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**BILL OF COMPLAINT AS AMENDED.**

Filed December 14, 1927.

**In Chancery of New Jersey**

*To His Honor Edwin Robert Walker, Chancellor  
of the State of New Jersey:* 10

The complainant, C. Theodore Herrmann, as administrator with the will annexed of Henry V. Herrmann, late of the City of Summit, in the County of Union and State of New Jersey, respectfully shows unto your Honor:

1. Henry V. Herrmann, late of the City of Summit, in the County of Union and State of New Jersey, departed this life on the 13th day of May, 1924, having first duly made and executed his last will and testament bearing date the 16th day of January, 1911, and a codicil thereto bearing date the 15th day of February, 1915, which said will and codicil were on the 4th day of December, 1925, admitted to probate by decree of the Prerogative Court, and by decree of the Prerogative Court made on the 27th day of December, 1926, the complainant was duly appointed administrator with the will annexed of the said Henry V. Herrmann, and thereafter and heretofore letters of administration with the said will and codicil annexed were by the Ordinary of the State of New Jersey granted to the complainant, which letters are still in full force and effect. A copy of the said will in hereunto annexed and marked "Exhibit A" and made part hereof, and a copy of the said codicil is hereunto annexed, marked "Exhibit B" and made part hereof. 20 30

*Bill of Complaint as Amended.*

2. Prior to the appointment of the complainant as administrator with the will annexed the estate of Henry V. Herrmann, deceased, was administered by the New Jersey Title Guarantee & Trust Company, administrators *pendente lite*, which said administrator *pendente lite* has partially administered the estate of the said decedent but did not fully administer the same.

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3. There has been left to be administered by the complainant, among other things, the fixing of the transfer inheritance tax due to the State of New Jersey. This tax cannot be fixed, determined or paid until the questions of doubt and difficulty arising on the face of the said will and codicil are decided.

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4. The said decedent left him surviving as his sole heir and next of kin C. Theodore Herrmann, his brother. C. Theodore Herrmann had previously been married to Grace Cranstoun Herrmann, and by her had two children, Gladys Herrmann, daughter, and Vietor Herrmann, a son, both of whom are now of full age. Prior to the death of Henry V. Herrmann, C. Theodore Herrmann had divorced Grace Cranstoun Herrman and intermarried with Ruth Eileen Herrman. Heretofore the said C. Theodore Herrman has by due proceedings taken adopted as his daughter, Dorothy Eileen Herrmann.

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5. Alfred S. Brown, named in clause Tenth of the will of said Henry V. Herrmann, survived the said decedent, and is still living.

6. Questions of doubt and difficulty have arisen upon the will and codicil, Exhibits A and B attached to this bill of complaint, and in particular with reference to the proper construction and legal effect of clause Tenth in the said will.

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*Bill of Complaint as Amended.*

The complainant believes and alleges the fact to be that all parties interested admit that in and by the said Tenth clause C. Theodore Herrmann has an undoubted vested valid life interest in possession. The said C. Theodore Herrmann claims that all of the gifts over after the gift to him for life are either invalid and void as violative of the Rule Against Perpetuities, or, if the gifts in question themselves are not violative of that Rule, they are so closely intermingled with the gifts void as violative thereof that by a proper construction of the said clause standing by itself and as modified by the codicil Exhibit B they fail, too. The said C. Theodore Herrmann also contends that all of the gifts over after the gift to him for life in clause Tenth of the will, Exhibit A, as modified by the codicil, Exhibit B, being void, the testator Henry V. Herrmann died intestate thereof, and that there is a resulting trust in favor of the said C. Theodore Herrmann as sole next of kin and heir at law of the testator, Henry V. Herrmann, deceased. That being the case, the said C. Theodore Herrmann also contends that there is a merger of the life interest given to him by the will and the interest in fee or absolutely in remainder vesting in him by intestacy and resulting trust as aforesaid, so that he, the said C. Theodore Herrmann, is now presently vested with the whole beneficial interest under the Tenth clause of the said will, and is entitled to immediate possession of all the residuary estate of Henry V. Herrmann, deceased.

7. Grace Cranstoun Herrmann, Gladys Herrmann and Vietor Herrmann deny the contention as aforesaid of C. Theodore Herrmann, and contend that he has no other interest in the residuary estate of Henry V. Herrmann except the life

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*Bill of Complaint as Amended.*

10 interest under the Tenth clause of the said will. They also severally claim that they have interests in the residuary estate of C. Theodore Herrmann, the exact kind or nature of which the complainant is not fully advised of, but which interests are inconsistent with the claim of C. Theodore Herrmann.

8. Alfred S. Brown contends that he is entitled to the sum of ten thousand dollars under clause Tenth of the said will.

20 9. Dorothy Eileen Herrmann contends that she is entitled to share as one of the children of C. Theodore Herrmann on the same basis with Gladys Herrmann and Vietor Herrmann, and as one of the children of C. Theodore Herrmann has an interest under the Tenth clause of the will of Henry V. Herrmann, deceased.

10. Most, if not all, of the foregoing claims are mutually inconsistent, and all of them are inconsistent with the claim of C. Theodore Herrmann.

30 11. The complainant cannot safely proceed with the administration of his trust as administrator with the will annexed of Henry V. Herrmann, deceased, so long as the aforesaid questions of doubt and difficulty arising upon the will and codicil of Henry V. Herrmann, deceased, remain unadjudicated, and until he be advised by this Honorable Court as to his duties in the premises, and until the rights of the several parties in the estate of Henry V. Herrmann, deceased, be adjudged, fixed and determined.

*Bill of Complaint as Amended.*

The complainant is without relief except in this Honorable Court, and therefore prays that:

1. Gladys Herrmann, Vietor Herrmann, Grace Cranstoun Herrmann, Dorothy Eileen Herrmann, Alfred S. Brown, and C. Theodore Herrmann individually, who are the defendants to this suit, may answer this bill of complaint and each statement therein made. 10

2. This Court do construe the last will and testament and codicil thereto of Henry V. Herrmann, deceased, and do fix, adjudge and determine the rights and interests of the several defendants as between themselves in and to the estate of Henry V. Herrmann, deceased; and that the complainant be advised by this Honorable Court as to his duties in the premises. 20

3. A writ of subpoena issue, commanding the defendants and each of them to answer this bill of complaint, and stand to and abide by such decree as this Court may make in the premises.

McCARTER & ENGLISH,  
Solicitors of Complainant.

G. W. C. McCARTER,  
Of Counsel. 30

Exhibits A and B are printed as Exhibit C. 1.

**ANSWER OF DEFENDANT,  
ALFRED S. BROWN.**

Filed March 22, 1928.

10	<p>C. THEODORE HERRMANN, as Administrator, etc., of Henry V. Herrmann, deceased, <i>Complainant,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>GLADYS HERRMANN, and others, <i>Defendants.</i></p>	<p><i>On Bill, etc.</i></p> <p><i>Answer of Defendant, Alfred S. Brown</i></p>
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This defendant, ALFRED S. BROWN, answering the Bill of Complaint, says:

20 1. Paragraph one is admitted so far as the admission to probate of the Will of said Henry V. Herrmann is concerned, but so far as the subsequent allegations of paragraph one are concerned, this defendant has no knowledge or information sufficient to form a belief.

30 2. Paragraph two is admitted, so far as the allegation that the Estate of Henry V. Herrmann, deceased, was administered by the New Jersey Title Guarantee and Trust Company, Administrator Pendente Lite, is concerned, but so far as the subsequent allegations in said paragraph are concerned, this defendant has no knowledge or information sufficient to form a belief.

3. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph three.

40 4. Paragraph four is admitted except as to the allegation that prior to the death of Henry V.

*Answer of Defendant, Alfred S. Brown.*

Herrmann, C. Theodore Herrmann had divorced Grace Cranstoun Herrmann, and intermarried with Ruth Eilene Herrmann, and that heretofore the said C. Theodore Herrmann had by due proceedings taken, adopted as his daughter Dorothy Eilene Herrmann, and as to such allegations defendant has no knowledge or information sufficient to form a belief. 10

5. Paragraph five is admitted.

6. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph six, that questions of doubt and difficulty have arisen upon the Will and Codicil, Exhibits A and B attached to the Bill of Complaint, and in particular with reference to the proper construction and legal effect of clause tenth in the said Will, and as to the other statements in said paragraph six, this defendant denies said statements. 20

7. Defendant has no knowledge or information sufficient to form a belief as to the statements in paragraph seven.

8. Paragraph eight is admitted, but defendant alleges his contention to be that he is only entitled to said sum under and subject to the conditions and contingencies hereinafter set out. 30

9. Paragraph nine is denied.

10. Paragraph ten is admitted.

11. Paragraph eleven is denied.

12. Defendant alleges the fact to be that in and by said tenth clause of the Will of Henry V. Herrmann, the residuary estate of said testator is vested in Trustees in trust to collect the in- 40

*Answer of Defendant, Alfred S. Brown.*

come thereof and after paying therefrom all taxes, assessments, water rents, charges and expenses of every kind connected with the protection and management thereof, to pay the residue of said rents, interest and income unto the said C. Theodore Herrmann, during his natural life, and this defendant alleges that the said C. Theodore Herrmann has no other or greater interest under the said tenth clause than the right to receive from the Trustee or Trustees of said Will, the residue of the rents, interest and income of the said residuary estate, after payment therefrom of all taxes, assessments, water rents, charges and expenses as in said tenth clause provided. And further alleges that said will provides that upon the death of the said C. Theodore Herrmann, the residuary estate shall be divided into as many equal shares as there are children of the said C. Theodore Herrmann, living at the time of his decease, and directs the Trustees to set apart one of such shares for each child and to collect the rents, interest and income arising from such share and after paying therefrom all charges and expenses connected with the protection and management thereof, to pay the residue of said rents, interest and income unto the child for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of such child, to pay over the principal of such share unto the issue of such child, and in default of issue then living, then to the surviving brothers and sisters and the issue of deceased brothers and sisters of such child, per stirpes, and if there be no such brother or sister or issue then living, then to Alfred S. Brown the sum of \$10,000 thereof, to Frederick Feibel the sum of \$10,000 thereof and all the rest, residue

*Answer of Defendant, Alfred S. Brown.*

and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodore Herrmann.

That it is further provided in and by the tenth clause of said Will that in the event that said C. Theodore Herrmann should not leave him any child or children him surviving, then upon his decease the said rest, residue and remainder so held in trust for his benefit, is given unto Alfred S. Brown the sum of \$10,000 thereof, unto Frederick Feibel the sum of \$10,000 thereof, and all the rest, residue and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodore Herrmann.

This defendant says that he is informed and believes and therefore states that at the time of the making and execution of said Will by the said testator, Henry V. Herrmann, the said C. Theodore Herrmann had two children then living, to wit: Gladys Herrmann, a daughter who was born on November 30, 1897; and Vietor Herrmann, a son who was born on the 24th day of September, 1906; that the said two children were also living at the time of the death of the said testator, Henry V. Herrmann, and are still living; that neither of said two children has ever had issue, nor has ever been married; that the said C. Theodore Herrmann never has had any other children born to him; that the said Frederick Feibel died before the testator, Henry V. Herrmann.

That under and pursuant to the tenth clause of the said Will on the death of the said testator, Henry V. Herrmann, the said Gladys Herrmann and Victor Herrmann became and ever since have been and now are vested with an equitable life interest in equal shares in the residuary estate of

*Answer of Defendant, Alfred S. Brown.*

10 the said testator, Henry V. Herrmann, subject to the equitable life interest therein of the said C. Theodore Herrmann, and upon the death of either the said Gladys Herrmann or Vietor Herrmann, subsequent to the death of the said C. Theodore Herrmann, the share of the principal  
20 of the said residuary estate in which the one so dying has an equitable life interest, will vest in the issue then living of the one so dying; and in default of such issue, then in the survivor of the said Gladys Herrmann and Vietor Herrmann, or his or her issue then living, per stirpes; and if there be no such brother or sister or issue then living, then in Alfred S. Brown \$10,000 thereof and all the rest, residue and remainder thereof in Grace Cranstoun Herrmann, the wife of said  
30 C. Theodore Herrmann, the said Frederick Feibel to whom the said testator directed the payment of \$10,000 thereof having died before the Testator. But in the event that the said C. Theodore Herrmann shall not leave any child or children him surviving, then the sum of \$10,000 of said residuary estate is to be paid over to Alfred S. Brown, and all the rest, residue and remainder thereof to Grace Cranstoun Herrmann, wife of said C. Theodore Herrmann.

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E. S. ATWATER, JR.,  
Solicitor of Defendant Alfred S. Brown.

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**ANSWER OF DEFENDANT, C. THEODORE  
HERRMANN, INDIVIDUALLY.**

Filed April 11, 1928.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>C. THEODORE HERRMANN, as a d m i n i s t r a t o r, e t c., of Henry V. Hermann, dec'd, dec'd,</p> <p style="text-align: right;"><i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>GLADYS H E R R M A N N and others,</p> <p style="text-align: right;"><i>Defendants.</i></p>	<p><i>On Bill, Etc.</i></p> <p><i>Answer of Defendant, C. Theodore Herrmann.</i></p>	<p>10</p> <p>20</p>
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The defendant C. Theodore Herrmann, of Freeport, in the County of Nassau and State of New York, answering the amended bill of complaint in the above-entitled cause, says:

1. He admits Paragraph 1.
2. He admits Paragraph 2.
3. He admits Paragraph 3.
4. He admits Paragraph 4.
5. He admits Paragraph 5.

6. Answering Paragraph 6, he admits the allegations of fact therein, and that the claims as therein stated are made by him, and says that his claim as therein stated is well founded in law and equity, and that he is now presently vested with the whole beneficial interest of all property af-

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*Answer of Defendant, C. Theodore Herrmann.*

fect or attempted to be affected by the 10th clause of the will of Henry V. Herrmann, deceased, and is entitled to immediate possession of all the residuary estate of Henry V. Herrmann, deceased.

10 7. Answering Paragraph 7, he believes that Grace Cranstoun Herrmann, Gladys Herrmann and Vietor Herrmann, deny his contention and claim some interest in the residuary estate of Henry V. Herrmann, deceased. This defendant says, however, that neither the said Grace Cranstoun Herrmann, Gladys Herrmann nor Vietor Herrmann has any interest whatsoever in the estate of Henry V. Herrmann, deceased.

20 8. Answering Paragraph 8, this defendant believes that Alfred S. Brown contends that he is entitled to the sum of ten thousand dollars under the 10th clause of the will of Henry V. Herrmann, deceased. This defendant contends that the said claim is unfounded in law and equity, and that the said Alfred S. Brown is not so entitled.

30 9 Answering Paragraph 9, this defendant admits the allegations of fact therein contained, and says that Dorothy Eileen Herrmann is entitled to share as one of the children of this defendant on the same basis with Gladys Herrmann and Vietor Herrmann, but because neither Gladys Herrmann nor Vietor Herrmann, nor any of the children of this defendant is entitled to any interest in the estate of Henry V. Herrmann, deceased, the said Dorothy Eileen Herrmann is not entitled to any such interest.

10. He admits Paragraph 10.

11. He admits Paragraph 11.

*Answer of Defendant, C. Theodore Herrmann.*

Wherefore this defendant prays that the Court may construe the last will and testament and codicil thereto of Henry V. Herrmann, deceased, and may advise the complainant as prayed for by him, and may adjudge that this defendant's contentions with respect to his interests in the estate of Henry V. Herrmann, deceased, are as herein-  
above asserted by him. 10

T. BRYANT SMITH,  
Solicitor of Defendant, C. Theo-  
dore Herrmann, individually.

W. MORTEN CARDEN,  
Of the New York Bar, of Counsel.

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**ANSWER OF DEFENDANT,  
GRACE CRANSTOUN HERRMANN.**

Filed April 25, 1928.

IN CHANCERY OF NEW JERSEY.

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*Between*

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant,*

*and*

GLADYS HERRMANN and others,  
*Defendants.*

*Answer of  
Defendant,  
Grace Crans-  
toun Herr-  
mann.*

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The defendant, Grace Cranstoun Herrmann, residing in Summit, Union County, New Jersey, answering the complaint of C. Theodore Herrmann, says:

1. She admits the allegations of paragraphs 1 and 2 of the complaint.

2. She denies the allegations of paragraph 3 of the complaint.

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3. She admits that Henry V. Herrmann left him surviving C. Theodore Herrmann, his brother, and that the said C. Theodore Herrmann married this defendant, and that by her the said C. Theodore Herrmann had two children, a daughter, Gladys Herrmann and Vietor Herrmann, a son, both of whom are now of full age; she denies that the said C. Theodore Herrmann prior to the death of said Henry V. Herrmann or at any time has legally divorced this defend-

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*Answer of Grace Cranstoun Herrmann.*

ant, or legally intermarried with Ruth Eileen Herrmann, and she denies that the said C. Theodore Herrmann ever legally adopted as his daughter, Dorothy Eileen Herrmann, and alleges that any proceedings which may have been instituted by said C. Theodore Herrmann were instituted in a foreign domicil fraudulently and that any alleged decree thus obtained by said C. Theodore Herrmann is not recognizable in the State of New Jersey. 10

4. She believes the allegations contained in paragraph 5 of the complaint to be true.

5. She denies the allegations contained in paragraph 6 of the complaint.

6. This defendant in answer to paragraph 7, alleges that the doubts urged by complainant respecting the last will and codicil, and particularly that part complained of, does not genuinely exist, and that the testamentary disposition of the estate made by the deceased in so far as it affects this defendant is that if this defendant survives C. Theodore Herrmann, and their two children Gladys Herrmann and Vietor Herrmann, she takes the residue of the estate upon the death of said C. Theodore Herrmann. 20

7. This defendant admits that the defendant Alfred S. Brown is entitled to the sum of \$10,000 upon the happening of the contingency under which the same is bequeathed to him in and by said last will and codicil. 30

8. This defendant has no knowledge of any person known as Ruth Eileen Herrmann, but denies that such a person is entitled to share as one of the children of said C. Theodore Herrmann on the same basis with Gladys Herrmann 40

*Answer of Grace Cranstoun Herrmann.*

and Vietor Herrmann as one of the children of the said C. Theodore Herrmann, because the said C. Theodore Herrmann has but two children entitled to participate in and by said last will and codicil, viz: the children born to him, Gladys Herrmann and Vietor Herrmann.

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9. This defendant admits that the claims therein set forth respecting her interest under said last will and codicil are inconsistent with the claims set out in the bill of complaint in behalf of C. Theodore Herrmann, and this defendant submits that the claims of said C. Theodore Herrmann individually are falsely urged and without merit, and that the complaint filed by him herein should be dismissed with costs.

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JOSEPH A. DUFFY,  
L. EDWARD HERRMANN,  
Solicitors for and of Counsel with Defendant,  
Grace Cranstoun Herrmann.

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**ANSWER OF DEFENDANTS, GLADYS HERRMANN AND VIETOR HERRMANN.**

Filed April 25, 1928.

IN CHANCERY OF NEW JERSEY.

*Between*

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant,*  
*and*  
GLADYS HERRMANN and others,  
*Defendants.*

*Answer of  
Defendants,  
Gladys Herr-  
mann, and  
Vietor Herr-  
mann.*

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The defendants, Gladys Herrmann and Vietor Herrmann, residing in Summit, Union County, this State, answering the complaint of C. Theodore Herrmann as administrator with the will annexed of Henry V. Herrmann, say:

1. They admit the allegations of paragraphs 1 and 2 of the complaint.

2. They deny the allegation of paragraph 3 of the complaint.

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3. They admit that Henry V. Herrmann left him surviving C. Theodore Herrmann, his brother, and that the said C. Theodore Herrmann married Grace Cranstoun Herrmann, and that these defendants were born of said marriage and that both are of age. They have no knowledge with respect to the other allegations of said paragraph.

4. They believe the allegations of paragraph 5 of the complaint.

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*Answer of Gladys and Vietor Herrmann.*

5. They deny the allegations of paragraph 6 of the complaint.

10 These defendants in answer to paragraph 7 of the complaint allege that the doubts urged by the complainant respecting the said will and codicil, and particularly that part thereof com-  
20 plained of, do not genuinely exist, and that the testamentary disposition of the estate made by the deceased is plain and susceptible of but one valid and legal construction, viz: That testa-  
tor's executors hold the residuary property in trust to pay the net income thereof to C. Theo-  
dore Herrmann, a brother during his life and upon his death to his children then surviving  
equally during their respective lives; and upon their deaths, the share of the estate of each de-  
ceased child shall be paid over to his or her issue then living.

That accordingly the said C. Theodore Herrmann has a vested equitable life estate, and these defendants, in the event that they survive him, will take a vested life interest in equal shares.

30 6. These defendants admit that the defendant, Alfred G. Brown, is entitled to the sum of \$10,000, upon the happening of the contingency which the said is bequeathed to him in and by said will and codicil.

40 7. These defendants do not know, and have no knowledge of any person by the name of Ruth Eileen Herrmann mentioned in paragraph 9 of the complaint. They deny that said Ruth Eileen Herrmann is a child of the said C. Theodore Herrmann, or that she is entitled as one of the children of C. Theodore Herrmann to participate under said will and codicil, on the same basis as these defendants, or that she as one of the chil-

*Answer of Gladys and Vietor Herrmann.*

dren of C. Theodore Herrmann has any interest under the tenth clause of the will of Henry V. Herrmann deceased, or any other clause thereof.

8. These defendants admit that the claims herein set forth respecting the interest of these defendants under said last will and testament and codicil are inconsistent with the claims of complainant set out in the bill of complaint, as in behalf of defendant C. Theodore Herrmann and these defendants submit that the claims as set out in the bill of complaint of said C. Theodore Herrmann individually, are falsely urged and are without merit, and that the complaint filed herein should be dismissed with costs. 10

JOSEPH A. DUFFY, 20  
L. EDWARD HERRMANN,  
Solicitors for and of Counsel with Defendants,  
Gladys and Vietor Herrmann.

Formal Replications filed to each answer.

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*C. Theodore Herrmann, direct.*

**TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

May 31, 1928.

10 *Between*  
 C. THEODORE HERRMANN,  
*Complainant,*  
*and*  
 GLADYS HERRMANN, *et als.,*  
*Defendants.*

20 Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of George W. McCarter for complainant; L. Edward Herrmann for defendant.

C. THEODORE HERRMANN, sworn for complainant.

*Direct examination* by Mr. McCarter.

30 Mr. McCarter: I offer in evidence certified copy under the seal of the Prerogative Court where the will was proved on the last will and testament and codicil of Henry D. Herrmann, deceased.

(Certified copy marked Exhibit C. 1.)

Mr. McCarter: I will say to your Honor that there was offered for probate with the will and codicil a second codicil, probate of which was denied, for some unknown reason to me. The

*C. Theodore Herrmann, direct.*

register of the Prerogative Court has attached that second codicil in here and has just certified the last will and testament and codicils added to that of Henry V. Herrmann, deceased, but I want to have the record show that codicil number 2 was denied probate.

The Court: Why, what was the matter with it? 10

Mr. McCarter: I don't know. I was not in that phase of the case. Mr. Herrmann may recall.

The Court: Very well. We cannot consider it.

Mr. McCarter: No.

I also offer in evidence certified copy of the decree of the Prerogative Court, directing the appointment of the complainant as administrator with the will and codicil annexed. 20

(Decree marked Exhibit C. 2.)

Mr. McCarter: I also offer in evidence, decree of the Prerogative Court dated March 31, 1927, allowing the accounting of the administrator *pendente lite*.

(Decree marked Exhibit C. 3.)

Mr. McCarter: I also offer in evidence certified copy of the letters of administration of the will annexed issued to the complainant. 30

(Letters of administration marked Exhibit C. 4.)

Q Mr. Herrmann, are you the complainant in this case? A I am.

Q What relation was Henry V. Herrmann to you? A A brother.

Q When did he die? A May 13, 1924.

Q How old was he at the date of his death? A Fifty-two. 40

*C. Theodore Herrmann, direct.*

Q Was he married? A No.

Q Had he ever been married? A No.

Q Did he leave any other brothers or sister besides yourself? A No.

Q How old are you, Mr. Herrmann? A Fifty-two.

10 Q Fifty-two now. Have you been married?

A Yes.

Q Have you been married more than once? A Twice.

Q What was the name of your first wife? A Grace Cranston Herrmann.

Q Did you have any children by her? A Two.

Q What were their names? A Vietor and Gladys.

20 Q How old are they? A Vietor is twenty-one, Gladys is thirty.

Q Were they both alive at the date of Henry V. Herrmann's death? A Yes.

Q Did you ever have any other children? A One by adoption.

Q She is Dorothy Eileen Herrmann? A Yes.

30 Q Is she the person named in this order of adoption, by the Surrogate Court of Nassau County, New York, exemplified copy of which I show you? A Yes, sir.

Mr. McCarter: I offer in evidence copy of an order of the Surrogate Court, Nassau County, New York, in the matter of the adoption of Dorothy Eileen Richter by Christian Theodore Herrmann, in which application Ruth Eileen Herrmann joins, said copy being duly exemplified in accordance with the act of Congress—

C. Theodore Herrmann, direct.

Mr. Herrmann: I object.

The Court: Why?

Mr. Herrmann: It has not been shown that the first wife has died; nor has it been shown that he was married a second time validly and it may become an important issue in this case. I don't know.

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Mr. McCarter: You can adopt a child out of a clear sky, if you want to.

The Court: Are you seeking by this adoption paper to establish her as one of the heirs?

Mr. McCarter: If I may say my personal opinion, I don't think she is entitled to it, but we allege in the bill that she claims to be entitled to it. She is an infant. The clerk of the Court has been appointed her guardian *ad litem* and I wish to place before the Court all the facts. My own thought, frankly, is that she, being adopted by someone other than the testator, does not come into the picture at all. She made claim and we wished as fiduciary to have the matter passed upon by the Court and I want to lay the facts before the Court.

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The Court: I wrote an opinion some time ago in which I held—I forget the name of the case now, but it was to the effect that a child adopted in New York could not inherit in New Jersey.

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Mr. McCarter: Well, that may dispose of the matter. I am not speaking for the child.

The Court: I have no objection to letting the paper be introduced in evidence for what it is worth. I do not think it is worth much.

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*C. Theodore Herrmann, cross.*

What is the name of that case, Mr. Herrmann?

Mr. Herrmann: Ahlemeyer *v.* Miller, Vroom 3 of Advanced Reports. It is also 131 Atlantic, 54.

10 The Court: All right. Thank you.

Mr. Herrmann: I think that is the case your Honor refers to. There were two cases and I think this is your Honor's case involving that.

The Court: All right.

Q Do you know Mr. Alfred S. Brown, one of the defendants in this case? A I do.

Q Was he related in any way to your brother?

A No.

20 Q Is he living? A Yes.

Q Grace Cranston Herrmann you have mentioned; is she living? A As far as I know.

Q Were you and she divorced? A Yes.

Q And you subsequently remarried? A Yes.

Q Your present wife is not, however, a defendant in this suit. Can you tell us anything about your late brother, Henry V. Herrmann, the state of his health; was he afflicted with any particular disease? A He had epilepsy.

30 Q And did he know he had it? A Yes.

Q How long did he have it? A Oh, every few weeks he was taken with spells.

Q For how many years did it continue? A Oh, all his life.

*Cross examination by Mr. Herrmann.*

Q You say you are divorced, Mr. Herrmann?

A Yes, sir.

40 Q Where? A Reno, Nevada.

*C. Theodore Herrmann, cross.*

Q When? A In 1922.

Q At the time you were divorced were you not living separate from your wife under an agreement in this State?

Mr. McCarter: I object as absolutely immaterial, your Honor please. 10

The Court: I will allow it.

A I was living apart from her.

Q Under an agreement entered into in a suit instituted by your wife against you? A Yes.

Q And that agreement is still in force? A To a certain extent.

Q It is entirely in force? A In force regarding the financial settlement with her.

Q She is still receiving her money from you under that agreement? A Through other channels, as far as I know. 20

Mr. Herrmann: That is all.

Mr. McCarter: That is the only testimony, your Honor please, I care to offer.

The Court: All right. Mr. Herrmann, have you got any testimony?

Mr. Herrmann: No testimony, sir.

The Court: This gentleman's two children, are they married and have they children? 30

Mr. McCarter: Take the stand again, please.

*Exhibit C. 1.*

C. THEODORE HERRMANN, resumed.

*Examined by Mr. McCarter.*

Q Your two children by your first marriage,  
Mr. Herrmann, Gladys and Vietor, are they  
10 married or single? A Single.

Q Have they ever been married, either of  
them? A No.

Q And have no children? A No.

The Court: All right. I suppose you will  
furnish me with memorandums. How long  
do you want?

Mr. Herrmann: Mine is practically ready.  
I can be ready in a day or two with my  
20 memorandum.

### EXHIBIT C. 1.

#### THE LAST WILL AND TESTAMENT OF

HENRY V. HERRMANN,

of Summit, in the County of Union, and State of  
30 New Jersey.

I, HENRY V. HERMANN, being of sound  
mind and memory, and considering the uncer-  
tainty of this mortal life, do hereby make, pub-  
lish and declare this instrument to be my last will  
and testament, hereby revoking all other wills  
and testaments at any time heretofore by me  
made.

FIRST: I direct that all my just debts and  
40 funeral and testamentary expenses shall be paid

*Exhibit C. 1.*

out of my estate by my executors hereinafter named as soon as practicable after my decease.

SECOND: I direct that my executors hereinafter named shall pay an annuity or annual sum of Five hundred and fifty dollars to MRS. AUGUST WETTER, of the Borough of Brooklyn, City of New York, so long as she shall live; such annuity to be paid in equal monthly installments on the 17th day of each and every month after my decease. And upon the death of the said Mrs. August Wetter, I direct that my said executors shall pay to MISS C. VIETOR, of Brooklyn, in the City of New York, an annuity or annual sum of Six hundred dollars so long as she shall live; such annuity to be paid in equal monthly installments on the 17th day of each and every month after the decease of the said Mrs. August Wetter.

This \$550. is extra, besides the \$560—willed to Mrs. A. Wetter by the late Eliza C. Herrmann.

THIRD: Mrs. Catharine Gerold, of Mettingen, Kingdom of Wurttemberg, Germany, has been already provided for under the will of my mother, Eliza C. Herrman, deceased, and I therefore make no provision for her by this will.

FOURTH: I direct that my executors hereinafter named shall pay an annuity or annual sum of Twenty five dollars to MRS. MARIE RUDOLPH, of Oeschingen, near Tübinger, Wurttemberg, Germany, at or about Christmas time in each year as a Christmas gift, so long as she shall live.

FIFTH: I direct that my executors hereinafter named shall pay an annuity or annual sum of Three hundred eighty dollars to MISS

*Exhibit C. 1.*

CLARA HERRMANN, of Mühlhausen, in Thuringa, Germany, so long as she shall live; such annuity to be paid in November of the preceding year for use during the following year, after my decease.

10 SIXTH: I direct that my executors hereinafter named shall pay an annuity or annual sum of Three hundred dollars to GOTTLIEB HERRMANN, now residing at No. 1237 Canton Avenue, Detroit, Michigan, so long as he shall live; such annuity to be paid in equal monthly installments on the last day of each and every month after my decease.

20 SEVENTH: I direct that my executors hereinafter named shall pay an annuity or annual sum of Four hundred dollars to HENRY O. VIETOR, now residing in Brooklyn, New York, so long as he shall live; such annuity to be paid in equal monthly installments on the last day of each and every month after my decease.

30 EIGHTH: I direct that my executors hereinafter named shall pay an annuity or annual sum of Two hundred dollars to MRS. CHARLES H. VIETOR, now residing in Ridgewood, in the State of New Jersey, so long as she shall live; such annuity to be paid in equal monthly installments on the last day of each and every month after my decease.

40 NINTH: I direct that my executors hereinafter named shall pay an annuity or annual sum of One hundred dollars to MRS. MARGARET J. RUSSEL, now an inmate of the Baptist Home Society, located at No. 116 East 68th Street, in the Borough of Manhattan, City of New York, so long as she shall live; such annuity to be paid in

*Exhibit C. 1.*

equal monthly installments on the last day of each and every month after my decease.

TENTH: All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, of whatsoever nature and description, and wheresoever situated, I do give, devise and bequeath unto my executors hereinafter named, in trust, nevertheless, and for the following uses and purposes, that is to say: That they shall collect and receive the rents, interest and income arising therefrom, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management thereof, they shall pay the residue of said rents, interest and income unto my brother C. THEODORE HERRMANN, during his natural life. And upon his death,

(1) In the event that my said brother, C. Theodor Herrmann, shall leave a child or children him surviving, then I direct my said executors to divide the said rest, residue and remainder of my estate so held in trust for the benefit my said brother, C. Theodor Herrmann, into as many equal shares as there are children of my said brother living at the time of his decease, and to set apart one of such shares for each child of my said brother living at the time of his decease, and to collect and receive the rents, interest and income arising from such share, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management of said share, they shall pay the residue of said rents, interest and

*Exhibit C. 1.*

income unto the child of my said brother for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of the child for whose benefit the said share shall have been so set apart, my said executors shall pay over the principal of the said share unto the issue of the said child for whose benefit the said share shall have been so set apart, to be divided equally among such issue share and share alike, for their own use and benefit absolutely and forever; and in default of such issue then living, then the principal of said share shall be paid over unto the surviving brothers and sisters of such deceased child, and the issue of any deceased brothers and sisters of such deceased child, share and share alike, for their own use and benefit absolutely and forever; such issue, however, to take the share which the parent would have taken if living, and if there be no brother or sister of such deceased child, or issue of any deceased brother or sister of such deceased child, then living, then the principal of said share shall be paid over as follows, viz.: Unto ALFRED S. BROWN, of the City of New York, the sum of Ten thousand dollars thereof, and unto FREDERICK FEIBEL, of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto GRACE CRANSTOUN HERRMANN, wife of the said C. Theodor Herrmann, for her own use and benefit absolutely and forever.

(2) In the event that my said brother, C. Theodor Herrmann, shall not leave any child or children him surviving, then upon his decease, I do give, devise and bequeath the said rest, residue and remainder of my estate so held in trust

*Exhibit C. 1.*

for his benefit, as follows: Unto ALFRED S. BROWN, of the City of New York, the sum of Ten thousand dollars thereof, and unto FREDERICK FEIBEL, of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto GRACE CRANSTOUN HERRMANN, wife of the said C. Theodore Herrmann, for her own use and benefit absolutely and forever. 10

ELEVENTH: I nominate, constitute and appoint ALFRED S. BROWN, of the City of New York, and FREDERICK FEIBEL, of Jersey City Heights, New Jersey, to be the executors of and trustees under this my last will and testament.

TWELFTH: I authorize and empower my said executors and trustees, or that one of them who may qualify and act as such and the survivor of them, to grant, bargain, sell and convey any and all lands and real estate owned by me, or to which I may be entitled, or in which I may have any interest, at the time of my decease, and to execute and deliver good and sufficient deeds of conveyance to the purchasers thereof, and to apply the proceeds of such sales in conformity with the provisions of this my last will and testament. 20 30

LASTLY: I request that the funeral services over my remains shall be private, and in no event to be held in Summit, New Jersey, and that there be no notice of my death published in any newspaper. And I also request that my body be cremated and the ashes laid at the head or at the foot of the graves of the two infants in my father's family plot in Greenwood Cemetery, Brooklyn, New York. 40

*Exhibit C. 1.*

In WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this sixteenth day of January, in the year of nineteen hundred and eleven.

Henry V. Herrmann (Seal)

Signed, sealed, published and declared by the above named Henry V. Herrmann, to be his last will and testament, in the presence of each of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

J. Lynch Pendergast, 60 West 76 St., New York City.

Fred M. McCallum, 266 Arlington Ave., Jersey City, N. J.

Jos. Frankenthal, 31 Elinor Place, Yonkers, N. Y.

CODICIL TO THE LAST WILL AND TESTAMENT OF HENRY V. HERRMANN

I, Henry V. Herrmann, being of age, sane and always unmarried, do hereby also will,

1. That this revokes all previous Codicils to my Will and Testament.

2. In 1911 I transferred my savings-bank book to my Aunt, Miss Caroline Vietor, of Brooklyn, who agrees to pay my funeral charges from part of the proceeds of said Bank-book, the remaining balance of which is to be hers exclusively.

Henry V.  
Herrmann

3. I herewith leave One Thousand Dollars (\$1,000.) of my Estate to "Greenwood" Cemetery, Brooklyn, so that the graves of my parents, Lot No. 21422, Sec. 124, be kept in perpetual order, from the proceeds of said money.

Henry V.

*Exhibit C. 1.*

4. As the death of anybody named in my Testament cancels the bequest to them, please note that the following named in my last will have already died, —

Mrs. Marie Rudolph, of Oeschingen, near Tübingen, Wurttemberg, Germany, named in Article No. 4;

10

Mrs. Margaret J. Russell of New York, named in Article No. 9; and

Frederick Feibel of Jersey City Heights, named in Article No. 10,

and my bequests to them are canceled.

5. My trifle of Real Estate in Oeschingen, near Tubingen, Württemberg, Germany, is to be left for the sole use of Mrs. Roesle Wolff (daughter of Mrs. Marie Rudolph, deceased), there residing.

20

6. Article No. 2 of my last Will & Testament regarding my Aunt, Mrs. Emily V. Wetter, of Brooklyn, is altered as follows,—

Instead of Five Hundred Fifty Dollars annual income, I leave her One Thousand Dollars, (\$1000.) annually in equal monthly payments, while she shall live. (This annual total, of \$1000. from me is additional to and distinct from the Five Hundred Sixty Dollars annually, which she receives from the Estate of Eliza C. Hermann, deceased).

30

7. Article No. 8 of my last Will & Testament regarding my Aunt, Mrs. Chas. H. Vietor, of Ridgewood, N. Jersey, is altered as follows—

Instead of Two Hundred Dollars annual income, I leave her Four Hundred Dollars, (\$400.) annually, in equal monthly payments, while she shall live.

40

*Exhibit C. 1.*

My object also is that my Aunts shall receive their annuities free of any delay or charge whatever and any taxes upon same to be paid by my Estate for them.

10 I also leave my Uncle, Mr. Chas. H. Vietor, of Ridgewood, N. Jersey, Four Hundred Dollars, (\$400.) annually, while he shall live.

8. Article No. 7 of my last Will & Testament regarding my Uncle, Mr. Henry Otto Vietor, of Brooklyn, is altered as follows, —

Instead of Four Hundred Dollars annually, it is herewith reduced to Two Hundred Dollars (\$200.) annually, (as his circumstances are better).

20 9. To my old friends I leave as follows,—  
Joseph Hirsch, of New York,

Albert van Praag, of Brooklyn and Frederick Manjer McCallum, of Jersey City,— to each of them One Thousand Dollars, net, in cash, and to

Alfred S. Brown, of New York (my lawyer) to Joseph Frankenthal, of Yonkers (my lawyer), and to my cousin, Mary T. Vietor, of Ridgewood, New Jersey, to each of them One Thousand Five Hundred Dollars net, in cash.

30 10. I bequeath to young Catharine Doyle, of Brooklyn, a Trust Fund sufficient to produce the sum of Two Hundred Dollars of annual income, for her sole benefit, — (to be established by my Executor). The principal of said Trust Fund, amounting to Five Thousand Dollars, or a trifle more, is to be held for her by a responsible Trust Company and invested in gilt-edged, long-term, senior bonds (such as New York Central & H. R. R. R. 3½% bonds due in 1997, also Central R. R. of New Jersey 5% bonds due in 1987; also Chi-

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*Exhibit C. 1.*

cago & North - Western R. R. 3½% bonds, due in 1987, or equivalent).

Henry V.  
Herrmann

It is better to have Catharine Doyle's interest coupons, from the above Trust Fund, due to mature in the same month, thus enabling her to receive this Two Hundred Dollars of annual income in the form of only two payments annually.

10

Catharine Doyle's bonds of said Trust Fund must consist of at least three separate issues of securities (so as not to take too much risk on any one security, but to divide the risk carefully).

Also a fund from my Estate, not to exceed One Thousand Dollars, (\$1000.) to the said Trust-Company, the combined annual - Proceeds and also the principal of which shall together pay the said Company's charges for its Trust as long as Catharine Doyle lives.

20

Catharine Doyle's Trust-Fund to be invested for a longer period than her natural life, but she shall have the right to dispose of the said principal at her death, (through a Testament of her own), though while she lives she is only to receive the income proceeds from the same.

My death-succession tax upon Catharine Doyle's Trust Fund, to be paid by my Estate.

This money is left to her as an incentive to her self-help.

30

11. In case my personal H. V. Herrmann Bank Account contains but a trifle of cash, upon my decease, the money in question, (in such case), will be found invested in good investments, (with memoranda attached, explaining each transaction). These to be sold, in order to obtain the cash.

Sell the securities listed as reserved to pay my \$13,700.- loan at the Trust Company, as soon as

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*Exhibit C. 1.*

they rise enough to net that amount, and liquidate the loan in question with the proceeds.

10 Sell my German American, (Fire), Insurance Co. stock, as soon as it rises to 600% bid, and re-invest the proceeds in bonds, resting satisfied to receive only about \$840.- annual income, (when, re-invested), instead of attempting to obtain as large an income as the dividends of said stock produced, i. e.-\$1050-yearly, and only buy gilt-edged investments.

Witness my hand and seal:—

New York, February 15, 1915.

Witnesses: (Seal) Henry V. Herrmann

(Seal) Jos. F. Eastmond

(Seal) C. M. Purdy

20 (Seal) Frank L. Dunnell

(From here on not probated including this page).

## Codicil No. 2

of and to the Last Will & Testament of Henry V. Herrmann

30 I, Henry V. Herrmann, of Summit, County of Union, State of New Jersey, being of sound mind and memory and always unmarried, do hereby make, publish and declare this instrument to be the Second Codicil of my last Will & Testament dated January 16, 1911.

40 1. Mr. & Mrs. Chas. H. Vietor, and Mr. Gottlieb Herrmann, all having died since my original Codicil dated February 15, 1915, all the references to them, in my said Codicil, and in my last Will and Testament dated January 11, 1911, become void.

*Exhibit C. 1.*Henry V.  
Herrmann

2. I herewith will that Mrs. Rosle Wolf, of Oeschinger, (near Tübingen), Wurttemberg, Germany, shall receive Fifty Dollars annually near Christmas, the same to be remitted to her each November in a check for German Marks, or equivalent, as long as she shall live.

3. Dr. Edward W. Vietor, of Brooklyn, N. Y., is to receive a Legacy at my death, from my Estate, of One Thousand Dollars, due him for long continued medical treatment of myself.

4. I herewith explicitly revoke and cancel Section No. 6 of my Codicil of February 15, 1915, referring to my Aunt Emily V. Wetter, (i. e. Mrs. August Wetter), of the Borough of Brooklyn, City of New York and re-confirm fully the Section Second of my last Will & Testament dated January 16, 1911, by which she is to receive Five Hundred and Fifty Dollars annually, as long as she shall live, from my Estate. (This above is besides the \$280.—and \$2.80—that she receives from the Estate of her sister, Eliza C. Herrmann, deceased).

Aside from the above I now herewith explicit by Will to the said Mrs. August Wetter, of the Borough of Brooklyn, City of New York, the sum of Eight Hundred and Ninety Dollars annually, so long as she shall live, such annuity to be paid in equal monthly installments, on the first day of each and every month after my decease.

(That is, she is to receive, all together \$2000. annually,—i. e. \$560. — from the Estate of the late Eliza C. Herrmann and \$1440. — from my own Estate).

And upon the death of the said Mrs. August Wetter, I direct that my said Executors shall pay to my Aunt, Miss Caroline, Vietor, of the Bor-

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*Exhibit C. 1.*

Henry V.  
Herrmann

ough of Brooklyn, City of New York, an annuity of One Thousand One Hundred and Twenty Dollars so long, as she shall live, such annuity to be paid in equal monthly installments on the first day of each and every month, after the decease of the said Mrs. August Wetter.

(That is this sum of \$1120,—is additional to the \$600.—which she is to receive under Section Second of my last Will & Testament dated January 16, 1911, which Section, (as stated), I herewith fully reconfirm, so that she is to receive a total annuity of One Thousand Seven Hundred and Twenty Dollars together, from my Estate).

And I explicitly will that my said Aunts receive their said annuities free from any delays, charges or taxes whatever, any such taxes or charges to be paid by my Estate for them.

5. In Section Tenth of my Last Will & Testament of January 16, 1911, I willed that upon the deaths of respectively, my brother C. Theodor Herrmann, or of his child or children, or of any "brother or sister of such deceased child, then living, then the principal of said share shall be paid over as follows: Unto Alfred S. Brown of the City of New York, the sum of Ten Thousand dollars thereof, and unto Frederick Feibel, of Jersey City Heights, New Jersey, the sum of Ten Thousand dollars thereof, and all the rest, residue and remainder thereof unto Grace Cranstoun Herrman, for her own use and benefit absolutely and forever."

The above is herewith explicitly altered by me to the following extent,—

(a) the above-named, Frederick Feibel, of Jersey City Heights, New Jersey, has died and the said Ten Thousand Dollars shall be paid to

*Exhibit C. 1.*

Joseph Frankenthal, of New York City, for his own use and benefit absolutely and forever, and

(b) None of the rest, residue and remainder thereof shall ever be paid over to Grace Cranstoun, Herrmann, now the separated wife of the said C. Theodore Herrmann,—as I explicitly do not wish her ever to receive any of my Estate,— but such share as Grace Cranstoun Herrmann would have received under the said Section Tenth of my last Will & Testament, dated January 16, 1911, shall instead go, the one-half of said share to Mrs. Rosle Wolf of Oeschingen, near Tübingen, Wuerttemberg, Germany, and the other one half to Wilhelm Gerold, of Alsbach, Hesse, Germany,—in such a finality as the said series of prior deaths.

Henry V.  
Herrmann

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(6) Section No. 11 of my Codicil dated February 15, 1915, refers, in part, to my German American Insurance Co. stock, — the title of which Company since then has been altered to the name of the Great American Insurance Co., — and it is now only necessary to obtain Five Hundred and Sixty Dollars in order to equalize the full present annual income of the said stock, when selling and re-investing the principal of the same.

20

Beginning 1923 A. D. The Great American Ins. Co., at end of 1922, gave a gift of 8 more shares of stock to Estate of Theo. Herrmann. Hence the income which was \$1050. and later \$560., now is \$688,—which it is desirable to obtain when re-investing. Correct.

30

Harry V. Herrmann

Lastly. Under Section Eleven of my last Will & Testament dated January 16, 1911, one of my Executors therein named, Frederick Feibel, of Jersey City Heights, New Jersey, has died and I

40

*Exhibit C. 1.*

hereby Will that my Executor be a reliable Trust Company, preferably the New Jersey Title Guarantee & Trust Co., of Jersey City.

10 Although Mr. Alfres S. Brown does not desire to do so, I herewith request him to become my Executor until such time as my Estate can be completed and transferred to the Trust Co.

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In Witness Whereof I have hereunto set my hand and affixed my seal this fifteenth day of March, in the year Nineteen Hundred and Twenty Two.

Henry V. Herrmann (Seal)

20 Signed, sealed, published and delcared by the above-named Henry V. Herrmann to be his last Codicil to and of his last Will & Testament dated January 16, 1911, in the presence of each of us, who, at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

(Seal) Jos. F. Eastmond 128 Pearl St. New York

(Seal) Jacob D. Fowler 89 Front St. New York City

30 (Seal) Louis W. Conselyea 89 Front St. New York City.

Probated December 4, 1925.

*Exhibit C. 1.*

NEW JERSEY PREROGATIVE COURT

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I, JOSEPH F. S. FITZPATRICK, Register of the Prerogative Court of the State of New Jersey, DO HEREBY CERTIFY that the foregoing is a true copy of Last Will and Testament and Codicils thereto, of HENRY V. HERRMANN, Deceased, 10

as the same is taken from and compared with the original Probated December 4, 1925, and now remaining on file and of record in my office

(SEAL) Witness my hand and the Seal of the Prerogative Court at Trenton this Twenty-fourth day of May, A. D. 1928.

JOSEPH F. S. FITZPATRICK, 20  
Register.

30

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## EXHIBIT C. 2.

## NEW JERSEY PREROGATIVE COURT.

10	IN THE MATTER OF THE PROBATE OF THE ALLEGED WILL AND CODICILS OF HENRY V. HERR- MANN, <div style="text-align: right; padding-right: 20px;"><i>Deceased.</i></div>	}	<i>Decree on Remittitur.</i>
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20 An appeal having been duly taken from part of the decree for probate heretofore made herein on the fourth day of December, 1925, and upon reading and filing the remittitur from the Court of Errors and Appeals,

It is, on this twenty-seventh day of December, 1926, on motion of Messrs. McCarter & English, proctors of C. Theodore Herrmann, ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

30 1. The decree of the Court of Errors and Appeals made on the eighteenth day of October, 1926, upon the appeal from the aforesaid decree of this Court, be and it hereby is made the decree of this Court.

2. So much of the decree of this Court made on the fourth day of December, 1925, as decrees the grant of letters of administration with the Will annexed, upon the goods, chattels and credits of Henry V. Herrmann, deceased, to Gladys Herrmann, be and the same hereby is set aside.

40 3. Letters of administration, with the Will annexed, upon all and singular the goods, chattels

*Exhibit C. 2.*

and credits of the said Henry V. Herrmann, deceased, be and the same hereby are granted to C. Theodore Herrmann, upon his giving bond to the Ordinary in the sum of ONE HUNDRED SEVENTY-FIVE THOUSAND DOLLARS, conditioned according to law.

4. The New Jersey Title Guarantee and Trust Company as Administrator *pendente lite* of Henry V. Herrmann, Deceased, do forthwith pay out of the estate in its hands as such Administrator, the following counsel fees allowed by order of the Court of Errors and Appeals, that is to say: To Julian C. Harrison, a counsel fee of Five Hundred Dollars (\$500.00); to McCarter & English, a counsel fee of Five Hundred Dollars (\$500.00); and to L. Edward Herrmann, Joseph A. Duffy, and John L. Keller, a counsel fee of Seven Hundred and Fifty Dollars (\$750.00) to be divided equally between them.

5. The said temporary administrator do forthwith account to this Court, with all convenient speed, according to the rules and practice of this Court.

E. R. WALKER,

O.

Respectfully advised

JOHN BENTLEY

V. O.

Endorsed:

“Filed Dec 28 1926

JOSEPH F. S. FITZPATRICK, REGISTER.”

*Exhibit C. 2.*

NEW JERSEY PREROGATIVE COURT

10 I, JOSEPH F. S. FITZPATRICK, Register of the Prerogative Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of Decree on Remittitur, In the Matter of the Probate of the Alleged Will and Codicils of Henry V. Herrmann, Deceased, as the same is taken from and compared with the original Filed December 28, 1926, and now remaining on file and of record in my office.

WITNESS my hand and the Seal of the Prerogative Court at Trenton this Twenty-fourth day of May, A. D. 1928.

20 JOSEPH F. S. FITZPATRICK,  
(SEAL) Register.

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## EXHIBIT C. 3.

## PREROGATIVE COURT OF NEW JERSEY.

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IN THE MATTER OF THE PROBATE  
OF THE ALLEGED WILL AND  
CODICILS OF HENRY V. HERR-  
MANN, DECEASED.

---

*Decree  
Allowing  
Account  
of Adminis-  
trator Pen-  
dente Lite.*

10

The Register having audited and stated the final account of The New Jersey Title Guarantee and Trust Company, administrator pendente lite appointed by this Court, of the Estate of Henry V. Herrmann, deceased, and having placed the same on the files of his office twenty days previous to the fourteenth day of March, A. D., nineteen hundred and twenty-seven, and having on the last date aforesaid reported the same to this court for allowance and settlement, and it having been proved to the satisfaction of this court that notice of its intention to settle the said account on said fourteenth day of March, A. D., nineteen hundred and twenty-seven, in this court, was given by said accountant according to law, and on said date the matter having been con-  
tinued by order of this court until this day:

20

30

And C. Theodore Herrmann, one of the beneficiaries under the will of said Henry V. Herrmann, deceased, individually and as administrator with the will annexed of the said decedent, having filed two certain exceptions to said account as follows:

“1. For that the said accountant has not charged itself with the sum of Five Thousand Dollars (\$5000) heretofore received by

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*Exhibit C. 3.*

it from the estate of Eliza C. Herrmann, deceased, as commissions allowed to Henry V. Herrmann, as executor of Eliza C. Herrmann and received by the accountant as administrator pendente lite of the said deceased executor.

- 10           2. For that the said accountant has not charged itself with the sum of Four Thousand Seven Hundred and Fifty Dollars (\$4750) allowed to Joseph A. Duffy, Collins & Corbin, Julian C. Harrison and John D. Craven as counsel fee for services alleged to have been rendered the estate of Eliza C. Herrmann, deceased.”

20           And Messrs. Collins & Corbin, appearing as counsel for said accountant, Messrs. McCarter & English, as counsel for said Exceptant, Joseph A. Duffy, Esq., counsel for Grace Cranstoun Herrmann and Gladys Herrmann, and L. Edward Herrmann, as guardian ad litem for Vietor Herrmann, and the court having heard the arguments of counsel and considered the said exceptions, and being of opinion that the same are not well taken and should be overruled; and having examined the said account and the vouchers and receipts for payments and disbursements claimed  
30           therein and having found the same to be correct in all particulars;

          It Is, on this thirty-first day of March, A. D., nineteen hundred and twenty-seven, ORDERED, ADJUDGED and DECREED, that said exceptions be and the same are hereby overruled, and that said account be in all things allowed as reported, and that there is a balance remaining in the hands of said accountant, amounting to the sum of \$133,764.22 of principal and \$4,317.62 of  
40           income to be disposed of according to law; and

*Exhibit C. 3.*

IT IS further ordered that the legacies set forth in paragraph 9 of the codicil to the will of said decedent, to be paid to Joseph Hirsch, Frederick M. McCallum, Albert Van Praag, Alfred S. Brown, Joseph Frankenthal, Mary T. Vietor, be paid in full without any deductions for inheritance taxes and that the accountant pay any part thereof, which has not been paid, from the aforesaid balance of principal; and 10

IT IS, further ordered that from the aforesaid balance, the said accountant pay the Register of this Court his fees and commissions allowed by law and that said accountant be allowed the sum of \$1690.56 as and for its commissions on principal, in addition to the sum heretofore allowed accountant on account of its said commissions, by a decree of this court, dated December 4, 1925, and \$921.35 as and for its commissions on income shown in said account, and that a counsel fee of \$1500.00 be allowed to Messrs. Collins & Corbin, proctors and counsel for said accountant; a counsel fee of \$500.00 to L. Edward Herrmann, guardian ad litem of Vietor Herrmann; a counsel fee of \$500. to Joseph A. Duffy, proctor and counsel for Grace Cranstoun Herrmann and Gladys Herrmann; and a counsel fee of \$500. to Messrs. McCarter & English, proctors and counsel for C. Theodore Herrmann. And said accountant is further ordered to pay said commissions on principal and counsel fees out of principal now in its hands as aforesaid and said commissions on income out of the balance of income now in its hands as aforesaid, and if necessary, it is hereby directed to sell so much of the securities in its hands, as said administrator, as may be necessary to pay said commissions on principal and counsel fees, and it is further ordered that after making 20 30 40

*Exhibit C. 3.*

10 said payments out of said balance remaining,  
that the said accountant turn over to C. Theodore  
Herrmann, the administrator with the will an-  
nexed of Henry V. Herrmann, the balance re-  
maining in its hands, together with any accumu-  
lation of income, which may have accumulated  
since the filing of the account herein, after de-  
ducting 5% therefrom for its commissions to him,  
as life tenant under the will of Henry V. Herr-  
mann, deceased.

E. R. WALKER  
Ordinary.

Respectfully advised:

JOHN BENTLEY  
V. O.

20 Endorsed: "Filed Apr. 9, 1927  
JOSEPH F. S. FITZPATRICK, REGISTER."

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*Exhibit C. 3.*

NEW JERSEY PREROGATIVE COURT.

I, JOSEPH F. S. FITZPATRICK, Register of the Prerogative Court of the State of New Jersey, Do HEREBY CERTIFY that the foregoing is a true copy of Decree Allowing Account of Administrator Pendente Lite, In the matter of the Probate of the Alleged Will and Codicils of Henry V. Herrmann, Deceased, as the same is taken from and compared with the original Filed April 9, 1927, and now remaining on file and of record in my office. 10

WITNESS my hand and the Seal of the Prerogative Court at Trenton this  
(SEAL) Twenty-fourth day of May, A. D. 1928.

JOSEPH F. S. FITZPATRICK, 20  
Register.

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**EXHIBIT C. 4.**

## STATE OF NEW JERSEY

(STATE SEAL)

Department of State.

10

## PREROGATIVE COURT.

To All to Whom these Presents Shall Come:—

## GREETING:

WHEREAS, so much of the decree of the Prerogative Court, made on the Fourth day of December, 1925, as decrees the grant of letters of administration, with the Will annexed, upon the goods, chattels and credits of said HENRY V. HERRMANN, Deceased, to Gladys Herrmann, was set

20 aside;

I, EDWIN ROBERT WALKER, Ordinary or Surrogate General and Judge of the Prerogative Court of the State of New Jersey, DO HEREBY appoint C. THEODORE HERRMANN, administrator of all and singular the goods, chattels and credits of the said deceased, who is duly authorized to administer the same agreeably to said Will.

30 WITNESS my hand and the Seal of the Prerogative Court, at Trenton, this Thirty-first day of December, A. D., nineteen hundred and twenty-six.

JOSEPH F. S. FITZPATRICK,

(SEAL)

Register.

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*Exhibit C. 4.*

NEW JERSEY PREROGATIVE COURT.

I, JOSEPH F. S. FITZPATRICK, Register of the Prerogative Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of Letters of Administration with the Will annexed, issued to C. Theodore Herrmann, in the matter of the Estate of Henry V. Herrmann, Deceased, as the same is taken from and compared with the original Issued December 31, 1926, and now remaining on file and of record in my office. 10

WITNESS my hand and the Seal of the Prerogative Court at Trenton this Twenty-fourth day of May, A. D. 1928.

(SEAL) JOSEPH F. S. FITZPATRICK, 20  
Register.

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**OPINION OF VICE CHANCELLOR.**

Filed June 16, 1928.

IN CHANCERY OF NEW JERSEY.

10 *Between*

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant,*

*and*

GLADYS HERRMANN, and  
others,

*Defendants.*

*Opinion.*

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McCarter & English for complainant.

W. Morton Carden for C. Theodore Herrmann.

L. Edward Herrmann for defendants.

Edward S. Atwater, Jr., for Alfred S. Brown.

CHURCH, V.-C.

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This is a bill for the construction of the will and codicil of Henry V. Herrmann, who died on May 13, 1924. The tenth clause of the will, which is the only one in dispute, reads as follows:

“All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, of whatsoever nature and description, and where-soever situated, I do give, devise and be-queath unto my executors, hereinafter named, in trust, nevertheless, and for the following uses and purposes, that is to say:

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*Opinion of Vice-Chancellor.*

That they shall collect and receive the rents, interest and income arising therefrom, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management thereof, they shall pay the residue of said rents, interest and income unto my brother C. THEODOR HERRMANN, during his natural life, And upon his death 10

(1) In the event that my said brother C. Theodor Herrmann, shall leave a child or children him surviving, then I direct my said executors to divide the said rest, residue and remainder of my estate so held in trust for the benefit of my said brother C. Theodor Herrman, into as many equal shares as there are children of my said brother living at the time of his decease, and to set apart one of such shares for each child of my said brother living at the time of his decease, and to collect and receive the rents, interest and income arising from such share, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management of said share, they shall pay the residue of said rents, interest and income unto the child of my said brother for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of the child for whose benefit the said share shall have been so set apart, my said executors shall pay over the principal of the said share unto the issue of the said child for whose benefit the said share shall have been 20 30 40

*Opinion of Vice-Chancellor.*

- so set apart, to be divided equally among such issue, share and share alike, for their own use and benefit, absolutely and forever; and in default of such issue then living, then the principal of said share shall be paid over unto the surviving brothers and sisters of such deceased child, and the issue of any deceased brothers and sisters of such deceased child, share and share alike, for their own use and benefit, absolutely and forever; such issue, however, to take the share which the parent would have taken if living; and if there be no brother or sister of such deceased child, or issue of any deceased brother or sister of such deceased child, then living, then the principal of said share shall be paid over as follows, viz: Unto Alfred S. Brown of the City of New York, the sum of Ten thousand dollars thereof, and to Frederick Feibel of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodor Herrmann for her own use and benefit absolutely and forever.
- (2) In the event that my said brother C. Theodor Herrmann shall not leave any child or children him surviving, then upon his decease, I do give, devise and bequeath the said rest, residue and remainder of my estate so held in trust for his benefit, as follows: Unto Alfred S. Brown, of the City of New York, the sum of Ten thousand dollars thereof, and unto Frederick Feibel of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, resi-

*Opinion of Vice-Chancellor.*

due and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodor Herrmann, for her own use and benefit absolutely and forever.”

It will be seen therefore that the residuary estate is given to the executors as trustees for the following purposes: to pay to C. Theodor Herrmann during his lifetime the income; at his death they are to divide the estate into as many equal shares as there are children of his living at his decease, and to pay the income to these children during their lives; at their death, the principal is to go to their children. Failing issue of the children of C. Theodor, the residue to go to Grace C. Herrmann absolutely, subject to two bequests of \$10,000. One of these to Frederick Feibel has lapsed because of his death before that of the testator.

When testator died there were surviving him his brother C. Theodor Herrmann and two children of C. Theodor; Gladys and Vietor, now 30 and 21 years old respectively, both unmarried, and Grace C. Herrmann. It seems to be admitted by all parties to the controversy, that C. Theodor Herrmann has a vested life interest in possession. His claim is that all the gifts over after his life estate are void as in violation of the rule against perpetuities; and that therefore there is a merger in him of his life interest and his interest as sole next of kin and heir at law because of intestacy; therefore he receives the fee.

It will be observed that the will gives the residuary estate to the executors in trust, first to pay the income to C. Theodore Herrmann for life; on his death the residuary estate is to be

*Opinion of Vice-Chancellor.*

divided into as many shares as there are children of his living at his death, and to pay the income of each share to the child for whom the share is set apart; and at that child's death to pay the principal over to that child's issue, or in default of issue, to the survivor. If there  
 10 be no survivor or issue of survivor, then to Grace C. Herrmann.

The trustees therefore have the legal title; C. Theodor has a life interest therein, and the children, Gladys and Vietor, also have a life interest subject to their father's life interest. So that as to each share there is a trust and a suspension for only two lives in being at testator's death. This is not against the statute of perpetuities.

20 The birth of another child to C. Theodor Herrmann would not invalidate the shares of Gladys and Vietor. It would merely diminish the amount of their income, as, for example, there would be three shares instead of two. The case of Mount 185 N. Y. 162, seems to be in point.

Chief Justice Cullen in his opinion says:

30 "The testator's sister is now seventy-six years old. The testator's nephew, Richard H. Mount, is over fifty years old. He had at the execution of the Will two children who still survive, Edward, now aged 30, and Harold aged 23. His wife, the mother of these two children, is still living. The elder son is married and pending this appeal has had a child born. The younger is unmarried. Bearing in mind the age of his wife and that of the children, the strong probability is that Richard Mount will have no other children by his present wife. She may  
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*Opinion of Vice-Chancellor.*

die, he may marry again and have children. But for such an event to have any bearing on the present controversy, the child must be born before the present equitable life tenant, a lady seventy six years old, dies. Therefore, the chances are decidedly against such an occurrence. If it does not happen, and the two sons of the nephew now living survive their grandaunt, there will be only a single question to determine; that is whether the direction in the Will to divide the corpus into shares for all the children of the testatrix's nephew, which would include children who might be born after her death, renders the provision, so far as it applies to children living at her death, illegal and void. If this provision is valid as to those children, no other question can arise under the will, because the remainders given on the death of those children are clearly good. We are inclined to the view that this question is a comparatively simple one \* \* \* (p. 169)

If the trust was to continue *in solido* for the benefit of all the nephew's children who might survive their grandaunt, it would be void, not only because it might depend on lives not in being at the death of the testatrix, but also because its continuance might last over a greater number of lives than that prescribed by the Statute. But on the death of the sister, the corpus is to be divided into several shares according to the number of children the nephew may then have, including the issue of any deceased child. The trust as to each share terminates with the life of the beneficiary. Therefore, as to the share of a child of the testatrix's

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*Opinion of Vice-Chancellor.*

nephew living at her death, the suspension is for two lives authorized by statute, to wit, the testatrix's sister, and the equitable life tenant of the particular share. It matters not that the whole corpus is not released at the termination of any two specified lives.

10 An entire estate may be held in trust for one beneficiary for life, and on his death may then be divided into shares, each of which may be held in trust for a second separate life (citing cases). It is not at all necessary that the testator create a single trust in a single piece of property. He may create separate trusts in undivided interests. The validity of each of such trusts is dependent solely on its terms and not on the fate or

20 validity of the others. If, therefore, the nephew should have children born after the testatrix's death and surviving her sister, their existence would serve to cut down the shares to be held in trust for the children living at the testatrix's decease. But we do not see how the invalidity of the testamentary disposition in favor of such after-born children can affect the legality of the trust in favor of the existing children."

30 I therefore find that the devise to C. Theodor Herrmann is for life only and that the life estates of Gladys and Vietor became vested at the death of the testator.

It follows that the claim of C. Theodor that he is now vested with the whole beneficial interest in the residuary estate is without merit.

It is urged that the will provides in effect that if there be other children in addition to those now in being, they shall have life interests with

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*Opinion of Vice-Chancellor.*

remainder to their children. This, it is contended, would violate the statute of perpetuities because there might not be a vesting within twenty-one years after the death of living persons.

This being so, it is urged that the whole tenth clause above quoted must fall because the provisions are so intermingled as to be inseparable. I believe that this contention is not sound. The purpose of the will is plain. The testator was unmarried and he desired to provide for his brother and his brother's family. This he did as far as he, at the time of drawing the will, was able. He remembered his brother and his brother's children, and he evidently desired his estate to descend in the blood of his brother. Failing any issue of his brother's children, he left the residue to his brother's wife. This is a normal method of disposition, and to give all the property now to the brother would be in my opinion clearly against the testator's wishes. As I have above indicated, the life interests of his brother, and his brother's now living children, are perfectly valid and clearly distinguishable from the rest of the clause.

It does not seem to me that at this time this court is called upon to decide what would be the effect on the Will if C. Theodor had other children, or if he died leaving none surviving him, or if they died without issue, or if Grace C. Herrmann, the final remainderman, died in the life time of the life tenants.

These are questions of no present concern. They may never come up for determination.

The will is valid as to all parties now in being and to construe it in regard to those not now

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*Opinion of Vice-Chancellor.*

in existence is unnecessary, and might be prejudicial to them should they ever come into existence.

10 “A Court of Equity will not take jurisdiction of a suit for a construction of a will unless it can afford immediate relief. It will not undertake, where there is no matter in dispute, to declare future rights, nor will it ever undertake to decide upon and determine contingencies which may never arise, unless such determination is necessary for the decision of some immediate relief to be granted, and which it can enforce by a decree.” 40 Cyc. 1845-46.

In the case of *Ogden v. McLane*, 73 N. J. Equity, 159, Vice-Chancellor Stevenson, said:

20 “This court will not instruct trustees in regard to their duty with respect to the payment or transfer of the trust estate in their hands until the time for such payment and transfer has arrived. When the time to act arrives, the parties who then shall be affected by the action of the trustee, are entitled to be heard; they are the parties who argue the question, the determination of which directly affects their interests.”

30 I will advise a decree in accordance with these conclusions.

**FINAL DECREE.**

Filed June 26, 1928.

IN CHANCERY OF NEW JERSEY.

*Between*

C. THEODORE HERRMANN, as  
 administrator, etc., of Henry  
 V. Herrmann, deceased,  
*Complainant,*

*and*

GLADYS HERRMANN, and  
 others,  
*Defendants.*

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66/415

*On Bill, etc.**Final Decree.*

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This cause coming on to be heard on the 31st day of May, 1928, in the presence of George W. C. McCarter, Esquire, of counsel with the complainant; W. Morton Carden, Esquire, of the New York Bar, admitted *pro hac vice*, of counsel with the defendant C. Theodore Herrmann individually; L. Edward Herrmann, Esquire, of counsel with the defendants Gladys Herrmann, Vietor Herrmann and Grace Cranstoun Herrmann; Alfred S. Brown, Esquire, of the New York Bar, admitted *pro hac vice*, counsel *pro se*; and the Clerk of this Court, having been duly appointed guardian *ad litem* for the defendant Dorothy Eileen Herrmann, and having filed an answer on her behalf; and it appearing to the Court that the only questions in dispute arise out of the tenth clause of the will of Henry V. Herrmann, late of Summit, in the County of Union, deceased; and the pleadings and proofs having

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*Final Decree.*

been read and considered, and the Court having heard the argument of counsel:

10 It is, on this 26th day of June, 1928, on motion of Messrs. McCarter & English, solicitors of the complainant, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED, and the said Chancellor by virtue of the power and authority of this court, does ORDER, ADJUDGE AND DECREE as follows:

1. The legal interest in the residuary estate of Henry V. Herrmann, deceased is by the tenth clause of his will validly bequeathed in trust.

20 2. The defendant C. Theodore Herrmann has for the term of his natural life the present whole beneficial interest therein under the tenth clause of the said will.

3. Gladys Herrmann has a vested beneficial interest therein for the term of her natural life, expectant upon the death of C. Theodore Herrmann, under the tenth clause of the said will.

30 4. The defendant Vietor Herrmann has a vested beneficial interest therein for the term of his natural life, expectant upon the death of C. Theodore Herrmann, under the tenth clause of the said will.

5. The defendant Dorothy Eileen Herrmann, adopted daughter of the defendant C. Theodore Herrmann, has no interest whatsoever under the will of Henry V. Herrmann, deceased.

40 6. The contention of the defendant C. Theodore Herrmann that the whole beneficial interest of the residuary estate of Henry V. Herrmann which is attempted to be affected by the tenth

*Final Decree.*

clause of his will is now vested in the said C. Theodore Herrmann is without merit.

7. Except as heretofore stated the Court refuses now to construe the tenth clause of the will of Henry V. Herrmann, deceased, to advise the complainant with respect thereto, or to declare any rights under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed.

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8. There is allowed to Messrs. McCarter and English, solicitors of the complainant, a counsel fee of one thousand dollars, and their costs of this suit to be taxed. There is allowed to W. Morton Carden, Esquire, of counsel with the defendant C. Theodore Herrmann individually, a counsel fee of five hundred dollars and the costs of the said defendant to be taxed. There is allowed to L. Edward Herrmann, Esquire, of counsel with the defendants Gladys Herrmann, Vietor Herrmann and Grace Cranstoun Herrmann, a counsel fee of one thousand dollars and the costs of the said defendants to be taxed. There is allowed Alfred S. Brown, Esquire, counsel *pro se*, a counsel fee of five hundred dollars and his costs to be taxed.

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9. The complainant does forthwith pay all of the said counsel fees and costs out of the corpus of the estate of Henry V. Herrmann, deceased, in his hands.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,  
V.-C.

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**NOTICE OF APPEAL OF COMPLAINANT.**

Filed July 14, 1928.

IN CHANCERY OF NEW JERSEY.

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*Between*

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant,*

*and*

GLADYS HERRMANN, and  
others,

*Defendants.*

66/415.

*On Bill, etc.*

*Notice  
of Appeal.*

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The complainant hereby appeals to the Court of Errors and Appeals in the last resort in all causes from so much of the final decree made on the advice of his Honor, Vice-Chancellor Church, in the above-stated cause as reads as follows:

30 “7. Except as heretofore stated the Court refuses now to construe the tenth clause of the will of Henry V. Herrmann, deceased, or to advise the complainant with respect thereto, or to declare any rights under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed.”

Dated June 29, 1928.

McCARTER & ENGLISH,  
Solicitors of Complainant.

G. W. C. McCARTER,  
Of Counsel.

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*Notice of Appeal of Complainant.*

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

G. W. C. McCARTER,  
Of Counsel with said Complainant.

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NOTICE OF APPEAL OF DEFENDANT,  
C. THEODORE HERRMANN INDIVIDUALLY.

Filed July 14, 1928.

IN CHANCERY OF NEW JERSEY.

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*Between*

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant,*

*and*

GLADYS HERRMANN, and  
others,

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*Defendants.*

66/415.

*On Bill, etc.*

*Notice of  
Appeal.*

The defendant C. Theodore Herrmann indi-  
vidually hereby appeals from the whole and  
every part of the final decree made on the advice  
of his Honor, Vice-Chancellor Church, in the  
above-stated cause; except the paragraphs there-  
of numbered 1, 2, 5, 8 and 9, to the Court of  
Errors and Appeals in the last resort in all  
causes.

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Dated June 29, 1928.

T. BRYANT SMITH,  
Solicitor of Defendant C. Theodore Herrmann.

G. W. C. McCARTER,  
Of Counsel.

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

G. W. C. McCARTER,  
Of Counsel with said Defendant.

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**PETITION OF APPEAL OF C. THEODORE  
HERRMANN, AS ADMINISTRATOR, ETC.**

Filed July 21, 1928.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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*Between*

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant-Appellant,*

*and*

GLADYS HERRMANN, and  
others,  
*Defendants-Respondents.*

*On Appeal  
from  
Chancery.*

*Petition of  
Appeal.*

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*To the Honorable the Court of Errors and Ap-  
peals in the last resort in all causes:*

The petition of C. Theodore Herrmann, as ad-  
ministrator with the will and codicil annexed of  
Henry V. Herrmann, deceased, the appellant in  
the above-stated cause, respectfully shows that  
your petitioner finds himself aggrieved by a  
final decree made in the Court of Chancery by  
his Honor, Edwin Robert Walker, Chancellor  
of the State of New Jersey, bearing date the  
26th day of June in the year 1928, wherein the  
said appellant was complainant and Gladys Herr-  
mann and others were defendants, in this respect,  
to wit, that the said decree adjudges as follows:

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“7. Except as heretofore stated the Court  
refuses now to construe the tenth clause of

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*Ptn. of Appeal of C. T. Herrmann, Individually.*

and Gladys Herrmann and others were defendants, in this respect, to wit: That the said decree adjudges that Gladys Herrmann and Vietor Herrmann each have a vested beneficial interest in the residuary estate of Henry V. Herrmann, deceased, for the term of the natural life  
 10 of each of them, expectant upon the death of C. Theodore Herrmann, under the tenth clause of the said will; that the said decree adjudges that the contention of your petitioner that the whole beneficial interest of the residuary estate of Henry V. Herrmann which is attempted to be affected by the tenth clause of his will is now vested in your petitioner was without merit; and that the said decree adjudged in paragraph 7 thereof as follows:

20         7. Except as heretofore stated the Court refuses now to construe the tenth clause of the will of Henry V. Herrmann, deceased, or to advise the complainant with respect thereto, or to declare any rights under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed.

30         And your petitioner humbly appeals from those parts of the decree of the Chancellor which decree as aforesaid, upon the ground that the same are erroneous, for that the Chancellor should have adjudged that neither Gladys Herrmann nor Vietor Herrmann has any interest whatsoever either under the 10th clause of the will of Henry V. Herrmann, deceased, or in the estate of which he died possessed; and should have adjudged that the contention of your petitioner that the whole beneficial interest of the residuary estate of Henry V. Herrmann, deceased, which  
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*Ptn. of Appeal of C. T. Herrmann, Individually.*

is attempted to be affected by the tenth clause of his will is now vested in your petitioner; and should have advised the complainant with respect to all of the matters which the complainant prayed for advise, and should have declared all of the rights of all parties under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed. 10

Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

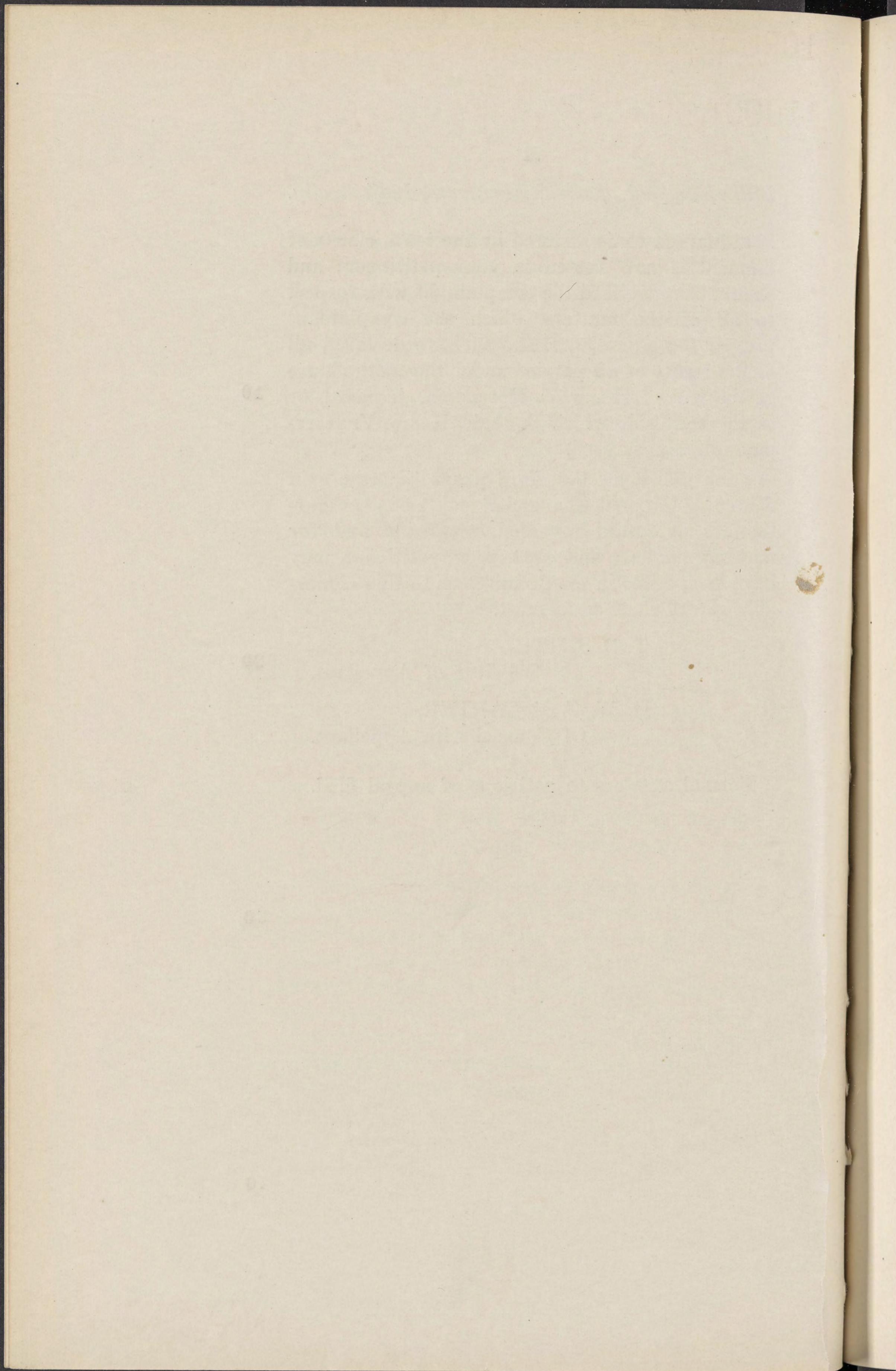
T. B. SMITH, 20  
Solicitor of Appellant.

G. W. C. McCARTER,  
Of Counsel with Appellant.

Formal answers to petitions of appeal filed.

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*Filed after the Oral Argument  
by leave of Court.*

## New Jersey Court of Errors and Appeals

BETWEEN

C. THEODORE HERRMANN, as  
administrator, etc., of Henry  
V. Herrmann, deceased,  
*Complainant-Appellant,*

*and*

C. THEODORE HERRMANN,  
*Defendant-Appellant,*

*and*

GLADYS HERRMANN and others,  
*Defendants-Respondents.*

On Appeal  
From  
Chancery.

### REPLY BRIEF FOR COMPLAINANT-APPELLANT.

Briefs of the defendants-respondents were not served upon counsel for complainant-appellant until just prior to the oral argument. Their points unanticipated by us were not covered by our brief or arguments. Others arose upon the oral argument. Accordingly, counsel for the complainant-appellant were by this court given fifteen days from the last day of the oral argument within which to serve and file this, their reply brief. By this reply brief, we shall attempt to clarify some misleading statements, quotations, citations and application.

## I.

**The lower court should have first construed this will in full and then applied the rule against perpetuities to the entire will as construed.**

From the inception of this case, we have contended that looking at this matter as of the date of the death of the testator, namely May 13, 1924, the complainant-appellant may have a child born to him more than ten months after May 13, 1924, whose name may be "X", and "X" may survive the complainant-appellant, and have a child named "Y", who in turn survives "X". Then applying this will, after it has been fully construed to this hypothetical case, there is immediately presented a positive violation of the rule against perpetuities. The operation of applying this will to the hypothetical case above given is in no sense a construction of this will.

As stated in our main brief, Gray in his work on Perpetuities, (3 ed.) Sec. 629, tersely states the matter as follows:

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

In *Canda vs. Canda*, 113 Atl. 503-508, affirmed 92 N. J. E., 423, the lower court said:

"That rule (the rule against perpetuities) requires that the estate must vest within the time prescribed by its limitations and not that

it may vest. 2 Jarman on Wills, 6th Ed. p. 299.”

Our learned adversaries have contended in their briefs and oral arguments before this court that the above contention on our part amounted to an improper effort to cause the lower court to determine the rights of the unborn children and unborn grandchildren of the complainant-appellant. Our learned adversaries go a step further, as did the court below, and say that since these children and grandchildren are unborn that the application of the rule against perpetuities should be delayed until after the time for their possible births shall have transpired. The rule against perpetuities means no such thing and calls for no such delay. The time when the rule is to be applied is the date of the death of the testator, and if then not applied, it shall be applied as of that date.

In *Hewitt vs. Green*, 77 N. J. E., 345, the court there said:

“It seems to me, however, that these trustees require directions in regard to the discharge of duties which they ought to proceed at once to perform, and which they cannot safely perform without such directions. If the bill had been filed by the complainants as executors, requesting instructions whether or not to pay over to themselves, as trustees, the whole of the \$100,000 fund, their right to receive instructions would perhaps have been more plain. The bill is filed by the complainants as trustees, and it alleges that as trustees they have received from the executors, the entire \$100,000 fund. The distinction between the complainants as executors and as trustees for the purposes of this case is, I think, purely technical and unimportant. If too large a fund has been

paid over to these trustees for the accomplishment of the lawful trust to which a portion of the income is to be applied, a resulting trust as to the remainder of the fund may, if necessary, be erected, and it is immaterial whether such trust is in favor of the executors or in favor of the residuary legatees. A duty in either case rests upon these trustees to surrender that portion of the fund which we may assume the executors unnecessarily and unlawfully paid over to them, and the rightful takers of this fund are the residuary legatees to whom it is the present duty of the trustees directly or through the executors to pay the same under the construction of the will which hereinbefore has been made.”

The court then proceeds to give the necessary detailed instructions analogous to those we are contending for here: namely, relating to the trusts for unborn grand and great grandchildren.

In the case of *McGill et al vs. Trust Company*, 94 N. J. E., 657, modified on other points and affirmed 96 N. J. E., 331, suit was brought by the children of Alexander McGill, son of the testator, therefore, the complainants were the grandchildren of the testator. In that case, the rule against perpetuities was applied and the respective rights of the unborn children of Alexander McGill and the unborn children of his sister, Eleanor McGill, then Mrs. Mayer, were determined. In *Stout vs. Stout*, 44 N. J. E. 479 and *Graves vs. Graves*, 94 N. J. E. 268: the rights of unborn were passed upon and in fact determined in manner sought here. The fact is that practically all of the cases we have cited in our main brief in support of our contention that paragraph “Tenth” and subparagraphs “1” and “2” thereof are violative of the rule against perpetuities

were cases where the rights of unborn descendants and other kin were involved and determined.

All of these cases were decided prior to the Declaratory Judgment Act of 1924, and some of them were decided prior to the Chancery Act of 1915. In our main brief we have fully discussed these two acts and their application here. We repeat that the Chancery Court of New Jersey and this Court on appeal therefrom have all the powers exercised in these prior cases and since these two statutes, the additional powers thereby added.

In *Miers vs. Persons*, 92 N. J. E. 17, the present chancellor dealt with the will of the late Mr. Justice Reed, who left his residuary estate in trust for his daughter for life and after her death the corpus to go this way or that way accordingly as she did or did not leave issue her surviving. The chancellor did not hesitate to declare the rights of all parties in respect to the corpus.

In respect to the language from *Potter vs. Watkins*, quoted on page 17 of the brief of the Respondents, Gladys and Vietor Herrmann, we say, first, that same is dictum only; and secondly, that the learned chancellor did not consider and did not deal with the Declaratory Judgment Act of 1924, but dealt only with the less explicit and limited provisions of the Chancery Act of 1915. In addition, the dictum is inconsistent with the decision in *Miers vs. Persons*. Both reason and authority unite to support the rule announced in *Miers vs. Persons*.

## II.

**The case at bar is distinguishable from other New Jersey cases which uphold life estates to children in being at the death of the testator.**

In *Stout vs. Stout*, the life estate to Mrs. Dunham's child was sustained. At the time the testator died, and in fact at the date when he executed his will, Mrs. Dunham was a widow who had only one child. The testator referred to this exact situation in the following language:

“interest, dividend and income of said residue to her child, if she shall leave but one child her surviving, and to her children, share and share alike, if she shall leave more than one surviving her, to be paid them, if there shall be more than one, and to it, if there shall be one, as the same shall be received, so long as they shall severally live.”

The court in that case construed “her child” to mean the same thing as if the testator had called this child by name.

In *McGill vs. Trust Co.*, 94 N. J. E., 657, the lower court found that the testator left trust funds, the income on which should be exclusively utilized “for the education and support of the children” of his son, Alexander, from the date of Alexander's death, until the youngest of these children was twenty-five years of age, then the corpus to be distributed between them equally. A similar trust was set up for the children of the testator's daughter, Eleanor. That court then found as a matter of law that these gifts of income were main objects of the testator and that he would have bestowed them even though he had known that the gifts over were void. That court accordingly held these

trusts to have vested at the testator's death subject to each child surviving his or her particular parent. Having reached these conclusions, the lower court held that the gift of the corpus was void; that Eleanor and Alexander each have an equitable life estate and that their respective surviving children likewise have an equitable life estate; that the corpus of both trust funds passed by a resulting trust to the next of kin of the testator.

We call special attention to the fact that the testator did not provide in his will for life estates to his grandchildren, or any of them, and that the nearest thing to a life estate was his provision that they should receive the income of these trust funds for their education and support from the date of the death of their respective parent, until the youngest of its respective class should reach twenty-five years of age. The result was that the lower court changed these estates into life estates.

On appeal of this case to this court, there was a decision by a divided court which held that (1) the gifts over of the corpus violated the rule against perpetuities; (2) Alexander and Eleanor were seized in severalty with the equitable remainder, not as a resulting trust under the will as held below, but because the testator died intestate in respect thereto; that Alexander's children as such had no interest in Eleanor's share. With these matters clarified, the lower court's decree was affirmed.

Two members of this court voted against these conclusions and one of them wrote a dissenting opinion. This opinion objects to the court's making the testator a new will to the extent of changing the gift of income to the grandchildren.

Because of the changes which were read into this will by the lower court and sustained by this

court, a picture different from the case at bar is presented. Here there is no lower court decision changing the term or nature of any estate. Here, there is a clear-cut issue devoid of any misleading constructions. Here, there was a refusal of the lower court to consider and pass upon that part of the will which our learned adversary on behalf of Respondents, Gladys and Vietor Herrmann, admitted in his brief and in his oral argument was violative of the rule against perpetuities. Under all these circumstances, we contend that there should be no alteration of this will by judicial decision, but in lieu thereof, a clear-cut application of the rule against perpetuities and consequent intestacy.

In the case of *Hewitt vs. Green, supra*, the testator gave annuities to three of his nieces, one grand-nephew, one nephew and the remainder to his grandchildren and great-grandchildren under the terms and conditions violative of the rule against perpetuities. The annuities above referred to were given to the above named relatives who were not only named in the will but opposite their names were written their exact relationship to the testator. The court, under these circumstances, held that these annuities were severable from that part of the will which was in violation of the rule against perpetuities.

*Kates vs. Walker*, 82 N. J. L., 157, is likewise cited by our adversaries as being against our position here, but we re-affirm our argument that it, as well as *Graves vs. Graves, supra*; *Tichenor vs. Mechanics Bank*, 96 N. J. E., 560; *Barrett vs. Barrett*, 255 Ill., 332; *Johnson's Estate*, 185 Pa., 179; *Anderson vs. Menefee*, 174 S. W., 904; *Hornor's Will*, 237 N. Y., 489; and *Hoyt vs. Hoyt*, 210 N. Y. S., 155, confirms the principles for which we contend. In *Kates vs. Walker, supra*, the testa-

tor left a part of his estate in trust to his wife for her life, and then provided as follows:

“and at her death it is my will that said trust continue, and I direct my said trustees to continue said investments for the benefit of my grandchildren, the children of my daughter, Mary Jane Walker, until the youngest shall attain the age of twenty-five years.”;

and then distributes to the several grandchildren equally. The court under these facts said:

“The question for solution, therefore, is whether the trust is valid, or whether it is in violation of the rule against perpetuities.”

The court held that the trust was invalid.

Our learned adversaries have cited the above cases as being contrary to our contentions here, and decisive in their favor. We contend that each of these cases above cited and referred to, except *Kates vs. Walker, supra*, announce the rule just as we contend for it here, but because of the exceptions which distinguish them from the case at bar, the rule against perpetuities was not applied to the same extent as it ought to be in the case at bar. In respect to *Kates vs. Walker, supra*, the conclusion reached was identical with our contentions here.

Our learned adversary on behalf of Respondents, Gladys and Vietor Herrmann, in his brief at page 8, quotes 30 *Cyc.*, 1490, Note 25, as an ideal hypothetical case applicable here, but our learned adversaries fail to inform the court that this same citation gives among the contrary cases, *Stout vs. Stout, supra*. Our learned adversaries omit to inform the court that of all the cases cited in support of his quotation there is no New Jersey case. The fact that it is a note and not included as text reduces its effect.

Our learned adversary on behalf of Respondent Brown, relies principally upon the case of *Matter of Mount*, 165 N. Y., 162 (see page 10 of his brief). In the first nineteen lines of his quotation from this case is found a complete answer to all of his contentions regarding same. In these lines, the court announces that since the testator's sister is seventy-six years of age, and the testator's nephew is fifty years of age that neither of them will probably have other children, or as the court says:

“The chances are decidedly against such an occurrence.”

In *Gray's Rule Against Perpetuities*, Third Edition, page 190, the author succinctly states the rule as follows:

“In other words, for purpose of determining the question of remoteness, men and women are deemed capable of having issue as long as they live. This was held by Sir Lloyd Kenyon in *Jee vs. Audley* (1 Cox, 324), and his decision has never been questioned.”

In *Stout vs. Stout*, the court held that although Mrs. Dunham was fifty years of age, she might give birth to other children, after the testator's death, and that such after-born children might survive her for more than twenty-one years, and that it would not hold that so long as she was alive that she could not have other children. This point has been re-affirmed in other cases. The basic hypothesis in the *Mount* case was legally false and contrary to the New Jersey rule.

In addition, as we stated in our oral argument and in our main brief the case of the *Matter of Mount*, *supra*, has never been followed by any of the courts of New York, and never was followed

by any court in New Jersey, excepting the Lower Court in this particular case.

In *Horner's Will*, 247 N. Y. 489, the Court of Appeals speaking of its prior decisions at page 503 said:

“Our ruling in *Matter of Mount* (185 N. Y., 162, 169) is pressed upon us as decisive. That case went to the verge of permissible excision.”

The court accordingly refused to apply that erroneous decision.

In *Hoyt vs. Hoyt*, 125 Misc., 95; 210 N. Y. S., 155; affirmed 213 N. Y. S., 823, one of the parties to that action contended for the application of the rule in the *Matter of Mount*, which was refused again upon the ground that it “went to the verge of permissible excision”. The court then proceeded to announce the proper rule to be the later case of *Matter of Horner*, 237 N. Y. 489, and accordingly applied same and held as we contend here that “a single organic plan had been conceived by the testator, a plan for the benefit of a fluctuating class \* \* \* We extract the heart of this plan when we condemn its fluctuating class. \* \* \* The illegal provision for the fluctuating class of after-born grandchildren (after born nieces and nephews and grand nieces and grand nephews in the case at bar) cannot be severed without destroying the organic unity of the entire plan.”

### Recapitulation.

ONE. The lower court should have first construed this will in full and then have applied the rule against perpetuities to the entire will as construed. If this had been done the effect would

have been that paragraph "Tenth" of the will and sub-paragraphs "One" and "Two" thereof would have been held to compose a single testamentary plan, the main object of which was violative of the rule against perpetuities. (*Gray's The Rule against Perpetuities* (3 Ed.) Sec. 629; *Canda vs. Canda*, 113 Atl., 503-508, affirmed 92 N. J. E., 423; *Hewitt vs. Green*, 77 N. J. E., 345; *Stout vs. Stout*, 44 N. J. E., 479; *Graves vs. Graves*, 94 N. J. E., 268; Chancery Act of 1915; Declaratory Judgment Act of 1924; *Meirs vs. Persons*, 92 N. J. E., 17; *In re Horner's Will*, 237 N. Y., 489; *Hoyt vs. Hoyt*, 210 N. Y. S., 155.)

TWO. The cases like *Stout vs. Stout*, *supra*; *McGill vs. The Trust Company*, 94 N. J. E., 657, modified and affirmed 96 N. J. E., 331; *Hewitt vs. Green*, *supra*, 30 *Cyc.*, page 1489, Note 25, and in *Matter of Mount*, 185 N. Y., 162, are all cases which are distinguishable and have been distinguished by us from the case at bar.

THREE. The commencement of this action for the relief sought was timely. (See our cases re Point I of this Summary.)

The following index shows the title of each case cited by us in our main brief and the pages of our main brief where same are cited, discussed and applied:

- Anderson v. Lincoln*, 95 Me. 541, Main Brief, Page 17;
- Anderson v. Menefee* (Tex.), 174 S. W. 904, Main Brief, Page 43;
- Benedict v. Webb*, 98 N. Y. 460, Main Brief, Page 24;
- Barrett v. Barrett*, 255 Ill. 332, Main Brief, Page 31;

- Camden Safe Dep. v. Guerin*, 87 N. J. E. 72, Main Brief, Page 11;
- Central Union Trust v. Eggleston*, 185 N. Y. 23, Main Brief, Page 24;
- Clark v. Camman*, 160 N. Y. 315, Main Brief, Page 27;
- Deats v. Ziegner*, 82 N. J. E. 605, Main Brief, Page 18;
- Declaratory Judgments*, Main Brief, Pages 49-53;
- Graves v. Graves*, 94 N. J. Eq. 268, Main Brief, pages 12 and 18;
- Greenwood v. Robertson*, 15 Beaver 92 (Eng.), Main Brief, page 15;
- Gray's Perpetuities* (3 ed.), Sec. 629, Main Brief, page 17;
- Hewitt v. Green*, 77 N. J. E. 345, Main Brief, page 10;
- Horner's Wills*, 237 N. Y. 489, Main Brief, pages 22 and 29;
- Hoyt v. Hoyt*, 210 N. Y. S. 155, Main Brief, pages 25 and 26;
- Johnson's Estate*, 185 Pa. 179, Main Brief, pages 29 and 30;
- Leake v. Robinson*, 2 Merrivale 363, Main Brief, page 15;
- McGill v. Trust Co.*, 94 N. J. E. 657, Main Brief, page 11;
- Porter v. Fox*, 6 Sim. 485, Main Brief, page 14;
- Pearks v. Mosely*, L. R. 5 Appeals 714, Main Brief, page 16;
- Stout v. Stout*, 44 N. J. E. 479, Main Brief, pages 8 and 9;
- Sielder v. Sims*, 56 N. J. E. 275, Main Brief, page 10;
- Sears v. Russell*, 8 Gray (Mass.) 86, Main Brief, page 15;

*Smith's Appeal*, 88 Pa. St. 492, Main  
Brief, page 15;  
*Thomas v. Gregg*, 76 Md. 169, Main  
Brief, page 15;  
*Tichenor v. Mechanics*, 96 N. J. E. 560,  
Main Brief, page 21;  
*Webster v. Boddington*, 26 Beaver 128,  
Main Brief, page 15;  
*Kates v. Walker*, 82 N. J. L. 157, Main  
Brief, page 9.

WHEREFORE it is respectfully submitted that the  
decree appealed from should be reversed and the  
relief prayed for by the complainant-appellant  
should be granted in full in the manner and to the  
extent described in our briefs.

W. MORTON CARDEN  
(of the New York Bar).

G. W. C. McCARTER,  
*Counsel with Appellants.*

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## New Jersey Court of Errors and Appeals.

*Between*

C. THEODOR HERRMANN, as Adminis-  
trator, etc. of Henry V. Herrmann,  
deceased,

Complainant-Appellant,

and

C. THEODOR HERRMANN,  
Defendant-Appellant,

and

GLADYS HERRMANN and others,  
Defendants-Respondents.

On Appeal from  
Chancery.

### BRIEF FOR RESPONDENT, ALFRED S. BROWN.

#### Statement.

This is an appeal from a final decree made in the Court of Chancery of New Jersey by his Honor, Edwin Robert Walker, Chancellor of said State, bearing date the 26th day of June, 1928, construing the tenth clause of the Last Will and Testament of Henry V. Herrmann, deceased, who died on May 13th, 1924. The bill of complaint was filed by C. Theodor Herrmann as administrator with the will annexed of said Will praying for a construction of said will and of a codicil thereto. The will bears date January 16th, 1911, and the codicil February 15th, 1915. Both were admitted to probate December 4th, 1925. The bill alleges that on December

27th, 1926, complainant was appointed administrator with the said will and codicil annexed; that questions of doubt and difficulty have arisen upon said will and codicil and in particular with reference to the proper construction and legal effect of Clause Tenth in said Will and that complainant cannot safely proceed with the administration of his trust so long as said questions remain adjudicated and until he is advised by the Court as to his duties and until the rights of the several parties in the estate have been adjudged, fixed and determined. The bill then prays that the Court construe the will and codicil and fix, adjudge and determine the rights and interests of the several defendants as between themselves in and to the estate of Henry V. Herrmann, deceased, and that the complainant be advised as to his duties.

Clause Tenth of the Will, in respect to which it is alleged in the bill of complaint questions have arisen reads as follows:

“TENTH:—All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, of whatsoever nature and description, and wheresoever situated, I do give, devise and bequeath unto my executors hereinafter named, in trust, nevertheless, and for the following uses and purposes, that is to say: That they shall collect and receive the rents, interest and income arising therefrom, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management thereof, they shall pay the residue of said rents, interest and income unto my brother C. THEODOR HERRMANN, during his natural life. And upon his death,

(1) In the event that my said brother C. Theodor Herrmann, shall leave a child or children him surviving, then I direct my said executors to divide the said rest, residue and

remainder of my estate so held in trust for the benefit of my said brother C. Theodor Herrmann, into as many equal shares as there are children of my said brother living at the time of his decease, and to set apart one of such shares for each child of my said brother living at the time of his decease, and to collect and receive the rents, interest and income arising from such share, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management of said share, they shall pay the residue of said rents, interest and income unto the child of my said brother for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of the child for whose benefit the said share shall have been so set apart, my said executors shall pay over the principal of the said share unto the issue of the said child for whose benefit the said share shall have been so set apart, to be divided equally among such issue, share and share alike, for their own use and benefit, absolutely and forever; and in default of such issue then living, then the principal of said share shall be paid over unto the surviving brothers and sisters of such deceased child, and the issue of any deceased brothers and sisters of such deceased child, share and share alike, for their own use and benefit, absolutely and forever; such issue, however, to take the share which the parent would have taken if living; and if there be no brother or sister of such deceased child, or issue of any deceased brother or sister of such deceased child, then living, then the principal of said share shall be paid over as follows, viz.: Unto Alfred S. Brown of the City of New York, the sum of Ten thousand dollars thereof, and to Frederick Feibel of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodor Herrmann for her own use and benefit absolutely and forever.

(2) In the event that my said brother C. Theodor Herrmann shall not leave any child or children him surviving, then upon his decease, I do give, devise and bequeath the said rest, residue and remainder of my estate so held in trust for his benefit, as follows: Unto Alfred S. Brown, of the City of New York, the sum of Ten thousand dollars thereof, and unto Frederick Feibel of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodor Herrmann, for her own use and benefit absolutely and forever."

The bill states (paragraph 6th) that the complainant believes and alleges the fact to be that all parties interested admit that in and by the said Tenth Clause, C. Theodor Herrmann has an undoubted vested valid life interest in possession and that the said C. Theodor Herrmann claims in addition that all the gifts over after the gift to him for life are void as violative of the rule against perpetuities; that there is a resulting trust in his favor as sole next of kin and heir at law of the testator, Henry V. Herrman, deceased, and that, therefore, there is a merger of the life interest given to him by the will and the interest in fee or absolutely in remainder vesting in him by intestacy and resulting trust so that he is now presently vested with the whole beneficial interest under the Tenth Clause of said will and entitled to immediate possession of all the residuary estate of Henry V. Herrmann, deceased.

These claims of the said C. Theodor Herrmann are put in issue by the answer of the defendant, Alfred S. Brown, as well as by the answers of other defendants.

The cause came on to be heard before Vice Chancellor Church to whom it was referred and thereupon such proceedings were had that a final decree

was made and entered whereby after reciting that the only questions in dispute arise out of the tenth clause of said will, it was ordered, adjudged and decreed among other things as follows:

3. The defendant Gladys Herrmann has a vested beneficial interest for the term of her natural life, expectant upon the death of C. Theodore Herrmann under the tenth clause of the said will.

4. The defendant Vietor Herrmann, has a vested beneficial interest for the term of his natural life expectant upon the death of C. Theodore Herrmann under the tenth clause of the said will.

6. The contention of the defendant C. Theodor Herrmann that the whole beneficial interest of the residuary estate of Henry V. Herrmann which is attempted to be affected by the tenth clause of his will is now vested in the said C. Theodor Herrmann is without merit.

7. Except as heretofore stated the court refuses now to construe the tenth clause of the will of Henry V. Herrmann, deceased, or to advise the complainant with respect thereto, or to declare any rights under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed.

By his petition of appeal the complainant-appellant C. Theodor Herrmann, as administrator etc. of Henry V. Herrmann, deceased, appeals from that portion of the decree contained in paragraph numbered 7 as above set forth on the alleged ground that the same is erroneous in that the Chancellor should have advised him with respect to all the matters as to which he prayed for advice and should have declared all of the rights of all parties under the tenth clause of the will of Henry V. Herrmann

or in the estate of which the said Henry V. Herrmann died possessed. The petition thereupon prays that said portion of the decree be reversed in the particulars aforesaid.

The defendant-appellant C. Theodor Herrmann by his petition of appeal appeals from those portions of the decree which adjudge that Gladys Herrmann and Vietor Herrmann each have a beneficial interest in the residuary estate of Henry V. Herrmann, deceased, for the term of the natural life of each of them, expectant upon the death of C. Theodore Herrmann, under the tenth clause of said will and from that portion of the decree which adjudges to be without merit his contention that the whole beneficial interest in the residuary estate of Henry V. Herrmann which is attempted to be affected by the tenth clause of said will is now vested in him and also from that portion of the decree contained in paragraph numbered 7 thereof, on the alleged grounds that said portions of said decree are erroneous and should be reversed in those particulars.

### **Argument.**

As stated in the decree the only questions in dispute arise out of the tenth clause of the Will of Henry V. Herrmann, deceased, a copy of which is set forth in the above statement of the case.

The life beneficiary C. Theodor Herrmann claims that all the gifts in said tenth clause after the gift to him for life are void as violative of the rule against perpetuities.

## I.

**Clause Tenth of the will does not offend against the law of perpetuities and is valid.**

In the construction of a will, the circumstances surrounding the testator at the time the will was made are to be taken into consideration (Gardner on Wills, Hornbeck Series, p. 385). The author says (Section 106) :

“But where the will is such as to call for construction, the Court, with a view to securing a proper construction, puts itself, so far as may be, in the position of the testator, that it may see things from his point of view. To this end, evidence regarding all relevant facts and circumstances surrounding the testator at the time of executing the will is admissible.”

In *Irving vs. De Kay*, 9 Paige 521, Chancellor Walworth says, page 528 :

“The principles stated in that case (*Hawley v. James*, 5 Paige 320, 458, 459) and which are now the settled rules of law are, that the intention of the testator, when it shall have been ascertained from an examination of the will in connection with the situation of his property &c at the time of making such will, must be carried into effect by the courts, so far as that intention is consistent with the rules of law that although some of the objects for which a trust is created, or some future interests limited upon the trust estate are illegal or invalid, if any of the purposes for which the trust was created are legal and valid and would have authorized the creation of such an estate, the legal title vests in the trustees during the continuance of such valid objects of the trust, except in those cases where the legal and valid objects of the trust are so mixed up with those which are illegal and void that it is impossible to sustain the one without giving effect to the other.”

The circumstances in which the testator, Henry V. Herrmann, made the will and codicil in question were as follows: He had no children, never having been married. He had one brother, the complainant, C. Theodore Herrmann, who was his only heir at law and next of kin and who was married to Grace Cranstoun Herrmann, and by her had two children, then living, to wit: Gladys Herrmann, a daughter, who is now thirty years of age and upward and Vietor Herrmann, a son, who is now twenty one years of age and upward. Said two children are still living and are parties defendant in this suit; they are the only children ever born to the said C. Theodore Herrmann. Neither has ever had issue, neither having ever been married.

By the Tenth Clause of the will the residuary estate is given to the executors in trust to pay the income to the said C. Theodore Herrmann during his life and upon his death to divide the residuary estate into as many shares as there are children of his living at his death and set apart one share for each child and pay the income of such share to the child for whose benefit the said share was so set apart during his or her life and at that child's death to pay the principal over to that child's issue or in default of issue to the survivor or if there be no survivor or issue of survivor then to Grace Cranstoun Herrmann. The trustees therefore are vested with the legal title of the residuary estate, C. Theodor Herrmann having an equitable life interest therein and the defendants, Gladys Herrmann and Vietor Herrmann, children of the said C. Theodor Herrmann, having also an equitable life interest therein, subject to the equitable life interest of their father, the said C. Theodor Herrmann.

If, therefore, the said C. Theodor Herrmann should now die, the residuary estate would be divided by the trustee into two equal parts, one of which would be held in trust for Gladys Herrmann

and the other in trust for Vietor Herrmann and on the death of either, the share held in trust for the one so dying would vest absolutely either in his or her issue or in the survivor or in the issue then living of such survivor or in Grace Cranstoun Herrmann. So that as to each share there is a trust and a suspension for only two lives in being at the death of the testator; as to one share for the lives of C. Theodor Herrmann and Gladys Herrmann and as to the other share for the lives of C. Theodor Herrmann and Vietor Herrmann. This does not offend against the Rule as to Perpetuities and is valid.

The birth of a child of C. Theodor Herrmann after the death of the testator, Henry V. Herrmann, would not invalidate the will as to the shares of Gladys Herrmann and Victor Herrmann. It would simply diminish the amount of their respective shares.

In *Matter of Mount*, 185 N. Y. 162, the testatrix by her will gave her residuary estate to trustees in trust to pay the income to her sister Susan, during her life and upon her death to divide the residuary estate into as many shares of equal value as would make one for each of the children then living of testatrix's nephew, Richard H. Mount and one for the lawful issue collectively of each of the children of said nephew (if any) who might then have died leaving such issue and set apart one of such shares to each child then living and one to such issue collectively of each deceased child and pay over to the children of such nephew on their arriving at the age of twenty five years the net income of the shares so set apart for them respectively during their respective lives and after their deaths respectively to pay over such shares to their issue; also to pay over to the issue of any deceased child of said nephew who should, at the death of said sister Susan, be of the age of twenty five years

otherwise on their attaining that age respectively their respective portions of the share so set apart to such issue respectively.

Certain of the next of kin of the testatrix claimed that this disposition of the residuary estate was void as suspending the absolute ownership of personal property for lives not necessarily in being at the death of the testatrix.

Cullen, C. J. delivering the opinion of the Court, says (p. 168) :

“The testator’s sister is now seventy six years old. The testator’s nephew, Richard H. Mount, is over fifty years old. He had at the execution of the Will two children who still survive, Edward, now aged 30, and Harold aged 23. His wife, the mother of these two children, is still living. The elder son is married and pending this appeal has had a child born. The younger is unmarried. Bearing in mind the age of his wife and that of the children, the strong probability is that Richard Mount will have no other children by his present wife. She may die, he may marry again and have children. But for such an event to have any bearing on the present controversy, the child must be born before the present equitable life tenant, a lady seventy six years old, dies. Therefore, the chances are decidedly against such an occurrence. If it does not happen, and the two sons of the nephew now living survive their grandaunt, there will be only a single question to determine; that is whether the direction in the Will to divide the corpus into shares for all the children of the testatrix’s nephew, which would include children who might be born after her death, renders the provisions, so far as it applies to children living at her death, illegal and void. If this provision is valid as to those children, no other question can arise under the Will, because the remainders given on the death of those children are clearly good. We are inclined to the view that this question is a comparatively simple one. \* \* \* (p. 169). If the trust was

to continue *in solido* for the benefit of all the nephew's children who might survive their grandaunt, it would be void, not only because it might depend on lives not in being at the death of the testatrix, but also because its continuance might last over a greater number of lives than that prescribed by the Statute. But on the death of the sister, the corpus is to be divided into several shares according to the number of children the nephew may then have, including the issue of any deceased child. The trust as to each share terminates with the life of the beneficiary. Therefore, as to the share of a child of the testatrix's nephew living at her death, the suspension is for two lives authorized by statute, to wit, the testatrix's sister, and the equitable life tenant of the particular share. It matters not that the whole corpus is not released at the termination of any two specified lives. An entire estate may be held in trust for one beneficiary for life, and on his death may then be divided into shares, each of which may be held in trust for a second separate life (citing cases). It is not at all necessary that the testator create a single trust in a single piece of property. He may create separate trusts in undivided interests. The validity of each of such trusts is dependent solely on its terms and not on the fate or validity of the others. If, therefore, the nephew should have children born after the testatrix's death and surviving her sister, their existence would serve to cut down the shares to be held in trust for the children living at the testatrix's decease. But we do not see how the invalidity of the testamentary disposition in favor of such after-born children can affect the legality of the trust in favor of the existing children."

This opinion was concurred in by all the members of the Court. The case is directly in point. At the time the testator, Henry V. Herrmann, made his will and at the time of his death, his brother, C. Theodor Herrmann, who by the will is given an

equitable life interest in the residuary estate, had two children then living, viz: Gladys Herrmann and Vietor Herrmann. They are still living and are the only children the said C. Theodor Herrmann ever had born to him. If he never has any other children then the shares of the residuary estate to be set aside at his death for the said Gladys Herrmann and Vietor Herrmann will be one-half for each. If another child is born to him, then the shares of the said Gladys and Vietor Herrmann will be one-third for each, and so on according to the number of children of the said C. Theodor Herrmann living at his death. But whatever the amount of the shares may be, whether one-half or one-third or one-fourth, that amount will be ascertained within the legal limit of a life in being at the death of the testator, Henry V. Herrmann, to wit, the life of C. Theodor Herrmann. The consequence is that the birth of another child or other children to the said C. Theodor Herrmann would not invalidate the trusts of the Will in favor of his existing children, Gladys Herrmann and Vietor Herrmann, but would simply cut down the *quantum* of their shares.

The will under consideration in the Mount case above referred to came into court again for construction after the death of the first life tenant and it was again contended that the provisions for the second life estates were void because the will gave such life estates to the nephew's children living at the death of the first life tenant and this provision might include children not in being at the death of the testatrix. The Supreme Court at Special Term overruled this contention and sustained the provisions as valid and on appeal to the Appellate Division this decision was affirmed (*Mount v. Mount*, 196 App. Div. 508). That court says, at page 511 of its opinion:

“The Special Term held that at the death of the first life tenant the trust fund should be

divided into as many shares as there were children of the said nephew living at the time of the death of the first life tenant, and that notwithstanding the subsequent life estates given to such children as might be born after the death of the testatrix would be void, nevertheless, the shares which would go under the will for life to such children as were in being at the time of the death of the testatrix passed as valid dispositions of the property of the testatrix. Inasmuch as there were no children born to the said Richard H. Mount after the death of the testatrix, the two children living at the death of the first life beneficiary, Susan, were each held to be entitled to a life estate in one-half of the said trust fund.

This will has been before the court in an action brought before the death of the life tenant, Susan, and was construed by the Court of Appeals in *Matter of Mount* (185 N. Y. 162). \* \* \* The decision of the Special Term is in accord with the conclusions reached by Judge Cullen in his opinion in that case, and with the conclusions reached we are also in full accord.

The appellant's counsel concedes upon this argument that if the rule of interpretation stated by Judge Cullen properly interprets the law as applicable to this will, the appellant has no standing to reverse the findings of the trial court, giving to the two children of Richard H. Mount each a life interest in one-half of the trust fund after the death of Susan. The claim, however, of the appellant is that the rule of construction stated by the Court of Appeals upon the former appeal has been overruled in subsequent cases, especially in *Matter of Wilcox* (194 N. Y. 288), wherein Judge Cullen himself wrote the opinion. I have examined this case and the other cases cited by the appellant's counsel to sustain his contention. I do not find that the rule of construction as stated by the Court of Appeals in the matter before the court upon former appeal has been in any way changed by any subsequent decisions, and our decision in affirming the judgment upon this

question may well stand upon the construction of the will given by the Court of Appeals upon the former appeal."

This decision was unanimously affirmed by the Court of Appeals (*Mount v. Mount*, 234 N. Y. 568).

After so thorough a discussion and consideration of the facts and of the principle involved, the opinion of Judge Cullen in *Matter of Mount*, 185 N. Y. 162, can hardly be regarded otherwise than as an authority upon that subject.

Moreover, the opinion is based upon a well established principle of law, viz: that where the property given is divided by the will into shares and a share set apart for each individual member of a class, the division to be made within the legal limit of lives in being at the death of the testator, the rule of gifts to a class does not apply so as to invalidate gifts otherwise valid of the several shares. This principle is asserted and maintained in *Jarman on Wills*, 5th Edition, page 267\*, etc., where the subject of gifts to a class is exhaustively discussed. The author there says that the word "class" when used in this phrase "gift to a class" has a different meaning in law from its popular meaning; that popularly the word "class" means persons answering to a certain description, such as "children", "nephews", "nieces", etc. But in its legal sense, when used in the phrase "gifts to a class", it means "a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons".

This definition has been universally accepted and approved and is to be regarded as the settled definition of that phrase. The definition being that a gift to a class is a gift of an aggregate sum to a

body of persons, it necessarily follows from the form of the gift that if any of the members of that body are incapable of taking, the gift fails entirely, because the gift is of the property as a whole to the members of the class as a body. And this is the rule of gifts to a class as laid down in *Leake v. Robinson*, 2 Merivale 363, which is the leading case on that subject. In that case according to Jarman on Wills, page 265\*, certain stock and moneys were bequeathed to W. R. R. for life, and after his decease to the child or children of the said W. R. R., who, being a son or sons, should attain the age of twenty-five, or being a daughter or daughters, attain that age or be married with consent; and in case the said W. R. R. should happen to die without leaving issue living at the time of his decease, or leaving such, they should all die before any of them should attain twenty-five, if sons, and, if daughters, before they should attain such age or be married as aforesaid, then to the brothers and sisters of the said W. R. R. on their attaining twenty-five, if a brother or brothers, and if a sister or sisters, on such age or marriage as aforesaid. The Master of the Rolls held that the bequest was void as to the whole owing to the fact that it was made to classes and not to individuals; that it was impossible to separate the shares of the capable from the shares of the incapable or adjust the proportions in which the capable persons should take or determine the manner and the period of ascertaining those proportions.

In Jarman on Wills, 5th Edition, page 267\*, it is said that "where this difficulty does not exist, the rule in *Leake vs. Robinson* does not generally apply", and this assertion is supported by the author, as follows (p. 267\*) :

"Thus in *Storrs vs. Benbow*, 3 D. M. & G. 390, where the testator bequeathed five hundred pounds to each child that might be born to

either of the children of either of his brothers, it was decided by Lord Cranworth that the gift was valid as to the children of nephews who were born in the testator's lifetime, and void as to the children of the other nephews. He said it was a mistake to compare the case with *Leake vs. Robinson*. The legacy given to one of the former set of children, could not be bad because there was a legacy given under a similar description to a person who would not be able to take because the gift was too remote."

(page 267) "Again in *Griffith v. Pownall* (13 Sim. 393), A had a power to appoint among all the children of B, begotten and to be begotten, and their issue; and in default to the children equally. All the children that B ever had (six in number) were born at the time of the creation of the power, and A appointed that the share which each child of B, begotten and to be begotten, was entitled to in default of appointment, should be held in trust for that child for life, and after its death for its children. Sir L. Shadwell, V. C. held the appointment valid. He said that if the gift be of the bulk of the property amongst a set of persons collectively, some of whom are within the rule of law as to perpetuity, but the rest of them are not, the gift is void *in toto*. That in the case before him the gift was not of the bulk of the fund, but the testator merely directed how the share of each daughter should go after her death. If there had been a seventh or eighth daughter the gift would have been bad as to their children; nevertheless the gift to the elder children would have been good \* \* \*

(p. 269) the principle of *Griffiths v. Pownall* prevailed in *Cattlin v. Brown* (11 Hare 372) where a testator entitled to the equity of redemption in lands subject to a mortgage in fee, devised them to T. B. C. for life, with remainder to all and every his child and children during their natural lives if more than one; and after the decease of any or either of such child or children then the part or share of him, her, or them, so dying, was given to his, her or their

child or children lawfully begotten, or to be begotten, and to his, her or their heirs as tenants in common. T. B. C. left several children, some born in the testator's lifetime, some after his death; and it was held by Sir W. P. Wood, *V. C.* that the shares of the children born in the life time of the testator were well given to their children though the gift to the other grandchildren failed \* \* \*

The author quotes also *Wilson v. Wilson* (4 Jur. N. S. 1076, 28 L. J. Ch. 95), and says:

“The bequest there was of a sum of money upon trust to pay the income to the testator's wife during her life, and after her death in trust for the then present and future children of I. L. *who should be living at the death of the testator's wife*, and who should attain the age of twenty one or marry, in equal shares; and the testator directed that the shares of each daughter should be settled upon trust for her for life, and after her death upon her children. Sir W. Wood decided that the trust in favor of a child of a daughter who was living at the death of the testator was valid. He said ‘I can conceive no ground why in respect of a child of I. L. *in esse* at the time of the testator's decease, there should not be a direction that her share should be settled on her children.’ ”

The case of *Porter v. Fox*, 6 Sim. 485, is cited in Appellant's brief (p. 14) as authority for the proposition that “the mere fact that Gladys and Vietor Herrmann were born at the date of the testator's death does not in the case of a gift like this validate the gift over upon the termination of their life estates”. But, as is said in *Wilson v. Wilson* (*supra*):

“In *Porter v. Fox* and that class of cases, the difficulty arises from there being a gift to a class of persons, some of whom can take whilst others cannot. In these cases it cannot be ascertained what is the share of each and hence

the gift is void as to all. Here, however, the children of each child of I. L. form a separate class, and the share of each child is separately ascertainable.

In the same way in the case at bar, the children of each child of C. Theodor Herrmann form a separate class, and the share of each class is separately ascertainable. Appellant's brief cites also *Stout v. Stout*, 44 N. J. Eq. 479, and says, page 15:

"This court itself cannot sustain the contention that the gifts over after the life estates in Gladys and Vietor are valid without overruling *Stout v. Stout*."

But in *Stout v. Stout* the income upon the property as a whole was given to all the children *as a class* with remainder after their death to their next of kin, whereas in the case at bar the gift is of the income upon each separate share to the child for whose benefit the share is to be set apart, with remainder in that particular share to that child's issue. A decision in the case at bar sustaining the gifts over after the life estates in Gladys and Vietor Herrmann would therefore in no way conflict with the decision in *Stout v. Stout*.

It is further to be observed that all the other cases cited in Appellant's brief under Point I (pp. 8 to 16) to sustain his contention that "the gift of the corpus of the testator's estate after the life estates to C. Theodor Herrmann's children violates the rule against perpetuities and is therefore void", are cases of gifts to a class and are governed by the rule in *Leake vs. Robinson*, whereas the case at bar does not come within the definition of "gifts to a class" and is not governed by that rule, because the property given is divided into shares and each share stands separate and apart from every other share.

After a full review of the cases on the subject,

Jarman on Wills concludes with this statement (p. 271\*):

“It must be taken as settled that where the shares of all the separate stocks can be ascertained within legal limits, as in those authorities, the rule in *Leake v. Robinson* is not applicable so as to defeat limitations, otherwise valid, of the separate shares.”

In the case at bar the shares of the separate stocks, that is, the shares of each of the children of C. Theodor Herrmann living at his death, can be ascertained within legal limits, viz, the limit of the life of C. Theodor Herrmann, a person in being at the death of the testator. The rule of gifts to a class as laid down in *Leake v. Robinson* is, therefore, not applicable so as to defeat the limitations of the shares of Gladys Herrmann and Vietor Herrmann, the two children of C. Theodor Herrmann who were living at testator's death and are now living. The limitations of those two shares are “otherwise valid” as prescribed in the above quotation from Jarman on Wills, in that they are each for the period of only two lives in being at the death of the testator, Henry V. Herrmann, one being for the lives of C. Theodor Herrmann and Gladys Herrmann and the other for the lives of C. Theodor Herrmann and Vietor Herrmann.

The distinction between a gift to a class in its legal sense, that is, a gift of property in bulk to persons in a body, on the one hand, and a gift of property in shares to individuals of a class, on the other hand, is well illustrated by comparing the two cases in the New York Court of Appeals, viz, *Matter of Mount*, 185 N. Y. 162 (*supra*) and *Matter of Horner*, 237 N. Y. 489.

In the *Mount* case, as we have seen, there was a direction to divide the property into shares and trusts were created for the separate shares, and the will was sustained as to shares set apart for the

benefit of children living at the death of the testator.

In the Horner case, among other provisions there was a trust for the benefit of the children of Grace B. Simms which included children living at the death of the testator and those who might thereafter be born to the mother; there was no direction to divide the property into shares but the trust was to continue as to the property as a whole until all the children had reached the age of twenty one years. Cardozo, *J.*, delivering the opinion of the Court, says (p. 501):

“We think the provisions for the benefit of after born children are so entangled with those for the benefit of Gladys” (the child living at the death of the testator) “as to make severance impossible.”

And at page 503:

“Our ruling in *Matter of Mount* (185 N. Y. 162, 169) is pressed upon us as decisive. That case went to the verge of permissible excision. It did not go so far as we shall have to go now if this trust is to be upheld. There the testator created a trust for life for the benefit of his sister, and directed that at the end of that estate the fund should be divided per stirpes into as many shares as there were children of his nephew then living and issue of deceased children, with separate trusts for each of them. We sustained this limitation for the benefit of the children alive at the testator’s death, though we pronounced it void as to the others. The judgment went upon the ground that there was present in that will the precise element that is lacking in the trust for the children of Mrs. Simms, a direction for the severance of the shares, so that the good was not inextricably commingled with the bad. (185 N. Y. at pp. 169, 170; cf. *Mount v. Mount* 234 N. Y. 568; *Boughton v. James*, 1 Coll. 26; Gray, the Rule against Perpetuities, § 389). Here as we have seen the poison interpenetrates the system.”

In the case at bar, the will expressly directs that the residuary estate shall be divided into shares and a share set apart for each child, and this is to take place within the limit of time prescribed by law for the vesting of future estates, viz., at the termination of the life of C. Theodor Herrmann, a person in being at the death of the testator.

The case comes, therefore, within the ruling of the Mount case (*supra*) and not within the ruling of the Horner case (*supra*).

The will is, therefore, valid as to the shares of Gladys Herrmann and Vietor Herrmann, children of C. Theodor Herrmann living at the death of testator.

## II.

**The trusts created by the Will in favor of Gladys Herrmann and Vietor Herrmann being valid, the claim of the Appellant, C. Theodor Herrmann, that he is now vested with the whole beneficial interest in the residuary estate of the testator and entitled to the immediate possession thereof cannot be maintained.**

The trusts created by the Will stand in the way and bar any such claim. By the terms of the Will, the legal title and right of possession are vested in trustees and they are directed to collect the income and pay therefrom taxes, assessments, water rents, charges and expenses of every kind connected with the protection and management of the property and then pay the residue of the income to the said C. Theodor Herrmann during his life and after his death to his children living at his death, dividing

the property into shares and setting apart one share for each child. These are active trusts which make it necessary for the trustees to hold the legal title in order that they may perform the duties imposed upon them. Being active trusts, they are not affected by the Statute of Uses, which, in the case of trusts merely passive, operates to transfer the use into possession by turning the beneficial interest of the *cestui que use* into a legal estate.

In Perry on Trusts, 2nd Edition, Section 300, it is said:

“Three principal reasons or rules of construction were laid down, whereby conveyances were excepted from such operation (of the Statute of Uses) \* \* \* Third, where such powers or duties were imposed with the estate upon a donee to uses that it was necessary that he should continue to hold the legal title in order to perform his duty or execute the power.”

Section 305. “The third rule of construction is less technical and relates to special or active trusts, which were never within the purview of the Statute. Therefore, if any agency, duty or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents, or to convey the estate, or if any control is to be exercised, or duty performed by the trustee in applying the rents to a person’s maintenance, or in making repairs, or to preserve contingent remainders or to raise a sum of money, or to dispose of the estate by sale, in all these, and in other and like cases, the operation of the statute is excluded, and the trusts or uses remain mere equitable estates.”

And in Jarman on Wills (5th Edition) page 305, it is said:

“The reader will have perceived \* \* \* that the same principle which determines whether the trustees take any estate, regulates also the nature and duration of that estate; the established doctrine being \* \* \* that the trustees

take exactly that quantity of interest which the purposes of the trust require; and the question is not whether the testator has used words of limitation or expressions adequate to carry an estate of inheritance, but whether the exigencies of the trust \* \* \* demand the fee simple, or can be satisfied by any and what less estate."

### III.

**The trusts of the Will in favor of C. Theodor Herrmann and his existing children, Gladys Herrmann and Vietor Herrmann, being valid, the Court will not now determine questions which may arise in case he has other children hereafter born, as that contingency is uncertain and may never occur and there is no present necessity for a decision with relation to it.**

In *Horton v. Cantwell*, 108 N. Y. 255, the Court refused to determine whether the plaintiff was entitled to a remainder in the estate on certain contingencies which might or might not occur, saying:

"Upon the whole case we think there is no practical or present controversy to be determined and the contingency may never arise in which the question can become a practical one, and even then if it do hereafter arise, there is no certainty there will be any contest whatever in regard to it. At any rate the matter is, so far as the plaintiff is concerned, a purely abstract one, and the courts do not sit to determine abstract questions."

In *Matter of Mount*, 185 N. Y. 162 (*supra*), the facts were these: The New York Code of Civil Pro-

cedure provided that if a party put in issue before the Surrogate the validity, construction or effect of any disposition of personal property contained in a will, the Surrogate *must* determine the question upon rendering a decree. In proceedings for the probate of the Will of Mount, some of the next of kin put in issue the validity, construction and effect of certain trust provisions in the will which gave the income of the residuary estate to testatrix's sister for life and upon her death to children of testatrix's nephew then living, contending that the entire disposition was void as suspending the absolute ownership of personal property for lives not necessarily in being at the death of the testatrix. The Surrogate made a decree sustaining the trust for the sister during life, but refusing to determine the validity of the provisions disposing of the estate after the death of the sister, "owing to the uncertainty as to who will be entitled to inherit the estate after the death of the said Susan Mount, and the fact that no decision can now be made thereupon except at the hazard of adjudicating upon the rights of persons who are not parties to the present proceeding and that no present necessity requires that any decision thereupon be now made."

In this position the Surrogate was sustained by the Court of Appeals, the Court saying (p. 168):

"While it is true that in proper cases the judgment of a Court will conclude the rights of persons not in being at the time the judgment is rendered, there certainly is no impropriety in a Court refusing to determine such rights when present conditions do not require it or render such determination advantageous to the disposition of the estate."

In *Cross v. Del Valle*, 1 Wallace (U. S. Supreme Court), 5, it is said in the opinion of the Court:

"A Chancellor will not maintain a bill merely to declare future rights. The Scotch

tribunals pass on such questions by 'declarator' but the English Courts have never assumed such power. *Grove v. Bastard*, 2 Phil. 621. In *Langdale v. Briggs*, 39 Eng. L & E 214, Lord Justice Turner remarks: 'As long as I have known this Court, now for no inconsiderable period, I have always considered it to be settled that the Court does not declare future rights, but leaves them to be determined when they may come into possession. In all cases within my experience, where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenants for life, reserving liberty to apply upon their death.' "

In *Stewart v. Stewart*, 61 N. J. Eq. (16 Dick.) 25, the bill was filed praying for the construction of a will and for instructions in respect to the complainant's duty thereunder. Magie, Chancellor, says (p. 27) :

"Upon a bill of this sort, the Court is not merely to counsel and advise, but it must decide and direct. Its action is to be confined to direction respecting duty, and limited to interests immediately involved and which must be properly and fully represented."

In *Griggs v. Veghte* (2 Dick. Ch. Rep. 179), the bill was filed for the construction of a will. Green, V. C., says (p. 181) :

"By the bill the complainant asks directions as to his duty in the administration of the estate under the provisions of the will, and propounds a number of questions, some of which relate to the distribution of the estate after the termination of life interests, and which may not be effectively disposed of in the present suit, and others to which no present exigency requires an answer. 'Where the duty of the trustee is involved in doubt, it is his right to ask and receive the aid and direction of a court of equity to the extent that his

necessities may require.' *Traphagen v. Levy*, 18 Stew. Eq. 448. This right does not, however, extend to the solution of propositions which do not present themselves as requiring any action by the trustee, or where the events which must control the rights of parties and the duties of the trustee have not transpired and are yet uncertain, or which should properly be submitted to some other tribunal or which are so clear as to admit of no question. The Court should be called on to decide and direct, not to counsel and advise. *Merlin v. Blagrove*, 25 Beav. 139; *Vanness's Exrs. v. Jacobus*, 2 C. E. Gr. 153."

In the case now before the Court, the appellant asks for advice and instructions as to his duties as administrator with the will annexed of the testator, Henry V. Herrmann, but there is nothing in the situation at the present time which requires any advice or instructions. The duties to be performed by him are the ordinary duties of an administrator with the will annexed, who must administer the estate in accordance with the provisions of the will. That will is valid, and as conditions are to-day, his duties as such administrator with the will annexed are perfectly plain and no problems present themselves which require solution by any action of his. Whether anything may hereafter occur to modify or control the rights of the parties or the duties of the trustee under the will, is, as yet, uncertain, but the Court cannot properly be asked to give advice or instructions based upon a contingency which may never happen. There are two objections to its doing so:

FIRST: Such instructions might turn out to be entirely unnecessary and futile either by failure of the event to occur upon which the instructions were based, or the lack of any contest or dispute with respect to it even if it should occur.

SECOND: The Court would pass upon the rights of persons not now in being but who may hereafter be born and those rights might be prejudiced by a decree now made without any opportunity to be heard on the part of those thus interested.

The Appeal should be dismissed and the Decree of the Court of Chancery affirmed.

Respectfully submitted,

ALFRED S. BROWN,  
Defendant-Respondent in person.

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## New Jersey Court of Errors and Appeals

*Between*

C. THEODORE HERRMANN, as  
a d m i n i s t r a t o r, etc., of  
Henry V. Herrmann, de-  
ceased,

*Complainant-Appellant,*

*and*

C. THEODORE HERRMANN,  
*Defendant-Appellant,*

*and*

GLADYS HERRMANN and others,  
*Defendants-Respondents.*

*On Appeal  
from  
Chancery.*

### **BRIEF FOR RESPONDENT, Grace Cranstoun Herrmann.**

Henry V. Herrmann died on May 13, 1924, leaving a will dated January 16, 1911, and two codicils, the will and one codicil admitted to probate, and the other codicil denied probate.

The pertinent parts of the will for the consideration of this court with respect to the bequest to the respondent are transcribed verbatim as follows:

“TENTH: All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, of whatsoever nature and description, and wheresoever situated, I do give, devise and bequeath unto my executors hereinafter named, in trust, nevertheless, for the following uses and purposes, that is to say: That they shall collect and receive the rents,

interest and income arising therefrom, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management thereof, they shall pay the residue of said rent, interest and income upon my brother C. THEODORE HERRMANN, during his natural life. And upon his death

(1) \* \* \* \* \*

(2) In the event that my said brother, C. Theodore Herrmann, shall not leave any child or children him surviving, then upon his decease, I do give, devise and bequeath the said rest, residue and remainder of my estate so held in trust for his benefit, as follows: Unto Alfred S. Brown, of the City of New York, the sum of Ten thousand dollars thereof, and unto Frederick Feibel, of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodore Herrmann, for her own use and benefit absolutely and forever."

The above may be summarized as follows:

- Paragraph 10. All the residue of my estate I give to my executors in trust to pay the net income thereof to my brother, C. Theodore Herrmann, during his natural life. And upon his decease:
1. \*\*\*\*\*
  2. If he shall not leave any child or children him surviving, I give said residue (subject to two above bequests) to Grace Cranstoun Herrmann, wife of said C. Theodore Herrmann, absolutely.

## ARGUMENT.

1. The rule against perpetuities has no application to this defendant.

### *THE REQUIREMENT OF THE RULE.*

A. **THE RULE STATED.** The Rule requires that future interests within its scope should vest within twenty-one years, exclusive of periods of gestation, after a life or lives in being.

B. **VESTING THE SOLE REQUIREMENT.** The Rule does not require that future interests should become present estates of enjoyment within the limits. It is satisfied if the future interests must vest within the limits. Consequently, if an interest is vested at its creation, it is not subject to the Rule at all; this is true, even though such interest may not become a present estate of enjoyment until long beyond the limits of the Rule. So with a future interest which is contingent at its creation. The Rule does not require that this contingent future interest should become a present estate of enjoyment within the limits, but only that it should vest within those limits. If restraints on alienation are imposed upon interests which must vest, if ever, within the limits of the Rule, such interests are valid, regardless of the validity of the restraint; if the provision for restraint is invalid it alone will be rejected.

Cyc: Perpetuities. Vol. 30, page 1482.

### C. AS TO FUTURE INTERESTS CREATED BY WILL.

“The validity of future interests created by Will is determined by the situation existing at the testator’s death.”

Cyc: Perpetuities, Vol. 30, page 1485.

The interest of this defendant is an equitable contingent remainder, the contingency being that, at the death of C. Theodore Herrmann, he shall

not leave any child or children him surviving. If he died, leaving no child or children surviving and this defendant is still living, she will get the residue. This contingent remainder becomes a vested remainder, and forthwith she becomes entitled to the entire residue of the estate. As she was a person living at the death of testator, the rule is not invaded.

“A contingent remainder is a remainder limited to an uncertain person or on an uncertain event, or so limited to a certain person and on a certain event as not to possess the present capacity to take effect in possession should the possession become vacant \* \* \* The chief characteristic which distinguishes a vested from a contingent remainder is the present capacity to take effect in possession should the possession become vacant, and the certainty that the event upon which the vacancy depends will happen sometime, and not upon the certainty that it will happen or the possession become vacant during the lifetime of the remainder-man.”

Cyc: Wills, Vol. 40, page 1664.

“The uncertainty therefore which distinguishes a contingent remainder is the uncertainty of the right and not of the actual enjoyment.”

Cyc. 40, page 1665.

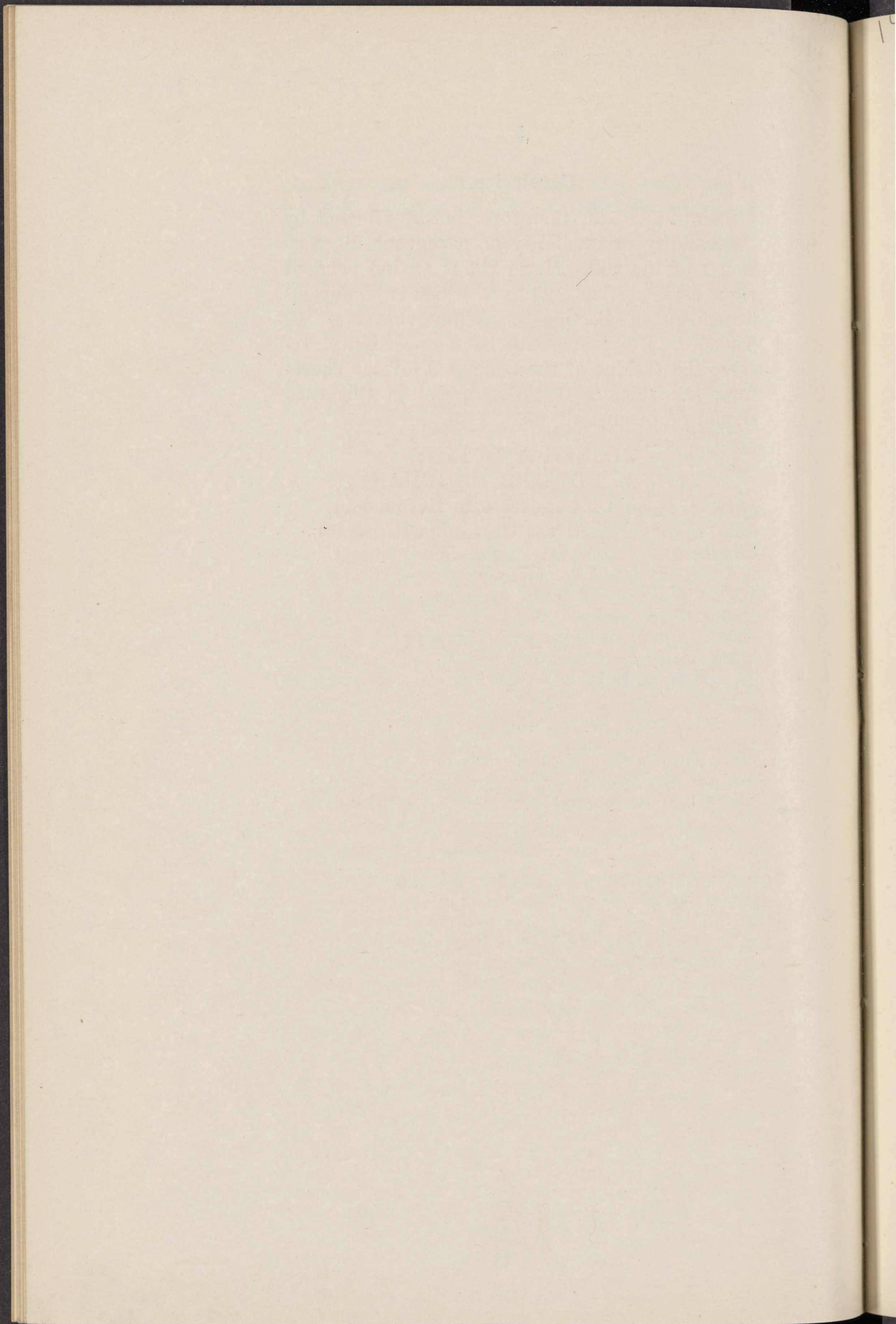
“Remainders are contingent if those who are to take in remainder are not in existence, or are uncertain, or where the vesting in right as distinguished from taking effect in possession is dependent upon some uncertain event or contingency.”

Cyc. 40, page 1666.

**Conclusion.**

This defendant, therefore, is not affected by the validity or invalidity of paragraph 10, Section 1 of the will. Her right is an independent right arising from Section 2, which is wholly independent of Section 1. While she lives, C. Theodore Herrmann, can by no possibility, receive the residue of the testator's estate. Therefore, she submits that the appeal in this case should be dismissed.

JOSEPH A. DUFFY,  
L. EDWARD HERRMANN,  
Of Counsel with Respondent,  
Grace Cranstoun Herrmann.



## New Jersey Court of Errors and Appeals

*Between*

C. THEODORE HERRMANN, as  
administrator, etc., of  
Henry V. Herrmann, de-  
ceased,

*Complainant-Appellant,*

*and*

C. THEODORE HERRMANN,  
*Defendant-Appellant,*

*and*

GLADYS HERRMANN and others,  
*Defendants-Respondents.*

*On Appeal  
from  
Chancery.*

### **BRIEF OF RESPONDENTS, Gladys Herrmann and Vietor Herrmann.**

#### **Statement.**

Involved herein are two appeals from a decree of the Court of Chancery, one by C. Theodore Herrmann as administrator, etc., of Henry V. Herrmann, deceased, as complainant below, and the other C. Theodore Herrmann individually, as defendant below. By stipulation the two cases are to be considered together.

C. Theodore Herrmann as administrator with the will annexed of Henry V. Herrmann filed a bill in the Court of Chancery for the construction of the will and codicil admitted to probate of Henry V. Herrmann, who died on May 13, 1924, leaving the will dated January 16, 1911, and two codicils, one dated February 15, 1915, and the other dated March 15, 1922; the second codicil was denied probate.

The will and the first codicil were admitted to probate December 4, 1925.

The controversy with respect to the will and codicil arises out of the Tenth clause of the will. This clause follows:

“TENTH: All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, of whatsoever nature and description, and wheresoever situated, I do give, devise, and bequeath unto my executors hereinafter named, in trust, nevertheless, and for the following uses and purposes, that is to say: That they shall collect and receive the rents, interest and income arising therefrom, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management thereof, they shall pay the residue of said rents, interest and income unto my brother C. Theodor Herrmann, during his natural life.

And upon his death,

(1) In the event that my said brother C. Theodor Herrmann, shall leave a child or children him surviving, then I direct my said executors to divide the said rest, residue and remainder of my estate so held in trust for the benefit of my said brother C. Theodor Herrmann, into as many equal shares as there are children of my said brother living at the time of his decease, and to set apart one of such shares for each child of my said brother living at the time of his decease, and to collect and receive the rents, interest and income arising from such share, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management of said share they shall pay the residue of said rents, in-

terest and income unto the child of my said brother for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of the child for whose benefit the said share shall have been so set apart, my said executors shall pay over the principal of the said share unto the issue of the said child for whose benefit the said share shall have been so set apart to be divided equally among such issue, share and share alike, for their own use and benefit, absolutely and forever; and in default of such issue then living, then the principal of said share shall be paid over unto the surviving brothers and sisters of such deceased child, and the issue of any deceased brothers and sister of such deceased child, share and share alike, for their own use and benefit, absolutely and forever; such issue, however, to take the share which the parent would have taken if living; and if there be no brother or sister of such deceased child, or issue of any deceased brother or sister of such deceased child then living, then the principal of such share shall be paid over as follows, viz.: Unto Alfred S. Brown of the City of New York, the sum of ten thousand dollars thereof, and to Frederick Feibel of Jersey City Heights, New Jersey, the sum of ten thousand dollars thereof; and all the rest, residue and remainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodor Herrmann for her own use and benefit absolutely and forever.

(2) In the event that my said brother C. Theodor Herrmann shall not leave any child or children him surviving, then upon his decease I do give, devise and bequeath the said rest, residue and remainder of my estate so held in trust for his benefit, as follows: Unto Alfred S. Brown, of the City of New York, the sum of ten thousand dollars thereof, and unto Frederick Feibel of Jersey City Heights, New Jersey, the sum of ten thousand dollars thereof; and all the rest, residue and remainder thereof unto Grace Cranstoun

Herrmann, wife of the said C. Theodor Herrmann, for her own use and benefit absolutely and forever.”

The Court below construed the will, and by its decree determined:

“1. The legal interest in the residuary estate of Henry V. Herrmann, deceased, is by the tenth clause of his will validly bequeathed in trust.

2. The defendant C. Theodore Herrmann has for the term of his natural life the present whole beneficial interest therein under the tenth clause of the said will.

3. Gladys Herrmann has a vested beneficial interest therein for the term of her natural life, expectant upon the death of C. Theodore Herrmann, under the tenth clause of the said will.

4. The defendant Vietor Herrmann has a vested beneficial interest therein for the term of his natural life, expectant upon the death of C. Theodore Herrmann, under the tenth clause of the said will.

5. The defendant Dorothy Eileen Herrmann, adopted daughter of the defendant C. Theodore Herrmann, has no interest whatsoever under the will of Henry V. Herrmann, deceased.

6. The contention of the defendant C. Theodore Herrmann that the whole beneficial interest of the residuary estate of Henry V. Herrmann which is attempted to be affected by the tenth clause of his will is now vested in the said C. Theodore Herrmann is without merit.

7. Except as heretofore stated the Court refuses now to construe the tenth clause of the will of Henry V. Herrmann, deceased, to advise the complainant with respect thereto, or to declare any rights under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed.”

**ARGUMENT.****POINT I.**

With respect to defendants, Gladys Herrmann, and Vietor Herrmann, the provisions of the will do not conflict with the rule against perpetuities.

Under the will the testator's executors hold the residuary property in trust to pay the net income thereof to C. Theodore Herrmann, brother of testator, during his life, and upon his death to pay said income to his children then surviving, equally for their respective lives. Upon their death, the share of the principal of each deceased child shall be paid over to his or her issue then living. For present purposes, the further provisions of this paragraph need not be considered. With respect to the question as to whether these provisions conflict with the rule against perpetuities, applied to these respondents, they take as follows:

- (a) C. Theodore Herrmann has a vested equitable life estate, and receives the net income during his natural life;
- (b) Gladys Herrmann and Vietor Herrmann, children of C. Theodore Herrmann who were living at the time of testator's death, and who are now living, no other children having since been born, take a vested life interest, subject to a condition subsequent, viz; that they must survive their father in order to obtain a life estate. If it should be determined that their interest is not presently vested, but is contingent until their father's death, it forthwith becomes a vested interest upon his death, they surviving him. In either case, provided either or both survive, the interest given them under

the will does not conflict with the rule against perpetuities.

- (c) If both survive their father, they each receive one-half of the net income, during their respective lives, and upon the death of either, leaving issue his or her share of the principal belongs to his or her issue then living absolutely.

This devise therefore, with respect to defendants Gladys Herrmann and Vietor Herrmann is valid, and does not conflict with the rule against perpetuities. The ultimate estate becomes vested in any case, immediately, upon the deaths of the persons living at the testator's death.

#### POINT II.

The provisions of the will with respect to a child who may be born hereafter to the said C. Theodore, conflicts with the rule against perpetuities.

We concede that with respect to an unborn child or children the provisions conflict with the rule against perpetuities, as to the corpus of the estate which requires that the vesting must be within twenty-one years after the death of living persons excluding period of gestation. Such as are not yet born at the testator's death are not persons living at his death and could live to be more than twenty-one years of age before its death; if it did, the vesting of such child's interest would be more than twenty-one years after the death of a person living at the death of testator.

If such a child be born and die before its father, it takes nothing. Similarly, if the two children now living, if they do not survive, take nothing. If it does survive its parent, it would take its

share for life, and it would share in the income *pro tanto* with Gladys and Vietor Herrmann if they also survived. The only effect would be to decrease the interest of Gladys Herrmann and Vietor Herrmann if they also survived.

With respect to the share of the principal of the estate of such unborn child, the provision with respect to giving the estate to such child's issue would be void. This is the only situation under paragraph 10 which could arise to conflict with the rule at this time. No such child has been born and therefore the difficulty is purely academic.

### POINT III.

**The antecedent estates are not affected by the void remote provision and are therefore valid.**

Until a child is born to C. Theodore Herrmann, which in turn lives to survive him, the provisions of the will do not conflict with the rule, but are operative in full. Should a child be born to him, by surviving him, it would take a life interest and only the portion limited over to such child's issue would be void.

The interest of each child of C. Theodore Herrmann is separate and severable from any of the part of the will as it was the manifest intention and design of the testator to provide for his brother and his family. He himself was not married and when he made the will and codicil, his only heir at law and next of kin was his brother, and his family, consisting of his wife and his two children. The will and codicil clearly indicate that he desired to reserve the residue of his estate for the benefit of his brother and his family alone, in the following manner, viz: That his brother should have the income for his life, and

after his death that his children or such as should survive him, should enjoy the income and after their death to pay the estate over to their issue. He emphasized the intent to limit his brother to the enjoyment of the income alone, by providing for the giving of the residue, in the alternative to his brother's wife, if the children should all predecease the father.

To carry out the intent of the testator in cases where the rule had been violated, courts have almost unanimously upheld the wills by sustaining the valid portion and cutting off the invalid remainders. The rule thus holding is stated, and the cases supporting the rule are set out fully in 30 Cyc. p. 1490 note 25 as follows:

“Suppose there is a devise of property in trust for A, who is alive at the testator's death, for life; and on A's death, in trust to pay the income to the surviving children of A in equal shares, and, on the death of each such child, the principal of its share to be paid to its children. Here the shares will be defined at A's death, which is within the limits of the Rule; after being so defined the validity of the gift of each share will be determined separately. Suppose A had a child B, born before the testator's death, and another child C, born after his death, and that both B and C survive him. The property is now divided into two shares. As to one share, there is a gift to B for life, remainder to B's children; this is good because the children of B must be begotten in his lifetime, and B was alive at the testator's death. As to the other share, there is a gift to C for life, and then to his children; this is good so far as the gift to C for life is concerned, because C must have been begotten in A's life. But it is bad so far as the gift to C's children is concerned, because as C was not alive at the testator's death, he may beget children at a time beyond the limits of the rule.”

The only exceptions to this rule are in cases where the effect of following it would be to work an injustice by distributing the estate in a manner contrary to the intentions of the testator, or, where the invalid part is an essential part of the general scheme of the testator.

The instant case does not fall within these exceptions. On the contrary, the necessity for the application of the rule is demonstrated. The testator clearly intended to limit his brother C. Theodore Herrmann to the enjoyment of a life estate in the residue of his estate. He also clearly expressed the intent to give to Gladys and Vietor Herrmann, children of the said C. Theodore Herrmann, who were in being when the will and codicil were made, a life estate, in the event that they survived their father. They were not indicated by name, but were undoubtedly intended, because they were the then children of his brother, actually in being.

To hold that the whole provision made by him was void because the rule *might* be invaded by the birth of another child to C. Theodore Herrmann, would result in a disposition of his estate clearly never intended by him, and would deprive the defendants of the enjoyment thereof as he had planned.

The only case apparently in this state directly sustaining the rule above set out is *Stout v. Stout*, 44 N. J. Eq. 479.

The Court found that a portion of the gift in one of the clauses of the will was in conflict with the rule because the time for vesting was too remote, because of the possibility of after-born children to one of the legatees named in the clause.

The Court held that this did not void the bequests to the other legatees named in the clause and said:

“(3) But is there any further conflict between the provision of this clause and the doctrine of perpetuities? The counsel for complainants seemed inclined to believe that the doctrine extends to any of the children of Mrs. Dunham who might be born after the death of the testator; but insisted that, while they might be cut off, the child who was living at the testator’s death could enjoy the bequest. But the counsel for the defendants goes so far as to claim that, not only are all after-born children cut off, but that the child living at the death of the testator is also. This is claimed to follow, because the gift is to a class and that the whole must fall, if part does, and this is the result of the authorities.

*Lewis on Perpetuities* 456; 1 Jar. on Wills 230. But does the gift fail because it is to a class, that is to all the children of Mrs. Dunham? I think not. The gift of the interest of the fund to them during their lives is not an impairment of the rule under consideration.”

The Stout case, while cited in several cases in this state, on the point involved in the present case, it has only been cited once, viz:

*Graves v. Graves*, 94 N. J. Eq. 268-275.

In that case it was decided that the testator provided that the principal of his estate should remain intact without depletion or distribution for the benefit of his grandchildren, and their families. This plainly contravenes the rule against perpetuities. No such conclusion was cited in the Stout case, nor does it appear in the Stout case that the possible severance of the interest of grandchildren were even considered. If it had been urged and considered, we believe

that to that extent the decision would have been modified.

We submit therefore, that the citation of the Stout case in the Graves case is only *obiter dictum*.

We cannot find that the Stout case has been directly either affirmed or overruled in this state. Indirectly, however, it has been affirmed.

In *McGill v. Trust Company*, 94 N. J. Eq. 657, a similar severance was upheld. The elimination of grandchildren in that case arose because of the provisions in the will that they were not to receive the principal until they attained the age of twenty-five years. While the limitation to the grandchildren was held void under the rule, there was a severance so that the grandchildren were decreed to have a life interest in the share devised to them. This conclusion was reached because the Court decided that it was not testator's primary intent to tie up the interest until the grandchildren reached twenty-five years of age.

In this case the issue of children take immediately upon the death of each surviving child of the first life tenant. In the instant case no intent is evidenced to tie up the estate and therefore, the grandchildren take their share subject only to be divested in whole or in part by predeceasing their parent, or by the birth of other children. In the event of the latter their share would merely be reduced.

Appellant also cites the case of *Hewitt v. Green*, 77 N. J. Eq. 345.

Neither is this case in point in consideration of the instant case. Under the facts involved in that case the corpus of the trust fund was not to be paid over until the youngest of the sur-

viving grandchildren should have reached the age of twenty-five years. No such age limit is involved in the instant case.

To the same effect, the case of *Kates v. Walker*, 82 N. J. L., p. 157, is cited by appellant. In that case the estate was bequeathed to the grandchildren when the youngest reached the age of twenty-five years.

An examination of the cases cited by appellant, discloses that most, if not all, of them fall into one of two classes, viz:

- (a) Where the age limit for distribution was fixed beyond 21 years, or
- (b) Where the court determined that the main object of the testator was to accumulate and distribute the estate at a period beyond the limits allowed by the rule against perpetuities.

Our courts observed such cases and commented thereon in the McGill case.

“It is true that there are more than a few authorities (such as *Re Johnston’s Estate*, 185 Pa. St. 179; *Gerbers Estate*, 196 Pa. St. 366; *Kountz’s Estate*, 213 Pa. St. 390), and a number of decisions in Illinois and New York holding that where a trust is created with an ultimate gift of corpus thereunder and prior estates for years or lives, if the ultimate gift be too remote and hence invalid, the prior estates are invalid also, on the theory that it is to be conclusively presumed the ultimate gift was testator’s main purpose or object and the prior estates merely incidental; and these authorities are reflected in some of the text books or the text of some of the digest writers. Such a holding is, however, utterly opposed to the rationale of the matter and the weight of authority is overwhelmingly the other way, as is also the decision in *Stout v. Stout*, 44 N. J. Eq. 479.”

Whether or not Section 1 under paragraph 10, of testator's will is held valid, Section 2 thereof clearly indicates that there was no intention on the part of testator to accumulate the estate for the benefit of the first life tenant's children or subsequent issue, because it specifically provides that the residue under a given contingency shall be paid over to Grace Cranstoun Herrmann, a person living at the death of the testator and still living.

We submit that the contention of the appellant urged under Point 2 in their brief, is unsound and cannot apply to the case under consideration, and that the cases relied upon are distinguishable from the present case in that, the facts in all of these cases show either that the age limit for distribution was fixed beyond twenty-one years, or that the testator intended to accumulate and distribute the estate at a period beyond the limit allowed by the rule. The present case does not fall within either of these classes.

#### POINT IV.

Courts consistently refuse to declare the rights or status of parties where such rights or status are not necessary to afford immediate relief.

The complainant alleges that the administrator cannot safely proceed with the administration of his trust, so long as the said question remains unadjudicated until he is advised by this court as to his duties in the premises, and until the rights of the several parties in the estate are adjudged, fixed and determined.

If paragraphs 1 to 6 inclusive of the decree are sustained, there can be no necessity for a determination of interest or rights which will follow at the termination of the life estates of C.

Theodore Herrmann and these respondents. Any determination would affect the rights of persons not yet in being and may or may not ever come into being. The complainant's duties as administrator could not be affected by any determination of these rights at this time.

It is fundamental that a suit for construction of a will will not be entertained where no necessity for a judicial construction thereof appears.

"A court of equity will not take jurisdiction of a suit for a construction of a will unless it can afford immediate relief. It will not undertake, where there is no matter in dispute, to declare future rights, nor, will it ever undertake to decide upon and determine contingencies which may never arise, unless such determination is necessary for the decision of some immediate relief to be granted, and which it can enforce by a decree."

40 Cyc. 1845-1846.

Chancellor Magie, in *Stewart v. Stewart*, 61 N. J. Eq. 27, states the principle as follows:

"Upon a bill of this sort, the court is not merely to counsel and advise, but it must decide and direct, its action is to be confined to direction respecting present duty, and limited to interests immediately involved, and which must be properly and fully represented."

Vice-Chancellor Stevenson in *Ogden v. McLane*, 73 N. J. Eq. 159, states the principle as follows:

"This court will not instruct trustees in regard to their duty with respect to the payment or transfer of the trust estate in their hands until the time for such payment and transfer has arrived. When the time to act arrives, the parties who then shall be affected by the action of the trustee are entitled to be heard; they are the parties who argue the question, the determination of which directly affects their interest."

To the same effect the following:

*Gregg v. Vechte*, 47 N. J. Eq., p. 180;  
*Traphagen v. Levy*, 45 N. J. Eq. 448;  
*Tuttle v. Woolworth*, 62 N. J. Eq. 532;  
*Morris v. Bearsden*, 2 Atl. Eq. 425;  
*Connant v. Bast*, 52 N. J. Eq. 12.

The complainant in the instant case asks for advice and instructions. He shows no present necessity for advice or instructions from this court, but on the contrary urges that he is entitled to the income of the estate as the present life tenant. No problem presents itself surely with respect to this. If no child is hereafter born to C. Theodore Herrmann, the question now sought to be raised may never be necessary for determination. To determine the matter at this time would serve no real purpose because the contingency may never occur, any instruction or advice conveyed at this time would therefore be futile.

The matters urged by the complainant in the event that the contingency arises can be more properly dealt with when the necessity for action arrives. To pass upon the rights of persons not now in being when no necessity therefore exists would be prejudicial to such persons.

Any determination of the rights of the parties not living at this time would be premature because of the provisions of the will relating to the contingent bequest to Grace Cranstoun Herrmann.

Appellants urge that such determination is necessary at this time for the purpose of having a proper inheritance tax calculated on the respective shares of the parties in interest. The inheritance tax act provides adequate machinery and details the method by which the State may levy the tax on all interests under the will. The

tax on the remainder estates or interests may be ascertained, and the payment of the tax suspended. For this purpose, it is not necessary to determine the rights of the parties or their status at this time.

Appellant further urges that under Section 7 of the Chancery Act of 1915, as supplemented by the Uniform Declaratory Judgment Act, P. L. 1924, page 312, the Court of Chancery possesses jurisdiction to declare the future rights of parties.

Section 16 of the latter act provides that all persons shall be made parties, who have or claim any interest which would be affected by the declaration, that no declaration shall prejudice the rights of persons not parties to the proceeding.

In the case *sub judice*, children may be born to either or both of the children of C. Theodore Herrmann, if there are, such persons would have a right to be heard before a decision against them is made.

Our courts have construed the declaratory judgment act in several cases, and have uniformly held that in order to entitle one to relief thereunder, it should appear that they have some present rights with respect to which they are entitled to relief.

“To entitle complainants to have this court consider the situation set out in their bill, and to render a declaratory judgment thereon, it should appear, from the facts alleged, that they have present rights against the persons whom they made parties to the proceedings, with respect to which they may be entitled to some relief. If it appears from the bill that the complainants can have no relief as against any party they have named as a defendant, such party should not be forced into a litigation which can have no

final result in favor of complainants, especially if such litigation will delay the party defendant in enforcing rights which have already been established in his favor as against complainants. \* \* \*

*Tanner v. Boynton Lumber Co.*, 98 N. J. Eq. 85.

“The statute of 1915 contemplates that, in order to be entitled to a construction, a suitor must have a fixed equitable right of future enjoyment in the subject matter of the instrument to be construed; that the judgment should be binding upon all the parties interested in the subject matter and that all parties in interest should be before the court. The act was not intended to apply to equitable rights presently enforceable by existing remedies, nor was it intended that the court should construe documents simply for the purpose of advice and counsel, nor to declare possible rights depending upon future happening, but to construe and declare existing rights and bind the parties by a decree enforceable in the future as the circumstances may warrant.

Chancellor Walker considered the purposes of the act. In *re Ungaro*, 88 N. J. Eq. 25, and in *Niers v. Persons*, 92 N. J. Eq. 17; see, also, *Snyder v. Taylor*, 88 N. J. Eq. 513.”

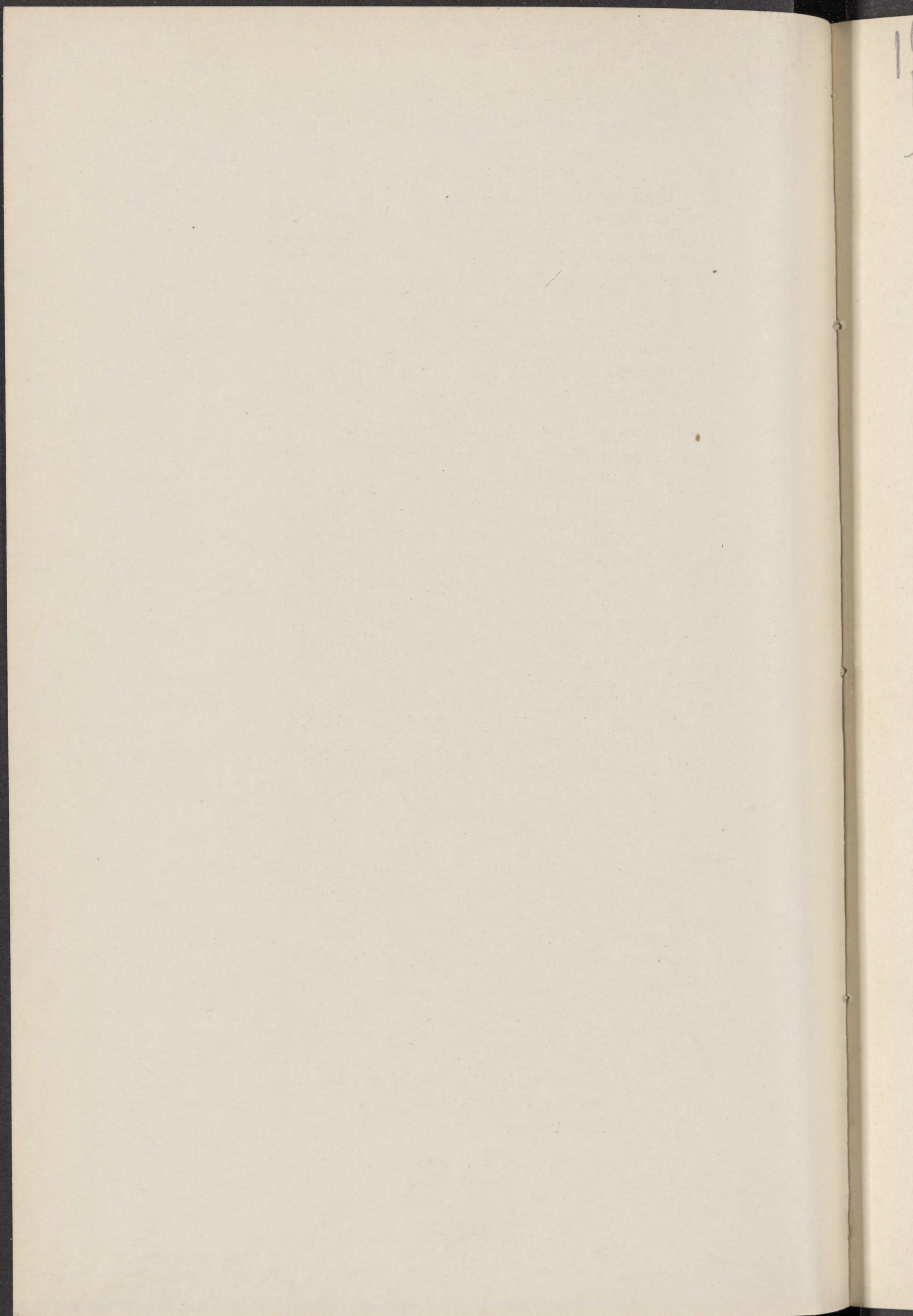
*Potter v. Watkins*, 92 N. J. Eq. 538.

This court, even under the provisions of the Uniform Declaratory Judgments Act, should not undertake to decide or declare the rights or status of parties upon a state of facts which is future, contingent and uncertain.

We submit that the decree appealed from should be sustained.

Respectfully submitted,

L. EDWARD HERRMANN,  
Of Counsel with Respondents,  
Gladys Herrmann and Vietor  
Herrmann.



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## New Jersey Court of Errors and Appeals.

BETWEEN

C. THEODORE HERRMANN, as administrator, etc., of Henry V. Herrmann, deceased,  
*Complainant-Appellant,*

*and*

C. THEODORE HERRMANN,  
*Defendant-Appellant,*

*and*

GLADYS HERRMANN and others,  
*Defendants-Respondents.*

ON APPEAL  
FROM  
CHANCERY

### BRIEF FOR APPELLANTS.

#### Statement.

These are appeals from a final decree in chancery advised by Vice Chancellor Church.

The bill was filed by the administrator with the will annexed of Henry V. Herrmann, deceased. It set forth that questions of doubt and difficulty have arisen on the will and codicil and in particular with reference to the proper construction and legal effect of Clause Tenth of the will which disposes of the testator's residuary estate. The testator, a bachelor, after leaving several legacies, attempted to deal with his residuary estate as follows:

“TENTH: All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, or to which I may be entitled at the time of my decease, of whatsoever nature and description, and wheresoever situated, I do give, devise and bequeath unto my executors hereinafter named, in trust, nevertheless, and for the following uses and purposes, that is to say: That they shall collect and receive the rents, interest and income arising therefrom, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management thereof, they shall pay the residue of said rents, interest and income unto my brother C. THEODORE HERRMANN, during his natural life. And upon his death.

(1) In the event that my said brother C. THEODOR HERRMANN, shall leave a child or children him surviving, then I direct my said executors to divide the said rest, residue and remainder of my estate so held in trust for the benefit of my said brother, C. Theodor Herrmann, into as many equal shares as there are children of my said brother living at the time of his decease, and to set apart one of such shares for each child of my said brother living at the time of his decease, and to collect and receive the rents, interest and income arising from such share, and after paying therefrom and thereout all taxes, assessments, water rents, charges and expenses of every kind and description connected with the protection and management of said share, they shall pay the residue of said rents, interest and income unto the child of my said brother for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of the child for whose benefit the said share shall have been so set apart, my said executors shall pay over the principal of the said share unto the issue of

the said child for whose benefit the said share shall have been so set apart, to be divided equally among such issue share and share alike, for their own use and benefit absolutely and forever; and in default of such issue then living, then the principal of said share shall be paid over unto the surviving brothers and sisters of such deceased child share and share alike, for their own use and benefit absolutely and forever; such issue, however, to take the share which the parent would have taken if living, and if there be no brother or sister of such deceased child, then living, then the principal of said share shall be paid over as follows, viz.: Unto ALFRED S. BROWN, of the City of New York, the sum of Ten thousand dollars thereof, and unto FREDERICK FEIBEL, of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof; unto GRACE CRANSTOUN HERRMANN, wife of the said C. Theodor Herrmann, for her own use and benefit absolutely and forever.

(2) In the event that my said brother, C. Theodor Herrmann, shall not leave any child or children him surviving, then upon his decease, I do give, devise and bequeath the said rest, residue and remainder of my estate so held in trust for his benefit, as follows: Unto ALFRED S. BROWN, of the City of New York, the sum of Ten thousand dollars thereof, and unto FREDERICK FEIBEL, of Jersey City Heights, New Jersey, the sum of Ten thousand dollars thereof; and all the rest, residue and remainder thereof unto GRACE CRANSTOUN HERRMANN, wife of the said C. Theodore Herrmann, for her own use and benefit absolutely and forever."

Answers to the bill of complaint were filed by C. Theodore Herrmann individually, Gladys Herrmann, Vietor Herrmann and Alfred S. Brown. Testimony was taken and the Vice Chancellor filed an opinion (Case 52) construing certain of the

part of Clause Tenth and refusing to pass upon certain of the other questions of construction raised by the pleadings. A final decree embodying his opinion was made (Case 261-263) and these two appeals were taken. The complainant, the administrator with the will annexed, appealed only from Paragraph 7 of the final decree, which is as follows:

“7. Except as heretofore stated the Court refuses now to construe the tenth clause of the will of Henry V. Herrmann, deceased, to advise the complainant with respect thereto, or to declare any rights under the tenth clause of the will of Henry V. Herrmann, deceased, or in the estate of which the said Henry V. Herrmann died possessed.”

C. Theodore Herrmann individually appealed also from Paragraph 7 of the final decree and in addition from all of the rest of the final decree except paragraphs 1, 2, 5, 8 and 9 thereof. Of the unappealed-from provisions, paragraph 1 adjudged that the legal interest in the residuary estate of Henry V. Herrmann was validly bequeathed in trust, paragraph 2 adjudged that C. Theodore Herrmann has, for the term of his natural life, the present whole beneficial interest in the residuary estate, paragraph 5 adjudged that C. Theodore's adopted daughter took nothing under the will, and paragraphs 8 and 9 allowed counsel fee and costs.

The two appeals will be argued together as all of the questions raised by the appeal of the administrator with the will annexed are also raised by the appeal of C. Theodore Herrmann individually.

The appellants contend, first, that certain of the gifts of the beneficial interest of the testator's residuary estate clearly violate the rule against

perpetuities, and are, therefore, void. They contend, secondly, that certain other gifts not in themselves violative of the rule against perpetuities are, nevertheless, so inextricably mingled with the void gifts that, by a proper construction of what is left of the will after the void gifts have been excinded, these other gifts not in and of themselves violative of the rule must, as a matter of construction, also fall. The appellant's contention, to its fullest extent, is that the result of the application of the rule against perpetuities and the above-mentioned construction is that C. Theodore Herrmann is left with the whole beneficial life interest and, he being the testator's sole next of kin, the whole interest in remainder as well. By application of the familiar doctrine of merger, the result of this is that C. Theodore Herrmann, the appellant, is vested with the whole beneficial interest in the residuary estate of Henry V. Herrmann, deceased, which the latter attempted to affect by Clause Tenth of his will. All of these contentions the Vice Chancellor decided adversely to the appellants, and he refused to adjudge whether or not, assuming the life estates in the remainder given to such of the children of C. Theodore Herrmann as survived him are valid, the gifts over on the expiration of those life estates are or are not void. While the appellants believe that the whole beneficial interest is vested in C. Theodore Herrmann, nevertheless they are aggrieved by the Court's refusal to make the additional construction asked for. If the life estates in remainder to the children of C. Theodore Herrmann are valid, and the decree appealed from adjudges that they are, it is of the utmost importance both to the administrator, and to C. Theodore Hermann individually, that there be an immediate adjudication as to the validity of the gift over of the corpus.

The clause of the will in question is longwinded, but for all practical purposes may be boiled down as hereinafter quoted. The gift is to the executors in trust to collect the income, pay charges, and pay the

“income unto my brother C. Theodore Herrmann, during his natural life. And upon his death

“(1) In the event that my said brother C. Theodore Herrmann, shall leave a child or children him surviving then \* \* \* to divide the \* \* \* remainder of my estate \* \* \* into as many equal shares as there are children of my said brother living at the time of his decease and to set apart one of such shares for each child \* \* \* and pay the \* \* \* income unto the child of my said brother for whose benefit the said share shall have been so set apart, during his or her natural life, and upon the death of the child \* \* \* pay over the principal of the said share unto the issue of the said child \* \* \* to be divided equally among such issue share and share alike, for their own use and benefit absolutely and forever, and in default of such issue then living then the principal of said share shall be paid over unto the surviving brothers and sisters of such deceased child, share and share alike, and the issue of any deceased brothers and sisters of such deceased child, share and share alike \* \* \* absolutely and forever \* \* \* but if there be no brother or sister of such deceased child or issue of any deceased brother or sister of such deceased child then living then the principal of such share \* \* \* unto Alfred S. Brown—Ten thousand dollars thereof and unto Frederick Feibel \* \* \* Ten thousand dollars thereof, and all the rest \* \* \* unto Grace Cranstoun Herrmann for her own use and benefit absolutely and forever.

(2) In the event that my said brother, C. Theodore Herrmann, shall not leave a child or children him surviving, then upon his decease \* \* \* unto Alfred S. Brown \* \* \*

Ten thousand dollars thereof and unto Frederick Feibel \* \* \* Ten thousand dollars thereof; and all the rest \* \* \* unto Grace Cranstoun Herrmann, wife of the said C. Theodore Herrman, for her own use and benefit absolutely and forever.”

Paraphrasing this for purposes of further clarification, we can analyze the gift as follows:—

1st: To C. Theodore Herrmann for life:

<i>Alternative (A)</i>	<i>Alternative (B)</i>
If he leave children him surviving	If he do <i>NOT</i> leave children him surviving
2nd: To such of C.T.H'S children as survive him for life.	To A.S.B. \$10,000.: F. F. \$10,000.: G. C. H. all
3rd: Each such child's share to its surviving issue <i>absolutely</i> . In default of issue to surviving brothers and sisters and surviving issue of any deceased brother or sister <i>absolutely</i> ; and in default of surviving brother or sister or issue of deceased to A.S.B., F.F. and G.C.H. as in 2nd B.	res: a b s o l u t e l y

Frederick Feibel predeceased the testator, so his legacy lapsed. C. Theodore Herrmann, the testator's brother, was living at the date of his death and still is. He had two children living at date of the testator's death, Gladys Herrmann and Vietor Herrmann, now thirty and twenty-one years of age respectively. Grace Cranstoun Herrmann is still living, as is Alfred S. Brown.

## ARGUMENT.

## I.

**The gift of the corpus of the testator's estate after the life estates to C. Theodore Herrmann's children violates the rule against perpetuities and is therefore void.**

C. Theodore Herrmann and his children were alive at the testator's death and all of them are now living. He might have children born after and indeed more than twenty-one years after the testator's death. The gifts over upon such children's death to their issue, if they leave issue, and otherwise as provided in Gift 3rd if they do not leave issue, may take effect at a time more remote than lives in being plus twenty-one years from the testator's death. Note that the gifts over of the corpus are all contingent upon the several takers *surviving* the children of C. Theodore Herrmann. The gifts of the corpus therefore, obviously cannot vest until the deaths of those children. Just as clearly those deaths may not take place until a time too remote under the Rule.

The common law rule against perpetuities is, of course, in effect in this State.

*McGill v. Trust Company*, 94 N. J. E. 657, modified as to other points and affirmed by this court in 96 N. J. E. 331, 125 Atl. 108.

That rule of course is to the effect that no future interest in property is valid which must not necessarily vest within lives in being in twenty-one years (exclusive of periods of gestation when there are actual after born children).

A case very much in point is

*Stout v. Stout*, 44 N. J. E. 479 (Bird, V. C. 1888).

In this case the testator gave his daughter Elizabeth W. Dunham the income for her life from one-third of the residue of his estate, and then provides that:

“Interest dividend and income of said residue to her child, if she shall leave but one child her surviving and to her children share and share alike if she shall leave more than one surviving her, to be paid them, if there shall be more than one, and to it if there shall be one as the same shall be received, so long as they shall severally live. And if the children of said Elizabeth W. Dunham shall severally die I give, devise and bequeath the principal of said one-third of said residue of my estate and of the investments thereof to the next of kin of said deceased children in every case in such share and manner as if the said children were the absolute owners of said one-third of said residue, in equal shares, and if I should die intestate in New Jersey leaving the same subject to the laws of descent and distribution in such case.”

The Court held that although Mrs. Dunham was fifty years of age she might have other children after the testator's death and that such after born children might survive her for more than twenty-one years and that, because of this possibility, the gift over to the children of her children was too remote and accordingly void.

Applying that case to the Case at bar, C. Theodore Herrmann is in the position of Elizabeth Dunham, the gift over to his children is limited to their lives as in *Stout v. Stout, supra*, and following that case the gift over of the corpus on the death of C. Theodore Herrmann's children is necessarily too remote and void.

See also,

*Kates v. Walker*, 82 N. J. L. 157.

In *Hewitt v. Green*, 77 N. J. E. 345, the testator created a trust to pay annuities to certain persons named in the will, which included a grand nephew, and that payment of these annuities should continue until this grand nephew reached the age of twenty-five years, and that thereafter the income should be accumulated for the benefit of the testator's grand children regardless of whether they were born prior or subsequent to the testator's decease; that as each grandchild arrived at the age of twenty-one years the accumulated interest on his share should be paid to him and that when the youngest surviving grandchild should have reached the age of twenty-five years the corpus of all these trust funds should be divided equally between these grandchildren, and in case any of the grandchildren had died before the distribution date leaving issue, such issue should receive the share which would otherwise have gone to its or their deceased parents. Under these facts the Court at page 358, said:

“The conclusion falls that when the testator died it was possible that the beneficiaries of the trust could not be ascertained until more than twenty-one years and nine months after the decease of all the grandchildren in *esse* at the time of the testator's death, and that the gift of the trust, therefore, was void under the perpetuities rule.”

The Court further held, at page 362:

“The validity of such a trust depends upon the conditions and possibilities as they exist at the time of the testator's death.”

See also

*Sielder v. Simms*, 56 N. J. E. 275.

*Gray, Rule vs. Perpetuities* (2 ed), Section 231.

In *McGill v. Trust Co., supra*, the testamentary design was that the trustees should pay the income derived from his estate in equal shares to his son Alexander and his daughter Eleanor, respectively, during their respective lives, and, at their respective deaths, pay the sum formerly going to the said son and daughter to his or her children until these children had reached twenty-five years of age, then the corpus of the trust should be turned over to them. The will also provided that in case either Alexander or Eleanor died without children being born to him or her that the corpus of such share which should have gone to such children had there been any should go to the children of the testator's surviving child. When the testator died Eleanor was married but had no children, and Alexander had three children. Under these facts this Court modified the Chancellor's decree to read that Alexander and Eleanor were seized in severalty of their father's estate because their father's attempted disposition thereof was in violation of the rule against perpetuities and that Eleanor's failure to have children did not give Alexander's children any interest either contingent or otherwise in Eleanor's share of the estate.

See also *Camden Safe Deposit, etc. Co. v. Guerin*, 87 N. J. E. 72, modified as to another point and affirmed by this Court in 89 N. J. E. 556.

Our search for New Jersey cases bearing upon the question of validity of a gift over the corpus of a trust fund whose vesting is delayed until after (1) a life estate in the first taker, and (2) a life estate or estates in the first taker's children who survive him and who might not have been

born at the date of the death of the testator, has convinced us that the two cases most in point are:

*Stout v. Stout* hereinabove cited, and  
*Graves v. Graves*, 94 N. J. E. 268, a decision by the present Chancellor.

In that case the testator, after making certain specific bequests, left the remainder of his estate to his trustee, who should, from the income therefrom, pay his widow Twenty thousand dollars for her life, and in respect of the balance of his estate, the Chancellor found that the testator had in effect provided as follows:

“E. To divide the remaining income into as many parts as there may be children and grandchildren surviving the testator and pay one of such parts to each of his children and grandchildren during the rest of the natural life estate.

F. In the event of there being other children of his children—that is grandchildren—born subsequent to the testator’s decease—the annual income to be divided into such portions that each child of a grandchild shall receive equal shares.

G. In the event of the decease of any grandchild leaving lawful issue, the share of the income which would have gone to the deceased grandchild to be paid to such issue in equal shares.

H. Upon the death of his last surviving grandchild to divide the principal of his estate among his great grandchildren share and share alike.”

When the testator died he left surviving him four children and five grandchildren and after his death one grandchild and three grandchildren were born. Other grandchildren and great grandchildren might still be born. Under this state of facts the Chancellor stated:

“Upon the whole matter I am constrained to hold that the trust attempted to be created by the testator is void because it violates the rule against perpetuities; that, consequently, the corpus of the estate vested in the children and next of kin of the testator upon his decease, and that they are entitled to enjoy it in possession, subject to a trust fund to be carved out of it sufficient in amount to produce the widow’s annuity during the term of her natural life.”

It may be urged that inasmuch as C. T. Herrmann has two children, the defendants Gladys and Vietor Herrmann, who were in fact born at the date of the testator’s death, the gifts over on the expiration of their life estates must vest immediately upon the termination of lives in being at the testator’s death, namely their own lives, and that such gifts over are, therefore, valid. It may be conceded for the sake of argument that if the gifts to Gladys and Vietor were separable that contention would be sound. For example, if the testator had specifically provided in his will that two funds of \$10,000.00 each should be set aside by his trustees and the income therefrom paid to Gladys and Vietor Herrmann for their respective lives, the remainder of the corpus over to their issue, then in such case these two life estates might be considered as separable from the invalid gifts over the corpus. In such a case it would make no difference whether or not C. Theodore Herrmann had any other children born to him because Gladys and Vietor Herrmann and their issue would receive \$10,000.00 and income therefrom, no more and no less. The case at bar is entirely different because the gift is to a class and the shares of the remaindermen cannot be ascertained until after the death of all children who

may be born to C. Theodore Herrmann and survive him. The question of whether or not such children were in being at the date of the death of the testator is under the facts in this case immaterial.

In the case at bar the size of the corpus going to Gladys and Vietor's issue or otherwise "after the termination of their respective life estates" depends entirely upon facts not settled at the date of the testator's death. C. Theodore Herrmann may still have other children who may survive him. This case, therefore, is quite different from the supposed case of a gift of \$10,000. There is abundant authority to the effect that the mere fact that Gladys and Vietor were born at the date of the testator's death does not in the case of a gift like this validate the gift over upon the termination of their life estates.

*Porter v. Fox*, 6 Sim. 485.

Here was a gift to the testator's nephew, T., in being at the date of the testator's death, and to the testator's grandchildren, his children being alive, to be distributed equally as T. and the grandchildren should reach twenty-five. *Shadwell, V. C.*, held that the gift to T., as well as that to the grandchildren was void. It is true that if T. should ultimately become a member of the class he must become so within a life in being at the date of the testator's death, that is, his own life, but his share cannot be determined until all the grandchildren, born before he reaches twenty-five, themselves reach twenty-five, or die, and that might be more than twenty-one years after the death of all persons living at the testator's death.

Authorities to the same effect are:

*Greenwood v. Robertson*, 15 Beav. 92.

*Sears v. Russell*, 8 Gray (Mass.) 86, and

*Smith's Appeal*, 88 Pa. St. 492.

*Thomas v. Gregg*, 76 Md. 169.

The most controlling of all the authorities however is *Stout v. Stout*, *supra*, where the testator left property to his daughter, Mrs. Dunham, for life, and after her death to her children for life and after their death to their next of kin absolutely. Mrs. Dunham had one child living at the testator's death, but it was held that the gifts over after the deaths of Mrs. Dunham's children were void because they did not necessarily have to take effect within lives in being plus twenty-one years. It was also held that the mere fact that there was one daughter born at the date of the testator's death, as to whose share the gift over could take effect within lives in being and twenty-one years, did not validate gifts over to that daughter's next of kin. This Court itself cannot sustain the contention that the gifts over after the life estates in Gladys and Vietor are valid without overruling *Stout v. Stout*. That case has been a rule of property in this State for forty years, and has been frequently cited, always with approval. For this Court now to upset that doctrine would be a complete violation of the rule of *stare decisis*.

The decision in *Stout v. Stout*, *supra*, is directly in accordance with the leading English cases. Conspicuous among those cases are the following:

*Leake v. Robinson*, 2 Merivale, 363  
(Grant, M. R. 1817).

*Webster v. Boddington*, 26 Beavan, 128  
(Romilly, M. R. 1858).

In the last mentioned case a testator gave his residuary estate to his daughter for life, and afterward to her two sons, Henry and Charles, and all her other children thereafter to be born and the issue of her children, that is to say, the testator's great-grandchildren, who should attain twenty-one. It was held that the gift over was too remote and was not validated as to the issue of Henry and Charles who were in being at the date of the testator's death.

*Pearks v. Moseley*, L. R. 5 Appeal Cases, 714. (House of Lords, 1880).

The will in the last mentioned case contained a bequest to the testator's daughter and her husband for life, but after their death

“in trust for all of the children of my said daughter who shall attain the age of twenty-one years and the lawful issue of such of them as shall die of age leaving lawful issue at his, her or their decease or respective deceases, which issue shall afterwards attain the age of twenty-one years or die under that age leaving issue at his, her or their decease or deceases respectively, as tenants in common, if more than one, but such issue to take only the share or shares which his, her or their parent or parents respectively would have taken if living.”

It was held that the gifts over after the life estate were void for remoteness.

## II.

**The life estates to such of C. Theodore Herrmann's children as survive him are all intermingled with and are inseparable from the gift of the corpus of the trust and accordingly fall with the gift of the corpus.**

This is a question of construction. The questions considered under the foregoing points have nothing to do with the testator's intent. The rule against perpetuities is an inexorable rule of positive law based on public policy and is applied in spite of, and even in direct contradiction to the testator's intent.

In *Gray, Perpetuities* (3 ed), Section 629, *et seq*:

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

The foregoing quotation was quoted with approval by the Supreme Court of Maine in

*Anderson v. Lincoln*, 95 Me. 541, at 544.

After, however, the rule against perpetuities has been applied, the Court is confronted with the question of construction. It must decide whether or not any of the gifts that remain are so dependent upon those that fall, or so involved in the whole consistent scheme as to lead the Court to conclude that the testator's intent would be more nearly carried out by having them fall along with

those that violate the rule. Under the circumstances of this case this question will not have to be answered with respect to the gift to C. Theodore Herrmann for life. This is so because C. Theodore Herrmann, the life tenant under gift 1st is also the sole next of kin of the testator. If therefore all gifts but the 1st are void or are eliminated by construction, we have a life estate in C. Theodore under the will and the whole equitable remainder in him as next of kin. By familiar principles of law this would result in a merger and C. Theodore would be in exactly the same position, i. e., vested to the whole beneficial interest and entitled to call upon the trustee for the legal estate, just as if his life estate was also void, and he would succeed wholly as next of kin. If authority be needed, see *Camden Safe Deposit, etc. Co. v. Guerin*, 89 Eq., 556 (C. E. A. 1918); *Deats v. Ziegner*, 82 Eq., 605 (C. E. A. 1913).

It is well settled that where gifts in themselves not violative of the rule against perpetuities are closely aligned with those which are violative and therefore void gifts, the Court as a matter of construction will hold that the valid gifts fall with the void.

The most important authority is *Graves v. Graves*, 94 N. J. E. 268.

The testator in that case left him surviving his widow and four children. Several grandchildren were alive at the date of the testator's death, and others were born afterwards. The testator's will expressed the wish that the principal of his estate should remain intact without depletion or distribution for the benefit of his grandchildren and their families, and to that end he devised and bequeathed the residue of his estate to two trustees in trust upon the following trusts, among others:

“c. All increase in shares of stock, special and stock dividends, and other increase in value or accumulations to principal, to be added to principal, the regular yearly income or dividends only to be used for distribution in manner thereafter provided. d. Out of income of the principal the trustees to pay testator’s wife during her natural life, in lieu of dower or further interest in his real estate or claim upon personalty the sum of \$20,000 per year. e. To divide the remaining income into as many parts as there may then be children and grandchildren surviving the testator and pay one of such parts unto each of his three children and grandchildren, during their natural life. f. In the event of there being other children of his children—that is, grandchildren, born subsequent to testator’s decease, the annual income to be divided into such proportions that each child and grandchild shall receive equal shares. g. In the event of the decease of any grandchild leaving lawful issue the share of the income which would have gone to the deceased grandchild to be paid to such issue in equal shares. h. Upon the death of his last surviving grandchild to divide the principal of his estate, with all accumulations, to and among the issue of grandchildren—that is, among great-grandchildren, share and share alike, the issue of any deceased grandchild to receive the share its parent would have received if living.”

None of the interested parties contended that under the rule against perpetuities the gift over to the testator’s grand-grandchildren on the death of the last surviving grandchild could be supported. It was submitted, however, that the direction to pay income to the testator’s children and grandchildren during their lives would create valid life estates. Dealing with this contention, however, the present Chancellor said, at page 274:

“\* \* \* To my mind, the meaning of the testator is perfectly clear. He, of course, well knew that grandchildren might be born to him, so to speak, after his death. That he contemplated it and made provision for them is apparent. In item 4, after providing in paragraph d for the payment of the annuity to his wife, he provides in paragraph e that the remaining income shall be divided into as many parts as there may *then* be children and grandchildren him surviving and that one of such parts shall be paid unto each of said children and grandchildren during their natural life; and in the event of any grandchild being under the age of twenty-one to pay its share to its guardian; and in paragraph f, that in the event of there being other children of his children (that is, grandchildren), born subsequent to his decease, he directs his trustees to divide the annual income in such proportions that each child and grandchild should receive equal shares; and in paragraph g, that in the event of the decease of any one of his grandchildren leaving lawful issue, the portion of the income which would have belonged to that grandchild, in equal shares to his or her issue, etc.; and in paragraph h, that upon the death of his last surviving grandchild, to divide the principal of his estate, with all accumulations and increases thereon, to and among the issue of his grandchildren, that is, among his great-grandchildren, share and share alike, the issue of *any* deceased great-grandchild to receive the share its parent would have received if living. These provisions, to my mind, evince a clear purpose of the testator to provide for grand- and great-grandchildren, and for the termination of the trust and distribution of the *corpus* on the death of his last surviving grandchild, whenever born, whether before or after his death; for, having expressed the wish that the principal of his estate should remain intact for the benefit of his grandchildren and their families, and hav-

ing provided that after-born grandchildren be let in to enjoy the income of the estate during the continuance of the trust, he proceeds, as I view it, to direct that upon the death of the last surviving grandchild, not surviving him, but surviving in any event, distribution be made of the *corpus* among his great-grandchildren. Thus he created by one class of grandchildren, namely, a class including all of them, whenever born, equality among them being apparently of first importance and solicitude with him."

The Court held, therefore, that subject to the trust to pay the widow \$20,000 per year for life, the testator's next of kin were entitled to the whole estate.

In *Tichenor v. Mechanics and Metals National Bank*, 96 N. J. E. 560, the will provided that the income should go to the testator's brother for life, and

"thereafter to his then living child (or children, including a son's widow) in equal shares for life."

The Vice Chancellor held that there might well be no widow until more than twenty-one years after the death of the first taker, and that all of the gifts over after the first life estate were void.

See also *Hewitt v. Green*, 77 N. J. E. 345 (Stevenson, V. C.).

The results reached by the foregoing New Jersey cases are amply supported by decisions in other jurisdictions. We shall cite in this connection New York cases along with others. As the Court well knows, the common law rule against perpetuities has been abolished by statute in New York, and a different statutory rule substituted. For that reason New York cases are not only not helpful, but indeed misleading upon the question

of whether or not a given future estate violates the common law rule against perpetuities. Where, however, the question under consideration is the present question of construction, New York cases on that point are persuasive and helpful. For the question now being considered is: Granting the invalidity of a portion of the will by reason of its violation of the rule against perpetuities—whether at common law or its statutory substitute—whether other gifts in the will, not in themselves violative of the rule, should, as a matter of construction, be also excinded. In considering this question of construction it is of no importance that the rule which makes void the other provisions is the common law rule or a statutory substitute.

The leading New York cases applicable here are as follows:

*In Re: Horners Will*, 237 N. Y. 489, 143  
N. E. 655, 204 N. Y. *supra*,

The testator left one fourth to his daughter Grace absolutely and the remaining three fourths to his trustee who should divide same into three equal funds and in this manner provided three trusts; namely, (1) for Grace's children, (2) Robert's children, and (3) for Robert Horn, Jr. It was held that the trust to Grace's children was in violation of the rule.

At the death of the testator in that case Grace had one child who was alive at the date of the decree in the lower court. The question was could the trust to this living child be separated from the trust to its unborn sisters and brothers. Under these circumstances the court said, page 503:

“We find no cleavage here which permits us to separate what is good from what is bad

without destroying the testator's will and making a new one of our own. \* \* \*

A single organic plan had been conceived by the testator, a plan for the benefit of a fluctuating class. *Benedict v. Webb*, 98 N. Y. 460, 466. *Bentinct v. Duke of Portland*, 7 CH. D. 693, *Webster v. Bodington*, 26 Beav. 136. There is significance in the disposition to be made of the fund, if no children are in being when the will shall take effect. In that event the income is to go to Mrs. Simms (Who was the testator's daughter Grace) during life but not without conditions; it is to go to her unless thereafter there should be children of her blood. This is a dominant motive never relaxed and unmistakably expressed. We feel its pulse in every line."

The next of kin of the testator acquiesced in the decree of the Surrogate and did not appeal from this decree; the testator's widow alone appealed. On this phase of the case the court said:

"The objection to the trust as declared by the decree is that it has been made over by the Court and the good separated from the bad, to such an extent that it is no longer the trust declared by the testator. This, however, is an objection that the next of kin who with the widow would take the fund if the trust were voided all together are competent to waive so far as their own interests are concerned \* \* \* Under such circumstances a reversal of the judgment as to the wife who appeals does not effect the shares of the others who have preferred to acquiesce."

The order of the Appellate Division and the decree of the Surrogate's Court should be modified by adjudging invalidity as to the appellant of the trust for the benefit of the children of Grace B. Simms and as so modified the order and decree should be affirmed.

In the case of *Benedict v. Webb*, 98 N. Y. 460, the syllabus clearly states the law and facts as follows:

“W. dies leaving his widow and four children surviving, two of them were minors. By his Will he gave the residuary estate to his executors in trust, the net income to be paid to his widow and children in certain proportions, until all of his said children or the youngest survivor of them shall have attained the age of twenty-one years’ the principal then to be divided, one-third thereof to be set apart and the net income paid to the widow during his life, the remainder to be divided amongst his children, the shares of two of them to be paid over to them, the other two shares to be held in trust, and the income to be paid to the beneficiaries during their lives respectively; one of those was a minor. Held, that there was an lawful suspension as to the share of the beneficiary who was of full age, and the trust was so far void, and as to sustain the trust in favor of the other three children would seriously interfere with the intention of the testator that the children and their issue should share equally, the entire trust should be pronounced illegal.

The will vested power in the executors to sell the residuary real estate ‘if they should deem it expedient or for the purpose of making such division \* \* \* or for carrying into effect all or any other of the purposes and trusts.’ Held, that this power fell with the trust.”

Again, in the case of *Central Union Trust Company v. Egleston*; 185 N. Y. 23, 77 N. E. 989, the syllabus clearly states the facts and law applicable here as follows:

“In the construction of wills having ambiguous or indefinite testamentary provisions, the inquiry in each case must be what provi-

sion has the testator intended to make for the disposition of his estate; and not whether he intended to dispose of his estate according to the statutory rules governing testamentary dispositions; when the provisions are understood and the intent of the testator ascertained, then it is for the court to determine whether such intended provisions are valid or otherwise, and it is the duty of the court to interpret the will as made, not to construct a new will.

Where it is manifest from the analysis of a holographic will that it was the purpose of the testator to perpetuate his estate and to tie up the corpus thereof in one indivisible trust to endure for the three lives of his sons, contrary to the provisions of the statute against perpetuities, which limits the suspension of the absolute ownership of property to two lives in being at the testator's death, the trust is invalid and, in the absence of any direction for the ultimate disposition of the corpus of the estate, the whole will must fail and the estate of the deceased must be divided among the widow and the three sons of testator in the statutory proportions provided in the case of intestacy, namely, one-third thereof to the widow and to each son two-ninths thereof.

Where such will provided, as part of the trust scheme, an annuity for the testator's widow, purporting to set aside a certain sum as a marriage settlement, the annuity falls with the failure of the trust; the widow's claim of a right to enforce the ante-nuptial contract cannot be considered, however, in an action for the construction of the will, especially where the trial court has found that, at the time of testator's death, there was no specific property, real or personal, to any amount, which had been set aside as a marriage settlement."

The recent case of

*Hoyt v. Hoyt*, 210 N. Y. Supp. 125 Misc. 95, affirmed 213 N. Y. Supp. 823, upon the opinion of

the lower court is very close to our case. The testator there provided for a trust carved from the residue and remainder of his estate, both real and personal and the income therefrom was to be paid to his widow for life and upon her death to divide this trust estate into as many equal shares as the testator had children then surviving and pay the income to these surviving children or their children in case of death, until they attained the age of 35 years, when the principal was to be paid for them. This, of course, was held in violation of the doctrine of perpetuities and the question then arose how much of the good could be separated from the bad, and all the reasoning announced in the above cases are reaffirmed and summarized in the following:

“In other words if by drawing a knife between the good and bad trusts, violence to the organic plan of the testator would result, this dissection should not be permitted and the whole should be declared void.”

The Court reached the decision that:

“The severance of the provision for after born children was refused, because of the impossibility of doing this without mutilation of the trust in the very essence of the testamentary plan. A single organic plan had been conceived by the testator, a plan for the benefit of the fluctuating class \* \* \* We extract the heart of this plan when we condemn its fluctuating element. In *re Horner supra* ‘precisely the same situation obtains in the case at bar. The illegal provision for the fluctuating class of after born grandchildren cannot be severed without destroying the organic unity of the entire plan. All the realty, the substitute cash for whatever has been sold as well as all of the property remaining unchanged will at the death of the widow descend to the heirs at law under the statute of

descent while the personal property will pass under the statute of distribution—and the persons to take same are those who are the testator's next of kin and heirs at law at the time of his death and not those who happen to occupy that relationship at the termination of the precedent estate *Clark v. Cammann*, 160 N. Y. 315, 54 N. E. 709.”

Thus the only trust sustained was the one to the widow for life.

In *Clark v. Camman, supra*, the syllabus states the facts and decision based thereon and same is as follows:

“A Will contained the following provision: ‘From and immediately after the decease of my said wife I will and direct that as to \$10,000 of the principal moneys to be invested as aforesaid, my said executors and trustees shall stand possessed of the same trust to apply the interest thereof to the use of my niece M. A. for and during her natural life so as she may not anticipate the same, and from and immediately after her decease upon trust to pay over and divide the said principal sum of \$10,000. unto and among all her children share and share alike and to their lawful representatives forever, as tenants in common per capita, the issue of any such child who may then be dead to take his or her deceased parent's share. M. A. had two children at the time of the testator's death, but they died before her, without issue, and she left no children at her death. Held (1) that the testator intended that the fund should go to the issue of the children of M. A. in case of the death of either during the existence of the life estate; that as no issue of those children were in being at the death of the testator, the remainder was contingent and not vested for the reason that the persons to whom or the event upon which the estate was limited to take effect remained un-

certain until the termination of the life estate (2) that as the children of M. A. died before the termination of the life estate created by the will without issue, there were no persons who could take as remaindermen; that consequently, intestacy existed as to the funds, and that the fund should be distributed, under the statute, among those who were next of kin to the testator at the time of his death."

"M. A." was Mary Ann Gillespie, the testator's niece.

The Court said in that case as follows:

"An argument is presented to the effect that there was no intestacy as to this fund at the death of the testator and no invalidity in the bequest for the lives of the widow and Mrs. Gillespie ("M. A.") but such intestacy occurred at the death of Mrs. Gillespie ("M. A.") who left no children her surviving, or issue of such children, and until the happening of that event it could not be determined who was entitled to the fund, and, consequently, those who occupied the relation of next of kin at that time were the persons entitled.

Such might have been the case if the estate had passed under the will, but in as much as the will fails to dispose of the fund, it must be disposed of under the statute which must be resorted to in order to determine the interest, as well as the persons among whom distribution must be made. The persons and the only persons who are entitled to take by virtue of the statute are those who answer to the legal definition of the next of kin at the time of the death of the intestate; if for any reason the bequest made ultimately fails to take effect according to the testator's intention, the property remains undisposed of by the will and the testator has died intestate as to such property and it immediately reverts to his personal representatives, appointed and to be appointed in trust for his next of kin.

The rights of persons claiming under a will are to be ascertained and determined in view of all its provisions and by the application of settled rules of construction governing such instruments. If, on such construction, no rights of property can be claimed under the will the provisions of the statute of distribution must control and alone determine the rights of the parties."

In the case *In re Horner's Will*, 237 N. Y. 489, hereinabove cited, the Court said, at page 503:

"Our ruling in *Matter of Mount* (185 N. Y. 162, 169) is pressed upon us as decisive. That case went to the verge of permissible excision. It did not go so far as we shall have to go now if this trust is to be upheld. There the testator created a trust for life for the benefit of his sister, and directed that at the end of that estate the fund should be divided *per stirpes* into as many shares as there were children of his nephew then living and issue of deceased children, with separate trusts for each of them. We sustained this limitation for the benefit of the children alive at the testator's death, though we pronounced it void as to the others. The judgment went upon the ground that there was present in that will the precise element that is lacking in the trust for the children of Mrs. Simms, a direction for the severance of the shares, so that the good was not inextricably commingled with the bad (185 N. Y. at pp. 169, 170; cf. *Mount v. Mount*, 234 N. Y. 568; *Boughton v. James*, 1 Coll. 26; *Gray*, the *Rule against Perpetuities*, Sec. 389). Here, as we have seen, the poison interpenetrates the system."

*Johnston's Estate*, 185 Pa. 179 (1898).

In this case the testator devised his real estate to his executors in trust for the period of seventy-five years giving the executors active power and

management in the estate and directing them to pay all charges against the land and all legacies out of the rents and profits and to pay the balance of the rents and profits to his children and their legal descendants until the expiration of the seventy-five years. At the expiration of the seventy-five years the trustee was to sell the land and the proceeds were to be distributed:

“To and among all my children, share and share alike, as may then be living, and the legal descendants of any of my said children that may then be dead.”

The Court held the term of seventy-five years given to the trustees did not violate the rule against perpetuities but the gift in remainder, however, was a future contingent interest repugnant to the rule against perpetuities, and, therefore, void for remoteness, and that as the testator's general scheme was to keep his estate entire for an unlawful period and as the particular estate was created for this purpose only the particular estate must fall with the remainder. Respecting this conclusion the Court said:

“So then we have nothing left of this whole devise but a simple estate of seventy-five years in a trustee; every other interest in the land passing directly and immediately to the heirs of George Johnstone, the testator; in other words, the heirs taking the fee in the lands, subject to this term of years. If the latter be allowed to stand \* \* \* it will not be pretended that the particular estate was desired to serve any purpose of its own distinct from the limitation over, on the contrary it is evident that it was adopted simply as a means to an end; a hook upon which to hand suspended a tied-up estate until such time as the testator desired it to be opened and parted. How does it in any way enforce

testator's wishes to leave the hook in its place when there is no estate to suspend upon it? The estate which he hoped to suspend for seventy-five years, if we are right in our previous conclusions, the law has disposed of by vesting it at once in his heirs who have a right to dispose of their interest therein at any time. The whole scheme of the testator has been defeated. Instead of observing his will is it not rather enforcing one not his to keep alive under such circumstances an estate which he contemplated only in connection with another, and larger one which the law has annulled."

*Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625.

In this case the will gave the residuary estate to trustees in trust to pay the income to the testator's widow for life, then to pay the income to his children for life, and then to pay the income to the grandchildren for life and then to turn over the body of the estate to the great grandchildren. The Court held the disposition of the corpus violated the rule against perpetuities, and that the will presented one entire, complete disposition of the estate, and that the invalidity of the disposition of the corpus rendered the entire will invalid. In the course of the Court's learned opinion, which we viewed in a prior Illinois case, it said, at page 626 of 99 N. E.:

"The parties agree that the will, in so far as it provides that upon the death of the widow, children, and grandchildren of John R. Barrett the trustee shall turn over the body of the estate to the great-grandchildren of Barrett, creates a perpetuity and is void, and the only question in difference between them is upon this proposition: Conceding the portion of the will disposing of the corpus of the estate to be void, can the provisions of the will which provide that the trustee shall

pay the income of the estate to the widow during her natural life, then to the four sons during their lives, and afterwards to the grandchildren during their lives, be sustained notwithstanding the invalidity of the provisions of the will which dispose of the body of the estate upon the death of the last surviving grandchild? The trial court was of the opinion that the provisions of the will creating said trust were so far connected as to form one complete scheme for the disposition and distribution of the testator's estate, and that the trust created by his will to effect such disposition and distribution was indivisible, and that as one principal part of the scheme for the disposition and distribution of the estate was void the entire scheme must fail, and the entire estate, so far as it was covered by paragraphs 2 and 3 of the will, must be disposed of and distributed as intestate estate.

(1) It is plain the provisions of the will which gave the life use of the property first to the widow, then to the sons and afterwards to the grandchildren, standing alone and but for the subsequent provision providing the corpus of the estate should be divided among the great-grandchildren of the testator, would be a valid disposition of the use and enjoyment of the several life estates created in the property, as those life estates would all vest within the lifetime of the widow and the four sons and within twenty-one years after the death of the last survivor of the four sons. We think it obvious, however, from the language of the entire will that the testator had in his mind, when he executed his will, a plan for the disposition of all his estate and not for the creation therein only of certain life estates, and that for the courts to hold that his plan or scheme of disposition or division must fail in so far as he sought to dispose of the corpus of the estate, but could be sustained as to the life estates would be to

make a new will for the testator, which the courts are powerless to do. The testator sought by his will to create a trust and to appoint a trustee, and to provide that the trustee should take possession of his estate and handle it, pay the income to certain beneficiaries, and then to distribute the corpus of the estate to certain beneficiaries pointed out by him in the will. Had the testator known that one provision of the will he was executing was void for remoteness, he would, without doubt have executed a different will.

(2) The principle is well established that where several trusts are created by will which are independent of each other and each is complete within itself, some of which are lawful and others are unlawful, and which may be separated from each other, the illegal trusts may be cut out of the will and the legal ones permitted to stand. There is, however, a well recognized limitation in all the reported cases and by the text-writers upon this rule which is that when some of the trusts in the will are legal and some are illegal, if they are so connected together as to constitute an entire scheme for the disposition of the estate, so that the presumed wishes of the testator would be defeated if one portion were retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or to some of them, then all the trusts must be construed together, and all must stand or all must fall. There seems to be a further limitation upon the rule recognized by the authorities, which is that the devise or bequest held to be legal and sustained must be direct to the beneficiary, and should be sustained only when the first gift is an absolute gift of the estate. Elaborate briefs have been filed on both sides of the question here involved, and numerous cases have been cited to illustrate the foregoing rule and its limitations as it has been applied by this and other courts. The rule is, however, plain,

and, as we believe, never applies when its application would have the effect to make for the testator a new will.

In *Lawrence v. Smith*, 164 Ill. 149, 45 N. E. 259, the will of Alonzo C. Wood first names executors and appoints them trustees of his entire estate, and bequeaths all the property to them in trust. After certain specific bequests, it provides for certain annuities to heirs at law and gifts of \$10,000 each to certain grandchildren reaching the age of 25 years. After the completion of the payments of \$10,000 each to the grandchildren reaching the age of 25 years, the balance of the estate, with the accumulations, if any, discharged of all trusts, is divided equally among the grandchildren then living, provided the trust has terminated as to all the before-named beneficiaries and remaindermen. If the trust is not so terminated, then the trustees are to hold until such termination and then make the division. The court held (1) that the provision for a trust until the death of all of the testator's children, and until the youngest grandchild, including any born after the testator's death, should become 25 years of age, violates the rule against perpetuities; (2) that as the gifts provided for in the residuary clause are gifts to a class and the amount each would receive would depend on the number of grandchildren then living, and as the class may be composed of those born too late to take under the rule, the gift cannot take effect as to any; (3) that the trust itself violates the rule by making provisions for tying up the estate for a longer period than that fixed by the rule; (4) that the trust created by the testator was one entire scheme, upon which the execution, in the main, of the various provisions of his will was made to depend; (5) that, aside from the books, pictures, etc., bequeathed to the daughters (the validity of which is unquestioned), no bequest is made directly to any beneficiary, but directions are only given to the trustees to

make certain payments out of the trust estate, and that, since the trust scheme is an entirety, the whole must be held to be invalid and property intestate, except as to the specific bequest of the books, pictures, etc. The court, on page 162 of the opinion, says: 'It is argued with much force that conceding the invalidity of the eighteenth or residuary clause, and conceding, also, that in so far as the twelfth, thirteenth, and fourteenth clauses undertake to make provision for any child or children of the first three mentioned daughters of the testator who may be born after his death and who may not be 25 years old at the death of its or their mother those clauses are also within the rule and invalid, still as the will must speak from the period of the testator's death and should be construed in the light of circumstances then existing, and as the only grandchildren then living were the five children above mentioned, who were the children of said three daughters, and the provision for each such child being separate and in no wise dependent on the provision made for or amount to be paid to any other child, those clauses should so far be held valid, and also the trust provisions of the will so far as they are necessary to carry them and other valid provisions of the will into effect. \* \* \* Then, again, the execution of these provisions of the will thus emasculated would be dependent upon carrying into effect the trust scheme devised by the will. But this trust itself violates the rule by making provisions for tying up the estate for a longer period than that fixed by the rule, and cannot, therefore, be sustained. From a careful reading of the will set out in the statement of the case, it clearly appears that the trust created by the testator was one entire scheme, upon which the execution, in the main, of the various provisions of his will was made to depend. Aside from the books, pictures, etc., bequeathed to the aforesaid three daughters by the seventh clause of the

will (the validity of which is unquestioned), there is no bequest made directly to any beneficiary, but directions, only, are given to the trustees to make certain payments out of the trust estate, some out of the principal others out of the income. In *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487, it was said: 'The appellants invoke the aid of the principle that where several trusts are created by a will which are independent of each other and each complete in itself, some of which are lawful and others unlawful, and which may be separated from each other, the illegal trusts may be cut off and the legal ones permitted to stand. This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. The rule, as applied in all reported cases, recognizes this limitation: That when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be construed together, and all must be held illegal and must fall.' We see no way by which a division of the trust created by this will can be made, and part held valid and the rest invalid, without doing violence to the intention of the testator. It is all one entire scheme, and, although the trust is an instrument to effect the beneficial purpose of the testator, it is made the most prominent feature of the will.'

In *Eldred v. Meek*, 183 Ill. 55 N. E. 536, 75 Am. St. Rep. 86, the will of Mary Brace first devises the entire estate to a trustee, and di-

rects him, after paying funeral expenses and debts, (1) to deliver to his daughter, Ella Meek, one-fourth part of the personal estate; (2) to deliver to his three grandsons each one-fourth part of the personal estate; upon their becoming, respectively 25 years of age; (3) to deliver to each of said three grandsons a conveyance of certain real estate when he becomes 25 years of age; (4) in case of the death of Ella Meek before the death of the testator, her share to go to the three grandsons upon their becoming 25 years of age; (5) in the case of the death of any one of the grandsons without leaving a legitimate child his share to go to the two remaining ones, in equal shares, upon their becoming 25 years of age; (6) in case of the death of two, leaving no legitimate children, the whole property to go to the survivor at the age of 25; (7) in case of the death of any of the said grandsons before reaching 25 years, leaving a child or children, the grandson's share to be divided among his children when they (the great-grandchildren) become, respectively, 25 years of age. It was held that the interests of the said grandchildren did not immediately vest; that the will creates a perpetuity; that it is an entire scheme; and that the whole must be rejected except the provision for the payment of debts and the gift of one-fourth of the personal property to the daughter, which was held to vest. The court cites with approval *Lawrence v. Smith*, supra, *Tilden v. Green*, supra, *Will of Butterfield*, 133 N. Y. 473, 31 N. E. 515, and *Johnson's Estate*, In re, 185 Pa. 179, 39 Atl. 879, 64 Am. St. Rep. 621, and says: 'It is true that parts of a will which are valid will be sustained, though other parts are rejected as invalid, if no violence is done to the parts sustained; but this rule should apply only when the first gift is absolute.'

In *Owsley v. Harrison*, 190 Ill. 235, 60 N. E. 89, the court construed the will of Carter H. Harrison, the elder. One clause of his will

directs that a certain residue of his estate be kept together by his executors for a period of two years after his death, and then divided into four equal shares. One-half of such share is devised to each of his four children in fee, the other half to the four children in equal shares for life, and, on the death of any one of them, to the heirs of the body of the deceased. It was alleged that this made no valid disposition of the one-half of the estate devised for life with remainder over to the grandchildren of the testator because of the interval of two years, and the court so found, and in consequence held the entire provision respecting that half of the estate void and the property intestate. Since the life estates were in themselves valid, under the theory of plaintiff in error in the case at bar the court should have sustained the life estate, at the termination of which the property would have been disposed of as intestate property, but, manifestly following the rule established in *Lawrence v. Smith* and *Eldred v. Meek*, the whole provision was held bad.

In *Reid v. Voorhees*, 216 Ill. 236, 246, 74 N. E. 804, 808 (3 Ann. Cas. 946), the will of James Reid, after providing for the payment of his debts, makes a direct devise of his personal property to two persons in equal shares. He then gives to six nephews and nieces the rents to be collected by the executor from his real estate, to be divided equally and paid annually for 30 years. In case of the death of any one of the six without an heir, the share was to go to the survivors. Thirty years after the testator's death, the real estate was to be divided equally among the nephews and nieces or their heirs. The court held that the provision for the division of the property 30 years after the death of the testator offends the rule against perpetuities; that the clause providing for the division of rents for 30 years is not a grant in *praesenti* and is also invalid; that the scheme of devise is entire, it being manifest that the testator intended to

make a testamentary disposition of all his property, and that, because of the illegal clauses he has failed to do so, and, if those clauses alone are set aside and other clauses given effect, the intention of the testator as to the distribution of his property would fail; that the whole will, including even the bequests of personal property, should be set aside, because the beneficiaries under that clause were so related that as heirs they would take half of the estate, and therefore it was necessary to reject the specific bequests to them in order to avoid an injustice not intended by the testator. The court in delivering the opinion called attention to the necessity for considering both the separability of the valid from the invalid provisions, considering the will abstractly, and the effect thereof upon the testator's manifest wishes. The court said: 'All of the positions of appellees may be conceded and yet appellants' contentions sustained under the law. Where provisions of a will are, in fact, independent and not for the carrying out of a common or general purpose, it is undoubtedly true that such as are contrary to law may be rejected without in any manner affecting valid provisions. The statement, however, that a valid provision will be sustained if no violence is done to the parts sustained by the rejection of the invalid provisions is too narrow a statement of the rule, and is in disregard of the cardinal principle that the testator's wishes, as evidenced by the general scheme, adopted, are to be taken into consideration, so that justice must be done if it can be. The rule as stated by appellees would seldom, if ever, permit a valid provision to be set aside because other provisions were held invalid. It would be difficult to frame a will so that the rejection of the invalid provisions could seriously affect or do violence to valid provisions which might be sustained. The correct solution can only be arrived at by taking into consideration the general scheme and intention of the testator,

and the effect that defeating a part of the provisions may have upon the general scheme of the testator or on the beneficiaries or objects of his bounty.'

In *Johnston v. Preston*, 226 Ill. 447, 80 N. E. 1001, 10 L. R. A. (N. S.) 564, the will of Jane Platt bequeaths certain personal property specially to John R. and George A. Platt, grandsons; gives a life estate in other personal property to James J. Platt, a son, with remainder absolutely to his five sons; devises to the executor certain real estate to hold for the period of 25 years from the date of probate of the will for the use and benefit of two of the grandsons, the fee then to vest in those two or their heirs absolutely; gives certain other real estate to the executor to hold for 25 years from the date of the probate of the will for the use and benefit of the three other grandsons, to go to them or to their heirs absolutely after 25 years from the date of the probate of the will. There are also certain annuities to be paid by the executor while he shall hold the property, which are made a charge upon the estate thereafter. The court held that the devise to the executor to hold for 25 years from the date of the probate of the will introduced a certain contingency and violated the rule against perpetuities, and that, therefore, the entire devise to the executor of the real estate was void; that the controlling purpose of the testatrix is equally well subserved, since it was to give to her son, James J. Platt, and his five sons, her entire estate; that the interests of the grandchildren were not postponed until the expiration of the 25 years, but that there was a clear intention to give an absolute fee simple estate with a present right of enjoyment, and since the payment of the annuities was not only imposed upon the executor but made a direct charge upon the estate, the ultimate result with the trust upheld cannot be any different from what it is with the trust eliminated. The entire trust was held void and the estate intestate.

(3) The plaintiff in error relies upon the following Illinois cases: *Howe v. Hodge*, 152 Ill., 252, 38 N. E. 1083; *Nevitt v. Woodburn*, 190 Ill. 283, 60 N. E. 500; *Chapman v. Cheney*, 191 Ill. 574, 61 N. E. 363; *Quinlan v. Wickman*, 233 Ill. 39, 84 N. E. 38, 17 L. R. A. (N. S.) 216. There are a number of characteristics in these cases, we think, which distinguish them from the case at bar, some of which are as follows: (1) The valid provisions dispose of the corpus of the estate while in the case at bar they do not, and certainly the disposition of the fee or of the principal, if it be a fund, must be deemed a primary purpose of the testator; (2) in these cases the void provisions are a limitation over after such valid dispositions of the corpus; (3) both the life estates and the disposition of the fee intended by the testator are preserved by sustaining the valid provisions; (4) the void limitations over after the disposition of the fee are reasonably deemed separable; (5) in all these cases except one the devises which are held valid are directly to the beneficiaries, and their interests vest directly as legal interests, instead of depending upon the trust. On the other hand, in the cases in which the life estates have been held to fall with the void provisions it has appeared (1) the devises are to a trustee and the beneficiaries take only equitable interests, depending in each case upon the trust; (2) the clauses, including the void limitation, taken together, comprise one entire, distinct scheme of disposition of the whole property; (3) the fee is not disposed of by the valid clauses except in the case of *Johnson v. Preston*, where the court found the primary disposition of the fee by the will to be identical with its disposition as intestate estate.

(4) The case at bar in every essential corresponds with one or the other, and in most respects with all of the Illinois cases in which the entire trust scheme has been held invalid. The following are some of its essential char-

acteristics: (1) The entire property is devised to a trustee, in whom the legal title vests, and this as is well said in *Amory v. Lord*, 9 N. Y. 403, 'completely negatives any theory of separate or separable trusts'; (2) the will presents one entire, complete, and connected scheme for the disposition of the entire property, and all of the provisions thereof are connected and interdependent; (3) the valid clauses of the will make no disposition of the fee; (4) it cannot be made to appear that the enforcement of the other provisions, after cutting off the void limitation in fee to the great-grandchildren effects the primary purpose of the testator.

Every case in this state, so far as we have been able to discover, where the will devises the property directly and completely to the trustee, and then directs him to make certain provisions out of the income thereof, has held the trust to be entire, and not separable. It is difficult to see upon what theory it could be argued that this will creates any separate trust or separate interest on behalf of any beneficiary. The estate is in the hands of the trustee as a whole. It is to be handled, invested, and reinvested, and the income collected as a whole. There is at no time any separation, or any hint of a separation, of the fund itself, until it is to be divided among the great-grandchildren. The trustee holds the legal title until the last one of the grandchildren is dead.

From a careful consideration of this will we are impressed with the view that John R. Barrett intended to dispose of his entire estate, not alone to create certain life estates therein, but to dispose of the fee, and that to only carry into execution the first part of the will and to eliminate the last would be entirely foreign to the intention of the testator. In the *Eldred Case*, *supra*, the application of the rule contended for by the plaintiff in error is thus limited, where it is said: 'Courts must construe a will according to its own

terms. They cannot make a new will or build up a scheme for the purpose of carrying out what might be thought was or would be in accordance with the wishes of the testator. *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 880; 14 L. R. A. 33, 27 Am. St. Rep. 487; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 250. It is true that parts of a will which are valid will be sustained though other parts are rejected as invalid, if no violence is done to the parts sustained. *Lawrence v. Smith, supra*; Gray on Perpetuities, Secs. 233, 423; *Howe v. Hodge*, 152 Ill., 252, 38 N. E. 1083; 1 Jarman on Wills (4th Ed.), p. 297. But this rule should apply only when the first gift is absolute. And bequests of a will valid in themselves will be rejected with the invalid ones where the retention of them would defeat the testator's wishes, as evidenced by the general scheme adopted, or where manifest injustice would result to the beneficiaries. *Lawrence v. Smith, supra.* And in *Lawrence v. Smith* great stress is laid upon the fact that the property was not given direct to the beneficiaries."

See also

*Lockridge vs. Mace* (109) Missouri, 162.

*In Re Kountz*, 213 Pa. St. 390.

*St. Amour v. Richards*, 2 Mich. 294.

*Re Fair Est.*, 60 Pac. 459 (Cal.).

In the case of *Anderson v. Menefee* (Tex.) 174 S. W. 904-911, the court there followed the rule which we contend for here and which was announced in *Barrett v. Barrett, supra*, as follows:

"From the foregoing conclusions we can but hold that, regardless of any distinction between real and personal property, the estate intended for Mr. Anderson's daughters did not, under the terms of the will, pass to them upon his death nor at any time thereafter. Nor will it pass until the expiration

of the 30 years named in the will. If this be true, then able counsel for appellants admits with commendable frankness that the provisions of the will relating to the daughters are invalid under the rule against perpetuities. . . . But in this event it is insisted that we should reject (only) the invalid portions.

“But we are of the opinion that this insistence can not be upheld. It seems evident that Mr. Anderson undertook to dispose of his entire estate in accord with a general plan that comprehended, not only the wife and son, but also the daughters. There is nothing in the facts that indicates that he would have made his will as he did with the provisions relating to the daughters eliminated. . . . We think the case well within that line of authorities which hold that where parts of a will are void, the whole will will be set aside, if to sustain the other part would work an injustice or violate the general scheme or plan of the testator. *Barrett v. Barrett*, 255 Ill. 332, 99 N. E. 625; *Reid v. Vorhees*, 216 Ill. 236, 74 N. E. 804; *Kountz Estate*, 216 Pa. 390, 62 Atl. 1103; *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259; *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 259; *In re Fair's Estate*, 132 Cal. 523, 60 Pac. 442; *Shepperd v. Fisher*, 206 Mo. 208, 103 S. W. 998; *Johnson v. Preston*, 226 Ill. 447, 80 N. E. 1001; *Gully v. Neville (Miss.)* 55 Sou. 289; *Eldred v. Meek*, 183 Ill. 26, 55 N. E. 536; *Central Trust Co. v. Eggleston*, 185 N. Y. 23, 77 N. E. 989; *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225.”

In the case at bar the gifts over to C. Theodore Herrmann's children, who survive him for their lives, are mere incidents to and dependent upon the gifts over of the corpus after the expiration of those lives. It is obvious that the testator's scheme was to preserve the corpus of his estate intact for his grand nieces and grand nephews.

To that end both the testator's brother and the latter's surviving children are given life estates only. When, however, we are confronted with the fact that the gifts over of the corpus are void, we are faced with the question, can the testator be held to have intended any such extraordinary situation as for his brother to have the whole estate subject to life estates in the brother's surviving children, coming into possession and enjoyment upon the brother's death? Is it not clear that the testator would not have tied up his nephews and nieces' shares for their lives if the corpus was not validly disposed of? Was not the only reason for tying up the nephews and nieces' interests an incident to preserving the corpus of the gifts over? At the date of the testator's death he was fifty-two years of age, his brother, the appellant, was forty-eight, and the latter's two children, twenty-six and seventeen respectively. At the date of the execution of the will they were all thirteen years younger. The testator was a bachelor and all his life had suffered from epilepsy.

When he drew his will he never expected to marry. A reading of the will and of the codicil discloses that the testator was the kind of man determined that the all important thing was to insure the principal of the fund, even though the rate of interest was exceedingly small. He was the kind of a man carefully to plan for the future extending far beyond his own life into the era of generations unborn. His will shows unmistakably that he had worked out a single organic testamentary plan from which he never varied. This plan was to provide his grand nieces and grand nephews with the principal of his estate, without any impairment whatever. Although the testator, at the date of his will, the date of his codicil and down to the date of his death, must have

known his nieces and nephews Gladys and Vietor Herrmann, personally, yet he fails to refer to either of them by name or to make any bequest to them unless they survived their father. At the same time the testator named his brother and ten other relatives in his will, and designated each of them by name, residence, and, in some instances, by relationship. And the same is true in the codicil. We feel that the will shows, on its face, that if the testator had not believed that his grand nieces and grand nephews, if born and surviving their parents, his brother's children, would receive the principal of this trust, the testator would not have made the will he did, but would have executed one entirely different.

The testator did not intend to die even partially intestate, it is true. Nevertheless the rule against perpetuities inexorably compels him to die intestate with respect to the gifts over after the life estates to C. Theodore's surviving children. With that intestacy resulting, in spite of the testator's will to the contrary, less violence will be done to such of the testator's intent to which legal effect can be given, by wiping out the life estates in C. Theodore Herrmann's surviving children than by letting them stand. Those life estates were simply adopted as a means to the end to tie up the corpus illegally. As was said by the Supreme Court of Pennsylvania in *Johnston's Estate, supra*, the life estates are nothing but a hook upon which to hang suspended the tied-up corpus and this Court should not, as that Court did not, leave the hook if nothing remains to hang therefrom, the suspended gift over being void.

## III.

**The contingent bequest of ten thousand dollars to Alfred S. Brown and the contingent remainder to Grace Cranstoun Herrmann in the event that C. Theodore Herrmann does not leave children him surviving are all so mingled with and inseparable from the gifts void as violating the rule against perpetuities that they must fall with those void gifts.**

The principles of law controlling this point are the same as those just discussed under Point ~~III~~ <sup>II</sup>. We need only repeat the argument upon the face of the document before the Court. We submit it is clear that the testator had one consistent scheme, and that as an integral part of that scheme, namely the disposition of the corpus after the expiration of the life estates to C. Theodore Herrmann's children, is void, the Court cannot consistently, with due respect to the testator's intent, leave a portion of that scheme hanging, as it were, in the air.

## IV.

**The Court should not have refused fully to construe the Tenth Clause of the will.**

If this Court fully adopts the contention of the appeal of C. Theodore Herrmann that the whole beneficial interest of the residuary estate of Henry V. Herrmann is now vested in the said appellant, then the Court need not consider the argument under this point, for the Court will then have fully construed the Tenth Clause of the will.

If, however, this Court agrees in whole or in part with the learned Vice Chancellor that any of the gifts other than the life estate in possession of C. Theodore Herrmann are valid or should not, as a matter of construction, be eliminated, then this Court should fully construe the Tenth Clause. If the Court is against the appellant upon the points argued either under Point II or Point III, *supra*, and no further construction is given, the administrator and C. Theodore Herrmann, individually, are left in a state of uncertainty.

Assuming for the sake of argument that this Court disagrees with the appellant and agrees with the Court below, as expressed in paragraphs 3 and 4 of the final decree (Case 62) that Gladys and Vietor Herrmann each have a valid life estate in remainder. In that event it becomes most important for the appellant to know whether or not the gift over after the expiration of the life estates in the surviving children of C. Theodore Herrmann are or are not valid. In like manner it is important for the appellants to know whether the gift over of the corpus in the event of C. Theodore Herrmann's dying without children him surviving is or is not valid.

If either or both of those gifts are invalid, as contended by the appellant, then, the appellant as next of kin of the testator inevitably is entitled to the corpus of the estate after the life estates in his surviving children. For the appellant to know that now in his lifetime is of vital importance to him. As appears from the record, he has a wife and an adopted child who take nothing under Henry V. Herrmann's will, and have no interest whatever in his estate. If, however, the appellant has the corpus of the testator's estate after the said life interests in remainder to the appellant's surviving children,

then he certainly has something which he can dispose of by his will for the benefit of his wife and adopted child. He has something more than that. He has a future interest in personal property which he can presently, in his lifetime, dispose of, and on which he can realize for the support and benefit of his wife and adopted daughter.

The complainant as administrator is also vitally interested in having those questions settled, because until they are settled the transfer inheritance tax, the payment of which is his duty, cannot be accurately adjusted. It is apparent, therefore, that the appellants are not asking the Court to decide some mere moot or hypothetical question, but to advise them as to their present rights and duties under the documents before the Court for construction.

Under such circumstances it is the duty of the Court fully to construe the documents in question and declare the rights of the parties thereunder. There can be no doubt, without admitting the authorities cited by the learned Vice Chancellor in support of his refusal fully to construe the will (Case 60), that the law as therein declared has been radically modified by statute. We refer first to Section 7 of the Chancery Act of 1915, which section provides:

“7. Decree to Declare Rights. Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested.”

This short but comprehensive statute has been elaborated and supplemented by the uniform Declaratory Judgments *Act*, *P. L. 1924—312*.

The attention of the Court is respectfully invited to all of that Act, and in particular to Sections 1, 4 and 12 thereof, which are as follows:

“1. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.”

“4. Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or

(b) To direct the executors, administrators or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.”

“12. This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.”

We should say in passing that the rights involved are equitable and that there is, therefore,

no doubt but that the Court of Chancery is the Court possessed of jurisdiction to declare the rights. The full force and effect of the Declaratory Judgments Act was well stated by the present Chief Justice in delivering the opinion in

*McCrorry Stores Corp. v. S. M. Braunstein, Inc.*, 102 N. J. L. 570:

“The Declaratory Judgment Act, by its first and second sections, confers upon our courts of record, within their respective jurisdictions, power to declare rights, status, or other legal relations, although no further relief is or could be claimed, and empowers those courts, among other things, to determine any question of construction or validity arising under a deed, will, or written contract, and declare the rights, statute or other legal relations thereunder of the parties thereto. Such declarations, by the express language of the statute, are given the force and effect of final judgments or decrees. It is true that they are not enforceable by execution or other final process, but relief, based thereon, may be granted, whenever necessary or proper, on application to a court having jurisdiction to grant such relief. Section 8.

“Declaratory judgment statutes similar to, if not identical with, that now under consideration have been enacted by the Legislature of many of our sister states, and have been the subject of much discussion by the courts of several of those states in considering the question whether challenges to the validity of such legislation, similar in essence to that interposed by counsel for the defendant, rest upon a sound legal basis. The great majority of those courts have held that the powers conferred upon judicial tribunals by these statutes, and the duties imposed upon them in the exercise of those powers, were not violative of constitutional principles. *State v. Grove*, 109 Kan. 619, 201 p. 82, 19 A. L. R.,

1116; *Board of Education v. Van Zandt*, 234 N. Y. 644, 138 N. E., 481; *Blakeslee v. Wilson*, 190 Cal. 479, 213 p. 495; *Braman v. Babcock*, 98 Conn. 549, 120 A. 150; *In re Petition of Kariker*, 284 Pa. 455, 131 A. 265; *Miller v. Miller*, 149 Tenn. 463, 261 S. W. 965.

“The reasoning contained in the opinions upon which this conclusion is rested is to us convincing of the soundness of that conclusion.”

See also *Johnson v. Talman*, 99 N. J. E. 762. In view of the Declaratory Judgments Act it was clearly the duty of the Court of Chancery to have helped the appellants in their need and to have determined all questions raised. C. Theodore Herrmann is entitled to know whether he gets the corpus of his brother's estate after the life estates in his surviving children (assuming they are valid) and whether or not he gets the corpus if he dies without children him surviving.

The Court of Chancery was asked to do that and it should have done it, and this Court now should reverse paragraph 7 of the decree appealed from and should make the adjudication which the Court below should have made.

In the event that this Court disagrees with the appellants contentions urged under Points II and III of this our brief, the decree which the Court below should have made is that C. Theodore Herrmann is entitled to the whole beneficial interest in the corpus of the residuary estate of Henry V. Herrmann after the life estates of such of Theodore's children as survive him. In the event that the Court agrees with the position taken by the appellants in Point II, but disagrees with their position as argued under Point III, then the decree should be that C. Theodore Herrmann, in the event that he leave a child or children him surviving, is entitled to the whole beneficial interest

in the residuary estate of Henry V. Herrmann, ~~subject only to the life estates therein of such of C. Theodore Herrmann's children as may survive,~~ and that in the event that C. Theodore Herrmann did not leave a child or children him surviving, then Alfred S. Brown and Grace Cranstoun Herrmann are entitled to the estates given them in paragraph 2 of Clause Tenth of Henry V. Herrmann's will.

### Recapitulation.

To sum up—appellant's contentions are as follows:

All gifts over after the life estates in remainder to C. Theodore Herrmann's surviving children violate the rule against perpetuities and are, therefore, void (Point I, *supra*).

As a matter of construction, the life estates in remainder to C. Theodore Herrmann's surviving children fall with the void gifts of the corpus expectant thereon (Point II, *supra*).

As a matter of construction the gifts of the corpus, in the event that C. Theodore Herrmann shall not leave any child or children him surviving, fall too (Point III, *supra*).

The necessary result of the foregoing, and of the fact that C. Theodore Herrmann is the testator's sole next of kin is that C. Theodore Herrmann is vested with the whole beneficial interest in the residuary estate of Henry V. Herrmann, deceased, and is entitled to call for the legal estate.

In the event that this Court does not agree with the appellant's contentions as to either or both of the questions of construction argued in Points II and III, then the parties are entitled to have

the Court declare all their rights under the will, and in the estate of Henry V. Herrmann, deceased. If the Court, therefore, should be against the appellants upon both these Points II and III, the adjudication should be that C. Theodore Herrmann, in the event that he leaves a child or children him surviving, is entitled to the whole beneficial interest in the residuary estate of Henry V. Herrmann, deceased, subject only to the life estates therein of such of C. Theodore Herrmann's children as may survive him (Point IV, *supra*).

**Wherefore it is respectfully submitted that the decree appealed from be reversed.**

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