INDEX

Notice of Appeal.

(Filed April 20, 1931.)

In Chancery of New Jersey

Between

FRANK J. GLOCK, *et als.*,
Complainants,

and

CATHERINE GLOCK, *et als.*,
Defendants.

79—164.
On Bill, &c.

The defendants Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock hereby appeal from the decree made by the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor James F. Fielder, in the above entitled cause on April 2nd, 1931, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated April 16th, 1931.

SCHUMANN & SCHUMANN,
Solicitors for Defendants Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock.

E. W. A. SCHUMANN,
Of Counsel with Defendants Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock.

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

E. W. A. SCHUMANN,
Of Counsel with Defendants Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock.

Petition of Appeal.

(Filed May 1, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK J. GLOCK, *et als.*,
Complainant-Appellees,

v.

CATHERINE GLOCK, *et als.*,
Defendant-Appellants.

On Appeal From the Court of Chancery.

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

The petition of Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock, the appellants in the above entitled cause, respectfully shows that:

1. 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, on the advice of Vice-Chancellor James F. Fielder, bearing date April 2nd, 1931, in a certain cause in said Court of Chan-

cery, wherein the said Frank J. Glock and others were complainants and the said Catherine Glock, these petitioners and others were defendants in this respect, to-wit: that the said decree adjudges that the fifth (5th) clause of the last will and testament of Frederick Glock, deceased, bearing date June 12th, 1894, and admitted to probate by the Surrogate of Hudson County on September 25th, 1894, was declared void and totally invalid; that the said decree adjudges that said testator died intestate as to his property affected by said fifth (5th) clause of said will; that certain lands and premises in said bill described should be sold and that it is referred to a Special Master to ascertain and report whether the defendants who have been in occupancy and control of said lands and premises are liable to account for rent or rental value; and

2. Petitioners appeal from the decree of the Chancellor, which decrees as aforesaid upon the ground that the same is erroneous in that the Chancellor should not have adjudged as aforesaid but should have adjudged that the bill of complaint herein should be dismissed.

Petitioners therefore pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that the petitioners may have such other relief in the premises as to this court shall seem proper.

SCHUMANN & SCHUMANN,
Solicitors of Appellants.

E. W. A. SCHUMANN,
Of Counsel with Appellants.

Bill of Complaint.

(Filed May 7, 1930.)

IN CHANCERY OF NEW JERSEY.

FRANK J. GLOCK, *et als.*,
Complainant-Appellees,

v.

CATHERINE GLOCK, *et als.*,
Defendant-Appellants.

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

The complainants, Frank J. Glock, and his wife, Viola Glock, of the Township of Maywood, County of Bergen, and State of New Jersey, Fred J. Glock, unmarried, of the City of Jersey City, County of Hudson, and State of New Jersey, and Edna Williams, and her husband, Harry Williams, of the City of Jersey City, County of Hudson, and State of New Jersey, and Josephine Glock, widow, of the Township of Maywood, County of Bergen, and State of New Jersey, respectfully show:

1. That Frederick Glock died resident in the City of Jersey City, County of Hudson, and State of New Jersey, on the 14th day of June, 1894, leaving a last will and testament which was, on the 25th day of September, 1894, duly admitted to probate by the Surrogate of Hudson County, and letters testamentary thereon issued to Mary Elizabeth Glock, executrix, who took upon herself the burden of administering the said estate, but who subsequently thereafter died, and no subsequent administrator or executor with the will annexed was ever applied for or appointed by the Surrogate. A true

copy of the said will is hereunto annexed and made a part hereof.

2. Said testator died seized of certain personal property to the extent of $800.00, as valued by Mary Elizabeth Glock, executrix of the deceased aforesaid, as evidenced by the petition for letters of executorship on file in the Surrogate's Office of Hudson County, and also of two parcels of real estate, one known as and by the street No. 111 Sherman Avenue, Jersey City, Hudson County, New Jersey, consisting of a two-story frame house and which is described by metes and bounds as follows:

> ALL that certain lot, tract or parcel of land and premises and the buildings and improvements thereon situate, lying, and being in the City of Jersey City (formerly City of Hudson), in the County of Hudson and State of New Jersey, which on a map entitled "Map of the property belonging to Washington Village Land Association situated near Hoboken and the Palisade Avenue near the Newark Road" surveyed and laid out into lots by William Hexamer, Surveyor and Architect, 1853, and duly affiled of record in the office of the Clerk (now Register) of the said County of Hudson, is known, designated and distinguished as lot numbered three hundred and fifty-two (352) lying and fronting on the westerly side of Bergen (now named Sherman) Avenue, being twenty-five (25) feet wide in front and rear, and sixty-two (62) feet on the northerly side and sixty-two (62) feet on the southerly side deep reference being had to said map will more fully appear.

The other parcel of property hereinabove referred to is known as and by street No. 234 Bowers Street, Jersey City, Hudson County, New Jersey, consisting of a four-family frame house, described by metes and bounds as follows:

ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson, and State of New Jersey, and bounded and described as follows, to wit:

BEGINNING at a point in the northerly side of Bowers Street (formerly Ludlow Place) distant two hundred feet westerly from the corner formed by the intersection of the northerly line of Bowers Street with the westerly line of Milton Avenue (formerly Union Place) and running thence westerly along the northerly line of Bowers Street twenty-five feet, thence northerly parallel with Milton Avenue one hundred feet, thence easterly parallel with Bowers Street twenty-five feet, thence southerly parallel with Milton Avenue one hundred feet to the northerly side of Bowers Street the point of beginning.

3. In and by his said will, Frederick Glock provided as follows: "5. I give, devise and bequeath unto my daughter, Mary Elizabeth Glock, during the term of her natural life or until she gets married all the rest, residue and remainder of my estate, whether real, personal or mixed, and wherever situate, she to pay all taxes, insurance and other municipal liens which may be levied against

the same, make all necessary repairs and keep a home for the other children, and in case she dies, or should get married, this bequest to be transferred to my daughter, Annie, but with the same restrictions, and in the event of her decease or her getting married, then this bequest to go to my next daughter, and so on to the boys until all of my children are either dead or married and then to go to the oldest grandchild and so on."

4. Since the decease of Mary Elizabeth Glock, executrix aforementioned, Fred Glock, George Glock, and Annie Glock, children of the testator aforesaid, entered into the possession of the aforesaid premises and assumed the management and control thereof, and did take unto themselves the various profits, rents, etc., accruing for several years on the personalty and realty left by the testator as aforesaid.

5. The will probated as aforesaid by reason of paragraph "5" thereof was never valid and could not now be valid and therefore is ineffectual to operate a proper distribution of the testator's estate inasmuch as the same was violative of the rule of perpetuities in that the actual vesting of the residuary estate not only was beyond lives in being and twenty-one years thereafter but in fact no definite time of ever vesting was provided for under the aforesaid paragraph, so that the same became and is utterly void.

6. Complainants contend, therefore, that the testator, Frederick Glock aforesaid, died intestate and his estate consisting of the personal property and the two parcels of real estate above enumerated should have been and should now be dis-

tributed to the heirs and next of kin of the said Frederick Glock according to the laws of descent and distribution which appertained at the decease of the testator on the 14th day of June, 1894.

7. Said Frederick Glock, at the time of his decease, left him surviving the following heirs and next of kin who are all his children, as follows: 1. John P. Glock, now deceased, leaving him surviving his widow, Catherine Glock, and two children, Eleanor Schmidt, and George Glock; 2. Thomas Glock, now deceased, leaving him surviving his widow, Wilhelmine Schnell Glock; 3. Fred Glock, still living, unmarried; 4. George Glock, still living, unmarried; 5. Mary Glock, now deceased, unmarried; 6. Stella Beddiges, still living; 7. Annie Glock, still living, unmarried; 8. Francis Glock, now deceased, leaving him surviving his children, Frank J. Glock, Fred J. Glock, Edna Williams, and his widow, Josephine Glock, who are the complainants herein.

8. All of the aforementioned heirs and next of kin would be entitled to a proportionate share in the property of the decedent aforesaid under the laws of descent and distribution as follows:

Eleanor Schmidt ..... One-twelfth (1/12th).
George Glock ..... One-twelfth (1/12th).

(Said shares being subject to the right of dower of the widow of John P. Glock, namely, Catherine Glock.)

Fred Glock, unmarried ..... One-sixth (1/6th).
George Glock, unmarried .... One-sixth (1/6th).
Stella Beddiges ..... One-sixth (1/6th).
Annie Glock, unmarried ..... One-sixth (1/6th).

Frank J. Glock ..... One-eighteenth (1/18th).

Fred J. Glock, unmarried ..... One-eighteenth (1/18th).

Edna Williams ..... One-eighteenth (1/18th).

(Said shares of Frank J. Glock, Fred J. Glock, and Edna Williams being subject to the right of dower of Josephine Glock, widow of Francis Glock.) All of the above mentioned shares, however, being subject to the right of dower of Wilhelmine Schnell Glock, widow of Thomas Glock, in a one-eighth (1/8th) share of the above mentioned properties.

9. That said Eleanor Schmidt is married to Henry Schmidt, and the said Henry Schmidt, the husband of said Eleanor Schmidt, claims an inchoate right of curtesy in that portion of said premises of which the said Eleanor Schmidt is seized. And the said George Glock is married to Johanna Glock, and the said Johanna Glock, the wife of said George Glock, claims an inchoate right of dower in that portion of said premises of which the said George Glock is seized. And the said Stella Beddiges is married to John Beddiges, and the said John Beddiges, the husband of said Stella Beddiges, claims an inchoate right of curtesy in that portion of said premises of which the said Stella Beddiges is seized. And the said Frank J. Glock is married to Viola Glock, and the said Viola Glock, the wife of said Frank J. Glock, claims an inchoate right of dower in that portion of said premises of which the said Frank J. Glock is seized. And the said Edna Williams is married to Harry Williams, and the said Harry Williams, the hus-

band of said Edna Williams, claims an inchoate right of curtesy in that portion of said premises of which the said Edna Williams is seized.

10. Complainants are desirous that a partition or division of the aforesaid parcels of land and premises should be made among the complainants and the several parties seized of and entitled thereto according to their several respective rights, estates, and interests therein, or in case, as complainants believe and aver the fact to be, that the said tracts of land and premises could not be divided among the owners thereof without great prejudice to their interest, then that the same may be sold and the proceeds divided among complainants and the other parties entitled thereto, as aforesaid, according to their respective rights and interests.

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

1. That Catherine Glock, widow of John P. Glock, deceased, Eleanor Schmidt, and Henry Schmidt, her husband, George Glock, and Johanna Glock, his wife, Fred Glock, unmarried, George Glock, unmarried, Stella Beddiges, and John Beddiges, her husband, Annie Glock, unmarried, and Wilhelmine Schnell Glock, widow of Thomas P. Glock, who are the defendants to this suit may answer this bill of complaint and each statement therein made.

2. That this court may construe the said last Will and Testament of Frederick Glock aforesaid and declare the same void and ineffectual in that the same is violative of the rule of perpetuities and decree the said Frederick Glock to have died intestate on the 14th day of June, 1894, and that all

his properties aforesaid be distributed to the herein mentioned heirs and next of kin according to the laws of descent and distribution in effect at that time.

3. That upon the decree voiding the aforesaid will, a fair partition and division of the above described personal property and lands and property may be made according to the practice of this court if the same be practicable and consistent with the rights of all the parties interested therein, among complainants and the other persons entitled to shares of the said premises in accordance with their respective rights.

4. That in case actual partition shall be found to be impracticable, or should it appear the same cannot be made without great prejudice to the owners of the said premises, then the said tracts of land and premises may be decreed by this court to be sold, including the inchoate rights of dower and curtesy of the parties entitled thereto and mentioned above, and that, after paying out of the proceeds thereof the costs and charges of this suit, the remainder of such proceeds be divided among the complainants and the several parties interested therein according to their rights, shares, and interests.

5. That the defendants, Fred Glock, George Glock, Annie Glock, and Stella Beddiges, be decreed to make discovery under oath of all moneys that came into their possession belonging to the estate of Frederick Glock, deceased, and of all moneys that came into their possession for the collection of rents and profits received from the premises which came into their control after the decease of the said Frederick Glock, and that they

be compelled to account to complainants for all such moneys received, and if they have occupied said premises to make accounting for a reasonable rental value thereof during such time of their possession, and upon such discovery and accounting, the defendants be decreed to pay to the complainants their respective shares thereto after deducting legitimate expenses of taxes, etc., expended for the proper maintenance thereof.

6. That one or more proper person or persons may be appointed to receive the rents, issues and profits of the said lands and premises for the benefit of complainants and all other persons interested therein, until the further order of this court.

7. 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.

PESIN & PESIN,
Solicitors and of Counsel with
Complainants.

Answer.

(Filed July 7, 1930)

IN CHANCERY OF NEW JERSEY.

FRANK J. GLOCK, *et als.*,
Complainants,

v.

CATHERINE GLOCK, *et als.*,
Defendants.

79—164.
On Bill.

The answer of the defendants Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock.

These defendants Fred Glock, George Glock, Stella Beddiges, John Beddiges, her husband, and Annie Glock, answering the bill of complaint, say that:—

1. Paragraphs 1, 2, 3, 7 and 9 are admitted.

2. Paragraphs 5, 6 and 8 are denied.

3. Paragraph 4 is denied except that it is admitted that at the decease of Mary Elizabeth Glock, the defendant Annie Glock entered into the possession of the realty described in the bill of complaint, assumed the management thereof and did take unto herself the rents, issues and profits thereof.

SCHUMANN & SCHUMANN
Solicitors of Defendants,
Fred Glock, George Glock,
Stella Beddiges, John
Beddiges, her husband, and
Annie Glock.

Transcript of Proceedings Before the Vice-Chancellor.

IN CHANCERY OF NEW JERSEY.

Between

FRANK J. GLOCK, *et als.*,
Complainants,

and

CATHERINE GLOCK, *et als.*,
Defendants.

On Bill, &c.

TRANSCRIPT OF SHORTHAND NOTES OF PROCEEDINGS in above stated cause, at Chancery Chambers, Jersey City, December 16, 1930, before His Honor James F. Fielder, Vice-Chancellor.

APPEARANCES:

Messrs. PESIN & PESIN (Mr. MEYER PESIN) for Complainants.
Messrs. SCHUMANN & SCHUMANN (Mr. EMIL W. A. SCHUMANN) for Defendants.

COMPLAINANTS' CASE.

Mr. Pesin: I offer in evidence certified copy of will of Frederick Glock.

(Marked Exhibit C-1.)

STIPULATION.

Mr. Schumann: The following stipulation has been agreed on between counsel:

Frederick Glock, the testator named in Exhibit C-1, died a widower June 14, 1894. The will, Ex-

hibit C-1, was admitted to probate by the Surrogate of Hudson County, September 25, 1894.

The testator Frederick Glock left him surviving as his only heirs at law and next of kin, the following:

Fred Glock, a son, who is single;

George Glock, a son, who is single;

Annie Glock, a daughter, who is single;

Mary Glock, a daughter, who died single June 17, 1916;

Stella Beddiges, a daughter, whose husband's name is John Beddiges, and to whom one son was born on November 21, 1899, named Fred Beddiges;

Francis Glock, a son, who died March 13, 1912, leaving him surviving a widow Josephine Glock; a son Frank who was born October 12, 1895, who is married to Viola Glock; a son Fred who was born in 1890 and who is single; a daughter Edna Williams who was born September 23, 1892, who is married and whose husband's name is Harry Williams;

Thomas Glock, a son, who died May 5, 1915, leaving him surviving a widow Wilhelmine Schnell Glock and no children. The said Wilhelmine Schnell Glock was declared legally dead by the Court of Chancery of this state on December 27, 1924, on application for surplus money in a partition proceeding affecting property other than that which is the subject-matter of this suit in a matter entitled Glock *v.* Glock, Docket 61, page 509.

John Patrick Glock, a son, who died March 4, 1920, leaving him surviving a widow Catherine Glock; a son George who was born March 3, 1904, who is married and whose wife's name is Johanna; a daughter Eleanor Schmidt, who was born February 28, 1896, and whose husband's name is Henry.

Conclusions.

No grandchildren other than those above mentioned have been born since the testator's death. These are all the material facts as I see it.

CASE CLOSED.

Conclusions.

(Filed Jan. 8, 1931.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK J. GLOCK, *et al.*,
Complainants,

and

CATHERINE GLOCK, *et al.*,
Defendants.

79—164.
On Bill, &c.

December 30, 1930.

Messrs. PESIN & PESIN, for complainants.
Messrs. SCHUMANN & SCHUMANN, for defendants Fred Glock, *et al.*

FIELDER, V.-C.

Frederick Glock died seized of real property leaving a will admitted to probate by the Surrogate of Hudson County, September 25, 1894, by clause 5 of which he devised said real property. The bill here is filed for partition of said real property, the complainants being the widow and children of Francis Glock, a son of the testator whose death occurred subsequent to his father's death.

Conclusions.

If the testamentary devise is valid, or partially valid, the complainants have no standing to file a bill.

The clause is as follows:

> "5th. I give devise and bequeath unto my daughter Mary Elizabeth Glock during the term of her natural life or until she gets married all the rest residue and remainder of my estate whether real, personal or mixed and wherever situate she to pay all taxes, insurance and other municipal liens which may be levied against the same, make all necessary repairs and keep a home for the other children and in case she dies or should get married this bequest to be transferred to my daughter Annie, but with the same restrictions, and in the event of her decease or her getting married then this bequest to go to my next daughter and so on to the Boys until all of my children are either dead or married and then to go to the oldest grandchild and so on."

The answering defendants admit that the ultimate intended disposition of the real property is invalid as offending the rule against perpetuities, but they insist that the life estates, or term of years, given to persons who were in being at the testator's death are valid and should be given effect.

The testator's intent, so far as it can prevail against legal rules, must be the guide in construing a will and the intent of this testator, as gathered from the provisions of his will, should be given effect to the extent that such intent does not conflict with the perpetuity rule. Where a devise

violates the rule but is made as supporting life estates, or estates for years, which are concurrent or consecutive, the life estates or estates for years are not to be vitiated by the invalidity of the subsequent devise, unless it clearly appears that the prior created estates are elements or parts of the plan of ultimate devise. (Hewitt *v.* Green, 77 N. J. Eq. 345; Graves *v.* Graves, 94 N. J. Eq. 268; McGill *v.* Trust Co,. 94 N. J. Eq. 657, affirmed 96 N. J. Eq. 331.)

If the defendants' theory is correct, this court should hold as valid a life estate, in succession to such of the testator's daughters and sons as are qualified by the terms of the will and also a life estate to the testator's oldest grandchild, if there was a grandchild living at the testator's death, but it seems to me that such life estates form part of the plan which the testator apparently had in mind, which was to keep his real property in his family for the use of members thereof, forever. The life estates to his children and grandchild were not intended to be preferential to them, or independent or separate from his main purpose. The first life estate to a daughter was the starting point of his scheme and the life estates to follow thereafter were intended to continue the scheme in operation forever. I am of the opinion that the entire clause 5 is invalid as violative of the rule against perpetuities and that the testator died intestate as to his real property and that the same descended to his heirs at law, among whom are the complainants. There will be a decree for partition and, since the property is incapable of actual division, ordering sale.

I suggest that the clause in question is also void for vagueness and uncertainty and I state some

questions occurring to me, which I believe to be difficult, if not impossible of solution.

The testator left him surviving three daughters, namely, Mary Elizabeth who has since died; Annie who is alive and unmarried and Stella who is living and married. Is Annie required to provide a home for Stella, as well as for her two brothers who I shall mention hereafter? If Stella should survive Annie and be then a widow, did the testator intend that Stella should have a life estate?

The testator also left him surviving five sons, namely, John, Thomas and Francis who are now dead and Fred and George, both of whom are living and unmarried. Upon the death of Annie, Stella being married and therefore disqualified from taking, which of the living sons shall succeed to a life estate and will the one who first succeeds be required to provide a home for his brother and for his sister Stella?

The testator intended a life estate for his oldest grandchild after the death or marriage of all of testator's children. Did the testator intend to designate his oldest grandchild, whether male or female, married or single and did he further intend that such grandchild should provide a home for testator's married living children and for all his other grandchildren?

The bill of complaint contains a prayer that certain defendants account for rents and profits alleged to have been received by them from the real property in question and for the rental value of such portion thereof as has been in their possession. At the hearing no testimony was taken in connection with this prayer, it being understood that if it was determined that the complainants have an interest in the real property, it would be

referred to a Master to take testimony and report whether any defendant could be required to so account and if so to take, state and report an account.

Decree.

(Filed April 2, 1931.)

IN CHANCERY OF NEW JERSEY.

Between

FRANK J. GLOCK, *et als.*,
Complainants,

and

CATHERINE GLOCK, *et als.*,
Defendants.

79—164.
On Bill, &c.

This matter coming on to be heard in the presence of Meyer Pesin, Esq., of the firm of Pesin and Pesin, Esqs., Solicitors for the complainants and Emil W. A. Schumann, Esq., of Schumann and Schumann, Esqs., Solicitors for some of the defendants; and the same having been submitted to the court for determination on the pleadings, an agreed state of facts and briefs; and the court having considered the same and being satisfied that the fifth clause of the will of Frederick Glock, deceased, bearing date June 12th, 1894, is invalid and void because violative of the rule against perpetuities;

It is on this 2nd day of April, 1931, ordered, adjudged and decreed as follows:

Decree.

1. That the fifth clause of the last will and testament of Frederick Glock, deceased, bearing date the 12th day of June, 1894, and admitted to probate by the Surrogate of Hudson County, September 25th, 1894, and which reads as follows:

> "I give devise and bequeath unto my daughter Mary Elizabeth Glock during the term of her natural life or until she gets married all the rest residue and remainder of my estate whether real, personal or mixed and wherever situate she to pay all taxes, insurance and other municipal liens which may be levied against the same, make all necessary repairs and keep a home for the other children and in case she dies or should get married this bequest to be transferred to my daughter Annie, but with the same restrictions, and in the event of her decease or her getting married then this bequest to go to my next daughter and so on to the Boys until all of my children are either dead or married and then to go to the oldest grandchild and so on."

be and the same hereby is declared void and totally invalid, to the end that said testator died intestate as to his property affected thereby.

2. That the parties to this suit hereinafter named being the heirs at law of said Frederick Glock, deceased, are therefore seized of and entitled to the lands and premises described in the complainants' bill of complaint, with the appurtenances; and that their respective rights and interests therein are hereby ascertained, adjudged and declared to be as follows, to-wit:

Decree.

(a) The complainant, Frank J. Glock, is seized in fee of an undivided one (1/18) eighteenth part of the said premises, subject to the right of dower of the complainant Josephine Glock, widow of Francis Glock, as aforesaid and subject to the inchoate right of dower of the complainant Viola Glock, wife of said complainant Frank J. Glock.

(b) The complainant, Fred J. Glock is seized in fee of an undivided one (1/18) part of the said premises, subject to the right of dower of the complainant Josephine Glock, widow of Francis Glock.

(c) The complainant Edna Williams, is seized in fee of an undivided one (1/18) eighteenth part of the said premises, subject to the right of dower of the complainant Josephine Glock, widow of Francis Glock and subject further, to the inchoate right of curtesy of the complainant Harry Williams, husband of said complainant, Edna Williams.

(d) The defendant Eleanor Schmidt is seized in fee of an undivided one (1/12) twelfth part of the said premises, subject to the right of dower of the defendant Catherine Glock, widow of John P. Glock and subject further to the inchoate right of curtesy of the defendant Henry Schmidt, husband of said defendant Eleanor Schmidt.

(e) The defendant George Glock is seized in fee of an undivided one (1/12) twelfth part of the said premises, subject to the right of dower of the defendant Catherine Glock, widow of John P. Glock and subject further to the inchoate right of dower of the defendant Johanna Glock, wife of said defendant George Glock.

(f) The defendant Stella Beddiges is seized in fee of an undivided one (1/6) sixth part of the said premises, subject to an inchoate right of curtesy of the defendant John Beddiges, husband of said defendant Stella Beddiges.

(g) The defendants Fred Glock, George Glock and Annie Glock are each seized in fee of an undivided one (1/6) sixth part of the said premises.

All of the above mentioned shares, however, being subject to the right of dower of Wilhelmine Schnell Glock, widow of Thomas Glock, deceased, in an undivided one (⅛) eighth part of the said premises.

3. That, all and singular, the said premises mentioned in the said bill of complaint and therein described as follows, to-wit:

> ALL that certain lot, tract or parcel of land and premises and the buildings and improvements thereon situate, lying and being in the City of Jersey City (formerly City of Hudson) in the County of Hudson and State of New Jersey, which on a map entitled "Map of the property belonging to Washington Village Land Association situated near Hoboken and the Palisade Avenue near the Newark Road" surveyed and laid out into lots by William Hexamer, Surveyor and Architect, 1853, and duly affiled of record in the office of the Clerk (now Register) of the said County of Hudson, is known, designated and distinguished as lot numbered three hundred and fifty-two (352) lying and fronting on the westerly side of Bergen (now named Sherman) Avenue, being twenty-five (25) feet wide in front and rear, and sixty-

two (62) feet on the northerly side and sixty-two (62) feet on the southerly side deep reference being had to said map will more fully appear.

Said premises being also known by the Street No. 111 Sherman Avenue, Jersey City, New Jersey.

ALSO

ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey and bounded and described as follows, to-wit:

BEGINNING at a point in the northerly side of Bowers Street (formerly Ludlow Place) distant two hundred feet westerly from the corner formed by the intersection of the northerly line of Bowers Street with the westerly line of Milton Avenue (formerly Union Place) and running thence westerly along the northerly line of Bowers Street twenty-five feet, thence northerly parallel with Milton Avenue one hundred feet, thence easterly parallel with Bowers Street, twenty-five feet, thence southerly parallel with Milton Avenue one hundred feet to the northerly side of Bowers Street the point of beginning.

Said premises being also known by the Street No. 234 Bowers Street, Jersey City, New Jersey.

including the estates and interests in dower of the defendant Wilhelmine Schnell Glock, widow of

Thomas Glock, deceased, Josephine Glock, widow of Francis Glock, deceased and of the defendant Catherine Glock, widow of John P. Glock, deceased, in the said premises and including also the inchoate rights of dower and curtesy of the defendants Henry Schmidt, Johanna Glock and John Beddiges and of the complainants Viola Glock and Harry Williams, together with all and singular, the hereditaments and appurtenances to the said premises belonging or in any wise appertaining, be sold at public vendue to the highest bidder in the presence and under the direction of Edward O'Byrne, Esq. one of the Special Masters of this court; and that the said Master sell the said lands and premises in such portions as to him may seem most for the interest of the parties; that he give public notice of the time and place of such sale and in all respects conduct the same according to the provisions of the statutes in such cases made and provided; and that he forthwith after such sale, make report thereof to this court and after his report of sale shall have been confirmed by this court, make and execute to the purchaser or purchasers good and sufficient conveyances in the law for the said lands and premises upon their complying with the conditions of said sale; and that such sale and conveyance or conveyances, duly executed as aforesaid, be valid and effectual forever and operate as an effectual bar both at law and in equity against the said parties complainant and defendant and all persons claiming by, from or under them or any of them.

4. It Is Further Ordered, Adjudged and Degreed that it be referred to Charles L. Carrick, Esq., one of the Special Masters of this Court, to

ascertain and report whether the defendants who have been in occupancy and control of the lands and premises hereinbefore described are liable to account for rent or rental value of the same and if so to take and state an account and make the proper apportionment thereof.

5. It Is Further Ordered, that the parties hereto or any of them shall be at liberty to apply to this court for further directions if occasion shall require; and

Applications for counsel fees are hereby reserved.

E. R. Walker,
C.

Respectfully advised,

James F. Fielder,
V. C.

We approve the foregoing as to form.

Schumann & Schumann,
Solicitors.

A true copy

Ferd Garretson,
Clerk.

Exhibit C-1.

In the Name of God Amen.

I, Frederick Glock, of the City of Jersey City, County of Hudson, and State of New Jersey, being of sound and disposing mind and memory, do hereby make and publish my last Will and Testament.

Exhibit C-1.

1. I direct that all my just debts and funeral expenses be paid as soon as may be reasonable after my decease.

2. I give, devise, and bequeath the sum of five dollars to each of my sons, namely, Thomas, Francis, Patrick, Frederick and George Glock.

3. I give, devise and bequeath unto my son, Frederick, all my horses, wagons and harness for his sole use and benefit.

4. I direct that the insurance on my life which is already payable to my two daughters shall so remain and be their share.

5. I give, devise and bequeath unto my daughter, Mary Elizabeth Glock during the term of her natural life or until she gets married all the rest, residue and remainder of my estate, whether, real personal or mixed, and wherever situate, she to pay all taxes, insurance and other municipal liens which may be levied against the same, make all necessary repairs and keep a home for the other children, and in case she dies, or should get married, this bequest to be transferred to my daughter, Annie, but with the same restrictions, and in the event of her decease or her getting married, then this bequest to go to my next daughter, and so on to the boys until all of my children are either dead or married and then to go to the oldest grandchild and so on.

Lastly. I hereby appoint my daughter Mary Elizabeth Glock sole executrix of this my last Will and Testament.

In Witness Whereof, I have hereunto set my hand and seal this 12th day of June, 1894.

F. Glock.

Exhibit C-1.

Signed, Sealed, published and declared by the above named Fredrick Glock to be his last will and testament in the presence of us who were present at the same time and subscribed our names as witnesses in the presence of the testator and each other.

HENRY DENIS 161 Webster Ave. J. C. N. J.

C. H. KOPF 59 Griffith St. J. C. N. J.

New Jersey Court of Errors and Appeals

FRANK J. GLOCK, *et al.*, *Complainants-Appellees,* *v.* CATHERINE GLOCK, *et al.*, *Defendants-Appellants.*	On Appeal from the Court of Chancery. Appeal by Some of the Defendants from Decree. Heard Below Before Fielder, V.-C.

BRIEF FOR APPELLANTS.

Statement of the Case.

Frederick Glock died a widower on June 14th, 1894, leaving a will admitted to probate by the Surrogate of Hudson County on September 25th, 1894, wherein, after directing the payment of debts and the making of several specific bequests, he provided in the fifth item thereof as follows:

> "I give devise and bequeath unto my daughter Mary Elizabeth Glock during the term of her natural life or until she gets married all the rest residue and remainder of my estate whether real, personal or mixed and wherever situate she to pay all taxes, insurance and other municipal liens which may be levied against the same, make all necessary repairs and keep a home for the other children and in case she dies or should get married this bequest to be transferred to my daughter Annie, but with the same restrictions, and in the event of her decease or her getting married then this bequest to go to my next daughter and so on to the Boys until all of my children are either dead or married and then to go to the oldest grandchild and so on."

The bill of complaint filed in this cause attacks the validity of the will, on the grounds that this clause violates the Rule against Perpetuities.

The testator left him surviving as his only heirs at law and next of kin, the following:

Fred Glock, a son, who is single;

George Glock, a son, who is single;

Annie Glock, a daughter, who is single;

Mary Glock, a daughter, who died single on June 17th, 1916;

Stella Beddiges, a daughter, whose husband's name is John and to whom one son was born on November 21st, 1899, namely, Fred Beddiges;

Francis Glock, a son, who died on March 13th, 1912, leaving him surviving a widow, Josephine; a son, Frank, who was born on October 12th, 1895, and who is married to Viola; a son, Fred, who was born in 1890 and is single; a daughter Edna Williams, who was born on September 23rd, 1892, and whose husband's name is Harry;

Thomas Glock, a son, who died on May 5th, 1915, leaving him surviving a widow, Wilhelmine Schnell Glock and no children;

John Patrick Glock, a son, who died on March 4th, 1920, leaving him surviving a widow, Catherine; a son, George, who was born on March 3rd, 1904, and whose wife's name is Johanna and a daughter Eleanor Schmidt, who was born February 28th, 1896 and whose husband's name is Henry.

No grandchildren other than those above mentioned have been born since the testator's death.

Testator died seized of two parcels of real estate known by the house Nos. 234 Bowers Street, Jersey City, N. J., and 111 Sherman Avenue, Jersey City,

N. J., on which are erected a four-family frame dwelling house and a two-family frame dwelling house, respectively, which properties constitute the whole of the residuary estate.

Specification of Grounds of Appeal.

The appellants contend that the decree is erroneous and that the Court should have advised a decree dismissing the bill of complaint.

ARGUMENT.

POINT I.

The life estates or terms of years given to persons in being at the testator's death are valid and should be given effect.

That the Rule against Perpetuities is in force in this State as a part of the common law, is conceded.

That the testator died intestate as to the corpus of his residuary estate because undisposed of, is also conceded.

That the will is void, is denied.

That the whole of the will is valid although not dispositive of the whole of testator's estate, is contended.

The Rule against Perpetuities is that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life '(or lives)' in being at the creation of the interest" (a life in being including a child *en ventre sa mere*).

> *John Chipman Gray's*—The Rule Against Perpetuities, Third Edition, p. 174, and as augmented in other parts of that text.

That the "interests" in this case are created at and are to be measured from the death of the testator permits of no contravention.

The author of this brief will make frequent reference to this book of Professor Gray's, first, because he has found in it what appears to him to be a concise and clear discussion of the Rule and secondly, because our Courts make frequent and favorable reference to it in their opinions.

> *McGill* v. *Trust Co. of New Jersey,* 94 N. J. Eq. 657, pp. 664, 666, 669, 670, *et seq.;* affirmed by the Court of Errors and Appeals of N. J., 125 Atl. 108.

The Rule is easy of statement but most difficult of application, as evinced by the frequent errors into which the Courts have fallen, including the Courts of this State.

Professor Gray in the preface to the third edition of his treatise says:

> "The Rule against Perpetuities should have been called the rule against remoteness. It is aimed at the control of future interests; it has nothing to do save incidentally, with present interests. But its name is a constant temptation to treat it as aimed against restraints on the alienation of present interests. Hence, frequent lapses into error from which the courts have recovered themselves slowly and painfully; * * *."

The Rule against Perpetuities is not a rule of construction but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist and then to the provision so construed, the Rule is to be remorselessly applied.

> *Gray,* page 497.

On page 231, Professor Gray says:

> "And if anything is now well settled in the law it is that a life estate, good in itself, is not destroyed by the remainder over being bad for remoteness or any other reason." (Citing among other cases *Stout* v. *Stout,* 44 N. J. Eq., p. 479.)

It is this phase of the law with which we are particularly concerned in the case at bar, for it is the conclusion of the author of this brief that the fifth clause of the will in question is not violative of the Rule against Perpetuities or any other rule as contended by the complainants, simply because no provision whatsoever is made for the final vesting of the corpus of the decedent's residuary estate, but we contend that the life estates therein created are not in themselves violative of the Rule and are valid and should be upheld, regardless of the fact that the corpus of the residuary estate is not disposed of.

On page 326, Professor Gray says:

> "The rule that you cannot split a gift must not be extended to the case of gifts to a class, where the gift of each member of the class is entirely independent of the gifts to the other members. Thus under a bequest of $1,000 to each one of the testator's grandchildren who reaches twenty-five, grandchildren living at the testator's death will take the legacy, although those born afterwards cannot."

Gray, page 334:

> "In gifts to those members of a class who reach a required age, which all the members of the class may not reach 'til a period beyond the limits of the Rule against Perpetuities, there is often a member of the class who, if he ever reaches the required age, must do so within the limits of the Rule; *e. g.,* a grandchild of the testator born before the latter's

> death. When such member reaches the required age, say twenty-five, the class is closed, and he is entitled to have his proportionate share paid to him."

Professor Gray, on page 342, says, discussing independent gifts:

> "When gifts are made to several persons by one description, but the amount of the gift to one is not affected by the existence or non-existence of the others, then the gifts are separable."

Gray, page 345:

> "* * * when, on a gift to a class, the number of the shares is definitely fixed within the time required by the Rule against Perpetuities, the question of remoteness is to be considered with reference to each share separately."

In *Hills* v. *Simonds*, 125 Mass. 536, there was a devise to the children of the testator's brothers and sisters for life in equal shares, and after the death of each, its share to go to its children or legal representatives. The testator's brothers and sisters were living at his death. It was held that the gift to the children or legal representatives of such of the children of the testator's brothers and sisters as were, in fact born in his lifetime, was not too remote. Professor Gray says that this is an accurate statement of the law as he understands it.

Gray, page 347, Section 394.

This principle of separability is frequently overlooked and we find that in *Stout* v. *Stout*, cited *supra*, Vice-Chancellor BIRD fell into that error when he eliminated the gifts to the grandchildren as being too remote. As a matter of fact, the child of the testator's daughter who was living at his death should have been included in the enjoyment

of the gift therein made because his share was definitely fixed at testator's death and his fate would not affect and would not be affected by the fates of the others.

We contend that the case at bar also comes within the meaning of that chapter of Professor Gray's book entitled Limitations to Classes, Chapter X.

Professor Gray, at page 358, Section 410, says:

> "On the whole, when the gift to one member of a series is unaffected by the existence or non-existence of the gifts to the other members and the gift to such member must take effect, if at all, within the limits fixed by the Rule against Perpetuities, such gift, on reason and authority, is not void for remoteness."

Concede then that the corpus of the estate of the testator in the case at bar is undisposed of, it is our contention that all of the life estates created by the testator in the fifth item of his will are good both, because they are separable and because not violative of the rule. The invalidity of an attempted ultimate gift of corpus by no means necessarily vitiates the entire trust. The provisions of the will are to be disturbed no further than is absolutely required by the existence of the Rule against Perpetuities.

> *McGill* v. *Trust Company of New Jersey*, 94 N. J. Eq. 657, at page 669, and the cases therein cited.

Where the trust is for the purposes of supporting several independent gifts, whether concurrent *or consecutive*, in such case, unless it be impossible to do so, the several gifts are to be separated and those preserved which do not violate the rule.

> *McGill* v. *Trust Co. of New Jersey*, cited *supra*, at page 669.

Vice-Chancellor BUCHANAN, in that case, at page 670, says:

> "Assuredly where a trust is created to provide a life estate to A and a subsequent life estate to B and then a remainder to C the validity of the gift to C will not vitiate the prior gifts to A or to B."

We submit that this is precisely our case and that the life estates created in favor of the children and grandchildren living at the death of the testator are valid. They are gifts of separate successive estates. Their size is unaffected by the happening of the contingencies therein provided for (death and/or marriage) because each child in his turn and each grandchild in his turn succeeds during his lifetime to use, occupation and income of the *whole* corpus. The size of the class, namely, the number of children or the number of grandchildren, neither increases nor decreases the life estate of each beneficiary in his turn. They are certainly separable, separate and successive estates.

On page 672, *McGill* v. *Trust Co.*, cited *supra*, Vice-Chancellor BUCHANAN observes that there are a few authorities holding, if the ultimate gift is too remote and hence invalid, the prior estates are also invalid, on the theory that it is to be conclusively presumed that the ultimate gift was the testator's main purpose or object and that prior estates are merely incidental. The Vice-Chancellor answers these minor opinions in the following strong language:

> "Such a holding is however utterly opposed to the rationale of the matter and the weight of authority is overwhelmingly the other way, as is also the decision, Stout v. Stout * * *."

On page 674 of the same cause, Vice-Chancellor BUCHANAN, speaking of applying the Rule against Perpetuities, says:

"The test is, as always, the testator's intent."

In the case *sub judice* the testator has made it plain that his chief concern (intent) is the creation of successive life estates, viz., the maintenance of a home by his oldest living child or grandchild in turn for the unmarried lives of his children and grandchildren. The very fact that no ultimate disposition is made of the corpus, we submit, makes this, his main purpose, more obvious than if he had disposed of the remainder after the termination of the life estates. He thought of nothing but these life estates.

It is the duty of this Court under well-settled principles of law, too often quoted and referred to, to require citation here, to carry out this intention if it can lawfully do so.

Having thus ascertained this testator's intention, we submit that the Rule against Perpetuities "remorselessly applied" does not vitiate these life estates because they are separable from each other and from the vested remainder or corpus, wherever that lies. As to this remainder we concede the testator died intestate and that the corpus vested at his death in his heirs at law but subject to these life estates to each of his children and grandchildren who live to enjoy them, in the order of seniority.

The leading cases in this State on this subject are:

McGill v. *Trust Co.*, 94 N. J. Eq. 657;
Graves v. *Graves*, 120 Atl. 420;
Stout v. *Stout*, 44 N. J. Eq. 479;
Hewitt v. *Green*, 77 N. J. Eq. 345.

Let us consider and apply them:

McGill v. *Trust Co.*:

McGill's will and codicil provided that the income from the estate should be paid to two children, Alexander and Eleanor, during their lives and at their deaths to their children—the corpus to go to such of their children as should attain 25. Eleanor so far has no children; Alexander has three, all *in esse* at testator's death. The attempted gift of corpus to Alexander's children was held void under the Rule against Perpetuities (p. 665). *The gift of income to these children was upheld because separate from and independent of the gifts of corpus* (pp. 671 and 678). The corpus of Alexander's share was held vested in Alexander and Eleanor *subject to Alexander's life estate and the succeeding life estates in his children* (p. 679). As to Eleanor's share, Alexander and Eleanor were held vested with the remainder *subject to Eleanor's life estate and to a succeeding contingent,* instead of vested, *life estate* in possible children of Eleanor by any other husband than Carr. This decree was affirmed by the Court of Errors and Appeals, 125 Atl. 108, except that it was held that Alexander's children have no contingent interest in Eleanor's share, it being too remote.

Graves v. *Graves*:

Testator's will provided that the residue be held in trust to invest, pay a $20,000 annuity to his widow in lieu of dower during her life, remaining income to be divided into as many parts as there may then be children and grandchildren surviving testator during their lives, after-born children and grandchildren to share equally in this income when they were born, lawful issue of grandchildren to take parent's share, corpus to be divided after

death of last surviving grandchild. Chancellor WALKER held (p. 424) the trust void because violative of the Rule and that corpus vested in children and next of kin of testator *subject to a trust fund to be carved out of it sufficient to produce the widow's annuity during her life.*

It is to be noted, first, that this will was upheld as to the annuity, obviously because it was separable and that the rest was held void *because the testator expressed his main purpose and intent as being to accomplish an illegality,* the tying-up of the estate for the benefit of great grandchildren. So states Vice-Chancellor BUCHANAN, discussing the *Graves* case in *McGill* v. *Trust Co.*, cited *supra,* at page 674, commenting that *it was the separability of the widow's annuity and the inseparability of the other* gifts upon which this opinion was predicated. *The latter gifts were incidental to and not separable from the main gift* which was void and therefore fell with it.

We have already discussed *Stout* v. *Stout,* which states the same principles as the *McGill* and *Graves* cases, applying them in part properly and in part, we respectfully submit, improperly.

Gray—footnote, page 348.

Hewitt v. *Green*:

We can add nothing to the discussion of this case by Vice-Chancellor BUCHANAN, appearing on page 673 of the *McGill* case, wherein he says:

> "A careful reading of the opinion, '(*Graves* case)' and reference to the record in the cause, render it evident, I think, that the basis for the determination in this behalf must necessarily have been (as in Hewitt *v.* Green, *supra*) that prior gifts which are only incidental to the effectuation of a main purpose which is void, fall with the main gift; and that none of

> the prior life estates were separable from the void remainder in fee and the life estates which were merely incidental thereto; and that it was impossible under the provisions of the will to separate testator's intent and purpose as to gifts which were void and those which (if they could be separated) would not be void," &c. (pp. 673 and 674).

The main purpose of the testator in the case at bar was obviously the creation of separate and successive life estates in his children and grandchildren in the order of their seniority. He didn't mention how the corpus was to be disposed of nor where it should vest. He did that which the law could not do for him, viz., the creation of life estates—and left the rest to the statute of descent, assumedly designedly and at all events with right. So, the corpus has vested according to law, viz., validly without his mention and the life estates have vested and/or will vest in those intended because they too are valid for the reasons herein stated.

POINT II.

The will is certain and definite.

Although the bill of complaint contains no allegation attacking the will or any part thereof for vagueness and uncertainty, the Vice-Chancellor, before whom this matter was heard, in his written conclusions (State of Case, p. 18, *et seq.*) "suggests" that the fifth clause of the will is also void for vagueness and uncertainty. The Vice-Chancellor predicates this part of his opinion upon the following questions, each of which we shall discuss in turn:

> "The testator left him surviving three daughters namely, Mary Elizabeth, who has

> since died; Annie, who is alive and unmarried and Stella who is living and married. Is Annie required to provide a home for Stella as well as for her two brothers who I shall mention hereafter?"

Reference to the fifth clause of the will discloses that the answer to this question must be in the affirmative because the will on that phase, reads, "keep a home for the other children." Obviously, Stella, one of his daughters, comes within the scope of this phrase.

The Vice-Chancellor next inquires, "If Stella should survive Annie and be then a widow, did the testator intend that Stella should have a life estate?" The answer to this question depends upon whether the word widow means unmarried.

A widow is an unmarried woman whose husband is dead (*Bouvier's Law Dictionary*).

A widow is defined as a woman who has lost her husband by death and is still unmarried (*Standard Dictionary*).

The third question raised by the Vice-Chancellor is in the following language:

> "The testator also left him surviving five sons, John, Thomas and Francis, who are now dead, and Fred and George, both of whom are living and unmarried. Upon the death of Annie, Stella being married and therefore disqualified from taking, which of the living sons shall succeed to a life estate and will the one who first succeeds, be required to provide a home for his brother and for his sister Stella?"

The will is clear in this respect and reads as follows:

> "* * * this bequest to go to my next daughter and so on to the Boys until all of my children are either dead or married and then to go to the oldest grandchild * * *."

Careful note must be made that the testator uses advisedly the phrase "next daughter and so on to the Boys" and then further on in the will the phrase "and then to go to the oldest grandchild."

We submit that this language permits of no meaning other than that the children were to succeed to the life estates in order of seniority, observing first, the female children, then the male children, and finally, the grandchildren regardless of sex.

Furthermore, the one who succeeds Annie will be required to provide a home for his brother and for his sister Stella, because both his brother and sister Stella come within the above quoted phrase "other children."

The last question raised by the Vice-Chancellor, which in his opinion renders the will void for uncertainty and vagueness, is as follows:

> "The testator intended a life estate for his oldest grandchild after the death or marriage of all of testator's children. Did the testator intend to designate his oldest grandchild, whether male or female, married or single and did he further intend that such grandchild should provide a home for testator's married living children and for all his other grandchildren?"

That the testator intended his oldest grandchild, whether male or female, is the correct version, because he refers to the "oldest grandchild" and does not designate whether he shall be male or female.

That the marriage of a grandchild would disqualify him from succeeding to a life estate is clear from the entire language of the clause:

> "And in case she dies or should get married, this bequest to be transferred to my daughter Annie but with the same restrictions and in

> the event of her decease or her getting married, then this bequest to go to my next daughter and so on to the Boys until all of my children are either dead or married and then to go to the oldest grandchild and so on."

The testator limits the disqualification by marriage in the language just quoted, viz.:

> "Until all of my children are either dead or married and then to go to the oldest grandchild and so on."

The phrase "and so on" is incapable of any other meaning.

That the testator intended that such grandchild should provide a home for testator's married living children and for all his other grandchildren, is easily adducible from the phrases "for the other children," "and so on."

In the construction of wills, the most unbounded indulgence has been shown to the ignorance, unskillfulness and negligence of testators. No degree of technical informality or of grammatical or orthographical error nor the most perplexing confusion in the collocation of words or sentences will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will and the whole carefully weighed together.

1 Jarmon on Wills, 315, cited in *Stewart* v. *Stewart,* 31 N. J. Eq. at page 404.

For the reasons given, we conclude that the decree of the Court of Chancery is erroneous and should be reversed and that the bill of complaint should be dismissed.

Respectfully submitted,

SCHUMANN & SCHUMANN,
Solicitors of Appellants.

E. W. A. SCHUMANN,
Of Counsel.

New Jersey Court of Errors and Appeals

FRANK J. GLOCK, *et als.*, Complainants-Appellees, vs. CATHERINE GLOCK, *et als.*, Defendants-Appellants.	On Appeal from the Court of Chancery.

BRIEF OF COMPLAINANTS-APPELLEES.

At the outset, we wish to concede and acknowledge the argument of appellants under Point I, that a life estate or term of years is not necessarily void if the remainder is void for remoteness under the perpetuity rule. But, where such life estate or terms of years or annuity is, as has been said by Vice Chancellor Buchanan in the *McGill* case, cited in Appellants' Brief, and affirmed by this Court, so inseparably interwoven or merely incidental to and in aid of the main invalid gift, then such prior estate is invalid and must fall with the main invalid gift.

The appellants' brief under Point I would lend the impression that the settled proposition of law, that a preceding estate does not necessarily fall with the void remainder, was questioned by the appellees and the Court below. A reading, however, of the Vice Chancellor's opinion herein will clearly expunge such inference. The appellees' contention, therefore, is that these life estates, which were created herein were so inseparably interwoven and merely incidental to and in aid of the main

invalid gift, as to necessarily fall with it. Yet, before we come to the argument of this point, it is well to note a very important feature which should, we believe, end the entire discussion then and there. It is this. No period of vesting whatever is provided for under Clause "5" of the will, and, therefore, any prior estate which this clause attempted to create is utterly void. In other words, this testator attempted to create successive life estates commencing from his surviving children to his grandchildren, to his great grandchildren, to his great, great grandchildren, and so on, until the last surviving members of his descendants, with no period of vesting in anybody. Clearly, this devise is so violative of the rule of perpetuities that by no reasoning can any of the preceding estates be valid. It is only, and here is something we must not lose sight of, that a preceding life estate, as recited in the *McGill* case, can be given recognition when it is not so inseparably interwoven with the void remainder. Where, however, there is no remainder which can vest, but a mere creation of successive estates less than a fee stretched out *ad infinitum,* then certainly none of these estates can become valid in law. We cannot, therefore, conceive, by any stretch of the imagination, how the doctrine enunciated by Vice Chancellor Buchanan in the *McGill* case, and affirmed by this Court, that the preceding estates will be recognized, etc., despite a void remainder, can apply when there is, as said above, no remainder from which to probe or determine the intention of the testator; for the rule of perpetuities, as stated by Professor William F. Walsh, in his text-book on Real Property, on page 558, is as follows:

> "*Every future interest must vest* within a period measured by the lives of definite per-

> sons in existence at the time of the creation of the future interest, and twenty-one years thereafter, and every such interest is void in its creation if it may by any possibility vest at a more remote time. The object of the rule is to prevent the fettering of property, real or personal, by creating future remote interests which either cannot be conveyed, or which tend to prevent or discourage alienation because they are so uncertain and indefinite that their value cannot be determined with any degree of accuracy."

This question was raised by us in the court below and indirectly was commented upon by the Vice Chancellor in his Conclusion, when he said, S. O. C. on page 18, line 20,

> "* * * but it seems to me that such life estates form part of the plan which the testator apparently had in mind, which was to keep his real property in his family for the use of members thereof, forever. The life estates to his children and grandchild were not intended to be preferential to them, or independent or separate from his main purpose."

But, in order that we may not limit ourselves by this theory and because it seems that the Vice Chancellor's Conclusion centered about the fact that the life estates created by the testator could not be enforced without distorting the intention of the testator, we will briefly comment upon it.

Before we discuss the same, we must assume for the sake of argument that there was a vested remainder void for remoteness. We contend that these life estates are so inseparably interwoven and are so incidental to and in aid of the main invalid gift (there being none) as to fall with it.

The cases of *Hewitt* vs. *Green,* and *Graves* vs. *Graves,* cited in appellants' brief, did not lay down

very clearly the proposition that preceding life estates would be valid despite a void remainder where such intention can be drawn from the context of the instrument creating them. In fact, a reading of these cases will lead to a contrary impression. Not, therefore, until the *McGill* vs. *Trust Co.* case, where a lengthy review of all the decisions in this state on that question was made by Vice Chancellor Buchanan, did the proposition become clearly established that prior gifts, which were only incidental to the effectuation of the main purpose, which was void, will fall with the main gift, and that the intention of the testator would play a leading role in the determination of their separability from the void remainder.

The appellants have briefly discussed the facts of these three cases. Now if it was held in those cases that the prior estates would have to fall with the main gift because the testator's intention could not be clearly determined to the contrary, then how much more difficult would it be to enforce the validity of the life estates in the case sub judice, particularly in view of the fact that there is no void remainder from which any analogy, reason, or intention could be drawn? What was the intention of the testator in our case? There is nothing profound or complex in the clause itself which would puzzle the mind. It is so evident, so clear that he intended to create an eternal heirloom, that to interpret the inescapable conclusion to the contrary would be to distort the plain and unambiguous intention of the testator, when he says:

> "I give * * * unto my daughter, Mary * * * then to Annie, but with the same restrictions, and in the event of her decease or her getting married then this bequest to go to my next daughter and so on to the Boys until all of my children are either dead or married

> and then to go to the oldest grandchild and so on."

If the testator had intended, by a clear import of these words, anything less than an eternal heirloom and a fettered alienation of this property, would he not have provided for a period of vesting, no matter how remote?

As it is conceded by the appellants that the clause is violative of the rule of perpetuities except for the life estate of the children (a very convenient exception), then can we say if the will should be declared void, in which event the children according to the law of descent would be entitled to the fee, that they should first enjoy these life estates and then the fee?

How are we to answer the questions which the Vice Chancellor below asked in his Conclusions to show the vagueness and uncertainty with which he was confronted in attempting to determine the testator's intentions? Certainly, the answers of appellants in their brief cannot suffice. The Vice Chancellor tried very hard to fathom the intention of the testator, but he was led to the irresistible conclusion that the testator intended that his property should pass on forever and that such life estates, which form a part of the plan, and which the testator apparently had in mind, were so inseparably interwoven and incidental to his main purpose, which, being void, must fall therewith.

It would be idle to argue this question further. We contend first that since there is no vested remainder of any estate void for remoteness, that then any prior term of years or life of such estate becomes necessarily void; and secondly, since the intention of the testator was to create an eternal heirloom, as the Vice Chancellor below concluded,

that then life estates created out of the same estate, which was void, as above, are necessarily so inseparably interwoven and incidental thereto as to fall with the void estate.

At this point it might be well to call the attention of the Court to the fact that there are certain other bequests of personal property left by the testator not in any manner interwoven with the *void corpus* of the estate, which we do not question. Our last contention is that inasmuch as the vesting of the corpus of the gift under paragraph "5" of the will has not been provided for by the testator, that then he is deemed to have died intestate as to such property, and the same must descend to the heirs at law and next of kin existing at the time of the testator's death according to the laws of descent and distribution in effect at such time, and inasmuch as these very children are now vested with the fee of the said property by law because of the failure of the testator to provide for the vesting thereof, that then their several life estates must merge in the fee, extinguishing thereby such life estates.

It is elementary that the acquisition of the fee merges in a preceding life estate held by the taker of the fee, as in the case of a mortgagee who subsequently acquires the fee by deed. It is deemed in such a case that the mortgage merges with the fee and is extinguished. The case of *Tennenberger* vs. *Sozio,* 136 Atl. 806, 101 N. J. Eq. 64, holds that:

> "Merger is presumed as a matter of law from the uniting of the greater and less estates in the same person."

The *McGill* v. *Trust Co.* case and the *Graves* v. *Graves* case, would also lead to such conclusion.

For these reasons we submit that the conclusions of the Vice Chancellor were sound and just and should therefore be affirmed.

Respectfully submitted,

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MEYER PESIN,
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