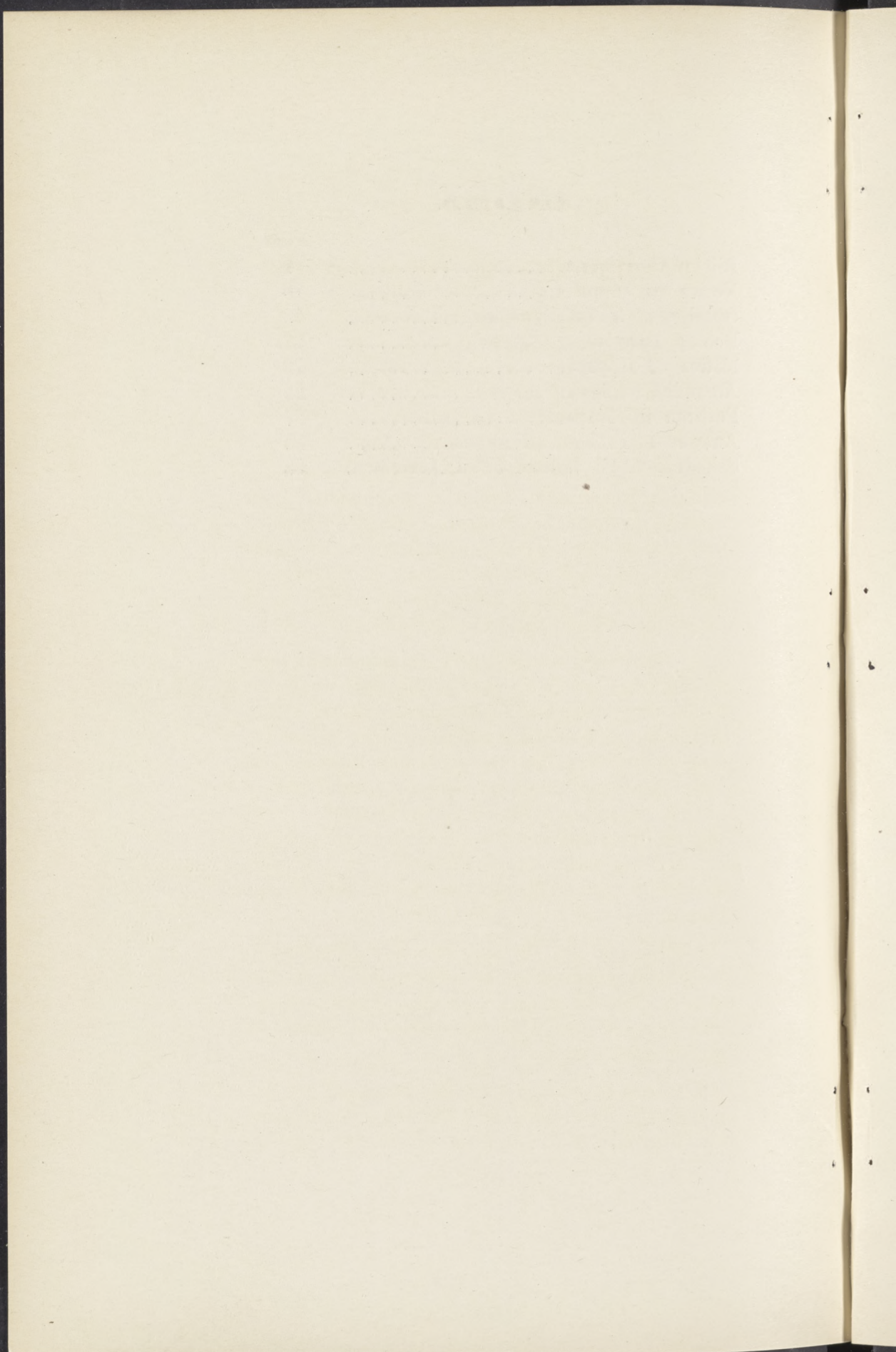


INDEX

	PAGE
Bill of Complaint.....	1
Notice to Dismiss.....	10
Opinion of Vice-Chancellor.....	13
Decree Dismissing Appeal.....	22A
Notice of Appeal.....	23
Amended Notice of Appeal.....	25
Petition of Appeal.....	27
Answer to Petition of Appeal.....	30
Schedule "A," Will of John McKeown.	33



BILL OF COMPLAINT.

In Chancery of New Jersey

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

10

The complainant, Geraldine G. Dwyer, of the City, County and State of New York, respectfully shows:

1. That on the 12th day of November, 1927, John McKeown, the father of the complainant, then of the City of Newark, County of Essex and State of New Jersey, departed this life leaving his last will and testament in writing, a true copy of which is hereto annexed and made a part hereof and marked "Schedule A."

20

2. That said last will and testament was duly admitted to probate by the Surrogate of the County of Essex on the 2nd day of March, 1928, and letters testamentary thereon issued to Lucius du Bignon Clay and the National Newark and Essex Banking Company, the executors therein named, who duly qualified as such executors and took upon themselves the burden of the administration of said estate agreeably to said will as executors thereof and trustees as therein appointed.

30

3. That in and by his will said testator directed the payment of his debts and after making certain pecuniary legacies, attempted to make disposition of his residuary estate as hereinafter mentioned.

4. That in and by the fifth paragraph of his last will and testament the testator gave, devised and bequeathed all his residuary estate unto his

40

Bill of Complaint.

said executors, in trust nevertheless, as set forth in the said will as follows:

10 “To hold, invest and reinvest the same and to collect the issues, profits, interest and income thereof and therefrom and after deducting all proper charges and expenses in the maintenance and administration thereof to pay out of the net income thereof and therefrom the sum of Six Thousand Dollars (\$6,000.00) per annum to my daughter Margaret (generally called Marjorie) A. Clay in equal quarterly or other convenient periodical payments until the date on which the earliest of the three following anniversaries shall be reached, viz.,

20 (a) The twenty-first anniversary of the birth of such female child of my said daughter as shall first attain said age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of my said daughter born after my death as shall first attain said age of twenty-one years.

30 (c) The thirtieth anniversary of the birth of such male child of my said daughter born before my death as shall first attain said age of thirty years.

Upon the date on which the earliest of the three aforesaid anniversaries shall be reached I direct my aforesaid trustees or the survivor of them to

40 (1) Set apart, establish and create thereout and therefrom a trust fund which in the sole judgment and discretion of my said trustees or the survivor of them shall be sufficient in amount and character of securities to

Bill of Complaint.

produce an annual net income of Six Thousand Dollars (\$6,000.00) and to hold, invest and reinvest said trust fund and to collect the issues, profits, interest and income thereof and therefrom and after deducting all proper charges and expenses in the maintenance and administration thereof to pay the net income to the extent of Six Thousand Dollars (\$6,000.00) annually to my said daughter, Margaret A. Clay, in equal quarterly or other convenient periodical payments, for and during the term of her natural life. 10

Immediately upon the death of my said daughter, Margaret A. Clay, I direct my aforesaid trustees or the survivor of them to apportion and divide the aforesaid trust fund into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter then living, and to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children, provided, however, that if upon the date of the death of my said daughter, Margaret A. Clay, there be any female child or children of my said daughter who shall not then have reached the age of twenty-one years or any male child or children of my said daughter who shall not then have reached the age of thirty years, then I direct my aforesaid trustees or the survivor of them to hold so many of such portions or shares as shall equal the number of such female child or 20 30 40

Bill of Complaint.

10 children as shall not then have reached the age of twenty-one years and the number of such male child or children as shall not then have reached the age of thirty years and to separately invest and reinvest the same and accumulate the issues, profits, interest and income thereof and therefrom and when any such female child shall reach the age of twenty-one years or any such male child shall reach the age of thirty years to deliver, transfer and pay over to her or him respectively one of such separate portions or shares with all accumulated income thereon, provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within 20 twenty-one years from the date of the death of my said daughter.

30 (2) To hold, invest and reinvest the remainder of my estate after the setting apart, establishing and creating of said trust fund mentioned in sub-paragraph (1) of this, the Fifth clause of my Will and to add thereto from year to year any excess of income over the sum of Six Thousand Dollars (\$6,000.00) which may be derived from the trust fund hereinabove created in said sub-paragraph (1) of this, the Fifth clause of my Will, and to collect, accumulate, invest and reinvest the issues, profits, interest and income thereof and therefrom until the date on which the earliest of the three following anniversaries shall be reached, viz.,

40 (a) The twenty-first anniversary of the birth of such female child of my said daugh-

Bill of Complaint.

ter as shall first attain said age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of my said daughter, born after my death, as shall first attain said age of twenty-one years.

(c) The thirtieth anniversary of the birth of such male child of my said daughter, born before my death, as shall first attain said age of thirty years.

Upon the date on which the earliest of the three aforesaid anniversaries shall be reached I direct my aforesaid trustees or the survivor of them to apportion and divide all of the trust fund created by this subparagraph (2) of this, the Fifth clause of my Will, into so many shares or portions as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter then living and to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children; provided, however, that if upon the date on which the earliest of the three aforesaid anniversaries shall be reached there be any female child or children of my said daughter who shall not have reached the age of twenty-one years or any male child or children of my said daughter who shall not have reached the age of thirty years then I direct my aforesaid trustees or the survivor of them to hold so many of such portions or shares as shall equal the number of such female child or children as shall not then have reached the

10

20

30

40

Bill of Complaint.

age of twenty-one years and the number of such male child or children as shall not then have reached the age of thirty years, and to separately invest and reinvest the same and to collect, accumulate, invest and reinvest the issues, profits, interest and income thereof and therefrom and when any such female child shall reach the age of twenty-one years or any such male child shall reach the age of thirty years to deliver, transfer and pay over to her or him respectively one of such separate portions or shares with all accumulated income thereon; provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death.

It being my express wish and desire that only the living child or children of my said daughter, Margaret A. Clay, and not the issue of any deceased child of my said daughter shall take under the provisions of subparagraphs (1) and (2) of this, the Fifth clause of my Will, anything therein contained indicating or tending to a contrary or different interpretation or construction notwithstanding, I expressly direct that if any child of my said daughter should die before the time when he or she shall become entitled to the actual possession and enjoyment of any separate portion or share mentioned in either of said sub-paragraphs then and in such event his or her separate portion or share shall be apportioned and divided into so many portions or shares of as nearly equal

Bill of Complaint.

value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter, him or her surviving and one such portion thereof shall be added to each of the separate portions or shares of such surviving children of my said daughter.” 10

5. That the said testator died possessed of personal property of a value in excess of Three Hundred Thousand Dollars (\$300,000.00).

6. That the executors and trustees named in said will are proceeding to execute the same and particularly to carry into effect the trusts attempted to be set up in the fifth paragraph of the said will. 20

7. That the trusts attempted to be established by the said testator in and by said fifth paragraph of his will are invalid, illegal, inoperative and void; that the estates and interests attempted to be established thereby are void for remoteness and the interests attempted to be established therein are void in that they violate the rule against perpetuities, and are contrary to law and against public policy. 30

8. That complainant is advised and believes and charges the truth to be that the said testator died intestate as to a great part of the income that may be derived from his said residuary estate.

9. That the complainant herein and her sister, Margaret A. Clay, are the only heirs-at-law and next-of-kin of their said father, John McKeown, deceased. 40

Bill of Complaint.

10 10. That the said Margaret A. Clay is married and her husband is the said executor, Lucius du Bignon Clay. Complainant's said sister and her husband have two children, Lucius du Bignon Clay, Jr. and Francis Butner Clay; that the said Lucius du Bignon Clay, Jr. was born on the 6th day of July, 1919, and the said Francis Butner Clay was born on the 26th day of February, 1921.

11. That the beneficial interest in the said residuary estate of the said testator is not sufficiently bestowed to be enforceable and that the same results to the said heirs-at-law and next-of-kin of the said testator for whom the title should be held by the said executors and trustees.

20 Complainant is without adequate remedy in the courts of law and, therefore, prays:

30 1. That the National Newark and Essex Banking Company and Lucius du Bignon Clay, as executors of and trustees under the last will and testament of John McKeown, deceased, Margaret A. Clay, Lucius du Bignon Clay, Jr. and Francis Butner Clay, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the trusts attempted to be established and created by the fifth paragraph of the will of the said testator may be decreed to be unenforceable, illegal and void and against public policy.

40 3. That the said executors and trustees of said testator may be decreed by this court to hold the legal title to the assets of the said residuary estate of the testator for the benefit of the

Bill of Complaint.

complainant and her said sister, who are the heirs-at-law and next-of-kin of the said testator entitled to the same.

4. That the disposition attempted to be made by the testator of his residuary estate may be decreed by this court to be illegal and unenforceable and against public policy. 10

5. That this court may fix and determine the right and interest of the complainant in and to the estate of said testator and the extent thereof.

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises.

LUM, TAMBLYN & COLYER, 20
Solicitors for and of Counsel
with Complainant.

30

40

NOTICE TO DISMISS.

IN CHANCERY OF NEW JERSEY.

10	<p style="margin: 0;"><i>Between</i></p> <p style="margin: 0;">GERALDINE G. DWYER, <i>Complainant,</i></p> <p style="margin: 0; text-align: center;"><i>and</i></p> <p style="margin: 0;">THE NATIONAL NEWARK AND ESSEX BANKING Co., <i>et als.,</i> <i>Defendants.</i></p>	}	<i>Notice.</i>
----	---	---	----------------

20 To: Messrs. Lum, Tamblyn and Colyer, solicitors for and of counsel with complainant
786 Broad street, Newark, N. J.

30 PLEASE TAKE NOTICE that we shall apply in behalf of the defendants, The National Newark and Essex Banking Company of Newark and Lucius du Bignon Clay, as Executors of and Trustees under the Last Will and Testament of John McKeown, deceased, to the Chancellor at the Chancery Chambers, in the City of Newark, N. J., on Tuesday, the 24th day of April, 1928, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order and decree dismissing the complainant's bill of complaint on the following grounds, viz.:

1. That the bill of complaint states no cause of action.
 2. That the bill of complaint discloses no equity.
 3. That the provisions of the trusts declared
- 40 by the will of John McKeown, a copy of which

Notice to Dismiss.

is attached to and made a part of the bill of complaint, appear to be and are valid, legal and effective.

4. That the allegations of the bill of complaint disclose no invalidity, illegality or insufficiency in the provisions of said will.

10

5. That the allegations of the bill of complaint do not disclose that said testator died intestate as to any part of the income that may be derived from his said residuary estate.

6. That the allegations in the 11th paragraph of the bill of complaint, "That the beneficial interest in the said residuary estate of the said testator is not sufficiently bestowed to be enforceable and that the same reverts to the said heirs-at-law and next-of-kin of the said testator for whom the title should be held by the said executors and trustees," is without equity or merit and is refuted by a mere reading and analysis of said will.

20

7. That the estates and interests established by the 5th paragraph of said will are clearly valid and do not violate the Rule against Perpetuities and are in accordance with law and public policy.

30

8. That, as will be shown by a mere reading and analysis of said will, the testator died testate as to all and every part of his residuary estate and the income therefrom.

9. That the will of the said testator clearly disposes of his entire estate and clearly and expressly shows that the complainant has no right and interest therein or to any part thereof.

40

Notice to Dismiss.

10. That the bill of complaint does not disclose facts upon which any decree of the Court may be made for the relief or benefit of the complainant.

10 11. That the relief prayed for in the bill of complaint is prematurely requested.

12. That the estate of the testator should not be put to any further expense and costs in defending this suit.

Respectfully yours,

PITNEY, HARDIN & SKINNER,

Solicitors for and of Counsel with
Defendants, The National Newark
and Essex Banking Company of
Newark and Lucius du Bignon
Clay.

20

Dated: April 10, 1928.

30

40

OPINION OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

Between

GERALDINE G. DWYER,
Complainant,

and

THE NATIONAL NEWARK AND
ESSEX BANKING Co., *et als.*,
Defendants.

Opinion.

10

A testamentary trust for the payment of a gift which may not necessarily vest within the period limited by law, but which requires the gift to be paid, at all events, within twenty-one years after the death of the testator, does not offend the rule against Perpetuities.

20

On motion to strike the bill.

For complainant, Messrs. Lum, Tamblyn & Colyer.

For defendant, Margaret A. Clay, Mr. Merritt Lane.

For defendant, Bank, Messrs. Pitney, Hardin & Skinner. 30

“FIFTH: all the rest, residue and remainder of my “estate of whatsoever nature and wheresoever found or situate I give, devise and bequeath unto my said son-in-law Lucius du Bignon Clay and The National Newark and Essex Banking Company of Newark, hereinafter named as executors of this will, in trust nevertheless for and upon the following uses, purposes and trusts, that is to say:

40

Opinion of Vice-Chancellor.

10 To hold, invest and reinvest the same and to collect the issues, profits, interest and income thereof and therefrom and after deducting all proper charges and expenses in the maintenance and administration thereof to pay out of the net income thereof and therefrom the sum of six thousand dollars (\$6,000.00) per annum to my daughter Margaret (generally called Marjorie) A. Clay in equal quarterly or other convenient periodical payments until the date on which the earliest of the three following anniversaries shall be reached, viz.,

(a) The twenty-first anniversary of the birth of such female child of my said daughter as shall first attain said age of twenty-one years.

20 (b) The twenty-first anniversary of the birth of such male child of my said daughter born after my death as shall first attain said age of twenty-one years.

(c) The thirtieth anniversary of the birth of such male child of my said daughter born before my death as shall first attain said age of thirty years.

Upon the date on which the earliest of the three aforesaid anniversaries shall be reached I direct my aforesaid trustees or the survivor of them to

30 (1) Set apart, establish and create thereout and therefrom a trust fund which in the sole judgment and discretion of my said trustees or the survivor of them shall be sufficient in amount and character of securities to produce an annual net income of six thousand dollars (\$6,000.00) and to hold, invest and reinvest said trust fund and to collect the issues, profits, interest and income thereof and therefrom and after deducting all proper charges and expenses in the maintenance and administration thereof to pay the net income to the extent of six thousand dollars (\$6,000.00) annually to

40

Opinion of Vice-Chancellor.

my said daughter, Margaret A. Clay, in equal quarterly or other convenient periodical payments, for and during the term of her natural life.

Immediately upon the death of my said daughter, Margaret A. Clay, I direct my aforesaid trustees or the survivor of them to apportion and divide the aforesaid trust fund into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter then living, and to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children, provided, however, that if upon the date of the death of my said daughter, Margaret A. Clay, there be any female child or children of my said daughter who shall not then have reached the age of twenty-one years or any male child or children of my said daughter who shall not then have reached the age of thirty years, then I direct my aforesaid trustees or the survivor of them to hold so many of such portions or shares as shall equal the number of such female child or children as shall not then have reached the age of twenty-one years and the number of such male child or children as shall not then have reached the age of thirty years and to separately invest and reinvest the same and accumulate the issues, profits, interest and income thereof and therefrom and when any such female child shall reach the age of twenty-one years or any such male child shall reach the age of thirty years to deliver, transfer and pay over to her or him respectively one of such separate portions or shares with all accumulated income thereon, provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and pay-

10

20

30

40

Opinion of Vice-Chancellor.

ment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of the death of my said daughter.

10 (2) To hold, invest and reinvest the remainder of my estate after the setting apart, establishing and creating of said trust fund mentioned in sub-paragraph (1) of this the fifth clause of my Will and to add thereto from year to year any excess of income over the sum of six thousand dollars (\$6,000.00) which may be derived from the trust fund hereinabove created in said sub-paragraph (1) of this, the fifth clause of my Will, and to collect, accumulate, invest and reinvest the issues, profits, interest and income thereof and therefrom until the date on which the earliest of the three following anniversaries shall be reached, viz.,

20 (a) The twenty-first anniversary of the birth of such female child of my said daughter as shall first attain said age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of my said daughter born after my death, as shall first attain said age of twenty-one years.

30 (c) The thirtieth anniversary of the birth of such male child of my said daughter, born before my death, as shall first attain said age of thirty years.

40 Upon the date on which the earliest of the three aforesaid anniversaries shall be reached I direct my aforesaid trustees or the survivor of them to apportion and divide all of the trust fund created by this sub-paragraph (2) of this, the fifth clause of my Will, into so many shares or portions of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter then living and to transfer,

Opinion of Vice-Chancellor.

convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children; provided, however, that if upon the date on which the earliest of the three aforesaid anniversaries shall be reached there be any female child or children of my said daughter who shall not have reached the age of twenty-one years or any male child or children of my said daughter who shall not have reached the age of thirty years then I direct my aforesaid trustees or the survivor of them to hold so many of such portions or shares as shall equal the number of such female child or children as shall not then have reached the age of twenty-one years and the number of such male child or children as shall not then have reached the age of thirty years, and to separately invest and reinvest the same and to collect, accumulate, invest and reinvest the issues, profits, interest and income thereof and therefrom and when any such female child shall reach the age of twenty-one years or any such male child shall reach the age of thirty years to deliver, transfer and pay over to her or him respectively one of such separate portions or shares with all accumulated income thereon; provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death.

It being my express wish and desire that only the living child or children of my said daughter, Margaret A. Clay, and not the issue of any deceased child of my said daughter shall take under the provisions of sub-paragraphs (1) and (2) of this, the Fifth clause of my Will, anything therein contained indicating or tending to a contrary or different interpretation or construction notwith-

10

20

30

40

Opinion of Vice-Chancellor.

standing, I expressly direct that if any child of my said daughter should die before the time when he or she shall become entitled to the actual possession and enjoyment of any separate portion or share mentioned in either of said sub-paragraphs then and in such event his or her separate portion or share shall be apportioned and divided into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter him or her surviving and one such portion thereof shall be added to each of the separate portions or shares of such surviving children of my said daughter.”

BACKES, Vice-Chancellor:

Thus, John McKeown disposed of the residue of his estate. He died November 12, 1927, survived by two daughters, the complainant and her sister Margaret A. Clay, and Mrs. Clay's two sons now nine and seven years of age respectively. The will made no provision for the complainant and she filed this bill praying that the trust be declared invalid as contravening the rule against Perpetuities, and that the trustees be decreed to hold the residuary estate for the heirs and next of kin of the testator. Mrs. Clay joins the complainant in resisting the motion to strike the bill.

The validity of the trust to pay the annuity to Mrs. Clay for life is not in question. The gift of the remainder, to her children, is the object of the attack. It is urged that it is void under the rule because it is not to vest until

“(a) The twenty-first anniversary of the birth of such female child of his daughter Margaret as shall first attain said age of twenty-one years, or until

Opinion of Vice-Chancellor.

(b) The twenty-first anniversary of the birth of such male child of said daughter, born after his death, as shall first attain said age of twenty-one years, or until

(c) The thirtieth anniversary of the birth of such male child of said daughter, born before his death, as shall first attain said age of thirty years,

10

and that the first of these events may happen after the period limited by the rule—lives in being and one and twenty years. The testamentary scheme is simple enough. After setting up the residue of the estate in a trust, the testator gave to his daughter, Mrs. Clay, six thousand dollars for life, to be paid out of the income until the occurrence of the first of the three events, and thereafter from the income of a part of the same residue, to be set up in a separate trust, sufficient to produce that sum. The principal of the latter he gave to her children living at the time of her death, each a proportionate share. The remainder of the residuary estate he gave to her children living at the time of the occurrence of the first of the same three events, proportionally. It resolves itself into this: that if at that period the daughter be dead, the entire trust intact, set up by the fifth paragraph of the will, is to be distributed among her then living children. It is only in case she survives that enough of the residue is to be set up in separate trust to insure the payment of her annuity. The trust for the daughter, first of the whole then of part of the residue of the estate, is not dependent upon any future event. The amount only is to be reduced, and as reduced re-set up if one of the three events happens in her lifetime. The trust, of the greater or lessor sum, is to continue as long as

20

30

40

Opinion of Vice-Chancellor.

she lives, and there is no room for serious discussion that upon her death the fund, as reduced, vests immediately in her surviving children.

10 The gift to the daughter's children living at the happening of the first of the three events is independent of the trust to secure the lifetime gift to the daughter for, in whatever form the fund may exist from time to time, only the sum of it is affected by the daughter surviving the event. The life of the daughter plays no part in the gift to her children. If the gift were conditional upon the event alone it would undoubtedly be bad for remoteness for it is possible that it would not happen and the gift therefore not vest within twenty-one years after the death
20 of the testator. The vesting is contingent upon the event. The daughter had no female child and her eldest son was, when the will took effect, but eight years of age, and besides he might have died before reaching thirty. The testator tied up his estate as long as he dared, evidently with the aid of a skilled lawyer, and he guarded against the possibility of violating the rule by providing that payment of the gift shall be made in any event within twenty-one years
30 from the date of his death. He advanced the day of vesting to come within the rule. In other words the gift was to vest, per share, in the children of his daughter living on the twenty-first anniversary of his death, if per chance it did not otherwise vest within the time fixed by law. And he did not stop there, but directed the several shares, at all events, however postponed as to vesting or payment, to be actually paid over—as to so much of the estate in which his
40 daughter may have a life beneficiary interest

Opinion of Vice-Chancellor.

within twenty-one years of her death—and the remainder, in which a life is not involved, within twenty-one years of his death.

The direction that if at the occurrence of the event a child be under the required age the trustees shall hold its share until it arrives, does not affect the vesting; the enjoyment alone is postponed. *Lembeck v. Lembeck*, 73 N. J. Eq. 427; *Fidelity-Union Trust Co. v. Rowlands*, 99 N. J. Eq. 72. 10

The provision that if at the period of vesting a child is not of the receiving age and should die before arriving its share should be divided between the remaining children would, in the circumstances, effect a divestiture with a gift over. Obviously, the testator intended that his estate should be enjoyed by the generation of his daughter's children exclusively, and, consequently only by those living at the time variously fixed for its distribution, in shares. However otherwise remote this may be in the different instances, the provision that in the extreme it should be within the time limited by the rule against Perpetuities precludes an attack upon the gift of the residue on that score. 20

So much of the residue retained and set up as a trust for the protection of the daughter's annuity may produce more than the requirement, and it is suggested that as to any excess of income there is intestacy, inasmuch as only the principal of that portion is to go to her children living at her death. The will provides that the excess is to be added to the remainder trust. The fact that the remainder trust is to be distributed to the children coincident with the creation of the trust from which the excess may later 30 40

Opinion of Vice-Chancellor.

flow is not inconsistent with the gift of the excess as part of the remainder trust, though it may accrue after the period of distribution. As it accrues it is to be apportioned as the remainder trust is directed to be distributed.

10 The bill will be dismissed.

20

30

40

DECREE DISMISSING BILL.

Filed December 4, 1928.

IN CHANCERY OF NEW JERSEY.

Between

GERALDINE G. DWYER,

Complainant,

and

THE NATIONAL NEWARK &
ESSEX BANKING COMPANY OF
NEWARK, *et als.*,

Defendants.

10

On Bill, etc.

Decree Dis-
missing Bill.

This cause coming on to be heard upon the bill of complaint herein and upon the motion of the defendant executors and trustees to strike out and dismiss the said bill, in the presence of Lum, Tamblin and Colyer, Esqs., by Ralph E. Lum, Esq., solicitors for and of counsel with the complainant Geraldine G. Dwyer, and of Merritt Lane, Esq., solicitor for and of counsel with the defendant Margaret A. Clay, and of Pitney, Hardin & Skinner, Esqs., by Corwin Howell, Esq., solicitors for and of counsel with the defendants The National Newark & Essex Banking Company of Newark and Lucius du Bignon Clay, as executors of and trustees under the last will and testament of John McKeown, deceased, and the Court having read the bill of complaint and the will of the said decedent, and having heard and considered the arguments of counsel, and being of opinion that the trusts declared in and by the fifth paragraph of the will of the said John McKeown, deceased, are valid and do not involve a violation of the rule against perpetui-

20

30

40

Decree Dismissing Bill.

ties, and that the testator did not die intestate as to any part of the principal of his residuary estate or of the income that may be derived from any part of his residuary estate; and that the various objections to said trusts made by the complainant in her said bill of complaint and
 10 by the defendant Margaret A. Clay are without equity and without merit;

It Is thereupon on this 4th day of December, 1928, on motion of Pitney, Hardin & Skinner, solicitors for the defendants The National Newark & Essex Banking Company of Newark and Lucius du Bignon Clay, executors of and trustees under the last will and testament of John McKeown, deceased, ORDERED, ADJUDGED and DECREED, and the Chancellor of the State of New
 20 Jersey by virtue of the power and authority of this court does hereby ORDER, ADJUDGE and DECREE that the trusts created in and by the fifth paragraph of the will of John McKeown, deceased, involve no violation of the rule against perpetuities and are valid so far as the objections thereto in said bill of complaint set forth are concerned, and that the said testator did not die intestate as to any part of the principal of his residuary estate or of the income that may
 30 be derived from any part of his residuary estate;

And IT IS FURTHER ORDERED, ADJUDGED and DECREED that the bill of complaint herein be and the same is hereby dismissed;

And IT IS FURTHER ORDERED, that application for costs and counsel fees may be deferred until a later date.

E. R. WALKER,
 C.

Respectfully advised,
 JOHN H. BACKES,

40 V.-C.

NOTICE OF APPEAL.

Filed December 8, 1928.

67-578

IN CHANCERY OF NEW JERSEY.

10

*Between*GERALDINE G. DWYER,
*Complainant.**and*THE NATIONAL NEWARK AND
ESSEX BANKING Co., *et als.*,
*Defendants.**On Bill, Etc.**On Final
Decree, Etc.**Notice
of Appeal.*

20

The complainant hereby appeals from so much of the decree entered herein on the 4th day of December, 1928, as orders, adjudges and decrees that the trusts created in and by the fifth paragraph of the will of John McKeown, deceased, involve no violation of the rule against perpetuities and are valid so far as the objections thereto in said bill of complaint set forth are concerned, and that the said testator did not die intestate as to any part of the principal of his residuary estate or of the income that may be derived from any part of his residuary estate, and that the bill of complaint herein be dismissed, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Honorable John H. Backes, Vice-Chancellor, to the Court of Errors and Appeals in the last resort in all causes.

30

LUM, TAMBLYN & COLYER,
Solicitors for Complainant.

Dated: December 5th, 1928.

40

Notice of Appeal.

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

RALPH E. LUM,
Of Counsel with Complainant.

10 Due service of a copy of the within Notice of
Appeal is hereby acknowledged this 17th day of
December, 1928.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant
National Newark and Essex Banking Co.

20

30

40

AMENDED NOTICE OF APPEAL.

67-578

IN CHANCERY OF NEW JERSEY.

Between

GERALDINE G. DWYER,
Complainant,

and

THE NATIONAL NEWARK AND
ESSEX BANKING Co., *et als.*,
Defendants.

On Bill, Etc.

*On Final
Decree, Etc.*

*Amended
Notice of
Appeal.*

10

The complainant and the defendant, Margaret A. Clay, hereby appeal from so much of the decree entered herein on the 4th day of December, 1928, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Honorable John H. Backes, Vice-Chancellor, to the Court of Errors and Appeals in the last resort in all causes, as orders, adjudges and decrees that the trusts created in and by the fifth paragraph of the will of John McKeown, deceased, involve no violation of the rule against perpetuities and are valid so far as the objections thereto in said bill of complaint set forth are concerned, and that the said testator did not die intestate as to any part of the principal of his residuary estate or of the income that may be

20

30

40

Amended Notice of Appeal.

derived from any part of his residuary estate,
and that the bill of complaint herein be dismissed.

Dated, December 11th, 1928.

10 LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel
with Complainant.

RALPH E. LUM,
Solicitor for and of Counsel with
Defendant, Margaret A. Clay.

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

20 MERRITT LANE,
Of Counsel with Complainant.

MERRITT LANE,
Of Counsel with Defendant,
Margaret A. Clay.

30

40

PETITION OF APPEAL.

Filed December 28, 1928.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

GERALDINE G. DWYER,
Complainant,

and

THE NATIONAL NEWARK AND
ESSEX BANKING Co., *et als.,*
Defendants.

*On Appeal
from
Chancery.*

*Petition of
Appeal.*

10

*To the Honorable the Court of Errors and Ap-
peals of the State of New Jersey in the Last
Resort in All Causes:*

20

The petition of Geraldine G. Dwyer and Mar-
garet A. Clay, the appellants in the above-stated
cause, respectfully show that your petitioners
find themselves aggrieved by a decree of his
Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey, made on the 4th day of De-
cember, 1928, in that the said decree orders that
the trusts created in and by the fifth paragraph
of the will of John McKeown, deceased, involve
no violation of the rule against perpetuities and
are valid so far as the objections thereto in the
bill of complaint set forth are concerned, and
that the said John McKeown, deceased did not
die intestate as to any part of the principal of
his residuary estate or of the income that may
be derived from any part of his residuary estate,
and further dismisses the bill of complaint.

30

40

Petition of Appeal.

10 And your petitioner humbly appeal from that part of the decree as decrees as aforesaid, upon the ground that the same is erroneous for that the trusts created in and by the fifth paragraph of the will of John McKeown, deceased, are invalid, illegal, inoperative and void, and that the estates in interest attempted to be established thereby are void for remoteness, and the interests attempted to be established therein are void in that they violate the rule against perpetuities and are contrary to law and against public policy and the residuary estate of the said testator results to his heirs at law and next of kin, and for that the court below denied the complainant the relief sought and prayed for in her said bill and dismissed the same.

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

LUM, TAMBLYN & COLYER,
Solicitors for and of Counsel with
Appellant, Geraldine G. Dwyer.

30 RALPH E. LUM,
Of Counsel.

MERRITT LANE,
Solicitor and of Counsel with
Appellant, Margaret A. Clay.

MERRITT LANE,
Of Counsel.

Petition of Appeal.

Due and legal service of a copy of the within
Petition of Appeal is hereby acknowledged this
5th day of January, 1929.

PITNEY, HARDIN & SKINNER,
Solicitors for Defendant,
The National Newark & Essex Banking Co. 10

20

30

40

ANSWER TO PETITION OF APPEAL.

Filed January 8, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

*Between*GERALDINE G. DWYER,
*Complainant-Appellant,**and*MARGARET A. CLAY,
*Defendant-Appellant,**and*

20

THE NATIONAL NEWARK &
ESSEX BANKING COMPANY OF
NEWARK and another as ex-
ecutors, etc.,
Defendants-Respondents.

*On Appeal
from
Chancery.**Answer to
Petition of
Appeal.*

30

The answer of the above named respondents, The National Newark & Essex Banking Company of Newark and Lucius du Bignon Clay, as executors of and trustees under the last will and testament of John McKeown, deceased, to the petition of appeal of the appellants Geraldine G. Dwyer and Margaret A. Clay.

40

These respondents not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, in answer thereto, nevertheless, say and admit that a decree was on the Fourth day of December, 1928, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as

Answer to Petition of Appeal.

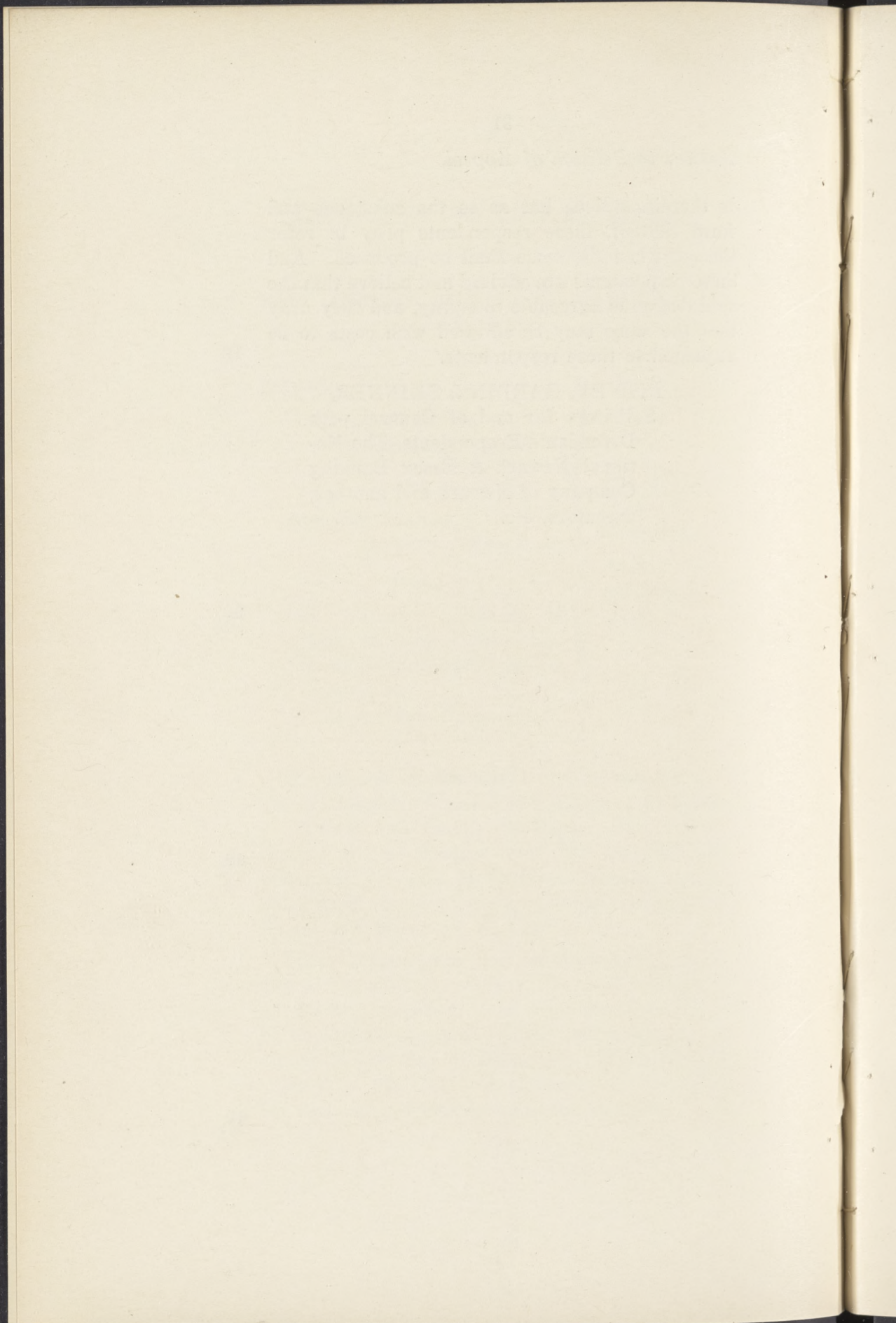
is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents. 10

PITNEY, HARDIN & SKINNER,
Solicitors for and of Counsel with
Defendants-Respondents, The Na-
tional Newark & Essex Banking
Company of Newark and another,
executors, etc.

20

30

40



"SCHEDULE A."

I, JOHN McKEOWN, of the City of Newark, Essex County, New Jersey, do hereby make, publish and declare my last will and testament in manner following, that is to say:

FIRST: I direct that all of my just debts and funeral expenses be paid as soon as may be convenient after my decease. 10

SECOND: If I should die in the City of Newark, N. J., or in the vicinity thereof, I direct that my body shall be buried in the Holy Sepulchre Cemetery in or near said City and for the purpose of such burial I direct my executors to purchase a well-located lot in said cemetery and also to mark my grave with a suitable but inexpensive tombstone with my name, date of birth (September 17th, 1863) and date of death inscribed thereon. These directions are given because there is not sufficient room in the lot in St. Raymond's Cemetery, Westchester County, New York, in which by beloved wife is buried to have my coffin placed beside hers. 20

THIRD: I give, devise and bequeath to my son-in-law, Lucius du Bignon Clay of the United States Military Academy at West Point, New York, as a token of my esteem and affection for him, the sum of Five Thousand Dollars (\$5,000), and all my articles of personal use of which I may die possessed. 30

FOURTH: As my daughter, Geraldine Grace Dwyer, has for a great many years past continuously displayed an antagonistic and unfilial spirit toward me and for other reasons which seem sufficient to me after due thought and 40

Schedule "A."

deliberation, I make no provision for her benefit or for the benefit of her children in this will.

10 FIFTH: All the rest, residue and remainder of my estate of whatsoever nature and wheresoever found or situate I give, devise and bequeath unto my said son-in-law Lucius du Bignon Clay and The National Newark and Essex Banking Company of Newark, hereinafter named as executors of this Will, in trust nevertheless for and upon the following uses, purposes and trusts, that is to say:

20 To hold, invest and reinvest the same and to collect the issues, profits, interest and income thereof and therefrom and after deducting all proper charges and expenses in the maintenance and administration thereof to pay out of the net income thereof and therefrom the sum of Six Thousand Dollars (\$6,000.00) per annum to my daughter Margaret (generally called Marjorie) A. Clay in equal quarterly or other convenient periodical payments until the date on which the earliest of the three following anniversaries shall be reached, viz.,

30 (a) The twenty-first anniversary of the birth of such female child of my said daughter as shall first attain said age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of my said daughter born after my death as shall first attain said age of twenty-one years.

(c) The thirtieth anniversary of the birth of such male child of my said daughter born before my death as shall first attain said age of thirty years.

Schedule "A."

Upon the date on which the earliest of the three aforesaid anniversaries shall be reached I direct my aforesaid trustees or the survivor of them to

(1) Set apart, establish and create thereout and therefrom a trust fund which in the sole judgment and discretion of my said trustees or the survivor of them shall be sufficient in amount and character of securities to produce an annual net income of Six Thousand Dollars (\$6,000.00) and to hold, invest and reinvest said trust fund and to collect the issues, profits, interest and income thereof and therefrom and after deducting all proper charges and expenses in the maintenance and administration thereof to pay the net income to the extent of Six Thousand Dollars (\$6,000.00) annually to my said daughter, Margaret A. Clay, in equal quarterly or other convenient periodical payments, for and during the term of her natural life.

Immediately upon the death of my said daughter, Margaret A. Clay, I direct my aforesaid trustees or the survivor of them to apportion and divide the aforesaid trust fund into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter then living, and to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children, provided, however, that if upon the date of the death of my said daughter, Margaret A. Clay, there be any female child or children of my said daughter who shall not then have reached the

Schedule "A."

age of twenty-one years or any male child or children of my said daughter who shall not then have reached the age of thirty years, then I direct my aforesaid trustees or the survivor of them to hold so many of such portions or shares as shall equal the number of such female child
 10 or children as shall not then have reached the age of twenty-one years and the number of such male child or children as shall not then have reached the age of thirty years and to separately invest and reinvest the same and accumulate the issues, profits, interest and income thereof and therefrom and when any such female child shall reach the age of twenty-one years or any such male child shall reach the age of thirty years
 20 to deliver, transfer and pay over to her or him respectively one of such separate portions or shares with all accumulated income thereon, provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of the death of my said daughter.

(2) To hold, invest and reinvest the remainder of my estate after the setting apart,
 30 establishing and creating of said trust fund mentioned in sub-paragraph (1) of this, the fifth clause of my Will and to add thereto from year to year any excess of income over the sum of Six Thousand Dollars (\$6,000.00) which may be derived from the trust fund hereinabove created in said sub-paragraph (1) of this, the Fifth clause of my Will, and to collect, accumulate, invest and reinvest the issues, profits, interest and income thereof and therefrom until the date

Schedule "A."

on which the earliest of the three following anniversaries shall be reached, viz.,

(a) The twenty-first anniversary of the birth of such female child of my said daughter as shall first attain said age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of my said daughter, born after my death, as shall first attain said age of twenty-one years. 10

(c) The thirtieth anniversary of the birth of such male child of my said daughter, born before my death, as shall first attain said age of thirty years.

Upon the date on which the earliest of the three aforesaid anniversaries shall be reached I direct my aforesaid trustees or the survivor of them to apportion and divide all of the trust fund created by this sub-paragraph (2) of this, the Fifth clause of my Will, into so many shares or portions of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter then living and to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children; provided, however, that if upon the date on which the earliest of the three aforesaid anniversaries shall be reached there be any female child or children of my said daughter who shall not have reached the age of twenty-one years or any male child or children of my said daughter who shall not have reached the age of thirty years then I direct my aforesaid trustees or the survivor of them to hold so many of such portions or shares as shall equal the number of such female child or children as shall 20
30
40

Schedule "A."

not then have reached the age of twenty-one years and the number of such male child or children as shall not then have reached the age of thirty years, and to separately invest and reinvest the same and to collect, accumulate, invest and reinvest the issues, profits, interest and income thereof and therefrom and when any such female child shall reach the age of twenty-one years or any such male child shall reach the age of thirty years to deliver, transfer and pay over to her or him respectively one of such separate portions or shares with all accumulated income thereon; provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death.

It being my express wish and desire that only the living child or children of my said daughter, Margaret A. Clay, and not the issue of any deceased child of my said daughter shall take under the provisions of subparagraphs (1) and (2) of this, the Fifth clause of my Will, anything therein contained indicating or tending to a contrary or different interpretation or construction notwithstanding, I expressly direct that if any child of my said daughter should die before the time when he or she shall become entitled to the actual possession and enjoyment of any separate portion or share mentioned in either of said sub-paragraphs then and in such event his or her separate portion or share shall be apportioned and divided into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall

Schedule "A."

equal the number of children of my said daughter him or her surviving and one such portion thereof shall be added to each of the separate portions or shares of such surviving children of my said daughter.

SIXTH: I hereby direct my Executors hereinafter named to pay any Federal or State Transfer Inheritance or Estate Tax or any governmental imposition or impositions of whatsoever nature that may be imposed against my estate or against any gift, bequest or annuity hereinbefore mentioned, from any out of my residuary estate to the end that any such gift, bequest or annuity shall be over, above and free from any and all Inheritance or Transfer tax or taxes or duty or imposition of any kind whatsoever. 10
20

LASTLY: I nominate and appoint my said son-in-law, Lucius du Bignon Clay and The National Newark and Essex Banking Company of Newark and any corporate successor to said banking company whether by merger or consolidation or adoption of a new charter under the laws of the United States or of the State of New Jersey or otherwise, to be the Executors of and trustees under this Will, hereby authorizing and empowering my said executors and trustees in either capacity and the survivor of them and the corporate successor as aforesaid of the said banking company, to transfer and convey all or any portion of my estate, whether real or personal, of whatsoever nature and wheresoever situate or found to such person or persons, on such terms, and for such price or prices as to them or the survivor of them and the corporate successor as aforesaid of said banking company shall seem proper, and to 30
40

Schedule "A."

make, execute and deliver all proper instruments of transfer and conveyance therefor. I hereby authorize and empower my said trustees to retain and continue any and all property, investments and securities which may be received by them as a part of my estate, without
10 liability or responsibility for loss by reason of the retention of any such property, investments or securities. Said trustees shall not be required to set aside any part of the income arising out of any securities which may be received or purchased by them at a premium above par for the purpose of amortization of such premium. In changing or making investments the trustees shall not be restricted to invest-
20 ments authorized by the laws governing the investment of trust funds by trustees, but may change or make any investment which in their discretion they or the survivor of them and the corporate successor as aforesaid of said banking company may think proper. All extraordinary cash dividends shall be considered and taken by the trustees as income. All dividends paid in stock shall be considered and taken by the trustees as principal.

I recommend and advise the retention in my
30 estate of all of the stock of the Vacuum Oil Company and of the Standard Oil Company of New Jersey and of the Standard Oil Company of Nebraska and of the Texas Corporation of which I may die possessed for as long a period as it may seem wise in the sole discretion and judgment of my trustees or the survivor of them and the corporate successor as aforesaid of the said banking company to hold the same in order to obtain the full benefit of any increase in value
40 thereof, and believing that said stock will con-

Schedule "A."

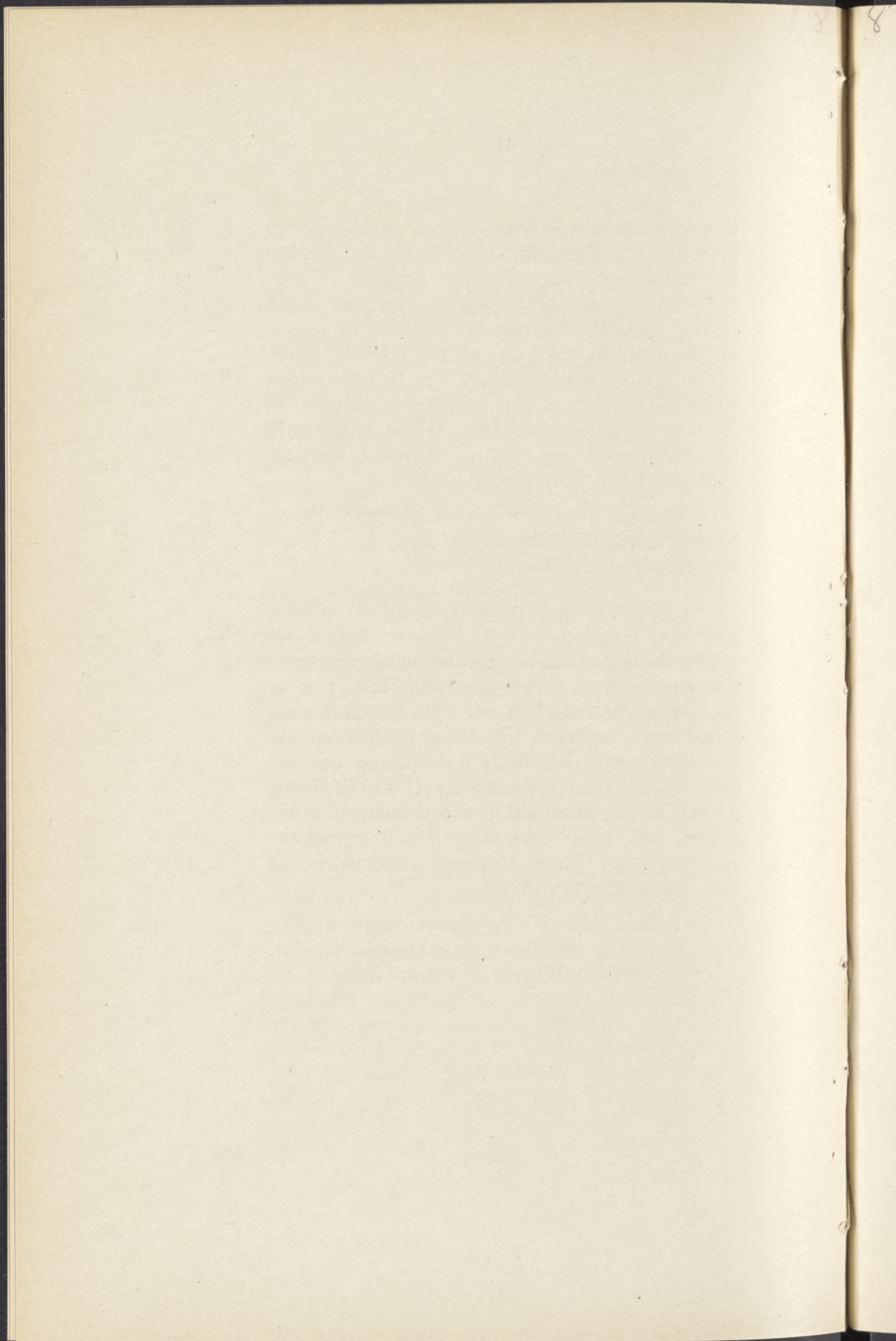
tinue to increase in value for a great number of years I suggest but do not require its retention in my estate for the purpose of distribution in kind as a part of the trust fund created by sub-paragraph (a) of the Fifth clause of this, my Will, but I do not intend by the above advice and suggestion in any way to limit or restrict the power of sale of said stock hereby given to my said trustees or the use by my said trustees of their discretion in relation to the sale or distribution thereof. 10

IN WITNESS WHEREOF I have hereunto set my hand and seal this 24th day of May, A. D. Nineteen Hundred and Twenty-seven.

JOHN McKEOWN. (L. s.)

The above instrument, consisting of nine typewritten pages, of which this is the last, was on the day of the date thereof, signed, sealed, published and declared by John McKeown, the testator therein named, as and for his last will and testament, in the presence of us, all being present at the same time, who thereupon at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto. 20 30

Edna C. Frey East Orange, N. J.
 Daniel B. Smith East Orange, N. J.
 J. Frederic Wherry Newark, N. J.



New Jersey Court of Errors and Appeals

Between

GERALDINE G. DWYER,
Complainant-Appellant,

and

THE NATIONAL NEWARK AND
ESSEX BANKING COMPANY OF
NEWARK, *et als.*,
Defendants-Respondents.

*On
Appeal
from
Chancery.*

BRIEF FOR APPELLANT.

Statement of Case.

The complainant in this case is the daughter of John McKeown, who died on November 12, 1927, a resident of the City of Newark. Said decedent left his last will and testament in writing which was duly admitted to probate by the Surrogate of the County of Essex on March 2, 1928, and letters testamentary thereon issued to Lucius du Bignon Clay and The National Newark and Essex Banking Company, the executors therein named, who duly qualified as such executors. A copy of said will is annexed to the bill of complaint (Case, p. 2 and p. 33).

In the complainant's bill, it is alleged that the testator by his will directed the payment of his debts and after making certain pecuniary legacies, attempted to make disposition of his residuary estate as set forth in the fifth paragraph of his said will (Case, p. 1).

In the bill of complaint it is further alleged that the testator died possessed of personal property valued in excess of \$300,000.00 and that

the trustees and executors named in said will are proceeding to execute the same, and particularly to carry into effect the trusts attempted to be set up in the fifth paragraph of the will (Case, p. 7).

It is further alleged that the trusts attempted to be established as aforesaid, are invalid, illegal, inoperative, and void, and that the estates and interests attempted to be established thereby are void for remoteness and that the interests attempted to be established therein are void in that they violate the Rule against Perpetuities and are contrary to law and public policy (Case, p. 7).

It is further charged that the testator died intestate as to a great part of the income that may be derived from his residuary estate.

It is further alleged in the bill that the complainant and her sister are the only heirs at law and next of kin of their said father, John McKeown, deceased; that the sister is married and that her husband is one of the executors and that said sister and her husband have two children, Lucius du Bignon Clay, Jr., born, July 6, 1919, and Francis Butner Clay, born February 26, 1921 (Case, p. 8).

The complainant alleges that the beneficial interest in the residuary estate of the testator is not sufficiently bestowed to be enforceable and that the same results to the heirs at law and next of kin of the testator for whom title should be held by the said executors and trustees (Case, p. 8).

The prayers of the bill are that the trusts attempted to be established and created by the fifth paragraph of the will of the testator may

be decreed to be unenforceable, illegal and invalid as against public policy, and that the executors and trustees may be decreed to hold the legal title to the assets of the residuary estate of the testator for the benefit of the complainant and her sister as heirs at law and next of kin of the testator; that the disposition attempted to be made by the testator of his residuary estate may be decreed to be illegal, unenforceable and against public policy, and that the Court may fix and determine the right and interest of the complainant in and to the estate of the testator and the extent thereof (Case, p. 8).

The National Newark and Essex Banking Company of Newark, and Lucius du Bignon Clay, as executors of and trustees under the last will and testament of the said testator, who are defendants to the said bill of complaint gave notice of an application to the Court of Chancery for an order and decree dismissing the complainant's bill of complaint on certain grounds which are set forth at length in said notice. (See printed Case, p. 10.)

After argument of the said application of the executors and trustees, the Court filed an opinion in which it was directed that the bill be dismissed (Case, p. 13).

In conformity with the opinion of the Court, the final decree was entered dismissing the complainant's bill (Case, p. 22a).

Thereupon notice of appeal was duly served and filed in the Court of Chancery (Case, p. 23) and a petition of appeal was duly filed in this court (Case, p. 25).

An answer to the petition of appeal was filed in common form.

Grounds of Appeal.

The appellant herein appeals from the decree upon the grounds that the trusts created by the fifth paragraph of the will of the testator are invalid, illegal, inoperative and void and that the estates and interests attempted to be established thereby are void for remoteness and that the interests attempted to be established therein are void because they violate the Rule against Perpetuities and are contrary to law and against the public policy; and also because the Court below denied the complainant the relief sought and prayed for in her bill of complaint.

BRIEF OF THE ARGUMENT.

The trusts declared in the will of the testator contravene the Rule against Perpetuities.

Under the terms of the fifth paragraph of the will it appears that the testator has given his residuary estate to his trustees therein named upon certain trusts. In the first place they are directed to pay out of the net income the sum of \$6,000.00 per annum to his daughter Marjorie until the date on which the earliest of the three following anniversaries shall be reached. In the words of the will they are as follows:

(a) The twenty-first anniversary of the birth of such female child of my said daughter as shall first attain said age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of my said daughter born after my death as shall first attain said age of twenty-one years.

(c) The thirtieth anniversary of the birth of such male child of my said daughter born be-

fore my death as shall first attain said age of thirty years.

Quite independently of the annuity given to Marjorie, the testator proceeds to direct that upon the date on which the earliest of the three aforesaid anniversaries shall be reached a certain trust shall be set up as therein indicated to pay \$6,000.00 annually to Marjorie during the term of her natural life and upon her death to divide the trust fund so set up into as many parts or shares as shall equal the number of children of Marjorie living at her decease. At this time we will omit reference to the special provisions made for these children.

Coming now to sub-division two of the residuary clause, the testator directs that the remainder of his estate, after setting up what might be called the first special trust, should be held, invested and re-invested until the date on which the earliest of three certain anniversaries shall be reached.

It now happens that these three anniversaries, so-called, are the same anniversaries first above referred to and mentioned in the residuary clause providing for the setting up of the first special trust. Furthermore, the testator, in the words of the will, apparently assumed that the second trust would be set up later than the first trust, because direction is given to add to the second trust from year to year any excess of income derived from the first trust.

In disposing of what is now apparently the corpus of the second special trust, the testator provides that upon the date on which the earliest of the three aforesaid anniversaries shall be reached, his trustees divide all the trust fund created by the second sub-paragraph into so

many shares as shall equal the number of children of his said daughter then living. At this time we will make no special reference to the disposition of these shares.

In the first place it should be observed that under the very terms of the will the time fixed for the creation of the first special trust and for the disposition of the second special trust is identically the same. The earliest of the three anniversaries mentioned by the testator fixes the time in each instance. We respectfully contend that these future interests do not conform to the rule in that it does not appear that they must vest, if at all, not later than twenty-one years from the death of the testator.

By reference to the contingencies mentioned twice by the testator it appears that he refers to certain events which may or may not happen. The future estates are not limited upon either lives or a period of twenty-one years or less, but rather, *the future interests are limited upon events*. The special trust under sub-paragraph one arises upon the happening of one of these events and the special dispositions under sub-paragraph two under the terms of the will become effective upon the happening of one of these events.

Considering these contingencies separately, we find that the testator refers to the twenty-first anniversary of the birth of such female child of his daughter as shall first attain twenty-one years. Under this provision the daughter might give birth to a female child after the death of her father, which would postpone the vesting of the future interests more than twenty-one years after the death of the testator. Again, under provision (b) a male child may be born

to the daughter after the testator's death and when such male child attains its majority a period of time greatly in excess of twenty-one years may have elapsed. Again, under provision (c) a male child born before the testator's death may attain the age of thirty years, but when such child attains such age a period of more than twenty-one years may have elapsed since the death of the testator.

It may be contended that under provision (c) this male child is a person in being at the death of the testator. However, we respectfully contend that the testator does not limit the interest upon a life but rather upon an event which may not happen until more than twenty-one years after his death. Whatever may be said with respect to (c) in this regard, however, does not have any relation to our observations on provisions (a) and (b). Here the children may be born after the death of the testator and the interest would not vest until more than twenty-one years after his death.

Under the provisions made for the disposition of the second special trust it is provided that the shares shall go to the children of the daughter then living. Apparently, then, these interests are in the nature of a contingent remainder and cannot vest until the event transpires.

In this paragraph it appears that the testator had some misgivings with regard to the Rule against Perpetuities because we find these words "provided further, however, anything herein contained to the contrary thereof notwithstanding, that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death." The query here presented is how these shares may be paid with-

in twenty-one years from the date of the testator's death when under the previous terms of the will it cannot be determined within that time to whom the payments may have to be made. This clause also gives color to our claim that the testator is here limiting the future estates upon certain events and not upon a life or lives or a definite period of years, not more than twenty-one.

Again, at the end of the first sub-division relative to the first special trust, it is provided that the shares of certain children in that trust shall be delivered, transferred and paid within twenty-one years from the date of the death of his said daughter. It should be observed with respect to this provision that the disposition thereof under the contingencies mentioned may not be effective or the interests fixed within twenty-one years of the death of the daughter.

In sub-division (2) the testator establishes the second special trust and therein provides that on the date of the earliest of the three anniversaries the trustees shall apportion and divide all the trust fund created by that paragraph "into so many shares or portions, * * * as shall equal the number of children of my said daughter then living, and to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of such children." He then proceeds to direct the holding of the shares for the male children and the female children until they reach the ages of thirty years and twenty-one years respectively, and then they are directed, "to deliver, transfer and pay over to her or him respectively, one of such separate portions or shares with all accumulated income thereon."

This paragraph is then concluded with a proviso as follows:

“Provided further, however, anything herein contained to the contrary thereof notwithstanding, that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death.”

From the language used by the testator in these dispositions, it is perfectly apparent that when he refers to the delivery, transfer and payment of “such separate portions or shares,” he refers to the portions and shares mentioned in the first part of this paragraph. Here he directs that the trust fund he is dealing with shall be divided into so many shares or portions as shall equal the number of children of his daughter then living. After thus designating the persons who are to take, and the interest they are to take, he then proceeds to direct the time of delivery, transfer and payment. *The proviso inserted in the paragraph under consideration does not in any way change the beneficiaries or the interests they take.* The testator refers in in the proviso to “such separate portions or shares” just as he had before in the paragraph. He does not say that on the twenty-first anniversary of his death this trust fund shall be divided into so many equal shares as his daughter then has children living. Quite the contrary, he simply directs that the delivery, transfer and payment of the shares he has already set up shall be made within twenty-one years from the date of his death. The use of the relative particle “such” throughout this paragraph certainly refers to and only to, the division that he makes in the very beginning of the paragraph. The testator is very particular in fixing the event

in the first instance upon which the trust is to be divided, and the persons among whom it is to be divided. If he intended to make a different division and among different persons, it is quite apparent that he would have done so, in the proviso. This he did not do, but simply attempted to accelerate the delivery and payment of the shares and interests he had already established.

Quite independent of the objections hereinbefore mentioned the interests attempted to be established for the children of the daughter also violate the Rule against Perpetuities.

Now, referring to the first special trust, it appears that the testator directs that upon the death of the daughter the corpus of that trust be divided into as many portions or shares as there are children of the daughter surviving her and the trustees are directed to transfer, convey and pay over one of such portions to each of such children. It is provided, however, that if upon the death of the daughter any female child shall be under twenty-one years or any male child under thirty years, then the trustees are to hold the shares of such children and to separately invest the same and accumulate the income and when such children reach the ages of twenty-one years and thirty years respectively, to deliver, transfer and pay over to her or him one of the shares with the accumulations. By reference to the second special trust it will be noticed that the children are provided for in like manner. The corpus of this trust is to be divided into as many shares as there are children of the daughter living when this trust is set up. The testator then provides that these shares shall be held and paid over to the children under practically the same terms as they receive their

interests under the first special trust. However, it is the intention of the testator that these children shall not receive their shares until they attain the ages fixed by the testator, as will appear by the very last section of the fifth paragraph of the will.

In this section the testator declares that only the living children of his daughter and not the issue of any deceased child shall take under the sub-divisions one and two of the fifth clause of his will. In addition, he goes on to direct that if any child should die before the time when he or she shall become entitled to the actual possession and enjoyment of any separate share in either of these distributions, then and in such event his and her separate share shall be apportioned and divided into so many portions or shares as shall equal the number of children of his said daughter him or her surviving and one such portion shall be added to each of the separate portions or shares of such surviving children of his said daughter. If we assume that the interest here is limited upon the life of the daughter her male children under the terms of the trust cannot succeed to any interest therein until they attain the age of thirty years. A male child born shortly before the death of the mother would have only a contingent interest in the estate because that interest under the terms of the will would not vest until the child is thirty years of age. If such child did not attain that age then there is a gift over of his share. In such instance then there is a postponement of the vesting for more than a life in being and twenty-one years thereafter. It is very apparent then that in the most favorable light that these provisions for the children can be considered, they violate the rule, particularly with respect to the

provisions attempted to be made for male children.

The law applicable to the situation here presented is supported by the authorities hereinafter cited.

In *Tiffany on Real Property*, Section 154, the author says:

“If the time named for the vesting of the future interest is not measured by lives, but is merely a definite number of years, it is necessary that this be less than twenty-one years in order that the limitation be valid.”

In *Palmer v. Holford*, 4 Russ., 403, the testator left part of his estate in trust to accumulate a fund which was to be distributed “into all and every the child and children of my said son, Charles Thomas Hudson, who shall be living at the end of the expiration of the term of twenty-eight years, to be computed from my decease, other than and except an eldest or only son.” In default of any children to take under this trust there are certain limitations over. The opinion of the Master of the Rolls (Sir John Leach) was as follows:

“The express intention of the testator is that all the children of his son, Charles Thomas Hudson, other than an eldest son, should take, who were living at the expiration of 28 years and that no person should take before that period. If Charles Thomas Hudson had such children born to him at any time within seven years from the testator’s death, then the vesting of the interests of such children who were unborn at the death of the testator would have been suspended for more than 21 years and the gift therefore is too remote and void; and the gifts over not being to take effect until after the same period which is too remote are necessarily void also.”

See also on this subject *Speakman v. Speakman*, 8 Hare, 180. In this cause the testator directed his executors to use part of his estate for the maintenance of his children during their minority or apprenticeship, then to distribute the income and at the end of fifty years to sell the property and divide the money amongst his children or any of their heirs in their stead. It was held that the limitations of the property at the end of the term of fifty years were void for remoteness. "The persons to take at the expiration of the fifty years would not be ascertainable until the expiration of the term; or in other words the gift of the property at the expiration of the term would be contingent as to the persons to take."

In Lewis on the Law of Perpetuity, page 172, the rule is stated as follows:

"It is to be observed that whenever lives in being do not form part of the time of suspension or postponement, the only period allowable under the Rule against Perpetuities is twenty-one years absolute. (*Crooke v. DeVandes*, 9 Ves., 197; *Palmer v. Holford*, 4 Russ, 403; 1 Jarm. Wills, 230.)"

An interesting case on the application of this rule is *Rolfe v. Lefebre*, 69 N. H., 238. In this case the testatrix left part of her estate to trustees to form an institution for the needy. She especially provided that no power of sale should be deemed to be in the trustees for ninety-nine years. In case certain terms of the bequest were not complied with within one year after probate, or the trustees did not comply with them after they were accepted, she gave the property to one Joseph Lefebre, his heirs and assigns forever. The bill was for a construction of the will, and for leave to sell certain lands. As to the latter we are not now particu-

larly interested. As to the former, the Court said:

“It is sufficient for the present to say that the gift over to Joseph is void as contrary to the rule against perpetuities. The event upon which the gift to him is to take effect is the failure of the trustees to faithfully comply with said terms and conditions—an event which may never happen. If it were to be assumed that the provisions for the preservation and application of the property are conditional limitations, upon the failure to perform any of which the testator intended the estate of the trustee should determine, rather than declarations of trust which are enforceable under the special jurisdiction of a court of equity, and an alienation of a portion of the property under direction of the court is a failure to comply with the terms and conditions of the trust—propositions which are clearly unfounded—nevertheless, the gift over is in violation of the rule against remoteness and void; for, to satisfy the rule which is in force in this state, the event upon which the gift over is to take effect must, of necessity, if valid, occur within the life or lives of some person or persons in being and 21 years and a fraction thereafter. (*Edgerly v. Barker*, 66 N. H. 434, 452, 462, 31 Atl. 900; *Wood v. Griffin*, 46 N. H. 230, 234; *Dennett v. Dennett*, 40 N. H. 498, 503; *Marston v. Carter*, 12 N. H. 159, 162; *Brattle Square Church v. Grant*, 3 Gray, 142; *Wells v. Heath*, 10 Gray, 17; *Odell v. Odell*, 10 Allen, 1, 7; Gray, Perp. Sections 592, 593); while if an absolute term is taken, and no anterior term for a life in being is referred to, such absolute term cannot be longer than 21 years (1 Perry, Trusts, Section 380; *Crooke v. DeVandes*, 9 Ves., 197; *Palmer v. Holford*, 4 Russ, 403; *Speakman v. Speakman*, 8 Hare, 180).”

The gift of the accumulated income is too remote.

With respect to accumulations provided for in the will, the observations of the text writers are pertinent.

In Tiffany on Real Property, Section 159, it is said:

“If this accumulation is to continue until a time beyond the limits of the Rule against Perpetuities and the gift is to be regarded as not vesting till such time, then the gift of the fund is void.”

See on this subject Gray on Perpetuities, Sections 674, 675 and 677.

This subject was also considered by Vice-Chancellor Stevenson in *Hewitt v. Green*, 77 N. J. Eq., 345. Referring to the accumulated income provided for in the trust the Court says:

“The whole matter may, I think, be disposed of by the proposition that the gift of income to the grandchildren is a mere incident to the tying up of the \$100,000. of principal for their benefit when the youngest member of the class has reached the age of 25 years. When the main gift fails the incidental gift fails with it.”

The doctrine established in this case also is pertinent to the general scheme of the trust established by the fifth paragraph of this will.

In *Hewitt v. Green* the testator established a special trust wherein, after providing for certain annuities, he provided that the remainder of the income should be accumulated for the benefit of his grandchildren as might survive him or be born thereafter and declared that when each grandchild should arrive at twenty-one the interest on his share shall be paid to him until the youngest child should reach the age of 25 years,

when the principal of the fund should be distributed among the grandchildren then living. It was held that the trust created in favor of the grandchildren, including those born after the testator's death, was violative of the common law rule against perpetuities in force in New Jersey where the testator died. Referring to this particular section of the will the Vice-Chancellor says, at page 363:

“This testator, according to what seems to me to be the perfectly plain meaning of the language which he employed, undertook to have \$100,000 kept in trust for a period which at the time of his death might exceed the limit imposed by the perpetuity rule as recognized by the law of New Jersey. The trust, therefore, is void.”

Applying this rule to the fifth clause of the will, in the very first instance it would seem that the testator has undertaken to have his whole residuary estate held in trust for a period which at the time of his death might exceed the limit allowed.

From the allegations of the bill it is apparent that the income of the estate will be greatly in excess of the amount of the annuity in the first instance provided to be paid to the daughter of the testator. Even assuming that the two special trusts are to be set up under the terms of the will, there would be a considerable accumulation of income in the hands of the trustees before the first special trust is set up.

Referring to the will of the testator, he directs that upon the date of the earliest of the three anniversaries a trust is to be set up to produce six thousand dollars (\$6,000.00) a year for Mrs. Clay. Then by the second sub-division of the residuary clause he directs the setting up of the second trust arrangement. It is true that

he does at this point refer to the excess of income over six thousand dollars (\$6,000.00) to be produced by the first special trust. This clause in the will is evidently framed upon the assumption that the second special trust will not be set up until some time subsequent to the establishment of the first special trust. Hereinabove we have already pointed out, however, that these two trusts must be set up simultaneously. The anniversaries, so-called, three in number, are the same in each instance. The earliest in one group will be the earliest in the other group. Under the terms of the will the testator only here disposed of the income that is in excess of the sum of six thousand dollars (\$6,000.00) to be raised by the first special trust. He has referred specifically to such excess of income but he has not by any appropriate words to that end referred to the excess of income which may accumulate prior to the setting up of the first special trust.

We, therefore, respectfully contend that there is an intestacy as to the surplus income which may accumulate between the death of the testator and the time when the special trusts are to be established under the terms of the will.

At this point we would also again refer to the rules above mentioned relative to accumulations. These accumulations, under a literal interpretation of the will, may continue beyond the limits of the Rule against Perpetuities, as we above observed. In a similar situation in *Hewitt v. Green, supra*, Vice-Chancellor Stevenson said "When the main gift fails the incidental gift fails with it." A consideration of this accumulation of income simply tends to confirm our views, above expressed that the whole

scheme of this residuary clause is violative of the Rule against Perpetuities.

The future interests created by the will of the testator do not vest within the limits of the Rule.

The Court below, referring to the gift to the daughter's children living at the happening of the first of the three events, says (Case, p. 20, l. 15):

“The life of the daughter plays no part in the gift to her children. If the gift were conditional upon the event alone, it would undoubtedly be bad for remoteness for it is possible that it would not happen and the gift therefore not vest within twenty-one years after the death of the testator. The vesting is contingent upon the event.”

We respectfully contend that the vesting is contingent upon the event in the case of the attempted gifts to the children under the terms of the first special trust as well. Evidently the Court made the above observation with respect to the gifts to the children directly upon the happening of the event which we have referred to as the second special trust.

The rights of the children of the daughter in the first special trust are contingent upon their surviving their mother and upon the happening of the event upon which the special trust is to be set up. Upon the death of the daughter, a division is to be made equal to the number of her children then living, but the trust may not be set up until the happening of one of the events. Certainly the gift to the surviving children of the daughter is contingent upon the event because thereupon the special trust is set up and her surviving children take therein.

Furthermore, the gift to her children at the happening of the event may not vest in the same persons in each instance, because only living children take under the terms of the last paragraph of the will and the children living at the death of the daughter may not be the same children living at the happening of the event.

Now, under the terms of the first special trust, the daughter's surviving children take; but although the testator directs the delivery, transfer and payment of each of such separate portions or shares within twenty-one years of her death, yet the event upon the happening of which the trust is to be set up may not happen until more than twenty-one years after her death.

We have already heretofore in this brief considered the provisions for accelerating the payment of the provisions for the children living at the happening of the first event and have shown that the same did not change the vesting of interest, but only affected the delivery, transfer and payment of interests otherwise established.

The Court below held that the testator advanced the day of vesting to come within the Rule. We respectfully contend that the day of vesting was not changed but only the payment of interests otherwise fixed and settled.

In the first instance upon the happening of the first of the three events, a special trust fund is set up for the benefit of the daughter for life with the remainder thereof to her children who survive her. In the second instance, the interests become fixed and vested in the children living at the happening of the first of the three events. The testator did not change the time for vesting, but rather attempted to provide for

earlier payment of interests otherwise fixed. The vesting is contingent upon the event in each instance and the testator has not advanced the day of vesting to come within the limits of the Rule.

It is respectfully urged that we are entitled to the prayer of our bill and that the decree of the Court of Chancery should be reversed.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Solicitors for Complainant-Appellant.

RALPH E. LUM,
EGBERT G. TAMBLYN,
Of Counsel.

New Jersey Court of Errors and Appeals

No. 87 February Term, 1929.

Between

GERALDINE G. DWYER,
Complainant-Appellant,

and

THE NATIONAL NEWARK AND
ESSEX BANKING COMPANY OF
NEWARK, *et als.*,
Defendants-Respondents.

*On Appeal
from
Chancery.*

REPLY BRIEF FOR MARGARET A. CLAY, Defendant-Appellant.

Italics mine except where otherwise noted.

I.

Respondents argue that the Rule against Perpetuities is not offended because, under item five of the Will, subsection 1, the shares in any event are to be delivered within twenty-one years from the date of the death of the daughter, and, under item five, subsection 2, within twenty-one years from the date of testator's death.

Until the happening of the earliest of the three anniversaries, which may be beyond the time prescribed by the Rule against Perpetuities, the trust funds to which the only operative words of distribution contained in the Will apply, *do not come into existence.*

On page 24 of their brief, respondents say:

“If clauses Fifth (1) and Fifth (2) *never come into operation*, the preliminary trust

is still good, because in effect it directs the payment of \$6,000 a year to Margaret for life."

But if clauses fifth (1) and fifth (2) never come into operation, as respondents concede they may not, then where are the words of distribution operative upon the corpus of the estate?

Respondents say, page 24:

"that everyone of the events will happen within the period allowed by the rule against perpetuities, or it will be definitely ascertained within such period that none of these events will ever happen."

Even if the life of the daughter Margaret A. Clay be considered as an element in measuring the limitation of the trust under item 5 subsection 1, *still* the earliest of the three anniversaries might *not* happen within the time prescribed by the Rule against Perpetuities, and it might *not* be certain, within the time prescribed by the Rule, that the anniversary would never happen, for, if Margaret A. Clay had died the day after the testator, as she might have, the earliest of the three anniversaries might be the reaching the age of thirty of the youngest male child born to the daughter before the death of testator, which date would be *twenty-four years* from the date of the death of testator and from the date of the death of Margaret A. Clay.

But the concession (p. 24) that no one of the events may ever happen so that subdivisions 1 and 2 of item 5 of the Will may never come into operation concedes, I submit, the invalidity of the ultimate distribution, because one *must* happen and subdivisions 1 and 2 of item 5 *must* come into operation or there is nothing in the Will providing for ultimate distribution. And if no one of the events may *ever* happen it cannot be

argued that the distribution *must* be made within the time limited by the rule.

II.

Respondents on page 8, *et seq.* of their brief refer to many cases to the effect that an executory devise or bequest to the heirs, etc. of a living person, as they respectively attain the ages of twenty-one, is good. The cases have no application to that at bar, for there is no such provision in this Will, nor can such a provision be read into it.

Respondents reach the result by reading into the Will a fourth anniversary, and they do that because of the provisos in subdivision 1 and subdivision 2 of item 5 with respect to division within twenty-one years in the first case of the death of the daughter, and in the other case of the death of the testator. But if testator had meant this, why, when he was dealing with the operative words of distribution and with the various anniversaries, did he not say so?

To reach the result contended for by respondents it is necessary to read into the Will in item 5, *preceding* subsection 1, one of the provisos, but, if that be done—which one?—they are different.

But if subdivisions 1 and 2 of item 5 may not come into operation, how can certain words contained in them be given operation?

III.

While respondents do not, in terms, say so, they cite cases as if to indicate that, because it is *possible* that the time of distribution will arrive within the time prescribed by the Rule

against Perpetuities, the Will may be sustained. It is only necessary to cite the cases already referred to on page 15 of my original brief: *Hewitt v. Green*, 77 N. J. E. 345; *Kates v. Walker*, 82 N. J. L. 157; *Gray on Perpetuities*, 3rd Edition, Sec. 214, p. 185; *McGill v. Trust Company of New Jersey*, 94 N. J. E. 657, at p. 666 (the decree was modified by this Court, 96 N. J. E. 331, but not upon the points here in issue), to the effect that, if it is possible that the gift *may not* vest within the time prescribed by the rule, it is bad. The cases cited by respondents on page 21 have no application.

IV.

Respondents also cite cases to the effect that, where there is a gift to a class and the class must necessarily close before the time limited by the Rule against Perpetuities, the gift is good. The answer is that the gift in the case at bar is not to a class which must necessarily close within the time limited by the Rule against Perpetuities, but, on the contrary, the class *may not* be closed until after that time.

Respondents are mistaken, I submit, when they say, page 26 of their brief, that "the divesting clause does not in any way affect this situation." On the contrary, a gift vested, but subject to divesting, wherever the effect of that divesting is to increase other shares, etc., which may not be determined until after the time limited by the Rule against Perpetuities, is bad. For the purposes of the rule such a gift, although it may be called vested subject to divesting, is treated as contingent. See cases referred to on page 15, *et seq.* of my original brief and the statement of Vice-Chancellor Buchanan in *McGill v. Trust*

Company of New Jersey, 94 N. J. E. 657, at page 666.

V.

At several places in their brief respondents have suggested that it is improper to speculate as to what may, or may not, happen, or what lapses there may be, and that the present application is premature.

This is but another way of saying that whether the provisions of a Will be in contravention of the Rule against Perpetuities is to be determined by the event. On the contrary, it is to be determined by possibilities, and speculation is always indulged in in such cases. The burden is on him who asserts the validity of the devise or bequest to show that it *must* vest within the time prescribed by the rule.

Respondents argue (p. 18) in effect that the Will is to be construed as if it provided for distribution to persons who, at the time of distribution, might not be in existence, in which event there would be an ordinary lapse. But this argument ignores the fact that the Will in express terms *directs the continuance of the trust* until, and, indeed, the creation of the trusts to be divided at, the time of happening of an event which may not take place within the time prescribed by the Rule against Perpetuities.

If the ultimate distribution of this property is bad because in contravention of the Rule against Perpetuities, then complainant and the defendant Margaret A. Clay, as next of kin, have absolute interests in the property, and have the right, at this time, to have those interests determined, and to have the estate turned over

to them, for the right to the income of \$6,000 is in Margaret Clay, one of those entitled to an absolute interest, and she and her sister have the absolute right to elect to take the entire estate at this time. And, in any event, if the ultimate distribution of the estate be offensive to the Rule against Perpetuities, Margaret A. Clay and complainant are entitled, as next of kin, to all the income in excess of the \$6,000 provided to be paid to Margaret A. Clay.

Respectfully submitted,

MERRITT LANE,
Of Counsel for Appellant Margaret A. Clay.

New Jersey Court of Errors and Appeals

Between

GERALDINE G. DWYER,
Complainant-Appellant,

and

MARGARET A. CLAY,
Defendant-Appellant,

and

THE NATIONAL NEWARK AND
ESSEX BANKING Co., *et als.*,
Defendants-Respondents.

On Bill, &c.
On Appeal
from
Chancery.

Will, Con-
struction,
etc.

Sat Below,
BACKES,
V.-C.

BRIEF FOR MARGARET A. CLAY, Defendant-Appellant.

Italics, etc., mine, unless otherwise noted.

The Opinion Below.

It is submitted that the effect of the opinion and decree below (p. 13; p. 22-a) is, in the first place, to make a will for the testator.

With respect to the contention that the provision as to the remainder in each instance is bad for remoteness, because of the direction of testator that the shares of the female grandchildren shall be held until they shall have reached the age of twenty-one and of the male grandchildren until they shall have reached the age of thirty, the shares of any children dying before the period of taking to go to the children surviving, under the cases referred to by Gray in his work on Perpetuities, 3rd Edition, Section 205-A, p. 178, Section 375, and in 21 Ruling Case Law, Title "Perpetuities," Section 35, p. 307, and

McGill v. The Trust Company of New Jersey, 94 N. J. Eq. 657 at p. 666, and see in the Court of Appeals, 96 N. J. Eq. 331; *Leake v. Robinson*, 2 Mer. 363; 35 Full English Reprint, p. 988, the Vice-Chancellor, impliedly conceding that such gifts over would be void for remoteness, *Lembeck v. Lembeck*, 73 N. J. Eq. 427; *Fidelity Union Trust Co. v. Rowlands*, 99 N. J. Eq. 72, having no application, comes to the conclusion that the provision in the one case:

“provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of the death of my said daughter.” (Subdivision 1, Item 5th, p. 15.)

And in the other case:

“provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death.” (Subdivision 2, Item 5th, p. 17.) save the respective gifts over.

But inasmuch as testator has not in his will indicated *to whom* the shares shall be paid at the expiration of the twenty-one years, the only provisions in the will as to the designation of beneficiaries being dependent upon the happening of the earliest of three certain anniversaries, one of which, at least, may not happen until the expiration of a time longer than permitted by the rule against Perpetuities, *the Court has made a will for testator in respect to an important matter, i. e., the persons who are to take.*

And so the Vice-Chancellor, I submit, in construing that portion of the will having to do with the life estate for the daughter, Margaret A. Clay, so as to make the will read that a sum sufficient to pay the daughter \$6,000 a year shall be held in trust until the death of the daughter and then, upon her death, to go to the children, disregards the express provision of the will as to the setting up of this trust fund.

The Vice-Chancellor is mistaken, I submit, when he says (p. 20) that "there is no room for serious discussion that upon her death the fund as reduced vests immediately in her surviving children." On the contrary, it is clear that it does *not* vest in the surviving children for there is likewise here a provision that the portions or shares shall not be paid until a female child reaches the age of twenty-one and a male child the age of thirty, and that the share of any child dying, shall go to the survivors which provision, under the cases heretofore cited, makes the gifts over bad for remoteness unless the proviso saves them.

Upon the matter of vesting the Vice-Chancellor, I submit, also has not given due weight to the provision at the end of the 5th item of the will:

"It being my express wish and desire that *only the living child or children* of my said daughter, Margaret A. Clay, and not the issue of any deceased child of my said daughter shall take under the provisions of subparagraphs (1) and (2) of this, the Fifth clause of my Will, anything therein contained indicating or tending to a contrary or different interpretation or construction notwithstanding, I expressly direct that if any child of my said daughter should die before the time when he or she shall become entitled to the actual possession and enjoyment of any separate portion or share men-

tioned in either of said sub-paragraphs then and in such event his or her separate portion or share shall be apportioned and divided into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustee or the survivor of them may be determined, as shall equal the number of children of my said daughter him or her surviving and one such portion thereof shall be added to each of the separate portions or shares of such surviving children of my said daughter."

One: the gifts over are bad for remoteness, or,

Two: the will is bad for uncertainty.

FACTS AND ARGUMENT.

Testator first gives the entire residue of his estate in trust to the defendant trustees to hold and administer until the happening of the earliest of three events—

(a) The twenty-first anniversary of the birth of such female child of his daughter, the defendant, Margaret A. Clay, as shall first attain the age of twenty-one years.

(b) The twenty-first anniversary of the birth of such male child of the said daughter born after his decease as shall first attain the age of twenty-one years.

(c) The *thirtieth* anniversary of the birth of such male child of his daughter born before his decease as shall first attain the age of thirty years.

In the meantime, he directs the payment of six thousand dollars per annum out of the net income to his daughter, Margaret A. Clay.

He next provides that, upon the happening of the earliest of the three anniversaries hereto-

fore denominated A., B. and C., the trust shall be split up into two—one trust of an amount sufficient to continue to pay his daughter, Margaret A. Clay, six thousand dollars a year; the balance to remain in the hands of the trustees with no charge upon it.

He then provides that, upon the death of the daughter, *that portion* of the trust held by the trustees, for the purpose of paying six thousand dollars a year to the daughter, shall be divided into as many parts as there shall be children of the daughter *then living*, and that these shares and portions, with accumulated income, shall be paid to each of the children, provided, however, that if any female child of the daughter shall not then have reached the age of twenty-one years, the share of that child shall be held by the trustees until it shall have reached such age, and if any male child of the daughter shall not have reached the age of *thirty* years, then the share of that child shall be retained by the trustees until it shall have arrived at such age.

The balance of the trust, *i. e.*, that portion of the original trust not needed for the purpose of continuing the payments of six thousand dollars a year to the daughter, Margaret A. Clay, the trustees are directed to hold (and there also goes into that trust any excess of income upon the first trust over the six thousand dollars a year), until the happening of the earliest of *the same three anniversaries heretofore referred to*, and then, upon the happening of the earliest of such anniversaries, that balance shall be apportioned and divided “into as many shares or portions * * * as shall equal the number of children of my said daughter *then living*” (*i. e.*, upon the happening of the earliest of such anniversaries), and the trustees are directed to con-

vey such shares to the children, provided, again, that, if at that time any female child shall not have arrived at the age of twenty-one years, the share of that child shall be held by the trustee until it reaches such age, and that if any male child *shall* not have arrived at the age of *thirty* years, the trustees shall continue to hold the share of that child until it reaches such age.

Testator *specifically* directs that it is only the children living *at the time of the distribution* who shall take, and expressly excludes any construction of the will which would permit the issue of a deceased child to take, and expressly provides that "if any child of my said daughter should die before the time when he or she shall become entitled *to the actual possession and enjoyment* of any separate portion or share mentioned in either of said sub-paragraphs then and in such event his or her separate portion or share *shall be apportioned and divided into so many portions or shares of as nearly equal value* to each other as in the sole discretion of my said trustees or the survivor of them may be determined, *as shall equal the number of children of my said daughter him or her surviving and one such portion thereof shall be added to each of the separate portions or shares of such surviving children of my said daughter.*"

Testator apparently thought, at one time while preparing his will, that it was not possible that the daughter, Margaret A. Clay, should predecease the happening of the earliest of the three anniversaries, for the trustees are directed to hold *the entire residue in trust in one fund* until that time, and it is not until the happening of the earliest of the three anniversaries that the special fund for the benefit of the daughter, Margaret A. Clay, is to be set apart, and it is

only in the event that the daughter, Margaret A. Clay, *outlives* the date of the happening of the earlier anniversary that the trustees are directed to distribute that portion of the fund to secure the payment of the six thousand dollars to the daughter, Margaret A. Clay, which can only be set apart, under the terms of the will, upon the happening of the earliest of the anniversaries, among the children of the daughter "*then living*," which *must* mean living at the time of the death of the daughter, Margaret A. Clay, and after the happening of the earliest of the three anniversaries, for it is only after the happening of the earliest of the three anniversaries that the special fund can be set apart, and then, if any female child should be under the age of twenty-one years and any male child under the age of *thirty* years, their shares are to be held until they reach the respective ages.

The Vice-Chancellor in holding that, in effect, testator has created a life estate in the daughter with remainder over upon her death has ignored, I submit, the express words of the will.

Testator proceeds to direct the trustees to hold the balance of the fund, *i. e.*, that portion of it not needed to be set apart to pay the six thousand dollars income to the daughter, until the happening of the earliest of the three anniversaries, the testator apparently assuming, when dealing with *this* portion of the trust fund, that the daughter, Margaret A. Clay, would die *prior to the happening of the earliest of the three anniversaries*, although the fund, with which he is here dealing, does not, under the terms of the will, become a separate fund unless Margaret A. Clay *outlives* the happening of the earliest of the three anniversaries.

This portion of the fund is to be divided into as many equal portions as there are children of the daughter *then living, i. e.*, at the time of the happening of the earliest of the three anniversaries, *not* at the time of the death of the mother, and the provision then is that the shares are to be transferred to the children but if any female child shall not have arrived at the age of twenty-one years it shall be held until the child reaches that age, and if any male child shall not have reached the age of *thirty* years it shall be held until the child reaches that age.

It is extremely difficult to determine what this will means.

Suppose the daughter, Margaret A. Clay, as is possible, dies *before* the happening of the earliest of the three anniversaries, what happens to the estate? The trustees apparently would continue to hold it until the happening of the earliest of the three anniversaries but, upon the happening of the earliest of the three anniversaries, after the death of Margaret A. Clay, where is it to go? The trustees are directed to set apart a sufficient fund to pay the six thousand dollars a year to the daughter, Margaret A. Clay. *But* she has pre-deceased the happening of the earliest of the three anniversaries.

The trustees are directed, upon the death of the daughter, Margaret A. Clay, to divide the trust into as many portions as there are children "then living," *i. e.*, in this instance, the date of the death of the daughter and to hold such shares, etc. But the will must refer to the date of the death of the daughter, *after* the happening of the earliest of the three anniversaries, for it is only upon the happening of the earliest of the three anniversaries that the fund is created. The trustees are then directed to con-

tinue to hold the balance of the fund until the happening of the earliest of the three anniversaries, and then, upon the happening of the earliest of the three anniversaries, to divide, &c. But how can they continue to hold the fund until the happening of the earliest of the three anniversaries *when the fund is not created until the happening of the earliest of the three anniversaries?*

The ultimate distribution of the principal of the trust fund set apart to secure the payment of the six thousand dollars a year to the daughter is predicated upon the death of the daughter, Margaret A. Clay, *after* the happening of the earliest of the three anniversaries referred to in the fifth paragraph of the will, *but* the creation of that which is to be so ultimately distributed is predicated upon the happening of the earliest of the three anniversaries.

What, then, effective ultimate distribution of his estate has testator made?

The provisions of sub-division one, item five of the will which deals with the disposition of the fund set apart to create the \$6,000 a year for the daughter, *i. e.*,

“providing further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of the death of my said daughter”;

and that provision of sub-division two of item five, which deals with the distribution of the balance of the estate:

“provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate por-

tions or shares shall be made in any event within twenty-one years from the date of my death'';

does not aid in, but, on the contrary *leads to confusion as to the construction of the will*. To whom shall delivery be made of such shares if such delivery, is to be made prior to the happening of the earliest of the contingencies referred to in the will? Or, otherwise expressed, if no one of the anniversaries occur until after twenty-one years after the death of the testator, to whom are the funds to be delivered?

Testator does not tell us nor can it be inferred from anything contained in the will. It is not until *after* the death of the daughter, Margaret, which must occur *after* the happening of the earliest of the three anniversaries, if one portion of the will is to be considered, and, if another portion of the will is to be considered, *before* the happening of the earliest of the three anniversaries, that the members of the class are determined who shall take the funds set apart to secure the payment of the six thousand dollars a year to the daughter Margaret, for testator specifically provides that those who are to take that specific fund are the children of the daughter *then living, i. e.*, at the time of her death. But testator has also provided that the distribution must be made in any event within twenty-one years after her death. He has omitted to tell us to whom it is to be distributed. The persons to whom it is to be distributed cannot be fixed until the death of the daughter, Margaret, for it is only the children *then living* who shares in this fund.

With respect to the balance of the trust estate, if it is to be distributed within twenty-one years after the death of testator, to whom is it to go?

Under the terms of the will the persons who are to take are not determined until the happening of the earliest of the three anniversaries for testator has expressly provided that only those shall take who shall be *then* living, *i. e.*, at the time of the happening of the earliest of the anniversaries. So, if the twenty-one years after the death of testator elapses before the happening of the earliest of the three anniversaries, there is nothing to determine who are to take.

That testator intended that in *no* event should *anyone take who was not living at the time of the happening of the specific times referred to in his will* is made clearly apparent by the use of the language— “It being my express wish and desire that only the living child or children of my said daughter, Margaret A. Clay, and not the issue of any deceased child of my said daughter shall take under the provisions of sub-paragraphs 1 and 2 of this, the fifth clause of my will, *anything therein contained indicating or tending to a contrary or different interpretation or construction notwithstanding*. I expressly direct that if any child of my said daughter should die before the time when he or she shall become entitled to the *actual possession and enjoyment of any separate portion or share* mentioned in either of said sub-paragraphs then and in such event his or her separate portion or share shall be apportioned and divided into so many portions or shares of as nearly equal value to each other as in the sole discretion of my said trustees or the survivor of them may be determined, as shall equal the number of children of my said daughter him or her surviving, and one such portion thereof shall be added to each of the separate portions or shares of such surviving children of my said daughter.”

This language not only means that, under sub-division 1 of paragraph 5, the persons who are to take are those who shall survive the daughter, and that, under sub-division 2, that portion of the will dealing with the ultimate distribution of the balance of the trust, those persons are those surviving at the time of the happening of the earliest of the three anniversaries, but it means that, in both events, if the child be a female, it must survive until it shall arrive at the age of twenty-one years, and, if a male, it must survive until it shall arrive at the age of thirty, for it is only when a female child shall arrive at the age of twenty-one and a male child at the age of thirty that its share is to be paid over to it, and the language which has heretofore been quoted "when he or she shall become entitled to the *actual possession and enjoyment of any separate portion*" is equivalent to the language "deliver, transfer and pay over."

The ultimate disposition attempted to be made by testator is wholly void for uncertainty.

Jarman on Wills, 5th Edition, Volume 1, star-page 326, p. 353, states the general rule:

"In the construction of wills the most unbounded indulgence has been shown to the ignorance, unskilfulness, and negligence of testators; no degree of technical informality, or of grammatical or orthographical error (a), nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together (b), *but* if, after every endeavor, he finds himself unable, in regard to any material fact, to penetrate through the obscurity in which

the testator has involved his intention, the failure of the intended disposition is the inevitable consequence. *Conjecture is not permitted to supply what the testator has failed to indicate*; for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one not pointed by the testator with equal distinctness. *The principle of construction here referred to has found expression in the familiar phrase, that the heir is not to be disinherited unless by express words or necessary implication*; which, however, must not be understood to imply that a greater degree of perspicuity or force of language is requisite to defeat the title of the heir to the real estate of a testator, than would suffice to exclude the claim of the next of kin as the successor of the personality; for though undoubtedly on some points, a difference of construction has obtained in regard to these several species of property, that difference is ascribable, rather to the diversity in their respective nature and qualities, than to any disparity of favor towards the claims of the heir and next of kin."

I concede, as Jarman states (1 Jarman on Wills, 5th Ed., star-page 326, p. 353, that—"no degree of technical informality, or of grammatical or orthographical error nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author, the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together," and I concede that in getting at that intent, punctuation may be disregarded, words may be given meanings other than those ordinarily attached to them, sentences may be transposed, but I

submit that here no disregard of punctuation, change of meaning of words or transposition of sentences *can make certain* what testator intended with respect to the disposition of that portion of the estate needed to secure the payment of the six thousand dollars to the daughter for life.

The Court, I submit, is not permitted to supply words, or, as Jarman puts it, "conjecture is not permitted to supply what the testator has failed to indicate, for as the law has provided a definite successor in the absence of disposition, it would be unjust to allow the right of this to be superseded by anyone not pointed out by the testator with equal distinctness.

While there may not be the same uncertainty with respect to the disposition of the balance of the estate as there is with respect to the disposition of that portion of it set apart to secure the payment of \$6,000 a year to the daughter, it is clear, and the Vice-Chancellor so concedes, that the ultimate disposition of that portion of the estate is bad for remoteness unless saved by the proviso that the shares of the grandchildren in any event shall be paid over to them within twenty years after testator's death. But that provision as to whom should take in such an event is so uncertain as to be void.

The Vice-Chancellor, in construing the will, has done that which I submit Jarman says should not be done, *i. e.*, conjectured.

The gifts over, if certain, are bad because violative of the rule against perpetuities.

There are certain fundamental principles having to do with the rule against perpetuities,

which it is necessary only to refer to and cite cases in support of.

A The gift is void unless it *must* vest within the period of the rule. That it *may* vest does not save it.

Hewitt v. Green, 77 N. J. E. 345;

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

Gray on Perpetuities, 3d Edition, sec. 214, p. 185.

As Gray states it:

“It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule against Perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote.”

In *McGill v. Trust Company of New Jersey*, 94 N. J. E. 657, at p. 666, Vice-Chancellor Buchanan said:

“It is not enough that the contingency may happen within the time limited by the rule; it *must necessarily happen*, if it happen at law, within that time. If there be a *possibility* that it may happen after the time limited by the rule, the gift is void. Gray Perp. (3d Ed.) 185, sec. 214; Foulke Perp. 194, sec. 335; Lew. Perp. *170, 171; 30 Cyc. 1483.”

His decree was modified by this court, 96 N. J. E. 331, but the modifications did not go to what he said on this subject.

See also note to *In re Walkertly*, 49 American State Reports at p. 119.

B. Whether a gift to a class is considered contingent or vested, subject to being divested upon the happening of a contingency, which may fall beyond the period prescribed by the rule, the rule applies.

As Gray states it, 3d Ed., sec. 205A, p. 178 (after referring to the fact that a vested interest is not subject to the rule against perpetuities):

“The preceding statement must be subjected to one qualification. When a remainder is given to a class, and such remainder is vested in certain members of the class subject to open and let in other members, born afterwards or afterwards fulfilling a condition, *the shares in such remainder or interest may be obnoxious to the Rule against Perpetuities, because their number and therefore their size may not be determinable until too remote a period.*”

And the rule is stated in 21 Ruling Case Law, title “Perpetuities” section 35, p. 307:

“Where the gift is to a class, the class must be such that all the members of it must *necessarily* be ascertained and take *absolutely vested interests* within the period. If this occurs the gift is, of course, upheld as valid as regards the rule against perpetuities. But where the gift is to a class of persons, and the share of some of them cannot be determined within the period allowed by the rule, and that of others can, *none of them can take any portion of the gift.* In other words, if the gift is to a class, and it is void as to any of the class, it is void as to all. It matters not that in the events which happen the class consists of but one person who might have taken.”

In *McGill v. Trust Co. of New Jersey*, 94 N. J. E. 657, at p. 665, Vice-Chancellor Buchanan said:

“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. Gray Perp. (3d Ed.) 87, 88, secs. 110, 110a; Foulke Perp. 443, 445, secs. 67, 69."

His decree was modified by this court, 96 N. J. E. 331, but the modification did not go to what he said on this subject.

It is thus immaterial, for present purposes, whether the gift of that portion of the trust fund set apart to secure the payment of the six thousand dollars to the daughter is to be considered as conferring upon her children contingent or vested estates, subject to being divested, in the first instance, by death before the death of the mother, and then, again, by death, if a female, before she reaches the age of twenty-one years, and, if a male, before he reaches the age of *thirty*, or whether the children, under the portion of the will having to do with the distribution of the balance of the trust fund, take contingent interests or vested estates subject to be divested by death prior to the happening of the earliest of the anniversaries designated by testator and then again by death, if a female child, before she reaches the age of twenty-one years, and, if a male child, before he reaches the age of *thirty* years. So far as the rule against perpetuities is concerned, in its application, the result is the same. But

C. Where a gift is contingent upon survivorship, as here, and when the time is annexed to the gift itself rather than to the payment, the gift is contingent.

Keen v. Plume, 82 N. J. E. 526, affirmed 82 N. J. E. 645;

Gifford v. Thorn, 9 N. J. E. 705;

Kates, Trustee v. Walker, 82 N. J. L. 157;

Post v. Herberts Executors, 27 N. J. E. 540;

Jarman on Wills, Vol. 2, p. 457;

Security Trust Co. v. Lovett, 78 N. J. E. 445;

Camden Safe Deposit Co. v. Guerin, 99 Atl. 103; affirmed 105 Atl. 189;

Hutchinson v. Exton, 53 N. J. E. 688;

Adams v. Woolman, 50 N. J. E. 516;

Potter v. Nixon, 81 N. J. E. 338.

In *Van Tillburgh v. Hollinshead*, 14 N. J. E. 32, the Chancellor said:

“The limitation over of the estate upon the death of the *devisee* to *his* surviving children, not to those who survive the *testator* nor to the children of the *devisee* as a class, but to such children of the *devisee* as shall survive *him*. This creates a contingent estate. If either of the children had died before the *devisee* for life, the whole estate would have gone to the survivor. The rule is, that where an interest is given to one for life, and after his death to his surviving children, those only can take who are alive at the time the distribution takes place.”

See also

Holcomb v. Lake, 25 N. J. L. 605;

Teets v. Weiss, 47 N. J. L. 154.

While it has been said that, under certain conditions, this principle does not apply to a gift to a class, the exception is *only* where the gift is to a class subject to be *opened* to let in those

born after the death of testator and before the time of distribution, with the right of survivorship. It does *not* apply where the gift, as here, is *not* to the class as such at the time of the making of the will or of the death of the testator, but specifically to those *who survive* at a specific time and, where the direction is to divide the trust property at the time of distribution into specific shares, one share for each of the children *surviving at the time of distribution*. The gift here is to each member of a class who shall answer the condition prescribed by testator, *i. e.*, survivorship *at the time of distribution*, and they take, not as a class jointly, but each his individual share.

Not only is the contingency of survivorship at the time of separation into shares involved under this will, but there is a further contingency for no one can take, if a female, *unless* and until she arrive at the age of twenty-one years, and no one can take, if a male, *unless* and until he arrive at the age of *thirty* years. If there was anything needed to indicate clearly that these gifts to the children are contingent, it is the language of testator in the last clause of the fifth item in which he says that *only* those are to take who fulfill the conditions at the time they are entitled, under the language of the will, "to the *actual possession and enjoyment* of any separate portion or share."

Applying the rules of law heretofore stated to the will, I submit that *all* of the gifts are invalid. In the first place, testator directs that the estate be held in tact until the happening of the earliest of three anniversaries. If any one of these anniversaries which may occur earliest would postpone the vesting of the estate beyond the period of the rule against perpetuities the rule is offended.

The third anniversary referred to is the thirtieth anniversary of the birth of such male child "of my said daughter born before my death as shall first attain said age of thirty years."

Testator, at the time of the making of this will did not know when he would die. A male child might have been born to the daughter two years prior to the death of testator. Testator may then have died. The following year the daughter Margaret may have died. Before the child reached the age of thirty, twenty-seven years would have to expire. The trust might, under that contingency continue for more than twenty-one years after a life, or lives in being. That is assuming, of course, that testator referred to the contingency of a life in being. He did not and it cannot be read into the will. Unless following upon a limitation for a life or lives in being there can be no postponement of vesting beyond the period of twenty-one years *absolute*.

21 Ruling Case Law, title "Perpetuities" sec. 15, p. 293.

Any disposition of the estate of testator, contingent upon the happening of the earliest of the three anniversaries referred to in the will, inasmuch as it is a possibility that the time when the earliest of the three anniversaries will happen will exceed a life or lives in being and twenty-one years thereafter is void for remoteness.

The mooted question, as to whether the possibility of the vesting of the estate being postponed beyond the period allowed by the rule, is to be considered upon the facts existing at the time of the making of testator's will, or at the

time of his death is not necessary to be answered, for, in *either* event, the third anniversary referred to by testator, which may be the earliest to occur, may postpone the vesting beyond the time allowed by the rule for the reason that, at the time of the death of testator, which is the point of time to be taken most favorable to the validity of the attempted disposition, Margaret A. Clay, the daughter of testator, had two male children, one born July 6, 1919, and the other born February 26, 1921. Testator died November 12, 1927. The youngest child of Margaret A. Clay was, therefore, at the time of the testator's death, six years old. Before that child could reach the age of thirty, twenty-four years must elapse. The coming of *that* child to the age of thirty might be the earliest of the anniversaries referred to by testator, for the older male child might die in the meantime, and Margaret A. Clay might not have any female children. But, even if the earliest event should be the coming of the boy Lucius, the older, to the age of thirty, the rule would still be offended for, at the time of testator's death, Lucius, born July 6, 1919, was eight years and four months old. Before he could arrive at the age of thirty, twenty-one years and eight months must expire. That period exceeds the time permitted by the rule by eight months. Where an absolute time is taken as the measure of the postponement of the vesting and not a life or lives in being, the period of gestation cannot be considered.

21 Ruling Case Law, title "Perpetuities" sec. 16, p. 293, states the rule:

"But the additional period allowed by law beyond twenty-one years and a life or lives in being is permitted to cover only the case of a child *en ventre sa mere* and a period of nine months cannot be allowed without gestation."

The daughter Margaret, of course, may have died the day after testator.

Upon no possible theory, therefore, I submit can a distribution of this estate, dependent upon the happening of the earliest of the three anniversaries indicated by the testator, be sustained.

There is no doubt that, with respect to that portion of the estate not needed to secure the payment of the six thousand dollars per annum to the daughter Margaret, its disposition is *wholly* dependent upon the happening of the earliest of the three anniversaries.

As indicated above, not only is its *actual division* postponed until that date, but the determination of the beneficiaries is postponed, not only until that date, but with respect to female children until they shall have arrived at the age of twenty-one years, and, with respect to male children, until they shall have arrived at the age of thirty, and only those who shall have survived those periods are to take.

But the gift over of so much of the estate as is needed to pay the six thousand dollars annually to the daughter is likewise void for remoteness or if not for remoteness, then for uncertainty as heretofore argued.

I have already referred to the fact that the testator has first provided that the estate should be held intact until the happening of the earliest of the three anniversaries, and then provided that, upon the happening of the earliest of the three anniversaries, the estate should be separated into two parts, and then provided that, upon the death of the daughter that portion needed to secure the payment of the income of six thousand dollars should be divided into as many parts as there were children "*then*

living," and then provided that the balance of the estate should be held until the happening of the earliest of the three anniversaries.

The result is that this fund, which is needed to secure payment of six thousand dollars a year to the daughter for life, *does not come into being until the happening of the earliest of the three anniversaries*, although the daughter may predecease that date. While testator has provided that *this* fund should be divided into parts upon the death of the daughter, *he has likewise provided that the fund should not come into existence until the happening of the earliest of the three anniversaries*. The *existence* of the fund is, therefore, dependent upon the happening of the earliest of the three anniversaries, and its very existence therefore may be postponed beyond the period allowed by the rule. If the fund cannot come into existence until a time beyond a period allowed for by the rule, its disposition certainly is postponed beyond the period provided for by the rule.

If the construction which I have placed upon the terms of the will with respect to this fund needed to secure the payment of six thousand dollars to the daughter is not the construction to be placed upon it, then what construction is *to be placed upon it*.

The Vice-Chancellor has answered that question by reading the will as if it merely provided for a life estate to the daughter, ignoring the words of the will with respect to the happening of the three anniversaries, etc. Under the head of uncertainty, I have already argued that the Court cannot so make a will for testator.

But there is a further objection to the validity of the ultimate disposition of the estate which applies to both funds.

Testator has provided, in *each* instance, that, after the division of the funds into as many portions or shares as the daughter may have children *then* living, *i. e.*, upon the happening of the particular contingency, the share of each female child shall be retained by the trustees and not paid over until such female child shall have reached the age of twenty-one, and that the share of each male child shall be held until it shall have reached the age of *thirty*, and testator has clearly indicated by his will that, notwithstanding the division of the funds into parts, the gifts of the children remain contingent, for he has stated, as his express wish and desire, that only a child living, not at the time of the happening of the events which may result in the division of the funds into parts, but, at the time the child is entitled "to the actual possession and enjoyment of any separate portion or share" shall be entitled to take. The gift, therefore, is contingent until each female child shall arrive at the age of twenty-one and contingent until each male child shall arrive at the age of *thirty*.

The general rule, as stated both by Gray, 3rd Edition, sec. 373, and 21 Ruling Case Law, title "Perpetuities" sec. 35, p. 307, is that where the gift is to, a class, the class must be such *as that all the members of it must necessarily be ascertained and take an absolute vested interest* within the period. * * * But where the gift is to a class of persons, and the share of *some* of them cannot be determined within the period allowed by the rule, and that of others can, *none* of them can take any portion of the gift.

And Gray says, sec. 375:

"In gifts to those members of a class who reach a required age, which all the

members of the class may not reach till a period beyond the limits of the Rule against Perpetuities, there is often a member of the class who, if he ever reaches the required age, must do so within the limits of the Rule, *e. g.* a grandchild of the testator born before the latter's death. When such member reaches the required age, say twenty-five, the class is closed; and he is entitled to have his proportionate share paid to him. This time of payment to him is not too remote, and if it were the only payment to him, it would be good. *But* there may be further payments to him or his representatives; other members of the class, then living, may die before they reach twenty-five, and then his share will be increased by other payments, which may fall beyond the limits of the Rule; the whole gift will be held void."

There is an exception to this general rule, but this exception only applies "when the words describing the class indicates that the amount of the gift to each member is *unaffected* by the existence or non-existence of the other members of the class."

And where a devise gives a vested interest, but the vesting is not indefeasible by reason of a divesting gift over or because of the possibility of a divesting to allow after-born children to share, then, if the number of shares can be definitely determined within the limits of the rule, the gift is good and all born afterward will be allowed to share, while if the number of shares cannot be ascertained within the limits of the rule, *the gift is void and none may take.*

And see the note to *Cadell v. Palmer*, 21 English Ruling Cases, p. 158.

The instant case is not within the exception.

Although in each instance testator directs the division of the corpus into as many parts as there are children of the daughter living at the time of the happening of the event on which the division is to be made and directs the transfer of such separate parts, with the accumulated income, to the children, he immediately, thereafter, uses language which indicates that he does not intend that this division into parts shall affect a vested gift to the children for he then provides that these shares shall not be transferred to any female child until she shall have arrived at the age of twenty-one years, or to any male child until he shall have arrived at the age of *thirty* years and to make it clear that he does not intend an immediate gift or an immediate vesting he provides that if any female child shall die before the age of twenty-one or if any male child shall die before the age of *thirty*, the shares of those children so dying shall be added to the shares of those reaching the required age. He, in effect, by his language contained in the last paragraph of the fifth clause of the will, directs that any language which he may have theretofore used shall not be considered as indicating an immediate gift or a vesting of any interest in any child. He states that only a child is to take who may be living at the time that it may be entitled to the *actual possession and enjoyment* of any separate portion or share and expressly excludes any interest in the children in the meantime. Taking the language of the will as a whole, the division into shares is merely for the purpose of convenient administration of the estate. The children are not even given the income on their separate shares until they arrive at the required ages.

The language of the Master of the Rolls, Sir William Grant, in *Leake v. Robinson*, 2 Mer. 363,

35 Full English Reprint, p. 979, at p. 988 is apposite:

“The case of *Booth v. Booth* is therefore not merely no authority for what is contended for by the grandchildren, but it is a strong authority the other way. For it shows that, where there is no gift but by a direction to transfer from and after a given event, the vesting would be postponed till after that event had happened; unless, from particular circumstances, you are enabled to collect a contrary intention. For otherwise Lord Alvanley would only have had to say, ‘These words can have no such effect as is ascribed to them. They operate only as a postponement of the enjoyment.’ Here, interest is not given to children dying before twenty-five. Children attaining twenty-five are to take the whole. *There is not even a provision for the case of a child dying under twenty-five leaving issue. All is to go to those who do attain twenty-five. How is it possible, therefore, that a child can be said to have a vested interest before twenty-five, when it has neither a right of enjoyment, a capacity of transmission, or a ground of claim, until after it shall have attained that age?* When the vesting is so clearly and expressly postponed, it is in vain to endeavour to infer from other expressions, used without any reference to that object, that the testator did not conceive himself to have postponed the vesting. That he has unnecessarily provided for survivorship; that he has spoken of shares of grandchildren dying under twenty-five, and in the last proviso, given over the moieties of the residue only in the event of either of his daughters dying without leaving any issue or any children of such issue—are all of them circumstances that appear to me not at all to affect the question of vesting, as none of these clauses make any new gift to the grandchildren, nor can they alter the terms or conditions of that which had been already made.”

And see *McGill v. Trust Co. of N. J.*, 94 N. J. E. 657, affirmed 96 N. J. E. 331, relying upon this case.

Whatever the form adopted by testator may be this is essentially a gift to a class and, being a gift to a class, the *whole* gift falls if it is void as to any of the class, unless the amount of the gift to each member is *unaffected* by the existence or non-existence of the other members of the class.

As Gray says, 3d Ed. sec. 389:

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

This is not this case.

And see the discussion in Gray sec. 391.

And in *Leake v. Robinson*, 2 Mer. 363, 35 Full English Reprint, 989, Sir William Grant, Master of the Rolls, said:

“He (the testator) supposed that he could do legally all that he has done—that is, include after-born grandchildren, and also postpone the vesting till twenty-five. But, if he had been informed that he could not do both, can I say that the alteration he would have made would have been to leave out the after-born grandchildren, rather than abridge the period of vesting? I should think quite the contrary. It is very unlikely that he should have excluded one half of the family of his daughters, in order only that the other half might be kept four years longer out of the enjoyment of what he left them.”

And further:

“To induce the court to hold the bequests in this will to be partially good, the case has been argued as if they had been made to

some individuals who are, and to some who are not, capable of taking. But the bequests in question are not made to individuals, but to classes; and what I have to determine is, whether the class can take. *I must make a new will for the testator*, if I split into portions his general bequest to the class, and say, that because the rule of law forbids his intention from operating in favour of the whole class, I will make his bequests, what he never intended them to be, *v. z.* a series of particular legacies to particular individuals, or what he had as little in his contemplation, distinct bequests, in each instance, to two different classes, namely to grandchildren living at his death, and to grandchildren born after his death."

And further:

"I am asked *why the existence of incapable children should prevent capable children from taking*. But, in *Jee v. Audley*, the *mere possibility that there might have been incapable children was sufficient to exclude those who were capable*. It is said the devise there was future. Certainly; but only in the same sense in which these bequests are future; that is, so conceived as to let in after-born children; which was the sole reason for its being held to be void. Unless my decision on the first point be erroneous, the bequests in this case do equally include after-born children of the testator's daughters, and are therefore equally void."

Wholly aside, therefore, from everything else, the fact that testator has, with respect to *all portions of the residue of the estate*, provided that the male children cannot take until they arrive at the age of thirty, makes all the ultimate gifts bad.

This postponement is not for the purpose of letting in any life estate. The only life estate provided for is that of the daughter and the

postponement does not come into effect until after her death. Between the death of the daughter and the actual transfer of the property to the children, there is no one entitled to any beneficial interest. The income is not even to be used for the benefit of the children. The postponement is a clear arbitrary postponement in no wise connected with any life estate.

Lembeck v. Lembeck, 73 N. J. E. 427, affirmed 74 N. J. E. 848 referred to by the Vice-Chancellor has no application to the case at bar for in that case there was an absolute gift not subject to divesting. There was a mere privilege given to the executors or trustees to postpone delivery for twenty-five years after the death of the testator. In the meantime, however, the income from the property was to go to the beneficiaries. The gift was not subject to be cut down in any manner whatever.

Fidelity Union Trust Co. v. Rowland, 99 N. J. E. 72, also referred to by the Vice-Chancellor is a similar case.

I have already, in the earlier portion of this brief, considered the application of the Vice-Chancellor to the situation, of the provisions in the will that in any event in the one case the distribution shall be made within thirty years after the death of testator's daughter, and in the other case, within thirty years after his death, and have argued that in this respect the Court is making a will for testator.

The objection to any such application to avoid the effect of the rule against Perpetuities summarized is two-fold:

One, there are no separate portions or shares to come into existence until the happening of the earliest of the three anniversaries, which may be a time beyond the period described by the rule against Perpetuities.

The clause, therefore, may have nothing to operate upon until after a period beyond that fixed by the rule.

Two, although there is a statement that the delivery, transfer and payment shall be made in any event within, in the one case twenty-one years from the date of the death of the daughter and, in the other case, within twenty-one years after the death of testator, there is no direction as to whom the payments shall be made and, therefore, if it can be considered that this proviso may operate as a gift the gift is wholly bad because of uncertainties of the persons who are to take.

CONCLUSION.

It is respectfully submitted that the testator died intestate as to the corpus of the residue of this estate, if the facts stated in the bill of complaint be considered as true as they must be upon the motion to strike, and that the decree striking the bill should be reversed and the record remitted to the Court of Chancery with direction to proceed with the cause and, in the event that the facts stated in the bill are established, to enter a decree adjudging that the trustees hold the corpus of the residue for the benefit of the heirs at law and next of kin and that their trust with respect thereto being a naked one they be directed to transfer the

corpus of the estate to the heirs at law and next
of kin as the case may be.

Respectfully submitted,

MERRITT LANE,
Of Counsel Appellant Margaret A. Clay.

SYNOPSIS.

PAGE

The Will Analyzed and Abstracted..... 2

BRIEF OF THE ARGUMENT.

I. Alleged violation of the Rule Against Perpetuities	4
The annuity or life estate for Margaret, otherwise known as Marjorie.....	6
Even if Margaret's life estate is not considered as directly involved, the trust fund under clause fifth (1), since it vests in her children, if at all, within 21 years of her death, is good.....	8
The trust of the balance of the residue does not violate the rule against perpetuities	12
The accelerating provisos	14
In case of a conflict the final clause in a will prevails	17
But no conflict exists here.....	18
The possibility of lapse does not in any way indicate a violation of the rule against perpetuities	18
The postponement feature is sound.....	21
The attack on the will is premature....	22
Absolute certainty is reached within the time permitted by the rule against perpetuities	24
Non-applicability of the principal holding by the Court in <i>McGill v. Trust Company of New Jersey</i>	25
The divesting clause	26
The accumulation features	27

	PAGE
II. The McKeown Will is not bad for uncertainty	31
III. There is no intestacy as to any part of the residuary estate.....	32
Conclusion	35

New Jersey Court of Errors and Appeals

Between

GERALDINE G. DWYER,
Complainant-Appellant,

and

MARGARET A. CLAY,
Defendant-Appellant,

and

THE NATIONAL NEWARK &
ESSEX BANKING COMPANY OF
NEWARK and another as ex-
ecutors, etc.,
Defendants-Respondents.

*On Appeal
from
Chancery.*

BRIEF FOR RESPONDENTS.

This is an action by one of the two children of John McKeown, deceased, to set aside the residuary clause in his will on the ground that it violates the rule against perpetuities and fails to declare the beneficial interests in the trust created by said will in a manner sufficient to be enforceable.

The National Newark & Essex Banking Company of Newark and Lucius du Bignon Clay, as executors of and trustees under the will of John McKeown, who were joined as defendants herein, moved to dismiss the bill for want of equity. The notice of motion to dismiss is printed in the state of case at pages 10 to 12.

Vice-Chancellor Backes rendered an opinion, printed at pages 13 to 22 of the record, giving a comprehensive statement of his views and sus-

taining the will and directing that the bill be dismissed. A decree was thereupon entered on motion of the defendant executors and trustees dismissing the bill (record, p. 22a).

It is the contention of these respondents that the will in question disposes of testator's entire estate and this in such way as to be entirely valid, the disposition of testator's estate made by the will in no manner contravening the rule against perpetuities.

The Will Analyzed and Abstracted.

It is hoped that a brief outline or abstract of the pertinent provisions of the will may prove helpful to the Court. The will is printed in the record at page 33 and the residuary clause is found in the Fifth paragraph thereof, printed at pages 34 to 39.

(1) A bequeaths the residue of his estate to B and C in trust, to pay out of the net income thereof, \$6,000.00 per annum to his daughter, Margaret, until

(a) A daughter of Margaret attains the age of 21 years.

(b) A son of Margaret, *born after A's death*, attains the age of 21 years.

(c) A son of Margaret, *born before A's death*, attains the age of 30 years.

(2) Upon the occurrence of the first of the above three events, the trustees are to create a new trust fund sufficient to yield to Margaret a net annual income of \$6,000.00 for and during the term of her natural life.

(3) Upon the death of Margaret, to divide the "*aforsaid*" trust fund into as many equal

shares as Margaret had children "*then living*" and to pay over one share "with all accumulated income thereon" to each of such children, provided that payment to any of Margaret's daughters under 21 at the time of her death, or to any of her sons under 30 at the time of her death, be postponed until such daughters and/or sons reach the age of 21 or 30, as the case may be.

But in all events such payment shall be made within 21 years after Margaret's death.

(4) The trustees are to accumulate the income of the rest of the trust fund above the \$6,000.00 annuity to Margaret, until

(a) A daughter of Margaret attains the age of 21 years, or

(b) A son of Margaret, *born after A's death*, attains the age of 21 years.

(c) A son of Margaret, *born before A's death*, attains the age of 30 years.

(5) Upon the occurrence of the first of the above events, then to divide this particular trust fund into as many equal shares as there are children of Margaret "*then living*" and to transfer and pay over one share to each of such children, provided that payment of the share of any daughter not yet 21 when this time of division arrives, or of the share of any son not yet 30, shall be postponed until such age, respectively, be reached. *But in all events such payment to be made within 21 years after testator's death.*

(6) If any child shall die before he comes into possession and enjoyment of his share of either trust fund, his share shall be added to that of the other children, proportionately.

Margaret was alive at A's death on Nov. 12, 1927, and then had two children both boys, one 8 years old, and the other 6, both of whom are still living. (Allegation of bill of complaint, record, p. 8, ll. 5 to 12, admitted on this motion.)

BRIEF OF THE ARGUMENT.

I. Alleged violation of the Rule Against Perpetuities.

As above pointed out, the trust fund, when a certain time arrives, is to be divided into two parts, one sufficient to produce \$6,000.00 annually for testator's daughter Margaret, which we shall call the "Special" Trust Fund (clause Fifth (1) of the will, record, p. 35, l. 9), and the other consisting of the balance. This second portion (clause Fifth (2) of the will, record, p. 36, l. 28), it is evident, is nothing more than a continuation of the original trust fund set up at the commencement of paragraph Fifth of the will. It is all one trust fund and no new trust fund is created when the time for division arrives, except the trust fund to produce \$6,000.00 annually.

Each of these funds is to be divided into shares corresponding to the number of Margaret's children and is to be "transferred, conveyed and paid over to them respectively, with all accumulated income thereon."

The will provides that "*the delivery, transfer and payment*" of the shares making up the "Special" Trust Fund "*shall be made in any event within 21 years from the date of the death of my said daughter.*"

As to the trust fund of the balance of the estate, which is the original trust fund, the will provides that "*the delivery, transfer and payment*"

of the shares making up the same "shall be made in any event within 21 years from the date of my death."

Thus the dates of these "deliveries" which certainly include vesting, must, both in the case of the "Special" Trust Fund and in the case of the trust fund of the balance, occur, beyond all per-adventure, within the time permitted by the rule against perpetuities.

It makes no difference whether, in the meantime, the estates of Margaret's children are vested or contingent or vested subject to be divested under the provisions for cross-remainders referred to in item (6) above of our analysis of the will. A final and definite vesting must take place within the time permitted by law.

As Vice-Chancellor Backes succinctly says in his opinion, record, page 19, line 13:

"The testamentary scheme is simple enough. After setting up the residue of the estate in a trust, the testator gave to his daughter, Mrs. Clay, six thousand dollars for life, to be paid out of the income until the occurrence of the first of the three events, and thereafter from the income of a part of the same residue, to be set up in a separate trust, sufficient to produce that sum. The principal of the latter he gave to her children living at the time of her death, each a proportionate share. The remainder of the residuary estate he gave to her children living at the time of the occurrence of the first of the same three events, proportionally. It resolves itself into this: that if at that period the daughter be dead, the entire trust intact, set up by the fifth paragraph of the will, is to be distributed among her then living children. It is only in case she survives that enough of the residue is to be set up in separate trust to insure the payment of her annuity. The trust for the daughter,

first of the whole then of part of the residue of the estate, is not dependent upon any future event. The amount only is to be reduced, and as reduced re-set up if one of the three events happens in her lifetime. The trust, of the greater or lessor sum, is to continue as long as she lives, and there is no room for serious discussion that upon her death the fund, as reduced, vests immediately in her surviving children."

The Annuity or Life Estate for Margaret, otherwise known as Marjorie.

At the top of page 5 of the brief of Messrs. Lum, Tamblin & Colyer for the appellant Dwyer, counsel say that the special trust fund was to be set up on the occurrence of the earliest of the three anniversaries, and they say that the will indicates that this be done quite independently of the annuity given to Margaret.

However, the special trust fund was a fund for the benefit of Marjorie during her life and after her death to be devoted to her children. Hence, both before and after the setting up of the special trust fund (provided it should ever be set up under the contingency stated in the will), we find that Margaret's (or Marjorie's) life, a life in being at testator's death, is used as the yardstick or measure, and there can be no violation of the rule against perpetuities in this provision of the will.

Reading together the opening clause of paragraph Fifth of the will and the clause in paragraph Fifth (1), it is plain that Margaret is to have \$6,000 a year for life in any event. Even though clause Fifth (1) never comes into effect, the payments of \$6,000 per annum are to be continued as long as there is a possibility that the

earliest of the three events clauses (a), (b) and (c) may occur. As long as Margaret lives, there is, in the eyes of the law, a possibility that she may have children, even though her two sons now living should die, and one or more of these children might fulfill the requirements of (a), (b) or (c). The will therefore clearly indicates, even though clause Fifth (1) never comes into effect, that the \$6,000 per year is payable to Margaret during her life.

The minute that clause Fifth (1) comes into operation, if it ever does, owing to the occurrence of the earliest of the events (a), (b) and (c), then the \$6,000 annual payments to Margaret are expressly payable to Margaret under the provisions of that clause, during her life.

There is nothing whatever in the will to indicate that the \$6,000 payments are to be continued beyond Margaret's death. The three events, if they occur at all under circumstances to bring clause Fifth (1) into operation, must occur during Margaret's life. If none of them occur until later, the payments of \$6,000 per annum end with Margaret's death.

It cannot be disputed that the gift of \$6,000 per annum to Margaret under the first trust is an annuity.

The general rule is well settled that the gift or grant of an annuity to a person without words of limitation is a gift or grant of annuity during the life of such person.

Yates v. Maddan, 3 Mac. & G. 532; 42 Eng. Reprint 365.

There is nothing in the will as regards the provisions for Margaret that in any way violates the rule against perpetuities.

Inasmuch as testator's will provides in clause Fifth (1) (record, p. 35, l. 25) that immediately upon the death of Margaret, the trustees shall divide the trust fund into as many portions as there are children of Margaret then living and transfer, convey and pay over one of such portions to each of the children, we respectfully contend that Margaret's life, a life in being, is used as the measure and that inasmuch as the portions are to be "delivered" in any event within 21 years from Margaret's death (record, p. 36, ll. 21 to 27) the requirements of the rule against perpetuities are fully met.

Even if Margaret's Life Estate is not considered as directly involved, the Trust Fund under Clause Fifth (1), since it vests in her children, if at all, within 21 years of her death, is good.

In *Taylor v. Biddall*, 2 Mod. 289; 86 Eng. Rep. 1078 (1678), the life estate was for the testator's sister Elizabeth. It was held that an executory devise to the heirs of the body of Robert Wharton (a person living at testator's death) "as they should attain their respective ages of twenty-one years" was good. Robert Wharton had a daughter Mary, and died before Mary was twenty-one years of age. It was held that Mary took the fee by executory devise.

In *Stephens v. Stephens*, Cas. Temp. Talb. 228; 25 Eng. Rep. 751 (1736), there was a devise to testator's grandson, Thomas Stephens, but in case he should happen to die before attaining twenty-one years then "to such other son of the body of my daughter, Mary Stephens, as shall happen to attain his age of twenty-one years." Mary had no life estate, but was a living person at testator's death. Thomas Stephens, the grand-

son, died without issue and under twenty-one years of age. Mary had another son named Thomas born after testator's death, who was nine years old at the time the opinion was rendered.

The Court held that the estate would vest in the last named son Thomas, by way of executory devise when he should attain the age of twenty-one years.

Taylor v. Biddall, supra, was considered in *Dungannon v. Smith*, 12 Cl. & F. 546; 8 Eng. Rep. 1523 at 1552. It was there stated that the term "heirs of the body" as used in the Biddall case should be understood as limited to meaning "sons or daughters of the body."

In the *Dungannon* case *Stephens v. Stephens, supra*, where the will used the expression "son of the body of my daughter, Mary Stephens" was approved.

In *Post v. Herbert*, 27 N. J. E. 540 at 547, (cited below in this brief), *Taylor v. Biddall, supra*, was cited with approval by this Court on the point that a postponement of possession until a minor should reach the age of twenty-one is sound.

In *Hewitt v. Green*, 77 N. J. E. 345 at 361, Vice-Chancellor Stevenson pointed out that the New Jersey law on the subject of perpetuities is to be tested by the rule under the common law. *Stephens v. Stephens, supra*, has uniformly been accepted as stating the true rule.

In *Woodruff v. Pleasants*, 81 Va. 37, the bequest was to testator's grandchildren in equal shares as he or she should come of age or should marry. There was no intermediate life estate, but testator left sons him surviving, and the

lives of these sons were held to be sufficient as the measure under the perpetuity rule.

The Court held that the legacies vested immediately in such grandchildren as were born at the time of the death of the testator, but added the following significant language:

“The same result would follow * * * if these legacies, instead of vesting * * * upon the death of the testator, only vested in the grandchildren, as the court below thought, as they attained the age of 21 or married. For the testator died leaving all his children living, and inasmuch as none of these sons could have a child except within the prescribed period, and as the legacies must vest in the supposed case within 21 years thereafter, it would seem to be clear that the limitation even then would not exceed the period of a life or lives in being, and ten months and 21 years.”

Otterback et al. v. Bohrer et al., 87 Va. 548; 12 Southeastern Reporter 1013, is to the same effect. The Court said:

“But it is further urged that this provision, so construed to apply to grandchildren, is obnoxious to the rule of law against perpetuities. In this we do not concur. * * * The testator has not gone further than the law allowed in his limitations, but during the lives in being, and the utmost period of gestation, and 21 years thereafter. This estate must vest within this period. There can be no child born to any of his children who would not fulfill the conditions within the prescribed period. This is allowed by the law, and is in violation of no rule thereof, and so it is good.”

In none of the above cases was any life estate in testator's children in the trust fund involved; and yet the several bequests to grandchildren at 21, even though born after testator's death, were held to be good, because the respective

testators' children's lives were to be treated as a part of the period under the rule.

Hence, as applied to the present case, Margaret's life is properly used as the measure in determining whether a bequest to her children under clause Fifth (1) is good.

Counsel for the appellant Dwyer at page 6 of their brief argue that the future estates for Margaret's children under clause Fifth (1) as well as under clause Fifth (2), are not limited upon either lives or a period of years of twenty-one or less. They say that on the other hand, the future estates are limited upon events. They therefore argue that an absolute period of 21 years after the death of the testator, within which the estates must vest, is requisite. Counsel point out at pages 6 and 7 that future children born to Margaret, on their reaching majority, would take at a period more than 21 years after testator's death. This is obvious but immaterial, because Margaret's life must be computed as a part of the period, and we do not see how the validity of clause Fifth (1) can be seriously disputed on this score.

Mr. Lane, counsel for the appellant Margaret A. Clay, at the bottom of page 29 of his brief presents the same argument as counsel for the appellant Dwyer. He says that as to all portions of the residue of the estate, the gifts are bad, because certain male children (namely, those born before testator's death) cannot take until they arrive at the age of 30.

Not only is such male child a person in being at the testator's death, but as we have seen the portion of the residue under clause Fifth (1) vests in such male child at any event at Margaret's death. As we shall later point out

the feature of the postponement of the enjoyment does not interfere with this vesting at Margaret's death.

At Margaret's death, even though the remainders under clause Fifth (1) up to that time have been contingent (which we do not concede), they instantly become vested. The language of the will is explicit.

The Trust of the Balance of the Residue does not violate the Rule against Perpetuities.

We now pass to a consideration of the objections of both opposing counsel to clause Fifth (2) which they call "the Second Special Trust," but which we consider merely a further definition of the original trust fund set up at the beginning of clause Fifth, or of the balance of said fund in case Fifth (1) should come into operation.

Counsel argue that the remainders are contingent and cannot vest until the event transpires, namely until the earliest of the three anniversaries occurs. Even if this is conceded, however, all children of Margaret living at the earliest of the three anniversaries, at that time instantly take a vested remainder under clause Fifth (2). The will proceeds as before to direct a withholding of the enjoyment until twenty-one years of age for female children and thirty years of age for male children, without however directing that the vesting be withheld, and then states the proviso that the delivery, transfer and payment shall be made in any event within twenty-one years from the date of testator's death.

Here we have a vesting in any event and under any interpretation within the absolute period of twenty-one years.

We respectfully suggest that clause Fifth (2) would have been good if the proviso had been framed along the same lines as the proviso in clause Fifth (1); that is, that delivery, transfer and payment should be made in any event within twenty-one years from the date of Margaret's death, instead of within a period of twenty-one years from testator's death. As already pointed out the authorities hold that a gift to grandchildren on their attaining twenty-one is good. The lives of the testator's children constitute a proper measure when grandchildren's interests are under consideration, even though testator's children remain unprovided for. However, the testator here saw fit to advance the period of vesting in clause Fifth (2), and did not adopt the longer permissible period.

Mr. Lane admitted in one of his briefs below that a gift to grandchildren when they arrive at the age of 21 is good. But he said that the gift to the grandchildren, under the provisions of the present will, was not when they arrived at the age of 21, but upon the happening of the earliest of the three contingencies.

We submit that each of the three contingencies in question is the arrival of the grandchildren at designated ages and that for any grandchildren born after testator's death, the designated age is 21 years. Why is it that in the present case arrival of a grandchild at the age of 21 years is an "event" and an invalid measure, while in the other cases involving grandchildren above cited in our brief, counsel says it is not an event, but a measurement of time that is permissible under the rule against perpetuities? We fail to see the distinction.

Minorities of unborn grandchildren are quite normally fixed as the period in wills admittedly

sound. The three events in question cannot be considered simply as events divorced from any minority of Margaret's children.

Again we point out however, that the testator took no chances, but by the proviso in clause Fifth (2) made the vesting take place in any event at the end of a period 21 years absolute after his death.

The Accelerating Provisos.

The concluding words of clause Fifth (1) of the will are as follows:

“provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of the death of my said daughter” (record, p. 36, ll. 21 to 27).

The concluding words of clause Fifth (2) of the will are as follows:

“provided further, however, anything herein contained to the contrary thereof notwithstanding that the delivery, transfer and payment of each and all of such separate portions or shares shall be made in any event within twenty-one years from the date of my death” (record, p. 38, ll. 16 to 21).

The chief attack upon testator's will made by both opposing counsel centers upon the alleged inefficacy of these provisos to accelerate the vesting of the respective remainder interests to a date 21 years from the date of the death of testator's daughter in the case of clause Fifth (1) and to a date 21 years from testator's death in the case of clause Fifth (2).

Thus counsel for the appellant Dwyer at the bottom of page 7 of their brief raise the query:

“How these shares may be paid within 21 years from the date of testator’s death, when under the previous terms of the will it cannot be determined within that time to whom the payments may have to be made.”

Counsel for the appellant Clay sums up his views as to these provisos at the top of page 31 of his brief where he says:

“One, there are no separate portions or shares to come into existence until the happening of the earliest of the three anniversaries, which may be a time beyond the period described by the rule against perpetuities.

“The clause, therefore, may have nothing to operate upon until after a period beyond that fixed by the rule.

“Two, although there is a statement that the delivery, transfer and payment shall be made in any event within, in the one case twenty-one years from the date of the death of the daughter and, in the other case, within twenty-one years after the death of testator, there is no direction as to whom the payments shall be made and, therefore, if it can be considered that this proviso may operate as a gift the gift is wholly bad because of uncertainties of the persons who are to take.”

The answer to these queries is simple. In the first place there can be no doubt that the delivery at the end of the respective 21 year periods is to be made to the then living children of testator’s daughter Margaret. Neither counsel opposing us has had the hardihood to suggest that these provisos might indicate that any other persons by any possibility are the recipients of these interests in the residue.

As to the point that these provisos deal with “shares” and that the shares under previous terms of the will may not be set up until a date

prohibited by the rule against perpetuities, we say that the clear meaning of the provisos is that the shares are to be set up and delivered over in any event at the conclusion of the respective 21 year periods.

Counsel for the appellant Clay would have us believe that the Court below indulged in unwarranted construction of the will to reach this result. Thus at the commencement of his brief he says that the effect of the opinion and decree below is "to make a will for the testator," and at the bottom of page 2 of his brief he italicizes the statement that "the Court has made a will for testator in respect to an important matter, *i. e.*, the persons who are to take."

Again at page 14 of his brief he implies that the Court is not permitted to indulge in "conjecture," and at page 23 he argues that the Court cannot "make a will for testator."

Let us see what the Court below said as to the effect of the two provisos (record, p. 20, l. 31 to p. 21, l. 3):

"In other words the gift was to vest, per share, in the children of his daughter living on the twenty-first anniversary of his death, if per chance it did not otherwise vest within the time fixed by law. And he did not stop there, but directed the several shares, at all events, however postponed as to vesting or payment, to be actually paid over—as to so much of the estate in which his daughter may have a life beneficiary interest within twenty-one years of her death—and the remainder, in which a life is not involved, within twenty-one years of his death."

We submit that it requires no violent construction, no conjecture by the Court whatever to reach the result that the Court below reached. It is only the astuteness of opposing counsel

which has raised the alleged doubts as to what shares are to be delivered over under the respective provisos or what persons are to take these shares. The meaning of the will in this regard, as Vice-Chancellor Backes indicates in his opinion is plain. The provisos merely add a fourth event to the three events listed by the testator as (a), (b) and (c) in his will.

The possibility of further children of Margaret cannot militate against the testator's clear instructions set forth in the two provisos. It is plain that children of Margaret, if any, born after the date fixed for vesting will take nothing. Under somewhat similar circumstances, Vice-Chancellor Buchanan says in *McGill v. Trust Company of New Jersey*, 94 N. J. E. 657 at page 665: (affirmed by this Court with modifications, 96 N. J. E. 331):

"A child thereafter born cannot share—he does not have even a contingent interest. 2 Jarm. Wills (6th Eng. ed.) 1677; Gray Perp. 337 sec. 379; 40 Cyc. 1480; Ward v. Tomkins, 30 N. J. Eq. 3."

A more ample quotation from the opinion in the McGill case is made below.

In case of a conflict the Final Clause in a will prevails.

If there is an insoluble ambiguity here between earlier clauses of the will and this clause, this final clause providing for delivery in any event within twenty-one years from the date of testator's death, or from his daughter's death, must prevail.

See *Hendershot v. Shields*, 42 N. J. E. 317 and 40 Cyc. 1417.

But no Conflict exists here.

There is, however, no conflict in clauses here, no ambiguity whatever. Clause Fifth (2) specifically says that on the occurrence of the earliest of the three anniversaries, the trust fund shall be divided into so many shares or portions "as shall equal the number of children of my said daughter *then living*," and the trustees are directed "to transfer, convey and pay over one of such separate shares or portions with all accumulated income thereon to each of *such* children." The delivery, transfer and payment moreover is to be made in any event within twenty-one years from testator's death. As above pointed out any child of Margaret born after the earliest of the three anniversaries, or born after twenty-one years from testator's death, gets nothing. There is not a suggestion in the will that such children should get anything.

There is no real conflict in the provisions of the will; the only effect of the twenty-one year proviso in clause Fifth (2) is to deliberately and avowedly hasten the vesting date and also the "delivery" date in case the earliest of the three anniversaries occurs more than twenty-one years from testator's death. The twenty-one year proviso in clause Fifth (1) hastens the "delivery" date of the assets in the "Special Trust," same having already vested at Margaret's death.

The possibility of Lapse does not in any way indicate a violation of the Rule against Perpetuities.

It may be argued that no one of the three events on which the setting up of the "Special" Trust Fund depends may ever occur, namely:

(a) The attaining of the age of 21 years by a daughter of Margaret.

(b) The attaining of such age by a son of Margaret *born after testator's death*.

(c) The attaining of the age of 30 years by a son of Margaret *born before testator's death*.

This, of course, would merely constitute a case of the ordinary lapse of a legacy, all possible takers, namely, Margaret's children, having died before the time of vesting. This, it is true, would result in a partial intestacy and the heirs and next of kin would take, but not by reason of any violation of the rule against perpetuities but because of the ordinary situation arising from lapse.

As shown above, the interest of testator's daughter Margaret ceases upon her death, and there can be no violation of the rule against perpetuities from the provisions in the will referring to her. Upon her death without leaving children her surviving, the lapse as to the principal of the "Special" Trust Fund, if same had been set up, would instantly occur without waiting for 21 years after her death.

In the case of the principal of the balance of the trust fund set up at the commencement of clause Fifth of the will and further defined under clause Fifth (2), lapse would occur as soon as all daughters of testator's daughter Margaret had died before reaching the age of 21 years, and all sons of said daughter, born after testator's death, had died before reaching the age of 21 years, and all sons of said daughter, born before testator's death, had died before reaching the age of 30 years. Lapse would also occur if, at the expiration of 21 years

from the date of testator's death, no child of Margaret was then living.

This lapse would be plainly defined and no construction is necessary to determine that it would occur. It would not be necessary to wait until 21 years from testator's death for this lapse to occur, if Margaret had died at any time during the 21 year period leaving no children her surviving. The possibility of further children who might take under this clause would be gone.

It is idle to argue that because none of the three events outlined may ever occur the trust fund set up at the commencement of paragraph Fifth of the will may go on forever and thus violate the rule. The will is to be read as a whole, and it is clear that if none of the three events occurs the "Special" Trust Fund to produce \$6,000.00 will never be set up. As long as Margaret lives, however, there will, in the eyes of the law, be a possibility of children who may fulfill one of the three requirements. But if none of the three events ever occurs, Margaret having died, then the principal of the entire trust fund must, in any case, be paid over within 21 years from testator's death, or on Margaret's death if before that time. This payment and delivery would, of course, in the situation supposed of a lapse, be made to the heirs and next of kin.

There is one distinction to be observed between clauses Fifth (1) and Fifth (2).

If it is suggested that both of Margaret's two sons now living may die within the twenty-one year period from testator's death and that there may be no other children, that would occasion merely the ordinary case of lapse as to clause Fifth (2) as pointed out above. If Margaret

should have other children born to her after the twenty-one year period expires, such children could clearly take nothing under clause Fifth (2) of the will. Under the terms of the will, it would be wholly unnecessary to await the occurrence of the earliest of the three anniversaries as applied to them to find out whether they would take anything under clause Fifth (2). Lapse would already have occurred; the balance of the trust fund after reserving sufficient for the purposes of clause Fifth (1) would have vested in the heirs and next of kin of testator and the supposed subsequently born children would take nothing.

It should be observed that the same thing is not true as to the trust fund in clause Fifth (1). Children born at any time to Margaret might have the chance to qualify as recipients of this fund; viz., all those in being when the earliest of the three anniversaries occurs, or at twenty-one years from Margaret's death.

The Postponement Feature is Sound.

Opposing counsel argue that actual enjoyment is to be withheld from Margaret's children until her daughters reach 21 years respectively and her sons reach 30 years respectively and that this militates against the prior vesting.

"If an estate *vests* within the prescribed period, the postponement of the time of enjoyment beyond lives in being and 1 and 20 years thereafter does not contravene the rule against perpetuities." *Trippe v. National Newark and Essex Banking Company*, 98 Eq. 462, affirmed by this Court on the opinion below, 100 Eq. 356.

See also *Post v. Herbert's Executors*, 27 Eq. 540; *Moore v. Matthews*, 70 Eq. 373; *Howell v.*

Gifford, 64 Eq. 180; *Lembeck v. Lembeck*, 73 Eq. 427; *Fidelity Union Trust Company v. Rowlands*, 99 Eq. 72.

The Court below, citing several of these authorities, says in his opinion at the top of page 21 of the record:

“The direction that if at the occurrence of the event a child be under the required age the trustees shall hold its share until it arrives, does not affect the vesting; the enjoyment alone is postponed.”

The mere reading of the will shows that not even is the actual enjoyment to be postponed beyond 21 years from the date of the death of testator's daughter in the one case and beyond 21 years from the testator's death in the other case.

We shall make further reference to the subject of postponement under the heading “accumulations.”

The attack on the Will is premature.

It might well be remarked that at this particular time the Court should not concern itself with the possibilities concerning the “Special” Trust Fund, for such “Special” Trust Fund has not yet come into existence and may never do so, and it will be time enough to pass on questions regarding such “Special” Trust Fund when those events occur that are to bring it into existence. As was said in *Trippe v. National Newark and Essex Banking Company*, *supra*, 98 N. J. E. 466:

“Those contingencies have not arisen and may never happen. If they or either ever come to pass others may then have come into being and have the right to be heard. Nor are we to anticipate that all three children

may die without issue before 1940, and what then would happen. It would be inappropriate to decide at this time the status of the trusts upon the happening of any of these contingencies. Nagel *v.* Conard, 79 N. J. Eq. 124; Tanner *v.* Boynton Lumber Co., 98 N. J. Eq. 85.”

Furthermore it is premature to speculate what children of Margaret may or may not be living 21 years from testator's death under clause Fifth (2) or at any other future time, and what the result of the circumstances then existing may be.

It is sufficient to say, as pointed out in the *McGill case, supra*, 94 N. J. E. 657 at 665, that gifts over to a class, where the class is open until some future time, are vested, *if there be one or more of the class in esse at the time of the making of the gift*. From the standpoint of the perpetuity rule, however, the class must close within the permitted period. So we say here, as stated in paragraph 10 of the bill of complaint (record, p. 8) and admitted on this motion, that Margaret has two sons, both born before the date of testator's will and before testator's death, and therefore *in esse* at the time of the making of the gift; further that the class must close within the time permitted by the rule. This is enough. Speculation about the future is idle.

The *McGill case* suggests an even earlier time of vesting in Margaret's two sons for both trusts than has hitherto been suggested in this brief; namely, the date of testator's death.

Counsel argued below, when we suggested that their attack is premature, that we were contending that because the estates *might* vest in time the Court should not now concern itself.

That is not our position. We say that the vesting is surely within time under every aspect.

Our point here is that it really should not be necessary to speculate as to who may be alive at various future dates, as we have done under the heading of "lapse" and elsewhere; that the Vice-Chancellor's clear and concise statement should be convincing as to the entire controversy. However, in this brief, doubtless at too great length, we have endeavored to answer the questions of the most enquiring mind, and we believe that we have shown that under all eventualities that may possibly arise the will is sound.

Absolute certainty is reached within the time permitted by the Rule against Perpetuities.

This is true as to both of the trusts and to all aspects of the will.

As we have seen counsel argue that the period of vesting is not fixed by a life in being and twenty-one years thereafter, and is not fixed by a period of twenty-one years absolute from the testator's death. They say that events control.

But these events must all happen within the permitted period, if at all.

It is true that the events may not ever happen. Our point here is *that everyone of the events will happen within the period allowed by the rule against perpetuities, or it will be definitely ascertained within such period that none of these events will ever happen.*

If clauses Fifth (1) and Fifth (2) never come into operation, the preliminary trust is still good, because in effect it directs the payment of \$6,000 a year to Margaret for life.

The trust must end if Margaret dies childless. There is no direction for further accumulation beyond that and there is nothing to violate the statute. If the trust ends within the period permitted by the rule, it makes no difference even though there is no vesting directed at all. The trust is good. There is no beneficiary after this period and therefore there is no trust.

Non-applicability of the principal holding by the Court in *McGill v. Trust Company of New Jersey*.

The present situation does not come within the rules (other than those above referred to) stated in *McGill v. Trust Company of New Jersey, supra*, 94 N. J. E. 657 at 665; affirmed with modifications, not pertinent here, by this Court 96 N. J. E. 331. There there was a gift to the testator's son for life with a further gift of the income to the son's children until they should attain twenty-five years of age and then a gift to them of the principal. It was held that the period of vesting was too remote, same being possibly postponed until twenty-five years after the death of testator's son. It was therefore held that the gift of the principal was void and that testator's son's children took a vested life estate subject to their father's life estate and subject to being divested in whole or in part by predeceasing their father or by the birth of other children.

Vice-Chancellor Buchanan states at page 665:

“When the time fixed for the closing of the class is so remote as to conflict with the perpetuity rule the gift is void.”

* * * * *

“Where a gift is made to such children as reach a certain age the class is closed and

the maximum number of members thereof ascertained when the first one reaches the specified age. All children born up until then will have the possibility of coming into share, although no particular one of them will in fact share unless he himself attains the age; but a child thereafter born cannot share—he does not have even a contingent interest. 2 Jarm. Wills (6th Eng. ed.) 1677; Gray Perp. 337 sec. 379; 40 Cyc. 1480; Ward v. Tomkins, 30 N. J. Eq. 3.”

It should be noted that in the present case the gift is not to such children of Margaret as reach a certain age. On the other hand, the class is closed in the case of clause Fifth (1) on Margaret's death, and in the case of clause Fifth (2) as soon as a child of Margaret born after testator's death reaches 21, or as soon as a child of Margaret born before testator's death reaches 30, and the class is closed in any event as soon as 21 years from testator's death have passed.

The Divesting Clause.

The fact that there may be a divesting of the shares of Margaret's children under the concluding language of paragraph Fifth of testator's will; that is, by the death of any child of Margaret before becoming entitled to the actual possession and enjoyment of his share, does not in any way affect the situation. See headnote 5 (3) in *McGill v. Trust Company of New Jersey, supra*, 94 N. J. E. 657 at 658 and the text at page 675. In any event the divesting in our case would have to take place within the period of the rule against perpetuities. Delivery of the assets and actual possession and enjoyment are co-temporaneous, and both must occur under the provisions of this will within the permitted period.

Opposing counsel discuss the divesting clause at length and draw the erroneous conclusion that possible divesting on some later date (which, however, is impossible in the instant case) is equivalent to failure to vest at all until some date forbidden by the rule against perpetuities. Even if the divesting were beyond the period and should be held to violate the rule, that would not make the prior vesting bad; the divesting clause only would be expunged and the prior estate would be upheld on the principle suggested in the *McGill and Trippe* cases, *supra*.

Vice-Chancellor Backes says on this phase of the present case (record, p. 21, ll. 14 to 29):

“The provision that if at the period of vesting a child is not of the receiving age and should die before arriving its share should be divided between the remaining children would, in the circumstances, effect a divestiture with a gift over. Obviously, the testator intended that his estate should be enjoyed by the generation of his daughter’s children exclusively, and, consequently only by those living at the time variously fixed for its distribution, in shares. However otherwise remote this may be in the different instances, the provision that in the extreme it should be within the time limited by the rule against perpetuities precludes an attack upon the gift of the residue on that score.”

The Accumulation Features.

This subject is closely related to the provisions as to postponement discussed above.

Counsel for the appellant Dwyer at the top of page 15 of their brief pay particular attention to the accumulation features of the McKeown will, which they urge to be invalid. It is pertinent to repeat here that all vesting under the

McKeown will must take place within the period permitted by the rule, possibly considerably before the expiration of the period; further that while enjoyment may be postponed and accumulation effective after the date of vesting (till twenty-one years of age in the case of daughters and thirty in the case of sons), this postponement and this accumulation are to be instantly terminated by the two provisos so frequently quoted above, within the permissive period applicable to each trust.

At this point a more detailed analysis of clauses Fifth (1) and (2) of the will may be necessary.

In clause Fifth (1), the words "transfer and pay over" are used three times:

1. Where the testator directs the trustees on Margaret's death "to transfer, convey and pay over" the shares to Margaret's children then living.

2. Where the testator directs his trustees, when Margaret's daughters reach twenty-one, and when her sons reach thirty, "to *deliver*, transfer and pay over" their shares.

3. Where the testator in the proviso directs that in any event, anything contained in his will to the contrary notwithstanding, "the *delivery*, transfer and payment" of all the shares shall be made within twenty-one years from the date of Margaret's death.

In clause Fifth (2) exactly the same language as that above quoted is used in the three instances.

It should be noted that in case 1, the word "deliver" is not used, whereas in case 2, and

case 3, it is used. In other words, in case 1 the testator had the vesting in his daughter's children in mind but without the physical delivery of the assets being involved, as appears from the language immediately following as to postponement.

In cases 2 and 3, the testator advisedly uses the word "deliver" and means in each case the physical turning over of the assets to Margaret's children. Certainly no one would question that in case 2, the assets are to be delivered when Margaret's daughters reach twenty-one and her sons reach thirty, and that there is to be no more withholding after that.

Then certainly in the provisos, case 3, the *delivery* of the shares to which all accumulated income has been added, must be made in each instance within the period permitted by the rule against perpetuities. The physical assets are to be *delivered* in case 3, just as plainly as in case 2, and with the avowed intention of possibly accelerating the date of delivery fixed by case 2. After they are delivered, there can be no more accumulation of income. It is idle to argue that these provisos do not mean just what they say. It is impossible to spell out of them any direction to accumulate beyond the period permitted by the rule.

Nor does the divesting clause above referred to at the end of the Fifth paragraph indicate by any possibility an extension of the period of accumulation. There is to be no divesting after any child of Margaret has become entitled to the actual possession and enjoyment. That moment is represented, as we have heretofore seen, by the *delivery* date defined in cases 2 and 3. Counsel for appellant Clay admits this on page 12 of his brief, halfway down.

But even if accumulation and postponement of enjoyment had been directed beyond the period permitted by the rule, and the plan should be declared to be offensive to the rule, that would not in any sense vitiate the testator's main scheme.

The following quotation from Vice-Chancellor Backes' opinion in the *Trippe case*, *supra*, 98 N. J. E. 462 at 465, affirmed per curiam by this Court, is squarely in point:

"The single question to be determined is whether the complainants are entitled to recover the corpus of the estate, and for answer we need look no further than the thirteenth paragraph of the will. By its provisions the lawful issue of the testator's children are, on the death of their parent, to receive and take their parent's one-third share of the trust funds. The gift of principal vests immediately upon the death of the parent, the enjoyment of the income being postponed until the issue severally reach twenty-one, and of the principal until they reach twenty-five with possible beneficial use of the income until twenty-one. If an estate vests within the prescribed period, the postponement of the time of enjoyment beyond lives in being and one and twenty years thereafter does not contravene the rule against perpetuities. *Dusenberry v. Johnson*, 59 N. J. E. 336; *Lembeck v. Lembeck*, 73 N. J. E. 427; *In re Smisson*, 79 N. J. E. 233; *Canda v. Canda*, 92 N. J. E. 423. *If the time of payment offends the rule against restraint upon enjoyment, the restriction is void, not the gift.* Gray Perp. (3d ed.) 100, 503. *Foulks* Perp. 292; *Lembeck v. Lembeck*, *supra*." (Italics ours.)

On the above authority, we contend that if in the present case the postponement and the time of payment offend the rule against perpetuities (which we do not concede), the restriction is void and not the gift.

II. The McKeown Will is not bad for uncertainty.

Counsel for the appellant Clay on pages 5 to 14 of his brief (and see particularly p. 12) argues that the ultimate disposition of the residue is wholly void for uncertainty.

We trust that the foregoing matter in our brief, where we endeavor to show that there is no violation of the rule against perpetuities, has also shown that this will is certain in intent in all particulars and that no conjecture need be indulged in to ascertain what the testator means.

It is true that clause Fifth (2) of the will makes the same set of events the occasion for setting up the balance of the trust fund (after establishing the fund in clause Fifth (1) for providing \$6,000 annually for Margaret) and for the transferring and paying over (that is the vesting) of the balance of the fund (record, p. 36, l. 28 to p. 37, l. 30). No one asserts that the balance cannot be set up and instantly paid over.

The meaning of the will is plain enough; whenever the first of the three anniversaries occurs or 21 years from testator's death have elapsed, the balance of the trust fund is to be paid over.

We have heretofore expressed the view that clause Fifth (2) is merely a further definition of the original trust fund, or rather of the balance of same.

The other alleged discrepancies which counsel for the appellant Clay says result in uncertainty are mere refinements based mainly on what counsel conceives to be the incomplete wording of the accelerating provisos. We insist that it is entirely certain that testator intended the

shares to be set off and paid over at the end of the respective 21 year periods of the provisos, if said shares had not already been set off; further that the persons to whom said shares are to be paid at the end of the respective 21 year periods are the children of Margaret then living in each case.

III. There is no intestacy as to any part of the residuary estate.

Counsel for the appellant Dwyer at the bottom of page 16 of their brief argue that testator died intestate as to a part of the income of his estate.

The will directs that Margaret, prior to the setting up of the special trust fund in clause Fifth (1), shall be paid \$6,000 a year. Counsel argue that the will makes no disposition of the balance of the income received during that period and that testator died intestate as to same.

It is, of course, elementary that where a will directs that legacies are to be held by an executor until beneficiaries reach a certain age, but is silent as to the income thereon in the meantime, it is the testator's intenton that the income be accumulated and paid at the time the legacy is payable. See *Von Fell v. Spirling*, 97 N. J. Eq. 527 in this court.

A case even more closely in point is *Bye v. Strasbourg*, in this court, 6 N. J. Adv. Reports, page 365; 140 Atl. 273, not yet officially reported.

This was a bill for construction of a will filed by the executors. The testator in his will gave

all of his estate real and personal to his executors in trust, and then provided as follows:

“Third. I give, devise and bequeath to my faithful and loyal friend, Martha H. Strasbourg, seventy per cent. (70%) annually of the net income of the mortgages which I hold at the time of my decease, and she shall also enjoy the use of my present home free of any rental, until such time as she marry, with the provision that from and after her marriage or death, as the case may be, I direct that my estate shall go to my cousins’ (naming them), ‘to be divided equally among them, share and share alike.’”

This Court says at page 366:

“The only question presented for determination is whether the remaining thirty per cent. of the net income of the testator’s mortgages, after the payment of the seventy per cent. to his friend, Martha H. Strasbourg, was disposed of by his will, or whether he died intestate as to it. His will contained no residuary clause, and there was no specific disposition of this surplus income. The decedent’s sister, Josephine Shoemaker, claims that her brother died intestate as to this thirty per cent., and that she is entitled to receive it, as his only next of kin, until the time for the distribution of the corpus of the estate shall arrive. The Vice-Chancellor on the hearing overruled the claim of the sister, and held that these moneys became part of the corpus of the estate, and distributable, when the trust terminated, among the beneficiaries named by the testator. From the decree based upon this conclusion the present appeal is taken.

“We concur in the conclusion reached by the learned Vice-Chancellor. In the case of *Sanford v. Blake*, 45 N. J. E. 247, where a somewhat similar situation existed, we held that, although there was no specific direction for the accumulation of income to increase the corpus of the fund, such income, when not

otherwise disposed of, would fall into the residuary estate and be distributable as a part of the corpus at the termination of the trust among those who were entitled under the will to share in the corpus. In other words, that the fact of the failure of the testator to make any specific disposition thereof would not produce an intestacy. We consider the principle thus declared to be applicable to the situation which the present case discloses. The testator's purpose, as indicated in his will, was that his whole estate should go to the named legatees at the termination of the trust, except that which was to be held by the trustees for the benefit of Mrs. Strasbourg, and that this thirty per cent. should be retained by the executors until the time for distribution of the corpus should arrive, and then distributed with the rest of the corpus among the legatees named by him in his will.

"The decree under review will be affirmed."

It is apparent that there is no intestacy as to any of the income in the McKeown will.

If Margaret dies leaving children before the event occurs upon which the special trust fund for Margaret is to be set up, exactly the same principle would apply as to all of the income of the trust fund.

Aside from the cases on this subject, we think that the will of testator on its face clearly disposes of the excess income. The will repeatedly in speaking of distribution uses the phrase "with all accumulated income thereon." In our judgment "all accumulated income" means income accumulated at any time whatever.

If it is argued that the word "thereon" refers only specifically to shares after they have been set off, then we would further argue that the

words "thereof" and "therefrom" in the phrase "and to collect, accumulate, invest, and reinvest, the issues, profits, interest and income *thereof* and *therefrom*" (record, p. 36, l. 40) refer to the testator's *estate*, on record, page 36, line 29, the word "estate" being the nearest antecedent, and certainly at the future date of which the testator is speaking, his estate would include all accumulations of income theretofore earned and later to be distributed.

On this subject of the alleged excess income, the Court below well said (record, p. 21, l. 30):

"So much of the residue retained and set up as a trust for the protection of the daughter's annuity may produce more than the requirement, and it is suggested that as to any excess of income there is intestacy, inasmuch as only the principal of that portion is to go to her children living at her death. The will provides that the excess is to be added to the remainder trust. The fact that the remainder trust is to be distributed to the children coincident with the creation of the trust from which the excess may later flow is not inconsistent with the gift of the excess as part of the remainder trust, though it may accrue after the period of distribution. As it accrues it is to be apportioned as the remainder trust is directed to be distributed."

Conclusion.

It is respectfully submitted that this will is unquestionably good on its face; that there is no uncertainty as to its meaning; that the testator's provisions in nowise infringe the rule against perpetuities; that there is no intestacy as to any part of testator's estate either principal or income; and that the dismissal of the bill of complaint by the Court below was proper.

The decree of the Court below dismissing the
bill should be affirmed by this Court.

PITNEY, HARDIN & SKINNER,
Solicitors for Respondents.

CORWIN HOWELL,

Of Counsel.

