the performance of which it was bound by contract."*

Apparently, in the Rhode Island case, the trust referred to by the testator in his will was an active, existing trust, whereas, in the case at bar, neither at the time of the making of testator's will, nor at any other time thereafter, was there any property in trust under the agreement of July 14, 1917, which is the agreement referred to in the will.

No case has been cited in which it has been held that a bequest such as this is good, because to a trust entity. Whenever the argument has been made it has been repudiated.

In *Hathaway* v. *Smith,* 79 Conn. 506, 65 Atl. p. 1058, Supreme Court of Errors of Connecticut, the will provided that the property of testator "should be disposed of in accordance with my *deed of trust* to Frank F. Webb, Noah D. Webster and Charles N. Daniels of said Willimantic of even date herewith." The deed of trust was executed prior to the testator's will; it conveyed certain property to trustees; the trustees were given the power to hold, change, invest, re-invest &c., to furnish testator with support; to pay themselves a reasonable compensation; upon the death of the testator, to continue to hold certain of the property in trust, and to otherwise dispose of the remainder. The court treated the

case as one of incorporating a trust deed into the will by reference. It considered the English authorities, discarded them, and held that, under the American Law, there could be no such incorporation by reference.

Leaving out of consideration the technical reason why a gift to the executor of another has been sustained, *i. e.,* that it is in reality an exercise of a power of appointment, the result of permitting such a gift is at least to require that the instrument under the terms of which the property of the testator devolves shall be executed with the formalities prescribed by the Statute of Wills and, as the courts hold, there is no opportunity for fraud. But to extend this principle, to permit a gift to a trustee, who may be appointed by a testator by a most informal document, or even orally, or, as in the case at bar, by a document executed by the trustee, is to open wide the door to fraud and to permit the devolution of a testator's property to be determined by instruments not executed in anywise in accordance with the formalities of the Statute of Wills, or, as we have said, it is to repeal the Statute of Wills.

Technically, therefore, the doctrine of the cases permitting gifts to executors of another *cannot* be extended to include a gift to a trustee, and there is no substantial reason why the doctrine should be so extended, on the contrary, to extend it would violate the policy of the provisions of the Statute of Wills.

If there be a public trust established, such as referred to by the Chancellor, in *Smith* v. *Smith,* 54 N. J. Eq. 1, affirmed 55 N. J. Eq. 821:

> " * * * the plans upon which Princeton, Yale or Harvard universities are conducted, or to previously-pronounced religious or other doctrines * * * to recognized schemes for distribution of moneys in charity * * * "

another question might arise. In such cases the trust is a public trust, a "recognized scheme" (in the language of the Chancellor), not depending for its proof upon any oral testimony of an act of the testator. In such cases there is no opportunity for fraud. To say that a trust created, as the one at bar, was created, by the private, secret act of testator in handing securities to his son, and the private, secret act of the son, executing a trust declaration known to no one (except the witness and, incidentally, as the son might show it to someone, as is claimed in the case at bar) stands upon the same footing as a "recognized scheme for the distribution of monies in charity &c." is, we submit, to go entirely too far.

In the one case there is no opportunity for fraud—in the other there is every opportunity for fraud.

The settled rule in this State, as set forth by this court in *Smith* v. *Smith,* and *Condit* v. *Reynolds,* as set forth in our principal brief (pp. 18-23) is that a gift to a trustee without designation, in the will, of the terms of the trust and beneficiaries thereof, is not a complete testamentary disposition, that these provisions and beneficiaries cannot be shown by evidence *dehors* of the will, and that in case of such a provision the trustee takes the legal title and a trust resolves for the benefit of the heirs of the testator.

In *Smith* v. *Smith* (54 N. J. E., affirmed 55 N. J. E. 821) the Chancellor stated (p. 6):

> "The will itself does not disclose what the plans were to be, but refers to statements

made by him before its execution which were susceptible of ascertainment. * * * ''

''Then the next question which arises is, whether such a reference in a will is unlawful under our statute (Rev. p. 1237, Sec. 22), which requires the will to be in writing, signed by the testator and attested by two witnesses.''

* * * * * * * * *

''Whether the testator, by mere reference to his own language, used to others at previous times, concerning that which was not existing, but was to take life in his will, may, as against his heirs and next of kin, make that language operative in the testamentary disposition of his property.''

''In the case of Ollife *v.* Wells, 130 Mass. 221, a testatrix devised the residue of her estate to A. 'distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him,' and it could be proved that those wishes required distribution to recognized public charities. Chief Justice Gray, in writing the opinion of the court, after saying that, in any view of the authorities, it was quite clear that intentions not formed by the testatrix and communicated to A. after the making of the will could not have any effect against her next of kin, and that if the wishes of the testatrix expressed to A. were formed and expressed before the execution of the will, the result must be the same, added this language * * * . The will, upon its face, showing that the devisee takes the legal title only, and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased not disposed of by his will * * *. A trust not sufficiently declared *on the face of the will* cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs-at-law or next of kin. By the statutes of the commonwealth, no will shall be effectual to pass any estate, whether real or personal, nor to change it, or in any way affect the same, unless signed by the testator and attested by three witnesses.''

Also as this court said in *Condit* v. *Reynolds,* 66 N. J. L. 242:

> ''The persons to be benefited by the exercise of the power now under consideration were not at all defined by the will, but were to be ascertained by the subsequent directions of the testatrix. According to the doctrine established in this state by the decision in Smith *v.* Smith, 9 Dick. Ch. Rep. 1; on appeal, 10 *Id.* 821, she could not lawfully ascertain them unless she did so by a writing executed in conformity with the requirements of the statute of wills, and this she never did.''

It is for this reason, among others, that, whenever the argument has been made, in this country at least, it has been repudiated.

V.

Counsel for Hattie Swetland, in their original brief insist that the New York Court of Appeals, in *Reynolds* v. *Reynolds,* 224 N. Y. 429, 121 N. E. 61, did not repudiate the reasoning of Judge Gaynor in *Jay* v. *Jay,* 41 Misc. 13 (See page 44 of the original brief). They say that Judge Pound in the Court of Appeals, did not criticise Judge Gaynor's reasoning, but said he ''stated the reasons for his decision clearly.'' *After* making *this* statement, the Court of Appeals, through Judge Pound, in *Reynolds* v. *Reynolds,* said:

> ''The reasoning is *plausible but uncertainty of designation and uncertainty of proof of designation are not far apart. Moreover, if this principle is applied,* we may incorpo-

rate into a written will, not a writing alone, but even oral statements based on the slippery memory of a single witness.''

If this is not a repudiation of the *plausible* reasoning which Judge Gaynor in the Jay case stated so clearly, then we do not understand the effect of the English language.

VI.

In an attempt to support the argument that the English cases, permitting incorporation by reference, which rule in England Lord Eldon, who first announced it, has called a mistake, are entitled to weight here, counsel for Hattie Swetland state in their original brief that our Statute of Wills was taken from the English Statute, and that it was historically of English origin, as *seems* to be recognized by such well considered cases as *McElvaine,* 18 N. J. Eq. 499, and counsel for Maurice J. Swetland in their original brief, at page 20, subdivision ''D'', devote considerable space to this argument, and the inference is, from page 24 of the brief, that this State never had a Statute of Wills before the Statute of 1851.

The fact is, as explained by the Connecticut court in *Hatheway* v. *Smith,* 79 Conn. 509, 65 Atl. 1058, and by the Court of Appeals in New York, in *re Conway,* 124 N. Y. 455, 26 N. E., 1028; in *re O'Neil,* 91 N. Y. 512, that, in England, the statutes with respect to wills were originally but modifications of the statute of frauds. See *Hatheway* v. *Smith,* 65 Atl. at p. 1062. In this State, as in Connecticut, the construction of the Statute of Wills was never seriously intermingled with that of the Statute of Frauds and Perjuries.

The course of our legislation with respect to wills is like that of Connecticut. The Statute

of Wills was passed March 17, 1713, and is found in Allison's Laws of 1776, at page 27. It provides, by Section 1, for what would be considered a good execution of a will, executed in the past, and by Section 2, it provides for what would be a good execution of a will in the future, *i. e.,* that it should be made in writing, signed and published by the testator in the presence of three subscribing witnesses. The statute appears in Paterson's Laws, page 5.

Our first act for the prevention of frauds and perjuries was passed on November 26, 1794, and appears in Paterson's Laws, page 133.

And the Statute of Wills not only was first in point of time, but has always existed separate and distinct and in nowise intermingled with the Act for the Prevention of Frauds and Perjuries. See ''Act Concerning Wills, Rev. of 1821,'' page 223, which was an act passed November 16, 1795, which act also appears in Paterson's Laws, page 189: ''An Act Concerning Wills,'' passed April 15, 1846, Statutes of New Jersey 1847, page 363.

At that time, in 1847, the act concerning frauds and perjuries was still that of November 26, 1794, and appears in the Statutes of New Jersey 1847, at page 499. In Nixon's Digest ''An Act Concerning Wills, Rev. of 1846,'' appears on page 1022, and ''An Act to Prevent Frauds and Perjuries'' on page 355.

We do not intend to follow the two acts any further. It is a fact, however, that they have, down to the present time, been kept separate, apart and distinct.

The language of the Connecticut court in *Hatheway* v. *Smith,* 79 Conn. 506, 65 Atl. 1059 (at p. 1062), in referring to their statute, which

had substantially the same history as ours, is applicable to a construction of our statute. The court said:

> "The statute is exhaustive, in that it contains within itself the law which permits a disposition of property by will upon compliance with prescribed conditions. It is prohibitory, in that it forbids the disposition by devise or bequest of any property, real or personal, by any person who does not come within and strictly comply with these conditions. It therefore forbids the passing of any property by force of a writing, although or signed and attested in the manner prescribed for the execution of a will, which does not contain in itself any bequest of any property to any person, and uses no language which can denote any such bequest, notwithstanding it may refer to some unsigned, or unattested document which may contain language that would constitute a bequest if it had been used in the attested writing."

The court considered the English doctrine of incorporation by reference and repudiated it. It held that the right to make a will rested upon the statute; it rejected the idea that there was any natural right to make a will; it held that the statute *created* the right and that, inasmuch as the right was created by the statute, the provisions of the statute must be strictly complied with, and that is the law in this State. As Vice-Chancellor Stevens said in *Provident Institution for Savings of New Jersey* v. *Sisters of the Poor of St. Francis, et al.,* 87 N. J. Eq. 424, at p. 435, and the case was affirmed on his opinion in 88 N. J. Eq. p. 349:

> "At present the policy of our law is to enforce rigidly the statute which prescribes the form of a will of either lands or chattels and the ceremonies necessary for its valid execution."

It is immaterial to the present argument that the original Statutes of Wills made no provision for wills of personal property. Vice-Chancellor Stevens in *Provident Institution for Savings of N. J.* v. *Sisters of the Poor of St. Francis,* points to the curious fact that the law of 1795 expressly reserved the rights of all persons to make wills of personal property, as "heretofore," provided only that they should be in writing, and that it was not until 1850, (P. L. 1850, p. 280) that statutes were passed prescribing safeguards for wills of personal property, similar to those which had been provided by law for devises of land, for two centuries. The important fact is that statutes dealing with wills or testaments in this State have always been kept separate and distinct from statutes dealing generally with frauds and perjuries.

We have stated that the first statute with respect to wills was that of March 17, 1713-1714 (Allison's Laws, p. 27). Reference to *that* statute indicates that there was a previous statute in East Jersey, passed in the year 1682, which declared "that all wills in writing, attested by two creditable witnesses, shall be of the same force to convey lands as other conveyances."

It is very clear that the decisions in *Smith* v. *Smith,* 54 N. J. E. 1, 55 N. J. E. 821, and *Condit* v. *Reynolds,* 66 N. J. L. 254, was a repudiation of the construction put upon their Statute of Wills by the English courts, and the adoption of the reasoning of the New York and Connecticut courts.

For an exhaustive consideration of the subject we refer the court to the Connecticut case of *Hatheway* v. *Smith,* 65 Atl. 1058, at p. 1062 &c.

And see point VI of our original brief.

Counsel for Maurice J. Swetland (p. 9 of their brief), refer to a *criticism* of the rule against the incorporation by reference in *Phelps* v. *Robbins,* 40 Conn. 250, and to the fact that the question was left undetermined, and that in the later case of *Bryan's Appeal,* 77 Conn. 240, the Supreme Court of Errors again avoided deciding whether or not the doctrine of incorporation prevailed in that State.

Counsel overlooked the decision of the Supreme Court of Errors in *Hatheway* v. *Smith,* 79 Conn. 509, 65 Atl. 1058, although that case was referred to by Vice-Chancellor Fielder in *Murray* v. *Lewis,* 94 N. J. Eq. 681, which in turn is referred to by counsel at p. 19 of their brief. This later case not only definitely repudiates the doctrine of incorporation by reference for Connecticut, but also, referring to the earlier case of *Phelps* v. *Robbins,* 40 Conn. 250-271 said:

> "The reasons we have indicated for the adoption of this policy were suggested in Phelps *v.* Robbins, 40 Conn. 250, 271, and in that case the opinion now expressed as to the meaning of our statute of wills *was plainly indicated.*"

We conclude by referring to our Point V of the original brief and to what we there said, that the case at bar falls within the principle of *Smith* v. *Smith,* 54 N. J. Eq. 1, affirmed 55 N. J. Eq. 821; *Condit* v. *Reynolds,* 66 N. J. L. 242; *Reynolds* v. *Reynolds,* 224 N. Y. 429, 121 N. E. 61, (to which we add) *Hatheway* v. *Smith,* 79 Conn. 506, 65 Atl. 1058, and not within the principle of *Condit* v. *DeHart,* 62 N. J. L. 78; *Matter of Fowles,* 222 N. Y. 222, 118 N. E. 613; and in *re Piffard,* 111 N. Y. 410, 10 N. E. 719 (p. 40 of the original brief); also, by referring to Point VII, of our original brief (p. 43), under which we argue, that, as held by the United States

Circuit Court of Appeals, in *Atwood* v. *Rhode Island Hospital Trust Co.,* 275 Fed. 513, 521, and other cases cited, the reserved power of revocation otherwise than by a will or codicil executed in compliance with the Statute of Wills, would render the bequest void, *whether or not* the trust agreement could be incorporated into the will and would have rendered the bequest void even if the terms of the trust agreement now offered as part of the will, one of which was the unqualified reservation in testator of the power of revocation, had been set out in full in the will, for, as stated under a state of facts similar to those in this case, in the Atwood case:

> "A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil, and thus say, to quote the court, 'I give the residue of my estate to said Trust Company (trustee) to be disposed of to such persons and in such proportions as I may have instructed (or here instruct) or shall hereafter instruct said Trust Company' and such a provision, even if incorporated, would, unexplained by parol evidence, be manifestly met by indefiniteness."

We thus stand on two basic propositions:

1. No extrinsic document not executed in conformity with the provisions of the Statute of Wills can be incorporated into a will by reference or, q. v., referred to to ascertain the beneficiaries of a trust or their terms of the trust, and

2. Even if such a document could be incorporated into a will by reference, a power of revocation reserved to the testator therein, which, as in this case, prospectively creates for the testator the power to change the terms of the disposition therein set out without compliance with the Statute of Wills, so that by revoking the ex-

trinsic instrument—the trust agreement—he could or would thereby revoke the provision of the will, would, even if incorporated in the will, render the provision void.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Appellants.

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Of the New York Bar,
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New Jersey Court of Errors and Appeals

Between

MAURICE H. SWETLAND, *et al.*,
Complainants-Respondents,

v.

HATTIE SWETLAND, *et al.*,
Defendants-Respondents

and

DOROTHY A. JOHNSON, CLARE PETER JOHNSON, JR. an infant, by CLARE PETER JOHNSON as Guardian *ad litem,* and EDITH PATRICIA JOHNSON, an infant, by CLARE PETER JOHNSON, as Guardian *ad litem,*
Defendants-Appellants.

On Appeal from Chancery Decree Construing Will. Heard Below Before Berry, V.C. Appeal of Dorothy A. Johnson, Edith Patricia Johnson, Clare Peter Johnson, Jr.

BRIEF FOR APPELLANTS.

(*Italics Ours, Except Where Otherwise Noted.*)

Foreword.

A brief for appellants was prepared by foreign counsel, not experienced in our practice or traditions. It, unfortunately, was served. It injected matters not in the record for the purpose of indicating that the position of appellant, Dorothy A. Johnson, a daughter of testator, was not an unjust

one, and that, if the court should hold that the gift here questioned is invalid, no unequal distribution of the property of testator would result. The assumed justification was a claim that counsel for respondents had, in their briefs before the court below, likewise departed from the record for the purpose of showing the converse.

There were matters of construction before the court below other than those now brought here and in ascertaining testator's intention, the result of equal or unequal division might properly have some influence.

Whether the result of the invalidity of the bequest here questioned will be equality or inequality has conspicuously nothing to do with the matter. Suffice it to say that, so far as the testimony brought up by this appeal goes, prior to testator's death there was a substantial provision made by testator for each of his children (pp. 65, 66, 67), but there is no evidence that there were no provisions made by testator during his lifetime for his children other than those described in the testimony, and it is impossible to determine from the proofs whether, if the bequest be sustained, the result will be equality.

And this is precisely as it should be for we repeat whether equality will or will not result should have no effect upon the issue now before this court for the matter is one, not of construction of the will, but of construction of the statute concerning wills, and the validity of the bequest under the law.

> *Zabriskie* v. *Huyer,* 62 N. J. E. 697-702;
> *Blackwell* v. *Blackwell,* 15 N. J. L. 286;
> *Annin* v. *Vandoren,* 14 N. J. E. 135.

In re O'Neil, 91 N. Y. 516-520 in which latter case the Court of Appeals of New York stated the rule:

> "I have no doubt the testator did intend to execute in proper form the will; the question is whether he has done so.
>
> While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case the courts do not consider the intention of the testator, but that of the legislature. . . . We think, however, that the statute fixes an inflexible rule, by which to determine the proper execution of all testamentary instruments."

The brief, as served, is withdrawn. This necessitates a reprinting of the entire brief and may result in one which is not as connected as it should be, as counsel, who is now arguing the case, had no connection with it until October 19th.

The Facts.

Testator, Horace M. Swetland, died June 15th, 1924 (p. 1). He left a will which, after creating a small trust for his half sister, Hattie Swetland, placed the balance of his estate in trust for the benefit of his wife, during her life, and provided, Item 3:

> "3. Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein created, and upon the death of said Hattie Swetland, if she shall have survived me, to distribute the principal of the trust held for her benefit, by dividing the principal of said trust or trusts, as the case may be, equally among my daughters, Mrs. Velma I. Stevens, Mrs. Ruth D. Kane and Dorothy A. Johnson, and my son, Maurice J. Swetland, as Trus-

tee, or his successor Trustee. *The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein provided.*

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

Reference to the will (p. 14) will indicate that there was no trust agreement "*heretofore mentioned,*" and that there were no purposes "*herein provided.*"

Evidence was introduced to establish the identity of that which was referred to by testator by the language "under the trust agreement heretofore mentioned and created by me under date of July 14th, 1927 * * *." That evidence may be summarized: Corey, one of the witnesses to the will, testified that, although he had been intimately associated with testator for many years (p. 61) and was intimately acquainted with the testator's business affairs, he had never seen the paper now insisted upon as being the trust agreement referred to by the testator in his will until after testator's death (p. 80) in his, Corey's, office (p.

70) and that he then found in the safe of the testator, with other private papers and bonds and securities, a document dated July 14th, 1917 (Ex. B to the bill of complaint, p. 21), which is signed by Maurice J. Swetland, the son of testator and the trustee designated in the document, but not authenticated by the testator in any manner. (It is not clear from the testimony, pp. 70, 80, 82, whether Corey actually saw the declaration of July 14, 1917 in testator's safe or only at his office when some one showed it to him. He *did* find the agreement of January 3rd, 1922, in testator's safe, so he says, p. 82.) He says that, at the same time, he found among the papers in testator's safe, with other securities (p. 82), another trust agreement dated January 3rd, 1922 (Ex. C. attached to the bill of complaint, p. 25), which agreement is signed by testator and by Maurice J. Swetland, his son. This agreement of January 3rd, 1922, bears date nine days previous to the date of the will, January 12th, 1922, but is not referred to by testator in any portion of the will.

Corey has no knowledge of the trust agreements except as above indicated.

Montgomery was secretary and assistant to testator from 1911 until 1923. He is one of the witnesses to the will (p. 64). He says: testator had a previous will which he took out on many occasions; he excepted from that will, dictated, interlined, marked out, dictated, wrote himself from that will; portions of it were re-written fifty times; finally Montgomery incorporated the drafts and redrafts and excerpts in a complete connected story of his will (p. 65).

Montgomery was the witness to the trust agreement of July 14th, 1917 (p. 23), and says that he saw Maurice J. Swetland, the son, sign the document. He says: it was executed in the office of testator; it was kept in the possesion of testator

in his private safe "to the best of my recollection"; Montgomery had access to that safe; he *believes* he typewrote the agreement of July 14th, 1917 (p. 78); *so far as he knows* the trust agreement was always in the possession of testator and in his safe as long as he, Montgomery, was employed by testator; *he does not remember whether there was more than one copy* (pp. 78, 79); he remembers seeing Maurice J. Swetland sign the instrument, but does not recall whether or not any other person was present; he does not know whether Mr. Swetland took the trust agreement, but he knows that it actually remained with testator (p. 79).

Recalled, Montgomery's memory seems to have become more definite for (p. 84), he remembers, distinctly, that he typewrote the agreement and saw it signed; the original was taken by testator and placed in his private safe; *the duplicate of that original* was handed to Maurice J. Swetland, the trustee; *there were two copies made;* the duplicate was signed (pp. 85, 86). But he had previously testified (pp. 78, 79), that he could not swear that there was more than one copy of the agreement, that he did not remember.

He had previously testified (p. 69) that the instrument was kept in the private safe of testator, to the best of his recollection, to which safe Montgomery had access, but he says on p. 78, that he did not have access to that portion of the safe in which the document was kept, and that it remained all of the time in the possession of testator "as far as I know."

Redfield (p. 92) says that: his acquaintance with testator dated from 1914 when they were neighbors; business relations began in 1919; he (Redfield) was an officer and director of the company in which testator was president; his relations with testator were quite intimate; his office adjoined the place of business of testator; he knew the son

of testator, Maurice J. Swetland; he first saw the trust document, of July 14th, 1917 (Ex. C. 4), sometime in 1918, when Maurice J. Swetland was going to war, at which time he gave it to Redfield "as my memory serves me, it was his copy, a duplicate original;" at the same time Maurice J. Swetland handed him 1,100 shares of U. P. C. preferred B. stock; he identifies this stock in the following curious manner (p. 92)—

> "Q. At that time did he hand you anything else? A. He handed me 1,100 shares of U. P. C. preferred B. stock.
>
> Q. Is that the stock referred to in the agreement? A. *Let me see if it refers to stock here*—yes, two certificates, one for 500 and one for 600 shares."

He saw the trust agreement of January 3rd, 1922 (p. 93), either a day or two after it was executed. He says: Maurice J. Swetland, came into his office with the agreement and said that it took the place of the old agreement and that the stock which he then had already delivered to Redfield, with some more stock, was to be kept by Redfield for him; Maurice J. Swetland handed him 1,998 shares of stock of the Publishers Securities Company; he took the stock and put it in an envelope which he produced (p. 95); Maurice J. Swetland had previously, in August, 1922, delivered to him 700 shares of Swetland Realty Company stock, which was kept in the envelope, and, on the 18th day of July, 1918, Redfield had received from testator 250 shares of stock which he likewise kept in the envelope (p. 94); he delivered the two agreements and the stock to Maurice J. Swetland *about June, 1925,* which was a year after the death of testator, he having died on June 15th, 1924.

Montgomery testified (p. 86) that, to the best of his knowledge and belief, he wrote the trust agreement of January 3rd, 1922.

Montgomery was employed by testator until October, 1923 (p. 64), or rather by the Class Journal Company, of which testator was president (p. 76). He says: he was not discharged in October, 1923, but that he left and subsequently he asked testator's assistance in getting employment; a year after testator's death, *November, 1925,* he became employed by the United Publishers Corporation through the witness Redfield, who is the secretary of the Company, and the manner in which he became employed is explained by him (p. 76):

> "I did not seek the employment; but Mr. Redfield, who is a great friend of mine, *called me on the telephone and we had a little conversation, and the result of it was that I was offered the position.*"

Redfield is the close friend of Maurice J. Swetland, whom Maurice J. Swetland, according to the testimony, trusted with the stock and the agreements from 1918 until June, 1925 (pp. 92, 95), one year after testator's death and but three months before this suit was started. The trust agreement of 1922 (Ex. C, p. 25) indicates that Maurice J. Swetland as trustee, is a stockholder of the company in which Redfield is an officer.

Testator died June 15th, 1924. The bill was filed September 2, 1925. As indicated by the bill, differences had arisen with respect to the construction of several items of the will. In November, 1925 (two months after the filing of the bill), Redfield, a friend of Maurice J. Swetland, seeks Montgomery, the other witness produced to identify the trust agreement, who is a great friend of his, and as the result "*of a little conversation*" Montgomery becomes employed by the company.

Such testimony as was obtained from these witnesses identifying the instruments was largely gotten out by leading questions, as indicated by the examination of Redfield (p. 92):

"Q. I hand you Exhibit C-4, being a trust agreement, dated July 14, 1917, and ask you if you ever saw that before? A. Yes.

Q. Did he (Maurice J. Swetland) give it to you? A. He gave it to me.

Q. That was a duplicate original? A. As my memory serves me, it was his copy, a duplicate original.

Q. Did he deliver those certificates of stock and this agreement to you for safe keeping? A. Yes.

Q. Prior to this date and after its delivery to Jack by his father had Jack delivered to you the 700 shares of Swetland Realty Company stock? A. Yes.

Q. Referred to on this envelope? A. Yes.

(*It might be noticed here, also, that there is no evidence of "its delivery to Jack by his father," which assumption is included in the question.*)

Q. Handed it to you for safe keeping? A. Yes.

Q. And you placed it with the other stock with Exhibit C-4? A. Yes, with that original —with the trust agreement.

Q. And requested you to place it with the stock under the trust agreement of 1917? A. That is right.

Q. The note had been received by him from his father, did he say?

Q. And he handed it to you for safe keeping? A. Yes.

Q. And you placed that with the trust agreement of July 14, 1917? A. Yes."

It is difficult to determine, from the testimony, which one of the two copies of the agreement of July 14th, 1917 (Montgomery upon being recalled being certain that there were two copies, duplicates (p. 85) although when first called he was uncertain as to whether there was more than one copy (p. 78)) was produced to the court as Exhibit C 4, whether the duplicate or the original. Corey would seem to indicate that it was the original

(p. 71), but Redfield seems to indicate that it is the duplicate, for he says that he had charge of the papers, (the duplicates, if there were any) from 1918 until June 1925, and then delivered them to Maurice J. Swetland (p. 95). And the same thing is true with respect to the agreement of January 3rd, 1922, (Ex. C. 8).

For the purposes of the cause it is immaterial whether the exhibits offered to the court are originals or duplicates. **If they are originals, then where are the duplicates? If they are duplicates, then were are the originals?**

The purpose of the Redfield testimony, we suppose, was to show delivery to Maurice J. Swetland. The purpose of the Corey and Montgomery testimony was to show continuous knowledge on the part of testator of the trust instruments *but* delivery would be shown much better if the papers delivered were produced, and continuous knowledge on the part of testator would be better shown if the papers kept by testator were produced. If all four papers were in existence there would be no difficulty of producing them. The originals are supposed to be traced by Corey to the safe of testator after his death. The duplicates are traced by Redfield to the hands of Maurice J. Swetland after testator's death and no explanation is given as to why all are not produced.

This is the kind of evidence upon which the court below was asked to hold that Exhibit B, the instrument of July 14th, 1917, was that referred to by testator in the third item of his will.

Examining the instrument we find that, while it is witnessed by Montgomery (p. 23), there is a form of acknowledgment endorsed upon it, which is not filled out (p. 24) and an appointment by Maurice J. Swetland of a successor trustee signed by him but not witnessed.

Apparently there was a previous trust instrument, dated the 25th day of September, 1916. See recital in the trust declaration of July 14th, 1917 (p. 21).

We are not informed as to the contents of that agreement. There is no assurance that it was similar to Exhibit B, the agreement of July 14th, 1917. On the contrary, the inference is otherwise, —else there would be no necessity of the declaration of trust of July 14th, 1917, which dealt not only with the new securities delivered to the trustee but with the old securities as well (p. 22).

Comparing the trust declaration of July 14th, 1917 (Ex. B) with the agreement of trust signed by the testator and by the trustee of January 3rd, 1922, (Ex. C) we find that they differ with respect to the ultimate disposition of the property. It is unnecessary, for the purposes of the argument, to point out all the differences. One is sufficient.

By the trust declaration of July 14th, 1917, (Ex. B) upon the youngest child of the trustee becoming the age of thirty years the principal of the trust is to be divided equally between the trustee's *present* wife, and his children, the living issue of any deceased child or children to take, in equal parts, the share of the parent; in the event of the death of the trustee's wife, before his youngest child should reach the age of thirty years and of the death of all his children before reaching the age of thirty years without leaving issue them surviving, then the principal of the said trust is to revert *"and become a part of the residuary estate of the aforesaid founder thereof, Horace M. Swetland."*

By the agreement of January 3rd, 1922 (Ex. C, p. 25, at p. 28), upon the youngest living child of the trustee attaining the age of thirty years, the principal of the trust is to be divided (1) that portion of the trust estate represented by 1,998

shares of the Publishers Securities Company common stock is to become the personal property of the trustee, Maurice J. Swetland; (2) the balance of the estate is to be divided equally between *the wife* (any wife) of the trustee if then living and his children, the living issue of any deceased child taking the share of its parents. In the event of all the beneficiaries thereunder dying prior to the termination of the trust, then and in that event "the net principal of this Trust Estate shall revert to and be paid over to the Corporation known as the Publishers Securities Company of Montclair, New Jersey, * * *"

Of the 1,998 shares of the Publishers Securities Company common stock, which, under the agreement of January 3rd, 1922 (Ex. C), is to become the property of the trustee, Maurice J. Swetland, upon his youngest child becoming of age, 1,100 shares are the same 1,100 shares which are referred to in the trust declaration of July 14th, 1917 (Ex. B, p. 21).

There are other differences not necessary to refer to for what has been said indicates that, under the agreement of January 3rd, 1922 (Ex. C) the ultimate disposition of some of the identical property referred to in the agreement of July 14th, 1917 (Ex. B) is different.

The question here arises upon the decree below as to whether the ultimate disposition of the property, referred to in the third item of testator's will (p. 17), is to be as provided by the declaration of trust of July 14th, 1917 (Ex. B), which, prior to the date of the will, had been superseded by the agreement of January 3rd, 1922 (Ex. C, p. 25), which instrument, although executed nine days before the making of the will, is in no wise referred to in the will, or, whether the ultimate disposition is to be as set forth in the agreement of January 3rd, 1922 (Ex. C), although that instrument is not referred to in the will.

The type of testimony relied upon to establish the identity of the agreement referred to in the third paragraph of the will of testator indicates the necessity of strict adherence to the rule which prevails in this State that there may be no incorporation in a will of a document dehors the will by reference.

We are not overlooking the cases which hold that a testator may leave his property to the executor of a third person. The distinguishing features of those cases will be hereafter pointed out. Here we have no document which bears intrinsic evidence that it is that referred to by testator. It does not bear the signature of testator. It is in no wise authenticated by him. True, it bears the signature of the trustee but the trustee may have executed any number of documents of a similar kind. The door is opened wide for fraud. We have no instrument here such as a will of a third party, *itself duly executed in accordance with the provisions of the statute of wills*, as was present in every case upholding the right of one to bequeath his property to the executor of another. The identity of this instrument depends upon the *oral* testimony of Corey, Montgomery and Redfield. One must look for the identity of the document to *oral* testimony. The document itself, as a piece of evidence, is not in the picture and there is incorporated in the will of testator, or at least his property devolves in accordance with the provisions of, a document in no wise authenticated except by oral testimony, and in this case oral testimony of the type hereinabove referred to.

No amount of words can avoid the effect that the ultimate disposition of this testator's property rests upon the oral testimony of Corey, Redfield and Montgomery, and, indeed, *really only upon the oral testimony of Montgomery* for he is the only one who says he saw the instrument

drawn and signed by Maurice Swetland, and, in considering his testimony, it must not be overlooked that, early, he testified that he did not remember whether there was more than one copy, and, subsequently, upon being recalled, said that he remembered that there were two copies, a duplicate and an original, and he is the person who left testator's employ in October of 1923, and then in November, 1925, a year after testator's death, less than two months after the suit was started but before it was tried, became employed through Redfield, an officer of the company, of which testator had been president and in which Maurice J. Swetland had stock, after a telephone message from Redfield, and "we had a little conversation, and the result of it was that I was offered the position."

If upon such testimony as here adduced, a testator's property can be disposed of according to the provisions of another document, the door is opened to the widest fraud for it is almost impossible, under the circumstances, for anyone interested to prove a negative.

It is not necessary for us here to assert that the declaration of trust of the 14th of July, 1917, Ex. B., is not that referred to in testator's will. It is sufficient for us to indicate that if its identity can be rested upon the kind of testimony which was adduced, then if it were not the instrument it would be impossible to prove that it were not.

The trust declaration of July 14th, 1917, provides (paragraph 4, p. 23):

> "4. That the founder of said trust, Horace M. Swetland *reserves at all times during his life time, the personal rights, power and privilege of terminating the aforesaid trust,* and that upon his election so to do, the aforesaid shares of stock constituting the principal thereof shall be returned and revert to him free and clear of any and all claims or demands whatsoever kind or nature, with the

> same force and effect as if the trust herein provided for had never been created, any law to the contrary notwithstanding."

The declaration of trust of January 23rd, 1922, provides:

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

The testator cannot be assumed to have overlooked, when he signed his will, nine days after the execution of this trust agreement of January 3rd, 1922, that he had executed such an agreement, and it must be assumed that, when he referred to the agreement of *July 14th, 1917,* he meant the agreement executed as of that date, which respondents say is Ex. B, p. 21. If he did, and the decree below so adjudges, then, at any time after the execution of the will down to the date of testator's death, he might have, by an instrument not executed in accordance with the provisions of the statute of wills, either revoked the gift or changed its ultimate disposition.

The Decision Below.

The Vice-Chancellor found that the trust instrument referred to by testator in the third item of his will was the declaration of *July 14, 1917,* and that the gift might be sustained regardless of the rule in New Jersey with respect to the doctrine of incorporation by reference upon the theory that it was merely an addition of property "to a trust established by him years before the execution of his will under a valid active trust and to which he had from time to time during his lifetime added

securities,'' and he relies for his authority upon the case of *Matter of Fowles,* 222 N. Y. 222, 118 N. E. 611, and that line of cases holding that a testator may provide for a devolution of his property as directed by the will of another.

The decree adjudges (p. 155)—''14. In the paragraphs of said will hereinabove marginally numbered 16 and 17, the testator referred to the Trust Agreement bearing date the 14th day of July, 1917, hereinabove set forth, and the bequests in said will to Maurice J. Swetland, as Trustee, are valid.''

The court below also read the words in item 3 ''The bequest to Maurice J. Swetland, Trustee, is made under the Trust agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes *herein* provided'' as—''the bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes *therein* provided.''

In passing, we observe that there was no trust agreement of July 14th, 1917, *created* by testator. The trust agreement of July 14th, 1917, was created by the trustee Maurice J. Swetland.

The Vice-Chancellor also held that the words, in the provision of the will giving power to the executors of investing and re-investing, *''With* regard to the question whether such investments or re-investments so made by them are of a character permitted by law to fiduciaries'' should be read *''without* regard'' (pp. 19, 115, paragraph 5 of final decree, p. 152).

From these portions of the decree this appeal is taken by Dorothy A. Johnson, one of the daughters of testator, and by her children (Notice of appeal 157, petition of appeal 162).

While the petition of appeal brings up other questions, the argument will be confined to the two hereinbefore mentioned.

ARGUMENT.

I.

It is unquestioned that, if resort cannot be had to determine the devolution of testator's property, under the third item of his will, to the trust agreement, the gift to Maurice J. Swetland, trustee, is void.

40 Cyc. 1952.
Canfield v. *Canfield,* 62 N. J. E. 578;
Burnett v. *Burnett,* 30 N. J. E. 595;
Garthwarte v. *Lewis,* 25 N. J. E. 351;
Nason v. *Tuckerton M. E. Church,* 27 N. J. E. 47;
Magnus v. *Magnus,* 89 N. J. E. 346;
Hartwell v. *Martin,* 71 N. J. E. 157;
Condit v. *Reynolds,* 66 N. J. L. 242;
Smith v. *Smith,* 54 N. J. E. 1, 55 N. J. E. 821;
Vreeland v. *Van Ryper,* 17 N. J. E. 133;
Booth v. *Baptist Church,* 126 N. Y. 215; 28 N. E. 238.

II.

The rule in this State is that an extrinsic document, not signed by the testator and attested by two witnesses as required by the statute of wills cannot be incorporated into a will by reference or consulted to ascertain the beneficiaries of a testamentary trust or their shares, or show any of the other terms of a testamentary disposition of property. And the rule is based upon reason.

To determine this case, it seems to us that it is not necessary to go further than the decisions of the courts in this State.

This court in *Smith* v. *Smith* (54 N. J. E. 1, 55 N. J. E. 821) affirmed the decision of the Court of Chancery upon the opinion written by the Chancellor (McGill). In that case there was a gift to a trustee, a board of trustees, and restrictions upon the action of the board were provided for, and testator then added:

> "The property and estate herein bequeathed is to be held in trust by the said board of trustees for the following object, namely: I desire that my entire estate with the accumulations shall be used in establishing and conducting a school for apprentices and young mechanics on plans to be hereafter described by me, or in case of my death before perfecting said plans, the school above named is to be conducted on plans which I have from time to time described to most of the board of trustees herein named and who shall approve of final practical plans in keeping therewith."

The Chancellor stated (p. 6):

> "The will itself does not disclose what the plans were to be, but refers to statements made by him before its execution *which were susceptible of ascertainment.*"
>
> * * * * * *
>
> "Then, the next question which arises is, whether such a reference in a will is unlawful under our statute (Rev. p. 1237, sec. 22), which requires the will to be in writing, signed by the testator and attested by two witnesses. *The question is not whether that which has existed for other purposes than the scheme of the will may be adopted as by reference, as, for instance, the plans upon which Princeton, Yale or Harvard universities are conducted, or to previously-pronounced religious or other doctrines. Attorney-General* v. *Lawes,* 8 Hare 321; Sowers *v.* Cyrenius, 39 Ohio 29; Attorney-General *v.* Molland, Younge 562; Potter *v.* Thornton, 7 R. I. 252;

Marsh *v.* Means, 3 Jur. (N. S.) 790, to recognized scheme for distribution of moneys in charity, Derby *v.* Derby, 4 R. I. 414; Decamp *v.* Dobbins, 4 Stew. Eq. 671, *but whether the testator, by mere reference to his own language, used to others at previous times, concerning that which was not existing, but was to take life in his will, may, as against his heirs and next of kin, make that language operative in the testamentary disposition of his property.*"

"In the case of Olliffe *v.* Wells, 130 Mass. 221, a testatrix devised the residue of her estate to A. 'to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him,' *and it could be proved that those wishes required distribution to recognized public charities.* Chief Justice Gray, in writing the opinion of the court, after saying that, in any view of the authorities, it was quite clear that intentions not formed by the testatrix and communicated to A. after the making of the will, could not have any effect against her next of kin, and that if the wishes of the testatrix expressed to A. were formed and expressed before the execution of the will, the result must be the same, added this language:

> 'It has been held in England, and in other states, that if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to or hold it for the benefit of third persons, and afterwards refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator, and of his own fraud, which a court of equity will, upon clear and satisfactory proof of the facts, enforce against him at the suit of such third persons. Upon like grounds, it has been held in England that if a testator devises or bequeaths property to his executors upon trust, not defined in the will, but which, as he states in the will, he has communicated to them before its exe-

cution, such trusts, if for lawful purposes, may be proved by the admission of the executors, or by oral evidence, and enforced against them. And in two or three comparatively recent cases it has been held that such trusts may be enforced against the heirs or next of kin of the testator, as well as against the devisees. *But these cases appear to us to have overlooked or disregarded a fundamental distinction that where a trust not declared in the will is established by a court of chancery against the devisee, it is by reason of the obligation resting upon the conscience of the devisee, and not as a valid testamentary disposition by the deceased. Where the bequest is outright upon its face, the setting up of a trust, while it diminishes the right of the devisee, does not impair any right of the heirs or next of kin in any aspect of the case; for if the trust were not set up, the whole property would go to the devisee by force of the devise; if the trust set up is a lawful one, it enures to the benefit of the cestui que trust; and if the trust set up is unlawful, the heirs or next of kin take by way of resulting trust. Where the bequest is declared upon its face to be upon such trusts as the testator has otherwise signified to the devisee, it is equally clear that the devisee takes no beneficial interest; and, as between him and the beneficiaries intended, there is as much ground for establishing the trust as if the bequest to him were absolute on its face. But as between the devisee and the heirs or next of kin, the case stands differently. They are not excluded by the will itself. The will, upon its face, showing that the devisee takes the legal title only, and not the beneficial interest, and the trust not being sufficiently defined by the will to take effect, the equitable interest goes, by way of resulting trust, to the heirs or next of kin, as property of the deceased not disposed of by his will. They cannot be deprived of that equitable interest, which accrues to them directly*

from the deceased, by any conduct of the devisee; nor by any intention of the deceased, unless signified in those forms which the law makes essential to every testamentary disposition. A trust not sufficiently declared on the face of the will cannot therefore be set up by extrinsic evidence to defeat the rights of the heirs-at-law or next of kin. By the statutes of the commonwealth, no will shall be effectual to pass any estate, whether real or personal, nor to change it, or in any way affect the same, unless signed by the testator and attested by three witnesses.'"

In *Condit* v. *Reynolds,* 66 N. J. L. 242 there was a direction as follows:

> "Third. Upon the death of my said husband, I give, devise and bequeath all my said hereinbefore mentioned estate in such manner as he may by his last will and testament devise and bequeath, or appoint to receive the same, trusting entirely to his discretion to carry into execution such charge and instruction as I may during my life have expressed to him in regard thereto."

This court said:

> "The persons to be benefited by the exercise of the power now under consideration were not at all defined by the will, but were to be ascertained by the subsequent directions of the testatrix. According to the doctrine established in this state by the decision in Smith *v.* Smith, 9 Dick. Ch. Rep. 1; on appeal, 10 Id. 821, she could not lawfully ascertain them unless she did so by a writing executed in conformity with the requirements of the statute of wills, and this she never did."

In *Murray* v. *Lewis,* 94 N. J. E. 681 there was bequeathed a sum of money to the executrix and executors, and then—

"This legacy is not to be in lieu of any commissions they may be entitled to. A sealed letter or paper addressed to my executors will be found with this my will, expressing my wishes as to the said sum, but such letter or paper shall not form part of my will."

Such a letter was found by the executors. Vice-Chancellor Fielder said:

"The rule prevailing in England is stated in the leading case of Allen *v.* Maddock, 11 Moo. P. C. C. 427, to be that an unattested document may, by reference in a will, under certain conditions and limitations, become incorporated in the will as part of it. The courts of but few of our states have had occasion to consider the rule, but some of them have followed it. Thus, in Newton *v.* Seamen's Friend Society, 139 Mass. 91, the rule is adopted, and is stated as follows: 'If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will and is identified by clear and satisfactory proof, as the paper referred to therein, takes effect as part of the will and should be admitted to probate.' This rule of incorporation by reference has been repudiated, however, in New York and Connecticut (Booth *v.* Baptist Church, 126 N. Y. 215; Hatheway *v.* Smith, 79 Conn. 506), and I do not find that it has been accepted in this state."

"In Hartwell *v.* Martin, 71 N. J. E. 157, the testator by will ordered his executors to make a settlement with his creditors of debts outstanding at the time of an assignment made by him for the benefit of his creditors, as shown by a list to be found with his will. Vice Chancellor Bergen held (at p. 159) such bequest to creditors to be void, 'because it is

an attempt to bequeath property to a class of persons *who can only be ascertained by reference to a non-testamentary paper, which the testator might change from day to day and thus enlarge or diminish his testamentary gifts as often as he chose, without observing the rules of law relating to the testamentary disposition of property. The effect, if it should be permitted, would be to allow a testator to declare the particular legatees to whom his estate should go without the formality required by law in such cases.*' By this declaration I understand the vice chancellor to disapprove the rule."

* * * * * *

"I cannot assent to the proposition that an unattested document making disposition of property can be incorporated in a will by reference thereto. Our statute (Comp. Stat. 5867, sec. 24), prescribes certain formalities which must be observed in every writing intended to take effect as a valid testamentary devise or bequest, and then it provides that all wills and testaments made in conformity with the statutory requirements, shall be sufficient to devise, pass and bequeath all estates and property, real and personal, and all rights of any kind. This statute defines our policy with respect to the manner in which a testamentary disposition of property may be made. *A writing may express clearly the wish or intention of a decedent, but if the statutory formalities have not been followed, it is not a valid will, because it cannot be a question of what he intended to do, but whether he has actually followed the provisions of the statute. These provisions are reasonable and easily understood and their purpose is to prevent frauds.* An honest attempt to execute a will is occasionally defeated by failure to follow the statute, but it is better that this should happen than that the provisions designed to protect testators generally from fraudulent alterations of testamentary bequests and devises, should be weakened. It seems to me obvious that to

constitute a will expressing the testator's testamentary desire, the writing must denote or specify the subject and object of the testamentary gift intended, otherwise no bequest is made, *and that to permit reference to be made to a collateral unattested document, mentioned or described in the will, for the purpose of ascertaining what the testator intends to bequeath, or for whom the bequest is intended, is calculated to defeat the salutary purpose of the statute and to afford opportunity for fraudulent practices.*''

We have quoted thus copiously from the opinion of Vice Chancellor Fielder for he refers to the other cases in this State and he likewise, succinctly, gives the reason for the rule.

III.

Cases in New Jersey distinguished.

The Vice-Chancellor at p. 130 says that—''It is contended on behalf of complainants and all defendants, except the defendants Johnson, that the English rule which 'has been adopted' in most jurisdictions in this country is also in force in New Jersey, and in support of this proposition cite *McCurdy* v. *Neall,* 42 N. J. E. 333; *Smith* v. *Smith,* 54 N. J. E. 1, affirmed 55 N. J. E. 821; *Condit* v. *Reynolds,* 66 N. J. L. 242; *Magnus* v. *Magnus,* 80 N. J. E. 346; *Condit* v. *Dehart,* 62 N. J. L. 78; *Smith* v. *Runkle,* 97 Atl. 296; affirmed 98 Atl. 1085-86-87.''

In *McCurdy* v. *Neall,* 42 N. J. E. 333 there was a will and codicil. It was sought to show that the will had not been properly executed. The Ordinary did not so hold (p. 335). He said on p. 336:

> ''But further, it cannot be denied that the codicil was executed with all due formalities. It is proved to have been so executed. It expressly confirms the will so far as the codicil is consistent with it, and is therefore a republication of the will itself, supplying all omissions and remedying all defects, if any, in the execution of the latter. I Redf. Wills 288.''

It is the established rule in this State that a codicil is a republication of the will and the doctrine that an extrinsic document referred to in a will cannot be incorporated in it by reference has no application whatever.

Smith v. *Smith,* 54 N. J. E. 1, affirmed 55 N. J. E. 821 has already been considered as authority against incorporating an extrinsic document in a will by reference.

Condit v. *Reynolds,* 66 N. J. E. 242 has already been considered and is likewise an authority against the incorporation of an extrinsic document in a will by reference.

Condit v. *De Hart,* 62 N. J. L. p. 78 was a case in the Supreme Court in which the testator by a codicil to his will—''*authorized and empowered* his son'' to make disposition of real and personal property devised and bequeathed to him by the will by his (the son's) last will and testament *duly made and executed* and whatever disposition his son should make of the property, the testator ratified and confirmed, and devised and bequeathed such property to such persons as his son should, in his last will and testament, name and designate.

The son died in the lifetime of the testator, leaving a will which was duly probated. The testator then died. The court recognized that, under the strict rule, the son could not, during the lifetime of his father, execute the power of appointment conferred upon him by the will of his father, but after the death of the son, the father had executed a second codicil by which he again reiterated his intention to devise the property to

the persons designated by the son's will. The court said (p. 81):

> "The son having died in the lifetime of the father, the will of the former, although not transferring the father's residuary estate by an appointment, is to be referred to for the purpose of ascertaining the person to whom that estate passes by the father's will. The latter instrument effectuates what the son attempted to do but could not by his own will. In re Piffard, 111 N. Y. 410."

The court then uses this language:

> "And this is so without regard to whether or not the father knew who had been designated by the son, in his will, as the person whom he desired to succeed to the father's residuary estate in the event of his dying first. The privilege of naming the beneficiary to whom the father's estate should go *was unlimited,* and did not depend for its validity upon the son's choice being communicated to the father."

This case, as will be hereafter pointed out, turned upon the right of a testator to, by his will, provide against the lapsing of a power of appointment conferred by him. He, the testator, reserved no control whatever over the son. The testator could not change the devolution of his estate except by remaking or changing *his* will in the manner prescribed by statute.

Magnus v. *Magnus,* 80 N. J. E. 346 was a case in which there was a devise "to my niece Clara Seidensticker to dispose of in accordance with my instructions to her". After the death of the testatrix, an envelope addressed in her handwriting to Clara Seidensticker was found in which was contained a paper in the same handwriting directing how the property should be distributed.

It is true that Vice Chancellor Stevens referred to English cases approving the doctrine of incorporation by reference, but, in no part of his opinion, does he approve them. He refers to them as cases having been cited by counsel, and then says that, even under those cases, the letter could not be incorporated in the will.

In view of the decisions of this court in *Smith* v. *Smith,* 54 N. J. E. 1, affirmed 55 N. J. E. 821, *Condit* v. *Reynolds,* 66 N. J. L. 242, and in the Court of Chancery, *Hartwell* v. *Martin,* 71 N. J. E. 157, it is not to be assumed that the Vice Chancellor approved the rule permitting incorporation by reference.

Vice Chancellor Fielder in *Murray* v. *Lewis,* 94 N. J. E. 681, at p. 684, said with respect to *Magnus* v. *Magnus,* 80 N. J. E. 346:

> "In *Magnus* v. *Magnus,* 80 N. J. E. 346, Vice Chancellor Stevens dealt with a will in which the testatrix made a bequest of personal property to her niece 'to dispose of in accordance with my instructions to her'. After the death of the testatrix a letter was found in her handwriting, addressed to the niece, in which instructions were given as to the disposition of certain articles of personal property. The vice chancellor referred to English cases approving the doctrine of incorporation by reference, without expressing his opinion thereon, and he rejected the letter in question because it was not referred to in the will in terms sufficient to identify it. I do not regard this case as placing the approval of this court on such doctrine."

Smith v. *Runkle,* 97 Atl. 296, in the Prerogative Court, affirmed upon the opinion of the Orphans' Court, 98 Atl. 1086, in this court affirmed upon the opinion of the Orphans' Court, not officially reported, was a case which did not involve the doctrine of incorporation by reference in any manner. The question there was as to whether two pages were a part of the will when executed. The court

considered the testimony with care and held that the sheets in dispute were prepared and annexed to the will, at least before the time of the execution of the codicil, and the court properly held that, under the settled rule, the publication of the codicil was a republication of the will as it existed at the time of the execution of the codicil. The papers were all physically attached to each other and the execution and publication of the codicil was, in effect, the execution and publication of a new will and that is the principle upon which the case was decided.

No one of these cases in this State can be considered as authority for the proposition that a testator's property may devolve according to the terms of a declaration of trust referred to by the testator in his will in existence at the time of the making of the will, either signed by the testator or by the trustee, and the case is stronger if the trust be revocable as in the case at bar.

Such a case is no stronger than one where the reference is to a letter in the handwriting of the testator and signed by the testator as in *Magnus* v. *Magnus,* 80 N. J. E. 346.

The effect in each instance is the same, i. e., that the devolution of testator's property depends upon the contents of an instrument not authenticated in accordance with the terms of the statute of wills and to permit it is to repeal the statute.

IV.

The cases in New Jersey, New York and Connecticut are not in conflict.

Those cases which are said to sustain the doctrine of incorporation by reference do not, in fact, sustain it, but were decided upon different principles.

In re Fowles' Will, referred to by counsel in the court below and by the Vice Chancellor, 222 N. Y. 222, 118 N. E. 611, was one in which the testator provided that a certain portion of his estate was to be paid "pursuant to the provisions of such last will and testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last will and testament duly executed by her)." The testator further provided:

> "In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

Both husband and wife were lost at sea with the Lusitania and there was nothing to show which was the survivor. The wife left a will, made at the same time as the husband's, and undertook to execute the power of appointment.

Cardozo, J., speaking for the Court of Appeals of New York, held that property of the testator should go as provided by the wife's last will. The court expressly recognized the rule against the incorporation of extrinsic documents, testamentary in character but not themselves authenticated in accordance with the statute.

He also recognized the rule that a power created by will lapses if the donee dies before the will takes effect. He held that the rule against incorporating an extrinsic document was not violated. He treated the case as one of ratification by the testator of an executed power, as if, in fact, the wife had not died before the testator, and

he said that the testator was privileged, by his will, to, for the purpose of distribution of his estate, determine, in case both perished in a single disaster, which one should be held to have lived longer. He referred to the decision of the Supreme Court of this State in *Condit* v. *DeHart,* 62 N. J. L. 78. He said (p. 612):

> "It is true that a power created by will lapses if the donee of the power dies before the maker of the will. Curley *v.* Lynch, 206 Mass. 289, 92 N. E. 429; Sugden on Powers (8th Ed.), 460; Farwell on Powers (2d Ed.), p. 226. That is because a will has no effect till the death of the testator. Whatever power it creates, comes into being at the time. But to say this, does not answer the question before us. The question is not whether this power of appointment lapsed. *The question is whether the testator has avoided the consequences of a lapse. More concretely, it is whether the law permits him to provide that if the donee's survivorship is incapable of proof, he will give his estate none the less to whomever she has named."*

He further said (118 N. E. 613):

> "The rule against incorporation has not been set aside. It has been kept within bounds which were believed to be wise and just. The rule is sometimes spoken of as if its content had been defined by statute, as if the prohibition were direct and express, and not inferential and implied. But the truth is that it is the product of judicial construction. Its form and limits are malleable and uncertain. We must shape them in the light of its origin and purpose. All that the statute says is that a will must be signed, published, and attested in a certain way. Decedent Estate Law (Consol. Laws, c. 13), sec. 21. From this the consequence is deduced that the testator's purpose must be gathered from the will, and not from other documents which lack the prescribed marks of authen-

> ticity. Booth *v.* Baptist Church of Christ, 126 N. Y. 215, 247, 28 N. E. 238. *It is a rule designed as a safeguard against fraud and mistake.* In the nature of things, there must be exceptions to its apparent generality. Some reference to matters extrinsic is inevitable."

He further said:

> "Words are symbols, and we must compare them with things and persons and events. 4 Wigmore on Ev. sec. 2470. It is a question of degree. Langdon *v.* Astor's Executors, 16 N. Y. 9, 26, 31; Robert *v.* Corning, 89 N. Y. 225, 242. Sometimes the distinction is said to between documents which express the gift and documents which identify it. Hatheway *v.* Smith, 79 Conn. 519, 521, 65 Atl. 1058, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99; Booth *v.* Baptist Church of Christ, *supra.* But the two classes of cases run into each other by almost imperceptible gradations. Langdon *v.* Astor's Executors, *supra. One may ratify assumptions of power,* extinguish debts, wipe out wrongs, confirm rights, by the directions of one's will. Bozzey *v.* Flight, L. R. 3 Ch. Div. 269; 1 Jarman on Wills, 99. In these and other cases, the expressions of the gift and the description of its subject matter must often coalesce. No general formula can tell us in advance where the line of division is to be drawn."
>
> "It is plain, therefore, that we are not to press the rule against incorporation to 'a dryly logical extreme.' Noble State Bank *v.* Haskell, 219 U. S. 104, 110, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487. (Our comment: this case had nothing to do with incorporation by reference. It involved constitutional law.) We must look in each case to the substance. We must consider the reason of the rule, and the evils which it aims to remedy. But as soon as we apply that test, the problem solves itself. *There is here no opportunity for fraud*

or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose. He has not limited his wife to any particular will. Once identify the document as her will; it then becomes his own. He authorizes her to act, and confirms her action. Condit v. *De Hart, supra, at page 81 of 62 N. J. Law, at page 776 of 40 Atl.* **For the purpose of the rule against incorporation, the substance of the situation is thus the same as it always is when a will creates a power.** *The substance is that a power which would otherwise have lapsed has been kept alive by the declaration that its execution however premature, is ratified, and approved.* **But the execution of a power does not violate the rule against incorporation.** *It can make no difference for that purpose whether the execution is authorized in advance or made valid by relation. There is no greater impairment in the one case than in the other of the principle of the integrity and completeness of testamentary disposition. The source of title may be in one case the appointment, and in the other the confirmatory will.* **But if we go beneath the form and reach realities, the truth is that under the sanction of the will, a power has been executed.** *That is the principle which underlies the ruling in Matter of Piffard and Condit* v. *De Hart. We reaffirm it now.''*

This last language of Judge Cardozo, *i. e.,* that, after all, the substance of the thing was the execution of a power points to the reason for the decisions in *Condit* v. *De Hart,* 62 N. J. L. 78, and *Matter of Piffard,* 111 N. Y. 410-414, 415, 18 N. E. 718, 719 (2 L. R. A. 193).

In *re Piffard Estate,* 111 N. Y. 410-414, 415, 18 N. E. 719, 2 L. R. A. 193, there was a bequest of a share of a devise to legatee and, in the event of her death in testator's lifetime to her executors. After the death of the devisee and legatee the testator executed other codicils confirming the

will and this provision. The case was treated by the Court of Appeals as one of ratification of the exercise of a power of appointment and is so explained in *re Fowles Estate, supra.*

Two years after the decision in the Fowles case the New York Appellate Division held in *Matter of Lawler,* 195 App. Div. 27, 29, 185 N. Y. Sup., p. 726, that the decision in the Fowles case must be limited to a state of facts where the extrinsic document *is a duly executed will* and that, beyond permitting reference *to a duly executed will* which attempts to execute a power, the rule against incorporation of extrinsic documents, not executed with the formalities required by the statute of wills, ''was reaffirmed in *Matter of Fowles* (222 N. Y. 222, 223).'' The court in an unanimous opinion states, page 29, last paragraph, that:

> ''In Booth *v.* Baptist Church (126 N. Y. 215), Judge Finch, writing for the unanimous court, said: 'It is unquestionably the law of this state that an unattested paper which is of a testamentary nature cannot be taken as a part of a will, even though referred to by that instrument.' ''

That the general understanding of the *Fowles* case by the courts of New York is as above indicated is shown by a recent decision of the Surrogate in *In re. Perry's Will* (Feb., 1926), 214 N. Y., Suppl. 461. In that case the testator sought to reserve to himself the right to indicate in an extrinsic document the details of his plan of distribution. The provision of the will referring thereto was held void, the Surrogate citing the *Fowles* case along with others as holding that the rule against incorporation by reference prevented such a disposition.

In *Reynolds* v. *Reynolds,* 224 N. Y. 429, 434, 121 N. E. 61, there was a bequest to the executor in trust ''for the purposes of paying out and dis-

posing of same as I have advised and directed him to do."

The court, Pound, J., referred to the *Fowles* case, and said (p. 62):

> "The total failure to designate the beneficiaries of the trust in the will makes it to that extent an unwritten will, ineffectual for any purpose. Decedent Estate Law (Consol. Laws, c. 13), sec. 16. The death of the executor prior to the establishment of the trust would leave the court wholly without power to distribute the fund in accordance with testator's wishes. Holland *v.* Alcock, supra; Fairchild *v.* Edson, 154 N. Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609; Gross *v.* Moore, 68 Hun, 412, 22 N. Y. Supp. 1019, affirmed 141 N. Y. 559, 36 N. E. 343."
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> * * * * * *
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> "To sustain this will would be to perpetuate a fraud upon the next of kin, evade the statute of wills, and defeat the policy of the state. The language of Finch, J., in Matter of O'Hare, supra, 95 N. Y., at page 422, 47 Am. Rep. 53, may readily be paraphrased to apply hereto. Any bequest of this character is dangerous, and indefensible. It exposes testators to the suggestion of unnecessary difficulties as inducements to the artifice of a secret and unwritten will. It exposes the trustee to temptation, and, even when he acts honestly, to severe and unrelenting criticism. It subserves no good or useful purpose. If we sustain it, we admit that any statute may be thus evaded."

The court expressly disapproved the authorities which were cited as sustaining the validity of such a gift.

> *Matter of Hetley,* 2 Ch. 866;
> *Jarman on Wills,* 6th Ed., p. 484;
> *Curdy* v. *Burton,* 79 Cal. 420, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157.

And, referring to the case of *Jay* v. *Lee,* 41 Misc. Rep. 13, 83 N. Y. Supp. 579, upon which case respondents below relied, said (p. 163):

> "Gaynor, J., in the Special Term Case of Jay *v.* Lee, 41 Misc. Rep. 13, 83 N. Y. Supp. 579, states the reasons clearly. Although the bequest can be made only by will, the evidence dehors is not to make a bequest, but to ascertain and identify the beneficiaries designated in the trust clause of the will; the designated beneficiaries are ascertainable and the trust enforceable, although the evidence to identify such designees may be unobtainable; the trust is therefore valid, and the case distinguishable from *Holland* v. *Alcock, supra,* and like cases where no human power could identify the beneficiaries. *The reasoning is plausible, but uncertainty of designation, and uncertainty of proof of designation are not far apart. Moreover, if this principle is applied, we may incorporate into a written will, not a writing alone, but even oral statements based on the slippery memory of a single witness.* The doctrine of incorporation, which exists *to some extent* in this state, may not be invoked to read into the will the recollection of the executor. As Cardozo, J. says in Matter of Fowles, *supra,* 222 N. Y. 232, 118 N. E. 613:
>
> > 'The rule against incorporation has not been set aside. It has been kept within bounds which were believed to be wise and just. * * * All that the statute says is that a will must be signed, published and attested in a certain way. Decedent Estate Law (Consol. Laws c. 13), sec. 21. From this the consequence is deduced that the *testator's purpose must be gathered from the will, and not from other documents which lack the prescribed marks of authenticity.* * * * It is a rule designed as a safeguard against fraud and mistake.' "

The fact is that the rule, as such, has never been relaxed in New York, the *Fowles* and *Piffard*

cases resting, not upon the principle of incorporation of an extrinsic document by reference, but upon the principle of ratification of the exercise of a power of appointment, and it is upon *this* principle that our own case of *Condit* v. *DeHart, supra,* was determined.

In *Hathaway* v. *Smith,* 79 Conn. 506, 65 Atl. 1058, there was an attempt made to incorporate a *deed of trust* into a will. It was held that this could not be done. While in the earlier case of *Phelps* v. *Robbins,* 40 Conn. 250, the point was not decided the Court states at page 271 why such an attempt should not be permitted:

> "We are not aware that this question has ever arisen before in this state. No lawyer, to our knowledge, in preparing a will has been bold enough to risk the experiment. On the contrary, the almost universal sense of the profession has been, that a will, *in all its parts,* must be subscribed and attested in the manner required by statute. The very fact that no case can be found raising the question, in a practice of more than a hundred and fifty years under the statute, and that the cases in our sister states are almost as rare as our own, is certainly a strong argument against the propriety of admitting any unattested paper to probate." (In New Jersey the question has been raised but five times, and in each case the attempted incorporation was unsuccessful.) "Even in this case the papers in question have never been admitted to probate. The court of probate has never passed upon the question, and it does not appear that any party interested ever contended that they were or should be considered and treated as part of the will, until the cause came into the Superior Court, and that court for the first time is asked to give them validity and effect. (This is true of the Swetland case.) But passing this irregularity, it must be conceded, we think, that the course will be regarded as a serious innovation. *Its tendency will be to render*

> *uncertain and confused the testamentary disposition of property, and open a wide field to litigation, to say nothing of the temptation to fraud and imposition.* And when all this is done, what good results from it? We are not aware of any evils attending the existing practice that the proposed innovation will remedy, nor do we believe that any benefit or advantage whatever will result. If so, it is manifestly unwise to introduce a change which, so far as we can see, is fraught only with evil."

Every case which has permitted the devolution of a testator's property in accordance with some document outside the will has been determined upon the theory that a power of appointment was conferred the execution of which, while not effective, has been confirmed by the testator, either in advance of the attempted exercise of the power, by direction as to how it might be exercised or by ratification of the attempted exercise of the power, In other words, the courts have held that, notwithstanding the strict rule of law that a power conferred upon a donee to appoint by will cannot be exercised by the donee if the donee die in the lifetime of the donor, the testator may obviate this rule of law by expressly directing that the power shall not lapse in such a case, or, in other words, he may direct how and under what circumstances the power may be exercised. And, in each one of the cases, there has also been observed by the court the fact that, in the particular case before the court, there has been no opportunity whatever for fraud.

Compare in re Matter of Fowles, 222 N. Y. 222, 232, 118 N. E. 611, at p. 613, in which case the court held—"There is here no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose. He has not limited his wife to

any particular will'', with *Reynolds* v. *Reynolds,* 224 N. Y. 429, 121 N. E. 61, at p. 62 in which case the court said: (citing from *Jay* v. *Lee,* 41 Misc. Rep. 13, 83 N. Y. Supp. 579)—''The reasoning is plausible, but uncertainty of designation, and uncertainty of proof of designation are not far apart. Moreover, if this principle is applied, we may incorporate into a written will not a writing alone, but even oral statements based on the slippery memory of a single witness.''

V.

The case at bar falls within the principle of Smith v. Smith, 54 N. J. E. 1, 55 N. J. E. 821; Condit v. Reynolds, 66 N. J. L. 242, and Reynolds v. Reynolds, 224 N. Y. 429, 121 N. E. 61, and not within the principle of Condit v. De Hart, 62 N. J. L. 78; Matter of Fowles, 222 N. Y. 222, 118 N. E. 613, and In re Piffard's Estate, 111 N. Y. 410, 10 N. E. 719.

Here there is no power of appointment conferred upon the trustee.

The reference is to a trust agreement created July 14th, 1917. The instrument, which the lower court referred to, is signed by the trustee alone and is revocable by the testator. The validity of the provision, therefore, cannot be sustained by reference to any principles governing the exercise of powers of appointment.

A distinguishing feature of all the cases, where some instrument dehors the will has been referred to as indicating the beneficiaries of the will, etc., is that, in each one of those cases, the instrument has not been an instrument *created by the testator.* It has always been an instrument, executed by another, to whom the testator has granted *un-*

limited powers, and that instrument has always been the *will* of another executed with all the formalities of the statute of wills. The testator, in other words, in every case, has definitely parted, at the time he made his will, with all power over his property and has conferred the power upon another. He has put it beyond his power to change the devolution of his property, except in a manner prescribed by the statute of wills, to wit, by revocation of the will by him made. As the Court of Appeals of New York said in the *Fowles Case,* 222 N. Y. 222, 118 N. E. 613: ''The grant of a power of appointment does not offend the rule against incorporating an instrument extrinsic the will into the will.'' And the reason is that the testator, by his act, has parted with all control over his property except such control as he may regain by revoking the will under the provisions of the statute of wills.

And quite a different situation is created when the testator refers in his will to some instrument, theretofore executed by him or by another, over which he has some control which he may exercise otherwise than by complying with the provisions of the statute of wills.

In the case at bar, aside now from the matter of identifying the instrument by oral proof, the instrument, not having been authenticated in any wise by testator, the testator retained absolute power to revoke the trust and therefore absolute power to, from time to time, change the devolution of his property in a manner not prescribed by the statute of wills.

Although more applicable to the discussion under another point it may be well here to state that in every case in which it has been held that resort may be had to an extrinsic document for the purposes of determining the devolution of the testator's property, the document has not only

been *one executed with all the formalities of a will* but has been one executed by a person *other than the testator.* In other words, the testator had not only put it out of his power to change the devolution of his property in a manner otherwise than as provided by the statute of wills but proof of the document did not rest *upon oral testimony as to the act of the testator or of another.* The statute of wills requires that any act of the testator directing the devolution of his property shall be proven in a certain way, i. e., by the proof required in the execution of a will.

Here we have the devolution of this testator's property governed by an alleged act of the testator, i. e., the creation of this trust proven by *oral* testimony and not even evidenced by the signature of the testator.

VI.

The English cases are without authority in this State.

Certain English cases were referred to in the argument below as sustaining the incorporation of extrinsic informal documents into a will.

In *Willis* v. *Lowe,* 4 notes of cases 428, it is stated that the doctrine was founded on a misapprehension. Lord Eldon, who first held that an extrinsic informal document could be incorporated by reference under the English statute, later expressed his doubt as to the soundness of that decision, 1 Ves. & Bea., 445, 14 Eng. Rep. 163.

The practice of permitting an extrinsic document not executed as required by the statute of wills but referred to in a will to be consulted to ascertain some of the terms of the testamentary disposition began in England a century and a half ago during a period of liberal construction following the enactment of the first statutes regulating wills. The practice of testators writing their own wills was common. Prior to the statute, a will of personalty could be oral, and any informal, unattested paper indicating a decedent's testamentary desires was accepted as a valid will. It was thought that under these circumstances the statutes should be given a liberal construction. A few years after the enactment of the original English Statute of Wills, 1837 (1 *Vict.,* ch. 26), a special liberalizing act (*Lord St. Leonard's Act,* 1853, 15 and 16 *Vict.,* ch. 24) was passed because so many testators failed to comply with the first statute.

In *In re Conway,* 124 N. Y. 455, N. E., and *In re O'Neil,* 91 N. Y. 512, N. E., the New York Court of Appeals stated that the decisions under the English Statute of Wills are so affected by the liberal provisions of Lord St. Leonard's Act (15 and 16 *Vict.,* ch. 24) as to be of little aid in interpreting the provisions of the New York Statute of Wills. The same is true of the statutes of New Jersey. The English and New Jersey statutes relating to the execution of wills have from the beginning differed in material respects, and while from the beginning the English statute has been liberally construed, the courts of New Jersey have held that the New Jersey statute is to be strictly construed to give literal effect to all of its provisions. See

Provident Inst. for Sav. v. *Mead,* 88 N. J. Eq. 349;
Provident Inst. for Sav. v. *Sisters of the Poor,* 87 N. J. Eq. 424;
In re Sutterlin, 3 N. J. Adv. R. 814 (Jan.-July, 1925).

Under the English statute the signature to a will need not be that of the testator, but the testa-

tor's name may be signed to the will by another in his presence and at his direction, and no witnesses need be present at the time. Under the New Jersey statute, not only must the signature be that of the testator himself, but must be subscribed to the will, or acknowledged by him, in the presence of two witnesses, present at the same time.

Under the English statute the testator not only need not declare the instrument to be his will, but even if it is represented by the testator to the witnesses to be some other instrument it is a valid will (Sugd. R. P. Statute, p. 340).

It is even held, under the English statute, that the will is valid where the signature of the testator and the attestation are on a piece of paper stuck or tied to the end of a will (*Cook* v. *Lambert,* 32 L. J. Prob. 93; *Re Hosford* L. R., 6 P. & D. 211; *Re West,* 32 L. J. Prob. 182; 1 *Jarman, Wills,* 80). Plainly, this reaches the limit of liberal construction, for obviously such a piece of paper might have been cut from another will containing totally different provisions.

It is not surprising, in view of such a liberal attitude toward the statute of wills, on the part of the English courts, that they also hold that an extrinsic document referred to by a will, but not executed in compliance with the statute, may be incorporated into the will by reference.

A few cases in a few of the states have permitted such incorporation. But these cases have been, without exception, cases where the testator has at least signed the paper to which reference was made. In no case has the document been one, such as the trust agreement in this case, which is a typewritten paper not even signed by the testator. In most of those few cases, the attempted incorporation was denied for one reason or another, and the English rule permitting incorporation by reference has remained a theory rather than a practical reality. In the Massachusetts case, for instance, which was quoted in the brief of counsel for Maurice J. Swetland, and cited by the Vice Chancellor (*Seabury* v. *Seaman's Friend Society,* 130 Mass. 91), the instrument to which reference was permitted was a document signed by the testator and his signature was attested by a witness and the will had stated that the extrinsic paper was signed by the testator and witnessed by that witness. Such a case could scarcely be a precedent for incorporating a document not even signed by the testator.

VII.

Even if irrevocable, the trust agreement could not be incorporated in the will; but it is revocable, and that fact alone would prevent incorporation.

If the trust agreement were irrevocable, still the property of testator could not devolve in accordance with its terms, for proof of the agreement would rest upon oral testimony *as to the act of testator,* whereas the statute of wills requires proof, in a certain formal manner, *of every act of the testator* which may be in effect a direction as to the distribution of his property.

But the instrument which is referred to in the will, as found by the court below (Ex. B, p. 21) is expressly revocable. It provides:

> "4. That the founder of said trust, Horace M. Swetland, *reserves at all times during his life time,* the personal rights, power and *privilege of terminating the aforesaid trust,* and that upon his election so to do, the aforesaid shares of stock constituting the principal thereof shall be returned and revert to him free and clear of any and all claims or de-

mands of whatever kind or nature, *with the same force and effect as if the trust herein provided for had never been created, any law to the contrary notwithstanding.*''

In such a situation it is the revocable trust agreement and the testator's power over it, not the will, which, at all times subsequent to the will and until the testator's death, will determine whether the beneficiaries named in the trust agreement shall or shall not be legatees. It is the revocable trust agreement, not the will, which determines the ultimate destination of the residuary property.

Distribution of testator's property therefore may be changed from time to time by the testator in a manner not prescribed by the statute of wills.

In *Atwood* v. *Rhode Island Hospital Trust Co.,* 275 Fed. 513, 521, the United States Circuit Court of Appeals for the 1st Circuit passed on a similar will, the residuary clause of which referred to an extrinsic revocable trust. The court held that the residuary clause was void. This decision the United States Supreme Court refused to review on the ground of ''no apparent error''.

The residuary clause in that will was:

> ''I give . . . the remainder . . . to my said executors . . . with the power . . . to sell . . . and pay . . . the proceeds over to the . . . Trust Company, to be held, managed and disposed of *as a part of the principal of the estate and property now held by it in trust* . . . as though the proceeds of such sales had been deposited by me as part of said trust estate . . .'' (This is the court's abbreviation of the quotation.)

The court held that, even assuming that the trust agreement could be received in evidence and referred to to show the terms of the trust, nevertheless the testamentary disposition was rendered

void by the provision in the trust agreement reserving to the trustor the power to alter or revoke the trust.

The court says, page 521:

> ''We are clear that the plan disclosed in the will and the *inter vivos* trust together is obnoxious to the statute of wills, falling plainly within the condemnation of the rule pungently stated by Sir George Parker in Johnson *v.* Ball, 5 De G. & Sm. 85, 91, where he said:
>
> > 'A testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.'
> >
> > This is exactly what Davis (the testator) undertook to do as to the residue of his testamentary estate.
> >
> > The case is on all fours with *Olliffe* v. *Wells,* 130 Mass. 221, and the other numerous cases to the same effect.
> >
> > Regarding the ninth clause of the will (above quoted) in connection with the trust instrument, which contains full power of revocation and modification, Davis said:
> >
> > 'I give the residue of my estate to said Trust Company to be disposed of to such persons and in such proportions as I may have instructed *or shall hereafter instruct said Trust Company.*'
>
> Such instructions might be given in writing or orally. A cablegram from him sent from Egypt would have been legally sufficient *to change the destination of the entire trust fund,* INCLUDING THE INCREMENT FROM HIS TESTAMENTARY ESTATE UNDER THE RESIDUARY CLAUSE.
>
> MANIFESTLY, THE REAL DISPOSITION OF THIS RESIDUARY ESTATE IS MADE, NOT BY THE WILL, BUT BY THE SHIFTING PROVISIONS OF THE TRUST INSTRUMENT. No amount of discussion or elaboration could make plainer the absolute destruction by such plan of the safeguarding provisions in the statute of wills.
>
> Learned counsel for the respondent Trust Company recognize that the case cannot be

distinguished from *Olliffe* v. *Wells,* and attack *Olliffe* v. *Wells* as bad law. We do not so regard it. In our view, the decision in *Olliffe* v. *Wells* is sound in principle and supported by the overwhelming weight of authority." (Citing a long list of cases, among them *Smith* v. *Smith,* 54 N. J. Eq. 1, *affirmed* 55 N. J. Eq. 821; *Condit* v. *Reynolds,* 66 N. J. Law 242 (Errs. & App.); and *Magnus* v. *Magnus,* 80 N. J. Eq. 348.)

In *Olliffe* v. *Wells,* 130 Mass. 221, the testatrix, residuary estate was given to a trustee in the following language:

> "To E. M. P. Wells, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him *or may express* to him."

It was held that the possible inclusion of future instructions, under the phrase "or *may* express" made the bequest void. It was held that these possible future instructions were an essential part of the testator's testamentary intentions, an essential limitation on the gift; and that to the extent that they might add to, or otherwise change existing instructions they would alter the will in the future by a method prohibited by the statute; that a testator may not reserve future control over instructions previously given because such a power of revocation can be legally exercised "only by a writing executed in conformity with the requirements of the statute of wills."

These decisions of the United States Circuit Court of Appeals in the *Atwood* case, and of the Massachusetts court in *Olliffe* v. *Wells,* are in accord with the decisions of this Court, as well as similar decisions in the New Jersey Court of Chancery.

Condit v. *Reynolds,* 66 N. J. Law, 242;
Smith v. *Smith,* 54 N. J. Eq. 1, affirmed 55 N. J. Eq. 821;
Hartwell v. *Martin,* 71 N. J. Eq. 157;
Magnus v. *Magnus,* 80 N. J. Eq. 346.

In *Langdon* v. *Astor's Executors,* 16 N. Y. 9, Chief Justice Denio says:

> "I concede that a testator cannot provide in his will that an act to be performed by him and having no pertinency except its effect upon his testamentary dispositions shall change such dispositions. *Such a provision would allow a testator to alter his will otherwise than by an attested instrument. . . . A new act of testamentary volition requires an instrument in writing clothed with the statutory forms.*"

In *In re Dana Co.,* 215 N. Y. 461, a revocable trust such as the one involved in this appeal was discussed by the New York Court of Appeals. The opinion reads:

> "The trust agreement is essentially testamentary in character. It reserved to the donor . . . the absolute right of revocation at any time during the lifetime of the donor. In fact, *after the execution of the deed of trust Mr. Dana still retained just as much power over the stock as he would have had if he had disposed of it by will instead of executing the instrument* which he delivered to Mr. Seibert (the trustee.) *There was no element of finality about the instrument during the donor's lifetime, for it was just as capable of revocation as a will would have been.* Under these circumstances it was a transfer of a testamentary nature, and must be regarded as speaking from the time when it became effective by reason of the death of the party who executed it. . . . *If the gift under the trust instrument had been irrevocable* so that its execution and delivery in 1905 placed

> it beyond the power of the donor to take it back, the case would be quite different. Then the interest of the beneficiaries would have vested at the time of the execution and delivery of the trust deed, and although it might not take effect in possession until followed by the death of the donor, it might well be held that the gift thereunder was distinct. . . . In the present case, however, the trust instrument took effect precisely as would a will bequeathing the stock which he might make."

(This opinion of the New York Court of Appeals delivered by Chief Justice Bartlett, was concurred in by the full court, including the present Chief Justice Benjamin N. Cardozo, who delivered the opinion in the *Fowles* case).

SO FAR AS THE RESIDUARY PROPERTY WHICH WOULD PASS TO THE TRUST AND BE CONTROLLED BY THE TERMS OF THE REVOCABLE TRUST AGREEMENT INVOLVED IN THIS APPEAL IS CONCERNED, the provisions of the trust agreement have no finality, because revocable during the testator's life-time; and the will, of which such revocable provisions would become a part if permitted to be incorporated into the will by reference, would be subject to change by the testator by his changing the trust agreement at any time. If the trust agreement were revoked, the residuary bequest in the will would be at the same time, and thereby, revoked. There would then be no trust and no beneficiaries and the residuary property would go to entirely different persons.

The trust agreement involved in this appeal performed not a single independent function at the time that the will was executed. It was propertyless. It covered no existing trust fund.

The property which had been given to Maurice J. Swetland with respect to the distribution of which he had executed Ex. B (p. 21), had been taken from under the terms of that declaration

of trust, and on January 3, 1922, had been redeposited with the said Maurice J. Swetland under the agreement, Ex. C (p. 25), and as heretofore set forth, the agreement of January 3, 1922, made a different distribution of the property than the agreement (Ex. B), of July 14, 1917, which the court below has held to be the agreement referred to in the will. The list of securities in the agreement of January 3, 1922 (Ex. C), includes all of the securities listed in Ex. B, the declaration of trust of July 14, 1917. The declaration of trust (Ex. B), of July 14, 1917, was merely an empty shell attempted to be revived by the testator for the sole purpose of controlling such part of the testamentary property as should be placed in it *tentatively* by the will.

That its chief function was to keep the testamentary property, which the will thus *tentatively* placed in the trust, subject to the testator's control during his life, so that he could take it back and make other disposition of it if he so desired, as if it were at all times undisposed of, is evidenced by the fact that only nine days previous to the execution of the will he had executed the trust agreement (Ex. C) of January 3, 1922, by which the disposition of part of his property *other than this portion of his residuary estate* was made irrevocable. He certainly had not forgotten the existence of this other and irrevocable trust agreement covering the other property, executed by him to the same trustee only a little over a week before. The evidence shows him to have been a keen, alert, experienced and successful business man of large wealth accustomed to keep his business affairs clearly in mind.

If he had wished to relinquish the control over his testamentary disposition of this part of his residuary estate he had but to refer, in the will,

to the nine day earlier *irrevocable* trust agreement. His avoidance of this, and his attempting to revive the old revocable trust could hardly, under these circumstances, have been purposeless. That he intended to make use of the power of revocation reserved in the old trust instrument, if he deemed that course advisable subsequent to the execution of the will is shown by the fact that he had at least twice before exercised that power. (See recital in preambles of 1917 and 1922 trust agreements.) (Exs. B and C attached to the Bill of Complaint.) And in the later trust agreement (Ex. C) he had made a change of beneficiaries whereby the whole of, or part of, the property covered by the later trust agreement, which included all of the property which had been under the earlier trust agreement, might ultimately go under a contingent remainder and gift over clause—to the son's "wife" whoever she might be instead of to his "present wife" as in the earlier trust agreement, and added other terms not in the earlier trust agreement. The oldest of the three trust agreements known to have existed (the 1916 trust agreement mentioned in Ex. B) must have been of still different terms, for a person does not execute new later trust agreements revoking former ones except for some changes in the trust. (The terms of the oldest trust agreement of 1916 referred to in the next later one (Ex. B) are not shown.)

That this revocable trust was intended by the testator to be a means of controlling his residuary property is further shown, as is the essential relationship of this revocable instrument to his testamentary plans to be expressed in a will referring to the instrument, by paragraph 3 of the trust agreement (Exhibit B) which refers to *"said trust and all additions thereto"*, and also provides that in case of the death of the beneficiaries

before a certain event "that then and in that event the principal of said trust *shall revert to and become a part of the* RESIDUARY ESTATE *of the aforesaid founder, Horace M. Swetland* (the testator)".

The provision of the trust agreement quoted at the end of the preceding paragraph is immediately followed by the paragraph numbered 4, which reserves to the testator full power of revocation of the trust agreement, and thereby full power to revoke the residuary gift which the will provides is "under the trust agreement".

These two documents are so linked together in the testamentary plan that the plan is incomplete without the provisions of both, and *so far as the residuary bequest and the residuary property which would pass thereunder is concerned,* revocation of the trust agreement or alteration thereof under the unlimited power over it reserved by the revocation clause would be at the same time revocation of the residuary bequest and would entirely change the ultimate destination of the residuary property; it would both change the beneficiaries and their shares. This, as all the cases agree, and as this Court has held in unequivocal terms, can be done only by another will or codicil executed in compliance with the statute of wills.

In line with the foregoing facts, the evidence also shows (pp. 93-95) that all of the property that was under the 1917 trust agreement (the revocable one the will refers to) was kept during the testator's life in a safe in the office of one of the subsidiaries of the corporation of which the testator was president, said office being in the same building, at 239 West 39th Street, in New York City, although Maurice J. Swetland, the chief beneficiary and the "trustee" lived in California and was in business there.

The language of the residuary clause of the will and the revocation clause of the trust agree-

ment together, says, in effect: "I give one portion of the residue to Maurice J. Swetland, as trustee, for the purposes stated in the trust deed *if I do not during my life direct otherwise which I expressly reserve the right to do.* In the event of my deciding to revoke the provisions of this trust agreement the property which my will says shall go to the beneficiaries named in the trust agreement shall not go to them but shall be subject to my disposal in any way in which I may desire."

It is seen from the authorities cited that: (1) if the will refers to an extrinsic instrument which is itself revocable or in any way subject to future change by the testator—if it for any reason lacks *finality* and is subject to either addition, subtraction, or complete revocation, so that the testator may, by so altering or revoking the extrinsic paper, thereby change the destination of the testamentary property, and in that way change the effect of the will; or (2) if the provision of the will itself is in such language that it could contemplate the inclusion of future instructions of the testator, which would affect the testamentary disposition in the future, as his testamentary desires might change from time to time—in either of these situations, *i. e.,* whether the future power of control is reserved in the extrinsic document or in the will—the provision of the will is void.

Authorities from every State whose courts have passed on the question could be quoted to the same effect, whether or not there may be among them some courts which have sanctioned incorporation of extrinsic documents under some circumstances; for in all jurisdictions, regardless of any diversity of views as to the propriety, under the language of the statutes of those States, of allowing an extrinsic document to be incorporated into a will by reference or to be "referred to" to

"identify" the terms of the trust and the beneficiaries, every case holds that such a provision reserving to the testator future control over the destination of the testamentary property renders the provision of the will void, by preventing incorporation, or renders the will, augmented by the incorporated document which is by its own terms revocable, void, because otherwise, to use the language of *Hartwell* v. *Martin,* the testator might change his mind from time to time in the future and, acting in accord with such change of testamentary desires "might change the extrinsic paper from day to day, and thus enlarge or diminish his testamentary gifts as often as he chose without observing the rules of law relating to the testamentary disposition of property"; and, in the language of this court in *Condit* v. *Reynolds,* because the power to designate beneficiaries in the future and *dehors* the will cannot be reserved in a will and if the language used manifests such an intention the provision "is invalid . . . because it attempts to reserve to the testatrix a right to make a testamentary disposition of her property without compliance with the statute of wills",—because to leave the final determination of the beneficiaries to the future control of the testator is to illegally reserve the power to "do that which she could not lawfully do unless she did so by a writing executed in conformity with the statute of wills."

No case to the contrary, in any jurisdiction, can be cited.

VIII.

The gift cannot be sustained upon the theory that the trust agreement is not a document of a "testamentary nature."

The Vice Chancellor, at the end of his conclusions (pp. 133-134) says that:

> "In the case at bar the trust agreement is not testamentary in character—it is not even executed by the testator—it is declaratory merely, not dispositive."

We do not know just what is meant by the statement that the trust agreement is not of a testamentary nature, and that it is declaratory merely. We must look to the trust declaration to ascertain not only the persons to whom the residue of the estate of testator ultimately goes, but also to ascertain how and in what manner it devolves. It is certainly as testamentary in its nature as the instruments dealt with in *Murray* vs. *Lewis,* 94 N. J. Eq. 681, and *Hartwell* vs. *Martin,* 71 N. J. E. 157.

This court has stated that the beneficiary of a testamentary trust must be *named in the will* and all the terms of the trust—*the testator's entire testamentary plan*—including the shares of the beneficiaries, must appear *on the face of the will,* and that evidence of extrinsic written or oral trusts referred to by the will is inadmissible (*Smith* vs. *Smith,* 54 N. J. E. 1, affirmed 55 N. J. E. 821; *Condit* v. *Reynolds,* 66 N. J. L. 242).

Condit vs. *DeHart,* 62 N. J. L. 78; *In re Fowles,* 222 N. Y. 222, 118 N. E. 611; *In re Piffard,* 111 N. Y. 410, 18 N. E. 718, 2 L. R. A. 193, referred to by the Vice Chancellor, were all cases which involved the matter of a power of appointment exercised by one other than the testator by that one's duly executed will.

In *Murray* v. *Lewis,* 94 N. J. Eq. 681, a letter naming the beneficiary of *a trust* addressed to the executors and directing them as trustees to pay a sum named in the will to a certain beneficiary named only in the letter, the will saying that the letter expressed the testator's wishes as to whom the executors should deliver said sum, was held to be testamentary.

In *Hartwell* v. *Martin,* 71 N. J. Eq. 157, a list of creditors referred to by the will, from whose debts the testator had some years before been discharged under an assignment for the benefit of creditors, for less than the full amount of the debts, whom the testator directed in the will should be paid in full without interest, the list being merely a list of names with opposite each name the amount to be paid that creditor-legatee, was held to be barred from incorporation and excluded from evidence by the statute.

In *Magnus* v. *Magnus,* 80 N. J. Eq. 346, a letter addressed to the testatrix's niece and containing instructions as to whom the niece should deliver certain articles of personal property belonging to the testatrix, was held testamentary, and that as the disposition was incomplete without the plan of distribution therein contained the property covered thereby was intestate.

In *Smith* v. *Smith,* 54 N. J. Eq. *Affirmed* 55 N. J. Eq. 821, the details of the plans for the organization of a school for mechanics, for which the will placed part of the estate *in trust,* was held testamentary, and it was held that, therefore, oral testimony relating thereto could not be received.

In *Condit* v. *Reynolds,* 66 N. J. Law 242, instructions to be given by the testatrix as to who should be the particular beneficiaries under a limited power of appointment were held to be tes-

tamentary and therefore could be shown only through the medium of a duly executed will setting out this information.

In *Booth* v. *Baptist Church,* 126 N. Y. 215, 28 N. E. 238, a list of the particular securities with which bequests of certain amounts specified in the will, to legatees named in the will, should be paid, was held to be testamentary.

In *Williams* v. *Freeman,* 83 N. Y. 561, a memorandum made by the testator, further explaining his intentions expressed in the will, was held testamentary and not admissible in evidence and therefore not to be considered a part of the will.

In *Hathaway* v. *Smith,* 79 Conn. 506, 65 Atl. 1058, an extrinsic *trust agreement* was held to be testamentary.

In Byran's Appeal, 77 Conn. 240, 58 Atl. 748, a letter naming the beneficiary of a bequest made in the will to the executors in trust for the person to be named in the letter, was held to be testamentary.

In *In re Diament's Estate* (1915), 92 Atl. 952, N. J. Eq., it is held that "A provision for revocation, express or implied, is purely testamentary in its inherent nature."

In *In re Dana Co.,* 215 N. Y. 461, 109 N. E. 557, the New York Court of Appeals held that a revocable Trust Agreement "is essentially testamentary in character."

It will be noticed that in several of these cases it was the terms of a trust or trust agreement which were held to be testamentary.

This court in *Stevenson* v. *Earl,* 65 N. J. E. 721, held that because the provisions of the rules controlling a railroad employees' savings fund permitted the depositor to withdraw all or any portion of the deposit at any time, the provision of another rule that such part as the depositor shall not have withdrawn during his lifetime should

go to such person or persons as the depositor had designated on becoming a depositor, were testamentary in character. The court held that the transaction could not be considered as a gift in vivos or as a trust because of the power retained by the depositor to withdraw, without restriction, all or any part of the fund, and said:

> "To hold that such a method of disposing of property by the owner at his death is valid would be to practically repeal the statute of wills. . . ."
>
> * * * * * *
>
> "The learned vice chancellor, who heard the cause in the court below, concluded, from the facts which have been recited, that there was a distinct donative purpose on the part of the husband towards the wife covering this fund, and that, as a matter of law, the effect of his agreement with the company was to impress the subject-matter of this donative purpose with a trust whose terms were defined by the printed regulations that constituted the agreement between the donor and the company, including both the withdrawal of sums by the settler of the trust during his lifetime and the payment to his widow of any balance that might at his death stand to the credit of his account. *Although we concur in the view that, on the facts set forth, a clear donative purpose appears on the part of the deceased toward his wife, we cannot agree that it covered the whole amount of the deposits made by him. On the contrary, it seems to us to be so plain as to be beyond the shadow of a doubt that he intended to retain the absolute control and ownership of all moneys which were deposited by him, and to deal with them on that basis, during his life;* and that his donative purpose toward his wife was confined solely to such balance, if any, as should remain to his credit at his death. Nor can we accede to the proposition that the agreement between the husband and the company is, in effect, a declaration of trust by the

former in favor of his wife. As was said by Bacon, V. C., in Warriner *v.* Rogers, L. R. 16 Eq. Cas. 348, and repeated by Sir George Jessel, M. R., in Richards *v.* Delbridge, L. R., 18 Eq. Cas. 13:

> 'The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be that the donor, or grantor, or whatever he may be called, *should have absolutely parted with that interest which had been his up to the time of the declaration;* should have effectively changed his right in that respect, and put the property out of his power, at least in the way of interest.'

Instead of the agreement showing that by force of it the husband had parted with his interest in the funds then deposited and thereafter to be deposited by him—that he had put them out of his power, so far as any interest of his own was concerned—*it in terms preserves to him the absolute right of dealing with and disposing of them solely for his own benefit.* And that he exercised this right to its fullest extent is shown by his dealings with the deposits, as set forth in the statement of facts above recited. If the right of the wife to the fund in dispute is to be sustained at all, it must be because the donative purpose of the deceased toward her, with relation to such balance of his deposits as should remain to his credit at his death, was rendered effective by the agreement entered into between himself and the company, coupled with the delivery by him to her of the passbook which he had received from the company as a voucher; in other words, because that agreement and the delivery of the passbook constituted a valid gift inter vivos. But, in order to legalize such a gift, there must be not only a donative intention, but also, in conjunction with it, *a complete stripping of the donor of all dominion or control over the thing given.* Cook *v.* Lum, 55 N. J. Law, 375, 376, 26 Atl. 803. As was said in the case cited, this is

the crucial test; and if it be applied to the present case the gift is not to be sustained, for neither by force of his contract with the company nor by the delivery of the passbook did he intend to, nor did he in fact, part with his complete dominion over any part of the moneys deposited by him. *The expressed intention of the deceased was only to bestow upon his wife so much of his deposit as should remain undrawn by him at his death.* **Such a gift, it seems to us, is purely testamentary in its character.** *If it is not, then it is a perfectly easy thing for a person to retain the absolute control and dominion over his moneys and personal securities during his life, and transfer that dominion to another at his death, with total disregard of the requirements contained in the statute of wills, by the simple device of depositing such moneys and securities under an agreement with the depository that he shall have the right to use them or deal with them as he pleases during his life, and that at his death so much of them as may remain shall be delivered to such person as is named in the agreement, who shall then become the owner thereof,* and then delivering the agreement to the beneficiary with a statement of the same purport as that made by the deceased to his wife when he gave the passbook to her. *To hold that such a method of disposing of property by the owner at his death is valid would be to practically repeal the statute of wills in its operation upon personal property, so far as its mandatory provisions are concerned.''*

It is hard to differentiate the underlying facts in that case from those in the case at bar. There, in fact, the depositor said that he desired that the property deposited by him in the fund with a trustee should go to his wife in accordance with the rules of the organization, except such portion as he might, in his lifetime, withdraw, or, in other words, except such portion as he might elect in his lifetime should not go to his wife in accord-

ance with those rules; here, we have the trust agreement or declaration of July 14, 1917, which says, in effect, precisely the same thing, i. e., "if I do not change the trust agreement, then my property shall be distributed in accordance with the terms of that agreement; if I do change it, it is to be distributed in the manner in which I may change it."

If, then, the rule against the incorporation of extrinsic documents is limited, as was contended below, to the exclusion of documents which are of a *testamentary* nature, it is clear that, under the cases above referred to, this document *is* of a testamentary nature.

> (1) It designates beneficiaries to whom the residuary property is to go;
>
> (2) distributes the income therefrom until a certain event;
>
> (3) fixes the time at which and the persons to whom the principal of the trust shall be finally distributed;
>
> (4) provides for limitations over in case of the death of one or more of the beneficiaries;
>
> (5) provides for a reversion of such property to the testator's "residuary estate" in the case of the death of all of them;
>
> (6) reserves to the testator, the trustor, power to revoke any or all of these provisions at any time.

An instrument could scarcely be more testamentary. It sets forth a complete and detailed plan of distribution which is an integral part of the testamentary disposition and is, to use the language of *Smith* v. *Smith,* 54 N. J. Eq. 1, "a re-

strictive scheme . . . meant to be an essential limitation of his gift."

If these provisions contained in the trust agreement had appeared in the will itself it could hardly have been contended that they were not testamentary in nature.

If any definition of what is an extrinsic document of a testamentary nature is needed, the cases excluding these various documents and oral testimony as to the terms of extrinsic trusts, indicate that:

> Any extrinsic document which furnishes the detailed plans of a testamentary disposition, the general character of which is stated in the will, is testamentary just as those detailed directions would be considered such if they were found in the will itself.

However, under our decisions, *no extrinsic document* mentioned in a will may be incorporated into it by reference, or referred to for the purpose of ascertaining the beneficiaries named therein, their shares, or any other term of such paper for the purpose of giving them or it effect as part of the will; and, in particular, an extrinsic *inter vivos* trust agreement covering a trust into which some of the testamentary property is to go, and whose terms are to control a detailed plan of distribution to beneficiaries named only in the extrinsic trust agreement, cannot be incorporated into a will which refers to it, or received in evidence to "identify" the beneficiaries and/or their shares, or in any other way be given effect as part of the will.

It is quite different from the case which would arise if the testator had directed that there should be paid certain monies to "the person who now is the owner of No. ..... Street, Newark, N. J." In such a case, while one

would have to go outside of the will to determine who was the person referred to, the evidence with respect to that person would not be *oral testimony directed to an act of the testator;* it would be testimony with respect to a situation wholly beyond the control of the testator.

Counsel for respondents cited a line of cases holding that bequests to such persons as shall have taken care of the testator in his last illness, or shall be in his employ at the time of his death, or shall be his surviving partner, and the like, are good.

This same line of cases was cited to the court in the *Atwood* case, *supra,* and were there distinguished from cases such as here. They have likewise been distinguished by the Court of Appeals of New York.

Chief Justice Denio, speaking for the Court of Appeals in *Langdon* v. *Astors,* Exrs., 16 N. Y. 9, 25, ... N. E. ....., says:

> "There is no principle in the law which forbids the making of testamentary gifts dependent upon the happening or not happening of any event in the future, whether in the testator's lifetime or afterwards. A bequest may be made with a provision that it shall not be operative if the legatee shall in the testator's lifetime receive a particular sum of money from another person, or if he shall within that time become entitled to an estate as the heir or legatee of another. So a testator may very properly provide that a legacy given in his will shall not be operative if he shall in his lifetime give the legatee a like sum. *This is not the reservation of a license to alter or revoke his will by an unattested paper.* The fact which is to destroy the legacy in such a case *is not a change of purpose, a new act of testamentary volition, which requires an instrument in writing clothed with testamentary forms.* . . . I concede that a testator cannot prescribe in his will that an act to be performed by him, indifferent in itself and having no pertinency except its effect upon his testamentary dispositions, shall change such dispositions. *Such a provision would allow a testator to alter his will otherwise than by an attested instrument. He cannot therefore declare that any mere entry in his books, or other writing without attestation according to the statute, shall in itself have any effect upon the provisions of his will.*"

In the *Atwood* case (275 Federal 513, 523) the United States Circuit Court of Appeals (1st Circuit) also distinguished them, the court saying, page 523:

> "It seems equally clear to us that this case does not fall within the rule which permits a testator to determine to some degree the objects of his testamentary bounty by his own subsequent conduct, as, for instance, in cases of gifts to servants in the employ of the testator at his decease, or to surviving partners, or to the persons or institutions caring for the testator in his last sickness. It is, of course, true that the volition of the testator as to who shall be his servants or partners, or final attendants, is a factor in selecting the objects of his testamentary bounty. But it is not the only factor. The volition and acts of such legatees are also factors in determining whether the designated relationship shall or shall not exist at the time of the testator's death. There is a great practical as well as legal difference between such relationship—arising 'in the ordinary course of his affairs or in the management of his property'—and a relationship which arises solely out of the bounty-giving volition of the testator. The distinction, however fine, is well recognized in the authorities, and we cannot hold ourselves at liberty to disregard it. Dennis *v.* Holsapple, 148 Ind. 297, 47 N. E. 631, 46 L. R. A. 168, 62 Am. St. Rep. 526; Lear *v.* Mansar, 114 Me. 342, 96 Atl. 240; Harriman *v.* Harriman, 59 N. H. 135.

These cases, as well as cases involving advancements (see Langdon *v.* Astor's Ex'rs. 16 N. Y. 9; Lawrence *v.* Lindsay, 68 N. Y. 108; Moore's case, 61 N. J. Eq. 616, 47 Atl. 731; Robert *v.* Corning, 89 N. Y. 225, Harris *v.* Harris' Estate, 82 Vt. 199, 72 Atl. 921; Coyne *v.* Boyce, 78 Md. 22, 26 Atl. 1021; Blackstone's Appeal, 64 Conn. 414, 30 Atl.; Holmes *v.* Coates, 159 Mass. 226, 34 N. E. 190; Sanford *v.* Raikes, 1 Merivale, 646, 653), undoubtedly involve gifts dependent in part upon future acts of the testator. But we agree with counsel for the plaintiff that none of them sustains the proposition that a testator may make a valid testamentary provision incorporating an extrinsic trust created by him and subject to change as his testamentary desires may change, *so that every alteration, oral or written, of the trust instrument is really a change in the disposition of his testamentary estate.''*

IX.

The gift cannot be sustained upon the theory that it is to an existing trust.

The Vice-Chancellor, in his conclusions, treats the trust as if it were an entity and says that the testator merely added additional property to it, and that the trust, as such, is one which is not theoretical, nebulous, intangible, or incapable of identification, but exists in fact.

In the first place, at the time of the making of the will there was *no existing trust* under the trust declaration of July 14, 1917, Exhibit B (p. 21). *All* of the property which had been given to the trustee and with respect to which the trustee executed the trust declaration, Exhibit B, had been re-delivered to the testator and delivered to the trustee under the terms of the trust agreement of January 3, 1922, Exhibit C (p. 25), and

that agreement provided for a different disposition of the property than did Exhibit B.

The court below does not assume that the residuary estate of the testator, so far as the gift to Maurice J. Swetland is concerned, is governed by the provisions of Ex. C, the agreement of January 3, 1922, on the contrary, in the decree below it is Ex. B, the trust declaration of July 14, 1917, which is held to determine the devolution of the property.

This simply means that the testator has, for the purposes of his will, revived the trust declaration of July 14, 1917, Ex. B, as a declaration *by him* as to how he desired his property dealt with, or in other words, looking at the substance of things, he desired to have read into his will the provisions of the trust declaration of July 14, 1917, Ex. B.

The same argument was made in *Smith* vs. *Smith,* 54 N. J. E. 1, affirmed 55 N. J. E. 821, and the court said, 54 N. J. E. 1, p. 6:

> ''Then, the next question which arises is, whether such a reference in a will is unlawful under our statute (Rev. p. 1247, Sec. 22), which requires the will to be in writing, signed by the testator and attested by two witnesses. The question is not whether that which has existence for other purposes than the scheme of the will may be adopted by reference, as, for instance, the plans upon which Princeton, Yale or Harvard universities are conducted, or to previously-pronounced religious or other doctrines, * * * to recognized schemes for distribution of moneys in charity, * * * but whether the testator, by mere reference to his own language, used to others at previous times, concerning that which was not existing, but was to take life in his will, may, as against his heirs and next of kin, make that language operative in the testamentary disposition of his property.''

In dealing with this phase of the case, we can do no better than to quote the language of Judge Anderson speaking for the United States Circuit Court of Appeals, 1st Circuit, in *Atwood* vs. *Rhode Island Hospital Trust Co.,* 275 Fed. 513, in which case a similar contention was made, although the reference in that will was, not to the *trust agreement,* as it is in the case at bar, but to the *trust itself.* The court said (p. 522):

> "Applying this somewhat abstruse and confusing language to this case, we understand it to mean that, because the trustee named in Mr. Davis' will had, with reference to some of Mr. Davis' property, functions to perform other than those of the will alone, the gift to such trustee is thereby made valid; in other words, that because the respondent Trust Company had, apart from the provisions in the will, a trust relationship to Davis, the bequest to it became valid, although it would have been invalid if this Trust Company had stood towards the testator as Wells stood in Olliffe *v.* Wells, with no trust relationship except that arising under the will itself.
>
> In our view this is a distinction without any legal difference. The real question is whether the residue of this estate was disposed of by Mr. Davis' will. Plainly it was not. *No additional sanctity attaches to this trust because as to the property vested in the same trustee by Mr. Davis during his lifetime it had duties enforceable either in a court of equity or to the performance of which it was bound by contract.*
>
> *Manifestly the real disposition of this estate is made, not by the will but by the shifting provisions in the trust instrument. No amount of discussion or elaboration could make plainer the absolute destruction by such a plan of the safeguarding provisions of the statute of wills."*

Whatever words may be used, the fact cannot be escaped that the devolution of this testator's property rests upon *oral testimony of an act of the testator himself.* This is a quite different thing from a gift to a recognized trust established by another, actively existing, the proof of which does not rest upon oral testimony with respect to the act of the testator and over which the testator has no control. Such a trust may be treated as an entity and a legatee or devisee under a will may be considered as sufficiently identified if such a trust is referred to in the will. It is such a trust that the Chancellor referred to by his language in *Smith* v. *Smith,* 54 N. J. E. 1. The statute of wills is not violated, for no proof by oral testimony is required *of an act of the testator.*

So with respect to those cases holding that one may leave his property to the executor of another. There is a granting of power to the *other* to create the entity, his executor, the appointment of whom is evidenced *by the will of the other executed in accordance with the statute of wills,* and the testator has no control whatever and no act of the testator need be proven by oral testimony. And the executor is in reality not an entirety at all but an instrument to carry on the execution of the power.

Here it is the act of the testator himself, *i. e.,* establishment of this trust, the trust agreement being executed not by the testator but by the trustee, which is to be proven by oral testimony.

While it is true that oral testimony is not used for the purpose of showing that the testator signed the instrument (for he did not) it *is* used for the purpose of showing that the testator created the trust, delivered the securities and accepted the trust declaration, without all of which acts on the part of the testator, the trust declaration of July 14, 1917, Exhibit B, would have no force whatever.

And the testator in his will says: "The bequest to Maurice J. Swetland, trustee, is made under the Trust Agreement heretofore mentioned, and created by me, under date of July 14, 1917, for the purposes herein provided." When proof other than that permitted by the statute of wills is permitted to be offered, with respect to the acts of the testator, for the purpose of determining the devolution of testator's estate by the terms of his will, the statute of wills is repealed and it does not alter the real situation to call the act of the testator, which is referred to, the creation of a trust. The door to fraud is as open in the one case as in the other.

To admit the trust agreement in evidence, or to permit it to be referred to for the purpose of ascertaining the persons to whom the estate passes by the will "regardless of what the rule is in New Jersey with respect to the doctrine of incorporation by reference, and about which there seems to be some contrariety of view," to use the language of the vice chancellor, and thereby give effect, as a part of the will, to the *contents* of the trust agreement, is, we submit, a proposal to obtain all the benefits of incorporation by reference and escape the rule against such incorporation by ignoring the substance of things. It is, to use the language of Judge Anderson, in the United States Circuit Court of Appeals, in *Atwood* v. *Rhode Island Hospital Trust Company,* 275 Fed. 513, "a distinction without any legal difference."

Such a procedure would be one and the same thing as incorporating the trust agreement into the will.

X.

Cases relating to testamentary charitable trusts which hold that the particular beneficiaries of a charitable bequest need not be specified cannot be considered authority for the proposition that in general the will need not specify the beneficiaries and their shares. These cases all state, as do all text-books, that this is a special rule for charities.

This is because the nature of such trusts is such that the particular beneficiaries are never known, and that to hold charitable trusts void because the particular beneficiaries are not named would defeat most charitable trusts whereas the policy of the law and of Courts of Equity is to encourage charitable bequests.

This is explained in *American Bible Society* v. *The American Tract Society,* 62 N. J. Eq. 219; *Smith* v. *Smith,* 54 N. J. Eq. 1, affirmed 55 N. J. Eq. 821; *Johnson* v. *Bowen,* 85 N. J. Eq. 76, 82; and *Nash* v. *Bremer,* 84 N. J. Eq. 131.

Counsel for Maurice J. Swetland cited, in their brief below, a list of charitable trust cases which hold, under the rule peculiar to such cases, stated above, that the individual beneficiaries of a charitable testamentary trust need not be named in the will, for the reason above stated.

XI.

The Vice Chancellor erred in holding that the word "with" in that provision of the will relating to the powers of the trustees in respect to the investment of trust funds, should be read "without".

The will provides that trustees named therein are to hold the testator's property until the death of the widow, and then divide it.

The provision of the will relating to the powers of the trustees in respect to investment of trust funds, page 19, line 12, reads:

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

The following paragraph reads:

> "I expressly authorize my Executors and Trustees of the trusts hereby created, at any time to sell, assign and transfer any stocks or bonds or other securities in which my estate or any of the trust funds hereby created may at any time be invested." (Both the "absolute" discretion and the non-liability clause are absent. See comment *infra.*)

The language of the will, as will be noted, is that such investments must be "with regard to the question whether such investments or re-investments so made by them (the trustees) are of a character permitted by law to fiduciaries."

The trustees, however, seek broader powers.

The chancellor held that the words "with regard" in the above provision should be changed to read "with*out* regard", which would give the trustees unrestricted power in regard to investments.

It is generally recognized that to change the language of a will is in any event a strong measure, which should be resorted to only on the clearest indication and to accomplish a just result.

We submit that a construction which makes it necessary to alter the language of the will should not be indulged in in this case, but that every doubt should be resolved in favor of the safety of the investments in which the trust funds are placed, and to this end every doubt should be resolved in favor of restricting the powers of the trustees in this respect to those securities which the statute specifies as acceptable investment for trust funds.

The Compiled Statutes of New Jersey (Vol. 2, p. 2271, Sec. 35; Sec. 37 (Vol. I, 1911-24 Suppl. to Comp. Stat., p. 1214, Secs. 72-73 (Laws 1903, p. 229) (C. S. 2272)) specify the securities in which trust funds may be invested. The list is broad and includes all securities in which savings banks may invest.

Section 38 authorizes application to the court for direction as to the sale or conversion or retention of investments. (P. L. 1889, p. 169.)

Section 36 provides as follows:

> "Sec. 36. *Act not to apply where deed, will or court* directs manner of investment. Sec. 3. This act shall not apply where the deed of trust, or the last *will* and testament of any testator, or any *court* having jurisdiction of the matter SPECIFICALLY *directs* in what man-

ner the trust fund shall be invested. (P. L. 1899, p. 237.)''

The language of the exception is, where the *testator or the court specifically directs* in what manner the trust fund shall be invested. The inclusion of direction by the court, together with the word ''specifically'', and the fact that directions by the court are always for investment in specific securities, or a specific class or classes of securities, and the coupling in the statute of testamentary directions and court directions, and the applying to both the words ''specifically directs'', indicates, it would seem, a statutory intent to exclude only testamentary trusts where the will directs the specific securities or classes of securities in which testamentary trustees may invest, with the same certainty as the form in which court directions are made. This would seem not unreasonable when, in addition to this language, the purpose of the statute, which is to afford maximum protection to trust funds, is considered.

A court direction is never that the trustees shall in their discretion invest in whatever they choose to invest, and such a direction would afford no protection. It would not be a ''specific'' direction. Even a direction to invest in the securities permitted by law is not a specific direction in the will such as is contemplated by statute, but it is in an express direction that the law, including the statute, is to control.

The statute would apply without the aid of the language of the will. But the language of the will expressly limits the investments to those *which the law permits to fiduciaries.*

Every doubt should, we submit, be resolved in favor of the application of the statute and the safety of the estate. The statute is remedial and is to be liberally construed to accomplish the purpose of its enactment, which was to insure the

safety of trust investments, not to protect the powers of trustees or, in even doubtful cases, to reserve to them a power to submit trust funds to hazards which the statute seeks to eliminate. (*Brown* v. *Brown,* 72 N. J. Eq. 667, 679; *Camden etc. R. Co.* v. *Briggs,* 22 N. J. L. 623, 676; *Horner* v. *Webster,* 33 N. J. L. 387, 405.) Likewise in construing the will the primary intention of the testator must be assumed to be to secure the safety of the trust estate as is the primary intention of every testator under such circumstances.

The construction asked by the trustees (*i. e.,* changing ''*with* regard'', to read ''*without* regard'') *would change a prohibitive and protective provision, a restriction of power, into a grant of power which would expose the trust estate to unnecessary risks.* To change the language used by a testator is, in any event, a strong measure, to be resorted to *only on the clearest indication and to accomplish a just result.* (1 *Jarman on Wills,* *page 469.) Conjecture or hypothesis of the testator's intention is not a sufficient basis for changing the testator's words. (*Ruling Case Law,* Vol. 18 (Wills) p. 203, Sec. 164; *Bingel* v. *Voltz,* 142 Ill. 214.) And a court of chancery will not reform a will, to correct an alleged or supposed mistake, under the guise of construction. (Ruling Case Law, Vol. 28 (Wills), p. 225, Sec. 187.)

This change is asked by the trustees, based on two inferences: (1) because the words ''absolute discretion'' are used in the general part of the language defining the trustees' powers, preceding the limiting language, and (2) because it is followed by a non-liability clause.

The testator's express language cannot be changed on anything but an absolutely necessary inference, in any event. And the inferences claimed do not in fact exist. Every qualification, limitation, or proviso, whether in private docu-

ment or statute law, is preceded by a more general provision which it limits. As said in *Judevine* v. *Judevine,* 61 Vermont, 587, 595, "It makes little difference in the construction whether the granting itself is in form conditional, or the condition is annexed to a clause in form absolute." Also, conditions annexed to a power should be strictly construed. (*31 Cyc.* (Powers) 1132, text 9.) And if there is a conflict between the general language and the restrictive language following it, the latter must control (*40 Cyc.* (Wills) 1417, text 37; 1 *Jarman on Wills* *page 436). Also, in law the word "absolute" adds nothing. Under the New Jersey rule all discretion is limited to sound judgment and good faith regardless of the form of expression in which it is conferred. No "absolute discretion" can be conferred. (*Holcomb* v. *Holcomb* (Chancellor Williamson), 11 N. J. Eq. 281, 290.)

It is evident from the provision of the will that the testator knew that there were some legal restrictions on the powers of trustees over investments, and sought to avail himself of them. It may be assumed that he probably knew more of the law on the question of the statutory investments for trust funds than he did about other phases of the law of wills, as he was a member of the board of directors of a large *Trust Company* at the time the will was executed, and had previously been president of a Trust Company.

That the testator did not intend to stress the "absolute" discretion and the non-liability clause is shown by the absence of both in the following paragraph of the will (above set out) empowering the trustees to *sell* trust securities, although, of course, as he knew, as much loss could be sustained through the sale of securities unnecessarily at an inopportune time, or at any time for an inadequate price, as through reinvestment of the proceeds of such sale.

In *Brown* v. *Brown,* 72 N. J. Eq. 667, 679, the power given in will to trustees "to invest in improved and productive real estate, *or in sound productive securities, such as they may deem best,* or in both real estate and securities," was held to be limited, as to securities, to statutory securities or those specifically directed by the court. In every case a testator, by necessary implication, desires, intends and directs investment to be in sound securities. The court after reviewing the previous New Jersey cases, says in that case (p. 679, next to last paragraph) "I think it unsafe to hold, in view of these decisions, that general language of this sort is sufficiently indicative of an intention to exonerate the executor if he does invest moneys in stocks which depreciate and cause loss to the estate."

Holcomb v. *Holcomb,* 11 N. J. Eq. 281, 290.

In this case, Chancellor Williamson said:

> ("Very much was said upon the argument in reference to the fact that the will declares, in express terms, that the investments shall be made in the discretion of the executors; and the right of this court to interfere with that discretion was questioned. * * * An executor or trustee cannot have an authority conferred upon him not in some measure subject to the control of this court. If the testator had declared that the executors, in the discharge of duties imposed by the will, should not be subject to the control of this court, the court would disregard such a provision in the will. It is the law which gives to the testator the power of disposing of his property by will, and the execution of that will must be submitted to the law. It cannot be taken without and beyond its control by the caprice of the testator. * * * The complainant and her property are under the protection of the law, and no testamentary injunction

can deprive either the one or the other of the benefit of that protection. *Cafe* v. *Bent*, 3 Hare 245.'')

The testator's estate was at the time of his death safely invested.

The executors, the majority of whom are the testator's two sons-in-law, and his son, Maurice J. Swetland, seek, by the beforementioned change in the language of the will, an unrestricted power over investing this large estate of upward of $1,000,000. Every indication of reason and justice to parties in interest, including infants who are in the care of the court, is, we submit, against granting any such power which may endanger the safety of the estate.

The investments should be ordered restricted to statutory securities.

There is a wide range within the statutory field of investments within which to exercise a discretion. The statutory securities include U. S. Government, state, county, township, school district, and municipal bonds, safe real estate mortgages, Federal Land Bank bonds, safe railroad bonds, and all other securities in which savings banks may invest funds. While all are secure investments, there are variations of maturity dates, interest returns, price range readiness of marketability, and other factors considered by investors.

It is respectfully submitted that the decree below should be reversed in the particulars above referred to.

MERRITT LANE,
Of Counsel with Appellants.

CLARE P. JOHNSON,
Of the New York Bar,
Of Counsel with Appellants.

New Jersey Court of Errors and Appeals

Between MAURICE J. SWETLAND, *et al.*, Executors and Trustees, *Complainants-Respondents,* *and* HATTIE SWETLAND, *et al.*, *Defendants-Respondents,* *and* DOROTHY A. JOHNSON, *et al.*, *Defendants-Appellants.*	*On Bill, &c.* *On Appeal from Chancery.*

BRIEF ON BEHALF OF COMPLAINANTS-RESPONDENTS.

This is an appeal from a decree of the Court of Chancery, construing the Will of Horace M. Swetland.

The bill was filed by the executors, who sought the advice and direction of the Court as to the meaning of various parts of the will as to the rights of the respective legatees, and the powers and duties of the executors and trustees.

The Parties.

The complainants are all of the executors and trustees named in the will, viz:

Maurice J. Swetland (often referred to in the record as ''Jack''), testator's son;

Frederic C. Stevens, the husband of testator's daughter, Velma I. Stevens;

Maurice J. Kane, husband of testator's daughter, Ruth D. Kane;

Ernest M. Corey, a trusted friend and business associate of testator for many years.

Furthermore, testator named substitutes for each of the foregoing, viz:

Emerson P. Harris for Maurice J. Swetland;

Velma I. Stevens for her husband, Frederic C. Stevens;

Ruth D. Kane for her husband, Maurice J. Kane, and Emerson P. Harris for Ernest M. Corey.

Thus very pointedly did testator provide that neither his daughter, Dorothy A. Johnson, nor her husband, Dr. Clare Peter Johnson, should ever have a part in the administration of his estate.

The defendants are Clara S. Swetland, testator's widow; Hattie Swetland, testator's half-sister; Maurice J. Swetland, testator's son, individually and as trustee, and his wife, Grace E. Swetland, and their children; Velma I. Stevens, testator's daughter, and her children; Ruth D. Kane, testator's daughter, and her children; and Dorothy A. Johnson, testator's daughter, and her children.

All of the adult defendants, other than the daughter, Dorothy A. Johnson, appear herein by McCarter & English, and Arnold L. Davis (of the New York Bar), and all of the infants, other than the Johnson infants, appear by Thomas Barber, Clerk, guardian *ad litem* (pp. 41 and 43).

Dr. Clare Peter Johnson, the husband of Dorothy A. Johnson, was, on his petition, appointed guardian *ad litem* for the Johnson infants, and he as such guardian, together with his wife, appear by Pitney, Hardin & Skinner,

with Dr. Johnson, (of the New York Bar), as one of counsel (p. 50).

While the cause of the break in the family between the testator and other members thereof, on the one side, and the Johnsons on the other, does not appear in the record, that it did exist is apparent from the care which testator took to exclude either of them from participating in the administration of the estate, on the one hand, and the Johnsons' violent opposition to the will and to the other members of the family as found in this proceeding, on the other.

On this appeal, Dr. Johnson as guardian of his children, and his wife, Dorothy A. Johnson, have abandoned all of the issues, except two—(1) the one relating to Jack's trust, and (2) relating to the powers of the executors to invest "without regard," which are the 13th and 6th issues as stated by the Vice-Chancellor (see p. 110-11).

Statement of Facts.

A copy of the will is embodied in the conclusions of the Vice-Chancellor, pages 99-105.

The story of the physical production of the will is clearly outlined in the conclusions of the Vice-Chancellor found at pages 108 and 109, and is as follows:

> "The testator was a publisher, actively engaged in a number of business enterprises at the time of his death. While he was a man of above the average education, he was not a lawyer, nor was he familiar with the language of the law or the legal niceties resulting from its use. He left an estate valued at upwards of $1,500,000, producing an income of over $50,000 a year. Notwithstanding his large estate and his unfamiliarity with legal terms, he drew his own will

without legal advice, using as a model an earlier will which had been prepared by able counsel. The complete will was composed of scraps from the earlier will, with crossed out parts and interlineations, original names, separate parts dictated at different times over a period of months with intervals of weeks between the different parts, and then the whole transcribed by testator's stenographer and incorporated into 'a complete and connected story of his will.' I think it clearly appears that the will as completed was the result of patchwork and piecemeal construction and obviously contains many errors in the use of words, rendering an interpretation and construction of some parts of the will difficult and making necessary a reconstruction of the will in order to give effect to the apparent intention of the testator'' (pp. 108-109).

By his will the testator created a small trust for his half sister, Hattie Swetland, and placed the entire balance of his estate in trust for the benefit of his wife during her life. At her death, the will directs the estate to be divided equally among his four children. The gifts to the daughters are to them individually. The gift to the son is to ''my son, Maurice J. Swetland, as Trustee, or his successor Trustee. The bequest to Maurice J. Swetland, Trustee, is made under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes *herein provided*'' (p. 17).

By the final decree the words ''herein provided'' were construed to mean *''therein provided''* (Case, pp. 151-152).

The daughter Dorothy and her husband, as guardian *ad litem* of their infant children, contend that the gift to Maurice J. Swetland, as

trustee, is technically illegal and that their brother should be disinherited.

Appellants have attempted to justify the position which they have taken in this case by a statement at pages 3 to 6 of their brief alleging an unjust discrimination against Dorothy in distributions of property made by her father in his lifetime. A careful reading of the record fails to disclose any support whatever for such a statement and we are informed that it is misleading and untrue in fact.

Possibly the most conspicuous impropriety in the statement is the following (page 6 of appellants' brief): ''The evidence on the Executors' accounting, taken before the Vice-Chancellor since the decision of this case, *which will soon be before this Court on appeal,* makes even more clear the justice of the position of Dorothy Johnson.''

The fact is that the matter of the accounting is still before the Vice-Chancellor; the testimony has not even been completed; and, of course, no decision has been rendered. Appellants' brief assures us that the decision—whatever it is—''will soon be before this Court on appeal.'' Appellants speak only for themselves, respondents preferring to await the closing of the testimony, the exchange of briefs and the handing down of a decision before considering the ill-concealed menace of an appeal whatever the court below may determine.

Possibly too much attention has already been given to appellants' breach. They refer to ''evidence on the executors' accounting'' as making more clear the justice of the position of Dorothy Johnson, but fail to point out *what* evidence. The real purpose of the paragraph then becomes

obvious, namely, to notify all concerned that the accounting "will soon be before this Court on appeal." Judging from past performance, it would seem reasonable to take appellants at their word in this particular regard. If the Court is at all interested in this subject, it will find the only testimony with reference to it at pages 65 to 68 and 92 to 96 of the case.

It appears from the testimony above referred to that the testator in his lifetime made a substantial distribution of securities among his children and that the share of his son, Maurice J., was given to him as trustee under the trust agreement referred to in the will.

Two of these trust agreements are printed at pages 21 and 25 of the case. The first is dated July 14, 1917, and is the document referred to in the will. The second is dated January 3, 1922. It is substantially the same trust as that created by the first document; the only differences being, first, that by the second document the donor added valuable securities to the trust fund and, second, that whereas the first agreement by its terms could be terminated by the founder during his lifetime, the second one was made irrevocable. In the language of the second agreement, it was substituted for the first one "without prejudice, but to the great advantage of the beneficiaries" thereof (p. 25).

At the time the will was executed, the document dated July 14, 1917, was in actual existence. At that time the trust referred to by the will was a substantial trust then in actual existence. The will clearly refers to the document and describes it with sufficient accuracy to insure its identity.

The question to be decided is whether or not the gift to Maurice J. Swetland, as trustee under

the provisions of this trust agreement, is valid or void.

ARGUMENT.

The executors and trustees take the position that the gift to Maurice J. Swetland as trustee under the trust agreement dated July 14, 1917, can be sustained on two theories: First, upon the theory of incorporation by reference; second, upon the theory that the trust agreement is not testamentary in character and may therefore be referred to for the purpose of defining and making certain the persons to whom and the proportions in which the estate is to be distributed.

I.

FIRST, AS TO INCORPORATION BY REFERENCE.

A.

The general rule both in England and in this country is that an extrinsic document whether testamentary or not, may be incorporated into a will by reference provided that the following three conditions are complied with:

1. There must be a testamentary reference in the will to the document sought to be incorporated.

2. The extrinsic document must be so accurately described in the will as to assure its identity.

3. The document must be in actual existence at the time when such reference to it is made in the will.

This rule has been almost universally adopted in this country.

The law against incorporation by reference is often spoken of as most strictly applied under the laws of New York. In Jessup-Redfield Law and Practice in the Surrogate's Court (1925 Edition), pages 638-639, which is the leading work on probate law in New York State, this class of cases is divided into four kinds:

1. "End of the will" cases where, by an index finger or by the words "see over," dispositive clauses have been found upon a page or sheet subsequent to the signature, and most of the cases held that such things were not to be deemed a part of the will.
2. Wills containing the clause "as may appear from memoranda that will be found by my executors among my papers." With few exceptions, the courts declined to give dispositive effect to these memoranda. *Booth* v. *Baptist Church,* 126 N. Y. 215, is an illustration.
3. Cases where "a properly executed codicil" referring to a will, takes up and incorporates that will and validates it, even if the will itself were not properly executed.
4. "But the final case, and one the principle "of which is applicable to all formal in"struments, such as deeds, indentures of "trust and wills alike, is the general rule "of incorporation by reference. As to this "it is to be observed that on the following "propositions there is complete unanimity "in the decisions that there are three es"sentials to the effectualness of such in"corporation where a will is concerned. "(1) The reference in the will to the docu"ment sought to be incorporated must be "explicit and unmistakable, (2) and the "description of the document sought to be

"taken up must be such that there can be "no mistake, and, (3) the paper so sought "to be incorporated must be in actual ex"istence at the time the will is made, that "is, it must not be a paper *to be prepared.*

"It is in this connection that error has "been committed in a number of cases by "confusion of this general rule in its appli"cation to wills with the decisions affect"ing an 'end of the' will. The validity of "incorporation, by reference, of an ex"trinsic document into a will does not de"pend on the testamentary character of "that paper, nor upon its own independent "efficacy. (See *St. John's Parish* v. *Bost"wick,* 8 App. D. C. 452.) It depends upon "the fact of its adoption by a will which "itself is duly attested and executed in "conformity with the statute. An authori"tative case of this character was 'Dickin's "Goods' (3 Curt. Eccl. Rep. 60; 1 Notes of "Cases, 398."

At the end of his discussion of this subject, Mr. Jessup lays down the rule—

> *"Where the testator by his own language "deliberately creates an ambiguity or uncer"tainty as to beneficiary, amount of legacy, "or nature of estate given,* AND POINTS THE "WAY, HIMSELF, *by reference to a document "or record that will identify the beneficiary "or measure the gift, then if that document "be in form of the requisite solemnity above "specified, the Court will respect the refer"ence of testator and refer to the document "to guide it in construing the will."*

The rule as to incorporation by reference was criticized in *Phelps* v. *Robbins,* 40 Conn. 250, but the question was left undetermined and in the later case of *Bryan's Appeal,* 77 Conn. 240,

the Supreme Court of Errors again avoided deciding whether or not the doctrine of incorporation prevails in that State.

The rule stated in Jarman on Wills, Vol. 1, Chapter VI, Sec. XV, at page 135 of the Sixth Ed., is as follows:

> "The rule that a document may be incorporated in a will by reference, is not confined to unattested wills and other documents intended to have a testamentary operation, but extends to any document referred to by a testator in order to elucidate or to explain his intention. The document, if sufficiently identified, is then said to be incorporated in the will. Thus, where a person by his will devises all the lands which were conveyed to him by a certain indenture (specifying the deed), *or devises lands to the uses declared by a particular indenture or settlement,* it is clear that the indenture so referred to may be consulted for this purpose, without violating the principle of the enactment, which requires an attestation by witnesses, the testator's intention to adopt the contents of such instrument being manifested by a will duly attested; and it would, it is conceived, be immaterial whether the paper so referred to was in the testator's hand-writing, or in that of any other person, and whether it professed to be testamentary or not, as it founds its claim to be received as part of the will, not on its own independent efficacy, but on the fact of its adoption by the attested will.
>
> "But whatever be the precise nature of the document referred to, it must be clearly identified as the instrument to which the will points. Two things are necessary; first, that the will should refer to some document as then in existence; second, proof that the document propounded for probate was, in fact, written before the will was made, and was identical with that referred to in the will."

Schouler on Wills, Part III, Chapter 1, Sec. 281, Vol. 1, page 345, 5th Edition, states the rule as follows:

> "Sec. 281. Instruments Incorporated in the Will and Documents Extraneous.
>
> "It is held, moreover, in various instances that if a testator refers in his duly executed and attested will to another paper which has already been written out, clearly and distinctly identifying and describing it, so that it may be safely incorporated in so solemn a disposition, that paper should be probated as part of the will itself. But a later or even a contemporaneous writing, having the character of a mere letter of instructions to one's executors, and not being executed and attested as the law requires, can have no temporary operation, and should not be admitted to probate. And, in general, an extraneous unattested writing, to be incorporated with the will itself, should be reasonably identified by reference as part of it and as existing when the will was executed. (2).
>
> "The modern English and American rule on this point is succinctly stated in a Massachusetts case: 'If a will, executed and witnessed as required by statute, incorporates in itself by reference any document or paper not so executed and witnessed, whether the paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof, as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such. (3.) In conformity with such a doctrine, a will which was void for want of proper attestation, has been validated by a subsequent codicil properly attested, which sufficiently refers to and embraces it. (4.)"

Theobald on Wills, Chapter IX, Canadian Edition of 1908, page 65, states the rule as follows:

> "III. Incorporation of Documents—Any document in existence when the will is executed, and sufficiently described to enable it to be identified, may be incorporated in the will, and may be referred to for the purposes of construction, whether incorporated in the will or not."
>
> Canadian Notes, Chapter IX, page 69a:
>
> "Documents in existence at the date of the execution of a will may be incorporated with the will by express reference to them, but not documents coming into existence after the execution of the will. And so, entries in a book sufficiently referred to in a will which are made before the execution of the will are incorporated in the will but not those made after the execution."

The leading English case is *Allen* v. *Maddock,* 11 Moore, P. C. 427, 6 Week. Rep. 825. In that case the testatrix executed a will which was attested by one witness only and therefore invalid. Thereafter she executed a codicil by which she gave certain legacies to different persons, which was duly attested as provided by the statute. The only reference to the former paper or intestate will was in the beginning of the codicil in which she stated: "This is a codicil to my last will and testament." The court after reviewing the authorities on the question of incorporation of an extrinsic document in a will, concluded by saying that the only question in this case was whether there was sufficient evidence to identify the paper propounded as a will. It was shown by the testimony that the paper in question was written by the testatrix, was found locked in her possession at her death in a sealed envelope, on which there was an endorsement describing it as her will and that after diligent search no other

paper had been found answering the description. The court held that the will as well as the codicil was properly admitted to probate. The decision in this case was rested squarely upon the doctrine of incorporation by reference.

Another English case very similar to our own case is *in re Dickins,* 3 Curt. Eccl. Rep. 60, 1 Notes of Cases, 398, 163 English Reports, Full Reprint, page 655. In that case where a testator left property to his eldest son in trust for himself and other children as expressed in an indenture of settlement made between him and the testator two years before, it was held that the indenture was part of the will but that as the original indenture ought to be retained by the trustee, a notarial copy should form part of the probate.

Another English case is *Goods of Durham,* 3 Curt. Eccl. 57, 1 Notes of Cases, 365, 163 English Reports Full Reprint, 654, where a widow made a will devising and bequeathing all her real and personal estate upon the trusts specified in the will of her late husband which she described by its date and as having been afterwards revoked. It was held that the revoked will of her husband should be admitted to probate as part of her will.

In *Molineux* v. *Molineux,* Cro. Jac. 144, it was held that a will may be made to take effect with reference to another instrument; and that therefore a devise "of such several annuities as are expressed in several writings signed and sealed" was good.

In *Quihampton* v. *Going,* 24 Week. Rep., 917, the court, in illustration of the rule now under discussion said that there was nothing more common than to give legacies to be held on the

trusts of a marriage settlement and that with respect to estates settled by will, every conveyance must be aware of the common expression of the uses by reference to a document not signed by the testator, as when a landed proprietor, after buying property adjoining his settled estates, devises the purchased property to the uses of his marriage settlement. And that when this is done, the court in construing the will, calls for the document to see what it is.

A full note reviewing the authorities on the point now under discussion will be found in 68 L. R. A., beginning at page 353.

At page 385 of that footnote, the English practice is stated to be as follows: "In England the practice has arisen of admitting a will to probate without a paper conceded to be entitled to be incorporated, because the extrinsic document is an instrument in the hands of parties who refuse to allow it to be used."

Numerous American cases are cited in the footnote in 68 L. R. A., page 353, above referred to.

One of the leading cases in this country is *Newton* v. *Seaman's Friend Society,* 130 Mass., 91, 39 Am. Rep., 433. In that case the testator by the third codicil expressly revoked that part of his will which gave directions for the payment of legacies and ordered his executor to pay the legacies mentioned in his will and codicils according to the directions written in a book by Melvin W. Pierce, signed by the testator, and witnessed by Pierce. The court, after reviewing the authorities held that the document referred to should be admitted to probate and that the probate court after admitting the will to probate, could admit to probate the document referred to in the will which, by mistake was not presented to the court when the will was admitted to probate.

The first syllabus of that case reads as follows:

> "If a will duly executed and witnessed, incorporates in itself by reference a paper not so executed and witnessed, containing directions as to the disposition of the testator's estate, such paper if in existence at the date of the will and clearly identified as the paper referred to, is a part of the will, and should be admitted to probate as such."

A recent Massachusetts case which reviews the authorities in that state is *Bemis* v. *Fletcher,* 146 N. E., 277. In that case testatrix gave the residue of her property to her husband and if he predeceased her, to persons who should be appointed trustees under her husband's will, to be disposed of to the same beneficiaries as should be provided in trusts established by her husband's will. It was held that the testatrix referred to her husband's will in existence when her will was made and that she might in this way incorporate a portion of her husband's will into her own will and that she thereby created independent referential trusts of all beneficiaries of her husband in proportions fixed by her husband's will.

In an earlier Massachusetts case, *Thayer* v. *Wellington,* 9 Allen, 283, 85 Am. Dec. 753, it was held that a testator may refer expressly to a paper already executed and describe it with such particularity as to incorporate it virtually into the will or he may refer to deeds, or other instruments, or monuments or existing facts to which reference may be held in construing his will.

In our state, Vice-Chancellor Fielder, in writing the opinion of *Murray* v. *Lewis,* 94 N. J. Eq., 681, criticised the English rule. The case then before him however, did not come within the English rule for the reason that it did not appear that the letter referred to in the will was in existence at the time the will was executed.

The facts bring it within paragraph 2 of the classification as set forth by Jessup-Redfield, above quoted. On the other hand, it is apparent from other decisions that the English rule has been recognized as the settled law of this state.

In *Hartwell* v. *Martin,* 71 N. J. Eq., 157, the will contained a direction to pay all debts outstanding in 1872 without naming the persons to whom payment was to be made and to ascertain who were embraced in that class, he referred his executors to a "list of all debts that I wish paid" to be found enclosed with his will. Vice-Chancellor Bergen held that the gift was void because it was an attempt to bequeath property to a class of persons who could only be ascertained by reference to a non-testamentary paper which the testator might change from day to day and thus enlarge or diminish his testamentary gifts as often as he chose without observing the rules of law relating to the testamentary disposition of property.

In *Magnus* v. *Magnus,* 80 N. J. Eq., 346, Vice-Chancellor Stevens quoted from the Sixth Ed. of Jarm. on Wills, page 99, as follows, where it said that two things are necessary: "First, that the will should refer to some document then in existence; second, proof that the document propounded for probate, was in fact written before

the will was made and was identical with that referred to in it." He also cited English authorities and also the case of *Newton* v. *Seaman's Friend Society,* 130 Mass., 91, above referred to. He then proceeded to point out that the case then before him did not comply with the rule as expressed in the English and Massachusetts authorities. It is obvious however, upon reading the opinion that he assumed the law of this state upon this subject to be the same as it is in England and Massachusetts and the other states with the exception of New York and possibly Connecticut.

This question was also considered in *Smith* v. *Smith,* 54 N. J. Eq. 1, aff'd 55 N. J. Eq. 821, and *Condit* v. *Reynolds,* 66 N. J. L., 242, but in those cases also the wills under consideration did not comply with the requisites of the English rule.

In all of the New Jersey cases above referred to one or more of the requisites of the English rule was lacking. There are however, three decisions in this state which show conclusively that the English rule (which is also the general rule in this country) has been adopted as the law of this state.

The first is the case of *McCurdy* v. *Neall,* 42 N. J. Eq., 333. In that case it was held that a duly executed codicil to a will expressly confirming the provisions of the will is a republication of the will itself in supplying all omissions and remedying all defects, if any, in the execution of the will. While the language of this decision differs, it is, nevertheless, practically identical with the decision of the English case, *Allen* v. *Maddock,* 11 Moore, P. C. C., 427, above referred to as the leading English case on the

subject now under consideration. The rule as laid down in *Allen* v. *Maddock* is the rule which was criticized by Vice-Chancellor Fielder in *Murray* v. *Lewis,* the opinion expressly referring to that case. In *McCurdy* v. *Neall,* however, the Chancellor considered that the law upon this subject was so well established in this state that there was no good ground of appeal and he therefore declined to give the appellant either costs or counsel fees out of the estate.

The next case is *Condit* v. *De Hart,* 62 N. J. L., 78. In that case testator by his will, devised his residuary estate to his son H. By a codicil he afterwards authorized his son to dispose, by his will, of the residuary estate. And then devised and bequeathed the same to such persons or person as his son should designate and appoint by his will as those to whom he desired it to go. H. died before the testator, leaving a will in which, after reciting the power of appointment contained in the codicil to his father's will, he designated his wife A. as the person to whom the estate should go.

It was held that while the power of appointment could not be executed by H. during the donor's lifetime and that therefore his will was not a good execution of it (because he could not by his will make a valid disposition of property which was wholly and absolutely in the ownership and control of another), yet the devise contained in the codicil to the testator's will, to such person or persons as H. should designate in his will, operated to pass the estate and that the will of the latter could be referred to for the purpose of ascertaining the personalty of the testator's devisee.

> "The son having died in the lifetime of his father, the will of the former, although not transferring the father's residuary estate by an appointment, is to be referred to for the purpose of ascertaining the person to whom that estate passes by the father's will. The latter instrument effectuates what the son attempted to do but could not do by his own will. *In re Piffard,* 111 N. Y., 410."

The third case which clearly establishes the rule in this state is *Smith* v. *Runkle,* 97 Atl., 296, 300, 302; aff'd by the Court of Errors and Appeals, 98 Atl., 1085, 1086 and 1087. In that case one of the questions was whether or not the first half sheet offered for probate was a part of the will. The court held that this half sheet while it may not have been in the will at the time it was executed was nevertheless prepared and annexed to the will prior to the execution of the codicil.

At page 302 of the opinion the court said:

> "In the case at bar, if the preparation and annexation of the first half sheet were not prior to the execution of the will it is clear that the preparation and annexation were prior to the execution of the codicil, and as the codicil is physically annexed to the will and is described as '1st codicil,' which must be to some will, and as that will is the only one presented, it seems to be a codicil to that will. Allen *v.* Maddock, 11 Moo. P. C. 427."

It will be noted that the authority cited by the court on this point is *Allen* v. *Maddock,* which was criticised by Vice-Chancellor Fielder in *Murray* v. *Lewis* and which is the leading English case in support of the doctrine of incorporation by reference. It will also be noted that the case of *Smith* v. *Runkle* was affirmed by the Court of Errors and Appeals upon the opinion from which this quotation is taken.

B.

Our statute of wills is taken from the English statute, (1 Vict. 26, ch. 9). In the matter of McElwaine, 18 N. J. Eq., 499, at 502. It is a well-settled rule that when the statute is copied from an existing statute of another jurisdiction, the construction of that statute by the courts of the jurisdiction from which it is taken, will be held to have been adopted with the act.

The English statute of frauds, (29 Car. II, ch. 3) was enacted in 1677. Prior to the enactment of the statute of frauds, the case of *Molineux* v. *Molineux,* Cro. Jac. 144, was decided, (1603). That is the case which held that a devise of "such several annuities as are expressed in several writings signed and sealed" was good.

The fifth section of the statute of frauds, (29 Car. II, ch. 3) provides that all wills of lands should be in writing signed by the testator or by some other person in his presence and by his express directions and attested and subscribed in the presence of the testator by three or four creditable witnesses.

The statute of wills, (1 Vict. 26 ch. 9) enacted in 1837 provides that no will should be valid unless it be in writing signed at the foot or end thereof by the testator or by some other person in his presence and by his direction, and that such signature should be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses should attest and subscribe the will in the presence of the testator.

These statutes did not change the law as to incorporation by reference. This is shown by the decision in the *Goods of Durham,* 3 Curt.

Eccl. 57, 1 Notes of Cases, 365, 163 English Reports Full Reprint, 654. That case was decided in 1842 and is as follows:

> "In the Goods of Louisa Elizabeth, Countess of Durham, widow, deceased, Prerogative Court, February 22, 1842—Probate granted on two instruments as together containing the will of the deceased, the later paper being duly executed, and referring to the former (not in the possession of the deceased at the time) so particularly that there could be no mistake as to its identity.
>
> "S. C. 1 Notes of Cases, 365; 6 Jur. 176, applied, in the goods of Wellesford, p. 78 *post.*
>
> "The deceased in this case died at Genoa on the 26th day of November, 1841, having executed her will on the 3rd of October, 1840, and thereof appointed her brother, the Hon. Charles Grey, and the Hon. J. G. B. Ponsonby, executors.
>
> "In this will, the testator, after reciting that the late earl, by his will, dated the 29th of September, 1827, had devised and bequeathed to her all his real and personal estate and appointed her sole executrix and residuary legatee, devised and bequeathed all her real and personal estate to her executors, upon trust for her only son, the present earl (aged 13), to be conveyed to him when he should attain the age of 21, or, in case of his death under 21, to the eldest of his issue, male, upon attaining 21, or if he should die under 21 without leaving issue, male, living at his decease, then 'upon the trusts intents and purposes expressed and declared in and by a will (afterwards revoked by the said will hereinbefore mentioned) executed by my said late husband, John George, earl of Durham, bearing date the 12th of April, 1826, by his then name of John George Lambton, or such of the said trusts, intents and purposes, as shall be then existing and capable of taking effect.'
>
> "The will was executed in duplicate, and

after its execution in October, 1841, and previously to leaving this country, the testatrix informed Mr. Stephenson, her confidential adviser, who wrote and attested the will that she had deposited one part thereof in the strong room at Lambton Castle with said former will of the late earl, and upon search after her funeral, a packet, tied up, and sealed with her seal, and indorsed with her initials, was found by Mr. Stephenson, containing one part of the Countess' will and one part of the former will of the late earl; the other part of the will was in the testator's own possession, at Genoa, and was brought to this country by Mr. Ponsonby, one of the executors.

"Addams prayed probate of the paper executed by the deceased, and of the will of the late earl, on the 12th of April, 1826, as together containing her will.

"The question is whether the former will of Lord Durham forms part of the will of Lady Durham; nothing can be more express than the reference to that instrument; it is so precise as to exclude all probability of mistake; before the Will Act there can be no doubt that both papers would have been entitled to probate, and that act has made no difference. In Habergham *v.* Vincent (2 Ves. jun 209), it was held, as to real property under the 'Statute of Frauds,' that if a testator in his will refers to another paper, and so describes it that there can be no doubt of its identity, that such paper is incorporated into the will, and forms part of it. In this country there can be no doubt of the identity of the paper referred to; in addition to which, the papers are found sealed up together in the same envelope.

"The Court: Sir Herbert Jenner Fust. I should like to know whether the trusts could not be carried into effect by the Court of Chancery.

"Addams. If the present earl were to die under the age of 21, leaving no male issue, the trusts of the will of the late earl

cannot be carried into effect without probate being granted to the two papers, at all events without expensive proceedings in the Court of Chancery, on the other hand, by granting probate of both papers, no difficulties can arise.

"Sir Herbert Jenner Fust. Much difficulty may arise in case of opposition, where parties may refuse to give up papers referred to; at the same time, I do not know that I can refuse probate in this case. In Smart *v.* Prujeau (6 Ves. 565) it was held that, in order to incorporate an unattested paper in a will, it must be so identified that there can be no mistake.

"Addams. Which is the case here.

"Sir Herbert Jenner Fust. There can be no doubt that the revoked will of the late earl is the identical paper referred to by Lady Durham in her will, and that it was intended by her to form part of her will.

"If this be a good dispostion of the real estate, I see no reason but that it should not be a good disposition of the personal estate also. Although I allow probate of these papers, similar cases must not pass without notice of the court."

The decision last referred to was followed by *In Re Dickens,* 3 Curt. Eccl. 60, 1 Notes of Cases, 398, 163 English Reports Full Reprint, 654, which was also decided in 1842 and is as follows:

> "In the Goods of Thomas Dickens, Deceased. Prerogative Court March 15, 1842. —Reference being made in a will to a deed so as to make it part of the will of the testator; probate allowed of the will and a notarial copy of the deed under the circumstances.
>
> "S. C. 1 Notes of Cases 398. Referred to, Sheldon *v.* Sheldon, 1844, 1 Roberts. 86.
>
> "Thomas Dickens died on the 13th day of February last, having two sons and daughters, he made a will on the 20th of August,

1840, and appointed his eldest son executor thereof. The testator left all of his estate, real and personal, to his eldest son, upon trust for him and the other children, in equal shares, the shares of the three younger children to be held by him, his heirs, executors and administrators, upon the same trust and for the same purposes, etc., as were mentioned in an indenture of settlement, dated the 20th of November, 1830, made between the testator and his son, or upon so many of the said trusts, intents and purposes as were then subsisting, or capable of taking effect. Upon an application of the executor that the deed referred to in the will was in his possession, and that it related, among other things, to freehold and copyhold estates, and that upon sale or mortgage thereof it would be necessary for him to produce the deed, and, therefore, that it was not in his power to leave the same in the registry of the court.

"Haggard prayed probate of the will and settlement, but without leaving the original deed in the registry.

"Sir Herbert Jenner Fust. The paper referred to in the will was in existence at the time, and is sufficiently referred to to incorporate it into the will, and the court, upon the principle upon which it acted in the case of Lady Durham's Will, will hold this deed to be part of the testator's will.

"The court is prayed to decree probate without the original settlement, on the ground that it is necessary to be retained in the possession of the trustee to enable him properly to execute his trust; I think, in this case, that if a notarial copy be left in registry, and a notarial copy form part of the probate, it will be sufficient.

"Great difficulty may arise in such cases where the original deeds cannot be got at."

This was the condition of the law in England in 1851 at the time of the enactment of our

statute of wills. It is therefore clear that the doctrine of incorporation by reference is part of the law of this State.

The appellants by their brief make three points which they contend prevent the doctrine of incorporation by reference from being applied to this particular case.

First, they allege that only a duly executed will can be incorporated by reference. But the authorities cited above show that there is no such limitation upon this doctrine and that documents other than wills have repeatedly been incorporated by reference.

Second, they claim that the trust agreement here in question cannot be incorporated by reference because the document sought to be incorporated was not signed by the testator. But the authorities cited do not support this contention. For example, in *Goods of Durham,* the reference was to the will of the testator's husband which had previously been revoked; in *Bemis* v. *Fletcher,* the reference was also to the testator's husband's will, and in *Condit* v. *De Hart,* the reference was to the will of another.

The third point which the appellants make is that the trust agreement sought to be incorporated was by its terms revocable. Here again the authorities do not support the appellants' contention. As above pointed out, in *Goods of Durham* the reference was to the will of testator's husband which had previously been revoked. In *Bemis* v. *Fletcher,* the reference was to the will of testator's husband. The husband was living at the time and his will was, therefore, of course, revocable. In *Condit* v. *De Hart,* the reference was to the will of a living person, which will was, therefore, revocable.

The will takes effect at the death of the testator. Whether or not the trust agreement referred to has or has not been revoked before that time is immaterial. The trust agreement by reference is made a part of the will. The will gives it life as of the date of the testator's death with the same force and effect as though it were set forth at length in the will. The entire will could have been revoked by the testator in his lifetime. But when he died, the will, including the document incorporated in it by reference, became operative and irrevocable.

The cases to which appellants refer which refuse to incorporate a document because, by its nature or terms, changes might be made in it, are cases where the terms of the gift or trust sought to be incorporated cannot be ascertained by an inspection of the will and of a document referred to in actual existence at the time when such reference to it is made in the will. In other words, there is a violation of the third of the three conditions which are requisite for a valid incorporation by reference.

Atwood v. *Rhode Island Hospital Trust Company,* 275 Fed. 513, which is relied on by the appellants, is an illustration of this. In that case the will read:

> "I give the residue of my estate to said Trust Company to be disposed of to such persons and in such proportions as I may have instructed or shall hereafter instruct said Trust Company."

It will be seen that in that case there was not a complete document referred to as being in existence which was sought to be incorporated, but the testator attempted to incorporate instructions which he might make at some future time.

In the Swetland case, a specific document was clearly identified and incorporated. There could be no uncertainty as to its terms and provisions either at the time of its incorporation or at the time of the testator's death. All of the requisites laid down by the authorities were complied with.

We should feel inclined to ignore certain statements of fact contained in the appellants' brief at pages 70-76, but for the fact that they are so filled with misstatements and unfair innuendo.

At page 70, he attacks the credibility of the witness Redfield, and charges that Redfield was employed by the United Publishers Co., of which Maurice J. Swetland was a large stockholder, intending thereby to infer that Mr. Redfield was somewhat under the domination of Maurice J. Swetland. From the record (p. 89) it appears that the United Publishers Co. was a corporation having a capital of $12,000,000, or 120,000 shares, of which Maurice J. Swetland as trustee owned 1,100 (p. 92). The absurdity of this innuendo becomes the more apparent when we learn from Mr. Redfield's testimony (p. 92) that Mr. Redfield was a neighbor of Mr. Swetland, a director and an officer of the United Publishers Co., which indicates very clearly that Mr. Redfield is a man of standing and position in the community in which Mr. Swetland lived, as well as in the great enterprise carried on by the United Publishers Co., and the petty criticism in appellants' brief is, therefore, entirely unwarranted.

Furthermore, at the end of paragraph 2, on page 70, appellant says—

> "Shortly after Redfield had testified for Maurice J. Swetland, he was also placed by Maurice J. Swetland and his associates at a $1,200 per year salary, for a small amount of clerical work which he had hitherto per-

formed gratis in connection with another corporation controlled by them."

There is not now and never was a scintilla of evidence in the record to support this statement, and although made thus boldly, appellant lacked the temerity to mention the corporation controlled by Maurice J. Swetland and his associates, which voted to Mr. Redfield this so-called "$1,200 a year salary."

His criticism of Montgomery and his inference and innuendo that Montgomery profited financially because of the testimony he gave in this case is likewise ridiculous and absurd, and it is with great restrain that we refrain from further analysis of it. We can only caution the court against taking any of the statements of fact without an examination of the record to see that it sustains them.

The purpose of appellants' attacks on Mr. Redfield and Mr. Montgomery is to show, or attempt to show, that the trust agreement, Exhibit C. 4, which was produced by the complainants was not properly identified as the document referred to by the testator in his will.

This trust agreement, (C. 4.), is the agreement of July 14, 1917, which is annexed to the complaint as Exhibit B, and is printed at page 21 of the case.

The testimony in this case is perfectly clear if it is borne in mind that both Mr. Swetland and Mr. Corey were officers of the Class Journal Company and both occupied the offices of that company at 239 West 39th street, New York City (pp. 69 and 70).

Mr. Montgomery says that the document was executed at the office of Horace M. Swetland,

239 West 39th street, and to the best of his recollection was kept in his private safe in that office (p. 69). Mr. Corey says that he first saw it at his office, 239 West 39th street, New York (p. 70)—the same office as that of Mr. Swetland and the Class Journal Co.—and that it was kept in Mr. Swetland's safe with other private papers.

This trust agreement was executed in duplicate; there were two originals. One was retained by the testator and placed in his safe in the office and the other given to the son, Maurice J. (p. 85) together with the securities referred to in it. It must have been the duplicate original of Maurice J. Swetland which was handed to Mr. Redfield for safekeeping for a time and concerning which he testified.

Criticism is made that testator did not sign the trust agreement. But the document is simply a declaration of trust and therefore properly signed only by the trustee. Mr. Swetland performed his part of the transaction when he transferred the securities to the trustee.

This document was offered in evidence by the complainants (p. 71). It was also offered by the appellants (p. 86) "to show * * * the testator's use of certain words which appear in the will." When it was being offered in evidence for that purpose, there apparently was no doubt as to its authenticity. That such a document existed at the time the will was executed appears from the reference in the will itself. This document has been produced by the executors from the testator's private papers in his office safe. That the trustee mentioned in that document received the 1,100 shares of United Publishers Corporation stock referred to in it, is also unquestioned (pp. 94, 95, 96 of the Case, and

pp. 5 and 70 of appellants' brief). In the face of this testimony, there can hardly be any serious doubt as to the authenticity of the paper produced.

II.

SECOND, The extrinsic document may be referred to in order to define the persons to whom and the proportions in which the estate is to be distributed.

This can be done even in New York State. The leading case is the *Matter of Piffard,* 111 N. Y. 136. In that case testator by his will gave to his daughter S. one-fifth of all his estate absolutely. By a codicil he directed that S. should have power by her will, "heretofore or hereafter" executed, to dispose of the share devised and bequeathed to her, be paid over by his executors to the executors or trustees named in her will in case of her death during his lifetime, but in case she survived, then that such share should be paid over to her. S. died before the testator, leaving a will. It was held, that, while the testator gave a power of appointment, which as a power the donee could not execute during the donor's lifetime, yet the further language of the codicil showed the testator's intent to be, in case of the happening of the contingency specified, to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as she had directed or should direct in the disposition of her own property; that the will of the daughter could be referred to to define and make certain the persons to whom the proportions in which the one-fifth should pass; and that the executors of the will of P. were properly required to pay over that share to the executors of the will of S. for the purposes of distribution.

After her (S) death, leaving a last will, the testator, with full knowledge of the existing situation, made two other codicils, confirming his will and the provisions contained in it now in question.

> "While, therefore, it may not be possible to sustain the power of appointment as such and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime. What she would have done by her will but could not, that he did for her by his own will."

In another important New York case, involving the question of incorporation of extraneous documents by reference, viz., *Matter of Fowles,* 222 N. Y. 222—in construing the "Second" and "Fourth" paragraphs of the Fowles will (which does not involve the question of incorporation by reference), Judge Crane in his dissenting opinion said, at page 239—

> "What did he mean then by saying that he desired to have them paid as if she survived him? He must have intended that these legacies should become part of her estate and should be paid to her personal representatives. This is the only meaning that

paragraph can have. 'In the event,' he says, 'that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my will that it shall be deemed that I shall have predeceased my said wife, and that this my will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife.' In considering these two legacies it must be assumed that the testator predeceased his wife and that she took the legacies. She being dead, the intention can only be given effect by paying the legacies to her estate or to her personal representatives. The ninth paragraph cannot be disregarded altogether and this meaning, we think, is quite apparent.

"In thus giving effect to the testator's intention, no rule of law is violated, all rules of construction are observed, and the authorities in similar cases followed. The testator could have stated that in case of death under the circumstances mentioned these legacies should be paid to his wife's representatives. He has stated the same thing in a different way. It is because testators do not always express themselves as exactly and as precisely as others might have done that so much litigation arises over wills, and has forced the courts to say that the intention of the testator, when this can be gathered from the four corners of his will, must be carried out, if not contrary to some rule of law. When the testator says that it shall be deemed that he predeceased his wife, it is the same as saying that it shall be deemed that his wife outlived him and that, although she be actually dead, she shall receive the legacies. The words 'executor' or 'personal representative' must under these circumstances, stand for the wife who is actually dead. Such construction is in harmony with the ruling in many

cases. (Phillips *v.* Davies, 92 N. Y. 199; Matter of Piffard, 111 N. Y. 410; Matter of Vowers, 113 N. Y. Townshend, 123 N. Y. 458, 462.)"

That the majority of the Court of Appeals concurred in Judge Crane's construction of the "Second" and "Fourth" paragraphs is evidenced by the prevailing opinion of Judge Cardozo, page 234, where he says,

> "Questions also arise under the second and fourth articles. The gifts under these articles did not lapse, but passed to the personal representatives of the legatee. On that subject it is impossible to add anything to what has been written by Judge Crane."

Because of such construction and because the gift was to Mrs. Fowles' *executor,* the legacies under these two paragraphs of the will of Mr. Fowles were upheld and ultimately distributed in accord with Mrs. Fowles' will.

It was around paragraph "Eighth" of Mr. Fowles' will that the war was waged, and Judge Crane differentiates the issue at page 241 as follows:

> "Unlike the provisions mentioned above, (paragraphs 'Second' and 'Fourth'), this part of the eighth clause gives no direct legacy to Mrs. Fowles" (or her executor) 'but merely a power of appointment.' "

This case, therefore, clearly holds that a gift to an executor is a complete testamentary disposition. If this is true as to an executor, it must be equally true if the gift is to a trustee, and if the gift will pass to the beneficiaries under the will, which the executor represents, it must necessarily follow that the gift will pass to the beneficiaries under the trust.

The case of *Booth* v. *Baptist Church,* 126 N. Y. 215, is often cited as an authority for the

rule against incorporating un-attested instruments in a will. In that case the question was raised as to whether certain legacies were general or specific. One of the gifts in the will was a legacy of "$10,000 in 100 shares, par value $100 a share, of the capital stock of some good railroad or coal company, guaranteed," or to be selected from my securities. Testator then said: "among my papers will be found a memorandum of the various securities I have selected for the payment of the several legacies." Such a paper was found preserved with the will. It was entitled in the testator's handwriting: "List of securities which I wish transferred to different institutions under my will of Feb'y. '85. John Guy Vassar."

Judge Finch for the Court of Appeals says at page 247:

> "It is unquestionably the law of this state that an unattested paper *which is of a testamentary nature* cannot be taken as a part of the will even though referred to by that instrument."
>
> * * * * * * *
>
> "I am satisfied that this memorandum is testamentary in character. By the will no specific securities were given as is fully conceded. The effect of the memorandum is more than an identification. If the legacy framed by the will had been specific and manifested a purpose to give some particular security or securities, and among these found in the assets there proved to be a larger number, so that doubt arose as to the specific securities intended to be given, an extrinsic memorandum referred to in the will to identify the thing given might be considered. But that is not the case here. The office of the paper, if it shall operate at all, is to give specifically what was not so given by the will; to change its terms in a material respect; to alter a bequest and modify the rights of the legatees. Such a paper, we think, cannot be received as a part of the will to affect and modify its terms, and change what was a general or possibly demonstrative legacy into a specific one."

In the Swetland case, as in all other cases where a gift is made to a trustee or to an executor, it is evident that the instrument under which such trustee or executor holds, is not "an instrument of testamentary nature," but may be offered in evidence to prove and to define and make certain the persons to whom and the proportion in which the legacy shall pass, as in the Piffard case, or "to identify the thing given" under the rule laid down in *Booth* v. *Baptist Church.*

III.

The words "with regard" appearing in item "third (B)" at page 19 of the case should be construed to read "without regard."

The only other point argued by the appellants on the brief, relates to the power given to the trustees with reference to the investment of trust funds. The pertinent parts of the will may be found in item "Third (B)" at pages 18 and 19 of the case. Upon reading these provisions, it becomes apparent that the testator intended to give his trustees power "to invest and re-invest the properties which may come into their hands in such manner as they may deem most advisable and *without* regard to the question whether such investments or re-investments so made by them are of a character authorized by law to fiduciaries." The use of the word "with" instead of "without" was undoubtedly a clerical error.

There are a number of instances in this will where words have obviously been misused and this is one of them.

The power of the court to correct obvious mistakes by changing a word in order to maintain the general intent of the testator is well settled.

The testator's intention is the "governing principle," the "law of the instrument," the "pole star" or the "sovereign guide" in the construction of a testamentary instrument.

Jarman on Wills, Sixth Edition, Vol. 2, page 659.

Schouler on Wills, Section 466.

"*Molding Language by Rejecting, Supplying, Transposing, or Substituting Words.* Where the testator's intention is manifest from the context of the will and surrounding circumstances, but is endangered and obscured by inapt and inaccurate modes of expression, the language will be subordinated to the intention, and in order to effectuate such intention, as far as possible, the court may depart from the strict words and read a word or phrase in a sense different from that which is ordinarily attributed to it, and for such purpose may mold or change the language of the will, such as by rejecting superfluous, abrupt, or repugnant words or phrases, or restricting them in their application; by supplying omitted words or phrases; by transposing words, expressions or sentences; or by substituting one word or phrase for another. This rule, however, applies only where it is necessary in order to effectuate the testator's intention, which is clearly apparent, but which has been defectively expressed in the will, and where the language of the will is plain."

40 Cyc. 1399, etc.

"XX. The words which it is obvious are mis-written (as dying with issue for dying without issue) may be corrected."

Jarman's 24 Rules of Construction.

Jarman on Wills—Vol. 2—Pages 840-843.

Some illustrations of the above rule are as follows:

"return" was construed as "remain"

"reviving" as "surviving"

"living at my death" as "her death"

"without having issue" construed as "without leaving issue"

"die with children" construed as "without children"

"oldest" construed as "youngest"

"may leave" construed as "may have"

"majority" construed as "minority"

"during majority" construed as "attainment of majority"

"and" construed as "or"

"my" construed as "their"

"received" as "receivable"

"payable" as "paid"

"when" as "if"

"all" as "any"

"her" as "their"

"leaving—no children" construed as "having or having had"

"survivor" as "other"

"death under age of twenty-one or die without issue"—"or" construed as "and"

Underhill on the Law of Wills—Vol. 1—Chap. 17—Page 493—Sections 361-362-363.

"and" construed as "or"

"grandchildren" construed as "grandchild"

The leading case in this state is *Brown* v. *Mugway,* 15 N. J. L. 330, where the court changed the word "or" to "and."

The fact that the will was not drawn by a lawyer but by the testator himself, may also be considered. *Hewitt* v. *Green,* 77 N. J. Eq. 345.

By the general provisions of the portion of the Swetland will now under consideration, the trustees are vested with absolute discretion as to investments, and it is evident that the testator intended that they should not be limited by the statute or laws to investments permitted thereby to fiduciaries.

The words "with regard" are entirely inconsistent with the whole provision, particularly that part preceding the words "with regard"—see Bill of Complaint—page 19—line 17—

> "I also expressly authorize and empower the trustee of the trusts hereby created in their absolute discretion to invest and reinvest the properties which may come into their hands in such manner as they may deem most advisable."

Certainly, the testator having thus expressed his intention did not intend by the use of the words "with regard" to nullify that provision, but also all other provisions made in his will giving power and discretion to his trustees in the matter of investments. Had he intended that the trustees should invest only in such investments as are permitted by law to fiduciaries, he would have omitted specifying these broad powers altogether. These are clearly mis-written words, which should be corrected, and an authority therefor is found in Jarman on Rules—

> "XX. (above quoted, which reads) The words which it is obvious are mis-written (as dying with issue for dying without issue) may be corrected."

The paragraph of the will now before the court closes with the following words: "and I direct that no liability shall attach to said trustees by reason of any investments or re-investments so made by them." This is apt language to adopt if the trustees are permitted to invest "without regard" to the requirements for trust funds; but if they must invest "with regard" to such requirements there would be no liability and the quoted words are obviously and awkwardly redundant.

Respectfully submitted,

BORDEN D. WHITING,
IRA C. MOORE, JR.,
GEORGE W. ELKINS,
(Of the New York Bar)
Of Counsel with Maurice J. Swetland, Ernest M. Corey, Frederic C. Stevens and Maurice J. Kane, Executors of and Trustees under the last will and testament of Horace M. Swetland, deceased, Complainants-Respondents.

New Jersey Court of Errors and Appeals

MAURICE J. SWETLAND, *et al.*,
Complainants-Respondents,

vs.

HATTIE SWETLAND, *et al.*,
Defendants-Respondents,

and

DOROTHY JOHNSON, *et al.*,
Defendants-Appellants.

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS.

Horace M. Swetland, of Montclair, New Jersey, died June 15, 1924, leaving a substantial estate (pp. 1, 63) disposed of by a will prepared by himself without the advice or assistance of a lawyer (pp. 75-77) and executed January 12th, 1922 (p. 1). It was probated June 30th, 1924, and the executors and trustees named therein duly qualified shortly thereafter (pp. 1, 2).

The testator left him surviving a widow, Clara A. Swetland, of advanced years and in feeble health (p. 11), a half-sister, Hattie Swetland, (p. 11), three married daughters, Ruth Kane, Velma Stevens and Dorothy Johnson (p. 60), each of whom, in turn, had living children, and a married son, Maurice J. Swetland (p. 60), who also had living children.

Following the probate of the Will, sharp differences arose with respect to its construction, precipitated by the daughter, Dorothy Johnson and

her husband, who is the guardian ad litem for their two children. All of the other beneficiaries under the Will were in complete accord with the executors and trustees (pp. 53-59).

The situation made necessary the institution of an action by the executors and trustees seeking a judicial construction of the Testament, which was instituted September 2, 1925 (p. 39). After rather a protracted trial, decree was entered October 16, 1926, by Vice-Chancellor Berry, by which the contention of the plaintiffs and defendants-respondents were substantially sustained (pp. 135-156). From that decree, the defendants Johnson alone appealed (pp. 157-161) April 21, 1927. Subsequent to the filing of the petition on appeal, a stipulation, executed on behalf of all parties, limited the printed testimony to that applicable to the points to be argued by the appellants which they had reduced to two points only. Of those they stress but one—the question of the validity of the gift to the Swetland Trust.

Before discussing the Will itself, it would seem advisable to consider, though briefly, the situation affecting all parties existing at the time of its execution and shortly prior thereto.

The testator was a man of mature years, scholarly training, substantial wealth and the head of a great business enterprise (pp. 61-63, 89-91).

On July 14, 1917, he established a trust fund of substantial proportions for the benefit of the wife and children of his only son, Maurice J. Swetland, and of which he appointed that son trustee (Exhibit B, pp. 21-24). That trustee, by writing, on the same day designated successor trustees pursuant to the right thereto reserved in the formal instrument (p. 24).

At the time of creation, the founder limited the fund to 1150 shares of Class B stock of the United Publishers Corporation (his principal organization) (p. 22), which the trustee delivered, with his copy of the trust agreement, to H. J. Redfield, Secretary of the United Publishers Corporation, early in 1918, just prior to his departure for France in the war service (pp. 92-93).

Thereafter, on July 18th, 1918, the founder of that trust, the testator, increased the fund by adding to it an additional 250 shares, which he delivered to Mr. Redfield with instructions to place them with the other stock then in his custody. This was while the son was abroad (p. 94).

Still later, at the end of August, 1919, the founder again increased this trust fund by adding to it a demand note of the Swetland Realty Company for $10,000.00 made out to the order of the trustee, delivered to him, and by him in turn to Mr. Redfield immediately thereafter (p. 94, fol. 30).

At the end of July, 1920, the founder again increased this trust fund by adding to it 700 shares of the capital stock of the Swetland Realty Company, issued in the name of and delivered to the trustee, Maurice J. Swetland, and in turn delivered by him to Mr. Redfield for safekeeping, who placed it with the other stock and trust agreement (p. 94, fol. 10).

During the founder's lifetime, he yet again increased this fund, viz., January 3, 1922, by adding to it 1998 shares of the common capital stock of Publishers Securities Company, represented by one certificate issued in the name of the trustee, which was likewise delivered by the trustee to Mr. Redfield for safekeeping (p. 93).

On this last occasion, the founder decided to forego all power of revocation with respect to

the trust fund (which up to that date he had reserved to himself), to accomplish which an agreement supplemental to Exhibit B of July, 1917, was executed by the founder and the trustee (Exhibit C, pp. 25-30, 86, 87). By this instrument, the founder assigned to the trustee all of his right to and interest in not only the 1998 shares that day added to the fund but specifically all the securities contributed by him to the fund since its inception (pp. 25, 26).

To obviate the necessity of executing any further document in the event of further additions to the fund, and to bind the trustee to placing such securities under the limitations of this trust, it was specifically provided this time:

> "(b) It is expressly agreed by and between the parties hereto that any and all additions to the trust estate shall be received by the said trustee for the purposes and uses and subject to all the terms and conditions of the trust hereby created, without the execution of any further or additional instrument of agreement" (p. 26, fol. 30).

Nine days later, January 12, 1922, the founder of this trust executed his Will, here under consideration, and therein again increased this trust fund by adding thereto a one-fourth part of his residuary estate, and it is due to the manner in which he phrased this bequest that we have this controversy continued.

This bequest appears in its entirety in the third paragraph of the Will, reading as follows:

> "3. Upon the death of my wife, Clara A. Swetland, if she shall have survived me, I direct my Trustees, subject to the provisions herein contained for the benefit of my half sister, Hattie Swetland, to distribute the remainder of the principal of the trust herein

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

"In the event that any of my said daughters shall predecease me or my wife, Clara A. Swetland, leaving lawful issue her and me surviving, then and in that event such issue shall take per stirpes and not per capita, the share its parent would have taken under this will had such parent survived me and my wife, Clara A. Swetland; in the event that any of my said daughters shall have predeceased me or my wife, Clara A. Swetland, leaving no lawful issue her or me surviving, the share such child of mine would have received under the provisions hereof shall be equally distributed among my surviving daughters or their issue, as herein provided, and Maurice J. Swetland, as Trustee, or his successor Trustee, under the Trust Agreement heretofore mentioned and created by me under date of July 14, 1917, for the purposes herein provided" (pp. 17-18).

It is contended on behalf of the appellants that this bequest to the Swetland Trust is void, and as to one-fourth of the residuary estate the testator died intestate because the trust agreement referred to in the will was not executed with like formality as a will.

On pages 2 to 7 of the appellant's brief appear statements of alleged fact which are admittedly outside of this record and made in an attempt

to morally justify this daughter in the maintenance of this controversy. Rarely have we seen so flagrant an abuse of the rules. Falsity in one instance is so patently shown by the printed record here, this court may thereby judge the remainder.

At the bottom of page 4 and the top of page 5 of the appellant's brief, appears the following statement:

> "Horace M. Swetland was a publisher and a financier, a man of large wealth, and the property disposed of by the will (claimed to be over a million dollars) was less than one-third of his entire fortune. The testator had previously distributed equally among his four children the stock of a Securities Company, valued at about one million dollars. He had also given each of his children homes and other property of substantial value. Furthermore, he had given to his son, Maurice J. Swetland, in the form of a trust, the valuable securities listed in Exhibit C. So that in the event that this son's share of the estate left in the will should become intestate, the son himself would not be one cent behind his sisters in the final distribution of his father's estate."

The stock of the securities company is, of course, that of the United Publishers Securities Company referred to at pages 65-68 of the record, the capital stock of which was distributed prior to the testator's death, one-fourth to each daughter and one-fourth to the *Swetland Trust—not* to the son individually. In spite of the attempt to take advantage of our assent to the omission of the major portion of the testimony taken during the trial, sufficient remains to clearly demonstrate this fact, and that the exact number of shares added to this

trust was 1998 (see p. 68, fol. 10; p. 26, fol. 20; p. 93, fols. 20-30).

Nor did the testator give a house to his son. He permitted him to occupy for a time a home located on the homestead adjacent to the dwelling occupied by the testator and his wife, but that house and the ground it stands on is a part of the realty left to the widow for life by the second paragraph of the will (p. 16, fol. 30), and discussed by the Vice-Chancellor in his opinion at pages 122-123, subdivisions 8 and 9. It is covered by the provisions of the decree (p. 148, fol. 30; p. 149, fols. 10-20; pp. 152, 153, subds. 7 and 8).

To the son was not given one dollar in property or securities either prior to the testator's decease or in his will. Everything referred to by these appellants on page 5 of their brief as having been given to this son was delivered to the son as trustee and for the benefit only of his wife and children (pp. 21-23; p. 26, fol. 30). The son was not entitled to a dollar of the income, let alone the principal, and only in one contingency could the son have any part of the principal, viz., as provided in the amended trust agreement, Exhibit C, if he should be still living at the time his youngest child attained the age of thirty years, he would be entitled to receive the 1998 shares of Publishers Securities common stock (p. 28, fol. 10).

To reduce expense by omitting some two-thirds of the record irrelevant to the points to be argued appealed to opposing counsel, but behind this worthy purpose stalked the sinister intent, unrevealed until after the record is printed and their brief is served. Fortunately, there is to be found sufficient proof left in the record to utterly discredit this attempt to whitewash the appellants. The opinion of the Vice-Chancellor could not be deleted, and its perusal will sufficiently indicate to

this court the real purpose of this dissenting daughter, abetted by her lawyer husband, and the extent to which they have attempted to capitalize their nuisance value.

It was all clear to the Vice-Chancellor and his determination not only confirmed the clear intention of the testator but was sound in law.

POINTS.

I.

The gift to the trust fund referred to in the third paragraph of Mr. Swetland's will is valid.

A.

To sustain this provision of the will, it is wholly unnecessary to enter upon an abstruse discussion of the doctrine of incorporation by reference or to theorize about testamentary disposition through the instrumentality of a document executed without due regard to the provisions of the Statute of Wills. The situation is aptly presented in the opinion of the Vice-Chancellor, wherein he discusses this paragraph of the will and from which we quote:

> "By it the testator merely added additional property to a trust fund established by him years before the execution of his will under a valid active trust, and to which he had from time to time during his lifetime added securities. The trust to which this bequest is added is not theoretical, nebulous, intangible or incapable of identification, but exists in fact, and the trustee legatee is as distinct and

> definite an entity as would have been an individual or corporation legatee" (p. 130, fol. 30).

If in this third paragraph of his will the testator had divided his residuary estate between his three daughters and the Montclair Hospital or the Seaman's Fund for Savings, or any other recognized established fund or trust, there is small likelihood that even these appellants would have had the temerity to question the validity of the disposition. Had this testator taken the precaution to secure legal guidance in the framing of this will, the fund to which he was making his final contribution would probably have been so definitely identified as to have avoided legal controversy.

The question here before the court is, did the language used by the testator, by which he named the trustee holding the fund instead of the fund itself, and the document by which it was primarily established instead of including not only it but its amending agreement, so befog and render uncertain the real intent and purpose of the testator and the identity of his beneficiary as to defeat his expressed desire and deprive from the benefit of his protection those infant grandchildren for whose welfare he had been for years so particularly solicitous?

In spite of the voluminous brief and impressive array of alleged judicial precedent presented by these appellants, we are still of opinion that the learned Vice-Chancellor was wholly correct and that the answer to this question must be a negative.

Taking all the surrounding circumstances into consideration, it is quite apparent that the testator had in mind the fund which he had established

and that these clauses of the third paragraph of his will must be construed as though they read, "to the Swetland Trust, established by me July 14th, 1917".

Who the ultimate beneficiaries of that trust or fund might be is not material to this inquiry. The immediate object of the testator's benefaction being identified and capable of taking, the validity of the bequest must, we think, be affirmed.

Upon this point, a celebrated New York case, which was based, in part upon a leading case in New Jersey, is so clearly applicable, we take the liberty to quote at length from the principal opinion written by Mr. Justice Cardozo. The general recognition by Bench and Bar alike of that distinguished jurist, whether resident in New York or not, gives added weight to his conclusions. We refer to the *Matter of Fowles,* 222 N. Y., 222, whereby the opinion of the Appellate Division (176 App. Div., 637) was reversed and the decision of the lower court (95 Misc., 48) was affirmed.

Mr. and Mrs. Fowles lost their lives in the Lusitania disaster. Prior to sailing, they executed their wills, and the ninth article of Mr. Fowles' will provided:

> "In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife."

By the preceding article, he gave a part of his residuary estate to a trustee to be held for the

benefit of his wife for life and, at the same time, authorized her to dispose of that share by her will. By her will, she gave her residuary estate to a trustee to be held for the uses of her sister for life with remainder over. The Court of Appeals of New York held flatly that, while it was impossible to determine who were the beneficiaries of the bequest without consulting the wife's will, the gift under the husband's will was to the wife's executor, which was a complete testamentary disposition and in spite of the fact that New York courts have in several cases criticized the doctrine of incorporation by reference. In arriving at his conclusion, Mr. Justice Cardozo said:

> "Half of the corpus (22½ per cent. of the entire residue) was to be paid by the trustees 'pursuant to the provisions of such last will and testament as my said wife may leave (hereby conferring upon my said wife the power to dispose of the said one-half by last will and testament duly executed by her).' * * * These provisions are not obscure, and their validity is not doubtful. The controversy grows out of the ninth article which reads as follows: (hereinabove quoted) * * * The wife left a will made at the same time as the husband's. She recites the power of appointment, and undertakes to execute it. She gives her residuary estate (including the property affected by the power) to trustees for the use of a sister during life with remainder over. Whether this gift in its application to the husband's estate is made valid and effective by the ninth article of his will is the chief question to be determined.
>
> "Of his intention, there can be no doubt. In that, we all agree. * * * He told the courts what he wished them to do if all other tests of truth should fail. They were to distribute his estate as they would if his wife were the survivor. We cannot know whether

she was in truth the survivor or not; there is no break in the silence and obscurity of those last hours. The very situation which was foreseen has thus arisen. If intention is the key to the problem, the solution is not doubtful. We are now asked to hold that under the law of the state of New York, a testator may not lawfully declare that a power executed by one who dies under such conditions shall be valid to the same extent as if there were evidence of survivorship.

"Two rules of law are supposed to stand in the way. One is the rule that a power created by will lapses if the donee dies before the will takes effect. The other is the rule that wills must be executed in compliance with statutory formalities, and are not to be enlarged or diminished by reference to extrinsic documents which may not be authentic. A testator is not permitted at his pleasure to violate these rules. He does violate them, it is said, by indirection, if he may dispense with evidence of survivorship and still sustain the gift which purports to execute the power. If the wife had survived a single second, the gift would certainly be valid. That would be so though she had signed the will while her husband was yet alive and before the power took effect (*Stone* v. *Forbes,* 189 Mass. 163, 168; *Airey* v. *Bower,* 12 A. C. 263; *Hirsch* v. *Bucki,* 162 App. Div. 659, 665). It is possible that she did survive, but it is also possible that she did not. The latter possibility, it is said, renders the gift void. We do not think it does.

"It is true that a power created by will lapses if the donee of the power dies before the maker of the will (*Curley* v. *Lynch,* 206 Mass. 289; Sugden on Powers (8th Ed.), 460; Farwell on Powers (2d Ed.), p. 226). That is because a will has no effect till the death of the testator. Whatever power it creates, comes into being at that time. But to say this, does not answer the question before us.

The question is not whether this power of appointment lapsed. The question is whether the testator has avoided the consequences of a lapse. More concretely, it is whether the law permits him to provide that if the donee's survivorship is incapable of proof, he will give his estate none the less to whomever she has named. That is what this testator said, not in words, but in effect. His will in this respect has a parallel in the one construed in *Matter of Greenwood* (1912, 1 Ch. Div. 392). There gifts were made to relatives, with the provision that if the legatees died leaving issue, the benefits of the gifts should not lapse, 'but should take effect as if his or her death had happened immediately after mine.' These words were held equivalent to a gift to the personal representatives of the legatees named. So here, there is by implication a gift to the legatees named by the wife, and a ratification of any execution of the power, however premature. The intent to avert the consequences of a lapse is clear. The only question is whether the intent is one to which the law will give effect. One obstacle, and one only, can be thought of. That is the rule against the incorporation of extrinsic documents, testamentary in character but not themselves authenticated in accordance with the statute. It is said that this rule is violated when a testator, to keep a power alive, ratifies its execution, adopts the will which executes it as his own, and thus in effect averts a lapse. We do not share that view.

"Everything that this testator did is justified by our decision in *Matter of Piffard* (111 N. Y. 410, 414, 415). The distinction between that case and this is purely verbal. There is none in substance. * * * There was a like decision upon like facts in *Condit* v. *De Hart* (62 N. J. L. 78). The argument is made that the express direction to transfer the share to the daughter's executors or trustees distinguishes the *Piffard* case from the one at

bar. But in another form of words, this testator gave the same direction. He directed his executors to turn over his estate to the persons named by his wife. There is no distinction between a direction to pay the *trustees* named in another will, and a direction to pay the *legatees* named in a will. The daughter's trustees in the *Piffard* case were not to take as individuals. They had no beneficial interest. They were to take as trustees. Only by reference to the will which appointed them could the nature of the trust and the names and interests of the beneficiaries be learned. If there was a violation of the rule against incorporation here, there was equally a violation there.

"*Piffard's case cannot be distinguished. It ought not to be overruled. Only the clearest error would warrant us in baffling the just hopes and purposes of this testator by disregarding a decisive precedent.* (Italics ours.) * * * The rule against incorporation has not been set aside. It has been kept within bounds which were believed to be wise and just. The rule is sometimes spoken of as if its content had been defined by statute, as if the prohibition were direct and express, and not inferential and implied. But the truth is that it is the product of judicial construction. Its form and limits are malleable and uncertain. We must shape them in the light of its origin and purpose. All that the statute says is that a will must be signed, published and attested in a certain way. * * * It is a question of degree (*Langdon* v. *Astor's Executors,* 16 N. Y. 9, 26, 31; *Robert* v. *Corning,* 89 N. Y. 225, 242.) Sometimes the distinction is said to be between documents which express the gift and documents which identify it (*Hathaway* v. *Smith,* 79 Conn. 519, 521; *Booth* v. *Baptist Church of Christ,* 126 N. Y. 215, 247). But the two classes of cases run into each other by almost imperceptible gradations (*Langdon* v. *Astor's Executors,*

supra). One may ratify assumptions of power, extinguish debts, wipe out wrongs, confirm rights, by the directions of one's will (*Bizzey* v. *Flight,* L. R. 3 Ch. Div. 269; 1 Jarman on Wills, 99). In these and other cases, the expressions of the gift and the description of its subject-matter must often coalesce. No general formula can tell us in advance where the line of division is to be drawn.

"It is plain, therefore, that we are not to press the rule against incorporation to 'a drily logical extreme' (*Noble State Bank* v. *Haskell,* 219 U. S. 104, 110). We must look in each case to the substance. We must consider the reason of the rule, and the evils which it aims to remedy. But as soon as we apply that test, the problem solves itself. There is here no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose. He has not limited his wife to any particular will. Once identify the document as *her* will; it then becomes his own. He authorizes her to act, and confirms her action (*Condit* v. *De Hart, supra,* at p. 81). For the purpose of the rule against incorporation, the substance of the situation is thus the same as it always is when a will creates a power. The substance is that a power which would otherwise have lapsed, has been kept alive by the declaration that its execution, however premature, is ratified and approved. But the execution of a power does not violate the rule against incorporation. It can make no difference for that purpose whether the execution is authorized in advance or made valid by relation. There is no greater impairment in the one case than in the other of the principle of the integrity and completeness of testamentary expression. The source of title may be in one case the appointment, and in the other the confirmatory will. But if we go beneath the form and reach realities, the truth is that under the sanction of the will,

a power has been executed. That is the principle which underlies the ruling in *Matter of Piffard* and *Condit* v. *De Hart*. We reaffirm it now. To hold that the purpose of this testator has been adequately or inadequately declared according to the accident of time at which death came to him or his wife in the depths of the ocean, is to follow the rule against incorporation with blind and literal adherence, forgetful of its origin, its purpose, and its true and deep significance.

"We have spoken thus far of the gift of the residuary estate under the eighth article of the will. Questions also arise under the second and fourth articles. The gifts under these articles did not lapse, but passed to the personal representatives of the legatee. On that subject it is impossible to add anything to what has been written by Judge Crane."

We now quote from the dissenting opinion by Mr. Justice Crane in the same case:

"'*Ninth.*—In the event that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife.' * * * The entire will of Mr. Fowles must be read in order to gather his intention, and no part is to be disregarded because it may be illegal. (*Tilden* v. *Green,* 130 N. Y. 29, 55.) The first essential is to determine from everything the testator said in the will what he meant should be done with his property, and then, secondly, to ascertain whether his meaning and intent can be given legal effect. A man can do as he pleases with his own unless he runs counter to some rule of law or public policy. * * *

What did he mean then by saying that he desired to have them paid as if she survived him? He must have intended that these legacies should become part of her estate and should be paid to her personal representatives. This is the only meaning that paragraph can have. 'In the event,' he says, 'that my said wife and myself should die simultaneously or under such circumstances as to render it impossible or difficult to determine who predeceased the other, I hereby declare it to be my Will that it shall be deemed that I shall have predeceased my said wife, and that this my Will and any and all its provisions shall be construed on the assumption and basis that I shall have predeceased my said wife.' In considering these two legacies it must be assumed that the testator predeceased his wife and that she took the legacies. She being dead, the intention can only be given effect by paying the legacies to her estate or to her personal representatives. The ninth paragraph cannot be disregarded altogether and this meaning, we think, is quite apparent.

"In thus giving effect to the testator's intention, no rule of law is violated, all rules of construction are observed, and the authorities in similar cases followed. The testator could have stated that in case of death under the circumstances mentioned these legacies should be paid to his wife's representatives. He has stated the same thing in a different way. It is because testators do not always express themselves as exactly and as precisely as others might have done that so much litigation arises over wills, and has forced the courts to say that the intention of the testator, when this can be gathered from the four corners of his will, must be carried out, if not contrary to some rule of law. When the testator says that it shall be deemed that he predeceased his wife, it is the same as saying that it shall be deemed that his wife outlived

him and that, although she be actually dead, she shall receive the legacies. The words 'executor' or 'personal representative' must, under these circumstances, stand for the wife who is actually dead. Such construction is in harmony with the ruling in many cases. (*Phillips* v. *Davies,* 92 N. Y. 199; *Matter of Piffard,* 111 N. Y. 410; *Matter of Vowers,* 113 N. Y. 569; *Woodward* v. *James,* 115 N. Y. 346; *Masterson* v. *Townshend,* 123 N. Y. 458, 462.)''

Not only did this decision sustain the bequest by Fowles as a gift to executors, but it unquestionably extended and liberalized the rule of incorporation by reference as theretofore applied in the State of New York and, as thus enunciated, stood the law of New York at the time Mr. Swetland executed the will here under consideration.

It must be borne in mind, too, that this will was executed in New York, where the testator had his principal business office, and by its terms disposed of his New York real estate, which formed a very substantial part of his entire estate.

The *Fowles* decision sustained the gift to an executor of another estate, despite the fact that the ultimate beneficiaries could only be determined by reference to an instrument neither made nor executed by the testator, and over which he had no control.

In the case at bar, we have under consideration a gift to a trustee but, as Judge Cardozo said, there can be no distinction between a direction to pay a trustee named in another will and a direction to pay the legatees named in a will.

In the instant case, the facts are even more appealing, because the fund was created by the testator long years before the instrument under consideration was executed by him, its amendment was executed by the testator himself, and in adding to this fund by his will, he was merely carrying out a policy adhered to over a period of several years preceding.

The first precedent cited by Mr. Justice Cardozo was *Matter of Greenwood,* 1 Ch. Div. 392 (1912), and the rule of construction there announced by that eminent English court has found favor in many of the courts of this country since, and notably New York, New Jersey and Massachusetts. In the *Greenwood* case, the language of the testator was not nearly so definite as either that used by Mr. Fowles or Mr. Swetland. Bequests were made to various relatives, with a general provision following that if any of the legatees died prior to the testator's death, but leaving issue, the benefits of the gifts by the testator should not thereby lapse, ''but should take effect as if his or her death had happened immediately after mine''. The learned Chancellor construed these words as equivalent to and thereby constituting gifts to the personal representatives of the legatees named in the will, and as such sustained them.

The next and controlling case cited by the learned New York jurist is *Matter of Piffard,* 111 N. Y. 410. In that case, the testator, by his will, left one-fifth of his estate to a daughter, Sarah. By a subsequent codicil, he directed that:

> ''my said daughters, Sarah Eyre Piffard and Ann Matilda Piffard, named in my said will, shall have power, by their several wills heretofore or hereafter duly made and executed, to dispose of, devise and bequeath the share of my estate devised and bequeathed to them severally in and by my said will; and to that end I direct that such share or shares shall be paid over by my said executors to the executors or trustees named in and by the several wills of my said daughters in case of the

death of them, or either of them, in my lifetime, instead of to my said daughter or daughters; but if my said daughters shall survive me, then such shares shall be paid to them severally, as now provided in and by my said will."

Mr. Justice Finch, writing for the court, after quoting the above provision, said:

"It seems to me impossible to misunderstand the purpose of this provision.

"It was clearly intended to reach and cover a contingency which has actually occurred, and to prevent a lapse of the legacies by the death of a daughter in the testator's lifetime. * * * And this view is very greatly strengthened by the fact that after her death leaving a last will, the testator, with full knowledge of the existing situation, made two other codicils, confirming his will and the provisions contained in it now in question.

"While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed. Her will, therefore, is referred to, not as transferring the property by an appointment, but to define and make certain the persons to whom and the proportions in which the one-fifth should pass by the father's will in case of the death of the daughter in his lifetime."

So here again, as far back as 1888, we find the highest court of the State of New York by unanimous decision recognizing a gift to executors

named in an instrument executed by a person other than the testator. There is at least an inference too, if not an intimation, that this result would have been accomplished even though the testator had not, subsequent to the death of his daughter, added a codicil to his will reaffirming its earlier provision.

The third case cited in support of the Fowles determination is that of *Condit* v. *DeHart,* 62 N. J. L. 78. In the latter case, a testator gave his residuary estate to a son and, by subsequent codicil, authorized that son to dispose of the estate so bequeathed to him

"by his (the son's) last will and testament duly made and executed by him at any time; and whatever disposition my son shall make of said real and personal estate or any part thereof by his said last will and testament I do hereby ratify and confirm, and I do hereby give, devise and bequeath the said real and personal estate, so given, devised and bequeathed by me to my said son to such person or persons as my said son, in and by his last will and testament, shall name, designate and appoint as the person or persons to whom he desires the said real and personal estate, or any part thereof, shall go or be given."

The will of the son referred to the codicil to his father's will and designated his own wife as the beneficiary of his father's residuary estate. The son predeceased the father, and thereafter the father executed a second codicil in which he expressly ratified the first codicil above quoted from. The only surviving heir-at-law of the testator, the father, was a daughter, and she brought action against the son's wife for the purpose of determining title to the residuary estate, and the New

Jersey court sustained the right of the son's wife thereto as against her sister-in-law, upon the ground that

> "the son having died in the lifetime of the father, the will of the former, although not transferring the father's residuary estate by an appointment, is to be referred to for the purpose of ascertaining the persons to whom that estate passes by the father's will."

Here was an extreme case where, under the will of the father, it was necessary to refer to an instrument not executed by him and over which he had no control to determine the beneficiary of this portion of his estate and, likewise, under the son's will it was necessary to refer to the will of his father to ascertain the nature and amount of the estate sought to be transferred to his wife. The court seemed to find no difficulty, however, in finding that the documents sought to be incorporated were explicit, so accurately described so as to avoid mistake, and that the son's will was in existence when the father's latest codicil was executed.

It so happens that in the three cases referred to the extrinsic document was a will or a codicil, but the reasoning of the court could apply as well to any other formal document such as a declaration of trust, especially when it is not of testamentary character, is definite in all its terms and can be identified from its earmark in the will beyond all reasonable doubt. Upon this feature of the case we will have more to say hereinafter.

To these cases may be added:

Harriman v. *Harriman,* 59 N. H. 135, which involved the devise of a farm upon the termination of the life estate provided by the testator to such

person or persons as should care for and support the life tenants in their old age. The court held that, in spite of the fact that the identity of the ultimate beneficiaries was not even known to the testator, the only question to be determined was one of identity and the parole evidence could be received by which those entitled to take could be disclosed.

Talbot v. *Talbot,* 32 R. I. 72, where it was held that a trust deed covering trust funds deposited by the testator during his lifetime, could not be regarded as of testamentary character, even though the fund covered thereby was finally disposed of by the testator's will.

Lear v. *Manser,* 114 Me. 342, where a testator gave to a trustee a sum for the benefit of "such person or persons or to such institution as shall care for me in my last sickness". Manifestly, the selection in this case was an act by the testator subsequent to the making of his will but it was not regarded by the court as of a testamentary character.

Reinheimer's Estate, 265 Penn. 185, where the residue of an estate was left "to the party or parties, their heirs and assigns forever, who may be farming my farm and taking care of me at the time of my death". Here also the identity of beneficiaries depended upon future acts of the testator, but the bequest was sustained.

Abbott v. *Lewis,* 77 N. H. 94, where the court had under consideration a gift "to the employees of the O. J. Lewis Mercantile Company who have been in the service of the house ten years and are so employed at the time of my death, $10,000.00, to be equally divided among them at the termination of this trust". In spite of the fact that the

testator, who was the principal owner of the business and its manager, had the power of selecting the employees and therefore of increasing or decreasing their number subsequent to the making of the will and that the identity of the beneficiaries could only be ascertained by parole evidence, the gift was sustained.

> *Dennis* v. *Holsapple,* 148 Ind. 297;
> *Curley* v. *Lynch,* 206 Mass. 289;
> *Stone* v. *Hackett,* 12 Gray (Mass. 227).

Opposed to this line of cases the appellants cite *Olliffe* v. *Welles,* 130 Mass. 221, where the court said:

> "A trust not sufficiently declared on the face of the will cannot be set up by extrinsic evidence to defeat the rights of the heirs and next of kin"

but the language of the will under consideration was a gift

> "to the Reverend Eleazer M. P. Welles, all the rest and residue of my estate, to distribute the same in such manner as in his discretion shall appear best calculated to carry out wishes which I have expressed to him or may express to him."

It is perfectly patent that the testatrix did not undertake to disclose who her beneficiaries were or might be, nor did she state any circumstance or refer to any writing by which they might be identified or their shares ascertained. Under such circumstances, the testimony of Mr. Welles could not be received. As pointed out by Mr. Justice Cardozo in the *Fowles* case, each one of these cases must stand upon its own bottom and the law of the particular case must be interpreted in the light of the facts there under consideration.

In considering these cases, it must, we think, always be borne in mind that the testator, by the language used in this paragraph of his will, intended to and did, in fact, refer to the fund previously established by him under the trust agreement specifically named, and to the rights of the beneficiaries under that trust to that fund and that by his will he gave this one-fourth of the residuary estate to the same persons and in shares corresponding to those who would take the property held by the trustee under the terms of that agreement. In other words, that it was an absolute disposition and not a reservation of power of disposal, as these appellants argue. It thus becomes clear that reference to the trust agreement is only for the purpose of identifying the persons who are to take the residue and define their shares and thus make certain the language of the testator.

The situation may be briefly summarized by stating that Mr. Swetland died leaving an unrevoked and, in fact, irrevocable trust fund in the hands of his son as trustee holding under the terms of an explicit instrument referred to by date and character in the will. Under that trust agreement, certain beneficiaries had vested interests in the fund and the testator, by his will, directed that a portion of his residuary estate should be divided in the same way and among the same people to whom the trust fund should go not at the time of his decease but at the happening of the event named in the trust agreement.

We have found no case in any jurisdiction which bars reference to the document extraneous to the will where, as here, it is solely for the purpose of making certain the language of the will by identifying the beneficiaries and their basis of taking.

Appellants' assertion, as a basis for the second objection above referred to, that the trust agree-

ment was revocable is either the result of misconception or superficial consideration of the situation existing at the time the will was executed—excluding all other possible motivations. To assume, as stated, that "this revocation clause was not brought to the attention of the Vice-Chancellor" (Brief, p. 37) is to assume that he did not read the complaint and Exhibits B and C attached thereto. His opinion sets any such question at rest.

Turning to the trust agreement referred to in the will (pp. 21-24), we find that the trustee, Maurice J. Swetland, acknowledged receipt from his father of the securities mentioned with a trust in favor of his wife and children, the income to be applied by him to their "support, education and maintenance." In it the testator is designated as the founder of the trust. That he did not sign it is wholly immaterial. The document is a formal declaration of trust in common form, wherein the conditions are too explicit to permit of possible doubt and the beneficiaries are precisely defined. No provision could possibly be altered or modified, except by the founder himself. The trustee was explicitly bound.

Appellants' counsel asserts with an assurance bordering on gusto not only that under universally recognized and controlling legal precedent this power reserved to the testator alone defeated the gift in the third paragraph of the will (pp. 37-45) but that the testator actually exercised this reserved power, revoked this trust and left the agreement of 1917, referred to in the will, "an empty shell" (pp. 45-46). How far that assertion is from the fact is shown by the incontrovertible documents.

As we have seen, intervening the creation of this trust by the testator in 1917 and January 3,

1922, he, on several occasions, added to the trust fund but without modifying in any way the limitations upon it (pp. 92-95). On January 3, 1922, he again and substantially increased this fund and, at the same time, deprived himself of all power of revocation or other interference, in all other respects ratifying and confirming the trust as founded nearly five years before. This was accomplished by the execution of a separate instrument executed by both founder and trustee (Ex. C, pp. 25-30) and formally acknowledged. In the preliminary recitals reference is made to the existing "trust estate" and the founder's desire to augment it (p. 25, fol. 20). Recital is also made of a "desire to establish a new trust by substituting this agreement for the one now in effect, *without prejudice, but to the great advantage of the beneficiaries hereof*" (italics ours) (p. 25, fol. 30). In the subsequent and covenant provisions of the agreement, no mention whatever is made of substitution or revocation, and in the absence of such the preliminary recital must be regarded as mere surplusage, particularly in view of the expressed intent of both parties that it should be "without prejudice, but to the great advantage of the beneficiaries" who were likewise the identical beneficiaries under the agreement mentioned in the will. Unless the language of the recital clearly amounts to covenant, no court would enforce it to the detriment of the beneficiaries. In the language of Comyns (Digest) "any words in a deed which show an agreement to do a thing make a covenant, but where words do not amount to an agreement, covenant does not lie."

In spite of this safeguarding clause, the appellants argue that the execution of this instrument

did prejudice these beneficiaries by cutting them all completely off from the only testamentary bequest made to them. It is difficult to follow the argument of appellants' counsel set forth under this subdivision or Point "III." For one purpose it is repeatedly stated that the agreement of 1917, Exhibit B, had been revoked by the 1922 agreement, Exhibit C (Brief, p. 45). In the same paragraph and for another purpose it is asserted that the 1917 agreement was left "merely an empty shell, a container which the will retrieved—a revoked and void instrument which the will sought to revive—for the sole purpose of controlling such part of the testamentary property as should be placed in it tentatively by the will." Then follow two pages of an attempt to enlarge upon this puerile and utterly absurd argument. If Exhibit B was revoked by Exhibit C, it was for all purposes and was no longer existent, not even as an "empty shell," and forsooth wherein would the testator have less control over this portion of his residuary estate had he specified the agreement of 1922 in his will than he did with the disposition as it stands?

The answer to it all is that the trust created by the testator July 14, 1917, was not revoked but was reaffirmed by the agreement of January 3, 1922; on the date of the execution of the will, January 12, 1922, the power of revocation reserved to the testator in the 1917 agreement had been formally and effectively waived and relinquished by him; and the agreement referred to in the will as it then stood was not of testamentary character and therefore not subject in any event to the limitations and disabilities enunciated in the cases cited by the appellants. Even if we disregard Exhibit

C, the amendation trust agreement, the trust at testator's death stood unrevoked, was valid, subsisting and enforcible. The validity of the gift by the will must be determined as of the date of the testator's death rather than the date of the execution of the will, see *Matter of Fowles, infra.*

It seems clear, therefore, that the learned Vice-Chancellor committed no error in construing this clause of the will as a gift to an existing valid trust.

This clause of the will may be sustained, however, under the doctrine of incorporation by reference, which is recognized by the courts of New Jersey as well as New York, because if, for any reason, it be held that the ultimate beneficiaries of the gift must be definitely ascertainable from the will, we may refer for this purpose to the provisions of the trust agreement specified in the will.

The much discussed question of testamentary incorporation by reference is admirably summarized in the 1925 edition of Jessup-Redfield, Law and Practice in the Surrogate's Court at pages 638-639, wherein he classifies the cases in four divisions, as follows:

1. "End of the Will" cases where, by an index finger or by the words "see over," dispositive clauses have been found upon a page or sheet subsequent to the signature, and most of the cases held that such things were not to be deemed a part of the will.

2. Wills containing the clause "as may appear from memoranda that will be found by my executors among my papers". With few exceptions, the Courts declined to give dispositive effect to these memoranda. *Booth* v. *Baptist Church,* 126 N. Y. 215, is an illustration.

3. Cases where "a properly executed codicil" referring to a will, takes up and incorporates

that will and validates it, even if the will itself were not properly executed.

4. "But the final case, and one the principal of which is applicable to all formal instruments, such as deeds, indentures of trust and wills alike, is the general rule of incorporation by reference. As to this it is to be observed that on the following propositions there is complete unanimity in the decisions that there are three essentials to the effectualness of such incorporation where a will is concerned. (1) The reference in the will to the document sought to be incorporated must be explicit and unmistakable, (2) and the description of the document sought to be taken up must be such that there can be no mistake, and, (3) the paper so sought to be incorporated must be in actual existence at the time the will is made, that is, it must not be a paper *to be prepared.*

"It is in this connection that error has been committed in a number of cases by confusion of this general rule in its application to wills with the decisions affecting an 'end of the will'. The validity of incorporation, by reference, of an extrinsic document into a will does not depend on the testamentary character of that paper, nor upon its own independent efficacy. (See *St. Johns Parish* v. *Bostwick,* 8 App. D. C. 452.) It depends upon the fact of its adoption by a will which itself is duly attested and executed in conformity with the statute. An authoritative case of this character was 'Dickin's Goods' (3 Curt. Eccl. Rep. 60; 1 Notes of Cases, 398)."

At the end of his discussion of this subject, Mr. Jessup lays down the rule—

> "Where the testator by his own language deliberately creates an ambiguity or uncertainty, as to beneficiary, amount of legacy, or nature of estate given, AND POINTS THE WAY, HIMSELF, by reference to a document or record that will identify the beneficiary or measure the gift, then if that document be in form of the requisite solemnity above specified, the Court will respect the reference of testator and refer to the document to guide it in construing the will."

The appellants Johnson rely chiefly upon the case of *Murray* v. *Lewis,* 94 N. J. Eq. 681, wherein the following provision of a will was under consideration:

> "To my executrix and executors who shall qualify the sum of $5,000. This legacy is not to be in lieu of any commissions they may be entitled to. A sealed letter or paper addressed to my executors will be found with this my will, expressing my wishes as to the said sum, but such letter or paper shall not form a part of my will."

The letter directed the payment of the $5,000 to a lady named therein, but there was no proof that the letter was in existence at the time the will was made (a fact essential under Jessup's third classification hereinbefore referred to). It must be noted too that the will itself stated that the letter should not form a part thereof, and the decision might well have turned upon that wording, for the Vice-Chancellor based his decision upon the propositions that

> "An unattested document making disposition of property may not be incorporated in a will by reference thereto"

and

> "The bequest having been made to the executors in trust, and the object of the trust being incapable of ascertainment on the face of the will, the executors take no beneficial interest therein."

It must be noted too that the letter was a mere request to the executors that they would in the future, subsequent to his death, pay to the person named therein the sum of $5,000. *There was no existing trust, no present act, no reference by the testator to an accomplished fact.* In the case at bar, the precise contrary appears. The trust had long been in existence, there was a present act, and reference was made by the testator to an accomplished fact. We feel that the learned Vice-Chancellor in his opinion went unnecessarily afield to arrive at the result indicated, that the facts appearing in that record did not warrant the broad statements above quoted, and that the case should not be regarded as a controlling precedent, even though our situation could not be wholly distinguished, which we think may be done.

The leading case in New Jersey is probably that of *Condit* v. *De Hart* (*infra*), which was cited with approval by the New York Court of Appeals in the leading case in that state, *Matter of Fowles,* cited at length in the preceding discussion.

We again take the liberty of quoting from Judge Cardozo:

> "The rule against incorporation has not been set aside. It has been kept within bounds which were believed to be wise and just. The rule is sometimes spoken of as if its content had been defined by statute, as if the prohibition were direct and express, and not inferential and implied. But the truth is that it is the product of judicial construction. Its form and limits are malleable and uncertain. We must shape them in the light of its origin and purpose. All that the statute says is that a will must be signed, published and attested in a certain way. * * * From this the consequence is deduced that the testator's

> purpose must be gathered from the will, and not from other documents which lack the prescribed marks of authenticity (*Booth* v. *Baptist Church of Christ,* 126 N. Y. 215, 247). It is a rule designed as a safeguard against fraud and mistake. In the nature of things, there must be exceptions to its apparent generality. Some reference to matters extrinsic is inevitable. Words are symbols, and we must compare them with things and persons and events. (Citing authorities.) Sometimes the distinction is said to be between documents which express the gift and documents which identify it. (Citing authorities.) In these and other cases, the expressions of the gift and the description of its subject-matter must often coalesce. No general formula can tell us in advance where the line of division is to be drawn.
>
> "It is plain, therefore, that we are not to press the rule against incorporation to 'a drily logical extreme' (*Noble State Bank* v. *Haskell,* 219 U. S. 104, 110). We must look in each case to the substance. We must consider the reason of the rule, and the evils which it aims to remedy. But as soon as we apply that test, the problem solves itself. *There is here no opportunity for fraud or mistake. There is no chance of foisting upon this testator a document which fails to declare his purpose.*"

It is to be noted that in each of these instances, as in the case at bar, three of the essentials named by Mr. Jessup in his work on Wills were found in the documents here incorporated with the sanction of the court, viz.: (1) the incorporated document was explicit, (2) the document was so accurately described as to avoid mistake and (3) the document was in actual existence when the testator's will was executed.

The appellants persist in referring to the trust agreement as one of testamentary character, but

we take the contrary view. The testator did not even sign it. It was an acknowledgment by the trustee of the limitations placed upon the property by the founder of the trust, and in all respects complied with both the statutes of New York and New Jersey as constituting the creation of a valid trust. Its beneficiaries (of whom the defendant, Maurice J. Swetland, was *not* one) were precisely defined as were their respective interests in the fund and the time when they should take. Even the appellants concede that this agreement was in existence when the will was executed, so we may well apply the language of the New York Court of Appeals as used in the opinion of the *Piffard* case (*infra*) and refer to the trust agreement "not as transferring the property by an appointment but to define and make certain the persons to whom and the proportions in which" this portion of the residuary estate should ultimately pass. It must be borne in mind that, at the time Mr. Swetland's will was executed, the power of revocation reserved to him under the trust agreement of 1914 had been effectually relinquished by the amendatory agreement of January 3rd, 1922, but the will is to be construed as of the date of his death and, the trust never having been revoked, it became absolute and enforcible, regardless of the amendatory agreement.

(*Matter of Teaker,* 124 Misc. 723.)

Schouler, in his work on Wills, says that the cardinal rule respecting a testamentary act is

> "that the plain intent of the testator as evidenced by the language of his will must prevail if that intent may be carried into effect without violating some deeper principle of public policy or of statute prohibition."

Sec. 856. "Testator's intention if ascertainable must prevail although the intention is imperfectly expressed. * * *"

Sec. 858. "In construing a will, the predominant idea of the testator's mind, if apparent, is heeded, as against all doubtful and conflicting provisions which might of themselves defeat it. * * * Hence, too, in interpreting a will the testator's general and controlling purpose should be regarded, rather than any exalted and exciting ideas which may have dictated the terms of his will, as the will must be construed to carry out the general purposes of the testator, and all the language of the will should be construed and given effect together to carry out his general scheme, so as to make it all consistent if possible. The general intention of the testator should not be negatived, and the general paramount intent of the testator controls all expressions tending to show a subordinate particular purpose."

Sec. 860. "A testator's intention is, however, to be collected from the whole will taken together, and not from detached portions alone. * * *"

Sec. 861. "A court is bound to give effect to every part of a will, without change or rejection, provided an effect can be given to it, not inconsistent with the general effect of the whole will taken together."

Sec. 960. "But where the language employed is sufficient to enable the court in view of the circumstances to ascertain who was intended the gift will be sustained, considering the circumstances at the time of execution."

Sec. 961. "Any description of a legatee will be sufficient from which his identity may be made out, although the description be mis-

taken or vague * * * and a failure to designate the beneficiaries makes it to that extent ineffectual."

With respect to incorporation by reference he states the following as the general rule:

> "If a testator refers in his duly executed and attested will to another paper which has already been written out, clearly and distinctly identifying and describing it, so that it may safely be incorporated in so solemn a disposition, that paper should be probated as part of the will itself. * * * And, in general, an extraneous unattested writing, to be incorporated with the will itself, should be reasonably identified by reference as part of it and as existing when the will was executed." (Vol. 1, Sec. 400.)

See also:

> Story's Equity Jurisprudence, Secs. 964-979.

Chancellor Kent states that the essential requisites of a valid trust are, first, a sufficient expression of an intention to create a trust and, second, a beneficiary who is ascertained or capable of being ascertained (Kent's Commentaries, 11th Edition, Vol 4, p. 307).

We have found no case which more succinctly states the proposition than *Newton* v. *Seamans Friend Society,* 130 Mass. 91, at 93, where Gray, C. J., speaking for the court, says:

> "If a will, executed and witnessesed as required by statute, *incorporates in itself by reference any document or paper not so executed and witnessed,* whether the paper referred to be in the form of a will or codicil or *of a deed or indenture,* or of a mere list or memorandum, the paper so referred to, if it

> was in existence at the time of the execution of the will and is identified by clear and satisfactory proof as the paper referred to therein, takes effect as part of the will and should be admitted to probate as such." (Citing *Allen* v. *Maddock* [*supra*], and other cases.)

The text writers on the subject of wills are practically unanimous in stating that the English rule with respect to incorporation by reference is recognized generally in this country, except by the courts of New York and Connecticut, and the defendants Johnson seek to make much of the cases purporting to reject the rule, citing many arising in New York. An examination of the decisions in that state, however, would seem to indicate that, were this will under construction by the courts there, the document here questioned would be received and incorporated as a part of the will.

In addition to the New York cases already cited see *Power* v. *Cassidy, et al.,* 79 N. Y. 602, where the will under consideration contained the following clause:

> "and the balance I give to my executors, to be divided by them among such Roman Catholic charities, institutions, schools or churches in the City of New York as a majority of my executrix and executors shall decide, and in such proportion as they may think proper."

It was insisted by counsel for the plaintiff, the widow of the testator and executrix, that no definite beneficiary capable of taking was designated, and that there was no absolute certainty as to the nature and terms of the bequest. The court thereupon said:

> "If we give full force and effect to the rule stated and hold that the language employed

must be such as to show that the object is certain and well defined; that the beneficiaries are either named or capable of being ascertained within the rules of law which are applicable to such cases; and that the trusts are of such a nature that a court of equity can direct their execution, we are of opinion that the gift in question was valid and should be upheld."

In the case of *Gilman* v. *McArdle,* 99 N. Y. 51, a will was under consideration whereby the remainder was directed to be expended for Roman Catholic masses, to be procured by him to be said for the repose of the souls of herself and her said husband. As the designated individuals died before the fund could be applied for the purpose stated, title to the fund was in question. The court below held that the trust was void for the want of a beneficiary who could enforce it, both of the persons for whose benefit the masses were to be solemnized being dead. The Court of Appeals reversed the judgment and sustained the gift, quoting with apparent approval the opinion of the same court in *Beekman* v. *Bonsor,* 23 N. Y. 298:

> "A gift to charity is maintainable in this state if made to a competent trustee and if so defined that it can be executed as made by the donor, by a judicial decree, although it may be void according to general rules of law for want of an ascertained beneficiary."

In the case of *Holland, et al.* v. *Alcock,* 108 N. Y. 312, a will was before the court containing the following clause:

> "All the rest, residue and remainder of my estate I give and bequeath to my executors, to be applied by them for the purpose of having prayers offered in a Roman Catholic

> Church, to be by them selected, for the repose of my soul and the souls of my family and also the souls of any others who may be in Purgatory."

The Court, speaking through Judge Rapallo, referred to the case of *Gilman* v. *McArdle* (*supra*), and the fact that the question now before the court had not been then directly passed upon, and said:

> "The point upon which the majority of the court in the case last cited reserved its decision is now again presented. There is no contract *inter vivos* but the will expressly bequeaths the fund in question to the executors in trust for the purposes therein specified * * *"

and sustained the trust.

In the case of *Van Cott* v. *Prentice, et al.,* 104 N. Y. 45, an action was brought against executors of the will of John H. Prentice, deceased, to recover possession of certain securities, title to which was claimed by the plaintiff as trustee under certain written instruments executed by the testator prior to the execution of the will. These written instruments were sealed, endorsed not to be opened until after death. The deed of trust contained the following:

> "Third: To pay over the interest from time to time received on such securities or investments and reinvestments to Clarence King of New Haven, in the State of Connecticut, or to such other person or persons as I shall from time to time direct—the said King having no title to or beneficial interest in said payments; and the said King shall pay over said interest as received to the person, and for the uses specified in confidential written instructions bearing even date herewith, signed in duplicate, and to be delivered to the said Van Cott and the said King."

The confidential and private paper which was sealed, retained by the plaintiff as directed and opened after death of the testator ten years later contained the following:

> "And I now direct that unless I shall otherwise provide in my lifetime or by testamentary disposition, the said trustee shall, after my death, devote any further income from the said securities or the reinvestment thereof to the use of the said Mrs. Howland and three children—one-third to her and the residue equally to the said children, or the survivors or survivor of them; * * *"

With respect to the deed of trust, the court said:

> "*Neither the power of revocation nor the provisions determining the trust in the event* of a legal interference, or the death of the trustee in the life of the settlor, *are in the least inconsistent with the trust as completely and perfectly constituted.* * * * We ought not to put the creator of this trust in the attitude of deliberately nullifying his own evident purpose. That he meant to create an effective trust is beyond all question, and a construction which makes him destroy in the very effort to create, should not prevail if there be any other rational interpretation. * * * We discover nothing in the provisions of the deed, properly construed, inconsistent with a completely constituted trust, wholly voluntary and benevolent, and subject to revocation by the settlor at any moment; a kind of trust of which the books furnish many instances, and which, indeed, are sometimes subject to doubt and suspicion if the power of revocation is absent.
>
> "But other questions argued grow out of the sealed and confidential paper to be opened only on the settlor's death, and which, when opened, disclosed the final disposition to be made of the trust fund. It is said, first, that the paper was testamentary in its character, and so not legally executed. The contention compels a view of the instruments delivered, which is unsound in several particulars. It assumes what is not true, that the title to the securities constituting the trust fund was never vested in the trustee, but the property was the settlor's at the moment of his death, and that the sealed paper alone, and by itself, is to be the subject of consideration, and took effect solely at the death of the signer. The three papers executed and delivered together, and at the same time, constituted the trust deed, and cannot be separated in determining their effect. The sealed paper was a component part of the declaration of trust, and spoke from that date. * * *"

See also:

In the *Matter of Tamargo,* 220 N. Y., 225, where a will was under construction, and the Court of Appeals said:

> "We are to determine from the will the meaning of the language of the paragraph 'Third'. The language expresses and directs, we must assume, the disposition that testatrix intended and desired. If it in its reasonable, ordinary and usual meaning, without the aid of rules of construction, expresses and effects a disposition, our duty and labors end in declaring that disposition."

In the case of *Jay* v. *Lee,* reported in 41 Misc. (N. Y.), at page 13, a codicil was under consideration under which a bequest to two individuals was made of personalty.

> "in trust, to distribute and make over the same to the persons whom I (the testatrix) have indicated to them during my lifetime."

and the court said:

> "The trust here is not secret, but expressed in the will, and the question is whether it is void for indefiniteness. I think the trust is valid. It is not void for indefiniteness, in that it does not designate the beneficiaries. It is not necessary that the beneficiaries be named in the will; it suffices that they are so designated that they are ascertainable (*Holland* v. *Alcock,* 108 N. Y. 312; *People* v. *Powers,* 147 id. 104; *Fairchild* v. *Edson,* 154 id. 199). The designation here is of persons whose names the testator had givn to the trustees before making her will. So long as the fact exists that she gave them the names, it does not matter whether it was done orally or in writing. Nor does it matter that the selected beneficiaries were not informed of their selection before the testator's death. Though not so informed, they were nevertheless designated, and known to the trustees. It may be true that the trustees could conceal the fact, and defeat the trust; but that is altogether a different matter; the fact of the trust exists, nevertheless. The law does not declare such a trust void on the possibility that the trustees will thus wrongfully defeat it; on the contrary, the law presumes that the trustees will do their duty, and declare the trust to the beneficiaries.
>
> "A test of whether the trust is void for indefiniteness is whether this court could carry it out if the trustees had died. There is no reason why it could not. There might or might not be difficulty in such case in ascertaining the designated beneficiaries. If the evidence, showing who they are could be found, the trust would be carried out by the court; if it could not be found, the trust would fail. But this, again, is only a matter of practical difficulty, which is incident to all things; it does not bear on the question of whether the will itself designates the beneficiaries. That the evidence which once existed, and made them ascertainable, has been lost, would only prevent the carrying out of the trust, it would not make it a void trust *ab initio.*
>
> "There seems to be no doubt that evidence *dehors* the will may be resorted to to identify the beneficiaries designated by the will. It is true that a bequest can only be made by a will. But the bequest here is made by the will, i. e., to the trustees. The evidence *dehors* is not to make a bequest, but to ascertain and identify the beneficiaries designated by the trust clause of the will. If this testator had written the names of beneficiaries on a piece of paper, and deposited it in a strong box, and then said in her will that these trustees should distribute this property among the persons on such list, the case would be no different to the present one. The designated beneficiaries being ascertainable, the trust would be valid."

This case does not appear to have been reviewed on appeal, but in the late case of *Reynolds* v. *Reynolds,* 224 N. Y. 429, the learned and widely quoted Mr. Justice Pound, writing for the court, referred specifically to the opinion in the *Jay* case and approving it, said:

> "Although the bequest can be made only by will, the evidence *dehors* is not to make a bequest, but to ascertain and identify the beneficiaries designated in the trust clause of the will. The designated beneficiaries are ascertainable and the trust enforcible although the evidence to identify such designees may be unobtainable; the trust is, therefore, valid and the case distinguishable from *Holland* v. *Alcock* (*supra*) and like cases where no human power could identify the beneficiaries."

We repeat, therefore, that, even under the New York decisions, this document may be incorporated in the will for the purpose of identifying the beneficiaries of the trust and the purposes of the

gift, for the document itself was in existence long anterior to the will, has been unmistakably identified, and is in all respects definite in its terms.

On page 33 of their brief, counsel for the appellants make the surprising assertion that in the court below we cited the *Jay* case "unaware of the fact that the New York Court of Appeals, in the recent case of *Reynolds* v. *Reynolds,* 224 N. Y. 429, had completely repudiated the reasoning in that case and expressly overruled the case." As a matter of fact, our reference to and quotations from *both* of these cases in our brief in the lower court was in the language hereinabove used in the same connection. We may add, in view of the statement by counsel, that in the *Reynolds* case the testamentary clause in question reads:

> "*Item Sixth.* I do hereby give and bequeath to my said Executor all of the personal property (of) which I may die poessessed and which I may own at the time of my death *in trust, however, and for the purposes of paying out and disposing of same as I have advised and directed him to do.*"

From the *Jay* case the court summarized Judge Gaynor as quoted hereinabove, saying that he "stated the reasons for his decision clearly", but it declines to so extend that proposition as to approve the acceptance of wholly parole testimony by a single witness with respect to statements made to him by the decedent. It does not overrule or discredit Judge Gaynor's decision as applied to the facts there before the court.

In New Jersey we have, in addition to the case of *Condit* v. *De Hart* already cited, the earlier and much cited case of *McCurdy* v. *Neall,* 42 N. J. Eq. 333. But if there had been any doubt upon the point, that would seem to have been set at rest

by the decision of the Court of Errors and Appeals of New Jersey in the case of *Smith* v. *Runkle,* 98 Atlantic 1085, which affirmed a decision by the Prerogative Court of New Jersey in October 1915 by Chancellor Walker, which in turn affirmed a decision by Judge Martin of the Orphans Court of Essex County, admitting a will and codicil to probate. The exhaustive opinion by Judge Martin is reported at length in 97 Atlantic Reporter 297-305. The English precedents are discussed at length not only as stated in the case of *Allen* v. *Maddock,* 11 Moore P. C. 427, but the general principles there laid down are approved. It would seem, therefore, that whatever effect the criticism of the Vice-Chancellor in the *Murray* case might otherwise have had has been wholly negatived by this court's later affirmance of Judge Martin's decision.

The appellants seek to escape the possible application of English precedents by claiming that the New Jersey Statute of Wills was not historically of English origin, but the contrary seems to be recognized by such well considered cases as *Matter of McElvaine,* 18 N. J. Eq. 499. The leading English case is *Allen* v. *Maddock,* 11 Moore P. C. 427, and therein the authorities are exhaustively reviewed. That court held that the prime question to be determined was whether or not there was sufficient evidence to identify the document referred to in the will so certainly as to preclude possibility of fraud or mistake, and parole testimony was resorted to solely for that purpose. The decisions of the American courts have not extended this doctrine but have generally recognized it, as already seen.

The appellants rely chiefly on two New Jersey cases, *Hartwell* v. *Martin,* 71 N. J. Eq. 157 and *Murray* v. *Lewis,* 94 N. J. Eq. 681.

The case of *Hartwell* v. *Martin,* 71 N. J. Eq., 157, cited by the objectors in support of their proposition, involved a will wherein the testator directed his executors to settle with creditors whose claims were outstanding in 1872 on the basis of principal without interest, and added:

> "A list of all debts that I wish paid will be found enclosed with this will."

With a duplicate original of his will, the testator delivered to his executor a list containing not only the names of some of his creditors of 1872, but some to whom he was liable on subsequent obligations. With the other duplicate original of the will was found a second list of creditors specifying names, dates and amounts which did not correspond with the other list, and it was shown on the trial that neither list contained the names of all those mentioned in the assignments specified by the will. The bequest was rejected upon the precise ground that it was

> "An attempt to bequeath property to a class of persons who can only be ascertained by reference to a non-testamentary paper, which the testator might change from day to day, and thus enlarge or diminish his testamentary gifts as often as he chose without observing the rules of law relating to the testamentary disposition of property."

In other words, it clearly appears by the record in that case that it was impossible to ascertain, even by evidence extrinsic to the will, the names of those whom the testator meant to designate as the beneficiaries of his gift.

In the *Murray* case, Vice-Chancellor Fielder goes considerably afield to criticize the opinion in *Allen* v. *Maddock* (*supra*), first because the facts

were so at variance with the facts before the court in the *Murray* case and, second, because he seems to have overlooked the repeated recognition and approval of the *Allen* case in this country and also prior New Jersey decisions in harmony therewith. In this *Murray* case, as heretofore pointed out, there was no evidence that the letter referred to in the will was in existence at the time the will was executed, and there was no existing trust or present act or reference by the testator to a fact accomplished.

Three additional New Jersey cases are cited by the appellants:

Magnus v. *Magnus,* 89 N. J. Eq. 346, where the entire estate was given to a niece "to dispose of in accordance with my instructions to her". Whether these instructions were written or oral, past, present or future did not appear. A letter found in a bureau drawer could not be conclusively identified as that referred to by the testator and, besides, it was clearly of a testamentary character.

Smith v. *Smith,* 55 N. J. Eq. 821, where a gift was made to trustees for a school for mechanical training, to be organized in accord with plans outlined or to be outlined by the testator. Not only was there the serious—in fact fatal—uncertainty, but any such written instructions would, by reason of the language of the will itself, have been of testamentary character.

Condit v. *Reynolds,* 66 N. J. L. 242, where a power of appointment was given a husband "to carry into execution such charge and instruction as I may, during my life, have expressed to him in regard thereto".

In each of these instances, a mere brief statement of the salient facts is sufficient not only to "square" the decision with the cases cited by the

respondents, but to show how inapplicable to the instant case such a precedent must be.

The appellants cite *Atwood* v. *Rhode Island Hospital Trust Company,* 275 Fed. Rep. 513, as opposing reference to the trust agreement to determine the ultimate beneficiaries because they were not specified in the will. That case is eliminated from consideration here, however, by the fact that counsel for all parties *conceded* that the will there under consideration did not "incorporate by reference any existing trust agreement", and therefore, as that court pointed out, it was not within the doctrine of *Newton* v. *Seamans Friend Society,* 130 Mass. 91, *Condit* v. *De Hart* and *Matter of Piffard,* etc., cited by us (*infra*), and these cases did not apply.

Because the testator, in a trust agreement produced by the trustee, reserved the power of modification, the court held that he might, subsequent to the making of his will, have given oral instructions modifying this trust by which the uncertainty of disposition was rendered too great to be sustained. Judge Bingham filed a long and vigorous dissenting opinion, citing many cases, among them *Moore's,* 61 N. J. Eq. 616, and *Condit* v. *De Hart* (*infra*).

Finally, in a last desperate effort to prejudice this court, an attempt is made, and for the first time, to discredit the trust agreement itself by claiming that it was not shown to be the one referred to by the testator. They did not have the temerity to raise any such question during the trial or before the Vice-Chancellor. Their brief below stated only "whether the trust agreement was found with the will does not affect the question". In view of the state of the pleadings (pp. 10, 48) and the absence of any question about

the identification, there was no reason why we should have brought from California, where he has long resided, Mr. M. J. Swetland, or even have taken his deposition. The whole argument of appellants and their attitude from the first may be well judged by the argument appearing at pages 68-77 of their brief. It is quite evident that counsel overlooked the statement by Mr. Johnson himself when he offered this document in evidence *on behalf of appellants* during his examination of Mr. Montgomery, called as his witness when, after having the witness identify the signature of Maurice J. Swetland, he said:

> "Mr. Johnson: I now offer in evidence paper heretofore marked Exhibit C. 4 for identification, and I offer it for a particular purpose, and for that only, which is to show along with other evidence, the testator's habitual use of certain words which appear in the will. This offer is not to be considered in any way as admitting this document —as putting this document in evidence, *for the purpose of construing or completing the language of the will that makes reference to some trust agreement of the same date"* (p. 86).

Mr. Montgomery, private secretary to the testator, who typewrote this trust agreement and was present when it was executed in duplicate, so testified and that one copy was placed by the decedent in his private safe (pp. 68-69, 84-85).

Mr. Corey, one of the executors, associated in business with the testator for many years but in no way a beneficiary under the will, testified that the trust agreement was kept by the testator with his private papers in his safe (pp. 70-71); that the amendatory agreement of January 3, 1922, was also found in the testator's safe with his papers and securities after his death (and this while tes-

tifying as a witness called on behalf of these appellants (pp. 83-84).

Mr. Redfield, who was secretary of the testator's principal business organization, the United Publishers Corporation, testified that he first saw this 1917 agreement in 1918, when Maurice J. Swetland delivered to him his copy with the stock for safekeeping, just before he left for overseas service (p. 92); that a copy of the amendatory agreement of July 3rd, 1922, was likewise delivered to and kept by him (p. 93) and placed with all the securities in an envelope, wherein they were kept until June, 1925, after the testator's death, when he returned them to the trustee (pp. 94-95).

In spite of the disingenuous argument of appellants' counsel on the pages referred to, and regardless of Mr. Johnson's statement to the Vice-Chancellor, hereinbefore quoted, when he offered the 1917 agreement in evidence, it is identified absolutely and beyond possible cavil by these wholly disinterested witnesses.

The single other question discussed by appellants relates to the power vested in trustees with respect to the investment of funds, appellants contending that the Vice-Chancellor erred in construing the word "with" as "without" as used in the will in conjunction with reference to the legal limitations upon fiduciaries. The intention of the testator and the correctness of the Vice-Chancellor's ruling were so obvious, we think it unnecessary to add further to the discussion.

McCarter & English,
Arnold L. Davis
(of the New York Bar),
Solicitors for Defendants-Respondents.

New Jersey Court of Errors and Appeals

Maurice J. Swetland, *et al.*,
Complainants-Respondents,

vs.

Hattie Swetland, *et al.*,
Defendants-Respondents,

and

Dorothy Johnson, *et al.*,
Defendants-Appellants.

SUPPLEMENTAL BRIEF FOR DEFENDANTS-RESPONDENTS.

On the day of the argument of the appeal herein the brief theretofore served on behalf of the appellants, with respect to which we had filed some time before an answering brief, was withdrawn and a new brief served on behalf of appellants which omits reference to the extraneous matters which we had criticised and substantially modifies the argument theretofore presented on appellants' behalf.

The endeavor made in the earlier brief to cast doubt upon the identification of the trust agreement referred to in the testator's will, and upon which we commented in the concluding pages of our brief, is now emphasized considerably more than before, and the object in so doing is even more apparent. In reply we again point out that before the Chancellor no question was raised by

anyone with respect to the identity of the document produced by the executors, nor was the slightest question raised either during the trial or in the briefs as to its being the identical document referred to by the testator in his will. Under such circumstances there was no reason in the world why we should have gone to the trouble of tracing the duplicate or putting it in evidence.

By reference to the State of Case (p. 71), it will be noted that when the trust agreement, Exhibit B, was offered in evidence by counsel for the executors, Mr. Johnson objected to its admission, without stating any grounds. The comment by the Court, however, indicates the only basis of objection which was under consideration, which necessarily assumed that the identification of the document had been properly accomplished.

Furthermore, as upon the oral argument, we call attention to the fact, again referring to the State of Case, that for yet another reason the appellants are barred from raising such a question for the first time before this Court, because no exception was taken to the admission of the document (it having been finally offered on behalf of the appellants themselves, p. 86), and it was not specified in the notice of appeal (pp. 157 to 163) or in the petition of appeal (pp. 162, 168).

In any event the argument is pointless because, as illustrated in our principal brief, the original of this trust agreement was so positively and precisely identified by persons wholly disinterested in the controversy, as the document referred to in the will, as to preclude the possibility of fraud or error, or even the slightest doubt.

On page 12 of the new brief differentiation between Exhibits B and C is sought to be established because under B a contingent reversion to the

residuary estate of the founder was provided for, while under C the same contingency provided for reversion to the Publishers Securities Company; but the result is precisely the same. This Securities Company is of course that referred to by Mr. Johnson in his concessions to the record on pages 66 and 67 of the record as the company to which the testator had transferred a substantial portion of his assets and then had divided its stock among his children. In the event of the death of the son's children, who were the beneficiaries under Exhibit B, the principal and unexpended income would pass in equal shares to the testator's children either under the provisions of Exhibit B or of Exhibit C. The statement on p. 12 of this brief that 1100 of the 1978 shares of P. S. Co. stock mentioned in Exhibit C was included in Exhibit B is erroneous. One is common and the other Class B stock.

At page 13 of their brief the statement is made that "the trustee may have executed any number of documents of a similar kind. The door is opened wide for fraud." To indulge in such an assumption is to do such violence to the record as to be almost inconceivable. It overlooks the fact that however many of "similar documents" the trustee may have executed unknown to the testator, this particular document was the one which evidenced the trust founded by the testator and was the one to which he referred in the third paragraph of his will.

On page 15 of the brief appears the statement that if the testator referred in his will to the trust agreement of July 14th, 1927, "then at any time after the execution of the will down to the date of testator's death he might have by an instrument not executed in accordance with the provisions of the Statute of Wills, either revoked the

gift or changed its ultimate disposition." That statement wholly disregards the fact that the power of revocation reserved to the founder of the trust under the agreement of July 14th, 1917, was expressly cancelled by that founder under the provisions of the supplemental agreement of January 3rd, 1922, which was executed before the will was executed. The testator therefore had not reserved the right and could not execute a revocation subsequent to the execution of his will. It also ignores the fact that the testator had no power to modify any of its terms or change its beneficiaries.

In this connection it should be noted that the other two daughters of this testator, Mrs. Kane and Mrs. Stevens, are in precisely the same position as the appellant, Mrs. Johnson, and are affected in precisely the same way by the will and by the decree, yet they recognized the trust agreement produced and the validity of the will, and not only did that, but have done what they could to insure the carrying into effect of that which every one knew to be the desire and purpose of their father as expressed in his will.

On page 16 of the brief appears the statement:

> "There was no trust agreement of July 14th, 1917, created by testator. The trust agreement of July 14th, 1917, was created by the trustee, Maurice J. Swetland."

Whatever may be the purpose of this statement, the fact, undisputed, remains that this testator was the *founder* of that trust, is so denominated in the document (p. 23, fol. 20), and the moving consideration as expressed in the document came from the testator (p. 22). Much of the argument in the succeeding pages of appellants' brief is predicated upon the assumption that at the time

of the execution of the will the testator still had not only the power of revocation but of purpose and beneficiary modification reserved to him under the provisions of the trust agreement, which of course is not the fact, as so amply demonstrated by the record. But even if the contrary were the case, the situation would not be altered for the reasons pointed out by the Vice-Chancellor below and amplified in our principal brief. We do not care to extend the discussion with respect to cases already cited beyond that contained in our principal brief.

Counsel for the appellants devote their eighth point to a discussion of the proposition that "the gift cannot be sustained upon the theory that the trust agreement is not a document of a 'testamentary nature,'" taking exception to the finding by the Vice Chancellor that the trust agreement was declaratory merely and not dispositive.

In support of that proposition they cite a number of cases which were discussed in their prior brief and are commented upon in ours. To these they add the case of *Stevenson* v. *Earle,* 65 N. J. E. 721, their quotations from and comments upon which indicate their apparent oversight of one essential and controlling distinction between the case at bar and that line of cases of which the *Stevenson* case is an example.

In the *Stevenson* case the testator, a locomotive engineer, quite some time prior to the execution of his will had made a substantial deposit in a fund for railroad employees' savings under the rules and regulations of the organization by which he was required at the time of opening his account to designate in writing the person to whom, in event of his death, any balance then remaining to his credit should be paid, in accord with which he designated his wife and thereafter gave to

her the pass book. He retained and exercised continuously until his death the right to withdraw amounts from this fund from time to time for his own personal use and benefit and also added amounts to it by deposit. By his will he left his estate in trust. His widow and also his executor claimed this fund. The court, reversing the Vice Chancellor, held that while the donative purpose of the testator was apparent from the designation of the wife, the gift did not cover the whole amount of the deposits made by him, but at best the balance only which might remain to his credit at his death, and that the agreement between the testator and the organization holding the fund could not be construed to be a declaration of trust in favor of the wife. Manifestly standing alone, it could not be so construed, nor as a gift *inter vivos*. The question of incorporation by reference was not involved. A very brief quotation from a portion of the opinion quoted by appellants' counsel (referring only to the agreement upon which the wife based her claim and wholly without reference to the will) will suffice to indicate our point:

> "Instead of the agreement showing that by force of it the husband had parted with his interest in the funds then deposited and thereafter to be deposited by him—that he had put them out of his power, so far as any interest of his was concerned—it in terms preserves to him the absolute right of dealing with and disposing of them solely for his own benefit, and that he exercised this right to its fullest extent is shown by his dealings with the deposits as set forth in the statement of facts above recited * * * but in order to legalize such a gift, there must be not only a donative intention, but also, in conjunction with it, a complete stripping of the donor of

> all dominion or control over the thing given. * * * The expressed intention of the deceased was only to bestow upon his wife so much of his deposit as should remain undrawn by him at his death. Such a gift it seems to us is purely testamentary in its character."

And counsel then adds:

> "It is hard to differentiate the underlying facts in that case from those in the case at bar. * * * Here we have the trust agreement or declaration of July 14th, 1917, which says in effect precisely the same thing, i. e., 'If I do not change the trust agreement then my property shall be distributed in accordance with the terms of that agreement; if I do change it it is to be distributed in the manner in which I may change it.' "

On the contrary, we find in the *Stevenson* case the only property under consideration was the balance of a fund deposited with an organization under a deposit agreement in which his wife was named as the payee of any credit balance remaining at his death—clearly of testamentary character. Title did not pass until death.

In the case at bar, on the other hand, we have disclosed an utterly different situation. The trust agreement was executed nearly five years before the testator's death, and under its terms he deposited with the trustee a substantial fund with respect to the management or use of which he reserved to himself no control or interest whatsoever. Title to the property passed to the trustee immediately. The trustor did not even retain the voting power on the stock. He could revoke the whole trust but never did. *No one is here claiming any interest in any part of that fund. The will here under consideration made no attempt to dispose of any of that property or fund.*

It by its express terms merely directed that one-fourth of the ultimate residuary estate should be given to the trustee named in the will and in that agreement. Resort does not have to be made to the trust agreement to find out what and how much of the testator's property was thus given, for that is defined by the will itself, and that property was never a part of the trust fund, nor is there conceivably to be spelled out of the situation any intent of the testator to create a trust over which he would have any control whatsoever; nor does the will refer to property the title to which had even to a limited extent parted from him prior to his death. Whether or not the testator retained until his death control of that portion of his estate which he sought by this paragraph of his will to give to a designated trustee and through him pass on to certain of his grandchildren is not in the slightest degree material to our issue. It can no more be urged as an objection to this gift than it could be to the gift in the same paragraph to this appellant and her two sisters. Therein lies the distinction. We are in no way concerned with the property which was specified in the trust agreement of July 14th, 1917. It is not denied that that was a valid trust. There is not even a suggestion that at the time of his death the testator had the slightest interest in any of *that* property or that any interest therein did or could pass to anyone under the provisions of this will. He merely provided that when the life estates created by him should terminate, one-fourth of the residue *then* remaining, if any, should be delivered to M. J. Swetland, as trustee, named in a formal document so long before authorized by him and still in existence. Whether the trustee then acting should be his son or a successor trustee was immaterial. The language used indicates the clear intent of the testator to make this gift to a trustee, living at his death, who had no power of appointment under the will or exercisable after testator's death, and whose beneficiaries were absolutely fixed by a pre-existing document identified by the will. The duties of the trustees appointed by the will of the testator as custodians of this residuary estate will be fully complied with by their delivery of the designated portion of this estate to the trustee named who survived the testator.

On page 10 of their brief they seek by analogy to apply this *Stevenson* case to this issue. They indulge the assumption that the *testator* might have changed the trust agreement, overlooking the fact that *he had no power to make the slightest change in any of its provisions.* He could only revoke it altogether, which points out the fallacy of the argument under their next point, IX (pp. 64, 68).

Their argument admits that the agreement of July 14th, 1917, was still in effective existence—in fact it is asserted repeatedly in the brief in support of various phases of their argument. Whether or not the property listed therein had been increased or decreased by mutual agreement between trustor and trustee is of no moment whatever here. The trustee named therein and in the will lived and could function. *Smith* v. *Smith,* 54 N. J. E. 1, is cited in support of their point, but it cannot, we think, be held to apply. The court there said, as quoted by counsel:

> "the question is * * * whether the testator, by mere reference to his own language, used to others at previous times, *concerning that which was not existing,* but was to take life in his will, may as against his heirs and next of kin make that language operative in the testamentary disposition of his property." (Italics ours.)

But in the instant case, to paraphrase the language above used, the testator referred to language used by *another* at previous time concerning that which *was* then in existence and in hand. We are not dealing with the property named in the trust agreement at all, nor with an instrument the terms of which could be modified or varied by the testator during his lifetime or by his will.

Likewise in the case of *Atwood* v. *R. I. Hospital Trust Co.*, 275 Fed. 513, next cited, the court, as it points out so clearly in its opinion, was dealing with an instrument the provisions of which were "shifting"—subject to "oral or written change" by the testator. No such situation is here presented.

On page 67 counsel concedes that a trust established by another—

> "may be treated as an entity and a legatee or devisee under a will may be considered as sufficiently identified if such a trust is referred to in the will. It is such a trust that the chancellor referred to by his language in *Smith* v. *Smith,* 54 N. J. E. 1. The Statute of Wills is not violated, for no proof by oral testimony is required of an act of the testator."

Then follows the statement:

> "Here it is the act of the testator himself, i. e., establishment of this trust, the trust agreement being executed not by the testator but by the trustee, which is to be proven by oral testimony."

But on page 16 of the same brief they say:

> "In passing we observe that there was no trust agreement of July 14, 1917, *created* by testator. The trust agreement of July 14, 1917, was created by the trustee, Maurice J. Swetland."

On page 38 they say:

> "A distinguishing feature of all the cases, where some instrument dehors the will has been referred to as indicating the beneficiaries of the will, etc., is that, in each of those cases, the instrument has *not* been an instrument *created by the testator.*"

and we add—that is one reason why they apply to the issue before this court.

In these cases cited for appellants there was of necessity resort to as much oral testimony to *identify* the extrinsic document as in the instant case. Here there was no oral testimony of any act by the *testator* with respect to the identification of this trust agreement. It was limited to the identification of the document as the one mentioned in the will, viz., to the signature of the trustee, the witness thereto, the placing of it in testator's safe and its removal therefrom subsequent to his death. The founder of the trust was the testator—the declarant of its terms and the namer of the beneficiaries thereunder was another person, the Trustee, and over it or him the testator at no time had any control. He could only revoke in its entirety, but did not. In the language of appellants' counsel above referred to, it may therefore be treated as an entity and the trust having been referred to in the will, the legatee so named may be considered as sufficiently identified.

They instance the cases holding that "one may leave his property to the executor of another," where the power is granted to the other to create the entity. The situation in the instant case is even stronger, for there can be no distinction between the executor of another and the trustee or custodian of a fund, for here the custodian (trustee) could not create the entity and his powers were precisely defined by a formal instrument long antedating the will, whereas in the executor case the terms of the instrument by which he was

appointed may have been wholly unknown to the testator, or not even in existence at the time of the signing of the will.

In re Conway, 124 N. Y. 455, and *In re O'Neill,* 91 N. Y. 512, cited on page 41 of their brief, are "end of the will cases" and can have no possible bearing on the issue before this court.

Olliffe v. *Wells,* 130 Mass. 221, involved a will under which a residuary estate was attempted to be given to a trustee to be disposed of by him "as in his discretion shall appear best calculated to carry out wishes which I have expressed to him, or may express to him." Surely nothing further is necessary than this brief quotation to indicate how far from the instant case was that and how utterly inapplicable it must be on the facts. Not only was this disposition subject to change by oral but by subsequent direction of the testator.

The brief quotation from the opinion of Chief Justice Denio in the case of *Langdon* v. *Astor's Executors,* 16 N. Y. 9, cited on page 47 of appellants' brief, seems not to give a fair idea of the actual effect of that decision, which might well be cited as favoring the contention of the respondents here. Mr. Astor by a codicil to his will bequeathed to his daughter, the plaintiff, the income from a substantial trust fund deposited with an institutional trustee in New York. By a prior codicil, which was not revoked, he provided—

> "for as much as I may make advancements or beneficial provisions for persons or purposes provided for in my will and codicils, it is my direction that such advancements, if charged in my books of account, shall be deemed as so much, on account of the provision in my will or codicils, in favor of such persons or purposes."

Following his death entries were found in his ledger in which he debited Mrs. Langdon:

> "for the following stocks charged to said trust account August 13, 1839, now handed her, being property bequeathed to her in similar terms by a codicil of my will * * *."

The question before the court was whether the plaintiff could, notwithstanding this entry in the ledger, recover the legacy referred to in the codicil which was executed by the testator subsequent to the codicil containing the above quoted restrictive clause. The Trial Court found in favor of the executors, defeating the claim. The General Term reversed, but the Court of Appeals, reversing the General Term, sustained the Trial Term.

Stress is laid by counsel upon *Matter of Dana Co.,* 215 N. Y. 461 (pp. 47 ff.). The question there before the Court was whether or not property transferred to a trustee by testator in his lifetime, under and in pursuance of the terms of a trust agreement *executed by the testator* was "subject to a transfer tax as a gift intended to take effect after the grantor's death." It appeared from the face of the trust agreement that the donor reserved to his own use the entire income from the trusteed property during his lifetime, the right to direct how the trustee should vote thereon, it being stock, the power to direct, the manner at and price for which the stock should be sold, to substitute a different trustee at will and in addition to all that, the right of revocation. The Court found, and properly, that

> "after the execution of the deed of trust Mr. Dana still retained just as much power over the stock as he would have had if he had disposed of it by will instead of executing the instrument. * * *"

The instrument directed the trustee to pay the income *after Mr. Dana's death* to his adopted daughter for life, thereafter to an adopted son for life, and thereafter to divide the principal among named donees, or, if they were unable to take, to divide it among those named as residuary legatees in the testator's will. What possible application to the issue before this court can the cited case have upon those facts? It is perfectly patent that the Dana trust, not becoming effective as a transfer of property, or any interest in property, *until after his death,* was a testamentary disposition of his property and that such a transfer was subject to the tax sought to be imposed. Not a single question involved before that court is here presented.

The situation here presented as so sharply distinguished from the cases relied upon by the appellants is that the trust agreement of July 14, 1917, is not testamentary in its nature. It went into effect according to its terms immediately upon execution, and the interests of the beneficiaries thereunder vested immediately. Revocable trusts are common and have never been held invalid because not executed with like formality as a will. The revocable provision of this agreement about which counsel for the appellants have so much to say, gave to the founder of the trust power to revoke the trust in its entirety, and no other power whatsoever. In the case at bar the gift by testator, evidenced by his will, was to the trustee named in an instrument specified by exact date, and that gift is not made subject to any power of revocation or control by testator. So far as the testamentary gift is concerned, it could only be revoked by a subsequent codicil or will, neither of which was executed, and finally we must

bear in mind that not only was this power of revocation reserved to the founder actually released prior to the execution of his will, but regardless of that it was never exercised.

It is therefore respectfully submitted that the decree of the Court below should be in all respects affirmed.

McCarter & English,
Arnold L. Davis,
(Of the New York Bar),
Solicitors for Defendants-Respondents.

by leave of Court.

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

New Jersey Court of Errors and Appeals

Between

MAURICE J. SWETLAND, *et al.*,
executors and trustees,
Complainants-Respondents,

and

HATTIE SWETLAND, *et al.*,
Defendants-Respondents,

and

DOROTHY A. JOHNSON, *et al.*,
Defendants-Appellants.

On Bill, &c.

On Appeal from Chancery.

SUPPLEMENTAL BRIEF ON BEHALF OF COMPLAINANTS-RESPONDENTS.

A brief was served upon the respondents by the appellants containing statements which were not supported by the record and which we are informed were misleading and untrue in fact. It was in answer to this brief that the brief of the complainants-respondents was prepared and filed. When the improper matter appearing in appellants' brief was brought to the attention of their New Jersey solicitors of record, the brief was withdrawn, but not until the brief of the complainants-respondents had been written and actually printed. We therefore of necessity filed the printed briefs.

We mention this matter because in our brief as filed we have referred to improper statements in appellants' brief. These references are, of

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course, to the brief originally served upon us and do not apply to the brief which is signed by Mr. Lane and which is now before the court. The questions of law discussed in our brief remain the issues involved in this appeal, and, with this explanation, that brief may stand in conjunction with this supplemental brief as setting forth the views of the executors and trustees of the Swetland will.

There are some arguments in the brief filed by Mr. Lane which perhaps are not answered with enough particularity in our main brief. It is our purpose now to point out certain flaws in those arguments.

I.

Appellants' error in statement of facts.

The trust agreement bears date July 14, 1917. It is signed by Maurice J. Swetland, the trustee named therein. It is witnessed by L. J. Montgomery. At the trial, the execution of this agreement was proven by the subscribing witness. No question of the authenticity of this trust was raised below, nor do we understand that the learned counsel for the appellants really intended to question it in his brief in this court (appellants' brief, p. 14), although much discussion of it is found therein.

It is not strange that new counsel should become somewhat confused in his discussion of the trust agreements of July 14, 1917, and the one of January 3, 1922. This confusion is strikingly illustrated at page 12 of his brief, wherein it is stated:

> "and the 1998 share of the *Publishers Securities Co. common stock,* which under the agreement of January 3, 1922 (Ex. C.), is to become the property of the Trustee, Maurice J. Swetland, upon his youngest child becoming of age, 1,100 shares *are the same 1,100 shares* which are referred to in the trust declaration of July 14, 1917 (Ex. B, p. 21)."

In fact, under the 1917 trust agreement, the trustee held *1,100 shares of the United Publishers Corp. preferred B stock* for the benefit of the trustee's wife and children (See Ex. 5, pp. 21-3). While the 1922 trust agreement included the same 1,100 shares plus other securities mentioned, including *"1,998 shares of Publishers Securities Co.* common stock." These companies are separate and different. The former is the publishing corporation, of which decedent was president, with a capital stock of "$12,000,000 or more" (p. 89), while the latter is a holding company, "and some or all of the assets of this had come from the testator, and the stock was distributed among his children only" including Dorothy Johnson (Mr. Johnson, p. 66), and it is this latter stock only which under the 1922 trust agreement was to eventually belong to the testator's son, Maurice J. Swetland.

II.

On page 13, appellants argue

> "No amount of words can avoid the effect that the ultimate disposition of this testator's property rests upon the oral testimony of Corey, Redfield and Montgomery, and, indeed, really only upon the oral testimony of Montgomery, for he is the only one who says he saw the instrument drawn and signed by Maurice Swetland."

This is true only to the extent necessary to identify and prove the document—it is equally true that a will of another affecting the ultimate

disposition of a testator's property, rests upon the oral testimony of witnesses to identify and prove the will.

The trust agreement signed by the trustee is a proven instrument, as is any will executed by another than the testator. Between the two, the distinction is without difference, for the reason that the will of A is no more sacrosanct as a written instrument than is the trust agreement, when either are sought to be incorporated in the will of B. The will of A is not an instrument executed by B in strict conformity with the statute of wills, any more than is the trust agreement, and as was said by Judge Cardozo, in *Matter of Fowles,* 222 N. Y. 222, at page 233,

> "once identify the document as her will; it then becomes his own."

III.

The authenticity of the trust agreement of July 14, 1917, cannot be questioned on this appeal.

A large part of appellants' new brief is taken up with an attack on the authenticity of the document which was admitted in evidence as the trust agreement of July 14, 1917, referred to in the will. It is too late to raise this question now. It was not raised in the court below. In fact, the document was actually offered in evidence by counsel for the present appellants (p. 86).

Paragraph five of the petition of appeal raises the question of law as to the right to incorporate the agreement into the will by reference, but nowhere in the petition is there raised the question of fact as to the identity of the document referred to. This question therefore need not be considered by the Court.

Engelhard v. *Schweder,* 92 N. J. Eq. 663.

IV.

The English cases cited in our main brief cannot be disregarded.

Under Point VI, on page 40 of appellants' brief, the following statement appears:

> "In Willis *v.* Lowe, 4 Notes of Cases, 428" (the correct citation is 5 Notes of Cases, 428), "it is stated that the doctrine was founded on a misapprehension. Lord Eldon, who first held that an extrinsic informal document could be incorporated by reference under the English state, later expressed his doubt as to the soundness of that decision, 1 Ves. & Bea., 455, 14 Eng. Rep. 163."

This argument was evidently used in *Allen* v. *Maddock.* In that case the Right Hon. T. Pemberton Leigh says:

> No doubt the rule of law is as stated by Lord Eldon in Smart *v.* Prujean (6 Ves. 565), "an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated."
>
> For this purpose it is necessary that it should be so described as to have no doubt in the mind of the judge, in the circumstances as they actually existed and are proved before him that the paper referred to is the paper propounded.

Page 455:

> In a subsequent case, however, if Lord Eldon's observations are accurately reported, he appears to have intimated some doubt whether a paper antedating and clearly and undeniably referred to could be made part of the will. Wilkinson *v.* Adam (1 Ves. and Bea. 455), but if any such doubt was ever thrown out, later decisions removed it.

Appellants also argue that the decisions under the English State of Wills are so affected by the liberal provisions of Lord St. Leonard's Act (15 and 16 Vict. ch. 24), as to be of little aid in interpreting the New Jersey statute of wills, citing *In re Conway,* 124 N. Y. 455; and *In re O'Neil,* 91 N. Y. 516 (erroneously cited in appellants' brief as 91 N. Y. 512).

The New York statute requires that a will be signed by the testator and the witness at the "end of the will." In the two New York cases above referred to, parts of the wills were written on the back of printed forms and not above the testator's signature. Both of those decisions construed this requirement of the New York statute that the testator sign at the end of the will. In other words, they are "end of the will" cases referred to in Jessup-Redfield Law of Practice in the Surrogate's Court, as quoted on page 8 of our main brief.

Neither of these decisions in referring to Lord St. Leonard's Act (15 and 16 Vict. ch. 24), was discussing the doctrine of incorporation by reference. The history of the English law leading up to the enactment of Lord St. Leonard's Act is stated *In the Matter of Conway,* 124 N. Y. 458 (the case relied on by appellants), at pp. 460-462, as follows:

> "Prior to January 1, 1838, no solemnities were necessary for the making of a will of personal estate. Wills were admitted to probate which did not contain either the signature or seal of the testator, and were in the handwriting of some other person. While the Statute of Frauds provided the formalities of signature and attestation necessary for a devise of lands by statute (1 Vict., chap. 26, sec. 9) it was provided 'That no will shall be valid unless it shall be in writ-

ing and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.' This act took effect January 1, 1838. A new ground of contest in the courts was now presented as to what should be considered a signing of the will at the end or foot thereof. Mr. Williams in his work on Executors (p. 78) says the tendency was at first in the direction of a liberal construction of this part of the statute, but afterwards it was deemed necessary to take a more rigid view of the enactment on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it. Accordingly probate was refused in a great number of cases. This result, not at all surprising, in view of the fact that prior to 1838 testamentary dispositions of personalty were frequently given effect where the testator had not even signed or authorized the signing of the writing, led to the passage of the statute (15 Vict., chap. 24), entitled 'An act for the amendment of the laws with respect to wills,' passed June 17, 1852. Section 1 provides as follows: 'Where, by an act passed in the first year of the reign of Her Majesty Queen Victoria, entitled an act for the amendment of the laws with respect to wills, it is enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction. Every will shall, so far only as regards the position of the signature of the testator or of the person signing for him, as aforesaid, be deemed to be valid within the said enactment as explained by this act if

the signature shall be so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such, his signature, to the writing signed as his will, and that no such will shall be affected by the circumstances that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the circumstance that the signature placed among the words of the testimonium clause or clause of attestation shall follow or be after or under the clause of attestation, either with or without the blank space intervening, or shall follow or be after, or under, or beside the names, or one of the names, of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment, but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made.'

"Clearly, it needs no other argument than is furnished by a statement of the practice in England respecting the probate of wills prior to 1838, and a reading of the amendment of 1852, to demonstrate the inapplicability of English decisions to a question like that before us. By statute the English courts are commanded to consider the intent of the testator in determining whether there was a due execution. With us it is the intention of the legislature and not that of the testator which controls such a question. Matter of O'Neill."

From the foregoing quotation, it clearly appears that Lord St. Leonard's Act has nothing whatever to do with the doctrine of incorporation by reference. The English Statute of Wills required that the will be signed by the testator at the foot or end thereof. Lord St. Leonard's Act changed this requirement as it had been previously construed by the courts.

The doctrine of incorporation by reference, on the other hand, is not based upon statute at all, but is a part of the common law of England. As pointed out in our main brief, it existed prior to the enactment of the English Statute of Frauds and was not altered either by that statute or by the Wills Act of 1837. It was the law of England centuries before the enactment of Lord St. Leonard's Act and was applied in at least two cases (*Goods of Durham,* 3 Curt., Eccl. 57, 1 Notes of Cases, 365, 163 Eng. Reports, Full Reprint, 654, and *In re Dickens,* 3 Curt. Eccl. 60, 1 Notes of Cases, 398, 163 Eng. Reports, Full Reprint, 654), *after* the enactment of the Statute of Wills and *before* that statute was "liberalized" by Lord St. Leonard's Act.

V.

The fact that the trust agreement was by its terms revocable is immaterial.

This is discussed at pages 25 and 26 of our main brief.

In the new brief filed by the appellants, the argument is made that because the trust agree-

ment was by its terms revocable "distribution of testator's property therefore may be changed from time to time by the testator in a manner not prescribed by the Statute of Wills" (Appellants' brief, p. 44). This argument is based upon a failure to distinguish between the fund disposed of by the trust agreement and the fund disposed of by the testator's will, *i. e.* his estate. Revocation of the trust agreement in the testator's lifetime could affect only the securities which were held under that agreement. It would have no effect whatever on the property disposed of by the testator's will. No matter what changes the testator might have made in his lifetime as to the disposition of the trust fund, the estate which was disposed of by his will passed to Maurice J. Swetland, trustee, under the terms and provisions of the trust agreement as set forth in the document of July 14, 1917, because his will, duly executed in accordance with the Statute of Wills, so provides.

VI.

The trust agreement is not a document of a "testamentary nature."

In New York State it has been held that an unattested paper which is of a *testamentary nature,* cannot be taken as a part of the will even though referred to by that instrument. *Booth* v. *Baptist Church,* 126 N. Y. 215, at p. 247. And yet the same court upheld wills by which the testator disposed of his estate in accordance with the provisions of the *will* of another. And what document is of a testamentary nature if not a will?

The distinction is that if the document referred to was created for the purpose of disposing of

testator's property at his death, it is testamentary and cannot be incorporated under the New York rule. But if the document has a separate existence for another purpose, and does not *of itself* purport to dispose of the estate which testator may have at his death, it is not of a "testamentary nature," as far as the testator is concerned, and can be incorporated by reference even in New York. It does not purport to dispose of testator's estate until at his death his duly executed will makes it a part of such will and thus gives it a testamentary character.

The trust agreement here in question relates solely to the trust fund referred to in it. It does not purport to dispose of the estate left by the testator at his death, and it is not of a "testamentary nature" as that term is used in the cases. It is referred to by the will as in the cases of *Condit* v. *DeHart* and *In re Piffard,* merely for the purpose of ascertaining the persons to whom the estate passes by the testator's will.

In the case of *Stevenson* v. *Earl,* 65 N. J. Eq. 721, relied upon by appellants, the rules of the deposit agreement appeared to make a disposition of the balance in the account remaining at the death of the depositor. The funds in this deposit were subject to change and withdrawal by the depositor during his lifetime, and it was only the balance remaining at the time of his death which was to be paid to his wife. In other words, the decision dealt only with the *corpus* or the remainder of the funds referred to by the deposit or trust agreement.

In the case at bar, we are not concerned with the *corpus* or property originally trusteed under the trust agreement, because it is not that property we are considering in this case. The *corpus*

of the trust may have been taken therefrom under any kind of a subsequent lawful agreement, but the *trust instrument* remained.

The testator by his will gave and devised to the trustee a new *corpus,* to wit, one-fourth of his residuary estate. That *corpus* could not be changed by any alteration in the trust agreement during the life of the testator, but could only be changed by the testator executing a new will. The gift was to Maurice J. Swetland as Trustee. That is the testamentary provision of the will. The unchangeable trust instrument was that which had theretofore been made and executed on July 14, 1917, and which was referred to "not as transferring the property by appointment, but to define and make certain the persons to whom and the proportions in which" the property, under the testamentary provisions of the will, should pass, as was done in the *Piffard* and *Condit* cases. Therefore, we cannot see in what respect the *Stevenson* case has any application to the case at bar.

Respectfully submitted,

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