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NOTICE OF APPEAL

NEW JERSEY SUPREME COURT
HUDSON COUNTY

10

VINCENT AHLEMEYER,
Plaintiff-Appellee,

vs.

JOHN A. MILLER and MAUDE
MILLER,
Defendants-Appellants.

Action at Law

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TO: Autenrieth & Gannon,
Attorneys for Plaintiff-Appellee,
931 Bergen Ave., Jersey City, N. J.

PLEASE TAKE NOTICE, that the appellants,
John A. Miller and Maude Miller, hereby appeal to
the Court of Errors and Appeals of the State of New
Jersey from the whole of the judgment, entered in
this case upon the following grounds:

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FIRST: Because under the descent laws of the
State of New Jersey the defendant, John A. Miller,
was the sole heir at law of George Miller and Beata
K. Miller, and was entitled to the property in ques-
tion, and the Supreme Court should have so decided.

SECOND: Because under the Adoption Act, under
which the defendant John A. Miller was adopted by
George Miller and Beata K. Miller, he became an
heir of each and both of them and was entitled to
the premises in question in fee, as such heir.

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THIRD: Because the Supreme Court erred in
its determination that the defendant John A. Miller

Notice of Appeal

was not entitled to the fee of the premises in question by reason of the rule in the Shelly Case.

FOURTH: Because the Supreme Court erred in its determination that the words "child or children of the party of the second part" mentioned in the deed in John A. Miller, Sr., and Elizabeth Miller, to George Miller and Beata K. Miller did not include the defendant John A. Miller. 10

FIFTH: Because the Supreme Court erred in its determination that the defendant John A. Miller did not take the fee in said premises by reason of the language of the deed, to wit: "That in default of any such child or children, then to the heirs at law of said party of the second part, etc." 20

SIXTH: Because the Supreme Court erred in not striking out the plaintiff's complaint. 20

SEVENTH: The Supreme Court erred in giving judgment in favor of the plaintiff against the defendants.

EIGHTH: The Supreme Court erred in deciding that the defendant's motion to strike out complaint was equivalent to demurrer, and these defendants should have been given an opportunity to plead the facts.

NINTH: Because the judgment entered was contrary to law. 30

WILLIAM C. ASPER,

Attorney for Defendants-Appellants.

COURT OF ERRORS AND APPEALS.

No. 87 February Term, 1926.

10 VINCENT AHLEMEYER,
Respondent,
 v.
 JOHN A. MILLER et al.,
Appellants.

Argued February 10, 1926; decided June 24, 1926.

20 Motion to strike out grounds of appeal.

For the appellants, WILLIAM C. ASPER.

For the respondents, AUTENRIETH & GANNON.

PER CURIAM.

There are nine grounds of appeal. The fourth is not challenged.

30 The first and second merely state defendant's propositions of law based on the facts of the case, but point to no judicial action. They will be struck out.

The third is directed to a passage in the opinion of the court below, and it is well settled that error cannot be assigned on an opinion. *Ruckman v. Demarest*, 32 N. J. L. 528.

A similar result is reached as to the eighth.

40 The disposition of the other grounds require a statement of the judicial action below.

The suit was in ejectment, plaintiff and defendant both claiming under the language of a deed. There was a statutory plea and also a motion to strike out the complaint. The motion was argued before Mr. Justice Minturn and denied by him, and he, deeming the motion as tantamount to a demurrer admitting all facts properly pleaded, ordered a judgment for plaintiff. 10

Omitting the fifth ground of appeal for the present, the sixth is that the court erred in not striking out the complaint. This is manifestly a proper ground, as is the seventh, that the court erred in giving judgment for the plaintiff. The ninth is a general assignment of error and valid for which it is worth. This leaves only the fifth, that the court "erred in its determination that the defendant John A. Miller did not take the fee in said premises by reason of the language of the deed, to wit "(quoting it) The motion to strike this out is that it is indefinite and does not state with sufficient particularity the errors of law committed by the Supreme Court." We consider it proof against any such objection; and no other objection having been invoked in the notice, the fifth ground of appeal will stand, although probably included in other valid grounds. 20

The result is that as to the first, second, third and eighth grounds of appeal, the motion will be granted; in other respects it will be denied. 30

Endorsed:

"Filed June 24, 1926.

THOMAS F. MARTIN,
Clerk."

SUMMONS

Issued Oct. 9, 1924

THE STATE OF NEW JERSEY

TO

10 JOHN A. MILLER, and MAUDE MILLER,
his wife,

(SEAL)

20 YOU ARE SUMMONED to answer the annexed complaint of VINCENT AHLEMEYER in an action at Law in the Supreme Court, wherein said VINCENT AHLEMEYER demands of you the possession of an equal undivided one-half part of a tract of land with the appurtenances situate in the City of Jersey City, in the County of Hudson and State of New Jersey, and particularly described in said complaint,

AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton within twenty (20) days after service upon you of this Writ and of the annexed complaint, judgment will be entered against you and you will be turned out of possession of an equal undivided one-half part of said land.

30 WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court at Trenton, this 9th day of October, 1924.

AUTENRIETH & GANNON,
Attorneys of Plaintiff.

EDWARD J. KELLEHER,
Clerk.

COMPLAINT

Filed Oct. 9, 1924

New Jersey Supreme Court
Hudson County

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 VINCENT AHLEMEYER,

Plaintiff,

vs.

JOHN A. MILLER and MAUDE

MILLER, His Wife,

Defendants.

 Action at Law
 In Ejectment

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The plaintiff, VINCENT AHLEMEYER, residing in the City of Jersey City, County of Hudson and State of New Jersey, says:

1. On September 19, 1891, Mary Elizabeth Miller and John Miller, her husband, of Jersey City, conveyed premises now known as 389-391 Grove Street, and hereinafter particularly described, to George Miller and Beata K. Miller, his wife, to wit:

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ALL those two certain lots, tracts or parcels 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 which on a Map of that part of the Town of Jersey, commonly called "The Aharsimus", made by Joseph F. Mangin and duly filed in the Clerk's Office of Bergen County, may be known and described as lots numbered 5 and 6 in Block numbered 150, each of said lots

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Complaint

being twenty-five (25) feet wide in front and rear and one hundred (100) feet deep throughout, and fronting on Grove Street.

10 Said deed was recorded in the Hudson County Register's Office on April 19, 1894, in Book 593 of Deeds for said County at page 487, a true copy of which is hereto annexed and marked "Schedule A."

20 2. Said conveyance to the said George Miller and Beata K. Miller, his wife, was limited "to the only proper use, benefit and behoof of the said party of the second part and the survivor of them during the lifetime of the survivor, and after the death of the survivor to the child or children of the parties of the second part and of the survivor of them, share and share alike, their heirs and assigns forever, and in default of any such child or children, then to the heirs at law of said parties of the second part in the following manner: one undivided half part to the heirs at law of said George Miller, their heirs and assigns forever, and one undivided half part to the heirs at law of the said Beata K. Miller, their heirs and assigns forever."

30 3. On or about April 10, 1895, the said grantees, George Miller and Beata K. Miller, his wife, instituted proceedings in the Hudson County Court of Common Pleas for the adoption of the defendant, John A. Miller, and on May 24, 1895, an order was made by said Court ordering and adjudging that the defendant, John A. Miller, was adopted as a child of the said grantees, George Miller and Beata K. Miller, his wife, a true copy of which order is hereto attached and marked "Schedule B."

Complaint

4. Said grantees, in said deed mentioned, viz.: George Miller and Beata K. Miller, his wife, never had any issue by their marriage, and the said George Miller died on or about August 7, 1914, leaving his wife, Beata K. Miller, surviving him, and the said Beata K. Miller died on or about November 12, 1922, leaving plaintiff, Vincent Ahlemeyer, her brother, as her only heir at law, and entitled to take an undivided one-half interest in the above-mentioned premises by virtue of the deed annexed hereto and marked "Schedule A." 10

5. Defendant John A. Milleer has entered into possession of the premises and is exercising ownership and claiming title to the same and refuses to recognize the right, title or interest of the plaintiff in and to an undivided one-half interest in premises described in said deed. 20

6. The said John A. Miller is married and his wife's name is Maude Miller and she claims an inchoate right of dower in and to the whole of the above-described premises and refused to recognize the right, title or interest of the plaintiff in and to an undivided one-half interest in said premises.

7. Plaintiff says his right to possession of an undivided one-half interest in and to the above described premises accrude on November 12, 1922, and has continued ever since that time and that the defendant wrongfully deprives him of the possession thereof. 30

Plaintiff demands possession and title of an undivided one-half interest in and to the premises above-mentioned.

AUTENRIETH & GANNON,

Attorneys for Plaintiff. 40

SCHEDULE A

THIS INDENTURE made the nineteenth day of September in the year of our Lord one thousand eight hundred and ninety-one.

10 Between MARY ELIZABETH MILLER and JOHN MILLER, her husband, of the City of Jersey City in the County of Hudson and State of New Jersey, party of the first part, and GEORGE MILLER and BEATA K., his wife of the same place, party of the second part.

20 WITNESSETH that the said party of the first part for and in consideration of One Dollar, lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release; enfeoff, convey and confirm unto the said party of the second part,

30 ALL those two certain lots, tracts or parcels 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 which on a Map of that part of the town of Jersey commonly called Aharsimus, made by Joseph F. Mangin and duly filed in the Clerk's office of Bergen County may be known and distinguished as lots numbered five (5) and six (6) in Block numbered one hundred fifty (150) each of said lots being twenty-five (25) feet wide in front and rear and one hundred (100) feet deep throughout and fronting on Grove Street being the same premises
40 Miller by John B. Drayton and wife by deed dated

Schedule A

May first A. D. eighteen hundred and sixty-eight and recorded in Book 165 of Deeds for said County of Hudson, page 603 &c.

Together with all and singular the tenements, hereditaments and appurtenances to the same belonging or in any wise appertaining. 10

And also all the estate, right, title, interest, curtesy, right of curtesy, property, possession, claim and demand whatsoever of the said party of the first part in and to the same and in and to every part and parcel thereof.

To have and to hold all and singular the above described land and premises with the appurtenances unto the said party of the second part to the only proper use, benefit and behoof of the said party of the second part and the survivor of them, during the lifetime of the survivor and after the death of the survivor to the child or children of the parties of the second part and of the survivor of them, share and share alike, their heirs and assigns forever, and in default of any such child or children then to the heirs at law of said parties of the second part in the following manner, one undivided half part to the heirs at law of said George Miller, their heirs and assigns forever, and one undivided half part to the heirs at law of the said Beata K. Miller, their heirs and assigns forever. 20 30

IN WITNESS WHEREOF the said party of the first part have hereunto set their hands and seals the day and year above written.

Schedule A

Signed, sealed and delivered
in the presence of

J. GARRICK

10 MARY E. MILLER (in German) (S.)
JOHN MILLER. (S.)

COUNTY OF HUDSON }
STATE OF JERSEY } SS:

BE IT REMEMBERED that on this twenty-
ninth day of December in the year of our Lord
one thousand eight hundred ninety-one, before me,
the subscriber, a Master in Chancery of New Jersey,
20 personally appeared Mary Elizabeth Miller and John
Miller, her husband, who I am satisfied are the
grantors mentioned in the within indenture, to
whom I first made known the contents thereof
and thereupon they each acknowledged that they
signed, sealed and delivered the same as their volun-
tary act and deed for the uses and purposes therein
expressed. And the said Mary Elizabeth Miller
being by me privately examined separate and apart
from her husband further acknowledged that she
30 signed, sealed and delivered the same as her volun-
tary act and deed freely without any fear or threat
or compulsion of her said husband.

J. GARRICK

Master in Chancery of N. J.

Rec'd in the office and recorded April 9, 1894, at
10:05 A. M. 1482.

SCHEDULE B

HUDSON COUNTY ORPHANS' COURT

<p>IN THE MATTER OF THE APPLICATION OF GEORGE MILLER AND BEATA CON- EGANTE MILLER, for leave to adopt JOHN MILLER, a minor</p>	}	DECREE.	10
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WHEREAS George Miller and Beata C. Miller,
his wife, on the tenth day of April, eighteen hun-
dred and ninety-five, presented their petition to
the Court setting forth that they reside at No. 389
Grove Street in the City of Jersey City, in the County
of Hudson; that the said George Miller is by occu-
pation a carpenter; that the age of the said George
Miller is forty-five years and the age of the said
Beata C. Miller is thirty-nine years, that they desire
to adopt John Miller, a minor child aged five years,
who resides in Jersey City in the County of Hudson
and is now living with your petitioners in said City;
that the parents of said child were
Miller and Miller, both of whom
are now dead; that the said child has no legal
guardian who could give consent to such adoption
and that the said child has no property whatsoever,
and praying that a discreet and suitable person
might be appointed next friend of the said child,
to the end that he might give his consent to such
adoption, and that the court would inquire into
the merits of the said petition and would by its de-

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Schedule B

cree, grant permission to the said George Miller and Beata C. Miller to adopt said child and that the court would change the name of said child to John Adam Miller, to which petition there was annexed an affidavit of the said petitioners duly verifying the same according to law.

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Whereupon and upon reading the said petition and affidavit the Court ordered the same be filed with the Clerk of this Court, and the same were filed accordingly, and it appearing to the Court that it was necessary, under the provisions of an act of the legislature of this State entitled "An Act providing for the adoption of children", approved March 9th, 1878, that a person should be appointed as next friend to said child, the Court did, by its order, fix Friday the third day of May, eighteen hundred and ninety-five, as the time and place of where such appointment would be made, and did order that notice of said petition of the said time and place so fixed should be published in "The Evening Journal" and "The Jersey City News", two newspapers published at Jersey City, and circulating in the County where this Court is located, once a week for three weeks successively, and where such publication was made as appeared to the Court by due proof, and the Court, on receiving the same, and on the tenth day of May, eighteen hundred and ninety-five, by its order, did appoint James H. O'Neil, Esquire, next friend of the said minor child, for the purpose set forth in said act and by the said order did assign the twenty-fourth day of May, eighteen hundred and ninety-five, for the hearing of said petition and the examination of the parties in interest, and whereas upon the day so appointed the Court did proceed to a full

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Schedule B

hearing of the petition and of the examination of the petitioners, and the said minor child and of all parties in interest, under oath, and the Court, from the testimony is of the opinion that the facts stated in the petition are true, and upon the said examination are satisfied that the petitioners are of good moral character and of reputable standing in the community and of ability to properly maintain and educate said child, reference being had to the degree and condition in life of the child's parents and furthermore that the best interests of the child would be promoted by such adoption; and whereas the said James H. O'Neil next friend of the said child, by appointment, as aforesaid, did, on the twenty-fourth day of May, eighteen hundred ninety-five, give his written consent duly acknowledged, to such adoption, which consent has been filed with the Clerk of this Court.

NOW, THEREFORE, the Court doth by virtue of the said act, order, adjudge and decree that the prayer of the said petitioners be and the same hereby is granted and that said John Miller, minor child of Miller and Miller, shall hereafter be known by the name of John Adam Miller, and the Court doth hereby declare and adjudge that from the date of this decree the rights, duties, privileges and relations heretofore existing between the said John Miller and his parents, the said Miller and Miller, shall be and are in all respects at an end, excepting the right of inheritance; and further that the rights, duties, privileges and relations between the said John Miller and the said George Miller and Beata C. Miller, his parents by adoption, are and shall henceforth be the same, including the right of inheritance,

Schedule B

as if the said John Miller had been born to his said adopted parents in lawful wedlock, except only as otherwise provided in said act of the Legislature above mentioned.

10 Done in open Court this 24th day of May, A. D. 1895.

R. S. HUDSPETH, P. J.

John Kenny.

Recorded in Hudson County Surrogate's Office in Book 24 of Orphans' Court Record at page 442.

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NOTICE OF MOTION TO STRIKE OUT
COMPLAINT

NEW JERSEY SUPREME COURT
HUDSON COUNTY

VINCENT AHLEMEYER,

Plaintiff,

vs.

JOHN A. MILLER AND MAUDE
MILLER,

Defendants.

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} Action at Law

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TO Autenrieth & Gannon, Attorneys of Plaintiff:

Please take notice that on the first day of November, 1924, at ten o'clock in the forenoon, at the Court House in Jersey City, in and for the County of Hudson, before the Honorable James F. Minturn, Justice of the above stated Court, we shall move to strike out the complaint filed in this cause upon the ground that it discloses no cause of action, to wit: Although the said complaint alleges that George Miller and Beata K. Miller, his wife, were both dead on November 12, 1922, George Miller having died on or about August 7, 1914, and Beata K. Miller having died on or about November 12, 1922, and further alleges that they never had any issue by their marriage, the complaint also alleges that on or about April 10, 1895, the said George Miller and Beata K. Miller, his wife, adopted John A. Miller, the above named defendant, according to the statute in such case made and provided. Therefore, the said John A. Miller was and is a child

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Notice of Motion to Strike Out Complaint

of the said George Miller and Beata K. Miller, and accordingly is entitled to the full possession and legal title in fee of the premises described in the complaint under the terms of the deed set forth in paragraphs one and two of the said complaint, and
10 his wife, Maude Miller, is entitled to an inchoate right of dower in and to the said premises.

Dated: October 28, 1924.

KINKEAD & KLAUSNER,

Attorneys of Defendants.

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Opinion Filed Nov. 14, 1925

NEW JERSEY SUPREME COURT

VINCENT J. AHLEMEYER,

vs.

JOHN A. MILLER AND MAUDE
MILLER.

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Opinion

Motion to Strike Out Complaint.

KINKEAD & KLAUSNER, for the motion.

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AUTENRIETH & GANNON, contra.

Argued by consent before Minturn, J.

The suit is an ejectment, and the motion is to strike out the complaint. Mary Elizabeth Miller and John Miller, her husband, conveyed the premises known as 389-391 Grove Street, Jersey City, by deed, dated September 19, 1891, and thereafter duly recorded, to George Miller, their son, and Beata K. Miller, his wife. After the statement of the usual habendum, the deed contained the following limitation, viz.: "To the only proper use, benefit and behoof of the said party of the second part, and the survivor of them during the lifetime of the survivor, and after the death of the survivor, to the child or children of the parties of the second part, and of the survivor of them, share and share alike, their heirs and assigns forever; and in default of any such child or children then to the heirs at law of said parties of the second part, in the following manner: one undivided half part to the heirs at law of the said

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Opinion

George Miller, their heirs and assigns forever, and one undivided half part to the heirs at law of the said Beata K. Miller, their heirs and assigns forever."

10 The life tenants died without children, but on May 24, 1895, as a result of proceedings duly instituted for the purpose, in the Hudson Orphans' Court, John A. Miller, then five years of age, one of the defendants herein, was adjudged, under the provisions of our adoption statute, to be their adoptive child, and thereafter he resided with his adopted parents as their only child, and thereafter married the other defendant herein. George Miller, the son of the grantor, died about August 7, 1914, and Beata, his widow, died about November 12, 1922, leaving her surviving her brother, the plaintiff herein.

20 The defendants are in possession of the locus in quo, claiming title under the statute of adoption, as the child and only heir at law of his adoptive parents, as well as under the provisions of the statute of "Descent"; and the common law "Rule in Shelley's case."

The main contention, however, is centred upon the effect of the provisions of the adoption statute, P.L. 1902, p. 259, P.L. 1912, p. 53, declarative of the legal status of the defendant, John, as the only surviving child of his adoptive parents.

30 The adoption statute has been before our courts in various factual phases, but never so far as has been disclosed, has the precise question now at issue been presented in this jurisdiction for determination. The act received a liberal construction by the Court of Errors and Appeals, the present Chief Justice writing the opinion in *re Book's Will*, 90 N. J. Eq. 549, where it was held that the word "child" when used in a will shall be deemed to include an adopted child. There the learned Chief

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Opinion

Justice observed, "The effect of the legislation just adverted to, is to clothe the adopted child with all the rights of a natural child, so far as inheritance of real estate, or the distribution of personal estate is concerned." That case was followed by *In re Alter's Will*, 92 N. J. Eq. 415. Vice Chancellor Foster dealing with section 20 of the act concerning wills, in so far as it relates to after-born children, said, "regardless of what the rule may be in other jurisdictions, the law in his state has been settled by the Court of Errors and Appeals by the decision in *re Books Will xxx*. It changes the statutory rules regulating the devolution of property by enlarging the class for whose benefit they were originally passed, by making the adopted child a lawful child of the decedent for the purpose of sharing in the distribution of his estate." 10 20

Vice Chancellor Howell had previously given this provision of the act a construction in *Stout v. Cook*, 77 N. J. Eq. 153. Vice Chancellor Buchanan in *Haver v. Herder*, 126 Atl. 661, when the question of "legal heirs" as comprehending children was discussed, observed that "this view is in accord with both the spirit of the legislative policy as indicated in the adoption statute, and the spirit of the judicial pronouncement in the *Book* case." 30

Cases are invoked from other jurisdictions in support of this construction, but the adjudication of the Court of Errors and Appeals, so far as the rule of law in this state is concerned, like the decretae of the Roman Curia is a finality. *Roma locuta est causa finita est*. But when we are concerned, as in this instance, with the additional inquiry, i. e., whether the adoption act is sufficiently comprehen- 40

Opinion

sive to include a grant of a life estate to the adoptive parents by a deed of conveyance, with a limitation over "to the child or children of the parties of the second part", and "in default of any such child or children then to the heirs at law of said parties of the second part, we are manifestly confronted with a legal inquiry entirely res nova, in the determination of which decisions of other jurisdictions may be invoked as illuminative of the discussion.

It will be observed that the cases in this jurisdiction, where the effect of the adoption statute was considered, were cases arising under wills, and where as a rule the testator occupied the status of the adopting parent, whereas the question now presented arises under the covenant of a deed of conveyance, and concerns the effect of a limitation created by the grantor, a third party, in no wise related by the enabling statute to the adopted child.

The legal construction accorded to a covenant, in a deed of conveyance, has always differed from the liberality of view accorded by Courts of Equity, to the same terms in a will; the reason being that the sole purpose of testamentary construction is to evoke the intention of the testator, while the language of the grantor employed in a common law deed of conveyance has by centuries of judicial construction and interpretation, been settled, until in this day the difference has become axiomatic.

Thus Chief Justice Whelpey, speaking for the Court of Errors and Appeals, in *Adams v. Ross*, 30 N. J. L. 505, observes concerning the legal effect of the use of the words "child or children", in a deed of conveyance, "In the construction of a deed of con-

Opinion

veyance, the question is not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention will supply the omission." 10

The defendant, John A. Miller, had not been adopted by the grantees for over three years after this conveyance had been made, and these defendants were then without children, and in the light of that fact the limitation over, by a third party, to their children or heirs at law was legally intelligible, as not comprehending a stranger to the blood in default of lawful issue.

In those jurisdictions where the question has been presented for adjudication, and where similar adopting statutes exist, the result has been adverse to the claim of the defendant. Thus in 20

Wilder v. Wilder, 116 Me. 389, 102 Atl. 110 (in the case of a trust deed).

Malek v. University of Mo. 250 S. W. 634 (a will).

Puterbaughs Est. (will) 261 Pa. St. 235-104 Atl. 601.

Casper v. Helvic (test. trust) 146 N.E. (Ind.) 123. 30

Savells v. Brown, Guardian, (Ky.) (deed) 218 S.W. 462.

Parker v. Carpenter (N. H.) (Test. trust) 92 Atl. 955.

In re Leask (N. Y.) (Test. trust) 197 N. Y. 193-90 N. E. 652.

Cochran v. Cochran (Tex.) (Will) 95 S. W. 731.

Middletown Trust Co. v. Gaffey (Test. trust) 112 Atl. 689 (Conn.) and 40

Opinion

In *re Yates* (Pa.) (Will) 126 Atl. 254, the result reached is one of unanimity that a limitation in a deed or will to a child or children, is not deemed to include an adopted child where the grantor or

10 testator is a stranger to the adoption. Probably the reasoning illustrative of the determinations in the cases cited is best presented by the language of the Court in the Maine case (*Wilder vs. Wilder, supra*) "What is the legal effect of the present statute regulating adoption so far as property rights are concerned? In strictness, it simply fixes the status of the adopted child in case of intestacy of his adopters, where the rights of inheritance are in-

20 volved. It is also held to have a bearing upon the intention of the grantor or testator who is himself the adopter. But it is of no particular aid in determining whether an adopted child is within or without the designation of 'child or children', as used in a deed or will, where the grantor or testator is other than the adopter. The right of inheritance is a matter of statutory creation; the taking under a deed or a will depends upon the intention of the grantor or testator, as revealed by the instrument itself con-

30 strued in the light of the surrounding facts and conditions. Where the grantor or testator is the adopting parent, it is reasonable to presume that the adopted child was within the intended bounty of such grantor or testator. But where he is a stranger to the adoption such presumption does not prevail. . . . The distinction . . . is clear."

40 *Wilder v. Wilder*, 102 Atl. Rep. (Me.) 110,
LRA 1918 B. 119.

Opinion

From this analysis it results that the deed of conveyance in question does not legally include the defendant, John A. Miller, as a child of his adoptive parents, the grantees mentioned in the deed, and that the title to the locus in quo has not in virtue of such conveyance vested in him as an adopted child. 10

The remaining questions presented involve the application of the Statute of Descents; the rule in Shelly's case, and the construction of the deed so as to vest a contingent remainder in the defendant, as a child, and heir at law of the grantees, within the terms of the grant.

It is generally conceded that section 11 of the Descent act (2 C. S. 1921, amended P. L. 1915, p. 64) 20
abolishes estates tail, but in reality it simply defines the legal character of an estate thus transmitted, so that an estate in fee tail may still be created by the use of appropriate language, as at common law its legal effect being defined by the statute.

James V. Dubois, 16 N. J. L., 285.

But in any circumstances no such estate can be created without the use of the words "heirs" and neither the words "children", "issue", "descendants", "seed" or "offspring" can supply its place, while as to conveyances the word is indispensable to create any character of a fee. 30

Co Littleton, 20 a,

2 Blackstones Com. 115

Adams vs. Ross, 30 N. J. L., 505.

It is also elementary that to invoke the rule in Shelly's case, the use of the word "Heirs" in the 40

Opinion

conveyance, is indispensable. But obviously further pursuit of this phase of the controversy while interesting in the abstract, can be of no practical utility in the disposition of the case sub judice, since the
 10 conveyance in question obviously contains no such limitation, the words "child" or "children" therein contained in the habendum being primarily under the settled rules of construction words of purchase, and not words of limitation.

Upon this phase of the subject, the adoption act itself lends controlling emphasis in declaring that "such child shall not be capable of taking property expressly limited to heirs of the body of the adopting
 20 parent or parents," thus expressly excluding from its operation titles by descent under the well settled rules of the common law, applicable to fees tail and titles derivable under the rule in Shelly's case.

The deed in this instance manifestly, therefore, created a life estate in the grantees, with a remainder over, contingent upon the birth of children, and upon failure thereof, to the heirs of the grantees respectively, as at common law.

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4 Kents Com. 210,

Butler v. Huestis, 68 Ill., 594.

Finally, as was declared by the Missouri Supreme Court in *Hockaday vs. Lynn*, 200 Mo., 466 (9 Ann cas 775): "It may be laid down as a general conclusion, that where the statute of adoption must be read into the statute of dower, and that of Descents, it is with this singularity always to be observed, viz.:
 40 that the adopted child is so let in only for the pur-

Opinion

pose of preserving in full its right of inheritance from its adoptive parent, and the door to inheritance is shut, and its bolt shot, at that precise point."

To the same effect are:

Wilder vs. Wilder, 116 Me., 389, and

In Re Leask, 197 N. Y., 193.

10

The result reached, therefore, is that the motion of the defendants to strike out the complaint is denied, and since the motion is tantamount in legal effect to the interposition of a demurrer at common law, judgment will be ordered to be entered upon the pleadings, in favor of the plaintiff, and against the defendants.

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Rule for Judgment

Entered Nov. 25, 1925.

NEW JERSEY SUPREME COURT
HUDSON COUNTY

10	VINCENT AHLEMEYER, <i>Plaintiff,</i>	} Action At Law
	vs.	
	JOHN A. MILLER AND MAUDE MILLER, <i>Defendants.</i>	

20 Defendants moved to strike out the complaint in the above entitled cause on the ground that it disclosed no cause of action upon which motion arguments for plaintiff and defendants by their respective counsel were duly heard, the facts pleaded being matters of record and admitted by the defendants, and the Court being of the opinion that the complaint discloses a cause of action and that the plaintiff is entitled to an undivided one-half interest and possession of the premises described in the complaint.

30 WHEREUPON it is ADJUDGED that the plaintiff recover from the defendants John A. Miller and Maude Miller, his wife, an undivided one-half interest or title, and possession of, in and to the premises described in the complaint.

JAMES F. MINTURN,
J. S. C.

Entered Nov. 23, 1925. On motion of Autenrieth & Gannon, Attorneys of Pltff.

A true copy.

EDWARD J. KELLEHER,
Clerk.

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

VINCENT AHLEMEYER,
Plaintiff-Appellee,

vs.

JOHN A. MILLER and
MAUD MILLER,
Defendants-Appellants,

BRIEF 10

PELIMINARY STATEMENT.

An appeal from a judgment of the Supreme Court, Hudson County, denying defendants' motion to strike out the plaintiff's complaint, and giving judgment to the plaintiff in the same motion, the action being in ejectment. 20

STATEMENT OF FACTS.

On Sept. 19th, 1891, Marie Miller and John Miller, being the owners of the premises known as 389 and 391 Grove Street, Jersey City, conveyed the same by Bargain and Sale Deed to their son George Miller and Beata K. Miller, his wife. 30

This deed was in the usual form and conveyed a fee except that the habendum read as follows:

"To have and to hold to the only proper use, benefit and behoof of the said party of the second part, and the survivor of them during the lifetime of the survivor, and after the death of the survivor to the child or children of the parties of the second part and of the survivor of them, share and share alike, their heirs and assigns forever; and in default of any such 40

child or children, then to the heirs at law of the said parties of the second part, in the following manner:—one undivided half part to the heirs at law of the said George Miller, their heirs and assigns forever, and one undivided half part to the heirs at law of the said Beata K. Miller, their heirs and assigns forever.”

10

On May 24th, 1895, as a result of proceedings duly instituted for the purpose in the Hudson County Orphans' Court, John A. Miller, one of the defendants herein, was, under decree of the Orphans' Court, adjudged to be the adopted child of George A. Miller and Beata K. Miller, the grantees in the deed from Marie Miller and John Miller to George Miller and Beata K. Miller.

20

George Miller, the adoptive father of the appellant John A. Miller, died August 7th, 1914. He left no issue, and his only heir at law was his adopted child, John A. Miller, the appellant herein.

Beata K. Miller, the adoptive mother of the appellant John A. Miller, died November 12th, 1922. She left a last Will and Testament, but we claim her only heir at law was John A. Miller, her adopted son and the appellant herein.

30

Upon the death of Beata K. Miller, the appellant went into possession of said premises and his possession was peaceable until this suit was started, October 9th, 1924.

Vincent Ahlemeyer, the respondent in these proceedings, claims to be the only heir at law of Beata K. Miller, being her brother, and claims he is entitled in fee to a one half undivided interest in said property under the original deed.

The other defendant, Maud Miller, is the wife of the appellant and has no other interest in the case.

40

GROUNDS OF APPEAL.

There was a motion made to strike out the grounds of appeal in this case, which was granted in part, the following grounds, however, were allowed to stand and are hereby enumerated for the convenience of the Court.

A: Because the Supreme Court erred in its determination that the words "child or children of the party of the second part" mentioned in the deed in John A. Miller, Sr., and Elizabeth Miller, to George Miller and Beata K. Miller, did not include the defendant John A. Miller. (Fourth ground of Appeal.)

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B: Because the Supreme Court erred in its determination that the defendant John A. Miller did not take the fee in said premises by reason of the language of the deed, to wit: "That in default of any such child or children, then to the heirs at law of said party of the second part, etc." (Fifth Ground of Appeal.)

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C: Because the Supreme Court erred in not striking out the plaintiff's complaint. (Sixth Ground of Appeal.)

D: The Supreme Court erred in giving judgment in favor of the plaintiff against the defendants. (Seventh Ground of Appeal.)

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E: Because the judgment entered was contrary to law. (Ninth Ground of Appeal.)

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POINT ONE.

The Supreme Court erred in giving its judgment in favor of the plaintiff and against the defendants.

Demurrers are abolished, but motion may be made to strike out the pleadings.

10 Rule 26, P. L. 1912, 389, Sup. CT. Rules 40, reads as follows:

Sec. 26. Demurrers are abolished.

20 "Any pleadings may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case the court may give judgment for the successful party or make such order as may be just."

30 It will be noticed, the rule divides itself almost automatically into two parts.

(1) A motion can be made to strike out a pleading.

(2) If you do not wish to make such a motion, you can set forth your allegations in your answering pleadings, and reserve the right to move to strike out then.

40 The Court's jurisdiction under the first option, is simply grant the motion or deny it. It cannot take any further step. In the case sub judice, the complaint being decreed to be sufficient in law, the motion to strike out should simply have been de-

nied and the next move could have been taken upon proper notice.

Savage v. Public Service Railway Co., 95 N. J. L., 432.

The rule that a motion to strike out, admits the allegations of the pleadings produced many contradictions. For instance, in this case the complaint sets out that Beata K. Miller died, "leaving Vincent Ahlemeyer, her brother, as her only heir at law" (State of Case, Pg. 9 Line 11), and yet in the Court order annexed to the complaint, we find the relations of John Miller and his adoptive parents "are and shall henceforth be the same, including the right of inheritance, as if the said John Miller had been born to his said adopted parents in lawful wedlock." 10

There surely has been no dispute about the fact that John Miller, the appellant, is an heir at law of Beata K. Miller. 20

The judgment in this case should not have been entered without a motion for such judgment, a notice of which motion should have been duly given; no notice was given of such intended motion.

At this point we come to another irregularity of pleading, and one which, to our minds, deprived the Court of any right to give a judgment in this case.

This was a suit in ejectment. Under our Common Law and our Statute, there could only be one plea in Ejectment, and that is "not guilty". That was the plea of General Issue. Demurrer was unknown. 30

Mount Pleasant Cemetery Co. v. Erie R. R. Co., 74 N. J. L., 100.

2 C. S. Pg. 2056, Sec. 10.

The Statutory form of the plea was repealed, but no change was made to the rest of the Statute on 40

Ejectment, and no substitute was given for the form of the plea repealed, and a general issue or denial still seems to be the only pleading in Ejectment that is permissible or necessary.

P. L. 1912, Pg. 468.

10 This seems to be the only inference we can draw from the latest case.

Swift v. Rice, 98 N. J. L., 538.

It may not have been called to the Court's attention before, the repealing Act of 1912, Pg. 468, is not effective because its title is defective. It reads:

20 "An Act to amend and to repeal certain parts of an Act entitled "An Act concerning the action of Ejectment". (Revision March twenty-seventh, one thousand, eight hundred and seventy-four.)

No such Act can be found in the Laws of 1874. The Ejectment Revision Act was passed in 1877.

How can the motion in this case be decided to be tantamount to a Demurrer, when such a pleading in Ejectment cases is unknown to the Common Law and was expressly prohibited under our Statute.

The Statute of 1912, if valid, did not abolish the plea of not guilty, it merely abolished the form.

30 **Rogers v. Wallington**, 90 N. J. L. 653.

The present Counsel for the appellant came into this case after judgment was entered; while he realizes that he has no right to mention facts not of record, still he may be permitted to say that the appellant has many facts to plead if this case even goes to a new trial, which in his judgment, ought to be pleaded.

40 For all of these reasons we feel justified in claiming that the judgment against the appellant should be set aside.

POINT TWO.

The Supreme Court erred in its determination, that the words "child or children of the party of the second part" mentioned in the deed, did not include the defendant John A. Miller.

Part 1: Grantor's Intention Immaterial. 10

In passing upon this deed, perhaps it might be wise to state that its interpretation cannot be governed by the intention of its grantors, but must be construed as to what did pass by apt and proper words.

Adams v. Ross, N. J. L. 505.

Accordingly it cannot be contended that the Grantors did not intend that the title should pass to the appellant, because he was a child of George Miller and Beata K. Miller by adoption, and he was not adopted until three and a half years after the date of the deed. 20

In this respect, he would be just as much in the mind of the Grantors as a child born to Beata K. Miller or George Miller, three and a half years after the deed was made, would be in his mind.

Nor can the deed be construed to mean that the only natural born children of Beata K. Miller and George Miller can come within the language of the deed. A child of either of them born of another subsequent lawful husband or wife would come within the language, and they would share the property, share and share alike, with the appellant, did such children survive the original grantees. 30

So what was in the mind of the original grantors, cannot in this respect be interpreted to exclude John Miller, the appellant, but he must be included and his adoption must be included with all the possibilities which might have occurred after the deed was made. 40

This argument disposes of the contention that the deed conveyed an estate tail. It did not. The language included five classes of children,

A: Lawful children of the grantees jointly.

10 B: Lawful children of Beata K. Miller, in case of the death or divorce of George Miller and her subsequent marriage.

C: Lawful children of George Miller under the same circumstances.

D: Illegitimate children of Beata K. Miller under some circumstances.

E: Adopted Children, and we might add, that it embraced adopted children by either of the grantees, individually as well as the adopted child jointly.

20 The test then is not, what did Elizabeth and John Miller intend, but what do the words in the deed mean.

Incidentally it might be mentioned that it is rather significant that John Miller, the Grantor, and John Miller, the appellant, bear the same name.

Part 2: History of Adoption.

30 It may be wise at this time, to delve into the History of Adoption to assist in the interpretation of our Adoption Statute.

The Common Law made no provision for adoption, due perhaps, to the influence of the Feudal Laws. But it was not unknown in England, notwithstanding this fact. It was well known, however, in the Civil and Ecclesiastical Laws under both Grecian and Roman Codes, the laws of adoption were well known, scientifically drawn and rigidly enforced. Our Statutes in reference to adoption are based on the Civil Law and should be as
40 liberally construed as possible, according to the

Civil Law and the Ecclesiastical Law, from which the Statutes were originally derived. The word itself, to adopt, is taken from Latin adoptare, and if we take its most known as usual signification, we find it to mean, "To take a stranger into one's family as a son and heir. To take one who is not a child, and treat him as one, giving him a title to the privileges and rights of a child." 10

Webster Dictionary, under "Adopt".

If we refer to history, we find the word has a similar meaning. By shield and buckler, Theodoric adopted the King of Heruli and so Tiberius adopted Germanicus, and when Tiberius was adopted by Augustus, Theodoric became the grandson of Augustus by the laws of Adrogation.

The adoption of Ben Hur by the noble Roman Admiral, as related in General Lew Wallace's immortal story, finds its justification in the Roman Law of that day. 20

Adoption was known to the Athenians, the Spartans, the ancient Germans, and to the old writers of the Old and the New Testament, and even in the sacred writ itself.

So the conception of the word "adoption" is broad, full of historic interest, and has its place fixed in the popular mind as given to a legally adopted child, **all the rights and privileges of a natural born child**, and so it should be construed that the Legislature's intent to be broad. Legislatures as a general rule, have very little knowledge of the technical meaning of words, and if possible, the interpretation of the adoption Act should not be more circumscribed, that it has at present, but if possible, it should be broadened. We find the necessity for it at the present time, even in the patriotic sense. As there are more than one patriotic organization at the present time in this fair land of ours, 30 40

seeking to place the orphan children of our World War Veterans in good homes by legal adoption.

We have our doubts even at the present time in saying, that the Adoption Law as it prevailed in England's Ecclesiastical Courts, if not at Common Law, did not become a part of our judicial system.

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Part 3: The Meaning of Child or Children.

The word "child or children" as used in the Statute of descent is not confined to children born in lawful wedlock, but includes children by adoption.

Power v. Halfey, 85 Ky. 671.

Ross v. Ross, 129 Mass 243.

Bray v. Miler, 23 Ind., App. 432.

Eckford v. Knox, 67 Tex. 200.

Vidal v. Commagere, 13 La. Am. 517.

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In re Newman, 75 Cal. 213.

In re Rowan Estate, 132 P. 299.

Barnes v. Allen, 25 Ind. 222.

Buckley v. Frazier, 153 Mass. 525.

Van Matu v. Sankey, 148 Ill. 536.

The adoption of a child has even revoked a will, when the adoption took place after the execution of the Will.

Glasscott v. Bragg, 111 Wis. 258.

Hilpipre v. Claude, 46 L. R. A. 172.

30 This applies to Deeds as well as to Wills.

Butterfield v. Sawyer, 187, Ill. 508.

5(8 N. E. 602.)

In the last case, the Habendum of the deed read:
 "To have and to hold all and singular, the premises hereby granted and confirmed * * unto the said Adeline Butterfield for and during her natural life, with remainder to her child or children that may be living at the time of her decease and to the heirs and assigns of such child or children forever, and in default of a

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child or children of the said Adeline Butterfield at the time of her decease, then to the heirs generally. * * *

Adeline Butterfield had no children of her body. But she adopted a boy; that boy took the estate under the deed.

The words "An Heir-at-Law" is no longer confined to the right to inherit by blood relationship, but the term is given a much broader signification, and is applied to all persons who succeed to the estate of one deceased, whether by the act of the party or by operation of law. 10

9 American & England Enc., 357. (2nd Edit.)

In *Warren v. Prescott*, 84 Maine 483 (24 Atl. 948) it was held that lineal descendants are those to whom the property would descend in a line where there is no Will. 20

That the Statute of Adoption makes an adopted child inherit from its adopters the same as if born in lawful wedlock and to that extent, constitutes a part of the Statute of Descent, and that the child by adoption answers the requirements of a lineal descendant.

It also held that it is as competent for the legislature to place a child by adoption in direct line of descent as for the Common Law to place a child by birth there. 30

To the same effect we have the case of *In re: Olney* 27 R. I. 495 (65 Atl. 956), where an adopted child was held to come within the language of "lawful issue".

In *Hartwell v. Tefft*, 19 R. I. 644 (35 Atl. 882), an adopted child was held the "lawful issue" of a person within the meaning of a will making a gift to such person with remainder to his "lawful issue". 40

In *Sewall v. Roberts*, 115 Mass. 262.

It was held that under a conveyance creating a trust for the benefit of the centui-que Trust during his life and upon his death to "his child or children" the adopted child of the centui-que trust, on the absence of blood issue took, there being no blood issue.

10 In fairness to both Court and opposing Counsel, however, it must be said that this decision changed the Massachusetts Statute, and we do not think this is the law today in that State, but we are dwelling upon the interpretation of the word "child or children" in legal instruments, and the decision is cited as illustrative of term signification.

And finally, we come to our own State.

20 In the case of *Book v. Book*, 90 N. J. E. 549, the opinion of the Chief Justice contains the following:

30 "Section 20 of the Wills Act became a part of that statute in December, 1824. Elm. Dig. pp. 600, 601. At that time a testator could have no lawful children except those born to him in wedlock. A child born to him of a woman who was not his wife, was not recognized by the law as having any claim to share in the real or personal estate of the father. At that time, too, the laws of this state recognized no power existing in any of its citizens to adopt a child of other parents and by the act of adoption vest in it the right to share in the distribution of the estate of the adopting party. In other words, the illegitimate child and the adopted child were neither of them recognized by our law as a lawful child of the actual or adopting parent.

40 The act of 1902 providing for the adoption of minors was a revision of a statute originally enacted March 9th, 1877. PIL. 1877 p. 123. It materially changed the then existing law regu-

lating the devolution of the estates of decedents. By its fourth section (which has remained unchanged by subsequent revision or amendment) it provided that the effect of the decree of adoption should divest the natural parents of the child of all legal rights and obligations due from them to the child, or from the child to them, and that the adopting parent or parents should be invested with every legal right in respect to obedience and maintenance on the part of the child as if it had been born to them in lawful wedlock, and that the child should be invested with every legal right, privilege, obligation and relation in respect to education, maintenance, and the rights of inheritance to real estate, or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock; and that if the adopting parent or parents should have other child or children, then and in that case, the children by birth and by adoption should respectively inherit from and through each other as if all had been children of the same parents born in lawful wedlock. The statute contains certain limitations which, however, have no bearing upon the question now under consideration, and which it is therefore not necessary to recite.

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The effect of the legislation just adverted to is to clothe the adopted child with all the rights of a natural child so far as inheritance of real estate or the distribution of personal estate is concerned. It makes such child the lawful child of the adopting parent in these respects. It changes the statutory rules regulating the devolution of property, not by amending or repealing pro tanto the provisions of pertinent legislative enactments, but by enlarging the class for whose benefit they were originally passed (that is, the children born to the de-

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cedent and their issue), by making the adopted child a lawful child of the decedent for the purpose of sharing in the distribution of his estate.

10 The act concerning wills, the statute of descents and the statute of distribution composed the entire legislative system regulating the transmission of the estates of decedents, testate or intestate, prior to the passage of the act for the adoption of minor children. By the enactment of this latter statute that system, as we have just said, was, to some extent, changed. To determine the purpose of the legislature in making that change, and the extent thereof, all of these statutes must be read together; for it is universally recognized rule of statutory construction that where there are different statutes in *pari materia*, though made at different times, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other. Sedgw. Stat. Con. (2d ed.) 211; 26 Am. & Eng. Encycl. (2nd ed.) 620, and cases cited; White v. Hunt, 6 N. J. Law 506; Koch v. Vanderhoof, 49 N. J. Law 621; Gartney v. Cohen, 51 N. J. Law 127. Applying this rule, we are of opinion that the legislative intent to be gathered from a reading of all these statutes was to vest in adopted children all the rights and privileges which, by the act concerning wills, the statute of descents, and the statute of distribution, had been conferred upon children born in wedlock; that is to say, to place them in the same position as if they had been natural born children of the decedent, so far as those statutes are concerned—to substitute the lawful children of the decedent, no matter what the source of their origin, in the place of those born of his body. To give this legislative purpose its full significance the meaning of the words “child”, “child-

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dren", and "issue", wherever appearing in the various statutes comprising the legislative system embodied therein, when used with relation to the testator or intestate, must be considered to have been enlarged so as to include adopted as well as natural born children within their scope."

This decision was followed in re: ⁹²Alter, N. J. E. 10
415.

There can be no doubt then that John A. Miller is "a child" of Beata K. Miller and George A. Miller, under the Statutes of Wills, Descent and Distribution. For the Adoption Act brought him with the purview of these Statutes.

Besides all of these arguments, there is a possibility of John A. Miller being a direct heir of John Miller, the original grantor. The similarity of the names has been already referred to, and in Schedule "B" of the Complaint being the decree of adoption, we find this in the recitals, 20

"That they (the petitioners) desire to adopt John Miller, a minor child aged 5 years, who resides in Jersey City, in the County of Hudson, and is now living with your petitioners in said city, that the parents of said child were Miller and Miller, both of whom are now dead. The decree follows the same wording." 30

POINT THREE.

10 The Supreme Court erred in its determination that the appellant, John A. Miller, did not take the fee in said premises by reason of the language of the deed, to wit: "That in default of any such child or children then to the heirs at law of said parties of the second part in the following manner: One undivided half part to the heirs at law of said George Miller, their heirs and assigns forever, and one undivided half part to the heirs at law of the said Beata K. Miller, their heirs and assigns forever."

Part 1: John A. Miller became vested in one half of the estate in 1914.

20 In 1914, George Miller died, his wife, Beata K. Miller, still had a life estate in the property. George Miller had no lawful issue of his body, who were his heirs?

Under our decisions his only heir at law was, his adopted son, John A. Miller, this appellant. Everyone else was excluded from inheriting from George A. Miller, except John A. Miller. John A. Miller at this point was the owner in fee of a one undivided half part in these premises, subject to the life estate of Beata K. Miller in that part.

30 Statute on Descent, 2 C. S., Pg. 1917, as modified and enlarged by.

Our Adoption Act, 2 C. S. Pg. 2807, as interpreted by the Court of Errors and Appeals in *Book v. Book*, 90 N. J. E. 549.

Part 2: John A. Miller became vested in a Second One Half Interest in 1922.

Beata K. Miller died in 1922, having no children of her body.

40 John A. Miller then became vested in the second

half interest in said property as the only heir at law of Beata K. Miller, for the reasons above cited.

If John A. Miller is not a "child" of George Miller, and Beata K. Miller, within the purview of the first clause of this unusual Habendum, then he is an "heir at law" of George Miller, and he is an "heir at law" of Beata K. Miller. For this is the interpretation that must be placed upon this language, and no one has the right to say what John Miller, Sr., and Marie Miller intended in 1891, thirty-one years preceding the death of Beata K. Miller, his daughter. 10

In *Adams v. Ross*, 30 N. J. L. 505, it was decided by this Court, that

"In the construction of a deed, the question is not, what estate did the grantor pass, but what estate did he pass by proper and apt words. No expressing of intent, no amount or recital showing the intention will supply the omission." 20

The Descent Act must apply, because the Respondent claims title under the Descent Act.

**Part 3: The Limitations under the Adoption Act
Does Not Apply Under the Second Clause
of the Habendum.**

The plaintiff contends that the limitations of the Adoption Act excludes the Appellant, John A. Miller, from taking an estate. These limitations are: 30

A. "Said child (the Adopted Child) shall not be capable of taking property expressly limited to the heirs of the bodies of the adopting parent or parents.

B. Nor property coming from collateral kindred of such adopting parent or parents by right of representation.

C. And provided also, on the death of the adopting parent or parents and the subsequent death of the child, so adopted, without issue, the property of such 40

adopting deceased parent or parents shall be distributed among the next of kin of said parent or parents and not to the next of kin of the adopted child."

Sec. 162 C. S. 2808 as amended, Cum. Sup. of C. S. Pg. 1555. The letters in parenthesis are ours.

10 The first limitation, "A", does not apply, because the property is not limited over to the heirs of the bodies of George Miller and Beata K. Miller. The fact that the respondent, a brother of Beata K. Miller, claims title, demonstrates that the property was not limited over to the heirs of their bodies. Besides, John A. Miller takes in this case, direct from John Miller, the original grantor, because he is the heir at law of both of his adoptive parents. The fee never going through his adoptive parents, according to this construction.

20 The second limitation, "B", does not apply, because the property does not come from any collateral kindred. It comes by a deed to John A. Miller direct, because he is the only heir at law within the law, of his adoptive parents.

The third limitation, "C", does not apply for the same reason, and ostensibly because he is still alive.

"Legal heirs" included Adopted Children.
Harver v. Herder, 126 Atl. 661.

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POINT FOUR.

The Supreme Court erred in giving judgment in favor of the plaintiff and the judgment was contrary to law.

The opinion below was based upon several cases cited therein, all of which are distinguishable from the one sub judice. 10

In re: *Yales* (Pa.) 126 Atl. 254. It was held, that whether an adopted child took under the will giving a remainder to "a child or children of the life tenant" was entirely a matter of intent on the part of the testator. The same case states that an adopted child would take under the present existing Pennsylvania Statute (Page 256, 1st Col., twenty lines from bottom); all the Pennsylvania cases cited are subject to the same criticism. 20

Wilder v. Butler, 102 Atl., Rep. 110. L. R. A. 1918 B 119, was also cited in the opinion.

The decision in this case from Maine was based upon the intention of the Grantor of the Trust Deed. We cannot take the Grantor's intention into consideration. The Maine Adoption Statute is more circumscribed than ours.

And moreover, under the Second Clause of the Habendum clause, John Miller does not take through his adoptive parents. He takes title because under the Statutes he is the only heir at law of each of his adoptive parents. 30

The opinion also states the Rule in Shelly's Case does not apply, the word "heirs" being missing, but in the Second Clause of the Habendum they are used, and should the Shelly Rule apply, the result would be the same as the defendant contends.

In re: *Fask*, 197 N. Y. 193, 90 N. E. 652.

The question involved in this case was the right of an adopted child of a deceased legatee to take an 40

interest in a trust fund to the exclusion of direct heirs.

The adopted child was legally adopted in California, but the property being in New York, the New York Adoption Law governed the case.

10 The child was adopted after the death of the testator and therefore, could not have been in contemplation when the will was drawn. Again the question of intention arose.

The New York Adoption Act has this clause in it:

“But as respects the passing and limitation over of real or personal property dependent, under the provisions of any instrument in the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of the remaindermen.”

20 Sec. 64, Domestic Relations, Laws of 1896, now Chap. 14, 114 Consolidated Laws.

This case is clearly distinguishable from ours by the very act itself.

The case of **Hockaday v. Lynn**, 200 Ma. 456 (94 S. W. 585) (8 R. R. A. N. S. 117) cited in the Court's opinion, in our judgment does not apply.

30 William Lynn, unmarried, died intestate, the owner of a one half interest in a farm, leaving a brother and children of a deceased brother. The brother died in 1896, leaving a son and an adopted daughter, who was married to Hockaday, the plaintiff; in that suit as an heir of her adoptive father's brother she asked for a partition of the property.

40 The opinion in this case is very prolific of obiter dicta, all beautifully expressed in most exquisite rhetoric and historical as well as biblical surroundings, the gist of which is, that in Missouri an adopted child becomes an heir by a deed or contract. The Court said:

“If we look to our Statute on Adoption it will be found to be writ large there that an adopted child means only the badge and relation of a child to the adopting parent.”

Their Statute of Descent goes to kindred only, which has been decided to mean in that state, “blood relations only.”

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Such a decision can in no way affect us, our Statute and decisions being so different.

Stout v. Cook, 77 N. J. E. 153

This was a question concerning the interpretation of a will made in 1861, leaving certain shares in a residuary estate to the testator’s children, and to their children if such children were dead. The defendant Andey Osborn was the adopted child of one of the testator’s children under a New York Law.

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The New York Adoption Statute was passed in 1863, and the New Jersey Adoption Statute in 1877. The will being dated 1861, it was held that the testator could not have in mind an adopted child at that time.

The case was revised in 79, N. J. E., on pages 573 and 640.

Because the effect of our Adoption Act was not at controversy at all; a New York Act was under discussion and a question of intention was involved.

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The case has been commented upon in

Haver v. Herder, 126 Atl. Rep. 661.

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POINT FIVE.

The Court erred in not striking out the plaintiff's Complaint.

10 In addition to the previous citations, we may add that the modern tendency is to enlarge the rights of adopted children. In Jersey they can inherit from their foster sisters and brothers now by the Adoption Statute.

The word "heirs" in its general and comprehensive sense includes all who stand in a relation to the ancestor that will entitle them under the law to inherit at his death, and this includes adopted children.

Wallace v. Noland, 246 Ill. 535.

This is so in Statute, Deed or Will.

Butterfield v. Sawyer, 187 Ill. 598.

20 **Flamigan v. Howard**, 200 Ill. 396.

Muriel v. Gruenwald, 289 Ill. 468.

The liberality of the law is best expressed in sections of a legal syllabus, a Kansas case.

A Statutory adoption proceeding creates all the legal incidents of the natural relation of parent and child and the child becomes entitled to the same rights of person and property as if it were a child born to the person adopting it.

30 The aim and end of adoption Statutes is the welfare of the child, and the theory is that such welfare will be best promoted by giving an adopted child the status of a natural one.

Bilderback v. Clark, 106 Kansas 737 (189 Pac. 977) (9 A. L. R. 1622).

40 In Ohio, it was held that, where the testator devised the remainder of his estate to the heir at law of a beneficiary for life, an adopted child of the beneficiary was an heir within the meaning of the will, although there was no adoption Statute in force.

Smith v. Hunter, 86 Ohio St. 106 (96 N. E. 91).

Where a child was adopted subsequently to the execution of a deed of trust which conveyed land to one for life and then to her heirs at law, the heirs at law were determined at the date of the distribution and not at the date of the execution of the deed.

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Gillian v. Guaranty Trust Co. 186 N. Y. 127 (78 N. E. 697.)

We respectfully submit the appellant's motion to strike out the complaint should have been granted.

Respectfully submitted,

William Q. Asper

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*Attorney for and of Counsel with
the Defendants.*

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18 FEB. 1. 1927

New Jersey Court of Errors and Appeals

VINCENT AHLEMAYER,
Plaintiff-Appellee,

vs.

JOHN A. MILLER *et al*,
Defendants-Appellants.

On Appeal
from the
Supreme
Court.

BRIEF OF PLAINTIFF-APPELLEE.

This is an appeal from a judgment of the Supreme Court entered in an ejectment suit, adjudging an undivided one-half interest and title in the premises described in the complaint, to be in the plaintiff-appellee, Vincent Ahlemeyer. The plaintiff appellee filed a complaint in ejectment, and pleaded in the complaint and annexed thereto schedules setting forth the facts in the case, which are incontrovertible as they are matters of record. Schedule A annexed to the complaint (Case, p. 10), is the deed under which both plaintiff-appellee and defendants-appellants claim. Schedule B annexed to the complaint (Case, p. 13), is the decree of adoption by virtue of which the defendant-appellant John A. Miller, must claim title to the premises in question under the deed, by reason of being an adopted child of the grantees named in the deed.

The defendants-appellants gave a notice of motion to strike out the complaint (Case, p. 17) on the ground,

“Therefore, the said John A. Miller was and is a child of the said George Miller and Beata K. Miller, and accordingly is entitled to the

full possession and legal title, in fee, of the premises described in the complaint under the terms of the deed, set forth in paragraphs one and two of said complaint * * *."

On the argument of the motion, and briefs having been submitted, Justice Minturn, sitting as a single justice, pursuant to the statute, denied the motion to strike out the complaint, and, because, as stated in his opinion (Case, p. 27), the defendants-appellants conceded the motion to be "Tantamount in legal effect to the inter-position of a demurrer at common law", gave judgment for the plaintiff-appellee on said motion (Rule for Judgment, Case, p. 28), wherein such fact is judicially recited.

It is argued by the defendants-appellants under point one of their brief that there is no authority for the Court below to treat the motion as a demurrer, but irrespective of the legal authority of the Court to act in such manner, it was stipulated in open Court by the Attorneys for the respective parties that the motion should be treated as a demurrer, and in addition thereto the opening paragraph of the brief of defendants-appellants submitted on the motion in the Court below, reads as follows:

"This is a motion by defendant to strike out the complaint of the plaintiff and is tantamount to a demurrer at common law, for the facts in this case are agreed upon between the parties."

And the opening paragraph of the brief of the plaintiff-appellee in the Court below, submitted on the argument of the motion to strike out the complaint, reads as follows:

"The motion under consideration in the above entitled cause is as stated in defendants' memorandum, tantamount to a demurrer at

common law calling for the determination by the Court of a question of law, purely and simply."

In the closing paragraph of brief of the plaintiff-appellee in the Court below, it was stated,

"* * * and because the facts are uncontrovertible and for the further reason that the defendants have stated in their memorandum that the motion is to be considered as a demurrer, a judgment for possession of an undivided one-half interest in the remainder should be entered in favor of the plaintiff and against the defendant."

We submit that the stipulation of the Attorneys entered into in open Court upon the argument of the motion before Justice Minturn, and also the statements contained in the briefs above quoted, amount to a binding stipulation as to the procedure to be followed by the Court below in disposing of the motion, which estops the defendants-appellants from raising the question on appeal in this Court that the Court below first, had no jurisdiction to give the judgment on the motion to the plaintiff-appellee, or, secondly, at least should have permitted the defendants-appellants to file an answer.

We might say, in passing, that if the defendants-appellants had been permitted to file an answer in this case by the Court below, the plaintiff-appellee would have moved to strike out the same and enter judgment on the ground that such answer was sham or frivolous, because all the facts were pleaded by plaintiff-appellee and are uncontrovertible, and upon denial of such a motion by the plaintiff-appellee, the case would have come to this Court with the very same question of law which is now presented. All this is beside the questions of law

argued hereafter in reply to point one of defendants-appellants' brief, dealing with the right of the Court below to give judgment for the plaintiff-appellee, irrespective of the stipulation entered into as above stated.

Originally nine grounds of appeal contained in the Notice of Appeal were filed in this Court (Case, p. 2), and upon a notice of motion to strike out some of said grounds of appeal, the Court allowed five grounds of appeal to stand (Case, p. 4). The eighth ground of appeal, set forth in the notice of appeal, which was struck out, was as follows:

"EIGHTH: The Supreme Court erred in deciding that the defendants' motion to strike out complaint was equivalent to demurrer, and these defendants should have been given an opportunity to plead the facts."

We submit that the matter argued in point one of the defendants-appellants' brief amounts to nothing more or less than an attempt to argue the matter which was stricken out on motion by this Court, as the former eighth ground of appeal. In case, however, that the Court wishes to consider this matter, as it has undoubtedly the right to do on the basis of jurisdiction or public policy, we will reply to the matters argued in point one in defendants-appellants' brief, without prejudice, however, to our right to stand upon the decision of the Court in striking out the eighth ground of appeal, above-mentioned.

Answer to Point One.

Defendants-appellants, under point one, argues in effect that there was no authority on jurisdiction in the Court below to enter judgment in favor of the plaintiff-appellee upon the motion to strike

out the complaint, apparently on the theory that no such thing as a demurrer was known at common law in an ejectment suit, and that further, that part of Rule 40 of the present Supreme Court rules relating to the authority of the Court to give judgment for the successful party on such a motion if the decision be decisive of the whole case, has no application to an ejectment suit.

It is contended further by defendants-appellants that even if such authority is conferred by the 1912 Supplement to the Practice Act, that the Repealing Act of 1912 relating to Ejectment P. 1912, page 468, is defective because of its title.

Replying to the last contention, first, we do not see what application the repealer of 1912 relating to Ejectment has to the present case at hand, as the only sections of the former ejectment act repealed by the 1912 repealer are sections 5, 10 and 12, and section 6 relating to Summons is amended. Section 5 of the original ejectment act relates to the form of the Summons and the description of the premises therein. Section 10 relates to the form of declaration, and section 12 relates to the form of the plea. But, in any event, the Repealer of 1912, relating to ejectment, above quoted, is an effective repealer, as the Ejectment Act was known as "An act concerning the action of ejectment," approved March 27, 1874, and was known as the Revision of 1874. Reference to volume one of the Compiled Statutes of New Jersey, page XVI, refers to the Revision of 1874 and gives an outline of the history of New Jersey compilations and revisions, and clearly explains the situation, that because of errors or omissions of the 1874 Revision, a new revision was issued, known as the Revision of 1877. Our opponent states in his brief that no such act can be found in the Statute of 1874, and that the ejectment revision was passed in 1877, but

we have before us at this writing a volume entitled "~~Revision~~^{ed} Statutes of the State of New Jersey," passed 1874, wherein an act entitled "An act concerning the action of ejectment" appears on page 661, approved March 27, 1874.

The defendants-appellants further contend that prior to the 1912 Supplement to the Practice Act and the Repealers in 1912 of certain parts of act relating to actions of ejectment, that the use of a demurrer was not known in an action of ejectment, and we respectfully call the Courts' attention to the case of *Price v. Sanderson*, 18 N. J. L. 426, wherein a demurrer to rejoinder to replication to a plea in ejectment was sustained. This decision was rendered in the February term of The Supreme Court, 1842, by Chief Justice Hornblower, and clearly indicates that a demurrer was recognized as part of a practice in ejectment suits prior to the enactment of the 1874 Revision, relating to the action of ejectment.

Section 9 of the 1874 Revision concerning ejectment provides:

"9. The pleadings shall be filed within the times allotted for filing the same in personal actions; and the practice and proceedings shall be in all respects in conformity with the practice in personal actions, so far as the same may be applicable, unless otherwise specially provided."

Section 10 then states the form of the declaration and section 11 and 12 of that act relate to the form of the plea, but the defendants-appellants contend that because it is not specifically enumerated in the act that a demurrer may be interposed to a defective declaration, that therefore the only pleading that can be filed to a declaration is a plea.

The error of such argument is apparent by comparison of the 1874 Revision relating to the action

of ejectment, and the 1874 Revision relating to the practice of law.

At page 662 of said Revision, sections 9, 10, 11, 12, &c., deal with the pleading and practice in ejectment suits, and say nothing about a demurrer, but merely state the form and contents of the declaration and plea. On page 619 of said Revision, relating to the practice of law, sections 103, 104, 105, &c., deal with the question of pleading, and there is no special mention of a demurrer made, but we do not think that the defendants-appellants will contend that under the 1874 Revision, relating to the practice of law, as set forth in sections 103, &c., above quoted, that because a demurrer was not specifically provided for, that no such thing existed in the practice of law. What the defendants-appellants confuse in their argument is the fact that both acts prescribe that the first pleading shall be a declaration, and if the defendant sees fit to answer, then, in an ejectment suit, the form of the answer must be a plea, but this certainly does not abolish the practice that in case the declaration is defective, the proper method of raising such defect, and having it passed upon, was either by special or a general demurrer. This was the practice in the State of New Jersey prior to the enactment of the 1912 Supplement to the Practice Act, wherein demurrers were abolished and in lieu thereof, a motion addressed to the complaint, raising the same question of law, was substituted.

In this connection, it is worthy of note, that in the compilation of New Jersey Laws by Elmer in 1838, known as "Elmer's Digest," the only reference to practice in ejectment suits was contained under the heading of Practice of Law on page 420 of such compilation, and was sections 109, 110, 111, 112 and 113. Then, a second edition of Elmer's Digest was printed in 1855, edited by John T.

Nixon and in this compilation the only practice relating to ejectment was under the heading of an act entitled, "An Act to regulate the practice of the courts of law," Revision—Approved April 15, 1846, under sections 96-99 inclusive, to be found at page 622 of said compilation, and also the provisions of an act entitled, "An Act to simplify the pleadings and practice in courts of law," approved March 17, 1855, to be found on page 635 of said compilation, wherein section 167 to section 212, inclusive, of said act, also under the general heading of Practice of Law prescribed the procedure in ejectment suits. Sections 62, 63, 64, 94, 143 and 155 of that compilation related to demurrer and all of these sections were included under the title of Practice of Law. It was not until the Revision of 1874 that the provisions relating to the practice in ejectment were made distinct from the act to regulate the practice of courts of law. All the act concerning the action of ejectment, revision of 1874 did, was to take the former sections, 167 to 212 inclusive of the act entitled, "An Act to simplify the pleadings and practice in courts of law," approved March 17, 1855, which related to ejectment, and entitle them under a separate act relating to ejectment. In all of these compilations prior to the revision of 1874, the practice in ejectment suits was the same practice as in personal actions and even in the 1874 revision, the act concerning the action of ejectment is under the general heading of Practice of Law, and it certainly cannot be contended that a demurrer was not authorized under the general acts for the practice of law, either prior to or at the time the revision of 1874 relating to ejectment was enacted.

In view of recital of such history of practice, the provisions of section 9 of the Revision of 1874, relating to actions of ejectment suits stating that the

“practice and proceedings shall be in all respects in conformity with the practice in personal actions”, authorized the use of a demurrer as a method of objecting to a defective declaration.

Then the Supplement to the 1912 Practice Act was passed and rule 26, annexed to the act, provided that demurrers were abolished, and in lieu thereof, substituted a motion to strike out the pleading. Said rule 26, annexed to the 1912 Supplement to the Practice Act, is now rule 40 of the Supreme Court, and reads as follows:

40. Demurrers are abolished.

“Any pleadings may be struck out on motion on the ground that it discloses no cause of action, defense or counterclaim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after the trial; *but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case the court may give judgment for the successful party or make such order as may be just.*”

Defendants-appellants argue that assuming the present practice applies to a suit in ejectment, that all the Court below had authority to do on the motion to strike out the complaint, was simply to grant the motion or deny it, and in case of denial of the motion that the Court could go no further.

The defendants-appellants in putting forth such an argument, ignore entirely the last part of rule 40 of The Supreme Court rules above set out, which we have underlined, and we contend that that part of rule 40 conferred ample authority upon the Court below, since it was agreed between the parties

that the matter should be treated as tantamount to a demurrer and the decision would be decisive of the whole case, to give judgment on the motion to the plaintiff-appellee.

The defendants-appellants cite the case of *Savage v. Public Service Railway Co.*, 95 N. J. L. 432, in support of such contention, but examination of that case will show that the motion was in the nature of a special demurrer addressed to the form of a complaint under section 110 of the Practice Act, and not under rule 40 of The Supreme Court rules, and we respectfully submit that this case has no application to the motion to strike out the complaint in our case.

We also submit that the cases of *Rogers v. Wash-^{ing}ton*, 90 N. J. L. 653 and *Swift v. Rice*, 88 N. J. L. 538, have no application to the question at hand under point one of the defendants-appellants' belief. We also submit that the case of *Mount Pleasant Cemetery Co. v. Erie R. R. Co.*, 74 N. J. L. 100, cannot be applied to the situation in our case, because of the 1912 Repealer of the Ejectment Act, Revision of 1874, upon which this case is based, and also because the practice has been since changed by Rule 40, Supreme Court Rules.

We desire to take issue with the statement in defendants-appellants' brief in point one, "There surely has been no dispute about the fact that John Miller, the appellant is an heir at law of Beata K. Miller". This is an unwarranted assumption by the defendant-appellee of the only question of law upon which he can hope to recover in this case, so that such statement, that there is no dispute that John Miller is an heir at law of Beata K. Miller, certainly is not agreed to by plaintiff-appellee. We deny it in fact as well as in law, most emphatically. The defendants-appellants seek to read a right to the defendant-appellant, John Miller, by reason of

the recitals of the order of adoption, but the defendant-appellant can acquire no greater rights by reason of such order of adoption than the statute of adoption authorizes. The scope of such authority, we will argue hereafter.

Counsel for the appellant, states in his brief, that he came into the case after judgment was entered, and that the appellant has many facts to plead if a new trial was granted. There can be no controverting the form and contents of the deed, Schedule A. There can be no controverting the form and contents of the decree of adoption, Schedule B. There can be no controverting the fact that the defendant-appellant, John Miller, must rely not only upon the deed, but also upon the decree of adoption for his right and title to the premises in question. If he fails to obtain such right under either or both of said instruments, no amount of additional facts pleaded or proved can give him any title or interest in the premises in question. Such procedure would merely be an attempt to read an intention into the deed, which is absolutely inadmissible. *Adams v. Ross*, 30 N. J. L. 505 (Ct. E & A).

Answer to Point Two.

We consider that the best answer to point two of defendants-appellants' brief would be an affirmative presentation ~~of~~ our argument on the point involved, so that we will confine ourself for the present in a criticism of the argument of defendants-appellants under point two.

Immediately after citing *Adams v. Ross*, 30 N. J. L. 505, holding that the intention of a grantor can not be considered but that the deed must be construed as to what passed by the use of apt and proper words, defendants-appellants proceed to

argue from an unwarranted and illegally assumed intention.

Further on, defendants-appellants contend that the language of the deed included five classes of children, and we deny, as will be hereinafter set forth in our affirmative argument, that it included any children but the lawful children of the grantees jointly.

We do not know what defendants-appellants have in mind when they incidentally mention that John Miller, the grantor, and John Miller, the appellant, bear the same name, unless it is to contend that John Miller, the appellant, was a blood descendant of John Miller, the grantor through his son George Miller. If this is so, why was the decree of adoption made? We think such fact absolutely negatives any innuendo sought to be put forth by such remark.

Under part two of point two of defendants-appellants' brief, an attempt is made to set forth the history of adoption under the Roman and Grecian laws, but we fail to understand how the laws of ancient Rome or Greece could be invoked to give an interpretation to our adoption act, favorable to the contentions of the defendants-appellants. Our Adoption Act is in derogation of the Common Law of England upon which the law of New Jersey is based, and as such it must be strictly construed, or in other words, the Adoption act means what it says, and not what the ancient laws of Rome or Greece said about the subject of adoption.

Under part three of point two of defendants-appellants' brief, the meaning of the word child or children is sought to be defined, but defendants-appellants' argument is based entirely upon an attempt to read an intention into the deed by the grantors, which is clearly contrary to the principle laid down in the case of *Adams v. Ross*, 30 N. J. L.

505, in which case Chief Justice Whelpley, passing upon the question of the construction to be placed upon words used in Deeds, says.

“In the construction of a deed of conveyance the question is not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention will supply the omission.”

In applying these principles, it is to be borne in mind that the defendant-appellant is an adopted child and not a natural child and that the only rights he acquires under said deed are by virtue of his adoption.

We have not been able to obtain access to reports of all the cases cited under part three of point two of defendants-appellants brief, but we think that an examination of such cases would disclose that the great majority of them concerned the meaning of the word child or children as used in a will, where the primary basis of construction is the intention of the testator. Such a rule of construction does not apply to deeds, *Adams v. Ross*, supra, and our case concerns a deed.

We are familiar, however, with the case of *Butterfield v. Sawyer*, 187 Ill. 598, which defendants-appellants cite in their brief, and argue at length.

The case of *Butterfield v. Sawyer*, 187 Ill. 598, relied upon by defendants-appellants can be very greatly distinguished from our case, for the reason that the Illinois Statute of Adoption, as clearly appears from the opinion, provides that

“A child so adopted shall be deemed for the purpose of inheritance by said child * * * and other legal consequences and incidents to the natural relation of parents and child, the child of the parents by adoption, the same as if it had been borne to them in lawful wedlock.”

This, it will be noted, is much broader than the New Jersey Statute of Adoption which confers a mere "Right of inheritance".

In the next place the remainder created by the deed in the *Butterfield v. Sawyer* case was to the "heirs jointly" of the grantees, where as in our case such a remainder is expressly negated by the provision that the remainder was to go "to the heirs at law of the said parties of the second part in the following manner, one undivided one-half part to the heirs at law of said George Miller, their heirs and assigns forever, and one undivided one-half part to the heirs at law of the said Beata K. Miller, their heirs and assigns forever." The difference between the classes designated to take the remainder in the two deeds is clearly apparent, and we contend that under the legal interpretation to be given to the word heirs used in the habendum of the deed in our case, it would be physically impossible as well as legally inconsistent to contend that one person was designated legally by said deed to take the remainder as heir at law of two separate parties. The language in our deed clearly dictates that the remainder is to be divided to the natural heirs of the respective grantees and not to some other parties who merely have a right of inheritance.

It is to be born in mind also in distinguishing the *Butterfield v. Sawyer* case from the situation existing in our case, that Illinois is not a Common Law state and that New Jersey is a Common Law state.

Furthermore, ten years later in the case of *Wallace v. Noland*, 246 Ill. 535, the same Supreme Court of Illinois judicially states that the use of the word heirs, applying to a remainder, means natural heirs, and the case of *Butterfield v. Sawyer*, supra, is commented upon in the *Wallace v. Noland* case, and distinguished and was not followed.

Defendants-appellants, naturally, did not cite the *Wallace v. Nowland* case, but we contend that it overrules entirely the effect of the decision in *Butterfield v. Sawyer*, relied upon by the defendants-appellants.

We are unable to locate the quotation of defendants-appellants from 9 A. & E. Encyc. 357, 2nd Ed., but we judge from the context " * * * as applied to all persons who succeeded to the estate of one deceased" that it refers to a will, because an estate created under a deed would have nothing to do with an estate of one deceased.

The case of *Warren v. Prescott*, 84 Maine 483, deals with a will, and therefore the question of intent enters into it, which cannot be considered in the case of a deed.

The case of *Hartwell v. Tefft*, 19 R. I. 644, cited by defendants-appellants, deals with a will, and is subject to the same criticism.

Dealing with the New Jersey cases, defendants-appellants lay great stress upon the case of *Book v. Book*, 90 N. J. Eq. 549, wherein this Court stated in effect that an adopted child was a child within the meaning of the use of such word in a will and took the same as a natural child in construing the will involved in that case. In order to arrive at this construction, however, it is very significant that it was necessary to build up a theory or scheme of legislation, consisting of the Statute of Wills, the Statute of Descent and the Statute of Adoption, which we contend is absolutely inapplicable in our case, for the reason that the Statute of Wills and the Statute of Descent have no concern with our case in any degree or manner whatsoever. The Statute of Wills is eliminated because the claim of both parties depends upon the legal effect of a deed, and the Statute of Descent is eliminated because the right of the defendant-appellant, John A.

Miller, to claim the status of an heir of his adopting parents, is not dependent upon the Statute of Descent but upon the first canon of descent of the Common Law of England, which is the basis upon which any single child of a decedent acquires the right or status of an heir in New Jersey. An examination of section one of the Statute of Descent shows that the statute only comes into application where there are two or more children, but in the case of a single or only child it is still the first canon of descent in New Jersey to-day, which creates the status or right of a single or only child to be designated as heir. And in this connection it is significant to note, at this time, that the first canon of descent of the Common Law prescribes that such child must be issue.

The first canon of descent is as follows:

“1. The first rule is that inheritance shall lineally descend to the issue of the person who last died actually seized in infinitum, but shall never lineally ascend.” Blackstone’s Commentaries, Book 2, Chapter XIV, page 208 (Original paging).

The second canon of descent at Common Law provided that male issue should be admitted before female; Blackstone’s Commentaries *Idem.*, page 211, and the third canon of descent provided that where there were two or more males in equal degree, the eldest only inherited, but in the case of females they all inherited equally. Blackstone’s Commentaries *Idem.*, page 214. This canon of descent was what was known as the rule of primogeniture. The purpose of section one of the Statute of Descent of New Jersey was to change the rule of descent set out in the second and third canons of descent, but it left the first canon of descent intact, and it is the first canon of descent, taken over

as part of the law of New Jersey from the Common Law of England, which today gives the right or status ^{to} of a single child to be designated as an heir.

It is also interesting to note as a premise of the decision in the *Book* case that Chief Justice Gummere in stating the history of the Law of Adoption, states as follows:

“At that time (December 18, 1924) the testator could have no lawful children except those born to him in wedlock. A child born to him by a woman who was not his wife was not recognized by law as having any claim to share in the real or personal estate of the father. At that time, too, the laws of this State recognized no power existing in any of its citizens to adopt a child of other parents, and by the act of adoption, vest in it the right to share in the distribution of the estate of the adopting party. In other words, the illegitimate child and the adopted child were neither of them recognized by our law as a lawful child of the actual or adopting parent.”

So that the Adoption Act is the only statute in New Jersey today which the defendant-appellant can rely upon for any interest in the premises in question under the deed, Schedule A. What right that statute confers will be discussed hereafter.

Of course, if the *Book* case is not applicable to the question in our case, the *Alter* case and other New Jersey cases following the *Book* case also have no application.

Defendants-appellants in their brief at the very end of point three state that there is a possibility of John A. Miller being a direct heir of John Miller, the original grantor. We fear that counsel for the defendant-appellant is laboring under a misapprehension. The title to the property was originally in Mary Elizabeth Miller, and John Miller, her husband, merely joined in the deed for the purpose

of conveying his courtesy right. The recital in the deed, Schedule A, distinctly says that it is the same premises which were conveyed to the said Mary Elizabeth Miller by John E. Brayton and wife, so that John Miller, the grantee in the deed, Schedule A, had no estate of inheritance which John A. Miller, one of the defendants-appellants, could inherit, even if he had such a right to take by representation, which we claim is expressly barred by a provision of the Statute of Adoption. In any event, such argument has no application to our case, because the plaintiff-appellee is claiming the one-half interest by virtue of being an heir of Beata K. Miller, and makes no claim regarding the share of George Miller, her husband.

Answer to Point Three.

In part one of point three of defendant-appellant's brief, he states that John A. Miller, one of the defendants-appellants became vested of one-half estate in 1914, on the theory that upon the death of George Miller one of his adopting parents ~~had~~ a one-half interest in the property thereupon vested in George Miller's heirs.

This is not so, for two reasons. First, George Miller did not have an estate of inheritance, and for that matter neither had Beata K. Miller. All they had was a life estate, and secondly, the deed expressly provided in the habendum that the conveyance was "unto the said party of the second part to the only proper use, benefit and behoof of the said party of the second part and the survivor of them during the life-time of the survivor * * *". We do not think there is any question but that if the estate granted to the grantees was not a life estate, but was a fee, it would have been considered as a tenancy by entirety under the language used

in the deed, and therefore upon the death of George Miller the whole estate would then have been vested in Beata K. Miller, his wife, the survivor. To strengthen his argument defendant-appellant quotes the Statute of Descent and the Adoption Act, but as above argued, the Statute of Descent has no application, for the reason that there is only one child involved.

Under part two of point three of defendant-appellant's brief, he argues that John A. Miller, one of the defendants-appellants became vested in the second one-half interest in 1922, for the reason cited in his argument to part one of point three of his brief. The same objections to the argument of part one apply to part two. In addition, he argues that if defendant-appellant, John A. Miller, is not a child, then he is an heir at law. The fallacy of this argument is immediately apparent when it is seen that having failed to establish the right to be designated as an heir in the nearest degree, namely as a child, he seeks to obtain the right of such designation in a more remote degree, namely as an heir. It is readily apparent that a child is the nearest degree of kindred, and that anything beyond, although embraced within the classification of an heir, is more remote, therefore he must take under the designation of a child or not at all, because if he fails in the nearest degree, we certainly cannot understand how he can take under the more remote degree of kindred or classification. And as argued hereafter, he must take, if at all, under the designation of a child by virtue of the right conferred upon him under the Adoption Act as an adopted child, because he is undeniably not the natural child of the grantees in the deed Schedule A, but merely an adopted child, and the only rights he acquires by such adoption are such as are conferred by the Statute of Adoption itself.

Further on, in part two of point three of defendants-appellants' brief, he seeks to invoke the Statute of Descent once more in support of his argument, but as above argued the Statute of Descent has no application whatsoever.

Under part three of point three of defendants-appellants' brief, he attempts to anticipate our argument regarding the limitations expressly set out in the Adoption Act which would exclude defendant, John Miller, from taking under the classification of an adopted child.

These limitations will be argued more fully hereafter. We will confine our answer to defendants-appellants' argument under this point to a mere statement of the facts which we claim bring the limitations of the Adoption Act into operation against defendants-appellants' claim.

The first limitation is as follows:

"* * * provided, said child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents * * *" Compiled Statutes, 2809 Section 16.

We contend that this express limitation is brought into effect by the words of the habendum of the deed, Schedule A, as follows:

"* * * and after the death of the survivor to the child or children of the parties of the second part and of the survivor of them, share and share alike their heirs and assigns forever* * *".

We think it is clearly stated by the use of the words, "to the child or children of the parties of the second part," that the remainder is "expressly limited to the heirs of the body of the adopting parent or parents."

The second limitation of the above quoted section of the Adoption Act is as follows:

“* * * provided said child shall not be capable of taking * * * property coming from the collateral kindred of such adopting parent or parents by right of representation.”

The facts in this case which bring such express limitations into effect are as follows: The deed, Schedule A, was made by Mary Elizabeth Miller and John Miller, her husband, to George Miller, son of said grantors, and Beata K. his wife. George Miller and Beata K., his wife, died without having any natural children, but adopted the defendant-appellant, John A. Miller, by decree of adoption, Schedule B. The estate granted to George Miller and Beata K., his wife, was a mere life estate, which is not an estate of inheritance. Therefore, for the defendant-appellant, John A. Miller, to claim either as a child or as an heir of the grantees, George Miller and Beata K., his wife, he must do so by right of representation of the grantees, George Miller and Beata K., his wife. An illustration of why the defendant-appellant, John A. Miller, must take either as a child or heir by right of representation of his adopting parents, is clearly shown by the following situation, which is a practical analogy to the deed in question. Suppose there was no deed, but that the title, as was the original case, was in the grantor in the deed, Mary Elizabeth Miller, and she died, and George Miller and Beata K., his wife, the grantees in the deed, and the adopting parents of John A. Miller, had pre-deceased the said Mary Elizabeth Miller, the grantor in the deed. In such case, the defendant-appellant, John A. Miller, the adopted child, would occupy the same legal status he does today under the deed in question, (he only has the right of in-

heritance in the present case, and his foster parents only had a life estate), but he could not take under the hypothetical situation above outlined, because there was no seizin in his foster parents, and therefore, could be no estate of inheritance, and in order to take, he would have to do so by representation of his foster parents, and this the Statute of Adoption expressly prohibits, as above quoted, evidencing the intention of the legislature to bar an adopted child, except when the foster parents had seizin to the property in themselves during their lifetime.

Answer to Points Four and Five.

We believe we have covered in our answer to other points of defendants-appellants' brief the cases from other States cited and argued by defendants-appellants, and that a further repetition of them is not necessary under these points.

The head notes in the case of *Gilliam vs. Guaranty Trust Company of New York*, 186 N. Y. 127—78 N. E. 697, are misleading. The situation in that case was that the deed conveyed the premises in question to a Trustee "in trust for the use and benefit of said Frances J. Dyett during her natural life and after her decease, to her heirs at law * * *". This differs from the limitation in the deed in our case in that the limitation in our deed was

"to the only proper use, benefit and behoof of the said party of the second part and the survivor of them during the life time of the survivor and after the death of the survivor, to the child or children of the parties of the second part and of the survivor of them share and share alike, their heirs and assigns forever, and in default of any such child or children, then to the heirs at law of said parties of the second part in the following manner: one un-

divided half part to the heirs at law of the said George Miller, their heirs and assigns forever and one undivided half part to the heirs at law of the said Beta K. Miller, their heirs and assigns forever."

This distinction between the remainder created in the Gilliam Case and the remainder created in our case is most important because of the scope of the New York statute of adoption which is the Domestic Relations Law, section 64 (Chapter 272, page 227 Laws 1896; now section 114, chap. 14 Consol. Laws) which provides that

"the foster parent or parents and a minor sustain towards each other the legal relation of parent and child and have all the rights and are subject to all the duties of their relation including the right of inheritance from each other * * * and such right of kin of the minor (adopted child) and such heirs and next of kin shall be the same as if they were the legitimate child of the person adopting, but as respects the passing and limitation over of real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen."

It will be noted in the first place, that the scope in the New York Adoption Act is much broader than the New Jersey Act and secondly, that there is a limitation in our deed dependent upon the life tenant having a child or children and in default thereof, the remainder was designated to go to the "heirs at law" of the respective grantees in the deed, one half to the heirs of each party. Such a limitation was not present in the Trust deed in the Gilliam case, the remainder being given unconditionally to the heirs at law of the life tenant, and if a limitation as in our deed had been present

in the Gilliam deed, the clear provisions of the New York statute would have barred the adopted child and the Gilliam decision would have been contrary to that made.

The case of *Gilliam v. Guaranty Trust Company*, 186 N. Y. 127 is clearly distinguished and explained in the later case of *In Re Leask*, 187 N. Y. 193, wherein the broader scope of the New York Adoption Act, as compared to the New Jersey Adoption Act, is made apparent. The Leask case holds in effect that the use of the words "leaving a child or children" has reference to the natural offspring of the life-beneficiary, and that on the death, his adopted child was not entitled to any of the property left by the will.

The case of *In Re Leask* cites a number of cases from all jurisdictions dealing with the rights of adopted children and comments upon the same.

The main point to be drawn from the cases of *Gilliam v. Guaranty Trust Company of New York*, *Supra*, and *In Re Leask*, *Supra*, is that the New York Statute is much broader than the New Jersey Statute and if the words used in our deed had been under consideration by the New York Courts in either of those cases, the decision would undoubtedly have been that the adopted child was barred by reason of the Statute of New York that states

"As respects the passing and limitation over of real estate and personal property of dependent under the provisions of any instrument on the foster parent dying without heirs, the minor is not deemed a child of the foster parent, so as to defeat the rights of remaindermen."

Arguments under point four and five of defendants'appellants' brief, appear to be a criticism of the cases cited in the opinion of the Supreme Court, on the decision of the motion in the Court below.

Such parts of the arguments under points four and five of the defendants-appellants' brief, as relate to his right to take under the designation of a child or heir, we believe are covered by our affirmative argument hereinafter set out.

Before proceeding with the plaintiff-appelle's argument, we desire to make clear to the Court a certain undisputed fact which we believe has great bearing upon the case.

First. The deed, Schedule A, was delivered and executed on September 19, 1891.

Second. The defendant-appellant, John A. Miller, was adopted by a decree, dated May 24, 1895, or almost four years later.

Third. For all legal purposes of construction of the deed, Schedule A, the defendant-appellant, John A. Miller, was not in existence at the date of the delivery and execution of the deed.

Fourth. The possibility of issue as to the grantees in the deed, Schedule A, was not extinct until the death of Beata K. Miller in November, 1922. *Oleson v. Somogyi*, 93 N. J. Eq., 506.

FIRST POINT.

In the absence of the statute of adoption and adoption proceedings thereunder, the defendant John A. Miller is a total stranger to the parties to the deed in question and entitled to no rights whatsoever in and to the premises described in said deed.

We do not think it will be disputed when we say that in the absence of the Statute of Adoption and Adoption proceedings thereunder, the defendant John A. Miller is a total stranger to the deed under consideration. At Common Law no such thing as an adopted child was known and prior to the enactment of the Statute of Adoption in New Jersey, New Jersey followed the Common Law rule which was that the only right of inheritance to real property was vested in the heirs of the ancestor as defined by the ^{Laws} Statute of Descent.

Chief Justice Gummere, in the case of *in re Book*, 90 N. J. Eq., page 549 (551), which is a Court of Errors and Appeals case, states what the law of New Jersey was prior to the enactment of the Statute of Adoption when he says:

“At that time the testator could have no lawful child except those born to him in wedlock. A child born to him of a woman who was not his wife was not recognized by the law as having any claim to share in the real or personal estate of the father. At that time, too, the laws of this State recognized no power existing in any of its citizens to adopt a child of other parents and by the act of adoption vest in it the right to share in the distribution of the estate of the adopting party. In other

words, the illegitimate child and the adopted child were neither of them recognized by our law as a lawful child of the actual or the adopting parent."

This clearly states the rule regarding the condition of the law prior to the Statute of Adoption, which is equally applicable where no adoption has taken place. We think it clearly established, therefore, that in the absence of either the Statute of Adoption or adoption proceedings thereunder, the defendant John A. Miller in this case is a total stranger to the parties to the deeds and would acquire no estate thereunder.

It, therefore, becomes pertinent to inquire what rights the defendant John A. Miller acquired in and to the premises described in the deed in question under the point immediately following.

SECOND POINT.

The only pertinent right conferred by the proceedings for the adoption of the defendant John A. Miller, by virtue of the statute of adoption, is "the right of inheritance to real estate * * * on the death of such adopting parent or parents * * *".

The Statute of Adoption, being in derogation of the common law, must be strictly construed and therefore such rights as are conferred by it upon adopted children must clearly appear and be defined by the provisions of the Act itself.

Section 4 of the Act is the section which confers upon the defendant John A. Miller whatever rights he possesses by virtue of such adoption proceeding,

and a paraphrase of such section clearly indicates the parts of the section which confer any rights upon adopted children, and what those rights are. Such paraphrase would read as follows:

“And the child shall be invested with * * * the rights of inheritance to real estate * * * on the death of such adopting parent or parents as if born to them in lawful wedlock * * *”.

Two limitations upon such right are set out in this section which will be argued more fully hereafter.

Since the Statute must be construed strictly, and it appears by a reading of the Statute that the only rights conferred upon an adopted child respecting property are “the rights of inheritance to real estate * * * on the death of such adopting parent or parents”, it is apparent that the only right conferred by the Statute upon an adopted child is the right to inheritance of the premises described in the deed in question from his adopting parents, and no other right. The two limitations upon such right contained in said section and argued hereafter under points ^{four and} five and ~~six~~, by their express limitation further directly confine the rights which an adopted child takes by virtue of his adoption to the right of inheritance only from the adopting parents.

The question at hand is not one of inheritance from the adopting parents as all the adopting parents had under the terms of the deed was a life estate, and a life estate is not an estate of inheritance even if the remainder in this deed was not specifically determined. Upon the death of the survivor of the adopting parents, their interest and estate in the property ceased and the only question then arising was who took the remainder created by the deed. If the adopted child takes the remainder at all, he takes it by purchase from the

grantor in the deed and not by descent, because there is nothing for him to inherit, the prior particular life estate not being an estate of inheritance and being terminated upon the death of the survivor of the life tenants.

Chief Justice Gummere, in his opinion in the case of *in re Book*, supra, confirms this viewpoint when he says:

“The effect of the Legislation just adverted to (Statute of Adoption) is to clothe the adopted child with all the rights of a natural child *so far as inheritance of real estate or the distribution of personal estate is concerned.*”

The point involved is very clearly stated in the case of *Stout vs. Cook*, 77 N. J. Eq. 153 (at p. 165), wherein Vice Chancellor Howell, referring to the words of the Statute above quoted, said:

“In other words such adopted child may inherit from the foster parents but the adoption shall not operate to create a capacity to take as a child under the will of some other person.”

Substitute the words “deed” for “will” in this opinion and we have the case at hand.

The case of *Stout vs. Cook* was reversed in the Court of Errors & Appeals, opinion reported in 79 N. J. Eq. page 573, and also 79 N. J. Eq. 640, on the basis that the will of the testator by its terms did not vest an estate in any of the children who were claiming the same, and therefor it was immaterial whether or not Audrey Osborn, the adopted child, was a natural or an adopted child. This decision, of course, leaves uneffected the principle of law enunciated by Vice Chancellor Howell.

In connection with the meaning of the words “right of inheritance”, as used in the Adoption Act, a distinction must be borne in mind between

the status of an heir and a mere right of inheritance, and the laws of descent must be understood as laying down the general rules of inheritance only, and not as denifing how the status is to be created, which gives the capacity to inherit. In order to inherit, the person must already possess the status which gives him the capacity to inherit, and if either the status or the res of inheritance is absent, the law of descent has nothing to operate upon. Applying these principles to the case at hand it will be seen that the status of a child or heir is created by the fact that the child or heir being a natural and blood relation of the person from whom the inheritance is claimed, whereas in the case of an adopted child the legislature, except so far as inheritance from the adopting parents is concerned, has not and cannot give an adopted child the status of a child or heir, co-extensive with a natural child or heir except in the case of property of which the adopting parents were actually seized during their lifetime, and this is all the Adoption Act did, and as is clearly stated, it was further limited by the two provisions of limitation expressly set out in the Adoption Act.

Since, therefore, the only right or status given Miller by the Adoption Act is the right of inheritance from his adopting parents, and they, in this case, only had a life estate, which is not an estate of inheritance, first, the status is missing, because this is not case of inheritance, he taking, if at all, by purchase from the grantor in the deed, as a remainderman, and secondly the res of inheritance is missing, since his adoptive parents only had a life estate.

We respectfully submit, therefore, that the only right conferred upon the defendant John A. Miller by virtue of the adoption proceeding is the "right of inheritance to real estate * * * on the death

of such adopting parent or parents * * *", and as this is not a case of inheritance but is one of a determination of who takes the remainder created by the deed, the adoption proceedings have no effect to vest any right or title in the defendant John A. Miller in and to the premises described in the deed in question.

THIRD POINT.

Even though the defendant John A. Miller was regularly adopted by the grantees mentioned in said deed, such adoption proceedings do not confer any rights upon him, outside of the rights designated by the statute of adoption, so as to enable him to take under the designation of "child" of said grantees under the deed of a third party.

It may be argued that by reason of the decision in the case of *In re Book*, 90 N. J. Eq. 549, the Court of Errors and Appeals has construed the Statute of Adoption to confer the right upon an adopted child to come within the purview of the designation of "child" when used in a deed or will.

In answering this point, it is significant to note that the Court of Errors and Appeals in the case of *In re Book*, *supra*, in order to arrive at the conclusion reached by the Court found it necessary to invoke not only the Statute of Wills but also the Statute of Descent. Needless to say, neither of these Statutes are concerned in our case and it is also significant to note that the Court, in its opinion, confined their statement of the law "so far as those Statutes are concerned" (p. 553). It may

also be further noted in connection with *In re Book, supra*, that the question was one of inheritance and no question of a remainder of any character was concerned. The person determined to be entitled to the estate was entitled to the whole, and no question of a life estate or remainder was involved as is present in our case.

Diligent research has failed to disclose to us any case in this State directly in point on this question. We have discovered the case of *In the Matter of Leask*, decided by the Court of Appeals of New York State, 197 N. Y. 193, which is directly in point except for the fact that a will is concerned instead of a deed. Before proceeding to consideration of that case, however, we desire to call the Court's attention to the case of *Adams vs. Ross*, 30 N. J. L., page 505, decided by the Court of Errors and Appeals, concerning the effect of the use of the words "child or children" in the deed in question. Chief Justice Whelpley, in his opinion in said case, passing upon the question of the construction to be placed upon words used in a deed, said:

"In the construction of a deed of conveyance, the question is not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital showing the intention will supply the omission. * * *."

Applying this principal to the case at hand, we arrive at the conclusion that the grantor in said deed conveyed an estate in remainder to the natural children of the grantees for two reasons, first, because the defendant John A. Miller had not been adopted at the time this deed was executed and delivered and was not adopted for almost four years thereafter, and therefor could not have been in contemplation of the grantor; and, secondly, the

grantor, by the use of the words "child or children" used a term which denotes natural child or children where a third party is concerned, and since the adoption proceedings conferred no right upon the adopted child other than that of inheritance from the foster parents, there must be read into the deed a construction or presumption that the grantor contemplated, or had in mind the further adoption of children, in order to enable the adopted child to take under the designation of "child". Manifestly, under the rule of construction laid down by the Court of Errors and Appeals in *Adams vs. Ross*, *supra*, this cannot be done in the deed in question. The defendant John A. Miller must either take under the designation of "child" by virtue of the rights conferred upon him by the adoption proceedings, or he cannot take at all on this theory, and, as heretofore pointed out, the only right the State of Adoption confers upon an adopted child is that of inheritance and the word "child" can only be construed to include an adopted child when the question of inheritance is present.

The case nearest in point with the case at hand, which we have found in our research, is that of *In the Matter of George Leask*, 197 N. Y. 193, decided by the Court of Appeals in New York State.

The Statute under consideration in that case was the Statute of Adoption of New York State, which is even broader than the New Jersey Statute of Adoption. The Court, in its opinion, states:

"In New York and other states having similar statutes of adoption, any limitation in a deed or will to a child or children or conditioned upon the survivorship of a child or children, is not deemed to include an adopted child where the grantor or testator is a stranger to the adoption.

The words 'leaving a child or children' as used by the testator had reference to natural

offspring of the life beneficiary to a child or children born to him in wedlock and who should survive him. The testator contemplated actual parentage—a relation dependent upon the operation of natural laws in marital intercourse and which could not arise without the intervention of natural laws favorable to the procreation and birth of offspring. In this respect it differs essentially from the relation of adopted parentage which may be established by the voluntary act of the parties thereto. What Hudson Hoagland meant in substance was the same as though he had said: 'If God, in his good providence, shall give my nephew Thomas C. Hoagland, a child or children who shall survive him', etc., then they should receive the principal sum of twenty-five thousand dollars of which the father was given the income for life. He did not mean that if his nephew should adopt a child who survived him, that such child should take. Other language would have been used if he had intended thus to confer upon Thomas C. Hoagland a virtual power of appointment. The phrase 'leaving a child or children' is not one which would naturally be used in reference to an adopted child or children. 'Having adopted a child or children who survived him' or some similar phraseology would have been employed if it had been the intention of the testator to include children by adoption in the qualifying clause under consideration."

The Court, later on in its opinion, states:

"In those States whose statutes of Adoption resemble ours, a limitation to a child in the will of a stranger to the adoption is not treated as a limitation to an adopted child."

The Court supporting this statement quotes the cases of

Schafer v. Eneu, 54 Penn. St. 304;
Jenkins v. Jenkins, 64 N. H. 407;

Reinders v. Koppelman, 94 Mo. 338;

Russell v. Russell, 84 Ala. 48;

Keegan v. Geraghty, 101 Ill. 26.

The Court further points out in his opinion:

“That in those cases cited to sustain the proposition that a limitation to a child in a deed or will of a stranger to the adoption is to be taken as a limitation to an adopted child, it will be found that the Statutes of Adoption under consideration were much broader and more comprehensive in their terms than the New York Statute.”

This will also be found to be the case with respect to the New Jersey Statute, which is even less comprehensive than the New York Statute.

A significant fact in connection with the contention of the defendant that he should come within the purview of the word “child” as used in the deed, is the fact that this would give a virtual power of appointment to the life tenants by adoption proceedings, to designate persons who should take the remainder created by the deed and thereby possibly defeat the terms of the deed. Because, unless the construction can be established that the Statute of Adoption entitles an adopted child to the same rights as a natural child where the words “child or children” are used in the instrument creating the estate, then where, as in the present case, a contingent remainder has been created providing that in default of having a child or children then the remainder shall go to certain other designated parties, such a construction would give the adopting parents the power of appointment which would have the effect of defeating the contingent remainder which otherwise would go to those persons who are members of the class designated to take at the termination of the prior particular life estate. The

rule of common law regarding construction of powers was that they would be strictly construed, and in any event the Statute of Adoption must be invoked in this case as conferring upon the adopting parents the right to so appoint a remainderman, and no such right is conferred by the Statute of Adoption either upon adopting parents or an adopted child.

We therefore respectfully submit that the defendant John A. Miller cannot take under the designation of "child" under the deed of a third party who was a stranger to the adoption proceedings and especially in view of the fact that at the time said deed was made he had not been adopted, and that the only rights conferred upon him by the adoption proceedings were that of inheritance. And taking the remainder created by a deed executed and delivered almost four years before his adoption proceedings is not a question of inheritance from the adopting parents but is one of taking by way of representation of the adopting parents from collateral kindred, which is expressly prohibited by the Statute.

Therefore, the sole question to be determined is as argued in the Supreme Court—can the defendant take as an adopted child, for he is only that in fact, under the designation of the word "child" in the deed.

To determine this, two criterions may be used, first whether the Common Law meaning of the word "child" can be said to include an adopted child, and second, whether the Adoption Act itself confers that right upon the defendant.

1. The Common Law meaning of the word "child" must be taken, because it is still the Common Law which fixed the right, in New Jersey, where there is only one child, for that child to in-

herit from his parents. It is the first canon of descent, above quoted, which gives that right, as the Statute of Descent of New Jersey only applies where there are two or more children, as above argued. The first canon of descent provides that such child shall be an issue of the intestate, so that an adopted child cannot, therefore, come within the meaning of the word "child".

2. The Adoption Act itself confers upon the adopted child only "the rights of inheritance to real estate * * * on the death of such adopting parent or parents", and even then limits such right by providing that "such child shall not be capable of taking * * * the property coming from the collateral kindred of such adopting parent or parents by right of representation".

Manifestly this narrow provision, irrespective of these two restrictions added, gives the adopted child nothing more than a "privilege" to take property by devolution from his adopting parent, which would otherwise be denied to him by Common Law, and does not operate to give said adopted child the "status" of a natural child. Consider in addition to this, the two restricted provisions above quoted, and it can be seen that the Adoption Act was designed to give an adopted child the "privilege" only of taking property from his foster parents. In addition to this the foster parents, as above argued, did not have an estate of inheritance, so that there is nothing to operate upon.

FOURTH POINT.

Defendant cannot take under the designation of "child", because the grant in remainder in the deed is limited "to the child or children of the parties of the second part", and the statute expressly prohibits an adopted child "taking property expressly limited to the heirs of the body of the adopting parent or parents."

The pertinent section of the Adoption Act, namely, section 16, 2 Comp. Stat., page 2808, expressly sets forth this restriction upon the right of inheritance conferred upon an adopted child,

"* * * provided, said child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents, * * *."

The habendum of the deed, Schedule A, Case page 11, after granting the life estate, provides for the remainder as follows:

"* * * and after the death of the survivor to the child or children of the parties of the second part and of the survivor of them, * * *"

Manifestly, the provision of the habendum in the deed limiting the remainder "to the child or children of the parties of the second part" is the apt and expressive use of words within the rule laid down in *Adams v. Ross*, 30 N. J. L., 505 limiting the remainder to the natural child or children of the parties of the second part. As argued previously, the defendant-appellant, John A. Miller, cannot take under the designation of "child" and the

same reasoning is applicable to the restriction imposed by the habendum clause of the deed, when it gives the remainder to the "child" of the grantees, and we contend this is the very situation which the legislature had in mind, when they put the express prohibition in the Statute of Adoption against an adopted child taking property expressly limited to the heirs of the body of the adopting parent or parents.

FIFTH POINT.

The defendant John A. Miller cannot take, because the statute of adoption provides "such child shall not be capable of taking * * * property coming from the collateral kindred of such adopting parent or parents by right of representation."

The argument under the third point hereinabove set out is equally applicable to this point because the designation "heir" is certainly more remote in contemplation than the designation of the word "child", and if the defendant John A. Miller cannot take as a child within the construction of such word in the deed, he cannot, by construction of the word heir, be considered to take the property under that designation as a legal term. This is perfectly apparent on the face of the deed by the fact that the grantors specified that in case the grantees and the survivor of them should die without having a child or children, that then the remainder was to go one-half to the heirs of the husband grantee and one-half to the heirs of the wife of the grantee. It cannot be said that the grantors in the deed in-

tended this to operate so as to give an adopted child the right to take because, on the face of it, it contemplated they should have no children whatever. If it can be argued that the grantors might have contemplated an adopted child under the provision providing that in default of the grantees having a child or children, then one-half was to go to the heirs of the husband grantee and the other half to the heirs of the wife grantee, then this refutes entirely any contention that an adopted child can take under the designation of the word "child" in the deed, because otherwise it would not have been necessary for the grantors in the deed to designate any further contingencies if an adopted child could take under the designation of child.

A further reason why the adopted child cannot take under the designation of the word heir is for the reason that the deed provided that in the absence of children, one-half of the remainder should go to the heirs of the husband grantee and the other half of the remainder should go to the heirs of the wife grantee, contemplating that there would be two sets of heirs and this could not be so if an adopted child is construed to come within the designation of the word "heir".

A further and we think complete bar to the adopted child taking under the designation of the word "heir" is the express provision of the statute, which expressly provides

"Provided always that said child or children shall not be capable of taking property * * * coming from the collateral kindred of such adopting parent or parents by right of representation."

The prohibition and exclusion by the express terms of the statute as above quoted certainly apply to the case in hand. The grantors in the deed were the

father and mother of the grantee husband in the deed, and the grantee husband and wife merely were given a life estate under the terms of the deed. Therefore, even if the adopted child should be considered as such to stand in the place of a natural child, the deed not only by its express terms, but also the force and effect of the Statute, prohibits the adopted child taking by way of representation the remainder from the grantors in the deed, who were the collateral kindred of the adopting parents.

For illustration, let us assume that there was no deed but that the title was in the grantors and they died and that the grantees or the adopting parents had predeceased the grantors, the adopted child would then stand in the same position as he stands today and his only right to take would be by way of representation of the adopting parents. This the Statute expressly prohibits, and under such state of facts, the defendant John A. Miller, the adopted child, could not take this property from the grantors in the deed.

SIXTH POINT.

The defendant, John A. Miller, cannot take under the designation of the word, heir, because the adoption act only confers the right of inheritance upon him as distinguished from the status of an heir.

The defendant appellant, John A. Miller, must take as an adopted child under the designation of "child" or not at all. He cannot take as an "heir at law", because he is not an heir of his adopting parents under the laws of New Jersey, but only

given the right of inheritance from his foster parents by virtue of the Adoption Act. As above argued under point two there is a distinction between the status which gives a natural child capacity to be designated an "heir" in the Common Law meaning of the term—for that is what must be taken in this place—and the status which gives an adopted child "a right of inheritance", merely, under the Adoption Act. The first has been defined by the Common Law through three centuries of development, and enables the natural child not only to inherit from his parents, but also through them by way of representation; the second is a statutory creation derogatory of the Common Law and a liberal construction of which would give the life tenants a power amounting to the power of appointing, and enable the life tenants to defeat the Common Law remaindermen from taking as heirs.

Furthermore, for Miller to take as an "heir at law" he must come in within the legal definition of such term under the laws of New Jersey, and not merely claim by reason of "a right of inheritance" from adopting parents under the Adoption Act. He is not an "heir at law" within the legal definition under the laws of New Jersey because he is an only child, if anything, and the rule of law of New Jersey today entitling an only child to inherit is not any statute of New Jersey, but the first canon of descent of the Common Law of England, which became part of the law of New Jersey, and is still the law of New Jersey today. That canon of descent is as follows:

"1. The first rule is, that inheritance shall lineally descend to the issue of the person who last died actually seized in infinitum, but shall never lineally ascend." Blackstone's Commentaries, Book 2, Chapter XIV, page 208. (Original paging.)

The Statute of Descent only applies where two or more children surviving. Section one of the Statute of Descent provides as follows:—

“That when any person shall die seized of any lands, tenements or hereditaments in his or her own rights in fee simple without devising the same in due form of law, leaving two or more children * * *”

It will, therefore, be seen that the Statute of Descent only applies in the case of children where two or more children survive an intestate, and that it is the first canon of descent above quoted which provides the rule of descent in the case of a single child. In this connection it is important to note that the first canon of descent expressly provides that such child shall be “issue” and an adopted child is not issue, and cannot be issue of the person who died seized of the property, because of the undeniable fact that he is somebody else’s child. Therefore, no theory of legislature can be built up, as in the *Book* case, to define an “heir at law”. The adopted child must obtain his right under the adoption Act, or not at all, and that Act only gives the “right of inheritance” from foster parents of real estate of which they were seized at the time of their death.

In fact, to apply the Statute of Descent to our case helps the plaintiff-appellee, because section two of the Statute of Descent says:

“2. That when any person shall die seized of any land, tenements or hereditaments in his or her in right in fee simple without devising the same in due form of law, and without leaving lawful issue, leaving a brother or sister, or leaving a brother or brothers, and a sister or sisters of the whole blood, the inheritance shall descend to said brother or sister or to such

brother or brothers, and sister or sisters, as the case may be, as tenants in common in equal parts. * * *

Using the argument, therefore, that a theory of legislation can be built up to create the status of an heir, section two of the Statute of Descent, expressly provides that in case a decedent died without leaving lawful issue, then the brother or sister, as the case may be, takes, and applying this to our case in the argument that the theory of legislation creates the status, we find that George Miller and Beata K. Miller, ^{died without leaving lawful issue because} the defendant-appellant is only an adopted child and that Beata K. Miller died, leaving a brother as her only heir at law, who is the plaintiff-appellee, Vincent Ahlemeyer. The defendant-appellant, John A. Miller, ^{is not issue with the legal} definition of the word heir, ^{because he is not} but, ^{can} could, be termed issue under the first canon of descent at Common Law, and his claim ~~would have to~~ go no further to entitle him to take the remainder created by the deed absolutely. This is why we say that the defendant-appellant, John A. Miller, must take under the designation of a "child" or not at all, and the provisions of the deed when they state that in the event of the grantees dying without child or children, then the remainder is to go to the heirs of the grantees, half ~~and~~ half, merely express and declare the condition of the law of New Jersey today, namely that unless the adopting parents are seized of an estate of inheritance at the time of their death, and leave a natural child of their body, surviving them, then the remainder goes to the natural heirs of said decedent, and not to those persons who have a mere right of inheritance from the decedents.

To summarize the objections why the defendant-appellant cannot take under the designation of heir, as used in a deed, they are as follows:

First. Because the deed expressly designates natural heirs by providing that after the death of the survivor of the grantees, the remainder was to go to the "child or children of the party of the second part."

Second. The defendant-appellant is not an heir at Common Law, because the only right of a single child to inherit is by virtue of the first canon of descent.

The case of *Adams v. Ross*, 30 N. J. L. 505, further prevents the defendant-appellant from taking, under the theory that he is an heir with respect to the life tenants, and that the grantor in the deed, in using the word heirs, intended to include him, because Chief Justice Whelpley in that case, speaking for the Court of Errors and Appeals says on page 510:

"In the construction of a deed of conveyance the question is, not what estate did the grantor intend to pass, but what did he pass by apt and proper words. If he has failed to use the proper words, no expression of intent, no amount of recital, showing the intention, will supply the omission, although it may preserve the rights of the party under the covenant for further assurance or in equity upon a bill to reform the deed."

And further on, in dealing with the proposal to broaden the scope of the meaning of the word heir, as used in a deed, Chief Justice Whelpley at page 513 says:

"I am utterly unprepared to overturn the Common Law as understood by Littleton, Coke, Shepherd, Cruise, Blackstone, Kent, and all the judges who have administered it for three centuries, and to adopt the dogma, that intention, not expression, is hereafter to be the guide in the construction of deeds. That would be as unwarrantable as dangerous."

SEVENTH POINT.

Said deed by its terms expressly created a contingent remainder vesting an undivided one-half interest in plaintiff upon the death of the survivor of the grantees mentioned in said deed without having a natural child.

A perusal of the deed, a complete copy of which is annexed to the complaint and marked Schedule "A," will disclose that the habendum limits the estate granted

"to the only proper use, benefit and behoof of the said party of the second part and the survivor of them during the life time of the survivor and after the death of the survivor to the child or children of the parties of the second part and of the survivor of them share and share alike, their heirs and assigns forever, and in default of any such child or children, then to the heirs at law of said parties of the second part in the following manner; one undivided one half part to the heirs at law of said George Miller, their heirs and assigns forever, and one undivided half part to the heirs at law to said Beata K. Miller, their heirs and assigns forever."

We do not think it will be disputed that the grantees in said deed took no more than a life estate and necessarily, if the grantees in said deed only acquired a life estate there must have been either a remainder or a reversion. The deed having expressly provided who was to take the property after the termination of the prior particular life estate, it was therefor a remainder and not a reversion.

Blackstone, in his commentaries on the laws of England (Book 2, p. 64) says regarding a remainder:

“An estate, then, in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined.”

The question then arises, was the remainder vested or contingent? Since the deed provides that in case the grantees have children, the estate is to go to them, but in default of having children it is to go then to their heirs, the remainder is a contingent remainder because it is uncertain in whom the remainder is going to vest until the prior particular life estate has been terminated unless during the prior particular life estate the grantees had children, which was not the situation in this case, unless an adopted child be considered as a child, which question has been argued hereinbefore under points 2 and 3.

Blackstone, in his commentaries (Book 2, p. 169) states:

“Vested remainders (or remainders executed whereby a present interest passes to the party thoroughly to be enjoyed in the future) are where the estate is manifestly vested ^{to} remainder to a determinate person after the particular estate is spent.”

Regarding contingent remainders, Blackstone says:

“Contingent or executory remainders (where no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain person, or upon a dubious and uncertain event; so that the particular estate may chance to be determined and the remainder never take effect.”

We quote Blackstone's definitions of remainders and the distinction between vested and contingent remainders as a common law authority. Modern authorities agree with this definition. Thus Prof. Alfred G. Reeves, late professor of law in the New York Law School, and author of a most modern and complete treatise on the law of real property (1909) and also the author of "A Treatise on Special Subjects of the Law on Real Property" and editor of "Reeves' Leading Cases on Wills," defines a remainder as

"A future estate made by act of the parties to take effect in possession after the natural termination of a prior particular estate which is created by the same transaction." (Reeves on Real property, vol. 1 page 95).

Later on in his work, Prof. Reeves defines "a vested remainder as one in which there is a present fixed right to future enjoyment of the property." An illustration is an estate to X for life, remainder to Y, who is a living person. Here, while Y cannot possess and enjoy the right until after the death of X, yet his right to such future enjoyment is not affected by any contingency or uncertainty. And Prof. Reeves defines a contingent remainder as "one in which either the person to take it is not in being, or not ascertained, or the event upon which it is to be enjoyed is uncertain or both; so that the right to the future enjoyment of the property is not fixed." A very clear statement concerning contingent remainders is further made by Prof. Reeves in this work on real property (vol. 1 p. 96) where he says:

"It is also to be added that a contingent estate generally, whether a remainder or not, is frequently defined as an uncertain right to future enjoyment. Special forms of conting-

ent remainders are cross remainders and alternate remainders. As to each of which, it is enough here to say that it is made so that it will continually go to one or the other of two or more designated persons as one or another of specified contingent events may occur."

Prof. Reeves in his work on real property, vol. 2, page 1166, further discussing contingent remainders, states:

"Every contingent remainder is an estate on condition precedent. It is contingent while the person to whom, or an event on which it is limited to take effect, remains uncertain." (Citing 2 Blackstone's Com. p. 169; 1 Fearné Contingent Remainder (Smith Ed.) p. 3.)

"An estate to A for life and then to the oldest son of B, who has no son, or then to the next President of the United States, illustrates a remainder that is contingent because of uncertainty as to person; * * *" The twofold division of such remainders thus naturally suggested—contingency as to event or as to the person—is at once clear and comprehensive. But for the purpose of examining and understanding them and their incidents as fully as their importance requires, the more complete fourfold classification of Mr. Fearné and Mr. Cruise should be understood. Mr. Fearné says:

"We may properly distinguish four sorts of contingent remainders. First, where the remainder depends entirely on a contingent determination of the preceding state itself.' (This is not present in our case)

"Second, where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate.' (This concerns our case as hereinafter shown)

"Third, where the condition upon which the remainder is limited is certain in event but the determination of the particular estate may

happen before it.' (This is not concerned in our case)

"Fourth, where the person to whom the remainder is limited is not yet ascertained nor not yet in being." (This concerns our case to a certain extent)

Passing over the first and third classes defined by Mr. Fearne, we will take up the second and fourth classes respectively, to the extent they affect our case.

Discussing the second classification of Mr. Fearne, Prof. Reeves says (vol. 2, p. 1171) :

"When the disposition or ownership of the property, after the natural termination of the particular estate is made to depend upon two or more contingencies so that if one event occur, the remainder will belong to one person, if another, to another, and so on, alternate remainders are created. And these are simply several contingent remainders usually of this second class, all dependent on one and the same particular estate, and so limited that as soon as any one of them becomes vested, the others disappear. Such would be a devise to A for life remainder to B if he marry X; and if B do not marry X, then remainder to C if he marry X; and if neither of them marry her, then remainder to D if he marry her. Here there are three contingent alternate remainders to vest in that one of B, C and D who may marry X; and as soon as either of them marries her (provided this be while A is still living) his remainder becomes vested and the others are defeated. Remainders in fee made in this alternate fashion have been described as 'a fee with a double aspect'. (Citing *Higgins v. Down*, 101 N. Y. App. Div., 119). In the much discussed case of *Hennessey vs. Patterson*, 85 N. Y. 91, the part of gift which illustrates this class of remainders was in substance, to the testator's daughter, Margaret, for life; and if she had issue living at her death

to such issue in fee; but if she died without leaving any issue, then to John Foley in fee. While Margaret was living and had no issue, the fee which might ultimately go either to her issue or to John Foley had a double aspect."

The case of *Hennessey vs. Patterson*, supra, is identical in principle and particulars with the case at hand. The testator's daughter Margaret in that case corresponds to George Miller and Beata K. Miller his wife, the grantees in the deed in our case; the issue of the testator's daughter Margaret corresponds to the child or children of George Miller and Beata K. Miller, mentioned in the deed in our case; and the John Foley in that case corresponds to the heirs of George Miller and Beata K. Miller, grantees in the deed in our case, who were designated to take in default of George Miller and Beata K. Miller having child or children, just as John Foley was to take in the event that the testator's daughter Margaret died without issue.

In discussing the fourth classification of Mr. Fearn's above stated, Prof. Reeves says (vol. 2, p. 1173):

"In the fourth, and clearest class of contingent remainders, the uncertainty relates to the person—because he is not in being or not yet ascertainable. A remainder to a child of a person who has no child, or to the next President of the United States or to the heirs of a living person is an obvious illustration."

Three exceptions to this classification are noted by Prof. Reeves, but with the possible exception of rule in Shelley's case, ~~which we will discuss completely under point 6~~, they have no bearing upon the case at hand.

New Jersey has defined a contingent remainder in the case of *Price v. Simon*, 13 N. J. Eq. 168, at page 176, in the following manner:

“It is the present capacity of taking effect in possession, if the possession would become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder.”

Fearne on Rem. 149 (Fourth Ed.)
Kent's Com. 203.

This case was apparently affirmed by the Court of Errors and Appeals in the reported case of *The Weehawken Ferry Company, appellants, vs. Charles G. Sisson and others*, reported in 17 N. J. Eq. 475.

The estate created by the deed at the time of its execution and delivery, which was almost four years before the defendant, Miller, was adopted, was a life estate to the grantees and the survivor of them and a contingent remainder to the then existing natural heirs at law of the respective grantees, which was a vested remainder subject only to be divested upon the happening of the condition precedent mentioned in the deed, namely, the grantees having a natural child. There is no question but that the deed created a life estate with a remainder over, unless the rule in Shelley's case operated, which point is disposed of by the case of *Stugrue vs. Long*, 82 N. J. L. 717 (Court of Errors and Appeals). If, therefore, there was a remainder it must have vested in someone, and since the defendant was not adopted till about four years after the deed was executed and delivered, the remainder must have vested in the heirs at law of the respective grantees, subject only to be divested upon the happening of the condition precedent mentioned in the deed, namely, the grantees having a natural child. This is the reason why the defendant-appellant can only take the remainder under the designation of “child” and must so take, or not at all.

It will therefore be seen that the estate created by the deed in this case is a contingent remainder and the only question to be determined by this Court is, who is the person or persons who are members of the class designated to take the remainder at the termination of the prior particular estate. Since the defendant John A. Miller is not a natural child of George Miller and Beata K. Miller, his wife, the grantees mentioned in said deed, said grantees died without having any child or children and the remainder therefore vests upon the death of the survivor of said grantees in the class of persons designated as the heirs of the grantees in said class of persons designated as the heirs of the grantees in said deed, and the plaintiff Vincent J. Ahlemeyer is the only heir at law of Beata K. Miller, one of the grantees mentioned in said deed, George Miller, her husband having predeceased her.

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