New Jersey Court of Errors and Appeals

IN THE MATTER OF THE Probate of the Alleged Will and Codicil of HENRY V. HERRMANN, deceased.	**On Bill, etc. On Appeal from the Prerogative Court.**

STATE OF CASE.

JULIAN C. HARRISON,
Proctor and of Counsel with Appellant C. Theodore Herrmann.

JOSEPH A. DUFFY,
Proctor for Grace Cranstoun Herrmann and Gladys Herrmann.

L. EDWARD HERRMANN,
As Guardian ad litem of Victor Herrmann.

COLLINS & CORBIN,
Proctors for the New Jersey Title Guarantee & Trust Company as Administrator pendente lite.

THE REPORTER CO., WALTON, N. Y.
New York Office: 258 Broadway, Room 402. Phone 6575 Barclay.
1926

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Petition.

PREROGATIVE COURT OF NEW JERSEY.

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

The petition of The New Jersey Title Guarantee & Trust Company, a corporation of New Jersey, and Joseph Frankenthal of the Borough of Manhattan, City, County and State of New York, respectfully shows:

1. Henry V. Herrmann, late of the City of Summit, in the County of Union and State of New Jersey, departed this life on May 13, 1924, and more than ten days ago, having first duly made and executed a paper writing purporting to be his last will and testament, bearing date January 16, 1911; and a further paper writing bearing date February 15, 1915, purporting to be a codicil to said last will and testament; and a further paper writing bearing date March 15, 1922, purporting to be a second codicil to said last will and testament. Copies of said will and codicils are annexed to this petition.

2. In and by said will and codicils, Alfred S. Brown and your petitioner, The New Jersey Title Guarantee & Trust Company, are named as executors of said last will and testament and codicils, and the said Alfred S. Brown has duly renounced his said office of executor.

3. Said decedent was unmarried and the name of his sole heir at law and only next of kin, and the Post Office address and degree of relationship of said heir at law and next of kin is:

C. Theodore Herrmann, a brother of full age, 239 Whaley Street, Freeport, New York.

4. The names and addresses of the legatees and devises mentioned in said will and codicils, who survived said testator, are, besides your petitioner Joseph Frankenthal, the following:

Miss C. Vietor,	359-80th Street, Brooklyn, N. Y.
Miss Clara Herrmann,	Mühlhausen, Thuringia, Germany.
C. Theodore Herrmann,	239 Whaley Street, Freeport, N. Y.
Gladys Herrmann, (a daughter of C. Theodore Herrmann)	105 New England Avenue, Summit, N. J.
Vietor Herrmann, (a son of C. Theodore Herrmann)	105 New England Avenue, Summit, N. J.
Grace Cranstoun Herrmann,	105 New England Avenue, Summit, N. J.
Alfred S. Brown,	1 Liberty Street, New York City
The Green-Wood Cemetery,	Brooklyn, N. Y.
Mrs. Roesle Wolff,	Oeschingen, near Tübingen, Württemberg, Germany.
Joseph Hirsch,	C/o Flashner (Dry Goods) Whitehall Street, New York City
Albert van Pragg	Cor. S. Portland Ave. & Fulton Street, Brooklyn, N. Y.
Frederick Manjer McCallum,	244 Union Street, Jersey City, N. J.
Mary T. Vietor,	261 Prospect Street, Ridgewood, N. J.
Catherine Doyle,	Brooklyn, N. Y.
Dr. Edward W. Vietor,	Orford, New Hampshire.
Wilhelm Gerold,	Alsbach Heese, Germany.

Your petitioners are informed and believe that all of said persons are of full age, except said Vietor Herrmann, an infant of the age of eighteen years.

5. Decedent was trustee of a certain trust under the will of his mother, Eliza C. Herrmann, deceased, under which he was making payments to certain beneficiaries. The securities, accounts and records of said trust estate your petitioners are informed and believe are deposited in one or more of five safe deposit boxes which said decedent had rented in sundry banking institutions in the States of New Jersey and New York. The beneficiaries of said trust fund are very desirous of having an accounting made of said trust fund so as to enable them to have a new trustee appointed who will be in a position to continue the administration of said trust and distribute said income.

Your petitioners are informed and believe that the estate of said decedent will not exceed in value the sum of $200,000.00.

7. As will appear from the copy thereof hereto annexed, the first of said codicils was executed by said decedent and witnessed by three witnesses, but no attestation clause appears thereon. Also, as set forth above, the beneficiaries under said will and codicils are many in number and widely scattered and your petitioners believe that it would be desirable and for the benefit of all parties in interest that said will and codicils be probated in solemn form in this Honorable Court, and that pending the hearing on such probate that your petitioner, The New Jersey Title Guarantee & Trust Company, be appointed administrator *pendente lite* of the estate of said Henry V. Herrmann, deceased.

Your petitioners, therefore, pray:

1. That this Honorable Court will admit said alleged will and codicils to probate in solemn form, as and for the last will and testament of said Henry V. Herrmann, and that letters Testamentary thereon be granted to your petitioner, The New Jersey Title Guarantee & Trust Company.

2. That this Honorable Court will make an order directing what notice shall be given to said parties interested.

3. That pending the giving of necessary notice for said admission to probate, said petitioner, The New Jersey Title Guarantee & Trust Company be appointed administrator *pendente lite* of the estate of said Henry V. Herrmann, deceased.

Dated, Jersey City, N. J., June 6, 1924.

THE NEW JERSEY TITLE GUARANTEE & TRUST COMPANY,

By D. E. Evarts,
First Vice President.

Attest:
W. N. Chappell
Assistant Secretary.
(Seal)

JOS. FRANKENTHAL,
Petitioners.
COLLINS & CORBIN,
Proctors.

Clement K. Corbin,
Of Counsel.

State of New Jersey,
County of Hudson, ss:

James H. Isbills, being duly sworn, according to law, deposes and says: That he is the Trust Officer of The New Jersey Title Guarantee & Trust Company, one of the petitioners in the foregoing petition named; that the matters and things therein contained are true to the best of his knowledge and belief; and he further states that he has made diligent inquiry and is informed and believes that the estate of said Henry V. Herrmann will not exceed the value of $200,000.

JAMES H. ISBILLS.

Subscribed and sworn to at
Jersey City, N. J., this
6th day of June, 1924, before me
Frank E. Garry,
Notary Public of N. J.
My commission expires Aug. 18, 1928.
(Seal.)

State of New York,
County of New York, ss:

Joseph Frankenthal, being duly sworn according to law on his oath says: That he is one of the petitioners named in the foregoing petition; that the matters and things therein contained are true to the best of his knowledge, information and belief.

JOS. FRANKENTHAL.

Subscribed and sworn to at New York, N. Y., this 6th day of June, 1924, before me a Notary Public, in and for said County and State, duly commissioned and sworn, as witness my hand and official seal.

George P. Frenkel,
Notary Public,
New York Co.
N. Y. Co. Clk's No. 200, Reg. No. 6034.
Commission expires March 30, 1926.
(Seal.)

Will.

THE LAST WILL AND TESTAMENT
OF
HENRY V. HERRMANN

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

I, Henry V. Herrmann, being of sound mind and memory, and considering the uncertainty of this mortal life, do hereby make, publish 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 funeral and testamentary expenses shall be paid 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. Catherine 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 Tübingen, 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 and eighty dollars to Miss Clara Herrmann, of Mühlhausen, in Thuringia, 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.

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.

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.

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.

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 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 siezed or possesed, 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. Theodore 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. Theodore 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, 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 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.

(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.

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.

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.

In Witness Whereof, I have hereunto set my hand and affixed my seal this Sixteenth day of January, in the year 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 name 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 Saving-bank book to

my Aunt, Miss Caroline Vietor, of Brooklyn, who agrees to pay my funeral charges from part of the proceeds of said Bankbook, the remaining balance of which is to be hers exclusively.

(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.

(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, Württemberg, Germany, named in Article No. 4;

Mrs. Margaret J. Russel 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 cancelled.

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

(6) Article No. 2 of my last Will and 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 ($1,000) annually in equal monthly payments, while she shall live. (This annual total, of $1,000—from me is additional to and distinct from the Five Hundred Sixty

Dollars annually, which she receives from the Estate of Eliza C. Herrmann, deceased.)

(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.

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.

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).

(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.

(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-edge, long term, senior bonds, (such as New York Central & H. R. R. R. 3-1/2% bonds due in 1997; also Central R. R. of New Jersey 5% bonds due in 1987; also Chicago & North-Western R. R. 3-1/2% bonds, due in 1987 or equivalent).

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.

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, ($1,000), 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.

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.

(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, explaning each transaction). These are 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 they rise enough to net that amount, and liquidate the loan in question with the proceeds.

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 reinvested), instead of attempting to obtain as large an income as the dividends of said Stock produced, i. e=$1,050 —yearly, and only buy gilt-edged investments.

Witness my hand and seal; New York, February 15, 1915.

(Seal) HENRY V. HERRMANN.

Witnesses:

(Seal) Jos. F. Eastmond,

(Seal) C. M. Purdy,

(Seal) Frank L. Dunnell.

Codicil No. 2 of and to the Last Will and Testament of Henry V. Herrmann.

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 and Testament dated January 16, 1911.

Paper Propounded as Second Codicil

(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.

(2) I herewith Will that Mrs. Rösle Wolf, of Oeschingen (near Tübingen), Wuerttemberg, 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 $280— that she receives from the Estate of her sister, Eliza C. Herrmann, deceased).

Aside from the above I now herewith explicitly 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, $2,000 an-

nually—i. e. $560—from the Estate of the late Eliza C. Herrmann and $1,440 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 Borough 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 $1,120 is additional to the $600 which she is to receive under Section Second of my last Will & Ttestament dated January 16, 1911, which Section [as stated] I herewith fully confirm, 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 Herrmann, for her own use and benefit absolutely and forever."

Paper Propounded as Second Codicil

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 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. Theodor 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. Rösle Wolf, of Oeschingen, near Tübinen, 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.

(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.

(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 hereby Will

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

Although Mr. Alfred 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.

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)

Signed, sealed, published and declared 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
(Seal)	Louis W. Conselyea	89 Front St., New York City

Order to Show Cause.

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER of The Probate of the Alleged Will and Codicils of Henry V. Herrmann, deceased.	On Petition for Probate. Order to Show Cause.

Upon reading and filing the petition of The New Jersey Guarantee & Trust Company and Joseph Frankenthal, whereby it appears that said The New Jersey Title Guarantee & Trust Company alleges that it is one of the executors named in the last will and testament and codicils of Henry V. Herrmann, deceased, who departed this life leaving a will and testament and codicils thereto, wherein Alfred S. Brown and said The New Jersey Title Guarantee & Trust Company are alleged to have been named as executors; and it further appearing that the said Alfred S. Brown has duly renounced his said office of executor:

It is, on this 9th day of June, 1924, upon motion of Collins & Corbin, Proctors for and of counsel with petitioners,

Ordered that the heir-at-law and next-of-kin, and legatees mentioned in said will and testament and codicils of said Henry V. Herrmann, deceased, i. e., C. Theodore Herrmann, Miss C. Vietor, Miss Clara Herrmann, Gladys Herrmann, Vietor Herrmann, Grace Cranstoun Herrmann, Alfred S. Brown, Greenwood Cemetery, Mrs. Roesle Wolff, Joseph Hirsch, Albert Van Praag, Frederick Manjer McCallum, Mary R. Vietor, Catherine Doyle, Dr. Ed-

ward W. Vietor and Wilhelm Gerold show cause before the Ordinary at 10 o'clock in the forenoon upon the 9th day of October 1924, at the Chancery Chambers, Jersey City, New Jersey, why said last will and testament and codicils thereto should not be admitted to probate as and for the last will and testament and codicils thereto of said Henry V. Herrmann, deceased, and why Letters Testamentary should not be issued to the said The New Jersey Title Guarantee & Trust Company, alleged to have been named as executor therein.

And in the presence of said counsel and Julian C. Harrison, of counsel with said C. Theodore Herrmann, and Joseph A. Duffy, of counsel with Gladys Herrmann, Vietor Herrmann and Grace Cranstoun Herrmann, both appearing specially for the purpose of consenting to the appointment of an administrator *pendente lite*. Further Ordered Adjudged and Decreed that Letters of Administration *pendente lite* upon the goods and chattels, rights and credits of the said Henry V. Herrmann, be granted to the said The New Jersey Title Guarantee & Trust Company pending the hearing upon said order to show cause and until the further order of this Court upon its giving bond to the Ordinary in the sum of Two Hundred Thousand Dollars ($200,000.00), conditioned according to law but without surety.

And Further Ordered that notice of the hearing of said application be given to the aforesaid parties by serving copies of this order, which may be certified by proctors for petitioners, upon those of said persons residing within the State of New Jersey, and by mailing copies thereof, with the postage prepaid thereon, to those of said persons being non-residents of the State of New Jersey, addressed to them at their last

Order to Show Cause

known residences, all within ten days from the date of this order.

Respectfully advised,

JOHN BENTLEY,
V. O.

Statement

The testimony taken before the Vice Ordinary relates solely to the execution of the will and codicils and is omitted as having no bearing on the matters involved in this appeal.

Cross-Petition of C. Theodore Herrmann.

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER of The Probate of the Alleged Will and Codicils of Henry V. Herrmann, deceased.	On Petition for Probate. Cross-petition for letters of administration with the will annexed.

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

The cross-petition of C. Theodore Herrmann of Freeport, New York, respectfully shows:

1. That he is the sole next-of-kin of the above-named decedent.

2. That Alfred S. Brown, the only person named as executor in the will and codicils of the decedent, has duly renounced.

3. That probate of the papers propounded as a second codicil, in which the decedent attempted to name the New Jersey Title Guarantee & Trust Company of Jersey City, has been refused by this Court, and there is no person named in the will and first codicil to undertake the administration of the estate of the decedent.

4. Your petitioner has an equitable life estate in the entire residuary estate and a vested interest in remainder, subject to the equitable life estates in petitioner and his children created by the will.

Your petitioner therefore prays that letters of administration with the will annexed of the said Henry V. Herrmann be granted to him.

C. THEODORE HERRMANN.

State of New York,
City of New York, ss:
County of New York,

C. Theodore Herrmann, the petitioner in the foregoing cross-petition named, being duly sworn according to law upon his oath, deposes and says: That the matters and things therein contained are true to the best of his knowledge and belief. Deponent further says that the value of the estate, for the administration of which this application is made, will not exceed, in value, the sum of Two Hundred Thousand Dollars ($200,000.).

C. THEODORE HERRMANN.

Subscribed and sworn to this
16th day of January, 1925.
Emily Stalp,
Commissioner of Deeds
For the City of New York.
New York County Clerk's No. 453.
New York County Register's No. 25189.
Kings County Clerk's No. 133.
Kings County Register's No. 5127.
Bronx County Clerk's No. 47.
Bronx County Register's No. 3046.
Commission Expires October 9, 1925.
(Seal.)

Cross-Petition of Grace C. Herrmann and Gladys Herrmann.

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER of The Probate of the Alleged Will and Codicils of Henry V. Herrmann, deceased.	On Petition for Probate. Cross-petition for letters of administration with the will annexed.

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

The cross-petition of Grace Cranstoun Herrmann and Gladys Herrmann, respectfully shows:

1. That Gladys Herrmann is the daughter of C. Theodore Herrmann, the life-tenant named in the "tenth" paragraph of the last Will and Testament of Henry V. Herrmann, deceased, the above-named decedent.

2. That Grace Cranstoun Herrmann is the Grace Cranstoun Herrmann named in subdivision 1 of paragraph "tenth" in said last Will and Testament of the above-named decedent.

3. Your petitioner, Grace Cranstoun Herrmann, by said subdivision 1 of paragraph "tenth," is entitled to all the rest, residue and remainder of the estate for her own use and benefit absolutely and forever, after the payment of the bequests named in said subdivision 1 of paragraph "tenth."

4. Grace Cranstoun Herrmann is also entitled to all the rest, residue and remainder of the estate, sub-

ject to the payment of the bequests as contained in subdivision 2 of said paragraph "tenth."

5. That Gladys Herrmann is entitled to an absolute estate in certain shares of the residuary estate as set forth in subdivision 1 of paragraph "tenth" of the last Will and Testament of the above-named decedent.

6. Your petitioners are, therefore, vested with an interest in the remainder of the estate, subject to the conditions as contained in subdivision 1 and subdivision 2 of said paragraph "tenth."

Your petitioners therefore pray that letters of administration with the will annexed of the said Henry V. Herrmann be granted to them or either of them.

GRACE CRANSTOUN HERRMANN
GLADYS HERRMANN

State of New Jersey,
County of Hudson, ss:

Grace Cranstoun Herrmann and Gladys Herrmann, the pettioners in the foregoing cross-petition named, being duly sworn according to law upon their oaths, depose and say: That the matters and things therein contained are true to the best of their knowledge and belief.

Deponents further say that the value of the estate, for the administration of which this application is made, will not exceed, in value, the sum of Two Hundred Thousand ($200,000) Dollars.

GRACE CRANSTOUN HERRMANN
GLADYS HERRMANN

Subscribed and sworn to this
5th day of March, 1925.
George A. Wardell,
Notary Public of
New Jersey.

Memorandum Opinion.

COURT OF CHANCERY OF NEW JERSEY

JOHN BENTLEY

Vice Chancellor

Jersey City, N. J., August 20, 1925

Collins & Corbin, Esq'rs,
1 Exchange Place, Jersey City.

Joseph A. Duffy, Esq.,
15 Exchange Place, Jersey City.

Julius C. Harrison, Esq.,
2 Rector St., New York.

Gentlemen:

In the application for the appointment of an administrator of the estate of Henry V. Herrman, I am convinced that C. Theodore Herrmann has the first right. I regret the length of time that has elapsed before a decision could be reached in this matter, but I feel that before going upon my vacation I should indicate my determination; and I also regret that lack of time precludes the preparation of any formal opinion or memorandum of the reasons for my view.

If an appeal is contemplated and counsel will advise me, I will then prepare a formal opinion for the Court of Errors and Appeals.

Yours very truly,

JB:ARB JOHN BENTLEY

Statement

L. Edward Herrmann, counselor-at-law, of this State, having in the meantime been appointed guardian *ad litem* for Vietor Herrmann, an infant son of C. Theodore Herrmann, over the age of fourteen years, joined in the application for the issuance of letters to his mother, Grace C. Herrmann, or to his sister, Gladys Herrmann, instead of the father and next of kin, C. Theodore Herrmann.

Opinion of Vice-Ordinary Bentley.

PREROGATIVE COURT OF NEW JERSEY.

In the Matter

of

The Probate of the Alleged Will and Codicil of Henry V. Herrmann, deceased.

November 27, 1925.

L. Edward Herrmann, Esq., Proctor, *pro se* guardian Vietor Herrmann.

Joseph A. Duffy, Esq., Proctor, Gladys Herrmann and Grace C. Herrmann.

Julian C. Harrison, Esq., Proctor, C. Theo. Herrman.

Opinion

This memorandum is not to be published in the official or unofficial reports.

Bentley, V. C.:

Application for the appointment of an administrator with the will annexed.

One Herrmann died leaving a last will and testament with one codicil, which has been admitted to probate, and another paper writing purporting on its face to be a second codicil but which has been refused probate because of informalities of execution, rendered fatal by the 24th Section of "An Act Con-

cerning Wills" (4 C. S. 4960), that portion of the will which is of any importance as to the right of administration in the 10th paragraph. Therein the testator undertook to provide against contingencies by providing for the distribution of his estate, either in the event of the life tenant, his brother, dying with issue living, or without issue. In the former event, the trustees were ordered to divide the corpus into as many equal shares as there might be children of his said brother living at the time of his brother's death. Then the trustees are directed, after meeting necessary charges, to pay the proceeds of each share to the child for whose benefit such share was set apart. Then the trustees are directed, after the death of any such child, to pay over the entire appropriate share to the issue of such deceased child. Then follows some inconsequential bequests. It is clear and, in fact, not denied that the ultimate distribution of the residum of the estate to the brother's grandchildren is void by reason of offending the rule against perpetuities. For this reason, looking no further for the moment, the children of the testator's brother have vested legacies, perhaps subject to be devested should they die prior to their father (Brooks v. Kip, 54 N. J. Eq. 462). It is further provided that, failing all other beneficiaries, the estate shall be enjoyed by the brother's widow; but this is so clearly a contingent interest as to require no further mention.

The other contingency the testator had in mind, namely the death of his brother the life tenant without living issue, the former undertook to provide against by bequeathing his residuary estate to the wife of the life tenant after deducting two trifling bequests, one of which has already lapsed by reason of the death of the legatee. The life tenant is still living and has at

least two children, each of whom applies herein for administration of the estate. Therefore, it is equally clear under this provision of the will that the life tenant has a purely contingent interest, which will vest only in the event of the death of both children, and the further uncertainty as to an enlargement of the class by the birth of additional children or child.

This case does not come within the provisions of Section 27 of "An Act Respecting the Orphans' Court, and Relating to the Powers and Duties of the Ordinary, and the Orphans' Court and Surrogates" (C. S. 3813), for the reason, of course, that the decedent did not die intestate. However, one of the persons named as executors predeceased the testator and the other has declined to accept the trust. Under these circumstances, I take it to be unquestioned that the right of the residuary legatees to letters of administration is preferred to the next of kin and has not been in doubt since the pronouncement of Chancellor Zabriskie, in "The Matter of the Will of Sophia A. Kirkpatrick" (22 N. J. Eq. 463).

Therefore, finding the residuary estate vested in the children of the life tenant, an order will be advised that letters of administration be issued to Gladys Herrmann, the only one thereof who is of full age. Under all the circumstances of this case the rule pursued in Cottle v. Vanderheyden (56 Barb. 622) and Lenan's App. (112 Pa. 294) should be followed instead of granting administration to the minor's guardian.

Decree for Probate.

PREROGATIVE COURT OF NEW JERSEY.

IN THE MATTER of The Probate of the Alleged Will and Codicil of Henry V. Herrmann, deceased.	On Petition. Decree for Probate of Will and Codicil.

A petition having been filed by The New Jersey Title Guarantee and Trust Company and Joseph Frankenthal for the probate of three certain papers purporting to be the last will and testament and two codicils thereto of Henry V. Herrmann, deceased, late of the City of Summit, in the County of Union and State of New Jersey, and the Court having upon June 9, 1924, made an order directing that the heir at law and next of kin of said Henry V. Herrmann and the legatees mentioned in said will and codicils, i. e., C. Theodore Herrmann, Miss C. Vietor, Miss Clara Herrmann, Gladys Herrmann, Vietor Herrmann, Grace Cranstoun Herrmann, Alfred S. Brown, Greenwood Cemetery, Mrs. Roesle Wolff, Joseph Hirsch, Albert Van Praag, Frederick Manjer McCallum, Mary R. Vietor, Catherine Doyle, Dr. Edward W. Vietor and Wilhelm Gerold show cause before the Ordinary at 10 o'clock in the forenoon upon the 9th day of October, 1924, at the Chancery Chambers, Jersey City, New Jersey, why said last will and testament and codicils thereto should not be admitted to probate as and for the last will and testament and codicils thereto of said Henry V. Herrmann, deceased, and why letters testamentary should not be issued to the said The New Jersey

Title Guarantee and Trust Company, alleged to have been named as executor therein, and notice of the hearing of said application having been given to said parties as directed by the Court in said order to show cause, and said hearing having been continued from time to time until this day and letters of administration *pendente lite* upon the goods, chattels, rights and credits of the said Henry V. Herrmann having been granted to The New Jersey Title Guarantee and Trust Company pending the hearing upon said order to show cause and until the further order of this Court, and testimony having been taken in open court and it appearing that said paper writing purporting to be the last will and testament of said decedent bearing date January 16, 1911, and said paper writing purporting to be a codicil to said last will and testament and bearing date February 15, 1915, were duly made and executed by said Henry V. Herrmann, deceased, as and for his last will and testament and codicil thereto; and it further appearing that a paper writing bearing date March 15, 1922, purporting to be a second codicil to said last will and testament of said Henry V. Herrmann, deceased, was not duly made and executed as such, in that, while the same purported to be signed, sealed, published and declared by said testator in the presence of three witnesses, who in the presence of each other subscribed their names as witnesses thereto, it appears from the testimony taken in open court that neither of said three witnesses was present at the same time that either of the others was present, but that each subscribed his name to said paper writing at a separate time and at a separate place entirely separate and apart from each of said other witnesses; and it further appearing that Alfred S. Brown, one of the executors named in said last will and testament, has

renounced in writing his said executorship and Frederick Feibel, the other of said executors so named is dead;

And Grace Cranstoun Herrmann and Gladys Herrmann, having made application on behalf of said Grace Cranstoun Herrmann and Gladys Herrmann, that letters of administration be granted to said Grace Cranstoun Herrmann and Gladys Herrmann as the person first entitled thereto, and C. Theodore Herrmann, having made application, that letters of administration be granted to said C. Theodore Herrmann as the person first entitled thereto;

And it appearing that the inventoried value of the decedent's estate amounts to $170,962.34 of which $157,315.28 was invested in securities, bonds and mortgages, and the balance consisted of cash and other personal property aggregating approximately $13,000; now in the presence of Joseph A. Duffy of counsel with said Grace Cranstoun Herrmann and Gladys Herrmann, Julian C. Harrison of counsel with said C. Theodore Herrmann and L. Edward Herrmann as guardian *ad litem* of Vietor Herrmann, who appears in support of said application of said Gladys Herrmann,

It is on this fourth day of December, 1925, on motion of Collins & Corbin of counsel with the petitioners, Ordered, Adjudged and Decreed that the said paper writing purporting to be the last will and testament of Henry V. Herrmann, deceased, bearing date January 16, 1911, and the further paper writing purporting to be a codicil to said last will and testament bearing date February 15, 1915, be and the same are hereby admitted to probate as and for the last will and testament and codicil thereto of Henry V. Herr-

mann, deceased, late of the City of Summit, in the County of Union and State of New Jersey; and it is further Ordered, Adjudged and Decreed that letters of administration with the will annexed upon all and singular the goods, chattels and credits of the said Henry V. Herrmann, deceased, be and the same hereby are granted to Gladys Herrmann upon her giving bond to the Ordinary in the sum of One Hundred Seventy Thousand Dollars, conditioned according to law; and

It is further Ordered, Adjudged and Decreed that the prayer of petitioner, that a certain paper writing bearing date of March 15, 1922, purporting to be a second codicil to the last will and testament of Henry V. Herrmann, deceased, be admitted to probate as and for a codicil to the last will and testament of said Henry V. Herrmann as aforesaid, be denied, and that said paper writing be and it hereby is found by this Court to be improperly executed and void and of no effect as and for a codicil to said last will and testament; and

It is further Ordered that counsel fee of Three Thousand Dollars be allowed to Collins & Corbin, of counsel with the petitioners, and that a counsel fee of Two thousand dollars be allowed to Joseph A. Duffy, counsel of Grace and Gladys Herrmann, and a counsel fee of One Thousand Dollars be allowed to L. Edward Herrmann, guardian *ad litem* of Vietor Herrmann, and a counsel fee of Fifteen Hundred Dollars be allowed to Julian C. Harrison, counsel for C. Theodore Herrmann; and that The New Jersey Title Guarantee and Trust Company, administrator *pendente lite*, be and it hereby is directed to sell so much of the securities in its hands as said administrator, as

may be necessary to pay said counsel fees, and forthwith to pay the same together with the costs of the proceedings herein to be taxed; and counsel for C. Theodore Herrmann stating that said C. Theodore Herrmann is dissatisfied with the above adjudication granting letters of administration to Gladys Herrmann, and that he is about to appeal from so much of this decree as adjudges that letters of administration be issued to said Gladys Herrmann, and said counsel agreeing in open court not to appeal from any other part of this decree and to bring on said appeal promptly at the next term of the New Jersey Court of Errors and Appeals.

It is further Ordered that the operation of so much of this decree as adjudges that letters of administration with the will annexed upon all and singular the goods, chattels and credits of said Henry V. Herrmann deceased, be granted to Gladys Herrmann, be stayed until the further order of this court, and

It is further Ordered that The New Jersey Title Guarantee and Trust Company heretofore appointed administrator *pendente lite* upon the goods, chattels, rights and credits of said Henry V. Herrmann, be and the same is hereby continued as such administrator *pendente lite* pending said appeal and until the further order of this court; and

All of said counsel consenting thereto, it is further Ordered that the said The New Jersey Title Guarantee and Trust Company as such administrator *pendente lite* proceed forthwith to pay the legacies and annuities given by the terms of said will and codicil to the following named persons; Miss C. Vietor, Miss Clara Herrmann, Greenwood Cemetery, Joseph Hirsch, Albert Van Praag, Frederick Manjer McCallum, Al-

fred S. Brown, Joseph Frankenthal, Mary T. Vietor and Catherine Doyle; and said administrator *pendente lite* be and it hereby is directed to sell so much of the securities in its hands as said administrator *pendente lite,* as may be necessary to pay said legacies, the payments to be made under this order to be in addition to such payments as heretofore have been ordered.

Respectfully advised,

E. R. WALKER.

John Bentley,
V. O.

O.

We consent to the form of the foregoing decree.

JOSEPH A. DUFFY,
Counsel for Grace Cranstoun Herrmann and Gladys Herrmann.

JULIAN C. HARRISON,
Counsel for C. Theodore Herrmann.

L. EDWARD HERRMANN,
As guardian *ad litem* of Vietor Herrmann.

Notice of Appeal.

PREROGATIVE COURT OF NEW JERSEY.

In the Matter of The Probate of the Alleged Will and Codicil of Henry V. Herrmann, deceased.

C. Theodore Herrmann hereby appeals from so much of the decree made herein December 4, 1925, and filed on the 23rd day of December, 1925, as denies his application for appointment as administrator with the will annexed, of the decedent Henry V. Herrmann, and directs the granting of administration to Gladys Herrmann; and he appeals from all portions of the said decree so providing, to the Court of Errors and Appeals in the last resort in all cases.

JULIAN C. HARRISON,
Proctor and of Counsel with
C. Theodore Herrmann.

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

JULIAN C. HARRISON,
Of Counsel with C. Theodore
Herrmann.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter

of

The Probate of the Alleged Will and Codicil of Henry V. Herrmann, deceased.

To the Honorable Court of Errors and Appeals in the Last Resort in all Cases:

The petition of C. Theodore Herrmann respectfully shows:

That your petitioner finds himself aggrieved by a decree made in the Prerogative Court of New Jersey, by his Honor, Edwin R. Walker, made December 4, 1925, and filed herein on the 23rd day of December, 1925, in a certain proceeding for the probate of the alleged will and codicil of Henry V. Herrmann, deceased, in this respect, to wit: That the said decree

(1) Adjudges that Gladys Herrmann, a daughter of your petitioner, is entitled to letters of administration upon the said estate.

(2) Denies the application of your petitioner C. Theodore Herrmann, the brother and sole next of kin of the decedent, to letters of administration with the will annexed.

And your petitioner humbly appeals from such decree of the Ordinary, upon the ground that the same is erroneous for that (1): The decree should have

directed the issuance of letters of administration to your petitioner and denied the issuance of letters to Gladys Herrmann or any other person or persons.

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

JULIAN C. HARRISON,
Proctor and of Counsel
with Appellant.

Formal answers to petition of appeal filed.

Service of 3 copies the within Statement of the case is hereby admitted this 14th day of January 1926.

Edward Herrmann -
Proctor
~~Attorney~~ for Pltf.

Joseph A. Murphy
Proctor
~~Attorney~~ for Grace Cranston Herrmann
& Gladys Herrmann

William Cahir
Proctor for the Def White Eagle
& Nile Co.

New Jersey Court of Errors and Appeals

In the Matter

of

The Probate of the Alleged Will and Codicil of Henry V. Herrmann, deceased.

BRIEF OF APPELLANT, C. THEODORE HERRMANN.

This is an appeal from so much of a decree of the Prerogative Court as grants administration on the Estate of Henry V. Herrmann, deceased, to the decedent's niece Gladys and denies administration to her father, C. Theodore Herrmann the sole next of kin and brother of the decedent.

The decedent died May 13, 1924, leaving a will and two alleged codicils. The will named as executor Alfred S. Brown, who renounced (page 1—line 30). The second codicil, which attempted to name the New Jersey Title Guarantee and Trust Company as executor (page 19—line 1), was denied probate (page 32—line 29). No appeal has been taken from this portion of the decree, all counsel acquiescing in this portion of the decision. This situation required the appoint-

ment of an administrator with the will annexed and cross-applications for the issuance of letters were filed by C. Theodore Herrmann, on the one hand and by Grace Cranstoun Herrmann and Gladys Herrmann, on the other.

Two opinions were written by the Vice-Ordinary: the first, in August, 1925, and the second, in November, 1925. In the first opinion, the Vice-Ordinary indicated that C. Theodore Herrman had the prior right to administer. In the second opinion, he decided that the prior right was in Gladys Herrmann; and the decree appealed from, awards administration to her.

The pertinent provisions of the will are as follows:

> "TENTH: All the rest, residue and remainder of my estate, real and personal, of which I may die seized or possessed, 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. Theodore 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. Theodore 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 unto Frederick Feibel of Jersey City Heights, New Jersey, the sum of Ten Thousand Dollars thereof; and all the rest, residue and re-

mainder thereof unto Grace Cranstoun Herrmann, wife of the said C. Theodore Herrmann, for her own use and benefit absolutely and forever.

(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."

FIRST POINT.

The appellant has the greatest interest in the effects of the deceased, and is entitled to administration both under the Statute and the authorities.

(a) Appellant is the Sole Next of Kin.

Section 27 of the Orphans' Court Act provides as follows:

"If any person die intestate, or if the executor named in any testament, renounce the executorship, or neglect for the space of forty days after death of the testator or testatrix, to prove said testament, then administration of the goods, chattels and credits of such intestate, or such testator or testatrix with the testament annexed, shall be granted to the husband or wife, as the case may be, or the next of kin of such intestate, testator or testatrix, or to some of

> them if they or any of them will accept the same; and if none of them will accept the same, then to such other proper person or persons as will accept the same."

It is stated by the Vice-Ordinary, that Section 27 is not applicable for the reason that the decedent did not die intestate. But the statute by its terms is applicable "if the executor named in any testament renounces." That is the case here. (Page 1—line 30).

(b) C. Theodore Herrmann is the Person Most Interested, Both Presently and in Futuro.

In *Booraem's* case, 55 N. J. Equity, 759, at page 762, it is stated:

> "The rule of practice in the ecclesiastical Court, in cases where the grant of administration was not within the statute, was to consider which of the claimants had the greatest interest in the effects of the deceased and decree the administration accordingly if there were no peculiar circumstances. *Wetdrill* v. *Wright,* 2 Phillimore, 243."

As sole next of kin, appellant is vested with all the interests in decedent's estate which are not validly disposed of by the will. His two children, Gladys and Vietor, to one of whom the decree below grants administration, have valid equitable life estates, but nothing more. (See Second and Third Points of this brief). These life estates constituting their entire interest are by the terms of the will itself, terminated in case either of them should predecease their father and they are subject to diminution by the birth and

survival of other children to C. Theodore Herrmann.

Matter of Kirkpatrick, 22 N. J. Equity, 462, was a case where administration with the will annexed was granted to the residuary legatee.

If the pronouncement of Chancellor Zabriskie in the *Kirkpatrick* case, to the effect that a residuary legatee is entitled to administration in preference to legatees, next of kin and creditors is sound, the principle underlying the rule requires the grant of administration to C. Theodore Herrmann in the present instance, since he takes the ultimate remainder as in cases of intestacy (See later Points.)

In no event should administration be granted to Gladys Herrmann. She has as has already been shown, only an equitable life estate. The appellant has both an equitable life estate and a legal remainder in fee. The estate of Gladys may never vest in possession or enjoyment. The remainder interest of C. Theodore Herrmann is vested and he is now in enjoyment of the equitable life estate.

SECOND POINT.

The remainders subsequent to the life estates are clearly void—such remainder interests being undisposed of, passed, as in case of intestacy, to the appellant as sole next of kin.

The will attempts to create remainders, after equitable life estates, granted to unborn children of the first life tenant the appellant.

It was conceded below and the opinion of the Vice-Ordinary states (page 29, line 21) that the ultimate gift to the grandchildren is void.

It will be noticed that there is no gift except to the trustees, and, in the direction to them, to divide upon the contingencies stated. The situation existing at the date of death was that C. Theodore Herrmann had two children, Gladys and Vietor; but inasmuch as the Trustees are directed to divide the residue held in trust for the benefit of C. Theodore Herrmann during his life into as many equal shares as there are children *living at his decease,* it is obvious that the class for whose members the residue is to be held in trust after the death of C. Theodore Herrmann, is not fixed until his death and remains open to let in all the children which may be born to C. Theodore Herrmann during his lifetime. The possibility exists, therefore, of the birth of additional children to C. Theodore Herrmann, and their surviving by many years the lives of all persons now in being, with the result that the vesting of the remainder in the grandchildren would be postponed beyond a life or lives in being, and twenty-one years thereafter. It is a settled rule that a gift to an unborn child of an unborn child is void.

While there is no authority in this State which declares that to be the rule in specific words, still the rule was followed in *Stout* v. *Stout,* 44 N. J. Eq. 479, wherein it was held that the gift to the child or children (should others be born) was valid, but that the gift to the grandchildren was void, being too remote.

However, it has been held in this State that the rule against perpetuities that obtains in this State is the same as that adopted by the English Courts.

In re Simpson, 79 Eq. 233.

The rule has been long settled in England, and we quote from a recent English case.

The Vice-Chancellor in *Cattlin* v. *Brown,* Vol. II, *Hare's Ch. Rep.* at p. 375, says "The rule is stated in the able argument of Mr. Preston, in *Mogg* v. *Mogg,* Mer. 654. He says 'A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good unless there be a limitation of the time within which it is to take effect.' This, I think, a perfectly accurate statement of the law which I am to apply to the case."

See also:

Minor & Wurts on Real Prop. Sec. 646, p. 517;
Whitby v. *Mitchell,* 44 Ch. Div. 85;
In re Park's Settlement, 1914 *Law Rep. Ch. Div.* Vol. 1, page 595.

It is the possibility that the period may be exceeded and not the certainty or probability that it will be exceeded in a given trust, which

calls for the application of the rule that makes the gift over void.

Graves v. *Graves,* 94 Eq. 268;
Camden Trust Company v. *Guerin,* 79 Eq. 233;
McGill v. *Trust Company,* 95 Eq. 657.

The only gift under this will being in the direction to divide, the vesting of any estate is postponed until the time fixed for such division.

Post v. *Herberts Executors,* 12 C. E. Green, 543;
Kates v. *Walker,* 82 N. J. Law. 159.

Vice-Chancellor Buchanan in *McGill* v. *Trust Company,* 94 N. J. Eq. page 665, states the rule as follows:

> "Gifts over to a class, where the class is open until some future time, are technically vested (unless they are made expressly subject to some other contingency), if there be one or more of the class in esse at the time of the making of the gift. Nevertheless, from the standpoint of the perpetuity rule, they stand on the same footing as purely contingent gifts, since the final membership of the class, and, hence, the actual ascertainment of the persons who will take, will not be determined until the time fixed for the closing of the class. And when the time fixed for the closing of the class is so remote as to conflict with the perpetuity rule, the gift is void. *Grey Perpetuities, Third Edition,* 87, 88, *Sections* 110, 110*A; Foulke Perpetuities,* 443, 445, *Sections* 67, 69."

It seems equally apparent, however, under the authorities, that invalidity of the attempted ulti-

mate gift of the corpus, does not vitiate the entire trust provisions of the will. It was so held by Vice-Chancellor Buchanan in the *McGill* case (*supra*).

In the *McGill* case the will was substantially similar, as far as our present inquiry is concerned, to that of the case at bar, and the court held that the living children of the life beneficiary who were to receive the income until they reached the age of twenty-five years had a vested equitable life estate.

That is the situation in the present case. The two children, Gladys and Vietor, have vested equitable life estates, subject to defeasance, in whole or in part, by their death before the death of the present life tenant or the birth of additional children to C. Theodore Herrmann who would also take life estates.

There would seem to be no objection under the cases to the vesting of a life estate in these afterborn children of C. Theodore Herrmann, since the rule against perpetuities is aimed against remote vesting and the life estates in the afterborn children of C. Theodore Herrmann must vest, if at all, during his lifetime.

> *Routledge* v. *Dorrill,* 2 Ves. Jr. 357;
> *Hampton* v. *Holman,* 5 Ch. D. 183, Ch. Div.

What, then, is the result of the invalidity of the gift over to the grandchildren of C. Theodore Herrmann where the possibility is that they may include the children of persons yet unborn? The attempted gift of corpus is invalid; the Trustee has no beneficial interest. The language of

Vice-Chancellor Buchanan in the *McGill* case is apposite:

> "Clearly, there is a resulting trust, corresponding to intestacy if the estates were legal instead of equitable, in favor of testator's heirs-at-law and next of kin, at the time of his death, to wit, Alexander and Eleanor. They are now vested of this equitable remainder in the corpus of Alexander's share. Their interests therein are of course several, not joint, corresponding to the legal estates by intestacy under the statutes of descent and distribution. They are subject, of course, to Alexander's life estate and the succeeding life estate in his children."

It requires but a change of names to state accurately the respective interests of the parties, under the will now before the Court. C. Theodore Herrmann has a life estate in the entire residue, subject to the payment of the annuities directed by the will; and he has a vested remainder in the corpus, subject, of course, to his own life estate and the succeeding life estates in his children now born or which may be born to him hereafter and to the contingency provided for in Subdivision 2 which is discussed below.

See also:

Heald v. *Heald,* 56 Maryland 300.

It is true that under subdivision 2 of Paragraph 10, there is a gift of the residue contingent upon the death of C. Theodore Herrmann without leaving children him surviving; but the interests of these residuary devisees being expressly conditioned upon the death of C. Theodore Herrmann without children him surviving, are necessarily contingent.

This contingent interest is not sufficient to support a grant of administration to Grace C. Herrmann and the Vice-Ordinary so states in his opinion (page 39, line 222). Upon the present state of facts, the ultimate remainder interest is vested in the sole next of kin, C. Theodore Herrmann.

THIRD POINT.

Where the remainder over after valid life estates is void for remoteness the prior estate neither receives enlargement nor suffers diminution.

This point is urged because of the fact that the learned Vice Ordinary in his opinion below (which is somewhat ambiguous) stated that the children of C. Theodore Herrmann have "vested" lgeacies, (p. 29, line 28) and the residuary estate was "vested" in the children of the life tenant (p. 30, line 27).

Construing the opinion, it is believed that what the learned Vice Ordinary meant was that the children of the life tenant took a fee. If this is the intendment, the Vice Ordinary was clearly in error, because an overwhelming weight of authority is in favor of the rule:

> "That if the future interests created by any instrument are voided by the rule against perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument."
>
> *Gray, Perp. 3rd Ed.*, Sec. 247
>
> "That a limitation of a life estate or other partial interest, with a remainder ex-

pectant upon which is void for remoteness remains in *statu quo prius,* neither receiving enlargement, nor suffering diminution."

Lewis on Perp. at p. 567;
Leonard v. *Burr,* 18 N. Y. 96;
Cody v. *Staples,* 80 Conn. 82; 67 Atl. 1;
Gambrill v. *Gambrill,* 122 Md. 235; 89 Atl. 1094;
Greenough v. *Osgood,* 235 Mass. 235; 126 N. E. 461;
First Universalist Soc. v. *Boland,* 155 Mass. 171, 29 N. E. 524.

There remains to be considered the case of *Brooks* v. *Kip,* 55 N. J. Equity, 462, relied upon in the opinion of the Vice-Ordinary for the proposition that Gladys and Vietor Herrmann have vested legacies.

It is not denied that these children take vested equitable life estates under the will, subject to be divested in case they predecease their father. It is denied that they take anything more.

The thought behind the citation by the Vice-Ordinary of *Brooks* v. *Kip,* 54 N. J. Eq. 462 appears to be that the will operates to vest the fee in the living children of C. Theodore Herrmann, Gladys and Vietor, by force of the statute of 1784. *Brooks* v. *Kip* does not so hold. All that is held in *Brooks* v. *Kip* is that a devise indeterminate in its terms which standing alone would create only an estate for life, will be enlarged to a fee by an imposition of a charge upon the person of the devisee. It has no bearing upon the estates created by the present will. As was pointed out by Mr. Justice Minturn in the recent case of *Ahlemeyer* v. *Miller,* 3 N. J. Advanced Reports, 1946, page 1951, the rule in *Shelley's* case is not applicable since the use

of the word "heirs," is indispensable to the creation of a fee tail, and neither the words children, issue, descendants, seed or offspring can supply its place. Section 11 of the Statute of Descent Comp. Stat., Vol. 2, p. 1921 has, therefore, no application.

Neither is Section 10 of the Statute of Descent applicable. A void remainder cannot be treated as a valid devise over. It is a nullity. Even were it valid Section 10 does not enlarge the life estates.

Sections 10 and 11 of the statute of descent read as follows:

> "10.—Construction of certain devises.—That in case any lands, tenements, hereditaments or real estate, situate, lying or being in this state, shall hereafter be devised by the owner thereof to any person for life, and at the death of the person to whom the same shall be so devised for life, to go to his or her heirs, or to his or her issue, or to the heirs of his or her body, then and in such case, after the death of such devisee for life, the said lands, tenements, hereditaments or real estate, shall go to and be vested in, the children of such devisee, equally to be divided between them as tenants in common, in fee, but if there by only one child, then to that one in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue, in like manner. (Rev. 1877, p. 299)."

> "11.—Operation of conveyance or devise in fee tail.—That from and after the passing of this act, where any conveyance or devise shall be made, whereby the grantee or devisee shall become seized in law or equity of such estate in any lands or tenements, as under the statute of the thirteenth of Edward the first (called the statute of entails),

would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only, in such grantee or devisee, who shall possess and have the same power over, and right in, such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee the said lands and tenements shall go to, and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common in fee, but if there be only one child, then to that one in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue in like manner; provided that the widow of any such grantee or devisee of such estate, shall have her dower in the premises in like manner as if the said grantee or devisee had died seized thereof in fee simple; and provided also that where any person shall marry a woman being a grantee or devisee and seized of such estate, the said husband after the death of his said wife, shall have his curtesy in the said lands and tenements, if there be issue of the marriage, in like manner, as if said wife had died, seized of an estate of inheritance in fee tail of the premises. (Rev. 1877, p. 299)."

Section 10 above quoted does not enlarge the life estate in the first taker in the case of devises falling within its provisions, and can obviously have no bearing upon the life estates of Gladys and Vietor in the will now before the court.

Section 11, if operative at all upon the devise under consideration, is intended to prevent the enlargement of the life estate. This section is generally regarded as abrogating, to some extent at least, the operation of the rule in *Shelley's* case; *Weart* v. *Cruser,* 49 N. J. Law 475; *Doty* v. *Teller,* 54 N. J. Law, 163.

These sections of the Descent Act and the case of *Brooks* v. *Kip,* cited by the Vice-Ordinary, may be disposed of, however, upon the short ground that a limitation over, void because it offends the rule against perpetuities, is void for all purposes. Sections 10 and 11 of the Descent Act apply to and operate only on valid devises.

As is pointed out by Gray in his work on Perpetuities, Third Edition, Section 649. It is only in cases of conditional limitation, that an invalid limitation over after a fee makes the estate absolute in the first taker. No well-considered case can be found which holds that a life estate is converted into a fee, simply because of the invalidity of the gift over upon the termination of the life estate.

LAST POINT.

The decree should be reversed and the matter remitted to the Court below with instructions to grant administration to C. Theodore Herrmann.

Respectfully submitted,

JULIAN C. HARRISON,
Proctor and of
Counsel with Appellant.

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New Jersey Court of Errors and Appeals.

IN THE MATTER OF The Probate of the Alleged Will and Codicil of HENRY V. HERRMANN, Deceased.	Additional Brief for Appellant.

Statement.

The basis of the decree appealed from, involving as it does the construction of the appellant's rights and interest under the Will of his deceased brother, Henry V. Herrmann, is of such far reaching importance to the appellant that we wish to supplement the excellent brief already prepared on his behalf by Julian C. Harrison, Esquire.

By reason of the death before the testator of one of the executors named in the Will, and the renunciation of the other, the appointment of an administrator with the will annexed became necessary. The contest over this administration was between the appellant, the testator's only surviving brother and next of kin, and the respondent, Gladys Herrmann, the appellant's daughter. The decree appealed from awarded the administration to Gladys Herrmann, and the Vice-Ordinary who advised the decree, awarded the administration to her because he construed the will to give her and her infant brother, Vietor Hermann, the residuary estate. It is this construction which is so prejudicial to the rights of the appellant.

The Appellant's Contention.

The relevant part of the will is Clause Tenth, which is quoted at length on pages 2, 3, and 4 of Mr. Harrison's brief, and which, omitting the less important parts, reads as follows:

> "TENTH: All the * * * residue * * * 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 name, in trust, nevertheless and for the following uses and purposes that is to say: * * * 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. Theodore Herrmann shall leave a child or children him surviving then I direct my said executors to divide the said residue * * * 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 * * * 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; * * *"

C. Theodore Herrmann, the appellant, the first life tenant, was alive at the death of the testator,

and is still alive. The gift to him for life is unquestionably valid. The next gift to his children living at his decease must vest not later than Theodore's death, and, therefore, is well within the time limit of the rule against perpetuities. The gift over after the deaths of Theodore's children is obviously and admittedly too remote and void under the rule against perpetuities. It is obvious that Theodore Herrmann, being alive at the testator's death and being still alive, may have children born after the death of the testator, and, indeed, born more than twenty-one years after the testator's death, and that such children may not die until more then twenty-one years after the death of Theodore, the life in being. The gift over, then, being to the issue of the children of Theodore, cannot admittedly vest until the death of such children, as, until then, it is uncertain who their issue will be. The gift over, therefore, will not vest until the death of persons who were not born at the death of the testator, and who may not be born until more than twenty-one years thereafter, and whose death may be more than twenty-one years after the death of Theodore, the life in being. Such gift over, obviously, is too remote and is void under the rule against perpetuities. The only valid residuary gifts, therefore, are to Theodore for life, and, after his death, to such of his children as survive him. Is the children's estate absolute or for life? By the express words of the will, their interest is for life only. Those words are: "they shall pay the residue of said rents, interest and income until 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" then over. Here is a very plain restriction of the interests of the children of Theodore to their natural lives, just as plain and no

plainer than the restriction of the interest of Theodore himself to his natural life. Notwithstanding this obvious limit put upon the estates or rights of Theodore's children, the Vice-Ordinary held that the one adult living child of Theodore was entitled, as against him, to administration with the will annexed. He said that Theodore's children have vested legacies, perhaps subject to be devested should they die prior to their father (Case, p. 29, line 27). We submit that what is important is not whether Gladys Herrmann's legacy is vested or contingent, but whether it is a life interest or an absolute one. We also submit that, by the terms of the will, her legacy is for her life only, and the fact that the gift over after her life and the lives of such of her brothers and sisters as may be born and survive Theodore is void does not enlarge her life estate, and that of her brothers and sisters who may be born and survive Theodore, into an absolute interest. We say that as to the whole beneficial interest in the residuary estate after the life estate to Theodore, and the life estates in remainder after his death in such of his children as may survive him, the testator died intestate, and that such whole beneficial interest, therefore, is vested, by virtue of the intestate law, in his sole next of kin, the appellant, C. Theodore Herrmann. Theodore, therefore, having under the will a present life estate, and having, by intestacy, the whole beneficial interest after the life estates to such of his children as survive him, is clearly the person most interested beneficially in the estate, and, obviously, entitled to administration with the will annexed.

The Authorities.

Stout vs. *Stout, 44 N. J. Eq. 479* (*Bird, V. C. 1888*). In this case, the testator gave the interest on one-third of his residue to his daughter for her lifetime, and, after her death, to her child or children so long as they should severally live, and, at their death, he gave the principal to the next of kin of such deceased child in each case, in such share and manner as if said child was the absolute owner and should die intestate. At the death of the testator, his daughter, the first life tenant, had one child living. It was held (1) that the gift of the principal to the next of kin of the testator's grandchildren at their decease was void for remoteness under the rule for perpetuities and (2) that the gift for life to the children of the testator's daughter was valid. Nothing was decided as to the disposition of the principal of the estate, the gift of which was void.

Camden Safe Deposit & Trust Co. vs. *Guerin, 89 N. J. Eq. 556* (*C. E. A. 1918*). In this case, there was a gift to trustees to pay income for life with a gift over of the fund, which failed because of a violation of the rule against perpetuities. The life tenants were the same persons as were entitled under the intestate law to the *corpus* of the fund, the gift over being invalid. The principal question was whether those life tenants were entitled to demand from the trustees a conveyance and possession of the trust fund. This Court held that they were, Bergen, *J.*, saying for the Court on page 558:

> "The vice-chancellor held that as the gift of the *corpus* of the estate could not take effect during the period of the lives of persons in being and twenty-one years after, it was in violation of the rule relating to perpetuities and void, and, there being no disposition of the *corpus,* it descended to the testator's heirs-at-law,

subject to the operation of such of the provisions of the trust as were lawful. This result is correct and is not contested by any of the parties interested in this litigation."

Graves vs. *Graves, 94 N. J. Eq. 268 (Walker, C. 1922)*. In this case, the testator gave all his residue to trustee in trust *inter alia* as follows (p. 270):

> "*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 thereinafter 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 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."

The Chancellor held that the gift of the *corpus* under sub-division *"h"*, upon the death of the tes-

tator's last surviving grandchild, was void under the rule against perpetuities. He said on page 274:

> "This probability, or at least possibility, renders void the trust so far as distribution to great-grandchildren at the time of the death of the last surviving grandchild is concerned, which entails intestacy as to the *corpus;* but the question still further is: Is the estate distributable now or at a later period, and if later, when?"

On the construction adopted by the Chancellor of the gifts to the testator's children and grandchildren under sub-divisions *"e", "f"* and *"g",* he held that they were void, leaving valid only the annuities to the testator's widow. He said on page 278:

> "Upon this 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; and the trustees must account. Directions for the accounting will be given on motion and on notice, if such course becomes necessary."

The case most nearly in point and absolutely controlling of the case at bar, however, is *McGill* vs. *Trust Company of New Jersey, 94 N. J. Eq. 657 (Buchanan, V. C. 1923).* In this case, the testator gave his residuary estate to a trustee to pay the income from one share to testator's son for life, and thereafter to use such income for the support and education of any children left by the son exclusively until they attained twenty-five years of age, and then to give them the principal, but

if none attained twenty-five, to give the principal to the testator's heirs of blood. The son and three infant children of the son survived testator. Held (1) the alternate gifts of *corpus* are both void under the rule against perpetuities; (2) the equitable life estate is good; (3) the son's children take a vested life estate subject to their father's life estate, and subject to be divested in whole or in part by predeceasing their father or by the birth of other children; (4) the *corpus* passes by resulting trust to testator's heirs-at-law and next of kin, subject to the preceding life estates. Buchanan, *V. C.* on page 679, said:

> "II. HAVE ALEXANDER AND ELEANOR VESTED ESTATES IN REMAINDER IN THE CORPUS? I think they have, or at least, what is equivalent thereto. The estates are equitable, the legal title being in the trustee. As to 'Alexander's share', there is an equitable life estate in Alexander, followed by an equitable life estate in his children, an estate for their joint lives, vested as to his present children, contingent as to possible future children. On the death of the survivor of them, or on Alexander's death, if he leave no children him surviving, what then? The attempted gift of *corpus* is invalid. The trustee has no beneficial interest. Clearly, there is a resulting trust, corresponding to intestacy if the estates were legal instead of equitable, in favor of testator's heirs-at-law and next of kin, at the time of his death, to wit, Alexander and Eleanor. They are now vested of this equitable remainder in the *corpus* of Alexander's share. Their interests therein are of course several, not joint, corresponding to the legal estates by intestacy under the statutes of descent and distribution. They are subject, of course, to Alexander's life estate and the succeeding life estate in his children."

On appeal to this Court, the decree advised by the Vice-Chancellor was modified in a respect not mate-

rial to us, and, as modified, affirmed, *96 N. J. Eq. 331.* Black, *J.*, for the Court, said on page 332:

> "We are satisfied with the conclusions reached in the court of chancery, which are contained in the final decree, and numbered 1, 2, 3, 5, 6, 6-a, 7, 8, 9, 10, 11 and 12. In numbers 9 and 10, it is held that by virtue of the provisions of the codicil, the testator's children, Alexander and Eleanor, were invested in severalty, with the equitable remainder of the whole estate, subject to the preceding life estates. But this is evidently a mere verbal mistake by the draftsman of the decree. We agree that they are so seized, but not by virtue of the provisions of the will. They are so seized because of the fact that the testator made no valid disposition of that estate, his disposition being in violation of the rule of perpetuities."

From the foregoing cases, we conclude

(1) That the invalidity of a gift over does not affect a valid life estate. *Stout* vs. *Stout.*

(2) That if a gift over of the residue violates the rule against perpetuities, so much of the estate as is not disposed of by valid gifts passes as in case of intestacy. *Camden Safe Deposit & Trust Co.* vs. *Guerin* and *Graves* vs. *Graves. McGill* v. *Trust Co. of New Jersey.*

The rule is well summed up by the learned author of The Rule Against Perpetuities, Professor John Chipman Gray, in the Second Edition of his work, as follows:

> "§ 247. Effect on Prior Limitations. If future interests created by any instrument are avoided by the Rule against Perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument. Thus, if an estate is given to A. for life, remainder to his children and their heirs, but, if the children all die under twenty-five, then to B. and his

heirs, the limitation to B. is too remote, and the children of A. take an indefeasible fee simple. The cases illustrating this are innumerable. So when there is a devise on a remote condition, and no prior devise, the land descends to the heir who has an indefeasible fee.

§248 If the devise of a future interest is void for remoteness, but the prior devise is for life only or other limited period,—for instance, if there be a devise to an unborn child for life, remainder to the unborn child of such unborn child,—the property after the termination of the prior interest goes to the person to whom the property which has been invalidly devised or bequeathed goes. This person is generally the heir in case of realty, and the residuary legatee in case of personalty. There is no difference in this respect between a devise or bequest void for remoteness and a devise or bequest void for any other reason."

A quotation from the third edition is found on page 12 of Mr. Harrison's brief, amply supported by the citations following it, to which may be added *Whitehead* vs. *Bennett, 22 Law Journal (Chancery) new series, 1020 (1853)* and *Graham* vs. *Whitridge, 57 Atl. 609 (Md. 1904)*.

It follows, therefore, that if the gift to the children of Theodore is for life, their life estate is not enlarged by reason of the invalidity of the gift over. Can there be any doubt that Gladys' estate is limited to her life? As we have seen, the language of the gift to the children of Theodore is that the trustee shall "pay the residue of said rents, interest and income unto the child of my said brother * * * during his or her natural life * * * (Case, p. 9, line 15). Could any clearer language be selected in creating a life estate? Our reports are full of cases where this language or that has been held to limit an estate to the life of the legatee or devisee, but in most, if not all of them, the problem of construction was

not as simple as in the case at bar, where there is indeed no problem at all. We shall, therefore, refer only to a case in this Court, *Deats* vs. *Ziegener, 82 N. J. Eq. 605 (1913)*. In that case, the testator left a will, in which, after a specific devise of realty to his mother, he disposed of the residue of his estate as follows:

> "I give and bequeath unto my wife Ella Landers all the rest, residue and remainder of my property, both real and personal, of every name and nature wherever situated, for her sole use and benefit for and during her lifetime."

The suit in question was started after the death of Ella Landers to determine whether, under the residuary clause, she became the absolute owner of the personal estate, or whether, upon her death, it went to the testator's next of kin. In holding that she received only a life estate, the present Chief Justice, for the Court, said (p. 606):

> "That the interest which the wife took in the realty of her husband under this residuary clause is a life estate is, of course, plain; and this would be the case even if a power of disposition had been annexed to the devise. CITING CASES. And the fact that the will contains no devise over after the death of the wife cannot enlarge her estate; if she dies without executing the power the lands descend to the heirs-at-law of the testator. *Crossling* vs. *Crossling, 2 Cox 395.*
>
> It is said, however, that there is a diversity between the rules of construction relating to bequests of personal property for life, and those which govern in like devises of real estate; that according to those rules a testamentary gift of personalty to a beneficiary for his life clothes him with the absolute ownership of the subject of the gift, unless there is a further express disposition of it after his death; and it is argued from this that, although it is unquestionable that the testator in the

present case intended that his wife should take exactly the same interest in his personal estate that she should take in his realty, these rules of construction prevent this intention from being carried into effect. This argument seems to us to be unsound. Conceding, for the purposes of discussion, that a testator, dealing separately with his personal estate, will be considered as vesting the absolute ownership thereof in his beneficiary, although he expressly declares in his will that only a life interest therein shall pass, unless he further provides for its devolution to named persons upon the death of the first taker, this is not the law of this state when he mingles his real and personal estate in a mass and disposes of it as a unit. In such a case the plain intent of the testator is given effect. The beneficiary, taking only a life estate in the realty, takes only the same interest in the personalty. In *Pratt* vs. *Douglas, supra,* where the testator left his residuary real and personal estate to his wife for her life with full power to dispose thereof, Mr. Justice Depue, speaking for this court, after declaring that a devise of lands expressly for life would not be enlarged to an estate in fee even when words conferring upon the devisee power to convey a fee were superadded to the devise, declared that *'the same rule of construction is applicable to bequests of personal estate',* (at p. 533). In the case of *Wooster* v. *Cooper, supra* (on p. 683), we, in considering a similar testamentary disposition of real and personal property, again declared that where the interest of the wife is limited by certain and express words to her life only, those words of limitation apply equally to the personal as to the real estate. To the same effect is *Robeson* v. *Shotwell, supra.* It is true that in each of these cases there was a gift over of the residuary estate upon the death of the first taker, but that was not considered of importance in determining the intention of the testator. That intention was found to be settled beyond doubt by the words of the limitation, and, having been ascertained, was

> given effect in accordance with the primary rule observed in the construction of wills, viz., that the intention of the testator as exhibited by the will shall prevail."

and again at page 609:

> "The conclusion reached by the vice-chancellor in the present case was that by the testator's will his wife took merely a life interest in his personal estate, and that, there having been no further disposition made of it by his will, it must go at her death to those persons who were entitled to it under the statute of distributions. In this conclusion we concur."

Deats vs. *Ziegener,* therefore, establishes that where there is a gift for life of the residue of the personalty, and the will is silent as to the disposition of the *corpus,* the *corpus* goes to the next of kin of the testator, and the life estate is not enlarged. Reading that case in connection with the authorities above quoted, we are forced to the conclusion that where there is a gift for life of personalty as part of the residuary clause of the will, and the gift over is void under the rule against perpetuities, the life estate is not enlarged, but the gift over goes to the next of kin of the testator. Applying this to the case at bar, we are forced to the conclusion that C. Theodore Herrmann, the appellant, is vested with, not only the life estate given to him under his brother's will, but the whole *corpus* under the intestate law, saving only the life estates of such of his children as may survive him. Subject only to the life estate in such of Theodore's children as survive him, Theodore now can dispose of the whole estate. Neither Gladys nor her brother Vietor is sure of ever having any interest in the residuary trust, and will not have any such interest unless they survive Theodore. Their interest then will be only for life. Theodore may bequeath to them or either of them some in-

terest in the *corpus,* but he is not bound to and may not. Except for their life estates expectant on his, he is the master of the whole beneficial interest, present and future. He, therefore, being the person entitled to what is left of the testator's estate, is, under the established practice, which, we understand, no one in this case disputes, entitled to administration with the will annexed. *Booreams Case, 65 N. J. Eq. 759.*

It is respectfully submitted, therefore, that the decree must be reversed with directions to issue letters of administration with the will annexed to the appellant.

W. MORTON CARDEN (Of the New York Bar)
G. W. C. MCCARTER,
Of Counsel with Appellant.

February Term, 1926.

New Jersey Court of Errors and Appeals

In the Matter of The probate of the alleged Will and Codicil of HENRY V. HERRMANN, Deceased.	On Petition &c.

REPLY BRIEF ON BEHALF OF APPELLANT, C. THEODORE HERRMANN.

Appellees now concede that Gladys and Vietor, the former of whom was granted administration in the Court below, have only expectant life interests subject to be divested in whole or in part by their deaths, or the birth of other children to the appellant (see brief of appellees, page 3).

It is also conceded that the remainder over attempted to be created after the death of all the children of C. Theodore Herrmann living at his death is partly invalid, and wholly so unless the Court is prepared to overrule the decision of Vice Chancellor Bird in *Stout* v. *Stout,* 44 N. J. Eq. 479, and adopt the purported rule stated in a footnote in Cyc. Vol. 30, page 1490 (see pages 8 and 9 of appellees' brief).

The argument of the appellees on this point and the broad statement of the law in the footnote, fails to consider the inexorable requirement of the rule against perpetuities. It is not enough that the future interest may, or even that it will, in all probability, vest within the limits of the rule. *It must necessarily so vest.*

Stout v. *Stout,* which is concededly against the appellees' contention, is quoted with approval by Chancellor Walker in *Graves* v. *Graves,* 94 Eq. 268; 120 Atl. 420; and the precise point was also passed upon in *Graves* v. *Graves,* by Chancellor Walker, where a gift over upon the death of the last surviving grandchild of the testator was held void, the Chancellor saying:

> "It is perfectly obvious that other grandchildren may still be born and they, upon birth, would be entitled to share in the income which would cease only upon the death of the last survivor of them, which might be beyond twenty-one years after the death of the class living at the time when the will took effect. This probability, or at least possibility, renders void the trust so far as distribution to great grandchildren at the time of the death of the last surviving grandchild is concerned, which entails intestacy as to the corpus; but the question still, further, is: Is the estate distributable now or at a later period and, if later, when?"

Not only has *Stout* v. *Stout* been approved by the decisions of this Court, but exactly the same conclusion was reached upon the same facts by the Court of Maryland in the cases of *Thomas* v. *Gregg,* 76 Md. 169, and *Heald* v. *Heald,* 56 Md. 300.

The will now before the Court speaks from the date of the testator's death. It must be

construed as of the date of death and cannot receive what might be called an ambulatory construction where the result reached will vary according to what happens after death.

There is a possibility of the death of both the living children of Theodore Herrmann before him and the birth of a third child who may survive him by fifty years or more. The scheme of the will contemplates that the issue of such child whenever born shall take in remainder. There is no gift at all except in the direction to divide among a class and the class whose members have life estates expectant on Theodore's life estate may all be yet unborn. The remainder over is to take effect upon their decease,—clearly a violation of the perpetuity rule.

A reference to several of the cases cited in the footnote to 30 Cyc. page 1490, note 25, will show that such cases do not sustain the broad proposition stated in the footnote. They merely hold that, if the will permits the separation of the remainders over into those which do, and those which do not violate the perpetuity rule, the separation will be made, and the valid remainders will stand. But one of the very decisions cited in the footnote indicates that the will in the case at bar would not permit of a construction which would save any of the remainders from the operation of the rule. The case is *Dorr* v. *Lovering,* 147 Mass., 530.

In that case the Court held that under the language of the particular will there was no violation of the rule against perpetuities. But it is stated, page 532:

> "In the case at bar, it was possible at the death of the testator that Nancy Gay might have a child born afterwards, and

> that all her children living at the death of the testator might die during her life. If the will is to be construed as giving life estates to the children of Nancy Gay, *who might be living at her death,* it might result that the after-born child would be the only child then living; and would take a life estate in the whole property; and in that event, the limitation over to the heirs at law of such after-born child would be void for remoteness, because it would not take effect until the end of the life of its parent, —a life not in being at the death of the testator. *If this was so, it would seem that the whole devise would be void for remoteness under the rule we have stated.*
>
> But upon careful consideration, we are of the opinion that the will cannot be thus construed, and that the case falls within the decision in *Hill* v. *Simonds,* 125 Mass. 526" (Italics are ours).

This case is therefore not opposed to *Stout* v. *Stout,* but in entire harmony with it, and the case suggested is the case at bar, of life estates to a class which includes unborn children with remainders over to issue of those composing the class, and the remainders confessedly void *in toto.*

And in *Griffith* v. *Pownall,* 13 Simon, 393, another case cited in the same footnote, the Vice Chancellor says in his opinion, at page 396:

> "I admit that if a person having a power over a fund appoints it in bulk, 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 appointment is void *in toto;* and that being so, the question is whether the appointment which the testator in this case has made is an appointment of that description."

Theodore, as the sole next to kin, has the greatest interest and is clearly entitled to administration.

The decree should be reversed, with instructions to grant administration to the appellant.

Respectfully submitted,

JULIAN C. HARRISON,
Proctor and of Counsel
with Appellant.