Again there was the testimony of George Honeybloom who testified (Case, pp. 117, 118) that he had a place of business two doors from the DeBellis restaurant, and was accustomed to eating in the restaurant. He testified that on November 21st, he was eating in the restaurant and noticed Rupprecht there; and that at 7.30 P. M. while on his way home he saw DeBellis and Rose DeBellis, his sister-in-law, standing outside the restaurant with street clothes on; that he spoke to them and they told him they were waiting for Rupprecht to bring back the car which had been loaned to him earlier in the afternoon.

Then there was the testimony of Samuel Silverman, salesman for the National Surety Company (Case, pp. 122, 123), that he was in the restaurant on November 21st, eating his lunch, and after six o'clock in the evening he came back into the restaurant, after leaving Mr. Honeybloom's Shop, when he saw DeBellis standing in the doorway and saluted him and spoke to him.

The testimony of Rupprecht was that the robbery took place some time around 6 P. M.

It is respectfully submitted that the judgment under review should be reversed and a new trial granted.

William A. Kavanagh,
Attorney for and of Counsel
with Plaintiff-in-Error.

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Amended Complaint.

(Filed Feb. 2, 1927.)

BERGEN COUNTY CIRCUIT COURT.

MARY FISCHER, Plaintiff, vs. EMIL STUART, Defendant.	Action at Law. Amended Complaint.

The plaintiff, Mary Fischer, residing in Fort Lee, in the County of Bergen, and State of New Jersey, says that:

1. The plaintiff is a daughter of the late Francis Hayek, late of the City, County and State of New York, who died on the 13th day of April, 1893, leaving a last will and testament, which was duly probated by the Surrogate of the County of New York, State of New York, where the said deceased was domiciled at the time of his death, and a copy thereof was duly filed in the office of the Surrogate of Bergen County, New Jersey; a copy of which is hereto annexed, marked Exhibit "A" and forms a part of this amended complaint.

2. At the time of the death of said testator, he was seized in fee of the land and of the premises, situate, lying and being in the Borough of Fort Lee aforesaid, County of Bergen, State of New Jersey, bounded and described as follows:

COMMENCING at a point 200 feet from the Northwest corner of Center Avenue and White-

man Street; running thence Westerly parallel with, and, on the North side of said Whiteman Street 300 feet; thence, Northerly to the South side of Hoym Street; parallel with east side of Anderson Avenue; thence Easterly along the South side of said Hoym Street 300 feet, thence South and parallel with Center Avenue 400 feet to the point or place of beginning, excepting therefrom a plot of 44 feet on the North side of said Whiteman Street running back North 100 feet, being the plot of land excepted by Francis Hayek, in the ninth clause of his said last will from the devise of the so-called homestead or summer residence at Fort Lee.

3. At the time of the death of said deceased he left him surviving six children, of whom the plaintiff is one, who were his only heirs at law and next of kin.

4. By a statute enacted by the Legislature of the State of New York, it was, among other things enacted in words as follows:

> "The absolute power of alienation shall not be suspended by any limitation or conditions whatever for a longer period than during the continuance of not more than two lives in being at the creation of the estate."

5. Said statute was in force in the State of New York at the times herein mentioned.

6. The said ninth clause of the last will and testament of Francis Hayek, deceased, is illegal and void under the said law of the State of New York.

7. Heretofore the plaintiff entered into a written contract with the defendant, Emil Stuart, to sell her interest in said real estate, being the one-sixth part thereof, for which the said defendant agreed to pay the plaintiff the sum of One Thousand Dollars on the execution and delivery to him of the deed of her said interest in said property on or before the 5th day of January, 1927, the plaintiff representing and warranting to the defendant that she owns, and was seized in fee of the said one-sixth interest in said property and could give a good and sufficient deed thereof to the defendant. Hereto annexed is a copy of said agreement marked Exhibit "B" which forms a part of this amended complaint.

8. The plaintiff duly executed and tendered a deed of her said interest in and of said property to the defendant pursuant to said agreement on the 5th day of January, 1927, but, the defendant then refused and still refuses to pay the plaintiff the said sum of One Thousand dollars therefor or any part thereof. That the plaintiff is now, and has, at all times been ready and able to deliver said deed to the defendant on payment of the said purchase price of One Thousand Dollars ($1000) agreed to be paid therefor. That defendant agreed to pay plaintiff One Thousand Dollars ($1000) as liquidated damages in case he failed to perform his said agreement.

The plaintiff demands as damages the sum of One Thousand Dollars ($1000) and interest from January the 5th, 1927.

McKirgan & Gilson,
Attorneys of Plaintiff.

Exhibit "A".

I, Francis Hayek, of the City of New York, revoking all other and former wills by me made, do make, publish and declare this my last will and testament in manner following, that is to say:

1. I direct the payment without delay after my decease of my funeral expenses and of all my just debts except those secured by mortgage.

2. I give and bequeath my watch, wardrobe and all my wearing apparel to my two sons Francis Jr. and Louis.

3. It is my will that my two sons Francis and Louis shall have the right and privilege before all others of purchasing all my right, title and interest as partners in the cabinet making business now carried on by the firm of F. Hayek & Co. Accordingly in case they may desire to make such purchase they shall take my said interest after payment of partnership debts at a valuation of Five thousand dollars, and such purchase price shall be treated as a gift and bequest to them under this my last will, and shall be charged to them as such, but without interest thereon, in the settlement of my estate. My sons shall have a like preference in respect to the occupation as tenants of so much room in, or such parts of, the premises on the corner of Tenth Avenue and Forty-fourth Street, this City, as may be necessary to carry on their said business. There shall be an appraisement every five years so long as they continue such occupation and pay the rent, and until the termination of the trusts in respect to said premises in 10th Avenue and Forty-fourth Street created by this my will.

Exhibit "A".

4. I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, and wheresoever situated, in trust to the following named persons, to wit: my son Francis, my son Louis, my son-in-law August Fischer and my friend Anthony Eickhoff, for the purposes hereinafter stated. My said trustees, however, shall have no power to mortgage or otherwise encumber any part of my real estate and no power to sell the same with the exception hereinafter specified in reference to certain real estate at Fort Lee, New Jersey.

5. It is my will that whatever sums of money my aforesaid trustees may see fit from time to time to pay over to my children out of the surplus of the income of my estate that may remain after paying taxes, interest on mortgages and other necessary expenses, shall be so given to my four daughters until the whole sum so received by each daughter shall equal half the purchase price paid by my two sons for my interest in the firm of Hayek & Co. and then and from that time it is my will that such surplus of income shall be distributed equally among all my children share and share alike, and the lawful issue of such as may be deceased. The same equal distribution among all shall take place from the start in case my sons decline to purchase my interest in the firm of F. Hayek & Co.

6. As to my landed property or real estate situated at Fort Lee, Bergen County, New Jersey, and which forms no part of my summer residence or homestead there situated, I give full power and authority to my said trustees to sell and convey the same, or any part thereof, at such time or times in

such manner, at such price and upon such terms as they may deem best for the interest of my estate, but I hereby require and direct that the proceeds of any such sale shall be applied first of all to the payment of any mortgage then existing upon my said summer residence or homestead.

10 7. I direct my above named trustees to collect the rents and other income of my real estate, and after payment of taxes and other expenses to apply the net income or proceeds of one-sixth thereof to the use of my daughter MARY FISCHER during her natural life and upon her decease the trust as to said one-sixth shall cease and I thereupon give and devise the corpus or principal of said one-sixth to the children and heirs at law of my said daughter MARY or to such other person or persons as she 20 may by her last Will and Testament appoint to receive the same. I make the same, or similar, disposition of one other sixth in favor of my daughter LOUISA SUPPES, also of one other sixth in favor of my daughter JULIA LANGLOTZ, also of one other sixth in favor of my daughter JOHANNA FISCHER, also of one other sixth in favor of my son FRANCIS and also of one other and only remaining sixth in favor of my son LOUIS. I give full power and au- 30 thority to my said trustees or to a majority of them to fill any vacancies that may occur in their number by death, renunciation, resignation or inability to act.

8. As to my real estate at Fort Lee situated outside of my homestead or summer residence that may be left unsold under the sixth clause of this my will and as to all my personal property not disposed of under the Second and Third clause hereof, I make 40

the same disposition of it as that just above made of the real estate on the corner of Tenth Avenue and Forty-fourth Street. To speak briefly it shall go to my trustees in trust as to each one-sixth thereof to hold the same one-sixth during the life of each one of my six children respectively in trust for each respectively and then upon his or her decease the corpus of such sixth shall go to his or her children 10 or heirs at law or such other person or persons as he or she may by will appoint.

9. As to my homestead or summer residence at Fort Lee consisting of three acres with all the building and appurtenances (excepting of course a plot of ground on the South side 44 feet in front and 100 feet deep with a house upon it built by my son Louis) I direct that this homestead prop- 20 erty shall be taken care of and kept in order and repair by my said Trustees for the benefit, use and enjoyment of all my grandchildren (children of my six children) including those that may be born after my decease until the youngest of my said grand-children becomes ten years old at which time the said homestead property may be sold if a sale be then deemed desirable and the proceeds of the sale be distributed equally among my said grandchildren. 30

10. It is my express wish that my above trustees shall not be held to furnish security or give bonds for the carrying out of the provisions of this Will.

In Witness Whereof I, FRANCIS HAYEK, have to this my Last Will and Testament consisting of two sheets of paper subscribed my name and set my seal this 15th day of June, 1891. 40

F. HAYEK.

Exhibit "B".

ARTICLES OF AGREEMENT made the 4th day of December in the year of our Lord 1926

BETWEEN

MARY FISCHER of Fort Lee, County of Bergen, State of New Jersey, party of the first part, and EMIL STUART, of the Borough of Fort Lee in the County of Bergen and State of New Jersey of the second part:

WITNESSETH, that the said party of the first part for and in consideration of the sum of One Thousand Dollars ($1000) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part doth agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns by deed of warranty free from all encumbrances on or before the 5th day of January, 1927, next ensuing the date hereof, one sixth part of all that lot, tract or parcel, of land and premises hereinafter particularly described, situate, lying and being in the Borough of Fort Lee, in the County of Bergen and State of New Jersey and bounded as follows:

> COMMENCING at a point 200 feet from Northwest corner of Center Avenue and Whiteman Street, running thence westerly parallel with and on the North side of Whiteman Street 300 feet; thence, northerly and parallel with Anderson Avenue 400 feet to the South side of Hoym Street; thence, easterly along said side of Hoym Street 300 feet; thence, south and

> parallel with Center Avenue 400 feet to the point or place of beginning, excepting therefrom a plot of 44 feet on the North side of Whiteman Avenue running back north 100 feet being the plot excepted by FRANCIS HAYEK in the ninth clause of his last will from the devise of the so called homestead or summer residence at Fort Lee.

The interest hereby agreed to be conveyed, descended to party of first part, as one of the six childred of said FRANCIS HAYEK entitled to share the real property of which he died intestate.

And the said EMIL STUART for his heirs, executors and administrators doth covenant, promise and agree to, and with the said party of the first part her heirs, executors, administrators and assigns that the said party of the second part, will pay and satisfy or cause to be paid and satisfied, under the party of the first part, the said sum of One Thousand Dollars ($1000) on the delivery of said deed properly executed as and for the purchase money of the foregoing described land and premises. And, it is further agreed by the parties to these presents, that said party of the second part his heirs and assigns may enter into and upon the said land and premises on the fifth day of January, 1927, next ensuing the date hereof and from thence take the rents, issues and profits to his and their use.

AND IT IS FURTHER AGREED by the parties to these presents, that the said deed shall be delivered and received at residence of said EMIL STUART at Fort Lee between the hours of nine in the forenoon and six o'clock in the afternoon on the said fifth day of January, 1927, next ensuing the date hereof.

Exhibit "B".

AND for the performance of all and singular the covenants and agreements, aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and, they hereby agree to pay, upon failure to perform the same the sum of One Thousand Dollars ($1000) which they hereby fix and settle as liquidated damages there
10 for.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals this day and year first above mentioned.

Signed, sealed and delivered in the presence of

MARY FISCHER (L.S.)

20 EMIL STUART (L.S.)

30

40

Notice of Motion to Strike Out Amended Complaint.
(Filed Feb. 8, 1927.)

BERGEN COUNTY CIRCUIT COURT.

MARY FISCHER, Plaintiff, vs. EMIL STUART, Defendant.	Action at Law. Notice of Motion to Strike Out Amended Complaint.

10

To MESSRS. MCKIRGAN & GILSON,
Attorneys of Plaintiff.

Sirs:

TAKE NOTICE, that on Tuesday, the 8th day of
20 February, instant, at 9:30 A. M., at the Court House in Hackensack, I shall apply to Hon. Newton H. Porter, Judge of the Circuit Court of Bergen County, for an order striking out the amended complaint in the above entitled cause, on the ground that it does not set forth a cause of action and because the plaintiff cannot convey a legal title to the interest in the land mentioned in the contract annexed to the amended complaint.

30 Dated, February 2nd, 1927.

Yours, &c.

CLARENCE LINN,
Attorney of Defendant.

Due and legal service of the within notice is acknowledged this 2nd day of February, 1927.

MCKIRGAN & GILSON,
40 Attorneys of Plaintiff.

Order Denying Motion and for Judgment Final.

(Filed, April 4, 1927.)

BERGEN COUNTY CIRCUIT COURT.

MARY FISCHER, Plaintiff, vs. EMIL STUART, Defendant.	Action at Law. Order Denying Motion to Strike Out Amended Complaint, and for Final Judgment.

The defendant having moved to strike out the amended complaint in the above entitled cause on the ground that it does not set forth a cause of action and because the plaintiff cannot convey a legal title to the interest in the land mentioned in the contract annexed to the amended complaint; and arguments of counsel for the respective parties having been heard and considered; and it appearing that the law of the State of New York governs, and that the trust created by the ninth clause of the last will and testament of Francis Hayek, deceased, annexed to the amended complaint, is void under the law against perpetuities of the State of New York; now on motion of McKirgan & Gilson, Esq., attorneys of plaintiff, and the consent hereunder written;

It is on this 5th day of April, 1927, ORDERED that the said motion be and it hereby is denied, and that final judgment be entered in favor of the plaintiff and against the defendant in the sum of

one thousand dollars and interest from January 5th, 1927.

NEWTON H. PORTER,
Judge.

I consent to the entry of the within order reserving the right to appeal from that part of the order denying the motion to strike out the amended complaint.

CLARENCE LINN,
Attorney of Defendant.

Judgment actually entered April 12, 1927.

Notice and Grounds of Appeal.
(Filed, May 5th, 1927.)

BERGEN COUNTY CIRCUIT COURT.

MARY FISCHER, Plaintiff, vs. EMIL STUART, Defendant.	Action at Law. Notice of Appeal.

10

To Messrs. MCKIRGAN & GILSON,
Attorneys of Plaintiff.

SIRS:

20 TAKE NOTICE that the defendant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The amended complaint does not set forth a cause of action.

2. The ninth clause of the last will and testament of Francis Hayek, deceased, annexed to the amended complaint, is valid, and therefore the plaintiff could not convey a legal title to the interest in the land mentioned in the contract attached to the amended complaint.

30

3. The court decided that the law of the State of New York governs and that the trust created by the ninth clause of the last will and testament of Francis Hayek, deceased, is void under the law against perpetuities of the State of New York,

40

whereas the court should have decided that the law of the State of New Jersey governs, and therefore that the said trust is valid.

4. The amended complaint should have been stricken out on the motion of defendant.

Dated, April 30, 1927. 10

Yours &c.,

CLARENCE LINN,
Attorney of Defendant.

Due and legal service of the within notice is acknowledged this 30th day of April, 1927.

MCKIRGAN & GILSON, 20
Attorneys of Plaintiff.

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New Jersey State Library

133MAY.T.1927

New Jersey
Court of Errors and Appeals

MARY FISCHER, Respondent, against EMIL STUART, Appellant.	On Appeal from Bergen County Circuit Court.

APPELLANT'S BRIEF.

The appellant (defendant below) moved to strike out the amended complaint of the respondent (plaintiff below), page 11 of printed case, on the ground that it does not set forth a cause of action, and because the respondent cannot convey a legal title to the undivided interest in the real estate which she contracted to sell to the appellant.

The Circuit Court having denied the appellant's motion, he now appeals from the order denying said motion and directing judgment to be entered in said action against said appellant.

The facts necessary to support the judgment are admitted.

The only question to be decided upon this appeal is one of law, viz: Did Francis Hayek die intestate in respect to the property which the respondent contracted to sell to the appellant. The appellant contends that the Ninth Clause of the will of said Francis Hayek (p. 4 of printed case) gave a vested interest to the grandchildren of the testator as a class living at the time of his death, subject to be opened to let in other members of the class,

or increase the number thereof according to the birth, if any, of grandchildren after his death, and, that the extent of that interest and the number of the members of the class would be determined at such time as the youngest of the grandchildren (or member) should reach the age of 10.

The vesting of the interest of the grandchildren took place at once upon the death of the testator, the enjoyment only being postponed until the youngest was 10.

There appears to be nothing in the language of the will which indicates other than that it was the intention of the testator that his grandchildren should have the homestead. He had made ample provision for his children and, while doing so, as an inspection of the will indicates, he expressly excepted the homestead property from going to them. There is no doubt that he wanted his grandchildren to have and enjoy the homestead, but he did not want it handed over to them, or sold until the youngest had arrived at the age of 10 years, thus affording a substantial means of maintaining for them a suitable home. They were uppermost in his mind as the beneficiaries of this property, and the court should give effect to his intention if it is possible to do so.

We submit that this can be done by treating the devise as one of a vested interest to the grandchildren at the time of his death and *postponing* the period of *enjoyment* thereof until the youngest grandchild should become ten years of age.

As was said by Mr. Jarman in his Work on Wills, page 233,

> "A testator is in less danger of transgressing the perpetuity rule, whilst providing for his own children and grandchildren than when the objects of his bounty are the children and grandchildren of another; since, in the former case, he has only to avoid protracting the vesting of grandchildren's shares beyond their ages of 21 years, and then the fact of the gift extending to after born grandchildren, would not invalidate it, because, all the children of the testator must be *in esse* at his decease, and, their children must be born in their lifetime so that, they necessarily come into existence during a life in being."

In the case of *Stout* vs. *Stout,* 44 N. J. Eq. 479, the doctrine announced by the author was examined and approved of by the Court. The children of the testator were *in esse* at the time of his death and, the grandchildren must be born within the lifetime of such children. It is because of this fact that all his grandchildren must come into existence during a life in being, and the estate would vest ten years from the last life in being, assuming that the last of the testator's children die immediately after the birth of the youngest after-born grandchild. It is submitted that the life in being at the time of the death of the testator within the rule or, lives in being, were the testator's children so that the interest would vest within lives in being assuming that the child or children of the testator would live until the youngest grandchild attained the age of 10 years, or, at the utmost, ten years of the last life in being, assuming that the last child of the testator died immediately after the birth of the youngest grandchild.

In the case of *McGill* vs. *Trust Co.,* 94 Eq. 657, we find that the vesting of the interest there was postponed until the grandchildren should attain the age of 25 years. This was clearly beyond 21 years from the last life in being. In the case of *Graves* vs. *Graves,* 94 N. J. Eq. 274, we find there that the

devise included great-grandchildren. Just what is meant by the rule against perpetuities in referring to the fact of a life or lives in being at the time of the testator's death as applied to the situation here may be open to some debate. We think that it may apply to the children of the testator. The authorities are not clear always, as to what lives are in contemplation by the rule where, as here, there is no life estate given, and during which the trust continues. However, we respectfully submit that if the devise is one of the vested interest the vesting took place immediately on the death of the testator and, that, therefore, there is no intervening life which enters into the calculation of time upon which the rule is based.

The period fixed for distribution was the time when the youngest grandchild should arrive at the age of 10 years, but, we submit that this was only postponing the time of enjoyment or possession of the interest and not the *seizen* thereof.

Here the possibility of afterborn children, of course, existed, but it would seem the only effect of that would be to *lessen* the interest of the grandchildren living at the testator's death but not to extinguish it.

The case of *Haggerty* vs. *Hockenberry,* 52 N. J. E., seems to support the theory of the appellant as to the vesting of the interest of the grandchildren. There H., by his will, devised and bequeathed the residue of his estate to the children of his son W.

> "that he now has, or may or shall hereafter have, and, if his last child should be unborn at the time of his death, to include that one."

in equal shares, and directed that the same should be held in trust, and invested by his executors, and, that, as the said children of his son should arrive at the age of 21 years, they should be paid their

respective shares with the interest that would accrue thereon. The court held that the grandchildren living at the death of the testator took a vested interest, subject to be modified or lessened by the shares, if any, of afterborn brothers and sisters.

It was further held, that such interest became due and payable only, when the whole class of the beneficiaries should, or could, be ascertained when they respectively reached the age of 21 years.

Law of the situs of real estate governs as to construction of will made by a non-resident.

Devises of real property are construed and take effect according to the law of the SITUS.

> *See Alexander Commentaries on Will* p. 330 and cases cited;
> *Guarantee Trust* vs. *Maxwell,* 30 Atlantic 339 (N. J. E.);
> *Van Wickle* vs. *Van Wickle,* 59 N. J. E. 317 and cases therein cited.

There was no equitable conversion of the realty so as to make the law come within the rule of the *lex domicilii.*

Resort to the doctrine of notional or equitable conversion is not available here.

We respectfully submit that conversion is effected only by positive direction not discretionary power to sell.

> *Davis on Wills* Vol. 1, p. 854 and cases cited;
> *Matter of Tatum,* 169 N. Y. 517—186 N. Y. 104 160 N. Y. 497, and Common Law cases therein cited.

Again, if the sale is directed only for the convenience of distribution or the division is authorized for such purpose, there is no conversion.

This doctrine is supported by the well considered case of *Clements* vs. *Babcock,* 56 N. Y. Supp. 527, where the principle is discussed and cases cited. See also 131 N. Y. 391, 144 N. Y. 68, 105 N. Y. 185.

In the case at bar the direction was not imperative, and, evidently what power was given to the trustees was for the purpose of division or distribution only.

It is, respectfully urged that the Ninth Clause of the will of Francis Hayek is valid, and that he did not die intestate in respect to the property, the one-sixth interest in which the respondent contracted to sell to the appellant.

The judgment of the Bergen County Circuit Court should be reversed.

Respectfully submitted,

CLARENCE LINN,
Of Counsel with Appellant.

133MAY.1.1927

New Jersey
Court of Errors and Appeals

MARY FISCHER, Respondent, vs. EMIL STUART, Appellant.	Action at Law On Appeal

BRIEF OF RESPONDENT.

Statement.

The plaintiff-respondent recovered a judgment against the defendant-appellant in the Bergen County Circuit Court for $1015, damages, for breach of contract to purchase certain real estate in Fort Lee, N. J.

The plaintiff entered into a written contract with the defendant to sell her interest in the "homestead property" of which her father, Francis Hayek, died seized. (*Schedule A, annexed to amended complaint, p. 4*). She is one of six children living at the time of his death. Francis Hayek was a resident of the City of New York when he died and his will was probated in New York County. A copy of the will was filed in the office of the Surrogate of Bergen County, N. J. The plaintiff claims that she is the owner in fee of the one-sixth of the homestead property, notwithstanding that the will of her father attempted to give it to his grandchildren as appears by the will, a copy of which is annexed to the amended complaint. (*Exhibit B, p. 8.*)

The facts are not disputed. The defendant raised the only question involved in the case by a motion

to strike out the amended complaint, contending that the plaintiff could not convey a good title because the ninth clause of the will of her father devises the property to his grandchildren.

Argument.

The Ninth clause of the will is void because it violates the rule against perpetuities prevailing in the State of New York, in that alienation is postponed beyond two lives in being when the testator died. The plaintiff contends that the law of New York governs and that her father died intestate with reference to the property mentioned in the Ninth clause of his will, and that she inherited one-sixth interest thereof and has a lawful right to sell the same.

The Ninth Clause of the will in question is as follows:

> "As to my homestead, or summer residence at Fort Lee, consisting of three acres with all the buildings and appurtenances (excepting, of course, a plot of ground on the south side 44′ in front and 100′ deep with a house upon it built by my son Louis.) I direct, that this homestead property shall be taken care of, and kept in order and repair by my said trustee for the benefit, use and enjoyment of all my grandchildren (children of my six children), including those that may be born after my decease, until the *youngest* of my said grandchildren becomes *ten years old*, at WHICH TIME the said homestead property may be sold, if a sale be then deemed desirable and, the proceeds of the sale be distributed equally among my said grandchildren."

The trust clause appearing in the will under which he gave the property to his children is found in the Fourth Paragraph of the will in connection

wtih the language found in the Ninth Clause. The said Fourth Clause reads as follows:

> "I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, and wheresoever situated, *in trust*, to the following named persons, to wit: My son Francis, my son Louis, my son-in-law August Fischer and my friend Anthony Eickhoff for the purposes hereinafter stated."

The testator excepted the said homestead property from the operations or provisions of said will in all particulars, except in the two clauses which have been quoted.

The law of New York against perpetuities is different from that of New Jersey. In this State the common law rule is in force, viz: "That all future interests, legal or equitable, in realty (except dower and courtesy and rights of entry for conditions broken) or personalty, which are contingent or indestructible, must be such as necessarily to vest, if at all, within the term measured by the life or *lives* of a person or persons in being at the time of the creation of the interest and *twenty-one years* thereafter; otherwise they are invalid and void" *McGill* v. *Trust Co.,* 94 N. J. Eq. 657, at page 664; aff. 96 Ib. 331.

In New York the statute has changed the common law rule. It provides that "The power of alienation shall not be suspended by any limitation or conditions whatever for a longer period than during the continuation of not more than *two lives in being* at the creation of the estate." *1 N. Y. Revised Stat.* page 723, sec. 15. That fact was admitted by the motion to strike out the amended complaint.

The testator was a resident of and domiciled in the State of New York at the time of his death. It is well settled that the law of the domicile of the testator governs with respect to the application of the rule against perpetuities.

"If, as appears to be the case, this trust for the grandchildren was plainly illegal and void under the New York Law, the argument based on a presumption that the testator did not intend to establish a trust which would be void under the laws of New Jersey has very little, if any force, * * * The law which determines the validity or invalidity of a trust is the law of the testator's domicile at the time of his death."

Hewitt v. *Green*, 77 N. J. Eq. 345, at page 362.

"If the question as to the authority of the complainants to convey were dependent upon the validity of the residuary clause in the will, I should be obliged to hold that the complainants were without power to convey, because this clause has, according to the agreed state of facts, been already declared null and void. The law which determines the validity or invalidity of a trust is the law of the testator's domicile at the time of his death."

Murphy v. *Morrisey & Walker, Inc.*, 4 N. J. Adv. Rep. 444; (No. 9, Feb. 27, 1926; not officially reported.)

The rule that the law of the domicile of the testator governs, is applicable to *real estate* as well as to personal property. In the *Murphy* case, *supra,* the court was dealing with real estate. And in the *Hewitt* case, *supra,* the language of the court shows that the rule was not limited to personal property, for in referring to the New York law the court said, quoting from a New York case:

" 'The duration of the suspense of a trust of personal property like a trust in *real estate* must be founded on lives. No term of years, however short, will satisfy the statute.' Underwood v. Curtis (1891), 127 N. Y. 523."

It would seem to be that under the law of New Jersey the ninth clause of the will providing for the children of the testator's six children, would not violate the rule against perpetuities, because the trust is for *lives in being and less than twenty one years.* (*Huggerty* v. *Hockenberry,* 52 N. J. Eq. 354.) But under the statute of New York the ninth clause of the will is illegal and void, because the trust extends beyond *two lives* in being at the time of the testator's death. The testator attempted to postpone the time of alienation during the lives of his *six children* and ten years thereafter, for there is the possibility of a grandchild being born so long as any one of the testator's children is alive.

The fact that the real estate is located in New Jersey is immaterial; the trust which was created and which is controlled by the law of the State of testator's domicile is rendered void.

The testator plainly intended that the trust should continue and the property to be held by the trustee until his last child had departed this life and until the youngest of the grandchildren should arrive at the age of ten. It was a pure case of testamentary intent that the period of alienation should not take place during the lives of his six children.

It is respectfully submitted that the ninth clause of the will of the testator in question is void as against the rule of perpetuities of New York, and because of which the testator died intestate with reference to the property mentioned in the contract of sale annexed to the amended complaint.

The judgment should be affirmed.

McKIRGAN & GILSON,
Attorneys of Plaintiff.

New Jersey Court of Errors and Appeals

[illegible], *Plaintiff in Error,* vs. [illegible], *Defendant in Error.*	ON ERROR.	10

On Appeal from Court of Chancery.

STATE OF THE CASE. 20

Before Ingersoll, V. C.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey: 30

Your oratrix, Sophia Hollander, of Atlantic City, New Jersey, respectfully shows that:

1. On May 26, 1921, Norman N. Gale and May [illegible] Gale, his wife, being indebted to Thomas J. [illegible] in the sum of $15,000, executed to him a bond [illegible] to secure that sum, payable at any time within [illegible] years from the date thereof, with interest at the rate of six per centum per annum payable half yearly from the date of the bond.