

INDEX.

	PAGE
Complaint	1
Schedule A, Annexed to Complaint.....	9
Schedule B, Annexed to Complaint.....	12
Answer of Defendants, Ida Bennett Potter and Ethel Bennett Etherington.....	17
Order Appointing Guardian ad Litem.....	21
Order Assigning Counsel to Guardian ad Litem	23
Order	25
Answer of the Mechanics' Trust Company of N. J.....	28
Answer of Iris Wells by Guardian ad Litem	33
Replication to Answer of Defendants Ida Bennett Potter and Ethel Bennett Ether- ington	34
Replication to Answer of Defendant Me- chanics' Trust Company of N. J.....	35
Replication to Answer of Iris Wells by Guardian ad Litem.....	36
Testimony	37
Witnesses for Complainant—	
De Witt Van Buskirk	
Direct	39
Cross	42
Edward H. Wells	
Direct	43

	PAGE
Exhibit C-1—Last Will and Testament of Edwin H. Bennett, deceased. (Printed at pages 9 to 12, <i>supra</i>).....	44
Exhibit C-2—Last Will and Testament of Serra Bennett Wells, deceased. (Printed at pages 12 to 16, <i>supra</i>).....	44
Exhibit C-3—Order Discharging Trustees and Appointing Substituted Trustee in the Matter of the Estate of Edwin H. Bennett, deceased.....	45
Exhibit C-4—Decree of the Essex County Orphans' Court in the Matter of the Application of Edward H. Wells for Leave to Adopt Ida Stuart Potter, a Minor.....	49
Conclusions of Vice-Chancellor Fielder.....	53
Final Decree.....	56
Notice of Appeal.....	63
Petition of Appeal.....	64
Answer of Edward H. Wells to Petition of Appeal	67
Answer of Iris Wells to Petition of Appeal of Ida Bennett Potter and Ethel Bennett Etherington	69

[Filed January 14, 1926.]

Complaint.

In Chancery of New Jersey

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

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The complainant, Edward H. Wells, of the Town of Montclair, County of Essex and State of New Jersey, individually and as sole Executor and Trustee under the last will and testament of Serra Bennett Wells, deceased, late of said Town, County and State, respectfully shows:

1. On the 27th day of June, 1898, Edwin H. Bennett died a resident of the City of Bayonne, County of Hudson and State of New Jersey, leaving a last will and testament which was duly admitted to probate by the Prerogative Court of New Jersey on the 8th day of July, 1898, a true copy of which is hereto annexed and marked "Schedule A". The said Edwin H. Bennett left him surviving his widow Kate Amelia Bennett, a son, Edwin H. Bennett, Jr., a daughter, Ida Bennett, who subsequently married Palmer A. Potter and became and now is Ida Bennett Potter, and a daughter, Serra C. Bennett, who subsequently married the complainant, Edward H. Wells, and became Serra Bennett Wells.

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2. The said last will and testament of the said Edwin H. Bennett, after providing for certain devises and bequests to his said wife and to his said son, provided in and by the 4th, 5th, 6th and 7th paragraphs thereof, as follows:

"FOURTH: I give, devise and bequeath all the rest and residue of my estate, both real

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Complaint.

and personal, of every kind and description, of which I may die seized or possessed, or to which I may be entitled to, or have an interest in at the time of my death, to my executors and trustees hereinafter named, to have and to hold the same IN TRUST, NEVERTHELESS, for the following uses and purposes:

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To invest the same in good, safe interest-bearing securities wherever not already invested at the time of my death. All stocks held by me in corporations may remain so invested unless the majority of my trustees deem it for the best interests of my estate to change such investment, in which case they may sell any part, or all of my stock in any company and re-invest the proceeds therefrom; such new investment to be charged with the same trust as the original investment. From the income received from my said trust estate, I direct my said trustees

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To pay to my daughters, SARAH C. BENNETT and IDA J. BENNETT each, One Thousand Dollars, annually, to be paid to them in quarterly payments.

To pay to my sister, ALICE BENNETT, of Brooklyn, New York, the sum of Three Hundred and Fifty Dollars per year, during the term of her natural life.

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To pay to my step-mother, EMELINE E. BENNETT, of Brooklyn, New York, the sum of One Hundred and Fifty Dollars per year during the term of her natural life.

To pay all the rest and residue of said income from said estate to my wife, KATE A. BENNETT, during the term of her natural life, such payments to be paid to her quarterly.

FIFTH: The above provisions made for the benefit of my wife are to be in lieu of her dower, and right of dower, in any and all real estate of which I may die seized.

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SIXTH: If, after the death of my said wife, my step-mother, Emeline E. Bennett and my

Complaint.

sister, Alice Bennett, be still living, or either of them, I direct that my trustees shall set aside from my said trust estate a sum sufficient to pay the annuities hereinbefore provided for them, or either of them, and at their death the said principal sum to be divided as hereinafter provided for the rest of my said trust estate. 10

SEVENTH: After the death of my wife, I direct that the residue of my trust estate be equally divided among my children, share and share alike, and in the event of any of my children dying before my wife, and leaving them surviving, at the time of the death of my said wife, lawful issue, said issue are to take the share their parent would have taken if living.”

3. The said Edwin H. Bennett in and by said last will and testament appointed his said widow, Kate Amelia Bennett, his said son, Edwin H. Bennett, Jr., and John E. Smith of Bayonne, New Jersey, as executors and trustees under said will. All of said executors and trustees duly qualified and continued to act as such until the death of the said Edwin H. Bennett, Jr., and the duties of said executors have long since been completed. Subsequent to the death of Edwin H. Bennett, Jr., which occurred at the time hereinafter stated and on July 31, 1914, the above mentioned Edward H. Wells was appointed as an additional trustee under said will of said Edwin H. Bennett, deceased, and the said Kate Amelia Bennett, John E. Smith and Edward H. Wells are now trustees under the said last will and testament of the said Edwin H. Bennett, deceased. 20 30

4. The said Kate Amelia Bennett, widow of the said Edwin H. Bennett, the said Ida Bennett Pot- 40

Complaint.

ter, daughter of the said Edwin H. Bennett, and Alice Bennett, sister of the said Edwin H. Bennett, are still living. Emeline Bennett, stepmother of the said Edwin H. Bennett, is deceased.

10 5. On the 21st day of February, 1912, the said Edwin H. Bennett, Jr., son of the said Edwin H. Bennett, deceased, died leaving his widow, Agnes Bennett, and leaving as his only issue him surviving, a daughter, Ethel Bennett, who subsequently married C. Kenneth Etherington and became and now is Ethel Bennett Etherington, who is still living.

20 6. The said Serra Bennett Wells, daughter of the said Edwin H. Bennett, died a resident of the Town of Montclair, County of Essex and State of New Jersey on the 1st day of April, 1925, leaving her husband, the said Edward H. Wells, but without leaving issue, her surviving, and leaving a last will and testament in and by which she appointed complainant as sole Executor and Trustee thereof. Said last will and testament, a true copy of which is hereto annexed and marked "Schedule B" was duly admitted to probate by the Prerogative Court of New Jersey on the 20th day of April, 1925, and letters testamentary thereunder have been issued to complainant who is now acting as the executor and trustee thereunder.

30 7. The said Serra Bennett Wells in and by said last will and testament, after bequeathing the sum of \$25,000 to her said sister, Ida Bennett Potter and all of her jewelry and household furnishings and effects to her said husband, provided in and by the 5th paragraph thereof, as follows:

40 "FIFTH: All the rest, residue and remainder of my estate and property, including

Complaint.

all thereof passing to me under the will of my father, Edwin H. Bennett, or which may pass to me from my mother, Kate A. Bennett, I give, bequeath and devise to the executor of this my last will and testament and the trustee thereunder hereinafter named, IN TRUST, nevertheless for the following uses and purposes: 10

(a) To hold the same as long as may be needed to carry out the trusts hereinafter set forth and during such time to collect the income therefrom and to pay over and accumulate the net income thereof as hereinafter is directed.

(b) To pay over all of such net income to my said husband in such installments as he may from time to time elect so long as he may survive me.

While I know that out of such net income my said husband will from time to time make proper provision for the maintenance, education and comfort of Ida Potter, who lives with us, and it is my earnest wish that he shall do so, I intend him to have all of said income during said period free of any trust whatsoever and without any liability to so use any thereof or to account therefor to any one. 20

(c) After the death of my said husband, from time to time to pay out of the net income of the said residue thereafter accruing such part thereof as in the uncontrolled judgment of my said executor or trustee may seem advisable for the maintenance, education and comfort of the said Ida Potter until she shall attain the age of thirty years, and then to transfer and pay over to her all of said residue, with any accumulation thereof as there then may be, as and for her own absolute property. 30

(d) In case the said Ida Potter shall not live to attain the age of thirty years, then 40

Complaint.

upon the death of the survivor of her and my said husband I give and bequeath all of said residue and any such accumulation of net income therefrom to my said sister, IDA BENNETT POTTER."

10 8. Ida Potter mentioned in the above recited 5th paragraph of the said will of said Serra Bennett Wells, is an infant under the age of fourteen years.

20 9. Complainant is advised and believes and therefore charges that upon the death of the said Edwin H. Bennett, his said son, Edwin H. Bennett, Jr., now deceased, and his said daughters, Serra Bennett Wells, now deceased, and Ida Bennett Potter, each took a vested undivided one-third interest in the residue of the estate of the said Edwin H. Bennett, deceased, subject to be divested by his or her death during the lifetime of the said Kate Amelia Bennett leaving issue him or her surviving, and subject to the life interest in said residue of the said Kate Amelia Bennett and to the payment of the annuities in said will provided and that upon the death of the said Serra Bennett Wells her one-third interest in said residue passed to complainant as executor of her last will and testament and now forms a part of the estate left by the said Serra Bennett Wells.

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40 10. On the other hand complainant is informed by the said Ida Bennett Potter and the said Ethel Bennett Etherington that they each claim that the said Edwin H. Bennett, Jr., Serra Bennett Wells and Ida Bennett Potter did not take a vested undivided one-third interest in the residue of said estate at the death of the said Edwin H. Bennett; that the only interest which the said Serra Bennett

Complaint.

Wells had in said residue at the time of her death was an interest contingent upon her surviving the said Kate Amelia Bennett and that therefore the complainant as executor and trustee of the said Serra Bennett Wells and as a legatee under her last will and testament has no interest in the said residue. 10

11. The said one-third interest in the said residue of the estate of Edwin H. Bennett, Deceased, is of large value and complainant as executor of the estate of Serra Bennett Wells, Deceased, will shortly be required to make and file returns for the purpose of having the estate taxes payable to the United States Government by said estate and the transfer inheritance taxes payable to the State of New Jersey on the transfers made by the will of the said Serra Bennett Wells, Deceased, assessed and thereafter to pay said taxes. If said one-third interest in the residue of the said estate of the said Edwin H. Bennett, Deceased, constitutes a part of the estate of the said Serra Bennett Wells, Deceased, the amount of such taxes will be at least \$50,000. larger than if the said one-third interest constitutes no part of the said estate of the said Serra Bennett Wells, Deceased. The question so raised must be determined before the amount of said taxes legally payable, can be ascertained or the complainant can safely pay the same. 20 30

12. Complainant is without adequate remedy in the courts at law and therefore prays

1. That Kate Amelia Bennett, John E. Smith and Edward H. Wells as trustees under the last will and testament of Edwin H. Bennett, Deceased, Ida Bennett Potter, Ethel Bennett Ether- 40

Complaint.

10 ington and Ida Potter, who are the defendants in this suit, may answer this bill of complaint and each statement therein made; that each defendant herein named shall disclose what right or interest he or she claims or may claim to have in or to the said residue or remainder of the estate of the said Edwin H. Bennett, Deceased, under his said last will and under or through the said will of said Serra Bennett Wells, Deceased, or otherwise.

20 2. That this court may determine the question of the construction of the said last will and testament of the said Edwin H. Bennett, Deceased, in so far as the same affects the right which the complainant claims thereunder as executor and trustee under the will of Serra Bennett Wells, Deceased, to a one-third interest in the residue and remainder of said estate of the said Edwin H. Bennett, Deceased, and may declare the rights of the persons interested under said will of said Edwin H. Bennett, Deceased, in the said residue and remainder of his said estate.

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

4. That complainant may have such further and other relief as may be equitable.

LINDABURY, DEPUE & FAULKS,
Solicitors and of counsel with
Complainant.

Schedule A, Annexed to Complaint.

I, EDWIN H. BENNETT, of Bayonne, New Jersey, being of sound and disposing mind and memory, and ever mindful of the uncertainties of this life, do hereby revoke all former wills by me made, and make, ordain, publish and declare this to be my Last Will and Testament, in manner and form following, that is to say: 10

FIRST: I direct that all my just debts and funeral expenses shall be paid out of my personal estate as soon as practicable, by my executors, after my decease.

SECOND: I give, devise and bequeath to my wife, KATE A. BENNETT, the house and lot, our residence at Bayonne, New Jersey, together with all the furniture, silver, and furnishings therein, and all horses, carriages, etc., belonging thereto, TO HAVE AND TO HOLD the same to her and her heirs forever. 20

THIRD: I give, devise and bequeath to my son, EDWIN H. BENNETT, JR., all the stock I may own at the time of my death in the corporation known as the Diehl Manufacturing Company.

FOURTH: I give, devise and bequeath all the rest and residue of my estate, both real and personal, of every kind and description, of which I may die seized or possessed, or to which I may be entitled to, or have an interest in at the time of my death, to my executors and trustees hereinafter named, to have and to hold the same IN TRUST, NEVERTHELESS, for the following uses and purposes: 30

To invest the same in good, safe interest-bearing securities wherever not already invested at 40

Schedule A, Annexed to Complaint.

10 the time of my death. All stocks held by me in corporations may remain so invested unless the majority of my trustees deem it for the best interests of my estate to change such investment, in which case they may sell any part, or all of my stock in any company and re-invest the proceeds therefrom; such new investment to be charged with the same trust as the original investment. From the income received from my said trust estate, I direct my said trustees

To pay to my daughters, SARAH C. BENNETT and IDA J. BENNETT each, One Thousand Dollars, annually, to be paid to them in quarterly payments.

20 To pay to my sister ALICE BENNETT, of Brooklyn, New York, the sum of Three Hundred and Fifty Dollars per year, during the term of her natural life.

To pay to my step-mother, EMELINE E. BENNETT, of Brooklyn, New York, the sum of One Hundred and Fifty Dollars per year during the term of her natural life.

30 To pay all the rest and residue of said income from said estate to my wife, KATE A. BENNETT, during the term of her natural life, such payments to be paid to her quarterly.

FIFTH: The above provisions made for the benefit of my wife are to be in lieu of her dower, and right of dower, in any and all real estate of which I may die seized.

40 SIXTH: If, after the death of my said wife, my step-mother, Emeline E. Bennett and my sister Alice Bennett, be still living, or either of them, I direct that my trustees shall set aside from my said trust estate a sum sufficient to pay the annui-

Schedule A, Annexed to Complaint.

ties hereinbefore provided for them, or either of them, and at their death the said principal sum to be divided as hereinafter provided for the rest of my said trust estate.

SEVENTH: After the death of my wife, I direct that the residue of my trust estate be equally divided among my children, share and share alike, and in the event of any of my children dying before my wife, and leaving them surviving, at the time of the death of my said wife, lawful issue, said issue are to take the share their parent would have taken if living. 10

EIGHTH: I hereby authorize and empower my executors hereinafter named to sell any and all real estate owned by me at the time of my death not herein specifically devised, whenever in their judgment such sale would be for the best interest of my estate, and give good and sufficient deeds therefor. 20

NINTH: I hereby nominate and appoint my wife KATE A. BENNETT, and my son EDWIN H. BENNETT, JR., and my friend JOHN E. SMITH, of Bayonne, New Jersey, Executors of and Trustees under this my last Will and Testament without bonds. 30

IN WITNESS WHEREOF, I, Edward H. Bennett, to this my last Will and Testament, have set my hand and affixed my seal, this 30th day of March, in the year of our Lord, one thousand eight hundred and ninety-six.

E. H. BENNETT (L.S.)

Signed, sealed, published and declared as and for his last Will and Testament, by the Testator, 40

Schedule A, Annexed to Complaint.

in our presence, who, at his request, and in his presence, and in the presence of each other have subscribed our names as subscribing witnesses thereto.

10 F. G. BOURNE, No. 1 West 72d Street, New York City.

PHILIP DIEHL, 508 Morris Ave., Elizabeth, N. J.
Proved July 9, 1898.

Schedule B, Annexed to Complaint.

20 I, SERRA BENNETT WELLS, of the Town of Montclair, in the County of Essex and State of New Jersey, DO HEREBY MAKE, PUBLISH AND DECLARE this my last will and testament in manner following, that is to say:

FIRST: I direct the payment of my just debts and funeral expenses as soon as may be practicable so to do.

30 SECOND: I give and bequeath to my sister, IDA BENNETT POTTER, the sum of Twenty-five Thousand Dollars (\$25,000.) and also all of my wearing apparel, including my furs.

THIRD: I give and bequeath all of my jewelry and also all of my household furnishings and effects to my husband, EDWARD H. WELLS.

40 FOURTH: It is my wish and I order and direct that the foregoing legacies shall be paid in full without any deduction for or on account of any estate or inheritance taxes whatsoever, and that all such taxes imposed upon my estate or any

Schedule B, Annexed to Complaint.

part thereof, or upon any legacy, bequest or devise herein given, shall be paid out of the residue of my estate hereinafter disposed of.

FIFTH: All the rest, residue and remainder of my estate and property, including all thereof passing to me under the will of my father, Edwin H. Bennett, or which may pass to me from my mother, Kate A. Bennett, I give, bequeath and devise to the executor of this my last will and testament and the trustee thereunder hereinafter named, IN TRUST, nevertheless for the following uses and purposes: 10

(a) To hold the same as long as may be needed to carry out the trusts hereinafter set forth and during such time to collect the income therefrom and to pay over and accumulate the net income thereof as hereinafter is directed. 20

(b) To pay over all of such net income to my said husband in such installments as he may from time to time elect so long as he may survive me.

While I know that out of such net income my said husband will from time to time make proper provision for the maintenance, education and comfort of Ida Potter, who lives with us, and it is my earnest wish that he shall do so, I intend him to have all of said income during said period free of any trust whatsoever and without any liability to so use any thereof or to account therefor to any one. 30

(c) After the death of my said husband, from time to time to pay out of the net income of the said residue thereafter accruing such part thereof as in the uncontrolled judgment of my said executor or trustee may seem advisable for the 40

Schedule B, Annexed to Complaint.

10 maintenance, education and comfort of the said
Ida Potter until she shall attain the age of thirty
years, and then to transfer and pay over to her
all of said residue, with any accumulation thereof
as there then may be, as and for her own abso-
lute property.

(d) In case the said Ida Potter shall not live
to attain the age of thirty years, then upon the
death of the survivor of her and my said hus-
band I give and bequeath all of the said residue
and any such accumulation of net income there-
from to my said sister, IDA BENNETT POTTER.

20 SIXTH: I nominate, constitute and appoint as
the sole executor of this my last will and testa-
ment and as the sole trustee of the trusts thereby
created my said husband, EDWARD H. WELLS. If
he shall not survive me, or shall fail to qualify as
such executor, or having so qualified shall fail
to continue to act as such executor, then I nomi-
nate, constitute and appoint in his place and stead
FREDERIC J. FAULKS, of the law firm of Linda-
bury, Depue & Faulks, whose office is in Newark,
New Jersey. In case my said husband shall at
30 any time not desire to act as such trustee, or for
any reason shall fail or be unable so to do, and
in any event upon his death, then I nominate, con-
stitute and appoint the said Frederic J. Faulks
as such trustee in his place and stead.

SEVENTH: It is my wish and I expressly order
and direct as follows:

40 (a) Neither the executor hereof nor the trus-
tee hereunder shall be required to give bond or
other security for the performance of his duties
or any thereof either in the State of New Jersey
or elsewhere.

Schedule B, Annexed to Complaint.

(b) My executor shall have power and authority to take such time for the conversion of my securities and the settlement of my estate as may be necessary to avoid a sacrifice of such securities or any injury to such estate, and to that end I authorize him to borrow on the pledge of any of such securities any sum or sums of money which in his discretion may be necessary or advisable to meet the payment of any indebtedness of mine or of any estate or inheritance taxes or death duties of whatsoever character that may be imposed upon my estate or upon any disposition thereof made by this will. 10

(c) My executor or such trustee shall also have power to continue without change or conversion my investments, whether in stocks, bonds, mortgages or other securities or property, so long as investments shall be required to meet the provisions of this my will and as in his judgment shall seem wise and for the best interests of my estate or of any of such trusts, and upon the payment, sale or other conversion of any such securities or other property or of any reinvestments thereof, to invest the proceeds in such good interest-bearing securities as he may select or approve, it being my intention that such investments or reinvestments need not be confined to those at the time being authorized for the investment of trust funds either by the laws of the State of New Jersey or otherwise. My said executor or such trustee shall also have authority to sell, convey and convert and transfer all or any part of my property and estate, as well real as personal, at such time or times, in such quantity or quantities, and for such price or prices, at either public or private 20
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Schedule B, Annexed to Complaint.

10 sale, or both, as he shall determine to be for the best interest of my estate or of any such trusts, and I expressly authorize my said executor or such trustee from time to time to execute good and sufficient deeds and instruments of conveyance and transfer for any or all of my property or estate held by him.

20 (d) Each and every of the foregoing powers and authority may be exercised by the said EDWARD H. WELLS or the said Frederic J. Faulks without bond or other security either as such executor or trustee, it being my intention to hereby vest in either of them at any time being in either such office the same power and authority with regard to all of my estate and property as I would then have, if living, subject only to the foregoing provisions of this my will.

EIGHTH: I hereby revoke and annul any and all wills or codicils heretofore made by me and again declare this instrument to be my last will and testament.

30 IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my seal this tenth day of September, in the year of our Lord One thousand nine hundred and twenty-three.

SERRA BENNETT WELLS (L.S.)

Signed, Sealed, Published and Declared by the within named Serra Bennett Wells to be her last will and testament in the joint presence of us, who at her request, in her presence, and in the presence of each other, have hereunto subscribed our names as witnesses:

40 M. HAROLD HIGGINS, 409 Franklin St., Bloomfield, N. J.

HAROLD J. BROWN, 18 E. Kinney St., Newark, N. J.

**Answer of Defendants, Ida Bennett Potter and
Ethel Bennett Etherington.**

[Filed February 13, 1926.]

IN CHANCERY OF NEW JERSEY.

<p style="text-align: center;"><i>Between</i></p> <p>EDWARD H. WELLS, Sole Executor and Trustee under the Last Will and Testament of Serra Bennett Wells, Deceased, Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p>KATE AMELIA BENNETT, JOHN E. SMITH and EDWARD H. WELLS as Trustees under the Last Will and Testament of Edwin H. Bennett, Deceased, IDA BEN- NETT POTTER, ETHEL BENNETT ETHERINGTON and IDA POTTER, Defendants.</p>	<p>10</p> <p>20</p> <p>30</p>
	<p>On Bill, etc.</p>

Ida Bennett Potter and Ethel Bennett Etherington, two of the defendants to the Bill of Complaint of Edward H. Wells, individually and as sole executor and trustee under the last Will and Testament of Serra Bennett Wells, deceased.

These defendants to so much of said bill as they are advised they should make answer unto, answering say:

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*Answer of Defendants, Ida Bennett Potter and
Ethel Bennett Etherington.*

1. They admit the allegations of paragraph 1 of the bill, but for greater certainty refer to a certified copy of the last Will and Testament of Edwin H. Bennett to be produced.

10 2. They believe that said last Will and Testament contained the clauses in the second paragraph of said bill set out, but for greater certainty, beg to refer to a certified copy of said will.

3. They admit the allegations of paragraph 3 of said bill.

4. They admit the allegations of paragraph 4.

5. They admit the allegations of paragraph 5.

20 6. They admit the allegations of paragraph 6 of said bill, but for greater certainty they refer to a certified copy of the last will and testament of Serra Bennett Wells.

7. They believe the said last will and testament of Serra Bennett Wells contains the provisions in the seventh paragraph of said bill quoted, but for greater certainty beg to refer to a certified copy thereof.

30 8. They admit the allegations of paragraph 8 of said bill.

40 9. They believe it to be true that the complainant makes the contention in the ninth paragraph of said bill set out, to the effect that Edwin H. Bennett, Jr., now deceased, Serra Bennett Wells, now deceased, and Ida Bennett Potter, at the time of the death of the said Edwin H. Bennett, each took a vested undivided third interest in the residue of the Estate of the said Edwin H. Bennett under and by virtue of his said will, subject to be

*Answer of Defendants, Ida Bennett Potter and
Ethel Bennett Etherington.*

divested by his or her death during the lifetime of the widow of said Edwin H. Bennett, Kate Amelia Bennett, leaving issue him or her surviving, and also subject to the life interest in the said residue of Kate Amelia Bennett, and to the payment of the annuities in the said will provided, and hence that upon the death of the said Serra Bennett Wells, the interest which it is claimed was vested in her, passed to the complainant as executor of her last will and testament, and forms a part of the estate left by the said Serra Bennett Wells, but these defendants are advised and believe that said claim is unfounded and incorrect. 10

10. These defendants admit the allegations of paragraph 10. 20

These defendants are advised that instead of the interests of the said Edwin H. Bennett, Jr., Serra Bennett and Ida Bennett Potter in and to the residue of said estate being vested in them respectively at the time of the death of the said testator, subject to be divested on the contingency hereinabove referred to, their said shares and interests in said residue did not vest, but rested contingent upon their respectively surviving the said Kate Amelia Bennett, widow of Edwin H. Bennett, deceased, and they pray the judgment and decree of this honorable Court to that effect. 30

11. They admit the allegations in paragraph 11 of said bill.

These defendants join with the complainant in a desire for a construction by this Court of the said last will and testament of the said Edwin H. Bennett and for a determination by the Court as to which of the said divergent claims touching the 40

*Answer of Defendants, Ida Bennett Potter and
Ethel Bennett Etherington.*

proper construction of the said last will and testa-
ment of Edwin H. Bennett is correct.

10 All of which matters and things these defend-
ants are ready to aver, maintain and prove as this
honorable Court shall direct.

DEMBE & DEMBE,
Solicitors for Defend-
ants Ida Bennett Pot-
and Ethel Bennett
Etherington.

ROBERT H. McCARTER,
Of Counsel with said
Defendants.

20

STATE OF NEW JERSEY, }
COUNTY OF , }

30 IDA BENNETT POTTER and ETHEL ETHERINGTON
each being duly sworn, on their respective oaths
say they are the defendants in the foregoing an-
swer named; that the matters and things therein
alleged are true as they relate to their own acts,
and so far as they relate to the acts of others, they
believe them to be true.

IDA BENNETT POTTER,
ETHEL BENNETT ETHERINGTON.

Subscribed and sworn to }
before me this 8th day }
of February, 1926. }

SAMUEL LEWIN,
Atty at Law of N. J.

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Order Appointing Guardian ad Litem.

[Filed March 2, 1926.]

IN CHANCERY OF NEW JERSEY.

<i>Between</i>	10
EDWARD H. WELLS, Individually and as sole Executor and Trustee under the Last Will and Testament of Serra Bennett Wells, Deceased, Complainant,	
<i>and</i>	On Bill, etc. 20
KATE AMELIA BENNETT, JOHN E. SMITH and EDWARD H. WELLS as Trustees under the Last Will and Testament of Edwin H. Bennett, Deceased, IDA BENNETT POTTER, ETHEL BENNETT ETHERINGTON and IDA POTTER, Defendants.	
	30

This matter being opened to the court by Messrs. Lindabury, Depue & Faulks of counsel with the complainant, and it appearing that the defendant Ida Potter has been duly served with process to appear and answer the complainant's bill; and it further appearing by affidavit that the said defendant Ida Potter is an infant under the age of fourteen years, and that she has no guardian appointed by the Orphans Court resident in

Order Appointing Guardian ad Litem.

10 this state, and it further appearing that the said defendant Ida Potter is the adopted daughter of Palmer A. Potter and Ida Bennett Potter, his wife, and that due notice of this application has been given to the said Palmer A. Potter and also to Edward H. Wells, with whom the said defendant Ida Potter resides and who is in *loco parentis* to the said defendant Ida Potter,

It is thereupon on this second day of March 1926, on motion of Messrs. Lindabury, Depue & Faulks, of counsel with the complainant ordered that Thomas Barber, Clerk of this Court, be and he is hereby assigned and appointed guardian *ad litem* of the said Ida Potter, by whom she may appear and answer and defend this suit.

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E. R. WALKER,
C.

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Order Assigning Counsel to Guardian ad Litem.

[Filed March 2, 1926.]

IN CHANCERY OF NEW JERSEY.

<i>Between</i>	10
EDWARD H. WELLS, Individually and as sole Executor and Trustee under the Last Will and Testament of Serra Bennett Wells, Deceased, Complainant,	
<i>and</i>	On Bill, etc. 20
KATE AMELIA BENNETT, JOHN E. SMITH and EDWARD H. WELLS as Trustees under the Last Will and Testament of Edwin H. Bennett, Deceased, IDA BENNETT POTTER, ETHEL BENNETT ETHERINGTON and IDA POTTER, Defendants.	
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It appearing to the court that the above stated cause is one for the construction of the will of the late Edwin H. Bennett under and by virtue of the terms of which and of the will of Serra Bennett Wells, Ida Potter, an infant defendant, for whom Thomas H. Barber, Clerk of this court, is guardian ad litem, has a substantial interest; and no cause appearing to the contrary;

Order Assigning Counsel to Guardian ad Litem.

10 It is on this 2nd day of March, 1926, of the court's own motion ordered that Pitney, Hardin & Skinner, solicitors and counsellors of this court, be and they are hereby assigned as counsel for the said Thomas H. Barber, guardian *ad litem* of the said infant defendant to the end that argument may be heard on behalf of the said infant defendant for the saving to her of her interest under the said wills and each of them.

E. R. WALKER,
C.

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Order.

[Filed March 10, 1926.]

IN CHANCERY OF NEW JERSEY.

Between

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EDWARD H. WELLS, individually
and as sole Executor and Trust-
tee under the will of Serra
Bennett Wells, Deceased,
Complainant,

and

On Bill, etc.

20

KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS
as Trustees under the last will
and testament of Edwin H.
Bennett, Deceased; IDA BEN-
NETT POTTER, ETHEL BENNETT
ETHERINGTON and IDA POTTER,
Defendants.

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It appearing that since the filing of the bill of complaint herein Kate Amelia Bennett, John E. Smith and Edward H. Wells have upon their application and by a decree of this Court dated February 11, 1926, been relieved and discharged from all further duties of their office as trustees under the last will and testament of Edwin H. Bennett, deceased, except for accounting, and that

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Order.

10 Mechanics Trust Company of New Jersey has by said decree been appointed trustee under said will and of the trusts created thereby in the place and stead of the said Kate Amelia Bennett, John E. Smith and Edward H. Wells and has qualified as such substituted trustee; and it further appearing that since the said bill of complaint was filed and by a decree of the Essex County Orphans' Court dated the 19th day of February, 1926, the name of Ida Stuart Potter, a minor, one of the defendants herein, has been changed to Iris Wells, and counsel for the guardian ad litem of said infant defendant and of all of the other parties hereto consenting to this order,

20 IT IS, on this tenth day of March, 1926, ORDERED as follows:

1. That the Mechanics Trust Company of New Jersey, as trustee under the last will and testament of Edwin H. Bennett, deceased, be and it hereby is substituted as a defendant herein in the place and stead of the said Kate Amelia Bennett, John E. Smith and Edward H. Wells, as trustees as aforesaid, and that as such substituted trustee the said Mechanics Trust Company of New Jersey shall answer the said bill of complaint within
30 ten days from the date hereof.

2. That Ida Stuart Potter in the said bill of complaint herein be hereinafter designated in this suit as Iris Wells.

E. R. WALKER,
C.

Order.

We consent to the making, entry and filing of the above order.

LINDABURY, DEPUE & FAULKES,
Solicitors for Complainant.

DEMBE & DEMBE, 10
Solicitors for defendants Ida
Bennett Potter and Ethel
Bennett Etherington.

DEMBE & DEMBE,
Solicitors for defendants Kate
Amelia Bennett, John E.
Smith and Edward H. Wells,
trustees, and Mechanics Trust
Company of New Jersey, sub- 20
stituted trustee under the last
will and testament of Edwin
H. Bennett, deceased.

PITNEY, HARDIN & SKINNER,
Solicitors for Thomas H. Bar-
ber, guardian ad litem of Ida
Stuart Potter, a minor de-
fendant.

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[Filed March 10, 1926.]

**Answer of the Mechanics' Trust Company
of N. J.**

IN CHANCERY OF NEW JERSEY.

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Between

EDWARD H. WELLS, Sole Execu-
tor and Trustee under the Last
Will and Testament of Serra
Bennett Wells, deceased,
Complainant,

20

and

KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS,
as Trustees under the Last
and Testament of Edwin H.
Bennett, Deceased; IDA BEN-
NETT POTTER, ETHEL BENNETT
ETHERINGTON and IDA POTTER,
Defendants.

On Bill, &c.

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The MECHANICS TRUST COMPANY OF NEW JER-
SEY, substituted Trustee for Kate Amelia Ben-
nett, John E. Smith and Edward H. Wells, Trus-
tees under the Last Will and Testament of Edwin
H. Bennett, deceased, answering the Bill of Com-
plaint filed in the above stated cause, respectfully
says:

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Answer of the Mechanics' Trust Company of N. J.

1. It admits the allegations of Paragraph 1 of the Bill, but for greater certainty refer to a certified copy of the last Will and Testament of Edwin H. Bennett to be produced.

2. It believes that said last Will and Testament contained the clauses in the second paragraph of said bill set out, but for greater certainty, beg to refer to a certified copy of said will. 10

3. It admits the allegations of paragraph 3 of said bill.

4. It admits the allegations of paragraph 4.

5. It admits the allegations of paragraph 5.

6. It admits the allegations of paragraph 6, of said bill, but for greater certainty it refers to a certified copy of the last will and testament of Serra Bennett Wells. 20

7. It believes that the said last will and testament of Serra Bennett Wells contains the provisions in the seventh paragraph of said bill quoted, but for greater certainty begs to refer to a certified copy thereof.

8. It admits the allegations of paragraph 8 of said bill. 30

9. It believes it to be true that the complainant makes the contention in the ninth paragraph of said bill set out, to the effect that Edwin H. Bennett, Jr., now deceased, Serra Bennett Wells, now deceased, and Ida Bennett Potter, at the time of the death of the said Edwin H. Bennett, each took a vested undivided third interest in the residue of the estate of the said Edwin H. Bennett under 40

Answer of the Mechanics' Trust Company of N. J.

and by virtue of his said will, subject to be divested by his or her death during the lifetime of the widow of said Edwin H. Bennett, Kate Amelia Bennett, leaving issue him or her surviving, and also subject to the life interest in the said residue
 10 of Kate Amelia Bennett, and to the payment of the annuities in the said will provided, and hence that upon the death of the said Serra Bennett Wells, the interest which it is claimed was vested in her, passed to the complainant as executor of her last will and testament, and forms a part of the estate left by the said Serra Bennett Wells.

10. This defendant admits the allegations of paragraph 10.

20 11. It admits the allegations in paragraph 11 of said bill.

12. This defendant has no interest under the said last will and testament of the said Edwin H. Bennett, other than as substituted Trustee in carrying out the terms and conditions therein contained, and in accordance with the true intent and meaning thereof, and is advised that Ida Bennett Potter and Ethel Bennett Etherington, two of the defendants to the Bill of Complaint
 30 made claim that instead of the interests of the said Edwin H. Bennett, Jr., Serra Bennett and Ida Bennett Potter, in and to the residue of the said estate being vested in them respectively at the time of the death of the said testator, subject to be divested on the contingency hereinabove referred to, that their said shares and interest in the said residue did not vest but rested contingent upon their respectively surviving the said Kate Amelia Bennett, widow of Edwin H. Ben-

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Answer of the Mechanics' Trust Company of N. J.

nett, deceased, and by their answers filed in this cause, pray the judgment and decree of this Honorable Court to that effect.

This defendant, therefore, joins with the complainant in a desire for a construction by this Court of the said last will and testament of the said Edwin H. Bennett and for a determination by the Court as to which of the said divergent claims touching the proper construction of the said last will and testament of Edwin H. Bennett is correct.

All of which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct.

DEMBE & DEMBE,

Solicitors of the Mechanics Trust Company of N. J., substituted Trustee for Kate Amelia Bennett, John E. Smith and Edward H. Wells, Trustees under the Last Will and Testament of Edwin H. Bennett, deceased.

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Answer of the Mechanics' Trust Company of N. J.

STATE OF NEW JERSEY, }
 COUNTY OF HUDSON, } ss. :

10 WALTER J. DALY, being duly sworn on his oath,
 according to law, deposes and says: That he is
 the Trust Officer of the Mechanics Trust Com-
 pany of N. J., that the Mechanics Trust Company
 of N. J. is the defendant in the foregoing Answer
 named; that the matters and things therein al-
 leged are true as they relate to the acts of the
 Mechanics Trust Company of N. J., and so far
 as they relate to the acts of others, he believes
 them to be true.

20 Subscribed and sworn to before me }
 this day of March, 1926. }

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Answer of Iris Wells by Guardian ad Litem.

[Filed March 10, 1926.]

IN CHANCERY OF NEW JERSEY.

<i>Between</i>		
EDWARD H. WELLS, individually and as sole Executor, etc., Complainant,	}	10
<i>and</i>		
KATE AMELIA BENNETT, and others, Defendants.	}	On Bill, etc.

The answer of Iris Wells, formerly Ida Potter, an infant under the age of twenty-one years, by Thomas Barber, her Guardian ad Litem, to the Bill of Complaint of Edward H. Wells, individually and as sole Executor and Trustee under the last Will and Testament of Serra Bennett Wells, deceased, complainant: 20

This defendant, answering by her said Guardian ad Litem, says: That she is a stranger to all and singular the matters and things in said Bill of Complaint contained other than that this defendant is informed that Serra Bennett Wells, deceased, died seized of or possessed of or entitled to an interest in the residue of the Estate of Edward H. Bennett, deceased, and that this defendant has or may have some interest therein; and this defendant being an infant of tender years submits herself to the judgment of this Honorable Court and prays that her said interest may be protected and saved to her. 30

THOMAS BARBER, Clerk,
Guardian ad Litem of 40
Iris Wells,

By PITNEY, HARDIN & SKINNER,
Solicitors.

Replication to Answer of Defendants Ida Bennett Potter and Ethel Bennett Etherington.

[Filed February 18, 1926.]

IN CHANCERY OF NEW JERSEY.

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Between

EDWARD H. WELLS, Sole Executor, etc.,
Complainant,

and

KATE AMELIA BENNETT, *et als.*,
Defendants.

On Bill, etc.

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The replication of Edward H. Wells, sole Executor, etc., to the answer of the defendants Ida Bennett Potter and Ethel Bennett Etherington.

The complaint joins issue on the answer of the said defendants.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

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**Replication to Answer of Defendant Mechanics'
Trust Company of N. J.**

[Filed March 13, 1926.]

IN CHANCERY OF NEW JERSEY.

<p style="text-align: center;"><i>Between</i></p> <p>EDWARD H. WELLS, Individually and as sole Executor and Trust- tee under the will of Serra Bennett Wells, Deceased, Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p>KATE AMELIA BENNETT, JOHN E. SMITH and EDWARD H. WELLS as Trustees under the last will and testament of Edwin H. Bennett, deceased, IDA BEN- NETT POTTER, ETHEL BENNETT ETHERINGTON and IDA POTTER, Defendants.</p>	<p>On Bill, etc.</p>	<p>10</p> <p>20</p> <p>30</p>
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The replication of Edward H. Wells, sole Execu-
tor, etc., to the answer of the defendant Mechan-
ics' Trust Company of N. J.

The complainant joins issue on the answer of
the said defendant.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

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**Replication to Answer of Iris Wells by Guardian
ad Litem.**

[Filed March 13, 1926.]

IN CHANCERY OF NEW JERSEY.

10

Between

EDWARD H. WELLS, Individually
and as sole Executor and Trus-
tee under the will of Serra
Bennett Wells, Deceased,
Complainant,

20

and

KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS
as Trustees under the last will
and testament of Edwin H.
Bennett, deceased, IDA BEN-
NETT POTTER, ETHEL BENNETT
ETHERINGTON and IDA POTTER,
Defendants.

On Bill, etc.

30

The replication of Edward H. Wells, sole Execu-
tor, etc., to the answer of the defendant Iris Wells
by Thomas Barber, her guardian ad litem.

The complainant joins issue on the answer of
the said defendant.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

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Testimony.

IN CHANCERY OF NEW JERSEY.

<i>Between</i>		
EDWARD H. WELLS, individually, and as Executor, etc., Complainant,	}	On Bill, &c.
<i>and</i>		
KATE AMELIA BENNETT, <i>et al.</i> , as Trustees, etc., Defendants.		10

Transcript of shorthand notes of testimony taken on final hearing in above stated cause, at Chancery Chambers, Jersey City, April 8, 1926, before His Honor James F. Fielder. 20

APPEARANCES.

Lindabury, Depue & Faulks (Mr. Faulks) for the complainant.

Dembe & Dembe (Mr. Harry Dembe) and McCarter & English (Mr. George McCarter) for defendants, Ida Bennett Potter and Ethel Bennett Etherington and Mechanics Trust Company. 30

Pitney, Hardin & Skinner (Mr. Ward) for the Guardian ad litem of defendant Iris Wells.

COMPLAINANT'S CASE

Mr. Faulks: I offer in evidence on behalf of the complainant copy of the will of Edwin H. Bennett,

Testimony.

deceased, which as appears from the certificate of the Register of the Prerogative Court attached thereto, was admitted to probate in such court July 8, 1898.

(Marked Exhibit C-1.)

10

Mr. Faulks: I also offer certified copy of the will of Serra Bennett Wells, late of the Town of Montclair, together with certificate of the Register of the Prerogative Court attached thereto, showing that said will was admitted to probate in that court on April 20, 1925.

(Marked Exhibit C-2.)

20

Mr. Faulks: I also offer in evidence copy of the decree of this court dated February 11, 1926, in the matter of the Estate of Edwin H. Bennett, deceased, by which the Mechanics Trust Company of New Jersey was appointed substituted trustee under the last will and testimony of the said Edwin H. Bennett, deceased, in the place of the then trustees, namely, Kate Amelia Bennett, John E. Smith and Edward H. Wells.

(Marked Exhibit C-3.)

30

Mr. Faulks: I also offer in evidence certified copy of the decree of the Essex County Orphans' Court in the matter of the Estate of Ida Stuart Potter, a minor, dated February 19, 1926, by which the name of the minor defendant in this proceeding, who, in the bill, is named Ida Potter is changed to Iris Wells.

(Marked Exhibit C-4.)

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De Witt Van Buskirk, for Complainant—Direct.

DE WITT VAN BUSKIRK, sworn as a witness on the part of the complainant, testifies as follows:

Direct examination by Mr. Faulks:

Q. Where do you reside? A. At Bayonne.

Q. Are you a member of the bar of the State of New Jersey? A. I am. 10

Q. You have, I believe, also some official connection with the Mechanics Trust Company of New Jersey? A. I am president of the Mechanics Trust Company.

Q. Where is its principal office located? A. At the City of Bayonne.

Q. How long have you lived in Bayonne? A. All my life.

Q. Did you formerly know Mr. Edwin H. Bennett, a resident of Bayonne? A. Very well, indeed, I did. 20

Q. Where did he reside at the time of his death? A. His official residence was Bayonne.

Q. Do you know the date of his death? A. July 8, 1898.

Q. Is that the same Mr. Bennett, a certified copy of whose will has been offered in this proceeding and marked Exhibit C-1? A. It is.

Q. Do you know whom Mr. Bennett left him surviving as his next of kin and heirs at law? A. His widow, Kate Amelia Bennett, a son Edwin H. Bennett, Jr.; a daughter Ida Bennett, and a daughter Serra Bennett, afterwards married to Edward H. Wells. 30

Q. Did you know the family? A. Very well.

Q. Do you know which of them are still living? A. Mrs. Kate Amelia Bennett is still living; also Ida Bennett, who is now Ida Bennett Potter, and that is all. 40

De Witt Van Buskirk, for Complainant—Direct.

Q. Do you know the date of the death of Edward H. Bennett, Jr., the son of the testator? A. February 21, 1912.

Q. Whom, if you know, did he leave him surviving? A. He left his daughter Ethel Bennett.

10 Q. Any other children? A. No other children. She is married to C. Kenneth Etherington, and is living at Montclair, New Jersey.

Q. What is her present name? A. Ethel Bennett Etherington.

Q. Do I understand you to have already testified that Ida Bennett, a daughter of the testator, is still living? A. She is still living. She is married to Palmer A. Potter.

20 Q. Whom did Serra C. Bennett marry? A. Edward H. Wells, the complainant in this case.

Q. She has since died? A. She died April 1, 1925.

Q. It appears by Exhibit C-3 that the Mechanics Trust Company of New Jersey, of which you are the president, has been appointed as substituted trustee under the will of Edwin H. Bennett. Has your Trust Company qualified and is it now acting as such substituted trustee? A. It has, and it is acting.

30 Q. Are you familiar with the assets which make up the Estate of Edwin H. Bennett? A. I am.

Q. Have you made any computation, Mr. Van Buskirk, with regard to the amount of Federal Estate and New Jersey Inheritance taxes that will be payable by Mrs. Wells' estate in case it is determined that she had, at the time of her death, a vested interest in her father's estate, namely the Estate of Edwin H. Bennett, as compared with the amount of such taxes in case she had no such interest? A. I have had a calculation made.

40

De Witt Van Buskirk, for Complainant—Direct.

Q. Will you state to the Court the figures? A. In the case of the New Jersey Taxes, in round figures it was \$33,800 or \$34,000 in round figures; the Federal taxes, \$17,600; a total of about \$51,000.

Q. That is the difference, as I understand? A. 10
Yes.

Q. Or excess, that the Estate of Mrs. Wells, or the beneficiaries under her will, will be compelled to pay for such taxes over and above what would have to be paid in case she is determined not to have a vested interest in her father's estate? A. Yes.

Q. Therefore, that is the amount that is in controversy in this suit? A. It is.

Q. Will you make a statement as to the taxes 20
that will be payable, either as Federal Estate taxes or New Jersey inheritance taxes, first, in the event that Mrs. Wells had a vested interest in her father's estate, and second, in the event that she should be determined to have had no such interest? A. If she had an interest in the estate, the taxes would be \$36,100.

Q. Which tax is that? A. That is the New Jersey tax; and if she had no interest, then the tax will be \$2,200, or something like that. The difference is the amount that I have testified to, 30
\$33,800 or practically \$34,000.

Q. That is the difference in the New Jersey Inheritance tax? A. Yes; and if she had a vested interest the Federal tax would be \$17,700. If she had no such interest, the tax would be only \$39, a difference of \$17,600; and, as I have said, the total difference, state and federal, between the vested estate and if she has not a vested estate, is about \$51,500. 40

De Witt Van Buskirk, for Complainant—Cross.

Cross-examination by Mr. Dembe:

Q. Have you a statement as to the approximate amount of the estate of Edwin H. Bennett now in the possession of the Mechanics Trust Company as trustee? A. I have.

10

Q. Will you tell us what it is—just the total? A. Two million dollars.

By Mr. Ward:

Q. I understood you to testify that Mr. Bennett, the testator, died July 8, 1898. Is not the correct date June 27, 1898? The record shows his will was probated July 8, 1898. A. My memorandum shows that he died on that date. I have no personal recollection about it, it is so long ago.

20

Q. Is the sister of the testator, Alice Bennett, still living and one of the annuitants under the will? A. Yes.

Q. Is the stepmother, Emeline E. Bennett, one of the annuitants, still living? A. No; she is dead.

Q. Did I understand you to testify that Edwin H. Bennett, Jr., left surviving a daughter, Ethel Bennett? A. Yes.

30

Q. Did you testify as to whether the widow is surviving? A. His widow is surviving.

Q. Agnes Bennett? A. Agnes Bennett.

Q. Have any children ever been born to the daughter Ida Bennett Potter? A. Not to my knowledge.

Mr. McCarter: I have no questions.

40

Edward H. Wells, Complainant—Direct.

EDWARD H. WELLS, the complainant, sworn as a witness in his own behalf, testifies as follows:

Direct examination by Mr. Faulks:

Q. Where do you reside? A. Montclair, New Jersey. 10

Q. You are the complainant in this suit? A. I am.

Q. Both individually and as executor of the will of your late wife, Serra C. Bennett? A. Yes.

Q. When did Mrs. Wells die? A. April 1, 1925.

Q. Did she leave a last will and testament? A. She did.

Q. I show you Exhibit C-2 and ask you if that is a copy of such will? A. It is.

Q. Mrs. Wells was not married prior to her marriage to you, was she? A. No. 20

Q. And at that time what was her maiden name? A. Serra Christie Bennett.

Q. Did she have any children? A. No. Wait a moment—a still born child.

Q. She left no child her surviving? A. No.

Q. One of the parties to this suit, Mr. Wells, is named in the bill of complaint as a minor defendant, Ida Potter. Since the bill of complaint was filed, have you adopted this child? A. I have. 30

Q. I show you Exhibit C-4, being a copy of the decree of the Essex County Orphans Court, dated February 19, 1926. Is that a copy of the decree by which such adoption was effected? A. It is.

Q. What is the child's present name? A. Iris Wells.

Q. Have you qualified as executor of Mrs. Wells' estate? A. I have.

Edward H. Wells, Complainant—Direct.

Q. And are exercising the duties of that office?

A. I am.

The Court: Any questions?

Mr. Dembe: None.

Mr. Ward: No questions.

Mr. McCarter: No questions.

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COMPLAINANT RESTS.

DEFENDANTS RESTS.

CASE CLOSED.

Exhibit C-1.

20 Last Will and Testament of Edwin H. Bennett,
deceased. (Printed at pages 9 to 12, *supra.*)

Exhibit C-2.

Last Will and Testament of Serra Bennett
Wells, deceased. (Printed at pages 12 to 16,
supra.)

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Exhibit C-3.**Order Discharging Trustees and Appointing
Substituted Trustee in the Matter of the Estate
of Edwin H. Bennett, Deceased.**

IN CHANCERY OF NEW JERSEY.

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IN THE MATTER
of the
Estate of EDWIN H. BENNETT,
Deceased.

On Petition for
Discharge of
Trustees and

Appointment of
Substituted
Trustee.

This matter being opened to the court by Fred-
eric J. Faulks, Esq., of counsel, with the peti-
tioners, in the presence of H. B. Dembe, Esq.,
counsel for the respondents Ida Bennett Potter,
Ethel Bennett Etherington and Alice Bennett
Middleton, and William H. Campbell, Esq., coun-
sel for the respondent Edward H. Wells, as execu-
tor of the last will and testament of Serra Ben-
nett Wells, deceased, and upon reading and filing
the petition of Kate Amelia Bennett, John E.
Smith and Edward H. Wells dated February 8th,
1926, duly verified, wherein it appears that the
said petitioners are the trustees under the last will
and testament of Edwin H. Bennett, late of the
City of Bayonne, in the County of Hudson and
State of New Jersey, and are now acting as trus-
tees thereunder and engaged in the administration
of the trusts created thereby and that the said
petitioners now desire to be discharged from the
further performance of their duties as trustees as
aforesaid and that the Mechanics Trust Company

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Exhibit C-3.

of New Jersey may be appointed trustee as aforesaid in their place and stead.

10 AND IT FURTHER APPEARING that the said Ida Bennett Potter, Ethel Bennett Etherington, Alice Bennett Middleton and the said Edward H. Wells as executor of the last will and testament of Serra Bennett Wells, deceased, constitute all of the persons in being who are interested as cestuis que trustent under said trusts and that each of the said respondents has by her or his consent duly proven consented to the discharge of the said petitioners as trustees as aforesaid and to the appointment of said Mechanics Trust Company of New Jersey as such trustee in the place and stead of the said petitioners.

20 AND IT FURTHER APPEARING that all of the said persons in being interested as cestuis que trustent under said trusts are of full age, and that there is sufficient reason for such discharge, and counsel as aforesaid for the said respondents joining in the said application,

30 IT IS, on this eleventh day of February, 1926, on motion of Messrs. Lindabury, Depue & Faulks, solicitors for the said petitioners, ORDERED as follows:

1. That Mechanics Trust Company of New Jersey, having its principal office and place of business at No. 19 West Eighth Street, in the City of Bayonne, County of Hudson and State of New Jersey, be and it hereby is appointed trustee under the last will and testament of the said Edwin H. Bennett, deceased, and of the trusts created thereby, with the same power, authority and dis-

Exhibit C-3.

cretion with respect to the investment, management, conversion, sale and other disposition of the said trust estate of the said Edwin H. Bennett, deceased, or so much thereof as may be necessary for the proper administration of the trusts thereof, as was given to or vested in the original trustees named in the said will and with all the rights, powers, duties and privileges incident to such appointment. 10

2. That the said Mechanics Trust Company of New Jersey shall qualify as such trustee by entering into a bond to the Chancellor of the State of New Jersey in the sum of \$2,000,000. conditioned for the faithful performance of its duties as such trustee in the manner prescribed in an Act entitled "An Act concerning trust companies" Revision of 1899 and the supplements and amendments thereto, specifying the security required for the faithful performance of its duties as such trustee. 20

3. That the said Kate Amelia Bennett, John E. Smith and Edward H. Wells be and they are hereby relieved and discharged from all further duties of their said office as trustees, except accounting for, paying over and delivering the money and assets received by them by virtue of their said office. 30

4. That among the assets so to be paid over and delivered by the said petitioners to the said Mechanics Trust Company of New Jersey there shall be included any and all of the stock certificates, mortgages or other securities now making up part of the trust estate which have heretofore been deposited and are now on deposit with the 40

Exhibit C-3.

10 said Mechanics Trust Company of New Jersey under the order made by this Court under date of July 31, 1914, "In the matter of the application of John E. Smith and Kate Amelia Bennett, Trustees under the last will and testament of Edwin H. Bennett, deceased," for the appointment of an additional trustee under such last will and testament, and that upon the petitioners so doing said order of July 31, 1914, in so far as it required said securities to remain in deposit with the said Mechanics Trust Company of New Jersey shall thereafter be of no further force or effect.

20 5. That said payment over and delivery of said assets shall be made by said petitioners to said Mechanics Trust Company of New Jersey as soon as it has qualified as such trustee in the manner aforesaid, and said accounting shall be made by said petitioners in the Prerogative Court of New Jersey with all convenient speed.

E. R. WALKER,
C.

30 A True Copy
THOMAS BARBER,
Clerk

Respectfully advised,
ALONZO CHURCH, V. C.

Exhibit C-4.

**Decree of the Essex County Orphans' Court in
the Matter of the Application of Edward H.
Wells for Leave to Adopt Ida Stuart Potter, a
Minor.**

ESSEX COUNTY ORPHANS' COURT

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IN THE MATTER

of the

Application of EDWARD H. WELLS
for leave to adopt Ida Stuart
Potter, a minor.

ON PETITION.

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WHEREAS, Edward H. Wells, on the 9th day of February, 1926, presented his petition to this Court, setting forth that he resides at Number 100 South Mountain Avenue in the Town of Montclair, County of Essex and State of New Jersey; that the business of the said Edward H. Wells is that of an officer of a manufacturing corporation; that the age of the said Edward H. Wells is sixty-six years; that he desires to adopt Ida Stuart Potter, a minor child, age about 10 years, and who is now living with the said Edward H. Wells at Number 100 South Mountain Avenue, in the said Town of Montclair, County and State aforesaid; that the said Ida Stuart Potter was adopted on November 24, 1916, by Palmer A. Potter and Ida B. Potter who are now the parents by adoption of the said Ida Stuart Potter; that said minor,

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Exhibit C-4.

Ida Stuart Potter, is possessed of a contingent interest in the estate of Serra Bennett Wells, the deceased wife of said Edward H. Wells, the value of which contingent interest is uncertain and cannot now be determined; and praying that the

10 Court would inquire into the merits of the said petition and would by its decree grant permission to the said Edward H. Wells to adopt said child and to change the name of the said child to Iris Wells, to which petition there was annexed an affidavit of the said petitioner duly verifying the same according to law, and the duly acknowledged written consent of Palmer A. Potter and Ida B. Potter, parents by adoption of the said Ida Stuart Potter, to the adoption of the said Ida Stuart Potter by the said Edward H. Wells and to the

20 change of the name of the said Ida Stuart Potter to Iris Wells.

WHEREUPON, and upon reading the said petition, affidavit and consent, the Court ordered that the same be filed with the Clerk of the Court; and the same were filed accordingly and the Court thereupon assigned the 19th day of February, A. D. One Thousand Nine Hundred and Twenty-six for the hearing of said petition and the examination of the parties in interest; and, upon

30 the day so appointed the Court proceeded to a full hearing of the petition and the examination of the petitioner, the said minor child, and all other parties in interest, under oath, and, Maebelle Bower, the natural mother of said minor, Ida Stuart Potter, having consented in writing to such adoption and change of name as appears by her written consent duly acknowledged and now on file in this Court, and the Court being of the

Exhibit C-4.

opinion that the facts stated in the petition are true and being satisfied that the petitioner is of good moral character and of reputable standing in the community and of ability to properly maintain and educate said child, reference being had to the degree and condition in life of the child's parents by adoption and that the best interests of the child would be promoted by such adoption. 10

NOW THEREFORE, by virtue of the Act in such case made and provided, it is ordered, adjudged and decreed that the prayer of the said petitioner be and the same is hereby granted; and that said Ida Stuart Potter, a minor child of Palmer A. Potter and Ida B. Potter parents by adoption, shall hereafter be known by the name of Iris Wells; and it is further ordered, adjudged and decreed that from the date of this decree the rights, privileges, duties and relations heretofore existing between the said Ida Stuart Potter and her adopted parents, Palmer A. Potter and Ida B. Potter, shall be and are in all respects at an end, excepting the right of inheritance; and that the rights, privileges, duties and relations of the said infant, Ida Stuart Potter and the said Edward H. Wells, her parent by adoption, are and shall henceforth be the same, including the right of inheritance as if the said Ida Stuart Potter had been born to the said adopted parent Edward H. Wells in lawful wedlock, excepting only as otherwise provided in an Act entitled, "An Act concerning minors, their adoption, custody and maintenance," approved April 2, 1902, and the several supplements and amendments thereto. 20 30

Done in open Court, this 19th day of February, A. D., One Thousand Nine Hundred and Twenty-six. 40

DALLAS FLANNAGAN,
Judge.

*Exhibit C-4.*STATE OF NEW JERSEY,
ESSEX COUNTY SURROGATE'S COURT.

10 I, E. GARFIELD GIFFORD, Surrogate of the County
of Essex, and Clerk of the Orphans' Court of said
County, do hereby certify the foregoing to be a
true copy of the Decree for Adoption, in the mat-
ter of Ida Stuart Potter, a minor, as the same
appears on file and of record in this office.

WITNESS MY HAND AND SEAL OF OFFICE, this
Sixteenth day of March, in the year of
[SEAL] our Lord, one thousand nine hundred
and twenty-six.

20 E. GARFIELD GIFFORD,
Surrogate and Clerk.

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Conclusions of Vice-Chancellor Fielder.

[Filed May 4, 1926.]

April 20, 1926.

59-713.

IN CHANCERY OF NEW JERSEY.

10

<i>Between</i>		
EDWARD H. WELLS, individually, etc.,	Complainant,	} On Bill for Construction of Will.
<i>and</i>		
KATE AMELIA BENNETT, <i>et al.</i> , Defendants.		

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Frederic J. Faulks, Esq., for complainant.

Harry B. Dembe, Esq., and George W. C. McCarter, Esq., for defendants, Ida Bennett Potter, et al.

Waldron M. Ward, Esq., for defendant Iris Wells.

FIELDER, V. C.

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This suit calls for construction of the will of Edwin H. Bennett who died June 27, 1898. He gave and devised the residue of his estate, in trust to pay specified annuities and to pay the balance of the income to his wife for life and

“Seventh: After the death of my wife, I direct that the residue of my trust estate be equally divided among my children, share and share alike, and in the event of any of my

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Conclusions of Vice-Chancellor Fielder.

children dying before my wife, and leaving them surviving, at the time of the death of my said wife, lawful issue, said issue are to take the share their parent would have taken if living.”

10 The testator left him surviving his widow, who is still alive and three children, one of whom, Serra C. Bennett, married the complainant Edward H. Wells. She died April 1, 1925, without issue, leaving a will under which the complainant is executor.

20 The question to be determined is whether, upon the death of the testator, his said daughter took a vested interest in his residuary estate, subject only to being divested on her death in the life time of the testator's widow, leaving issue; or whether the share given Mrs. Wells in the testator's residuary estate was contingent upon her surviving the testator's widow and was not intended to vest in Mrs. Wells unless she survived said widow.

30 The intention of the testator, as disclosed by his will, is that his residuary estate should belong to his children “equally” and “share and share alike,” or in case of the death of any of them leaving issue, before the time arrived for entering into possession, then such issue to take the deceased parent's share and he postponed the time for possession only for the purpose of providing for his wife as long as she might live. He did not provide that in case of the death of a child without leaving issue, the surviving children should take the share of the deceased child, or that the share of the one so dying should be divested and go elsewhere.

Conclusions of Vice-Chancellor Fielder.

Where a will gives and devises a remainder but postpones payment merely for the purpose of letting in a life interest, the rule is that the remainder vests immediately upon the death of the testator (*Post vs. Herbert*, 27 N. J. Equity, 540; *Howell v. Green*, 31 N. J. Law, 570; *Miller v. Wor-* 10
rall, 59 N. J. Equity, 134; *Trenton Trust Co. v. Moore*, 83 N. J. Equity, 548, affirmed 84 N. J. Equity, 194; *Redmond v. Gummere*, 94 N. J. Equity, 216).

It follows that Mrs. Wells' share in the testator's residuary estate vested in her immediately upon the death of the testator. The event which alone could divest her, namely, her death leaving issue, not having occurred, she died seized of her share and it will pass under her will. 20

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Final Decree.

[Filed April 26, 1926.]

IN CHANCERY OF NEW JERSEY.

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Between

EDWARD H. WELLS, Individually
and as sole Executor and Trustee
under the last will and testament
of Serra Bennett Wells,
deceased,

Complainant,

and

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KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS,
as Trustees under the last
will and testament of Edwin
H. Bennett, deceased, IDA BENNETT
POTTER, ETHEL BENNETT
ETHERINGTON and IDA POTTER,
Defendants.

On Bill, etc.

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This cause coming on to be heard in the presence
of Frederic J. Faulks, Esq., of counsel with the
complainant; Robert H. McCarter, Esq., George
W. C. McCarter, Esq. and Harry Dembe, Esq., of
counsel with the defendants, Ida Bennett Potter,
Ethel Bennett Etherington and Mechanics Trust
Co. of New Jersey, Trustee; and Waldron M.
Ward, Esq., of Messrs. Pitney, Hardin & Skinner,

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Final Decree.

of counsel with Thomas Barber, Clerk in Chancery, guardian ad litem of the defendant, Iris Wells, and the pleadings and proofs having been read and the respective counsel having been heard and the Court having duly considered the said pleadings, proofs and arguments,

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AND IT DULY APPEARING that on the 27th day of June, 1898, Edwin H. Bennett died a resident of the City of Bayonne, County of Hudson and State of New Jersey, leaving a last will and testament which was duly admitted to probate by the Prerogative Court of New Jersey on the 8th day of July, 1898; that the said Edwin H. Bennett left him surviving his widow, Kate Amelia Bennett, a son, Edwin H. Bennett, Jr.; a daughter, Ida Bennett, who subsequently married Palmer A. Potter and became and now is Ida Bennett Potter; and a daughter, Serra C. Bennett, who subsequently married the complainant, Edward H. Wells and became Serra Bennett Wells; that the said last will and testament of the said Edwin H. Bennett, after providing for certain devises and bequests to his said wife and to his said son, provided in and by the 4th, 5th, 6th and 7th paragraphs thereof as follows:

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“FOURTH: I give, devise and bequeath all the rest and residue of my estate, both real and personal, of every kind and description, of which I may die seized or possessed, or to which I may be entitled to, or have an interest in at the time of my death, to my executors and trustees hereinafter named, to have and to hold the same IN TRUST, NEVERTHELESS, for the following uses and purposes:

To invest the same in good, safe interest-bearing securities wherever not already in-

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Final Decree.

10 vested at the time of my death. All stocks held by me in corporations may remain so invested unless the majority of my trustees deem it for the best interests of my estate to change such investment, in which case they may sell any part, or all of my stock in any company and re-invest the proceeds therefrom; such new investment to be charged with the same trust as the original investment. From the income received from my said trust estate, I direct my said trustees

To pay to my daughters, Sarah C. Bennett and Ida J. Bennett each, One Thousand Dollars, annually, to be paid to them in quarterly payments.

20 To pay to my sister, Alice Bennett, of Brooklyn, New York, the sum of Three hundred and Fifty Dollars per year, during the term of her natural life.

To pay to my step-mother, Emeline E. Bennett, of Brooklyn, New York, the sum of One hundred and Fifty Dollars per year during the term of her natural life.

To pay all the rest and residue of said income from said estate to my wife, Kate A. Bennett, during the term of her natural life, such payments to be paid to her quarterly.

30 "FIFTH: The above provisions made for the benefit of my wife are to be in lieu of her dower, and right of dower, in any and all real estate of which I may die seized.

"SIXTH: If, after the death of my said wife, my step-mother, Emeline E. Bennett and my sister, Alice Bennett, be still living, or either of them, I direct that my trustees shall set aside from my said trust estate a sum sufficient to pay the annuities hereinbefore provided for them, or either of them, and at their death the said principal sum to be divided as hereinafter provided for the rest of my said trust estate.

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Final Decree.

“SEVENTH: After the death of my wife, I direct that the residue of my trust estate be equally divided among my children, share and share alike, and in the event of any of my children dying before my wife, and leaving them surviving, at the time of the death of my said wife, lawful issue, said issue are to take the share their parent would have taken if living.” 10

AND IT FURTHER DULY APPEARING that the said Kate Amelia Bennett, widow of the said Edwin H. Bennett, the said Ida Bennett Potter, daughter of the said Edwin H. Bennett, and Alice Bennett, sister of the said Edwin H. Bennett, are still living and that Emeline E. Bennett, stepmother of the said Edwin H. Bennett, is deceased; that Edwin H. Bennett, Jr., son of the said Edwin H. Bennett, deceased, died on the 21st day of February 1912, leaving his widow, Agnes Bennett, and leaving as his only issue him surviving, a daughter, Ethel Bennett, who subsequently married C. Kenneth Etherington and became and now is Ethel Bennett Etherington, who is still living; that Serra Bennett Wells, daughter of the said Edwin H. Bennett, died a resident of the Town of Montclair, County of Essex and State of New Jersey on the 1st day of April, 1925, leaving her husband, the said Edward H. Wells, but without leaving issue, her surviving, and leaving a last will and testament in and by which she appointed the said Edward H. Wells sole executor and trustee thereof, which said last will and testament was duly admitted to probate by the Prerogative Court of New Jersey on the 20th day of April, 1925, and under which letters testamentary have been issued to the said Edward H. Wells who is 20 30 40

Final Decree.

10 now acting as the executor and trustee thereof; that the said Serra Bennett Wells in and by said last will and testament, after bequeathing the sum of \$25,000 to her said sister, Ida Bennett Potter, and all of her jewelry and household effects to her said husband, provided in and by the 5th paragraph thereof as follows:

20 “FIFTH: All the rest, residue and remainder of my estate and property, including all thereof passing to me under the will of my father, Edwin H. Bennett, or which may pass to me from my mother, Kate A. Bennett, I give, bequeath and devise to the executor of this my last will and testament and the trustee thereunder hereinafter named, IN TRUST, nevertheless for the following uses and purposes:

(a) To hold the same as long as may be needed to carry out the trusts hereinafter set forth and during such time to collect the income therefrom and to pay over and accumulate the net income thereof as hereinafter is directed.

(b) To pay over all of such net income to my said husband in such installments as he may from time to time elect so long as he may survive me.

30 While I know that out of such net income my said husband will from time to time make proper provision for the maintenance, education and comfort of Ida Potter, who lives with us, and it is my earnest wish that he shall do so, I intend him to have all of said income during said period free of any trust whatsoever and without any liability to so use any thereof or to account therefor to any one.

40 (c) After the death of my said husband, from time to time to pay out of the net

Final Decree.

income of the said residue thereafter accruing such part thereof as in the uncontrolled judgment of my said executor or trustee may seem advisable for the maintenance, education and comfort of the said Ida Potter until she shall attain the age of thirty years, and then to transfer and pay over to her all of said residue, with any accumulation thereof as there then may be, as and for her own absolute property. 10

(d) In case the said Ida Potter shall not live to attain the age of thirty years, then upon the death of the survivor of her and my said husband I give and bequeath all of said residue and any such accumulation of net income therefrom to my said sister, IDA BENNETT POTTER.”

AND IT FURTHER DULY APPEARING that by a decree of the Essex County Orphans' Court dated February 19, 1926, the name of the Ida Potter mentioned in the above recited 5th paragraph of the said will of the said Serra Bennett Wells was changed to Iris Wells and that said Iris Wells is an infant under the age of 14 years; 20

AND the Court being of the opinion that the complainant is entitled to have the said last will and testament of Edwin H. Bennett, deceased, construed in so far as the same affects the right which the complainant claims thereunder individually and as executor and trustee under the last will and testament of Serra Bennett Wells, deceased, and to have a declaration of the rights of the complainant under the will of the said Edwin H. Bennett, deceased, in the rest and residue of his said estate. 30

IT IS, thereupon, on this 26th day of April 1926, on motion of Frederic J. Faulks, Esq., of counsel 40

Final Decree.

with the complainant, by Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED AND DECREED and the said Chancellor, by virtue of the power and authority of this Court, doth hereby ORDER, ADJUDGE AND DECREE as follows:

10 1. That the said Serra Bennett Wells, at the time of her death, had an absolute, vested one third interest in the rest and residue of the estate of said Edwin H. Bennett, deceased, subject to the life interest therein of the said Kate Amelia Bennett and to the payment of the annuities in said will provided and that said interest of said Serra Bennett Wells passed at her death to complainant as sole executor and trustee under her last will and testament and now forms a part of
20 the estate left by the said Serra Bennett Wells.

2. That out of the principal of the said estate of Edwin H. Bennett, deceased, there should be paid costs of the complainant and of the respective defendants herein to be taxed by the Clerk and that in the costs to be taxed and so paid there shall be included the following counsel fees:

To Frederic J. Faulks, Esq., of counsel with complainant, the sum of \$1500.00.

30 To Robert H. McCarter, Esq. and Harry Dembe, Esq., of counsel with the defendants, Ida Bennett Potter, Ethel Bennett Etherington and Mechanics Trust Company of New Jersey, Trustee, the sum of \$1500.00., and to Messrs. Pitney, Hardin & Skinner, of counsel with the said guardian ad litem of the defendant Iris Wells, the sum of \$1000.00.

Respectfully advised,

JAMES F. FIELDER,
V. C.

E. R. WALKER,
Chancellor.

Notice of Appeal.

[Filed May 5, 1926.]

IN CHANCERY OF NEW JERSEY.

59-713.

<i>Between</i>	}	10
EDWARD H. WELLS, individually, etc.,		On Appeal from Court of Chancery
Complainant,		
<i>and</i>		
KATE AMELIA BENNETT, <i>et al</i> , Defendants.		

The defendants, Ida Bennett Potter, and Ethel Bennett Etherington, hereby appeal from the final decree made in this Court in the above stated cause on the Twenty-sixth day of April, nineteen hundred and twenty-six, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last resort in all causes.

DEMBE & DEMBE,
Solicitor of Defendants, Ida Ben-
nett Potter, and Ethel Bennett
Etherington.

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

ROBT. H. McCARTER,
Of Counsel for Defendants.

Due and timely service of the within notice of appeal is hereby acknowledged this 27th day of April, 1926.

LINDABURY, DEPUE & FAULKS,
Solicitors for Complainant.

PITNEY, HARDIN & SKINNER,
Solicitors for Guardian ad
litem of minor defendant,
Iris Wells.

Petition of Appeal.

[Filed May 6, 1926.]

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10 EDWARD H. WELLS, Individually
and as sole Executor and Trust-
tee under the Last Will and
Testament of Serra Bennett
Wells, deceased,
Complainant Respondent,

vs.

20 KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS,
as Trustee under the Last Will
and Testament of EDWIN H.
BENNETT, Deceased, IDA BEN-
NETT POTTER, ETHEL BENNETT
ETHERINGTON and IDA POTTER,
Defendants-Appellants.

On Bill, &c.
Petition.

On Appeal
from
Court of Chancery

*To the Honorable Court of Errors and Appeals
in the last resort in all causes:*

30 The petition of Ida Bennett Potter and Ethel
Bennett Etherington, the defendants-appellants
in the above stated cause, respectfully shows that
your Petitioners find themselves aggrieved by a
final decree made in the Court of Chancery by
his Honor, Edwin Robert Walker, Chancellor of
the State of New Jersey, bearing date of April 26,
1926, wherein Edward H. Wells, individually and
as sole Executor and Trustee under the Last Will
and Testament of Serra Bennett Wells, deceased,

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Petition of Appeal.

was Complainant, and your Petitioners and others, defendants, in this respect, to wit: that in and by the said final decree, it is amongst other things adjudged:

1. That the said Serra Bennett Wells, at the time of her death, had an absolute, vested one third interest in the rest and residue of the estate of said Edwin H. Bennett, deceased, subject to the life interest therein of the said Kate Amelia Bennett and to the payment of the annuities in said will provided and that said interest of said Serra Bennett Wells passed at her death to complainant as sole executor and trustee under her Last Will and Testament and now forms a part of the estate left by said Serra Bennett Wells.

Your Petitioners hereby appeal from such decree upon the ground that the same is erroneous and contrary to law in that the Court should have adjudged and decreed that the said Serra Bennett Wells at the time of her death, did not own or have an absolute, vested one-third interest in the rest and residue of the Estate of the said Edwin H. Bennett, deceased, subject to the life interest therein of the said Kate Amelia Bennett, and to the payment of annuities, which passed at her death to the Complainant as sole Executor and Trustee under her Last Will and Testament, but that the interest of the said Serra Bennett Wells under the Will of the said Edwin H. Bennett, was contingent upon her surviving the life tenant, Kate Amelia Bennett, and that upon the death of the said Serra Bennett Wells in the lifetime of Kate Amelia Bennett leaving no issue her surviving, the said Serra Bennett Wells had no interest or property of any kind in the rest and residue of the Estate of the said Edwin H. Bennett,

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Petition of Appeal.

deceased, which passed at her death to the Complainant as sole Executor and Trustee under her Last Will and Testament.

10 Your Petitioners therefore pray that the said decree of the Chancellor may be reversed and set aside and for nothing holden, and that your Petitioners may have such relief in the premises as to this Honorable Court shall seem meet, and your Petitioners will every pray, etc.

DEMBE & DEMBE,
Solicitors of Appellants.
ROBERT H. McCARTER,
of Counsel with Appellants.

20 Service of the within Petition of Appeal is hereby acknowledged this 5th day of May, 1926.

LINDABURY, DEPUE & FAULKS,
Solicitors of Edward H. Wells,
Individually and as Executor,
Complainant and Respondent.

30 PITNEY, HARDIN & SKINNER,
Solicitors of Guardian ad
litem of minor defendant,
respondent, Iris Wells.

**Answer of Edward H. Wells to Petition
of Appeal.**

[Filed May 6, 1926.]

59—713.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

BETWEEN

EDWARD H. WELLS, Individually
and as sole Executor and Trus-
ee under the Will of Serra
Bennett Wells, deceased,
Complainant-Respondent,

and

KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS,
as Trustees under the last
Will and Testament of Edwin
H. Bennett, deceased, and IDA
POTTER,

Defendants,

and

IDA BENNETT POTTER and ETHEL
BENNETT ETHERINGTON,
Defendants-Appellants,

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On Bill, etc.
On Appeal
from Chancery.

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The answer of Edward H. Wells, individually and as sole executor and trustee under the last will of Serra Bennett Wells, deceased, respondent, to the petition of appeal of the above named appellants.

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*Answer of Edward H. Wells to Petition of
Appeal.*

10 This respondent, not acknowledging all or any
of the matters which in the said petition of ap-
peal are contained to be true, for answer thereto
nevertheless says and admits that a decree was
on the twenty-sixth day of April, one thousand
nine hundred and twenty-six made and entered in
the Court of Chancery in the cause for that pur-
pose mentioned in the said petition, as is therein
stated; but as to the substance and form thereof,
this respondent prays to refer thereto when the
same shall be produced. And this respondent is
advised and believes that the said decree appealed
from by the said appellants is agreeable to equity
and he prays that the said decree may be affirmed
20 with costs to be adjudged to this respondent.

LINDABURY, DEPUE & FAULKES,
Solicitors for and of counsel
with EDWARD H. WELLS, In-
dividually and as sole Exe-
cutor and Trustee under the
Will of Serra Bennett
Wells, deceased.
Complainant-Respondent.

30 Due and timely service of the within answer to
the Petition of Appeal is hereby acknowleged this
5th day of May, 1926.

DEMBE & DEMBE,
Solicitors for Defendants-Appellants, Ida Bennett Potter
and Ethel Bennett Ether-
ington.

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**Answer of Iris Wells to Petition of Appeal of
Ida Bennett Potter and Ethel Bennett Ether-
ington.**

[Filed May 6, 1926.]

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

BETWEEN

EDWARD H. WELLS, Individually
and as sole Executor and Trus-
tee under the last will and tes-
tament of Serra Bennett Wells,
deceased,
Complainant-Respondent,

and

MECHANICS TRUST COMPANY OF
NEW JERSEY, Substituted Trus-
tee under the last will and tes-
tament of Edwin H. Bennett,
deceased, and IRIS WELLS,
Defendants-Respondent,

and

IDA BENNETT POTTER and ETHEL
BENNETT ETHERINGTON,
Defendants-Appellants,

On Appeal
from Chancery.

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The answer of Iris Wells, infant respondent,
by Thomas Barber, Clerk in Chancery, her guard-
ian ad litem, to the petition of appeal of the above
named appellants.

This respondent, not acknowledging all or any
of the matters which in the said petition of ap-
peal are contained to be true, for answer thereto,

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Answer of Iris Wells to Petition of Appeal of Ida Bennett Potter and Ethel Bennett Etherington.

10 by her guardian ad litem, nevertheless says that a decree was, on the twenty-sixth day of April, 1926, made and entered in the Court of Chancery in the cause for the purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.

20 And this respondent is advised and believes that the portions of said decree appealed from by said appellants is agreeable to equity and prays that the same be affirmed with costs to be adjudged to this respondent; and this respondent, being an infant of tender years, submits herself to the judgment of this court and prays that her interest in the subject matter of said appeal may be protected and saved to her.

PITNEY, HARDIN & SKINNER,
Solicitors for and of counsel
with Thomas Barber, Guardian ad litem of infant respondent Iris Wells.

30 Service of a copy of within Answer to Petition of Appeal is hereby acknowledged this 5th day of May, 1926.

DEMBE & DEMBE,
Solicitors for Appellants.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

EDWARD H. WELLS, Individually and as sole Executor and Trustee under the Will of Serra Bennett Wells, deceased,

Complainant-Respondent,

and

KATE AMELIA BENNETT, JOHN E. SMITH and EDWARD H. WELLS, as Trustees under the Last Will and Testament of Edwin H. Bennett, deceased, and IDA POTTER,

Defendants,

and

IDA BENNETT POTTER and ETHEL BENNETT ETHERINGTON,

Defendants-Appellants.

On Bill, &c.

*On Appeal
from
Chancery.*

BRIEF FOR DEFENDANTS IDA BENNETT POTTER AND ETHEL BENNETT ETHERINGTON.

This case involves the construction of the will of Edwin H. Bennett.

Mr. Bennett died in June, 1898, leaving a last will, true copy whereof is attached to the bill of complaint. He also left him surviving his widow, Kate Amelia Bennett; a son, Edwin H. Bennett, Jr.; a daughter, Ida, who is married and now the wife of Palmer A. Potter, and a daughter, Serra, who married and became Serra Bennett Wells. Mrs. Wells died on the first of April,

1925, without issue, leaving a last will and testament, a copy of which is also attached to the bill, under which if Mrs. Wells was capable of disposing of the interest left to her by her father's will, practically bestows upon Ida Potter, the whole of such interest. The exact question presented for consideration and decision, is whether, testator's widow still living, the daughter Serra acquired a vested interest in the estate of her father during her mother's life, and was therefore capable of disposing thereof by will to a stranger, before her mother's death.

We recognize the rule laid down in *Post v. Herbert*, 27 N. J. Equity 540, to the effect that while a legacy to a person at a given age, or from, when and after his attaining a given age, is *prima facie* contingent, nevertheless when it appears that such postponement of the gift is merely for the convenience of the estate, the rule as to the legacy being contingent does not apply.

Our contention is that the facts and circumstances existing in *Post v. Herbert*, and which required the Court of Errors to except it from the admitted general rule of contingency, do not exist in the case at bar.

In construing any will, it is fundamental that the whole, and not any one clause must be looked at, and the intention of the testator ascertained in that manner. Following that rule, observe that the will in question makes specific bequests to his widow and son respectively, in the second and third clauses of the will. He then bunches his entire residuary estate together, and creates a trust of it, permitting his investments to stand and charging new or substituted investments with the same trust as the original. The beneficiaries he evidently has in mind for the enjoyment of

this trust estate, are his sister Alice, his stepmother, his widow and his three children, or their issue. Family pride and interest prompted the trust estate, and after providing for his sister and stepmother, the evident purpose and desire of Mr. Bennett was that his children and their issue—not strangers—should enjoy his estate. The construction which the complainant gives to the will, goes counter to this obvious purpose of the testator, and enables an entire stranger, Ida Potter, to share in one-third of the estate. She is under fourteen years of age, and was not born until about fourteen years after the testator died.

The complainant bases his contention entirely upon the phraseology of the seventh clause alone. The sixth clause cannot be ignored. The two read as follows:

“SIXTH: If, after the death of my said wife, my stepmother, Emeline E. Bennett and my sister Alice Bennett, be still living, or either of them, I direct that my trustees shall set aside from my said trust estate a sum sufficient to pay the annuities hereinbefore provided for them, or either of them, and at their death the said principal sum to be divided as hereinafter provided for the rest of my said trust estate.

“SEVENTH: After the death of my wife, I direct that the residue of my trust estate be equally divided among my children, share and share alike, and in the event of any of my children dying before my wife, and leaving them surviving, at the time of the death of my said wife, lawful issue, said issue are to take the share their parent would have taken if living.”

The ultimate disposition of the trust estate must be ascertained by reading both of these clauses. The annuities to the sister and step-

mother had already been provided for in the fourth clause. The fifth clause interposes the requirement that both the testator's sister and stepmother, as well as his widow, shall have died before "the said principal sum" is to be divided among his children.

Whatever may be the proper construction of the seventh clause, considered by itself, surely it must be conceded that the phraseology of the sixth clause postpones the division, or application of "the principal sum" named in the clause, until after the death of both his widow, his sister and stepmother. The doctrine recognized in *Post v. Herbert* hereinabove alluded to, and from which that case is said to be an exception, certainly applies to the sixth clause of this will. No disposition whatever is made of the "principal sum" referred to in the clause, until the widow and the testator's two other relatives shall have died. The language is,

"and at their death the said principal sum to be divided."

Teets v. Weise, 47 N. J. Law, 154, decided by the Court of Errors and Appeals, would seem to govern. There Justice Parker says:

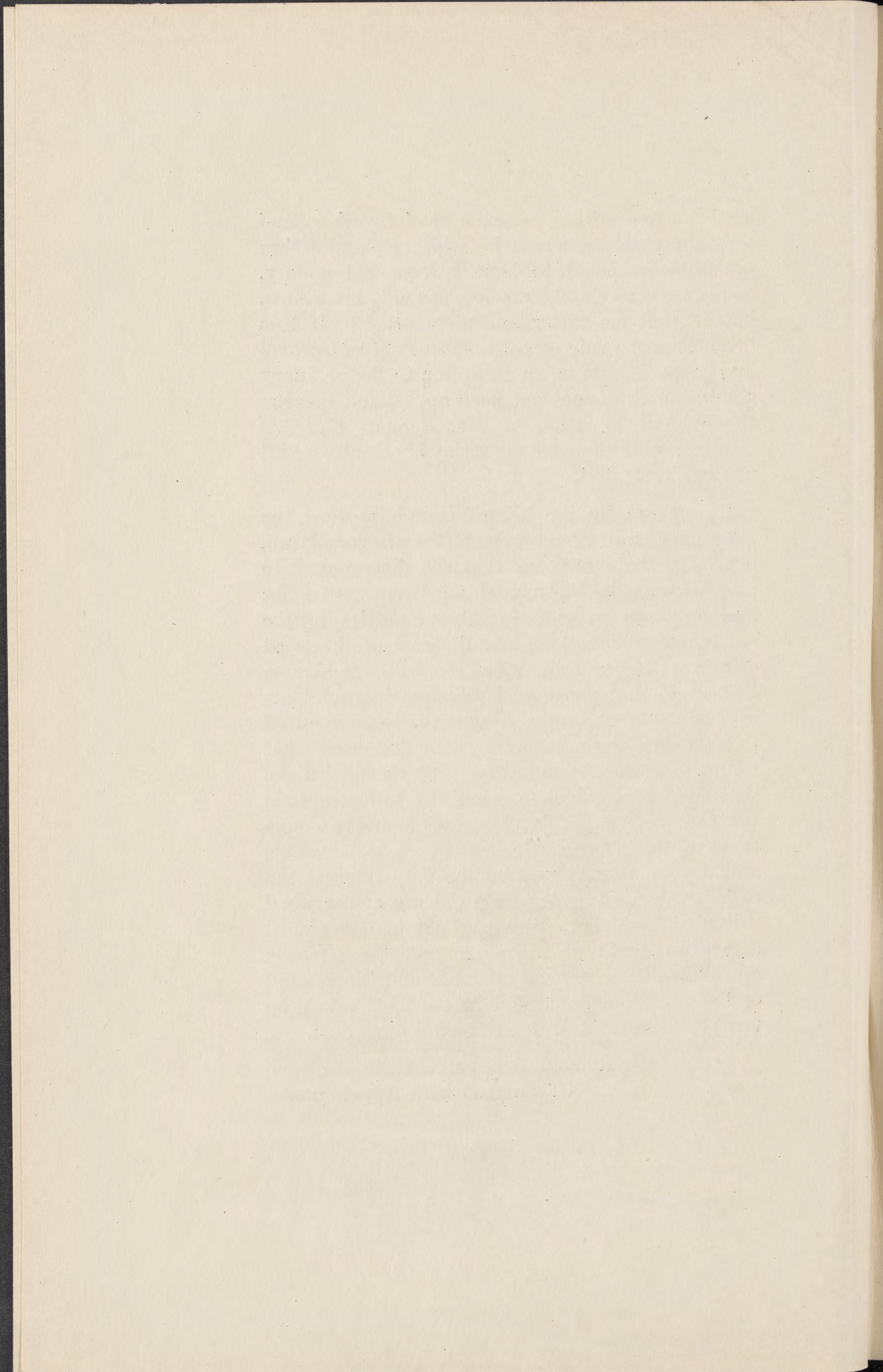
"When the event specified is annexed to the devise itself, the estate does not vest unless the event happens."

Then follows the seventh clause above quoted, which undertakes to dispose of the balance of the trust estate by equally dividing it among his children after the death of his wife. Does not the fact that the testator at the end of the sixth clause undertakes to dispose of the "principal sum" set aside from his trust estate after the death of his sister and stepmother "as hereinafter provided for the rest of my said trust estate" plainly indicate that the two clauses, the

sixth and seventh, are to be read together, and that the children whom he expected, and whom alone he expected to benefit from his bounty, were they who should survive, not only his widow, but as well his sister and stepmother? If this is so, then the rule established in *Post v. Herbert* and recognized to be an exception to the ordinary governing rule, does not here apply, and thereby the evident intention of Mr. Bennett that his family, and it alone should enjoy his estate, would not be frustrated.

It appears by the bill of complaint that the testator's estate at the present time is very large, but it nowhere appears that the discrepancy in size between the "principal sum" required to be laid aside to provide for the annuities to the sister and stepmother, and the rest of the trust estate existed in 1896, when the will was signed. For aught that appears, a very considerable portion of the trust estate would have been required to constitute the necessary "principal sum" that would produce the annuities. We cannot believe that the testator had in mind any different time for the vesting in his children of the two portions of the trust estate, and hence we conclude and urge that inasmuch as the only interest the children derived arises from the use of the word "divided" which in turn was not to occur until after the death of his wife, that these words must have their natural meaning and the vesting of the equitable remainder in the trust estate be postponed until Mrs. Bennett shall have died.

ROBERT H. McCARTER,
Of Counsel with Appellants.



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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

EDWARD H. WELLS, individu-
ally and as sole executor and
trustee under the will of
Serra Bennett Wells, de-
ceased,

Complainant-Respondent,

and

KATE AMELIA BENNETT, JOHN
E. SMITH and EDWARD H.
WELLS, as trustees under
the last will and testament
of Edwin H. Bennett, de-
ceased,

Defendants.

IRIS WELLS,

Defendant-Respondent,

and

IDA BENNETT POTTER and
ETHEL BENNETT ETHERING-
TON,

Defendants-Appellants.

On Bill, etc.

*On Appeal
from
Chancery.*

BRIEF FOR THE GUARDIAN AD LITEM OF THE DEFENDANT-RESPONDENT, IRIS WELLS.

Iris Wells is the infant made defendant under her former name, Ida Potter.

Not to burden the Court by needless repetition, we adopt the statement of the case in the brief for the complainant-respondent.

Complainant-Respondent was entitled to a declaratory judgment.

Chancery Act of 1915, Section 7 (P. L. 1915, p. 185; Cumulative Supplement of 1924, p. 271).

Uniform Declaratory Judgments Act of 1924 (P. L. 1924, p. 312; Cumulative Supplement of 1924, p. 2834).

The latter act expressly provides (Section 1), that rights may be declared "whether or not further relief is or could be claimed."

Unless complainant receives the protection of the declaratory judgment of the Court he must take upon himself the responsibility of the construction of the will of the testator, Edwin H. Bennett. In that case he must either include the interest thereunder of his own testatrix, Mrs. Wells, as part of her estate returned by him for tax purposes, pay the tax thereon, and subject himself to the possibility that the payment might, in the future, be excepted to on an accounting; or omit to return this interest as part of the taxable estate of his testatrix and subject himself to the possibility of penalties and interest.

The Complainant's testatrix was at her death vested of a one-third remainder interest in the residuary estate of her father, which was transmitted by her will to the complainant as executor and trustee thereof.

The law favors the early vesting of estates.

Ruling Case Law, "Remainders," Sec. 61.

An estate will not be construed as contingent unless the meaning and intent of the testator will admit of no other construction.

Ruling Case Law, "Wills," Sec. 192.

Van Dyke's Adm'r v. Vanderpool's Adm'r,
14 N. J. Eq. 198.

Vesting is especially favored in the case of a gift of a part of the residue.

Theobald on Wills (4th ed.), 467.

Kimble v. White, 50 N. J. Eq. 28, 31;
affirmed *per curiam*, 51 N. J. Eq. 638.

Vesting is especially favored in the case of a gift to children.

Ruling Case Law, "Wills," Sec. 192.

Ruling Case Law, "Remainders," Sec. 66.

While the gift to the children in this case is in the form of a direction to the trustees to divide in the future, this does not prevent vesting, as the period of distribution is postponed solely for the purpose of permitting the enjoyment of the intermediate estate.

Post v. Herbert's Executors, 27 N. J. Eq. 540.

This was not a gift to the children as joint tenants, but to them as tenants in common. The direction that the residue be "*equally divided among*" them is in itself sufficient to indicate that the testator intended a tenancy in common; also the direction that the division be made "*share and share alike*" is in itself sufficient. Either of these phrases creates a severance of the estate and indicates that the legatees are to take in severalty.

Potter v. Nixon, 81 N. J. Eq. 338, 344.

Parker v. Glover, 42 N. J. Eq. 559, 562.

Post v. Herbert's Executors, 27 N. J. Eq. 540, 547.

Adams v. Woolman, 50 N. J. Eq. 516, 521.

The policy of the law of this State, as expressed by the Legislature, is opposed to joint tenancies. Comp. Stat. 1910, p. 1538, Sec. 15.

The children of the testator were, of course, in being at the time of his death and were capable of enjoying the remainder instantly upon the termination of the preceding estate, and their interests were, therefore, vested.

Security Trust Co. v. Lovett, 78 N. J. Eq. 445.

This is not even the case where a class may increase in number after the death of a testator, resulting in the diminution *pro tanto* of the interests of the members of the class in being at the time of testator's death.

If the gift is to be construed as a gift to a class, the membership of the class of necessity was ascertained at the time of testator's death, and the members of the class then in being took vested interests.

Ruling Case Law, "Wills," Sections 237, 240;

28 *Halsbury's Laws of England*, page 715.

The appellants' attempted distinction of *Post v. Herbert's Executors* is groundless. Their citation of *Teets v. Weise*, 47 N. J. L. 154, is not in point. In that case the devise under construction was to the

"children and any issue of any deceased child or children of my said daughter, Julian Ver Noy, *that may be living at the time of her decease*, equally to be divided between them, share and share alike, per stirpes and not per capita" (italics ours).

It was held that no estate vested in a child who predeceased the daughter (leaving no issue).

There is no word in the will now before the Court which imports contingency in the gift to the children. There are no words of survivorship in the residuary clause affecting the inter-

ests of children. There is no cross remainder to brothers or sisters or their stocks. There is no executory gift over in case of death without issue.

The construction contended for by the appellants *would lead to an intestacy* as to the one-third share in remainder of complainant's testatrix, because, as is clear, the gift is not in joint tenancy and because there is no gift over in the event of death before the life tenant without issue. This in itself is sufficient, if there were doubt as to the construction of the residuary clause, to lead to a construction in favor of the vesting of the interest of the remainderman dying without issue.

The share of the remainderman dying without issue is subject to be divested only in the event stated in the will, namely, in the event of death before the widow *and* leaving issue surviving the widow. And this is a mere substitutionary gift to the issue in such case.

So far as the testator's wish is indicated, it is that, in case the deceased child leaves issue capable of taking the parent's share, the issue should take in preference to any others; but if there be no issue, the testator is content that the deceased child's share shall pass to the objects of the bounty of the child as expressed in his or her will, or to his or her nearest of kin in case of intestacy.

A clause which may operate to divest an interest once vested should, in logic and in conformity to the policy of the law favoring vesting be strictly construed.

Neilson v. Bishop, 45 N. J. Eq. 473;
Cook v. McDowell, 52 N. J. Eq. 351;
Howell v. Gifford, 64 N. J. Eq. 180;

Trenton Trust & Safe Deposit Company v. Moore, 83 N. J. Eq. 584 at 588, affirmed on the opinion below, 84 N. J. Eq. 194;
 28 *Halsbury's Laws of England*, p. 822;
 25 *English Ruling Cases*, p. 593.

The opinion of the learned Vice-Chancellor is clearly supported by decisions of this Court expressly in point.

Cook v. McDowell, 52 N. J. Eq. 351 (Chancellor McGill, 1894).

The testator's will directed that a fund be invested and the interest paid to his widow during her life and "after her death" the fund to be divided in the same manner as the residuary estate. He gave all of the residuary estate to his children (naming them),

"to be divided equally among them share and share alike, to them, their heirs and assigns forever, in case any of my said children die before receiving their share leaving issue then I give, devise and bequeath to such issue the share the parent would have taken if living."

One of the sons died before distribution of the estate, leaving no issue. Held, that his share of the residue vested in his representatives.

Miller v. Worrall, 59 N. J. Eq. 134 (V.-C. Stevens, 1899), reversed 62 N. J. Eq. 776.

Testator left all of his property in trust to pay the income to his widow during her life and upon the death of his wife to

"divide the entire amount thereof equally between my children, share and share alike, to whom I do hereby give, devise and bequeath the same, their heirs and assigns forever, the children of any deceased child to have the share of his, her or their parent."

One of the children died, without issue, during the lifetime of the widow, and it was held that her share of the estate was payable to her representatives.

Security Trust Company v. Lovett, 78 N. J. Eq. 445 (Vice-Chancellor Leaming, 1911). The testator gave all of his estate to his widow for life and directed that after the death of his wife the property should be sold and the proceeds be divided among his children (naming them), "share and share alike," and one equal share to the children of a deceased child. And he further provided,

"should either of my above named children die leaving issue, it is my will that the portion herein devised or bequeathed to such child or children shall be equally divided between their issue."

One of the sons died during the life of the widow, leaving no issue. Held, that his share in the proceeds was vested.

See also *Weaver v. Patterson*, 92 N. J. Eq. 170, at p. 172 (Vice-Chancellor Buchanan, 1920).

Redmond v. Gummere, 94 N. J. Eq. 216 (affirming, *per curiam*, opinion of Vice-Chancellor Buchanan). The will construed devised certain real estate in trust to pay the net income therefrom to two daughters of the testatrix during their joint lives, and upon the marriage or death of the survivor

"to pay over and divide the proceeds of such sale to and among my children" (naming them), "in equal shares, in all cases the children of a deceased parent to receive said parent's share."

Held, that children of the testatrix, who had died during the joint life estate without leaving children, took vested interests in the fund.

Siebert v. Ohliger, 121 Atl. 747 (Vice-Chancellor Church, 1923).

The will construed gave to the testator's widow a life estate, and after her death gave the income for five years, to his children equally (naming them), with the provision,

“the child or children of any deceased son or daughter to take the parent's share.”

And the will directed that at the expiration of the five-year period the principal should be equally divided and paid to the children (naming them), with a similar direction for the substitution of the children of any deceased son or daughter.

Held, that the children took vested interests as of the death of the testator, subject to be divested only by the death of the remainderman prior to the period of distribution leaving child or children.

Schmeider v. Meyer, 96 N. J. Eq. 69 (Vice-Chancellor Backes, 1924); reversed in 3 A. R. 247.

The question in that case was whether a trust could be terminated by the mutual agreement of the parties.

The estate in question was left in trust to pay one-third of the income to the testator's widow for life and the balance to his children and provided,

“After the death of my said wife my said estate shall be divided equally between my said children, share and share alike; and if any child dies leaving lawful issue, such grandchild or children shall receive the share or portion of the parent.”

Vice-Chancellor Backes said:

“The children have a vested estate in the remainder. That has been held repeatedly
* * *”

The Vice-Chancellor held that the distribution could be accelerated by the surrender by the widow of her life interest to the remainderman.

This Court held that the distribution could not be accelerated because the remainder was subject to be divested in favor of the children of deceased children. The Court, however, said:

“We agree with the Vice-Chancellor that by the terms of the will the children of the testator took a vested estate * * *.”

“* * * while the estate in remainder vested in the testator’s children immediately upon the testator’s death, it was subject to be divested by the death of any such child or children before the period of distribution, to wit, the death or remarriage of the widow—providing such child or children of the testator died before that period, leaving a child or children.”

Authorities from other jurisdictions in great number might be cited, the force and bearing of which would, of course, vary according to the language of the will construed in any given case.

It will be sufficient to refer to a few cases.

Hervey v. M’Laughlin, 1 Price, 264, 145 Eng-
Repr. 1397 (Court of Exchequer, 1815).

Bequest upon trust to pay the interest of a fund to Eleanor Todd for her natural life and from and after her death “to George, Eleanor and Elizabeth, the three children of the said Eleanor Todd, to be divided among them in equal shares, and in case of the death of either of them the share of such as may die to go to and

belong to the children, or child, if but one of the persons so dying.”

George died in the lifetime of Eleanor Todd, leaving children. Eleanor died in the lifetime of Eleanor Todd, leaving no children. Elizabeth survived Eleanor Todd. The Court held, with respect to the division of the fund, that the children of George were entitled to one share; that the personal representative of Eleanor was entitled to one share and that Elizabeth was entitled to one share. The Court said:

“Thomson, Chief Baron * * *

“There can be no question as to Eleanor’s share.

“Graham, Baron. * * * With regard to Elizabeth there can be no doubt, because she survived all events; and there is as little in respect to Eleanor, because she died without children. I consider the shares as vesting, subject to being divested by either dying, leaving children. * * * Elizabeth is clearly entitled to one share; Eleanor’s representatives to another; and George’s children are to be put in his place and take his share. * * *

“Wood, Baron. There can be no doubt of the testator’s intention in this case. He has given first to Eleanor Todd; then it is expressly given to these three children after the death of their mother; then to any children of either dying in her life-time. Now George died in the life-time of his mother; then his children became entitled; Eleanor takes it absolutely, having no children; and therefore it devolves on her personal representatives, as no contingency took it away from her.”

Gray v. Garman, 2 Hare 268, 12 L. J. Ch. 259, 67 Eng. Repr. 111 (V.-C. Wigram, 1843).

After giving a life estate to his wife, the testator directed—

* * * “All the rest, residue, and remainder of my estate and effects I desire may be equally divided between the brothers and sisters of my said wife, Elizabeth Rockwell; and, in case any or either of them shall be dead at the time of the decease of my said wife, Elizabeth Rockwell, leaving issue, then such issue to stand in the place of their respective parents or parent.”

There were many brothers and sisters of the wife, of whom some died during the lifetime of the testator without issue and one during the lifetime of the testator with issue; and of those who survived the testator some died in the lifetime of the widow without issue, and one survived the widow. It was held, among other things, that those who died in the lifetime of the widow without issue had vested interests which passed to their representatives. The Court says, on this question—

“On the second question, I have no hesitation in saying that the representatives of the brothers and sisters of the wife, who died after the testator, but in the lifetime of the widow, leaving no issue, are entitled to shares in the residue. The gift to the brothers or sisters who survived the testator was determinable only on one event, their death, leaving issue; that event did not happen, and their interest in the gift was, therefore, not taken away.”

Strother v. Dutton, 1 De G. & J. 675, 44 Eng. Repr. 886 (Ch. App., 1857).

Testator bequeathed a sum to his daughter R, to be invested and the interest to be paid to her during her life and that of her husband J—

* * * “and that at the death of the longer liver the principal sum of £-1000 shall be called in and distributed equally share and share alike amongst their children, in case any lawful children are living from son or daughter being dead, the issue of their marriage, that such child or children shall be equally entitled to the part or share their parent would be entitled to if they had been living.”

The daughter survived testator and her husband. She had many children, of whom some died without issue in the testator's lifetime and others without issue during her lifetime. Vice-Chancellor Kindersley held in the court below that the latter took vested interests so as to entitle their personal representatives to shares in the fund.

On appeal, Lord Justices Knight Bruce and Turner affirmed. They did not call on the counsel for the respondents. Lord Justice Knight Bruce said:

* * * “This discussion would have been startling but for the gift to more remote issue, which seems the only distinction between the present case and *Hallifax v. Wilson* (16 Ves. 168). That gift in favor of the issue of the children who have issue does not affect the shares of the children who died without leaving issue (see *Baldwin v. Rogers*, 3 DeG. M. & G. 649). I am of opinion that the decision of the Vice-Chancellor is right.”

McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015 (1885).

This case involved the construction of a will, the substance of which is set forth in the following quotations from the opinion:

“The only gift of real estate in remainder to grandchildren is contained in the opening words of the eighteenth clause, by which the testator directs that ‘After the decease of all my children now living, and when and as soon as the youngest grandchild shall arrive at the age of twenty-one years,’ the lands ‘shall be inherited and equally divided between my grandchildren *per capita*, the lawful issue of my said sons and daughters’, in fee.

“This gift is not to such grandchildren only as shall be living at the expiration of the particular estate, but it is to ‘my grandchildren *per capita*, the lawful issue of my said sons and daughters,’ words of description appropriate to designate all such grandchildren.”

* * * * *

“The remainder, being vested according to the legal meaning of the words of gift, is not to be held contingent by virtue of subsequent provisions of the will, unless those provisions necessarily require it. The subsequent provisions of this will had other objects.

“The direction that if any grandchild shall have died before the final division, leaving children, they shall take and receive *per stirpes* the share of the estate, both real and personal, which their parent would have been entitled to have and receive if then living, was evidently intended merely to provide for children of a deceased grandchild, and not to define the nature, as vested or contingent, of the previous general gift to the grandchildren; and its only effect upon that gift is to divest the share of any grandchild deceased leaving issue, and to vest that share in such issue.”

The decree below should be affirmed.

Respectfully submitted,

PITNEY, HARDIN & SKINNER,
Solicitors for Guardian *ad litem* of
Defendant-Respondent Iris Wells.

WALDRON M. WARD,
Of Counsel.

May, 1926.

New Jersey Court of Errors and Appeals

Between

EDWARD H. WELLS, Individually
and as sole executor and trustee
under the will of Serra
Bennett Wells, Deceased,
Complainant-Respondent,

and

KATE AMELIA BENNETT, JOHN E.
SMITH and EDWARD H. WELLS,
as trustees under the last will
and testament of Edwin H.
Bennett, Deceased, and IDA
POTTER,

Defendants,

and

IDA BENNETT POTTER and ETHEL
BENNETT ETHERINGTON,
Defendants-Appellants.

On Bill, etc.
On Appeal from
Chancery.

**BRIEF FOR
COMPLAINANT-RESPONDENT.**

The appeal in this case was taken by Ida Bennett Potter and Ethel Bennett Etherington from a decree of the Court of Chancery advised by Vice Chancellor Fielder construing the last will and testament of Edwin H. Bennett, Deceased. The decree appears on pages 56 to 62 of the case and the opinion is on pages 53 to 55 of the case.

The bill of complaint (Case, p. 1) was filed by Edward H. Wells, individually and as executor and trustee under the will of Serra Bennett Wells, Deceased, to establish his rights under the last will and testament of Edwin H. Bennett, Deceased (hereinafter referred to as "the testator"), who died on June 27, 1898.

The will last mentioned (Case, pp. 9 to 12) gives the residue of the testator's real and personal property in trust to pay certain annuities and to pay the balance of the income thereof to the testator's widow, Kate Amelia Bennett, during her life. The 7th paragraph of the will, upon the proper construction of which the decision of this appeal depends, provides as follows:

"SEVENTH: After the death of my wife, I direct that the residue of my trust estate be equally divided among my children, *share and share alike*, and in the event of any of my children dying before my wife, and leaving them surviving, at the time of the death of my said wife, lawful issue, said issue are to take the share their parent would have taken if living." (Italics ours.)

The testator left him surviving his widow, Kate Amelia Bennett, who is still living, and three children as follows: a son, Edwin H. Bennett, Jr.; a daughter, Ida Bennett, who subsequently married Palmer A. Potter and became and now is Ida Bennett Potter, and a daughter, Serra C. Bennett, who married the complainant, Edward H. Wells, and became Serra Bennett Wells (Case, p. 39).

The testator's son Edwin H. Bennett, Jr., died February 21, 1912, leaving as his only issue him surviving a daughter, Ethel Bennett, who subsequently married C. Kenneth Etherington and became and now is Ethel Bennett Etherington (Case, p. 40).

The testator's daughter Serra Bennett Wells died without issue April 1, 1925, leaving her surviving her husband, the said Edward H. Wells (Case, p. 43). In and by her last will and testament Mrs. Wells appointed her husband as the executor of and trustee under her will and bequeathed the residue of her estate to her executor in trust to pay the net income thereof to her said husband during his lifetime and after his death to expend such part thereof as might be advisable for the maintenance of Ida Potter (the minor defendant hereinafter mentioned) until she should attain the age of thirty years, and then to transfer and pay over to her all of the residue thereof, and in case the said Ida Potter should not live to attain the age of thirty years then, upon the death of the survivor of her and Mr. Wells to pay the residue to the testatrix's sister Ida Bennett Potter (Case, pp. 12-16).

The parties defendant to this suit are the Mechanics Trust Company of New Jersey as substituted trustee under the last will and testament of the testator (it having been substituted for Kate A. Bennett, John E. Smith and Edward H. Wells, as trustees under such will, subsequent to the institution of this suit), and the said Ida Bennett Potter, Ethel Bennett Etherington and Ida Potter (Case, p. 45, *et seq.*). The last mentioned defendant is an infant under the age of fourteen years. Subsequent to the commencement of this suit she was adopted by said Edward H. Wells pursuant to the decree of the Orphans' Court of Essex County and her name changed to Iris Wells (Case, p. 49, *et seq.*).

Complainant-respondent claims that upon the death of the testator his said son and his two said daughters each took a vested undivided one-third interest in the residue of the testator's estate,

subject only to being divested in the case of any thereof by his or her death during the lifetime of the testator's widow leaving issue him or her surviving, and that upon the death of the said Serra Bennett Wells without issue her one-third interest in said residue passed to complainant as executor of her last will and testament and now forms a part of the estate left by her.

The same claim is also made on behalf of the minor defendant Iris Wells, whose interests herein are being protected through her guardian ad litem by counsel appointed by the Chancellor for that purpose. If it is sustained she will largely benefit thereby under the provisions of Mrs. Wells' will. The defendants-appellants, Ida Bennett Potter and Ethel Bennett Etherington assert that Mrs. Wells' interest in the testator's residue was purely a contingent one which terminated upon her death without issue her surviving within the lifetime of the testator's widow.

The Court of Chancery determined that Mrs. Wells' share in the testator's residuary estate vested in her immediately upon the death of the testator and that the event which alone could divest her, namely her death leaving issue, not having occurred, she died seized of her share and that such share passed under her will to her executor and trustee.

This residue is of large value and, although not distributable until the death of the testator's widow, the present worth of the one-third interest therein claimed by the complainant as executor of his wife's estate is sufficient to subject such estate to the payment of approximately \$51,500. (Case, p. 41) more for Federal estate and New Jersey inheritance taxes than would be the case if his wife's interest in the residue of the testator's estate was a contingent and not a vested one. It

will be readily seen, therefore, that the question raised by the contrary claims thus made as to the effect of the seventh clause of the testator's will is an important one, and must be determined before the amount of said taxes legally payable can be ascertained or the complainant can safely pay the same.

ARGUMENT.

I.

Complainant-respondent claims a right cognizable in a court of equity under the will of the testator and was entitled to apply for the determination of the question of the construction thereof in so far as the same affects such right.

Upon the foregoing undisputed facts complainant-respondent as the executor of and a beneficiary under his wife's estate, claims a right under the will of the testator and is entitled to a construction of such will and a declaration of the rights of the persons interested therein under Section 7 of the Chancery Act (1915), 1 Cumulative Supp. to Comp. Stat. of N. J., p. 271, Sec. 33-120 (P. L. 1915, p. 185). This section reads as follows:

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

In *In Re Ungaro*, 88 N. J. E. 25, Chancellor Walker held that under this statutory provision a suit may be brought for the construction of a will without any further relief being sought. He said in part at pages 28 and 29:

“Instead of being declaratory I think the statute in question was meant to be remedial—that is, to extend the remedy of construction to cases where there exists no present right to relief resulting from construction. The fact that so many cases have been brought for construction where no relief was available and the suitors were turned away, seems to indicate a situation where construction without relief was a right much desired and one which might be extended with propriety. And the legislature seems to have taken this view. Moreover, that statute provides in its first section that the act shall be liberally construed, which, of course, means to advance the remedies given in and by it.”

In *Miers v. Persons*, 92, N. J. E. 17, the Chancellor again said at page 19:

“No directions as to present action by the trustees are solicited. Formerly a suit would not lie for the construction of a will without seeking equitable relief in the premises, the rule being that the court would only interpret the provisions of a will as an incident in the granting of relief but now under the Chancery act (P. L. 1915, p. 184, Sec. 9) any person claiming a right cognizable in a court of equity under a will or other instrument, may apply for a declaration of the rights of the persons interested. *In Re Ungaro*, 88 N. J. Eq. 25.”

The complainant-respondent is also entitled to a judicial construction of the will under the uniform Declaratory Judgments Act of 1924 (P. L.

1924, p. 312, Cum. Supp. of 1924, p. 2834). This Act has been construed or applied in *Tanner v. Boynton Lumber Co.*, 129 Atl. 617; 3 N. J. Adv. Rep. 1184; *Patterson v. Currier*, 129 Atl. 711; 3 N. J. Adv. Rep. 1246; *In Re Bell*, 2 Misc. 317.

Under the authorities above cited the right of the complainant-respondent to have the testator's will construed and the rights of the parties thereunder determined may be regarded as settled.

It is essential to the complainant-respondent, as the executor of his wife's will, that these rights should now be determined because he is required at an early day as such executor to make, verify and file returns for the purpose of having the estate taxes payable thereunder to the United States Government and the transfer taxes payable to the State of New Jersey on the transfers made by his wife's will determined, and thereafter promptly pay such taxes. If the complainant-respondent's contention as to the effect of the testator's will upon the value of his wife's estate is sound, the situation presented is the unusual and serious one of his being called upon to pay estate and inheritance taxes upon a large sum of money which is not yet payable to him and will not be so until the death of the testator's wife. In the case of delay beyond the dates fixed by law for the payment of such taxes there will be interest penalties, in the case of the Federal taxes at the rate of 1% per month and of the New Jersey taxes at the rate of 10% per annum. If the Federal taxes are paid upon the basis of the interest in question under the testator's will being a vested one and it should finally be held to have been a contingent one which ceased upon Mrs. Wells' death, difficulty and perhaps impossibility in the recovery of the amount so paid faces the complainant-respondent. In the case of the State

of New Jersey taxes there will in the same event, be a delay in such recovery and a substantial loss of interest on the money paid. It is apparent, therefore, that a decision of the question involved in this case is necessary at this time.

II.

The testator's residuary estate vested in his children severally at his death subject to the annuities and to the life estate given to Kate A. Bennett and subject also in the case of each such child to be divested in case he or she should die before the life tenant leaving issue him or her surviving, but not otherwise.

It is evident from a reading of the testator's will that the period of distribution of the residue of his estate among his children was postponed for the single purpose of allowing his widow to enjoy the income therefrom during her life. Under these circumstances, the direction to divide the estate equally among the children, *share and share alike*, upon the death of the widow, its equivalent to a direct gift at the testator's death.

The provision in favor of the issue of any child dying during the lifetime of the widow simply operates to divest the share of the child so dying in favor of such issue and in no way affects the share vested in a child dying without issue. This construction of the seventh paragraph of the will is required by a long line of decisions in this State, one of the latest of which to reach this court is *Redmond v. Gummere*, decided in 1922, and reported in 94 N. J. Eq. 216.

In that case the testatrix had given to trustees certain real estate upon trust to pay the net income therefrom to her two unmarried daughters, Anna and Ellen, so long as they should live and remain unmarried. There was a direction that at the death or marriage of the last survivor the trustees should sell his real estate and pay over and divide the proceeds of such sale among her five children therein named "in equal shares, in all cases the children of a deceased parent to receive said parent's share." Two of the remaindermen had died before the period of distribution without leaving issue, and one of the questions raised was whether the shares which such remaindermen would have received, had they outlived the intermediate estate, should be paid to the surviving children and the issue of the children who had deceased or to the personal representatives of the children so dying without issue. This, of course, depended upon whether the shares vested in the five children called "equitable remaindermen" at the death of the testatrix. In passing upon these questions Vice Chancellor Buchanan, speaking for the Court of Chancery, said:

"The only words of gift to the five named as 'equitable remaindermen' are in the direction to pay and divide. Ordinarily the vesting of such gift would not take place until the arrival of the time for distribution, but where the time of payment is postponed only for the purpose of letting in a life interest, the remainder interests vest immediately on the death of the testator. *Post v. Herbert*, 27 N. J. Eq. 540, followed by a long line of subsequent cases, among the more recent of which may be mentioned *Cranstoun v. Westendorff*, *supra* (at p. 37); *Freund v. Freund*, 91 N. J. Eq. 80; *Shepherd v. Davis*, 91 N. J. Eq. 468 (at p. 471)."

This is precisely the situation in the case at bar. The distribution to the ultimate beneficiaries is postponed to a time subsequent to the death of the testator, only for the purpose of letting in the intermediate estate. This intermediate estate is, at maximum, an estate of two lives. It is the typical case of a remainder after a life estate, and subject to no uncertainty except the precise time of the certain termination of the preceding life estate.

Although the remaindermen in fact constitute a class, yet the gift is to them by their respective names, and with the further qualifying clause 'in equal shares.' There can be no doubt, therefore, that the gift is in severalty and not as joint tenants. *Dildine v. Dildine*, 32 N. J. Eq. 78; *Pennsylvania Co. v. Riley*, 89 N. J. Eq. 252 (at p. 255).

All five remaindermen survived testatrix, and each of them therefore became immediately vested of an undivided one-fifth share in the equitable remainder.

The meaning and effect of the concluding clause of the trust or gift, 'in all cases the children of a deceased parent to receive said parent's share' is of course perfectly clear, to this extent: that as to each of the five named remaindermen, if he or she dies before the arrival of the distribution period, leaving children, the share or interest theretofore vested in him or her shall become thereby divested and shall vest in such children. *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445; *Trenton Trust Co. v. Moore*, 83 N. J. Eq. 584 (at p. 587) affirmed, 84 N. J. Eq. 194; *Hicks v. Hicks* 84 N. J. Eq. 515 (at p. 518); *Miers v. Persons*, 92 N. J. Eq. 17.

Since the divesting is to occur only in favor of children of a remainderman predeceasing the distribution period, there is no divesting in the case of a remainderman dying without children, and in such case the vested share or interest passes to the personal representative

of the one so dying. *Brown v. Fidelity Trust Co.*, 82 N. J. Eq. 323 (at p. 326); *Trenton Trust Co. v. Moore, supra.*"

This opinion was adopted by this court (94 N. J. Eq. 216) and with the decisions hereinafter cited, we submit, rules the case at bar.

In *Trenton Trust & Safe Deposit Co. v. Moore*, 83 N. J. Eq. 584, unanimously affirmed on the opinion below 84 N. J. Eq. 194, Vice Chancellor Backes said at page 587:

"It is contended by some of the defendants that the remainder is contingent, because the gift is to be found only in the directions to the trustee to 'assign and pay over and convey' at a future time. It clearly appears, however, that the time of payment was postponed for the single purpose of allowing the life-right holder to enjoy the estate. If the postponement of division or payment is merely on account of the position of the property; as, for instance, if there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. *Theob. Wills* 584; *Post v. Herbert's Executors*, 27 N. J. Eq. 540; *Howell v. Gifford*, 64 N. J. Eq. 180; *Potter v. Nixon*, 81 N. J. Eq. 338."

In *Potter v. Nixon*, 81 N. J. Eq. 338, at page 341, Vice Chancellor Leaming said:

"Standing alone a mere direction to divide a fund among given legatees at a future time is not regarded as a present gift; but in this state the rule is well settled that when the provisions of a will disclose an intent to defer the time of payment of legacies for the convenience of the estate, as where the postponement of time of payment is to let in an

intermediate interest, the gift will be regarded as an immediate gift. The gift here in question to the children of the brothers and sister of the life beneficiary is clearly of that nature; its postponement of payment is obviously to let in the intermediate interests, and it must be regarded as a present gift payable at a future time under the contingencies stated in the bequest."

To the same effect are also *Post v. Herbert's Executors*, 27 N. J. Eq. 540; *Cook v. McDowell*, 52 N. J. Eq. 351; *Dusenberry v. Johnson*, 59 N. J. Eq. 336, and *Siebert v. Ohliger* (N. J. Chancery 1923), 121 Atl. 747; 1 N. J. Adv. R. 946).

It is clearly established by the above and many other New Jersey decisions which might be mentioned that the interests of the children of the testator vested at his death and that they did not divest except in the case of the death of a child or children leaving issue.

This is the conclusion reached by the learned Vice Chancellor. He said:

"Where a will gives and devises a remainder but postpones payment merely for the purpose of letting in a life interest, the rule is that the remainder vests immediately upon the death of the testator (*Post v. Herbert*, 27 N. J. Equity, 540; *Howell v. Green*, 31 N. J. Law, 570; *Miller v. Worrall*, 59 N. J. Equity, 134; *Trenton Trust Co. v. Moore*, 83 N. J. Equity, 548, affirmed 84 N. J. Equity, 194; *Redmond v. Gummere*, 94 N. J. Equity, 216).

It follows that Mrs. Wells' share in the testator's residuary estate vested in her immediately upon the death of the testator. The event which alone could divest her, namely, her death leaving issue, not having occurred, she died seized of her share and it will pass under her will."

III.

The gift was not a gift to a class.

While the testator did not name his children in the seventh paragraph of his will, he provided that the residue of the estate should be "equally divided among my children, *share and share alike.*"

In *Post v. Herbert's Executors, supra*, 27 N. J. Eq. 540 (Court of Errors and Appeals), the provision of the will under construction was as follows:

"I give and devise to my said executors all that tract of land and premises situated, etc. * * * in trust for the use of the said Abraham Post, he, the said Abraham, to have and enjoy the possession of the same, and the rents, issues and profits thereof until the youngest child of my daughter Amy Eliza attains the age of twenty-one years. * * * After the said youngest child attains the age of twenty-one years, I order and direct my executors to sell the said tract of land at public sale, * * * be by them divided between the children of my said daughter Amy Eliza, share and share alike."

One of the six children of Amy Eliza died under the age of twenty-one. Her administrator claimed one-sixth of the proceeds of the sale of the farm. Her brothers and sisters, on the other hand, claimed the whole proceeds. It was contended that the bequest was to the children as a class and not as individuals. This court decided that the interest of the children vested upon the death of the testator and that the administrator of the deceased child was entitled to the one-sixth share. With

regard to the contention that the gift to the children was a gift to a class, Chief Justice Beasley, speaking for the entire court, said at page 547:

“With respect to the further position that this bequest is to the children as a class, and not as individuals, and that, consequently, a joint tenancy was created, it is sufficient to point to the fact that the division is directed to be made between these legatees, ‘share and share alike.’ These are clear words of severance, denoting plurality of interests among the objects of the gift, and, therefore, the rule invoked is excluded. The authorities are clear upon this point. *Hawkins on Wills*, 112; *Westcott v. Cady*, 5 Johns. Ch. 335; *Vreeland v. Van Ryper*, 2 C. E. Green 134.”

In *Potter v. Nixon*, *supra*, 81 N. J. Eq. 338, at page 343, Vice Chancellor Leaming said:

“But the fact that the legatees to whom the *corpus* of the fund is to be ultimately paid form a class will not, under the provisions of the will here in question, be operative to create interests in the nature of joint tenancies in which only survivors at the time of distribution take. The language of the will is that the fund ‘shall be equally divided between all the children of such deceased brothers and sister.’ As is held in *Post v. Herbert*, 27 N. J. Eq. (12 C. E. Gr.) 540, 547, these are clear words of severance, denoting plurality of interests among the objects of the gift.”

See also:

Vreeland v. Van Ryper, 17 N. J. Eq. 133,
134;

Post v. Rivers, 40 N. J. Eq. 21, 22;

Parker v. Glover, 42 N. J. Eq. 559, 561.

I V .

Conclusion.

We respectfully submit that, as determined by the Court of Chancery in this case, the distribution of the residue of the testator's estate among his children was postponed merely for the purpose of permitting the widow to enjoy the income thereof during her lifetime and that, therefore, the children's interest vested at the death of the testator; that under the provisions of the will such interest did not divest except in the event of the death of any of such children leaving issue and then only in favor of such issue, and that since the gift was to the testator's children "share and share alike" they took distributively and not as a class.

We respectfully submit that the decree of the Court of Chancery adjudging that the interest given to Serra Bennett Wells is now a part of her estate and that it passed at her death to complainant as her executor should be affirmed.

Respectfully submitted,

LINDABURY, DEPUE & FAULKS,
Solicitors of Complainant-Respondent.

JOSIAH STRYKER,
FREDERIC J. FAULKS,
Of Counsel.

Bill of Complaint

James M. Smith, Plaintiff
vs.
John D. Doe, Defendant

That the said Plaintiff is entitled to recover of the said Defendant the sum of \$1000.00 for the value of certain goods and chattels wrongfully taken from him by the said Defendant.

That the said Plaintiff is entitled to recover of the said Defendant the sum of \$500.00 for the value of certain goods and chattels wrongfully taken from him by the said Defendant.

That the said Plaintiff is entitled to recover of the said Defendant the sum of \$250.00 for the value of certain goods and chattels wrongfully taken from him by the said Defendant.

That the said Plaintiff is entitled to recover of the said Defendant the sum of \$125.00 for the value of certain goods and chattels wrongfully taken from him by the said Defendant.

