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Bill of Complaint.

Bill of Complaint.

Filed November 25, 1916.

In Chancery of New Jersey.

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

The complainants, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, all of Plainfield, New Jersey, and Edith Hyde Colby of West Orange, New Jersey, as executors and executrix of and trustees under the last will and testament of Elizabeth Hyde, deceased, and as surviving executors and executrix of and trustees under the last will and testament of Charles Hyde, deceased, and individually, and Carolyn K. Hyde, of Plainfield, New Jersey, individually and as executrix of and trustee under the last will and testament of Francis deL. Hyde, deceased, respectfully show that:

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1. Charles Hyde (husband of said Elizabeth Hyde), a resident of Plainfield, Union County, departed this life on June 12th, 1901, leaving a last will and testament which was on June 24th, 1901, admitted to probate by the Surrogate of the County of Union and is recorded in Book R of Wills for said county at pages 122, &c. A true copy of said will is annexed hereto, made a part hereof and marked Schedule A. In and by said last will and testament, after making certain legacies and bequests, the said Charles Hyde, by the fourth clause thereof, provided as follows:

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“Fourth: All the rest, residue and remainder of my estate, real, personal and

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mixed, and wheresoever situate, I give, devise and bequeath to my executors herein-after named, and to the survivors and survivor of them in trust, nevertheless, for the following uses and purposes:

10 1. To give and distribute one hundred thousand dollars thereof within five years from the date of my death, for such religious, charitable or educational or other purposes as they may deem advisable, provided, nevertheless, that no portion thereof shall be given to, or distributed among, my wife or children individually or collectively.

20 2. To apportion, divide and distribute all the balance of said rest, residue and remainder among my widow, and my heirs at law and next of kin, in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and force in the State of New Jersey at the time of my death in case I had died intestate; except, nevertheless, that there shall be first charged to, and deducted out of the share of my son, Charles L. Hyde, the sum of two hundred and thirty-three thousand two hundred & fourteen $\frac{95}{100}$ dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him, and represented by two promissory notes made by him to me, one for the sum of two hundred and thirty thousand one hundred and sixteen dollars and fifty-eight cents, dated January first, eighteen hundred and ninety-seven and the other for the sum

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40 of seven thousand one hundred seventy-eight

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dollars and thirty-two cents, dated November first, eighteen hundred and ninety-eight, and on which said notes there is due today the sum above mentioned; and except also that there shall be first charged to and deducted out of the share of my son, Dorsey W. Hyde, the sum of thirteen thousand and thirty 52.100 dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him; and except further that there shall be likewise first charged to and deducted out of the share of any of said heirs or next of kin any sum or sums which I may hereafter loan or advance to or for such heir or next of kin. 10

It being my intention that no charge shall be made against the share of any heirs or next of kin for any loan, debt or advancement heretofore made except only those which I have hereinbefore specified. 20

It being also my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, Francis deL. Hyde and Edith L. Hyde, and therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be di- 30 40

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vided and distributed, share and share alike, among my said five children.”

10 2. By the fifth clause of said will said Charles Hyde appointed his wife, Elizabeth Hyde, his four sons, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Francis deL. Hyde, and his daughter, Edith L. Hyde, and the survivors and survivor of them, executors of his said will. All of them qualified as such executors, and letters testamentary were issued by the Surrogate of said County of Union to them at the time of the probate of said will. The said Edith L. Hyde subsequently married. Her present name is Edith Hyde Colby.

20 3. By virtue of the fourth clause of said will, hereinabove quoted, the residue of the estate of said Charles Hyde vested in the said Elizabeth Hyde, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, Francis deL. Hyde and Edith L. Hyde (now Edith Hyde Colby), as trustees under the terms of said fourth clause, and thereafter as such executors and trustees they assumed the burden thereof and pursuant to the terms of said will delivered to the said Elizabeth Hyde, the widow of said Charles Hyde, the personal property to which she was entitled
30 under the fourth paragraph of said will.

4. On September 7th, 1910, the said Francis deL. Hyde departed this life leaving a last will and testament which was on September 23rd, 1910, admitted to probate by the Surrogate of Somerset County, and was recorded in Book S of Wills for said county, at pages 308, &c. A true copy of said will is annexed hereto, made a part hereof and marked Schedule B. In and by said will, after directing the payment of his
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debts, the said Francis deL. Hyde, by the second clause thereof, provided as follows:

“Second. All the net residue and remainder of my estate of whatsoever nature and wheresoever situate, I give, devise and bequeath to my executors hereinafter named and to the survivor of them in trust nevertheless for the following uses and purposes: 10

I. To hold, and use for the benefit of my wife and children so long as my wife shall live, allowing them the use of such of my real estate as my wife may desire to occupy as a residence, and allowing her the entire net income from the remainder of my estate for the support of herself and my children and the education of my children. 20

II. To sell, convey and convert into money at such time or times and in such manner as they may deem advisable any and all of my real estate, securities, stocks or personal property and to invest and reinvest all moneys belonging to the principal or corpus of my estate, whether the same be in money at my death or be converted into money by my executors, in such securities as they may deem advisable and to pay and use all the net income arising therefrom to my wife during her lifetime for the use and benefit of herself and my children. 30

III. At my wife's death, or sooner if in the judgment of my executors it be sooner advisable, to distribute, give or use a portion of the principal of my estate among, to or for the benefit of my children or to any one or more of them, provided that neither my wife nor any child shall be given or shall 40

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receive more of the principal or corpus of my estate than the share to which my wife or such child would be entitled under the laws of descent or distribution in force in the state of New Jersey at the time of my death in case I had died intestate.

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IV. Upon the death of my wife, or sooner if in the judgment of both of my said executors it shall be advisable so to do, to apportion, divide and distribute the whole principal or corpus of my estate among my wife and children and the descendants of any of my children who may die leaving descendants in the same shares, manner and proportions that my wife, children and descendants of my deceased children or children would be entitled as my widow and next of kin under the laws of distribution of personal estate among the widow and next of kin in force in New Jersey at the time of my death if I had died intestate. It being my intention that if such final distribution is made during the lifetime of my wife she shall receive the same share to which a widow of an intestate would be entitled under said laws, but that if such final distribution is not made until after her death then my estate shall be distributed in the same manner as if I had left no wife surviving me.

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It being also my intention that in the distribution of my estate all my property shall be treated and considered as having been by me converted into personal property. The provisions herein made for the benefit of my wife if accepted by her shall be in lieu of her dower in my estate."

Bill of Complaint.

The said Francis deL. Hyde left him surviving a widow, the said Carolyn K. Hyde and three children, Francis deL. Hyde, Carolyn Hyde and Edward Hyde. The said Francis deL. Hyde, Carolyn Hyde and Edward Hyde are infants under the age of twenty-one years, to wit, of the age of fourteen years and upwards.

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5. By the third clause of said will said Francis deL. Hyde appointed his wife, said Carolyn K. Hyde, and Louis E. Laffin, executors of his said will. Said Carolyn K. Hyde qualified as such executrix and letters testamentary were issued to her by the Surrogate of Somerset County on September 23rd, 1910.

6. On September 21st, 1916, said Elizabeth Hyde, residing at Plainfield, Union county, departed this life leaving a last will and testament and codicil thereto, which were on October 26th, 1916, admitted to probate by the Surrogate of Union County and were recorded in Book F 2 of Wills for said county, at pages 488, &c. True copies of said will and codicil are annexed hereto, made a part hereof and marked Schedule C. In and by said will, after making certain bequests and devises, the said Elizabeth Hyde, by the nineteenth clause thereof, provided as follows:

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“Nineteenth. The remainder of my estate not hereinbefore disposed of consists of certain real estate acquired by me since the death of my husband, and of moneys, stocks and securities which came to me, or resulted from re-investment of property which came to me, under paragraph fourth of the last will and testament of my said husband, and it is my will and I hereby direct my executors to sell and convey the said real estate, and having converted same into

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money to mingle the same with my other moneys, stocks and securities, and to divide this total residuum of my estate into five equal parts, and thereupon one such portion I give and bequeath to my step-son, Dorsey W. Hyde, or, if he be dead, to his surviving children; one such portion to my son, Charles L. Hyde, or; if he be dead, to his surviving children; one such portion, which shall include the seventy shares of the capital stock of the City National Bank of Plainfield, New Jersey, now owned by me among my said securities, and which such shares I value for the purpose of this distribution at the sum of \$250.00 per share, to my son, Louis K. Hyde, or, if he be dead, to his surviving children; one such share to my daughter, Edith Colby, or, if she be dead, to her surviving children; and one such share to the children of my deceased son, Francis DeL. Hyde."

The children of Francis deL. Hyde mentioned in said nineteenth clause are the said Francis deL. Hyde, Carolyn Hyde and Edward Hyde, all being infants under the age of twenty-one years.

7. By the twentieth clause of said will said Elizabeth Hyde appointed said Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Edith Colby, and the survivor and survivors of them, executors of her said will. All of said executors have qualified and letters testamentary have been issued to them by the Surrogate of Union County.

8. Doubt and difficulty have arisen in the minds of the complainants as to the true construction of the said will of Charles Hyde and

Bill of Complaint.

the said will of Elizabeth Hyde and more particularly of the clauses thereof hereinabove quoted, and in the administration and distribution of the estate of the said Elizabeth Hyde under her said will, and in the execution of the trust created therein, divers questions have arisen and will arise, and the said complainants, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Edith Hyde Colby, as executors of said Elizabeth Hyde, are advised and believe that it is necessary to the proper execution of their duties, that they should receive the advice and instructions of this Court. 10

9. The said executors are in doubt as to whether under the fourth clause of the will of Charles Hyde the said Elizabeth Hyde became entitled to the absolute title in fee to the personal property therein bequeathed to her or whether said clause gave her only a life estate therein, coupled with a power of disposal and with a vested remainder over to the said five children named therein. They are uncertain whether the residue of the personal estate of Charles Hyde that, by virtue of the fourth clause of the will of Charles Hyde, was in the hands of said Elizabeth Hyde at the time of her death, should be administered and distributed as a part of the estate of the said Charles Hyde or as a part of the estate of the said Elizabeth Hyde, and until these questions are determined by this court the said executors of Elizabeth Hyde are unable to render a true and proper accounting of the said residue of the estate of Charles Hyde that was in the hands of said Elizabeth Hyde at the time of her death. 20 30

10. The value of said residue of the personal estate of Charles Hyde that, by virtue of the 40

Bill of Complaint.

fourth clause of the will of Charles Hyde was in the hands of said Elizabeth Hyde at the time of her death, is far in excess of the sum of \$5,000 and the said executors of Elizabeth Hyde are in doubt as to whether or not they should transfer the same without first paying to the treasurer of this state the tax imposed upon the transfer of estates of decedents by the act entitled "An act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases" and the acts amendatory thereof and supplementary thereto.

11. The value of the property belonging to the said Elizabeth Hyde at the time of her death which was derived from sources otherwise than by virtue of the fourth clause of the will of Charles Hyde, is less than \$50,000. The value of said residue of the personal estate of Charles Hyde that, by virtue of the fourth clause of his will was in the hands of Elizabeth Hyde at the time of her death, is in excess of the sum of \$60,000. The said executors of Elizabeth Hyde are in doubt as to whether they should make a return to the collector of internal revenue pursuant to the act of Congress commonly known as the Federal Estate Tax Law, being Title II. of the act entitled "An act to increase the revenue and for other purposes," approved September 8th, 1916, and as to whether this property should be included in such return if made.

Complainants therefore pray:

1. That Francis deL. Hyde, Carolyn Hyde and Edward Hyde, who are the defendants to this suit, may answer this bill of complaint without oath and each statement therein made.

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2. That the said complainants, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Edith Hyde Colby, as executors of the last will and testament of Elizabeth Hyde, deceased, may receive the advice and direction of this Court in the premises and that the doubts and difficulties herein suggested or that arise in connection with their duties under and by virtue of the last will and testament of Elizabeth Hyde, deceased, may be resolved. 10

3. That the will of Charles Hyde and the will of Elizabeth Hyde may be construed and the true meaning and legal effect of the fourth clause of the will of Charles Hyde and the nineteenth clause of the will of Elizabeth Hyde may be determined by decree of this Court.

4. That this Court may adjudge and declare the rights of the parties hereto in the residue of the estate of Charles Hyde which was received by the said Elizabeth Hyde by virtue of the fourth clause of the will of said Charles Hyde and remained in her hands at the time of her death and that the persons entitled thereto and their respective proportions therein may be determined. 20

5. That the said executors of Elizabeth Hyde may receive advice and instructions from this Court as to whether they should administer, distribute and account for the said residue of the estate of Charles Hyde remaining in the hands of Elizabeth Hyde at the time of her death, as a part of the estate of said Elizabeth Hyde or whether they should account for the same and transfer it to themselves as executors of the estate of Charles Hyde. 30

6. That the said executors of Elizabeth Hyde may receive advice and instructions from the 40

Bill of Complaint—Schedule A.

Court as to whether or not they should transfer the said residue of the estate of Charles Hyde remaining in the hands of Elizabeth Hyde at the time of her death without first paying to the treasurer of this state a transfer tax thereon.

7. That the said executors of Elizabeth Hyde
10 may receive advice and instructions from this Court as to their duties with respect to filing with the collector of internal revenue a return pursuant to Title II. of the act of Congress entitled "An act to increase the revenue and for other purposes," approved September 8th, 1916.

8. That complainants may have such further or other relief in the premises as the nature of the case may require.

9. That a writ of subpoena may issue, com-
20 manding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

COLBY & WHITING,
Solicitors for Complainants.

BORDEN D. WHITING,
Of Counsel.

SCHEDULE "A"

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I, CHARLES HYDE, of Plainfield, Union County, New Jersey, do hereby make, publish and declare, this my last will and testament in manner and form following, hereby revoking any and all former will or wills by me at any time made.

First. I authorize and direct the payment by my executors of all my just debts.

Second. I give and bequeath to my wife,
40 Elizabeth Hyde, all estate and interest which I

Bill of Complaint—Schedule A.

may have in the household furniture and furnishings, plate, silverware, books, pictures, paintings, bric-a-brac, horses, carriages, vehicles, harnesses, tools, implements, stable and barn furnishings and equipments, and other like property in or about the dwelling house and premises where we reside in Plainfield, New Jersey, and most of which are already her property. 10

Third. I give and bequeath to my daughter, Edith L. Hyde, the sum of eleven thousand two hundred and twenty dollars (\$11,220) to be paid to her by my executors upon her marriage, or upon her thirtieth birthday if she has not married by that date.

Fourth. All the rest, residue and remainder of my estate, real personal and mixed, and wheresoever situate, I give, devise and bequeath to my executors hereinafter named, and to the survivors and survivor of them in trust, nevertheless, for the following uses and purposes: 20

I. To give and distribute one hundred thousand dollars thereof within five years from the date of my death, for such religious, charitable or educational or other purposes as they may deem advisable, provided, nevertheless, that no portion thereof shall be given to, or distributed among, my wife or children individually or collectively: 30

II. To apportion, divide and distribute all the balance of said rest, residue and remainder among my widow, and my heirs at law and next of kin, in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and force in the State of New Jersey at the time of 40

Bill of Complaint—Schedule A.

my death in case I had died intestate; except, nevertheless, that there shall be first charged to, and deducted out of the share of my son, Charles L. Hyde, the sum of two hundred and thirty-three thousand two hundred and fourteen 95-100 dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him, and represented by two promissory notes made by him to me, one for the sum of two hundred and thirty thousand, one hundred and sixteen dollars and fifty-eight cents, dated January first, eighteen hundred and ninety-seven, and the other for the sum of seven thousand one hundred seventy-eight dollars and thirty-two cents, dated November first, eighteen hundred and ninety-eight, and on which said notes there is due today the sum above mentioned; and except also that there shall be first charged to and deducted out of the share of my son, Dorsey W. Hyde, the sum of thirteen thousand and thirty 52-100 dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him; and except further that there shall be likewise first charged to and deducted out of the share of any of said heirs or next of kin any sum or sums which I may hereafter loan or advance to or for such heir or next of kin.

It being my intention that no charge shall be made against the share of any heir or next of kin for any loan, debt or advancement heretofore made except only those which I have hereinbefore specified.

It being also my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes

Bill of Complaint—Schedule A.

to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, Francis de L. Hyde and Edith L. Hyde, and therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children. 10

Fifth. I hereby nominate, constitute and appoint my wife, Elizabeth Hyde, my four sons, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Francis deL. Hyde, and my daughter, Edith L. Hyde, and the survivors and survivor of them, executors of this, my last will; hereby giving any majority of them full power and authority to sell and convey, either at private or public sale, all and any of my estate, real, personal or mixed, and to make good and sufficient deeds and conveyances therefor: and I order and direct that in every instance where my said executors are directed or authorized to do or perform any act or thing, the action of any majority of them shall be as valid and effectual as if all had joined therein; and I further order and direct that none of them shall be required to give bonds or security, either as executors or trustees, in the State of New Jersey or elsewhere. 20 30

In witness whereof I have hereunto set my hand and seal at Plainfield, New Jersey, this tenth day of May, A. D. nineteen hundred and one. 40

Bill of Complaint—Schedule A.

The words "survivors and survivor" wherever mentioned in this will, refer directly to the executors as survivors and not to their next of kin or heirs.

CHARLES HYDE (L. S.)

10 The foregoing instrument consisting of four pages, was signed, published and declared by the said testator, Charles Hyde, to be his last will and testament, in the presence of us, who were both present at the same time, and signed our names as witnesses in the presence of each other, and of the testator, and at his request.

20 The words "eleven thousand two hundred and twenty dollars (\$11,220.00)" written in third paragraph; the words "two hundred and thirty-three thousand two hundred and fourteen 95-100 dollars" and the words "thirteen thousand and thirty 52-100 dollars" written in section 11 of fourth paragraph; the words "or other" interlined in line one page two, and the word "The words 'survivors and survivor' wherever mentioned in this will, refer directly to the executors as survivors and not to their next of kin or heirs," being the last sentence of this will, were all inserted and written before execution.

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CHARLES HYDE.

Witnesses:

EDWARD RYAN,
CHARLOTTE D. LUNDBERG.

Bill of Complaint—Schedule B.

SCHEDULE "B."

I, FRANCIS L. HYDE, of Plainfield, Union County, New Jersey, do hereby make, publish and declare this my Last Will and Testament.

FIRST. I order and direct the payment of all my just debts as soon as may be out of my estate. 10

SECOND. All the net residue and remainder of my estate of whatsoever nature and wheresoever situate, I give, devise and bequeath to my executors hereinafter named and to the survivors of them in trust nevertheless for the following uses and purposes:

I. To hold, and use for the benefit of my wife and children so long as my wife shall live, allowing them the use of such of my real estate as my wife may desire to occupy as a residence, and allowing her the entire net income from the remainder of my estate for the support of herself and my children and the education of my children. 20

II. To sell, convey and convert into money at such time or times and in such manner as they may deem advisable any and all of my real estate, securities, stocks, or personal property and to invest and reinvest all moneys belonging to the principal or corpus of my estate, whether the same be in money at my death or be converted into money by my executors, in such securities as they may deem advisable and to pay and use all the net income arising therefrom to my wife during her lifetime for the use and benefit of herself and my children. 30

III. At my wife's death, or sooner if in the judgment of my executors it be sooner advisable to distribute, give or use a portion of the prin- 40

Bill of Complaint—Schedule B.

10 ciprof of my estate among, to or for the benefit of my children or to anyone or more of them, provided that neither my wife nor my child shall be given or shall receive more of the principal or corpus of my estate than the share to which my wife or such child would be entitled under the laws of descent or distribution in force in the State of New Jersey at the time of my death in case I had died intestate.

20 IV. Upon the death of my wife or sooner if in the judgment of both of my said executors it shall be advisable so to do, to apportion, divide and distribute the whole principal or corpus of my estate among my wife and children and the descendants of any of my children who may die leaving descendants in the same shares, manner and proportions that my wife, children and descendants of my deceased children or children would be entitled as my widow and next of kin under the laws of distribution of personal estate among the widow and next of kin in force in New Jersey at the time of my death if I died intestate. It being my intention that if such final distribution is made during the lifetime of my wife she shall receive the same share to which a widow of an intestate would be entitled under said laws, 30 but that if such final distribution is not made until after her death then my estate shall be distributed in the same manner as if I had left no wife surviving me.

40 It being also my intention that in the distribution of my estate all my property shall be treated and considered as having been by me converted into personal property. The provisions herein made for the benefit of my wife if accepted by her shall be in lieu of her dower in my estate.

Bill of Complaint—Schedule B.

THIRD. I hereby nominate, constitute and appoint my wife, Carolyn K. Hyde and Louis E. Laffin executors of this my Last Will and Testament, hereby giving them full power and authority to sell and convey by good and sufficient deeds, conveyances and other proper instruments any and all my estate real and personal; and I order and direct that neither of them shall be required to give or furnish any bonds or security either as executors or trustees in the State of New Jersey or elsewhere. 10

In witness whereof, I have hereunto set my hand and seal at Plainfield, New Jersey, this eleventh day of October, nineteen hundred and five.

FRANCIS deL. HYDE,
F. deL. HYDE (SEAL). 20

The foregoing instrument consisting of four pages, was signed, published and declared by the said testator Francis deL. Hyde, to be his last will and testament, in the presence of us, who were both present at the same time, and signed our names as witnesses in the presence of each other, and of the testator and at his request.

FRANCIS deL. HYDE. 30

Witnesses:

J. F. MacDONALD,
GRACE ROWLAND.

Stipulation.

Stipulation.

New Jersey Court of Errors and Appeals

10	DORSEY W. HYDE, Executor, <i>et als,</i> <i>Complainants-Appellants,</i> <i>and</i> FRANCIS DEL. HYDE, <i>et als.,</i> <i>Defendants-Respondents.</i>	}	<i>On Appeal.</i> <i>Stipulation.</i>
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20 It is hereby stipulated and agreed by the parties hereto that the following abstract of the will of Elizabeth Hyde, deceased, is a true copy of so much of said will as is material to the determination of this suit. It may be printed as a part of the state of the case in lieu of Schedule C annexed to the bill of complaint.

It is further stipulated and agreed that the codicil to the will of Elizabeth Hyde, deceased, is not material to the determination of this suit and need not be printed as part of the state of the case.

30 COLBY, WHITING & MOORE,
Solicitors of Complainants-Appellants.

JEROME T. CONGLETON,
Solicitor of Defendants-Respondents.

Schedule C.

SCHEDULE "C."

I, Elizabeth Hyde, of Plainfield, Union County, New Jersey, widow of Charles Hyde, deceased, do hereby make, publish and declare this my last will and testament hereby revoking and annulling any and all former will or wills by me at any time heretofore made. 10

FIRST. I authorize and direct the payment by my executors of all my just debts.

SECOND. Paragraphs Second to Sixteenth, inclusive, are specific bequests and devises of personal and real property.

SEVENTEENTH. All the rest and remainder of my goods and chattels, exclusive of moneys, stocks, securities and the like, not hereinbefore specifically bequeathed, I give and bequeath to my executors hereinafter named and to the survivors or survivor of them, in trust, nevertheless, to divide the same (resorting to sale either public or private and conversions into money if by them deemed advisable) into four equal shares or parts, and thereafter I give and bequeath one of such shares or portions to my son Charles L. Hyde, or, if he be dead, to his surviving children, absolutely; one of such shares to my said son Louis K. Hyde, or, if he be dead, to his surviving children, absolutely; one of such shares to the children of my deceased son Francis deL. Hyde, absolutely. 20 30

EIGHTEENTH. Devise of lots in Hillside Cemetery.

NINETEENTH. The remainder of my estate not hereinbefore disposed of consists of certain real estate acquired by me since the death of my husband, and of moneys, stocks and securities 40

Schedule C.

which came to me, or resulted from reinvestment of property which came to me, under paragraph fourth of the last will and testament of my said husband, and it is my will and I hereby direct my executors to sell and convey the said real estate, and having converted same into money

10 to mingle the same with my other moneys, stocks and securities, and to divide this total residuum of my estate into five equal parts, and thereupon one such portion I give and bequeath to my step-son Dorsey W. Hyde, or, if he be dead, to his surviving children; one such portion to my son Charles L. Hyde, or, if he be dead, to his surviving children; one such portion, which shall include the seventy shares of the capital stock of the City National Bank of Plainfield, New

20 Jersey, now owned by me among my said securities, and which such shares I value for the purpose of this distribution at the sum of \$250.00 per share, to my son Louis K. Hyde, or, if he be dead, to his surviving children; one such share to my daughter, Edith Colby, or, if she be dead to her surviving children; and one such share to the children of my deceased son, Francis deL. Hyde.

30 TWENTIETH. I hereby nominate, constitute and appoint said Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Edith Colby, and the survivor and survivors of them, executors of this my last will and testament, hereby giving them, and any majority of them, full power and authority to sell and convey at private or public sale, either for the purpose of making division or divisions, distribution or distributions of my estate, or otherwise, any and all of my estate,

40 sufficient deeds and conveyances therefor, and

Schedule C.

at any time; and I order and direct in every instance where my said executors are authorized to do or perform any act or thing, the act of any majority of them shall be as valid and effectual as if all had joined therein. And I further order and direct that none of them shall be required to give bonds or security, either as executors or trustees, in the State of New Jersey, or elsewhere. 10

IN WITNESS WHEREOF I have hereunto set my hand and seal at Plainfield, New Jersey, this thirtieth day of January, nineteen hundred and eleven.

ELIZABETH HYDE (L. S.)

The foregoing instrument consisting of fourteen typewritten pages, was signed, published and declared by the said testatrix Elizabeth Hyde to be her last will and testament, in the presence of us, who were both present at the same time, and signed our names as witnesses in the presence of each other and of the testatrix at her request. 20

ARTHUR E. CRONE, Plainfield, N. J.

HARRY H. COWARD, Plainfield, N. J. 30

*Answer.***Answer.**

Filed February 27, 1917.

In Chancery of New Jersey.

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*Between*DORSEY W. HYDE, *et als*, ex-
ecutors, etc.*Complainants,**and*FRANCES DEL. HYDE, *et als*,
*Defendants.**On Bill, etc.**Answer.*

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The answer of Francis deL. Hyde, Carolyn Hyde and Edward Hyde, infant defendants, by Howard A. Colby, their guardian *ad litem*, to the bill of complaint of Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Edith Hyde Colby, as executors and executrix of and trustees under the last will and testament of Elizabeth Hyde, deceased, and as surviving executors and executrix of and trustees under the last will and testament of Charles Hyde, deceased, and individually, and Carolyn K. Hyde, individually and as executrix of and trustee under the last will and testament of Francis deL. Hyde, deceased, complainants.

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These defendants answering unto so much and such parts of the complainants' bill of complaint as they deem material and necessary for them to make answer unto, say:

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1. They admit the allegations contained in the first paragraph of the said bill of complaint.

Answer.

2. They admit the allegations contained in the second paragraph of the said bill of complaint.

3. They admit the allegations contained in the third paragraph of the said bill of complaint.

4. They admit the allegations contained in the fourth paragraph of the said bill of complaint. 10

5. They admit the allegations contained in the fifth paragraph of the said bill of complaint.

6. They admit the allegations contained in the sixth paragraph of the said bill of complaint.

7. They admit the allegations contained in the seventh paragraph of the said bill of complaint. 20

8. They admit that certain doubts and difficulties have arisen as to the true construction of the last wills and testaments of Charles Hyde and Elizabeth Hyde, and more particularly with respect to the clauses set forth in said bill of complaint, and in the administration and distribution of the estate of Elizabeth Hyde under her last will and testament and in the execution of the trust created therein, divers questions have arisen and will arise as alleged in the eighth paragraph of said complaint, and these defendants say that they are desirous that this Court should construe said last wills and testaments and that their rights under the same should be ascertained and determined and adjudged by this Honorable Court, and that the complainants may be advised thereof and instructed in the performance of their duties with reference thereto under the terms of said last wills and testaments. 30
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Answer.

9. They admit that the executors have expressed the doubts and uncertainties alleged in the ninth paragraph of the bill of complaint, and that until said questions are determined by this Honorable Court, the said executors of the said Elizabeth Hyde, deceased, are unable to render a
10 true and proper accounting of the residue of the estate of Charles Hyde that was in her hands at the time of her death, but these defendants allege and insist that the true meaning and effect of the fourth clause of the said last will and testament of Charles Hyde, deceased, was to give his wife, Elizabeth Hyde, an absolute estate in said personal property, and that the executors of Elizabeth Hyde should administer, distribute and account for the residue of the estate of Charles
20 Hyde remaining in the hands of Elizabeth Hyde at the time of her death as a part of the estate of Elizabeth Hyde and in accordance with her last will and testament.

10. They have no knowledge of the value of the residue of the personal estate of Charles Hyde, that, by virtue of the fourth clause of the will of Charles Hyde, deceased, was in the hands of said Elizabeth Hyde at the time of her death, except as in the tenth paragraph of said bill
30 of complaint is stated, and leave the complainants to make such proof thereof as they may be advised is necessary for them to do, but they allege and insist that whatever the value of said estate may be, that a one-fifth part thereof became vested in them at the time of the death of the said Elizabeth Hyde, under her last will and testament, and that the State of New Jersey may be entitled to impose a tax by virtue of the act referred to in said tenth para-
40 graph of the bill of complaint.

Answer.

11. They have no knowledge of the value of the property belonging to the said Elizabeth Hyde at the time of her death which was derived from sources otherwise than by virtue of the fourth clause of the will of Charles Hyde, nor of the value of the residue of the personal estate of Charles Hyde that, by virtue of the fourth clause of his will, was in the hands of Elizabeth Hyde at the time of her death, except as is stated in the eleventh paragraph of said bill of complaint, and leave the complainants to make such proof thereof as they may be advised is necessary for them to do, but these defendants allege and insist that a one-fifth part of the residue of the personal estate of Charles Hyde, deceased, that, by virtue of the fourth clause of his will, was in the hands of Elizabeth Hyde at the time of her death, became vested in them, and that said residue may be liable to the tax referred to in said eleventh paragraph of said bill of complaint.

These defendants, being infants of tender years, submit themselves to the judgment of this Honorable Court, and pray that their interests may be protected and saved to them.

JEROME T. CONGLETON,
Solicitor for Howard A. Colby, guardian ad litem for Francis deL. Hyde, Carolyn Hyde and Edward Hyde.

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Replication.

Replication.

Filed February 27, 1917.

IN CHANCERY OF NEW JERSEY.

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Between

DORSEY W. HYDE, *et als.*, Exe-
cutors, etc.,

Complainants,

and

FRANCIS DEL. HYDE, *et als.*,
Defendants.

On Bill, etc.

Replication.

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The complainants join issue on the answer of the defendants, Francis deL. Hyde, Carolyn Hyde and Edward Hyde.

COLBY & WHITING.

Solicitors for Complainants.

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40

Opinion.

of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and in force in the State of New Jersey at the time of my death, in case I had died intestate. * * * It being my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life, of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children. * * * And therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children."

The question to be determined is whether testator's widow, under these provisions of his will, took a life estate only in the property given her, or whether she took the same absolutely.

Under the law in force at the time of testator's death in June, 1901, the widow, if he had died intestate, would have been entitled to her dower in any real estate of which he died seized (C. S. p. 2043), and also to one-third of his personal estate that was subject to distribution. (C. S. p. 3874, sec. 169.) These were the portions of his estate which testator by this fourth paragraph of his will directed his widow should take after the trustees had "apportioned, divided and distributed the residue of his estate among the widow and children."

Opinion.

From this language it would appear that testator intended Mrs. Hyde should have her dower in the realty and an absolute one-third interest in the residue of his personal property, and such would be the effect unless testator, by provisions in this or other paragraphs of his will, limited in any way this gift to his widow. Complainants contend that this limitation is imposed by the later clauses in the fourth paragraph, in which testator declares it to be his "will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children."

And complainants also contend that a like limitation was imposed by the concluding provisions of this fourth paragraph, wherein testator directs that, on the death of his wife, all that part then remaining of the personal property which came to her under this paragraph of his will should be divided equally among his children.

It is clear, from the language quoted, that testator intended his widow to receive those portions of his estate that she would have received had he died intestate, and that he expressly directed that she should have the actual custody, control and disposal of the same. The word "actual" as used by testator in this connection, must be regarded as synonymous with "absolute," as no restraint is placed upon the use or disposition she may make of the whole or any part of the property given her. The fact that

Opinion.

testator undertook to make a disposition of any part of this property which his widow at her death had left unused or undisposed of, or that remained, as he expressed it, cannot be given the significance complainants claim, in view of the absolute power of disposition given the widow

10 over the share of the estate which came to her. Having found that testator gave his widow this uncontrolled power to dispose of her share or interest in his estate, without any limitation or restraint, the determination of the question in controversy must be controlled by the principle stated by Chancellor Green in *Annin's Executors v. Vandoren's Admr.*, 14 Eq., 135 (at p. 146), and quoted approvingly by Mr. Justice Swayze, in delivering the opinion of the Court of Errors and Appeals in *McCloskey v. Thorpe*, 74 Eq. 413, that:

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“The cases rest upon the principle that if the testator, either expressly or by implication, manifests an intent to vest in the first legatee the uncontrolled power of disposing of the property, such power involves the idea of absolute ownership, and the limitation over is void, as inconsistent with the rights of the first legatee.”

30 This principle was applied in *Downey v. Borden*, 36 L. 460, and in other cases cited in the opinion of Justice Swayze, and it has been held that this rule of construction is applicable to bequests of personalty as well as to devises of land. *Pratt v. Douglas*, 38 Eq. 516 (at p. 533.)

A decree will therefore be advised that Mrs. Hyde's share of the testator's estate was given to her absolutely and not for life.

Final Decree.

Final Decree.

Filed May 10, 1917.

IN CHANCERY OF NEW JERSEY.

<p><i>Between</i></p> <p>DORSEY W. HYDE, <i>et als</i>, Exe- cutors, etc.,</p> <p style="text-align: center;"><i>Complainants,</i></p> <p style="text-align: center;"><i>and</i></p> <p>FRANCIS DEL. HYDE, <i>et als</i>, <i>Defendants.</i></p>	}	<p>10</p> <p><i>On Bill, etc.</i></p> <p><i>Final Decree.</i></p>
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This cause coming on to be heard in the presence of Everett Colby, of counsel with the complainants, and Jerome T. Congleton, of counsel with the defendants; and it appearing that in and by the last will and testament of Charles Hyde, deceased, in the pleadings in the cause mentioned, the testator by the fourth clause thereof did provide as follows, to wit:

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“Fourth: All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, I give, devise and bequeath to my executors hereinafter named, and to the survivors and survivor of them in trust, nevertheless, for the following uses and purposes:

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I. To give and distribute one hundred thousand dollars thereof within five years from the date of my death, for such religious, charitable or educational or other purposes as they may deem advisable, provided,

Final Decree.

nevertheless, that no portion thereof shall be given to, or distributed among, my wife or children individually or collectively:

10 II. To apportion, divide and distribute all the balance of said rest, residue and remainder among my widow, and my heirs at law and next of kin, in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and force in the State of New Jersey at the time of my death in case I had died intestate; except, nevertheless, that there shall be first charged to, and deducted out of the share of my son, Charles L. Hyde, the sum of two hundred and thirty-
 20 three thousand two hundred and fourteen 95-100 dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him, and represented by two promissory notes made by him to me, one for the sum of two hundred and thirty thousand, one hundred and sixteen dollars and fifty-eight cents, dated January first, eighteen hundred and ninety-seven, and the other for the sum of eleven
 30 thousand one hundred seventy-eight dollars and thirty-two cents, dated November first, eighteen hundred and ninety-eight, and on which said notes there is due today the sum above mentioned; and except also that there shall be first charged to and deducted out of the share of my son, Dorsey W. Hyde, the sum of thirteen thousand and thirty 52-
 40 100 dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him; and except

Final Decree.

further that there shall be likewise first charged to and deducted out of the share of any of said heirs or next of kin any sum or sums which I may hereafter loan or advance to or for such heir or next of kin.

It being my intention that no charge shall be made against the share of any heirs or next of kin for any loan, debt or advancement heretofore made except only those which I have hereinbefore specified. 10

It being also my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, Francis deL. Hyde and Edith L. Hyde, and therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children." 20 30

And it further appearing that pursuant to the terms of said last will and testament of said Charles Hyde, deceased, his executors as trustees thereunder, delivered to Elizabeth Hyde, widow of said Charles Hyde, one-third of the personal property of which the said Charles Hyde died seized that was subject to distribution under said fourth clause of his will.

Final Decree.

And it further appearing that said Elizabeth Hyde died on September 21st, 1916, leaving a last will and testament and codicil thereto, which were duly admitted to probate by the Surrogate of Union County on October 26th, 1916, in and by which she did dispose of the personal property which came to her under the fourth paragraph of the last will and testament of her husband, the said Charles Hyde, deceased, and did appoint the complainants executors and trustees under her last will and testament.

And the said complainants having applied to this Court for instructions with respect to whether under the fourth clause of the will of Charles Hyde, the said Elizabeth Hyde became entitled to an absolute title in fee to the personal property therein bequeathed to her, or whether said clause only gave her a life estate therein, coupled with a power of disposal and with a vested remainder over to the children named therein, and as to how the residue of the personal estate of the said Charles Hyde, that, by virtue of the fourth clause of his will was in the hands of said Elizabeth Hyde at the time of her death, should be administered and distributed;

And the pleadings and proofs having been read, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered said pleadings, proofs and arguments, and it appearing to the Court that the complainants are entitled to relief:

It is, on this 9th day of May, 1917, 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 that the said Elizabeth Hyde,

Final Decree.

widow of said Charles Hyde, under and by virtue of the fourth paragraph of the last will and testament of said Charles Hyde, deceased, took an absolute one-third interest in the residue of his personal property, and not a life estate, and that said complainants administer and distribute the same as a part of the estate of Elizabeth Hyde. 10

AND IT IS FURTHER ORDERED that the costs of the complainants and defendants in this cause, including a counsel fee to Messrs. Colby & Whiting of two hundred dollars, and to Jerome T. Congleton of one hundred dollars, be and the same are hereby ordered to be paid by the said complainants out of the corpus of the estate of Charles Hyde, deceased.

E. R. WALKER,
C. 20

Respectfully advised,

JOHN E. FOSTER,
V. C.

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Notice of Appeal.

Notice of Appeal.

Filed May 11, 1917.

IN CHANCERY OF NEW JERSEY.

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Between

DORSEY W. HYDE, Executor,
et als,

Complainants,

and

FRANCIS DEL. HYDE, *et als,*
Defendants.

On Bill, etc.

*Notice of
Appeal.*

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The complainants hereby appeal from so much of the final decree made in this court in the above stated cause as ordered, adjudges and decrees that the said Elizabeth Hyde, widow of said Charles Hyde, under and by virtue of the fourth paragraph of the last will and testament of said Charles Hyde, deceased, took an absolute one-third interest in the residue of his personal property and not a life estate, and that

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said complainants administer and distribute the same as a part of the estate of Elizabeth Hyde, to the Court of Errors and Appeals in the last resort in all causes.

Dated May 10th, 1917.

COLBY, WHITING & MOORE,
Solicitors for and of Counsel with Complainants.

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Notice of Appeal.

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

IRA C. MOORE, JR.,
Of Counsel with Complainants.

Service of the within notice of appeal is hereby acknowledged this 10th day of May, 1917. 10

JEROME T. CONGLETON,
Solicitor of Defendants-Respondents.

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Petition of Appeal.

Petition of Appeal.

Filed May 15, 1917.

New Jersey Court of Errors and Appeals

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DORSEY W. HYDE, Executor,
et als,
Complainants-Appellants,
and

FRANCIS DEL. HYDE, *et als,*
Defendants-Respondents.

On Appeal.
Petition.

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

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The petition of Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and Edith Hyde Colby, as executors and executrix of and trustees under the last will and testament of Elizabeth Hyde, deceased, and as surviving executors and executrix of and trustees under the last will and testament of Charles Hyde, deceased, and individually, and Carolyn K. Hyde, individually and as executrix and trustee under the last will and testament of Francis deL. Hyde, deceased, the appellants in the above stated cause, respectfully show that your petitioners find themselves aggrieved by final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the ninth day of May, in the year nineteen hundred and seventeen, wherein the said Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde and

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Edith Hyde Colby, as executors and executrix

Petition of Appeal.

of and trustees under the last will and testament of Elizabeth Hyde, deceased, and as surviving executors and executrix of and trustees under the last will and testament of Charles Hyde, deceased, and individually, and Carolyn K. Hyde, individually and as executrix and trustee under the last will and testament of Francis deL. Hyde, deceased, were complainants and Francis deL. Hyde, Carolyn Hyde and Edward Hyde, were defendants, in this respect, to wit:

That the said decree adjudges that the said Elizabeth Hyde, widow of Charles Hyde, under and by virtue of the fourth paragraph of the last will and testament of said Charles Hyde, deceased, took an absolute one-third interest in the residue of his personal property and not a life estate, and that the said complainants administer and distribute the same as a part of the estate of Elizabeth Hyde.

And your petitioners humbly appeal from that part of the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for that the said Elizabeth Hyde, widow of Charles Hyde, under and by virtue of the last will and testament of Charles Hyde, deceased, did not take an absolute interest in the residue of his personal property and the same should not be administered and distributed as a part of the estate of Elizabeth Hyde; and for that the true meaning and effect of the fourth paragraph of the said last will and testament of Charles Hyde, deceased, was to give his wife, Elizabeth Hyde, a life estate in said personal property coupled with a power of disposal during her life and a vested remainder to his five children in said paragraph

Petition of Appeal.

named, in the residue of the estate of Charles Hyde remaining undisposed of in the hands of Elizabeth Hyde at the time of her death; and for that the complainants should have been instructed to administer, account and distribute the residue of the personal estate of said Charles
 10 Hyde remaining in the hands of said Elizabeth Hyde at the time of her death, as a part of the estate of said Charles Hyde and not as a part of the estate of Elizabeth Hyde.

Your petitioners therefore pray that the said decree of the said Chancellor may be in the particulars aforesaid reserved, 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.
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COLBY, WHITING & MOORE,
Solicitors of Appellants.

IRA C. MOORE, JR.,
Of Counsel with Appellants.

Service of the within petition of appeal is hereby acknowledged this 18th day of May, 1917.

JEROME T. CONGLETON,
 30 *Solicitor of Defendants-Respondents.*

Answer to Petition of Appeal.

Answer to Petition of Appeal.

Filed May 14th, 1917.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

<p><i>Between</i></p> <p>DORSEY W. HYDE, Executor, <i>et als,</i> Complainants-Appellants, <i>and</i></p> <p>FRANCIS DEL. HYDE, <i>et als.,</i> Defendants-Respondents.</p>	}	<p>10</p> <p><i>Answer.</i></p>
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The answer of Francis deL. Hyde, Carolyn Hyde and Edward Hyde, infant defendants and respondents, by Howard A. Colby, their guardian *ad litem* appointed in this cause, to the petition of appeal of the above named appellants. 20

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was, on the 9th day of May, inst., made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as therein stated, but as to the form and substance thereof, these respondents pray to refer thereto when the same shall be produced. 30

And these respondents are advised and believe, that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be adjudged to these respondents.

JEROME T. CONGLETON, 40
Solicitor for and of Counsel
with Defendants-Respondents.

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New Jersey Court of Errors and Appeals

DORSEY W. HYDE, Executor; <i>et als,</i> Complainants-Appellants, and FRANCIS DE L. HYDE, <i>et als,</i> Defendants-Respondents.	}	On Appeal from Chancery.
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Brief for Complainants-Appellants.

This is an appeal from a decree of the Court of Chancery construing the fourth paragraph of the will of Charles Hyde, deceased.

Statement of the Case.

Charles Hyde, a resident of Plainfield, New Jersey, died on June 12th, 1901, leaving a will the fourth paragraph of which provided as follows:

“Fourth: All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, I give, devise and bequeath to my executors hereinafter named, and to the survivors and survivor of them in trust, nevertheless, for the following uses and purposes:

* * * *

2. To apportion, divide and distribute all the balance of said rest, residue and remainder among my widow, and my heirs at law and next of kin, in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and

distribution in vogue and force in the State of New Jersey at the time of my death in case I had died intestate; except, nevertheless, that there shall be first charged to, and deducted out of the share of my son, Charles L. Hyde, the sum of two hundred and thirty-three thousand and two hundred and fourteen $95/100$ dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him, and represented by two promissory notes made by him to me, one for the sum of two hundred and thirty thousand, one hundred and sixteen dollars and fifty-eight cents, dated January first, eighteen hundred and ninety-seven and the other for the sum of seven thousand one hundred seventy-eight dollars and thirty-two cents, dated November first, eighteen hundred and ninety-eight, and on which said notes there is due today the sum above mentioned; and except also that there shall be first charged to and deducted out of the share of my son, Dorsey W. Hyde, the sum of thirteen thousand and thirty $52/100$ dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him; and except further that there shall be likewise first charged to and deducted out of the share of any of said heirs or next of kin any sum or sums which I may hereafter loan or advance to or for such heir or next of kin.

It being my intention that no charge shall be made against the share of any heir or next of kin for any loan, debt or advancement heretofore made except only those which I have hereinbefore specified.

It being also my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, Francis deL. Hyde and Edith L. Hyde, and therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children."

The testator appointed his wife and his five children, above named, as his executors, all of whom survived him.

Thereafter, on September 7th, 1910, Francis deL. Hyde, one of the children of Charles Hyde, died, leaving a will whereby he gave his estate to his executors in trust for his wife and children. His widow, Carolyn K. Hyde, who is one of the complainants in this suit, qualified as sole executrix. He is also survived by three children, all of whom are under twenty-one years of age and are the defendants to this suit.

On September 21st, 1916, Elizabeth Hyde, the widow of Charles Hyde, died leaving a will wherein she directed her executors to divide into five parts the property which came to her under the fourth paragraph of her husband's will and to give one part to each of his four children and the remaining part to the children of his deceased son, Francis de L. Hyde. The

four surviving children of Charles Hyde are also the executors of the will of Elizabeth Hyde, deceased,

A question has arisen as to what interest Elizabeth Hyde took in the personal property which came to her under the fourth paragraph of the will of Charles Hyde, deceased. The intention of the testator is quite plainly expressed but in view of the rule of construction applied in *Downey v. Borden*, 36 N. J. L. 460 and other similar cases, there is some doubt as to whether that intention can be legally effected.

It is not entirely clear whether Elizabeth Hyde took only a life estate, or the absolute title. The four surviving children of Charles Hyde take the same interests in this property under either construction, but to the widow and children of the deceased son, Francis de L. Hyde, the question is very important. If the will gave Elizabeth Hyde only a life estate in this property, and Francis de L. Hyde a vested remainder in one-fifth of it, then this one-fifth interest in remainder passed under Francis de L. Hyde's will and now belongs to his widow in trust for herself and children. If, on the other hand, Elizabeth Hyde had the absolute title, then this one-fifth interest passed under her will to the three children of Francis de L. Hyde, and their mother has no interest in or control over it.

This question is important also because of the inheritance tax laws. Charles Hyde died in 1901, so that if title to this property vested by virtue of his will, it is not affected by the State Transfer Tax Act of 1914 or the Federal Estate Tax Act of 1916. Elizabeth Hyde died on September 21st, 1916, thirteen days after the Federal Estate Tax law went into effect. The

amount of property in question is large and if it passed under the will of Elizabeth Hyde is subject to Federal as well as State inheritance taxes.

The complainants contend that the will of Charles Hyde gave to his widow Elizabeth Hyde a life estate only, with a vested remainder to the five children named therein.

Points.

I.

WHERE A GIFT OF PROPERTY IS EXPRESSLY DEFINED TO BE FOR LIFE AND THE FIRST TAKER IS ALSO GIVEN POWER TO DISPOSE OF THE PROPERTY ABSOLUTELY, THE POWER OF DISPOSAL DOES NOT ENLARGE THE LIFE ESTATE TO A FEE, AND A LIMITATION OVER OF SO MUCH AS REMAINS UNDISPOSED OF UPON THE DEATH OF THE FIRST TAKER IS VALID.

There are two well-defined rules which have been recognized and applied in this state in the construction of wills in cases where there is a gift of property and also a donation of a power of disposal to the beneficiary. A distinction has been made from the time of the earliest cases between an estate given indefinitely in the first instance and one given expressly for life. But although it is perfectly established, the distinction is such a slight one, that it is often very difficult to determine within which class a gift is brought by the phraseology of a given will.

Robeson v. Shotwell, 55 N. J. Eq. 318, 321.

In one class of cases, where there is a gift without definition of the estate given and also an unlimited power to dispose of the property, the generality of the gift and the unrestricted power of disposal are construed to pass an absolute estate to the beneficiary, and any gift over is held to be void, because such a limitation over is inconsistent with the complete estate given to the first taker. *Benz v. Fabian*, 54 N. J. Eq. 615, 617. The following are cases in this class:

Den v. Gifford, 9 N. J. L. 46 (Sup. Ct. 1827).

Sharp v. Humphreys, 16 N. J. L. 25 (Sup. Ct. 1837).

Annin v. Vandoren, 14 N. J. Eq. 135 (Chan. 1861).

Downey v. Borden, 36 N. J. L. 460 (E. & A. 1872), affirming 35 N. J. L. 74.

Hoxsey v. Hoxsey, 37 N. J. Eq. 21 (Chan. 1883).

McClellan v. Larchar, 45 N. J. Eq. 17 (Chan. 1889).

Benz v. Fabian, 54 N. J. Eq. 615 (Chan. 1896).

Tuerk v. Schueler, 71 N. J. L. 331 (E. & A. 1904).

Wills v. Wills, 72 N. J. Eq. 782 (Chan. 1907), affirmed by Court of E. & A. in 73 N. J. Eq. 733.

McCloskey v. Thorpe, 74 N. J. Eq. 413 (E. & A. 1908).

Brohm v. Berner, 77 Atl. 517.

Bennett v. Assn. 79 N. J. Eq. 76, affirmed by Court of E. & A. (1910) in 78 N. J. Eq. 302.

Huston v. Boyd, 83 N. J. Eq. 794 (Chan. 1914).

Bunnell v. Beam, 97 Atl. 494 (Chan. 1916).

The other class of cases is where the estate given is, by the express terms of the will, defined to be a life estate, and, if a power of disposal be added, the beneficiary will take a life estate only and the added power of disposal will be held to be a separate and distinct gift, which has no effect to enlarge the life estate into a fee or to prevent a limitation over. *Benz v. Fabian, supra*. The following are cases in this class:

Cory v. Cory, 37 N. J. Eq. 200, reversed on other grounds by

Pratt v. Douglas, 38 N. J. Eq., 516 (Ct. of E. & A. 1884).

Lienau v. Summerfield, 41 N. J. Eq. 381 (Chan. 1886).

Wright v. Wright, 41 N. J. Eq. 382 (Chan. 1886).

Rhodes v. Shaw, 43 N. J. Eq. 430 (Chan. 1887).

Stevens v. Flower, 46 N. J. Eq. 340 (Chan. 1890).

Cox v. Wills, 49 N. J. Eq. 130 (Chan. 1891), reversed on other grounds, *Id.* 573.

Bradway v. Holmes, 50 N. J. Eq. 311 (Chan. 1892).

Wooster v. Cooper, 53 N. J. Eq. 682 (Ct. of E. & A. 1895).

Robeson v. Shotwell, 55 N. J. Eq. 318, affirmed by Court of E. & A. (1897), *Id.* 824.

Hunt v. Smith, 58 N. J. Eq. 25 (Chan. 1899).

Parker v. Travers, 74 N. J. Eq. 812 (Ct. of E. & A. 1908).

Kemp v. Thomas, 81 N. J. Eq. 103 (Chan. 1912).

Deats v. Ziegner, 82 N. J. Eq. 605 (Ct. of E. & A. 1913).

Fenster v. Bierman, 99 Atl. Rep. 529 (Chan. 1916).

The rule was stated by this court in *Downey v. Borden, supra*, as follows:

“As a rule of construction the principle is entirely settled that where lands are devised in the first instance in language indeterminate as to the quantity of the estate from which an estate for life would result by implication and words adapted to a creation of a power of disposal without restriction or to the mode of execution are added, the construction will be that an estate in fee is given, but where the quantity of the estate of the taker is expressly defined to be for life, the superadded words will be construed to be the mere gift of a power of disposition.”

We take it that by the words “in the first instance,” as here used, is meant “to the first taker” and not “in the first part of the will.” The Court did not mean to say that where property is given in the first part of the will in language indeterminate as to quantity a subsequent clause limiting that gift to a life estate will be ignored and the will construed to pass a fee. The determining fact is whether or not it appears from the whole will that the testator expressly defined the estate of the first taker to be for life.

It will be noted that in each of the cases above cited as being in the first class, the estate was given to the first taker indefinitely. In none of them was either the estate or the power of disposal expressly defined to be for life. In the latter class, the estates were given for life only in express terms.

In the will now in question the testator stated that it was his will and intention that while his wife should have the actual custody and control

“during her life” of a portion of his personal estate, still that so much thereof as should remain at her death should be divided among his five children. He thereby clearly expressed his intention of limiting his wife’s interest in this property to a life estate. He also gave his wife the “actual * * * disposal during her life.” The court below held that he thereby gave his widow uncontrolled power to dispose of her share or interest in his estate without any limitation or restraint and that the gift of this additional power enlarged her life estate to a fee. (Case pp. 31, 32.)

This view is contrary to that of this court as expressed in *Robeson v. Shotwell*, 55 N. J. Eq. 318. Affirmed *Id.* 824. In that case the will provided:

“I give to my beloved wife, Martha S. Shotwell, all the property that I possess, both real and personal for her sole use, benefit and enjoyment during her life, with full power to dispose of any of the said property, both real and personal, and to use the proceeds thereof in such manner as she may desire.

“After the death of my wife I do authorize and direct my executor to divide such property as may then remain as follows:”
&c.

In that case it was argued that the beneficiary had “not only a power of absolute sale and disposal, but an express power in addition to use the proceeds thereof at her pleasure,” and it was insisted that “the effect of such a power to use the proceeds is to make the power over the property practically and legally absolute for all purposes in the life tenant, and therefore to create so absolute an estate and right

of property that not only the limitations beyond it are void but the power given must be taken to express the testator's real intention as to the character of her estate and supersede his express declaration limiting her estate to one during life." * * *

Vice-Chancellor Emery, in writing the opinion of the Court, disposed of this argument as follows (at page 323):

"I am of opinion that the additional power given in this case to the life tenant of the right to use the whole or any portion of the proceeds of the sale or conversion which she has the power to make, cannot change the application of the rule.

"The vital question in such cases is whether, on the construction of the whole will of the testator, the absolute property has been given to the first taker or only a power over the property. That the power over the property may, if she chooses, be exercised absolutely by the life tenant for her own benefit does not, as it seems to me, of itself convert the power into property or override all other provisions of the will. That could not have been the intention of the testator in this case, for he contemplates that his wife may not exercise the power of sale or disposal which he confers upon her, and he disposes of the property which remains after her death undisposed of or unappointed under the power. The testator's intentions, as declared in his will, can be carried out, as to all its substantial provisions, by holding it to confer what, on the face of it, it purports expressly to confer, viz., a life estate, with a power of disposal for the life tenant's bene-

fit, and then a disposition of so much as was not appointed under the power."

In *Leinau v. Summerfield*, 41 N. J. Eq. 381, a wife by her will "constituted" her husband and certain other designated persons "heirs to my entire estate * * * in such manner, however, that my dear husband, during his life time and so long as he pleases, shall be and remain in quiet and undisturbed possession and enjoyment of my entire estate, and may perfectly freely and without control, do with and dispose of the same without rendering an inventory," &c. It was held that the husband took thereunder a life estate in testator's lands, with a power to convey the fee.

Of the cases relied upon by the defendants, *Dutch Church v. Smock*, 1 N. J. Eq. 148 (Chan. 1830); *Kendall v. Kendall*, 36 N. J. Eq. 91 (Chan. 1882), and *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21 (Chan. 1883), are the most difficult to harmonize with the contention of the complainants.

In *Hoxsey v. Hoxsey*, the will contained the following provision:

"I give and bequeath to my beloved wife, Margaret, all my estate, real and personal, wheresoever situate, for her use and enjoyment during her natural life, and after her death it is my wish, unless she shall have earlier divided the same or disposed of it by will, that the same shall be equally divided among my children."

Later on in the same paragraph the testator stated his intention as follows:

"I have willed to my wife all my estate, both real and personal, to her and her heirs and assigns forever, untrammelled by any restrictions and conditions, and only controlled in the manner of managing the same

so far as my wishes above expressed may control her in the manner of disposing of the same."

The Court held that the testator's bequest of his property to his wife for her use "during her natural life," with remainder over to his children in case she did not dispose of it by her will, was not declaratory of her interest, but as appears by the subsequent part of the will was a mere expression of his wishes.

"In other words, he says it is his intention that her estate in the property shall be absolute, and that the expression of his wishes in the will as to her management and disposition of it, is to be regarded as merely advisory."

In *Dutch Church v. Smock* and also in *Kendall v. Kendall*, there was a gift for life coupled with a power of disposal, but no limitation over to indicate that it was a power and not property which the testator had in mind and in *Kendall v. Kendall* this omission was relied on in construing the will. *Robeson v. Shotwell*, 55 N. J. Eq. at 324.

It will be noted that these cases were not appealed. If they stand for the principle that a power of absolute disposal enlarges to a fee an estate expressly defined to be for life, they must be considered as overruled by the decisions of this court above cited. See especially *Robeson v. Shotwell*, *supra*, *Wooster v. Cooper*, 53 N. J. Eq., 682, and *Parker v. Travers*, 74 N. J. Eq., 812. The testamentary schemes in those cases are very similar to that in this case.

II.

A LIMITATION OF THE POWER OF DISPOSAL IS INCONSISTENT WITH THE GIFT OF A FEE, AND THE PRESENCE OF A LIMITATION TO THE LIFE OF THE BENEFICIARY, INDICATES AN INTENTION TO GIVE ONLY A LIFE ESTATE IN THE PROPERTY, ESPECIALLY WHERE IT IS ACCOMPANIED BY A GIFT OVER OF WHAT REMAINS AT THE DEATH OF THE FIRST TAKER.

Where there is a devise in fee, with a limitation over in the event of the death of the devisee without disposing of the property by *will*, the Court will give effect to the intention of the testator and hold the devise to be a life estate only, coupled with a power of testamentary disposition.

Kent v. Armstrong, 6 N. J. Eq., 637.

Cantine v. Brown, 46 N. J. L., 599.

Kellers v. Kellers, 79 N. J. Eq., 412, and 80 N. J. Eq., 441.

But where there is a devise in fee coupled with an *unlimited* power of disposition, a limitation over of what remains undisposed of upon the death of the first taker is void. *McCloskey v. Thorpe*, 74 N. J. Eq., 413. It would appear, therefore, that when the estate of the first taker is not expressly for life, whether the gift of "what remains" is valid or not, depends upon whether the first taker's power of disposal is limited or unlimited. If it is unlimited, that is to say, if the first taker is given power to dispose of the property both during his lifetime and also by will, then a limitation over upon his death is void as being inconsistent with the rights of the first taker. And it is

held that the presence of a gift of "what remains," is not enough to show an intention to limit the first taker's estate and power of disposal to the term of his own life.

See *Rodenfels v. Schuman*, 45 N. J. Eq., 383, 386, in which the Court of Chancery reversed the construction placed upon a will by the same court in *Naundorf v. Schuman*, 41 N. J. Eq., 14, and also reversed *Jones v. Stites*, 19 N. J. Eq., 324.

Where, however, the estate of the first taker is expressly stated to be for life, or his power of disposal is expressly limited in some way, the gift to another of what remains undisposed of at his death, is perfectly valid.

Downey v. Borden, 36 N. J. L., 460, 468.

Bradway v. Holmes, 50 N. J. Eq., 311, 313.

Benz v. Fabian, 54 N. J. Eq., 615.

Kellers v. Kellers, 79 N. J. Eq., 412, at 422, *et seq.*

In the present case the will in question contains the following provision:

"It being also my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children, Dorsey W. Hyde, Charles L. Hyde, Louis K. Hyde, Francis deL. Hyde and Edith L. Hyde, and therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of

said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children."

The will here in question gives to Elizabeth Hyde the "actual * * * disposal during her life" of a share of the testator's personal estate. The Court of Chancery held that "the word 'actual' as used by the testator in this connection must be regarded as synonymous with 'absolute,' as no restraint is made upon the use or disposition she may make of the whole or any part of the property given her." (Case p. 31.)

It will appear from an examination of the cases, that there is a difference between an "absolute power of disposal" as the term is therein used, and a "power of absolute disposal." The testator in this case gave his widow a power of absolute disposal. That is to say, she had power to give an absolute and unrestricted title. But her *power* was not absolute in the sense of being unrestricted and unlimited. It was expressly limited to her lifetime. It was restricted in that it could not be exercised by will. *Wooster v. Fitzgerald*, 61 N. J. L., 368. Her power of disposal was therefore not absolute and unlimited, and does not indicate an intention on the part of the testator to give her a fee. See *Robeson v. Shotwell*, 53 N. J. Eq. at 324, 325.

III.

THE TESTATOR'S INTENTION IS EXPRESSED IN PLAIN LANGUAGE AND SHOULD NOT BE DEFEATED BY THE EXTENSION OF A TECHNICAL RULE OF CONSTRUCTION WHICH DOES NOT CLEARLY APPLY.

The scheme of the fourth paragraph of the will in question is first to dispose of the great bulk of the testator's estate in general terms to his six principal beneficiaries. He directs his executors "to apportion, divide and distribute all the balance of said rest, residue and remainder among my widow, and my heirs at law and next of kin, in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and force in the State of New Jersey at the time of my death in case I had died intestate." If he had stopped there each of his five children would be entitled to two-fifteenths of his personal estate, and Elizabeth Hyde, his widow, would have received the absolute title to one-third of it. But he did not stop there, and the remainder of this paragraph cannot be ignored. He next proceeded to make exceptions as to the shares to be given to certain of his beneficiaries. The shares of Charles L. Hyde and Dorsey W. Hyde were decreased in amount; the share of any child to whom he may have made advancements, was then increased to a larger amount than it would have been had he not inserted such a provision; the share of his widow, Elizabeth Hyde, was then limited to a life estate only, coupled with a power of disposal, with remainder to his five children.

He directed his executors to "apportion, divide and distribute his personal estate to his widow in the same manner and proportion" as she would take the same under the statute of distribution. That is to say, he directed one-third of his personal estate to be set apart and delivered to his widow. He then expressly declared it to be his intention that her interest in this portion so set apart and given to her, should be for her life only, that she should have the power to dispose of this property during her life, but that so much thereof as remained at her death should be divided among his five children. He then reiterated his intention to give his five children an interest in this one-third share of his residuary estate by directing "that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children."

The scheme of disposition which the testator had in mind is perfectly clear. None of its provisions are inconsistent, nor is there anything in his plan which is contrary to public policy, or which could not have been clearly effected by the use of language already construed by this court. *Robeson v. Shotwell*, *supra*, *Wooster v. Cooper*, *supra*, *Parker v. Travers*, *supra*.

The intention of the testator is the law of wills, *Provost v. Provost*, 27 N. J. Eq. 296. Effect should be given in the construction of wills to all the words if possible, and it should be construed so that it may stand, not fall. *Elle v. Young*, 24 N. J. L. 775, 782. Every

part of the will, every word, indeed, must stand. *Cory v. Cory*, 37 N. J. Eq. 198.

The Court of Chancery held that by this will the testator gave one-third of his personal property to his widow absolutely and that his children received no interest in this one-third share.

That the decree appealed from is not in accordance with the *actual* intention of the testator, is obvious. It nullifies his expressed wish that his wife should have the custody, control and disposal of this property "during her life" only. It invalidates the gift over of "so much thereof as shall remain at her death," although the testator in plain language stated and reiterated his intention to make such a gift. By the extension of a rule of construction, the court below has found the testator's intention to be contrary to what he himself expressed it to be. The rule relied upon to attain this result has never been applied, by this court, to a case which did not very clearly come within it. We respectfully submit that it is a rule which should be limited, not extended, and never applied where to do so would defeat the testator's expressed intention.

COLBY, WHITING & MOORE,
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BORDEN D. WHITING.

IRA C. MOORE, JR.,

Of Counsel.

New Jersey Court of Errors and Appeals

DORSEY W. HYDE, Executor,
et als.,

Complainants-Appellants.

and

FRANCIS DEL. HYDE, *et als.,*

Defendants-Respondents.

*On Appeal
from
Chancery.*

Brief for Defendants-Respondents.

The appeal in this case brings up for review a decree of the Court of Chancery (state of the case, p. 33) to the effect that Elizabeth Hyde under the fourth paragraph of the will of her husband, Charles Hyde, took an absolute fee to one-third of the personal property bequeathed by that paragraph.

Statement of the Case.

Charles Hyde died a resident of Plainfield, New Jersey, on June 12th, 1901, leaving a last will and testament (page 12 of state of case) which was admitted to probate by the Surrogate of Union County on June 24th, 1901. The controversy arises under the fourth paragraph of this will, which provides as follows (state of the case, p. 13):

“Fourth: All the rest, residue and remainder of my estate, real, personal and mixed, and wheresoever situate, I give, devise and bequeath to my executors hereinafter named, and to the survivors and sur-

vivor of them in trust, nevertheless, for the following uses and purposes.

* * * *

2. To apportion, divide and distribute all the balance of said rest, residue and remainder among my widow, and my heirs at law and next of kin, in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and force in the State of New Jersey at the time of my death in case I had died intestate; except, nevertheless, that there shall be first charged to, and deducted out of the share of my son, Charles L. Hyde, the sum of two hundred and thirty-three thousand and two hundred and fourteen $95/100$ dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him, and represented by two promissory notes made by him to me, one for the sum of two hundred and thirty thousand, one hundred and sixteen dollars and fifty-eight cents, dated January first, eighteen hundred and ninety-seven, and the other for the sum of seven thousand, one hundred seventy-eight dollars and thirty-two cents, dated November first, eighteen hundred and ninety-eight, and on which said notes there is due today the sum above mentioned; and except also that there shall be first charged to and deducted out of the share of my son, Dorsey W. Hyde, the sum of thirteen thousand and thirty $52/100$ dollars with the interest that may be due thereon, for money heretofore loaned or advanced by me to or for him; and except

further that there shall be likewise first charged to and deducted out of the share of any of said heirs or next of kin any sum or sums which I may hereafter loan or advance to or for such heir or next of kin.

It being my intention that no charge shall be made against the share of any heir or next of kin for any loan, debt or advancement heretofore made except only those which I have hereinbefore specified.

It being also my will and intention that while my wife, Elizabeth Hyde, shall have the actual custody, control and disposal during her life of the portion of my personal estate which comes to her under this fourth paragraph of my will, still that so much thereof as shall remain at her death shall be distributed and divided equally among and between my five children, Dorsey W. Hyde, Charles L. Hyde and Louis K. Hyde, Francis deL. Hyde and Edith L. Hyde, and therefore I hereby order and direct that upon the death of my wife, Elizabeth Hyde, all that part then remaining of said personal property which came to her under the terms of said fourth paragraph, shall be divided and distributed, share and share alike, among my said five children."

The defendants-respondents, who are the three surviving children of Francis deL. Hyde, maintain that their grandmother, Elizabeth Hyde, took an absolute title under the will of her husband, Charles Hyde, to one-third of the personalty bequeathed by the fourth paragraph. In his opinion filed in this case (see state of case, page 29), Vice-Chancellor Foster sustained this contention on the ground that a gift of an abso-

lute power of disposal is equivalent to the gift of a fee.

Points.

I.

WHERE THE WORDS OF A BEQUEST GIVE THE LEGATEE THE ABSOLUTE POWER TO EXPEND OR CONSUME PERSONALTY, EVEN THOUGH IMPLIEDLY CLEARLY INTENDED FOR LIFE ONLY, THE LEGATEE TAKES AN ABSOLUTE ESTATE, AND ANY GIFT OVER OF WHAT IS LEFT IS VOID. POWER OF EXPENDITURE IS EQUIVALENT TO ABSOLUTE POWER OF DISPOSITION, AND WHERE SUCH ABSOLUTE POWER OF DISPOSAL IS GIVEN, A BEQUEST OVER IS VOID.

This principle was established in *Annin v. Van Doren*, 14 N. J. Eq. 135 (Chancery 1861) where the testator left the residue of his estate to four daughters to be paid as soon as possible, and provided that if daughters A or B died without legal issue, the shares bequeathed to her (if not paid over by the executors, and if paid over, then such part thereof *as remained unexpended*) to go to C and D. Chancellor Green held that the power of expenditure was equivalent to absolute power of disposition, and where such absolute power of disposition is given, a bequest over is void.

The doctrine established in that case has been repeatedly followed and affirmed in many cases.

Kendall v. Kendall, 36 N. J. Eq. 91 (Ch. 1882).

Hoxsey v. Hoxsey, 37 N. J. Eq. 21 (Ch. 1883).

Rodenfels v. Shatman, 45 N. J. Eq. 383 (Ch. 1889).

Wills v. Wills, 72 N. J. Eq. 782 (Ch. 1907), affirmed by Court of Errors & Appeals, 73 N. J. Eq. 733.

Bennett v. Assn. for Friendless, 79 N. J. Eq. 76, affirmed by Court of Errors & Appeals, 78 N. J. Eq. 302 (1910).

Bunnell v. Beam, 97 Atl. 949 (Ch. 1916).

McCloskey v. Thorpe, 74 N. J. Eq. 413 (Ct. of E. & A. 1908).

In the last mentioned case Mr. Justice Swayze, speaking for this court, says:

“An examination of these cases demonstrates that if the language of the will is such as necessarily to imply an absolute power of disposition, the estate is absolute in the first taker, and such power of disposition is to be implied from an untrammelled power to expend the legacy. * * * We are satisfied that the testator intended that his wife should expend the proceeds of the sale if she wished. To do this, she must have an absolute power of disposition, and the case is within the principle relied on by Chancellor Green in *Annin's Exr. v. Van Doren's Adm.*”

Vice-Chancellor Foster following this opinion (see page 32 of state of case) decided that Elizabeth Hyde took an absolute estate under the will of her husband.

“Having found that the testator gave his widow this uncontrolled power to dispose of her share or interest in his estate, without any limitation or restraint, the determination of the question in controversy must be controlled by the principle stated by Chan-

cellor Green in *Annin's Exrs. v. Van Doren's Adm.*, 14 N. J. Eq. 135 (at page 146), and quoted approvingly by Mr. Justice Swayze in delivering the opinion of the Court of Errors and Appeals in *McCloskey v. Thorpe*, 74 N. J. Eq. 413. * * *”

The complainants attempt to limit the force of this rule by restricting its operation to cases where the estate purported to be given is not defined to be a life estate. An examination of the cases cited (page 7 of the complainants' brief) in support of this contention will show that these cases are based on other grounds than contended. Most of the cited cases merely hold that the legatee did not have power of disposal for his or her own benefit, and consequently can have no bearing on the case now before the court, for there can be no dispute that Mrs. Elizabeth Hyde could have used the property for her own benefit so far as she desired, even to the extent of expending it all.

Pratt v. Douglass, 38 N. J. Eq. 516 (Ct. of E. & A., 1884) simply decided that the will did not authorize the testator's wife to dispose of the property for her own use.

Wright v. Wright, 41 N. J. Eq. 382 (Ch., 1886), held that the legatee had a life estate with a testamentary power of disposal, but no power of disposal for her own benefit.

Rhodes v. Shaw, 43 N. J. Eq. 430 (Ch., 1887), expressly proceeds on the ground that the first taker did not get an unlimited power of disposal for her own use, but held in trust for her children.

In *Stevens v. Flower*, 46 N. J. Eq. 340 (Ch., 1890); *Bradway v. Holmes*, 50 N. J. Eq. 311 (Ch., 1892); *Cox v. Wills*, 49 N. J. Eq. 130 (Ch. 1891);

Hunt v. Smith, 58 N. J. Eq. 25 (Ch., 1899), and *Kemp v. Thomas*, 81 N. J. Eq. 103 (Ch., 1912), the wills were construed to give the life tenants merely the power to consume such of the estate as was necessary for their maintenance without leaving it to the legatees to determine the extent of that necessity. The real significance of such decisions may be seen by comparing these cases with *Wills v. Wills*, 72 N. J. Eq. 782 (Ch., 1907), affirmed by the Court of Errors and Appeals in 73 N. J. Eq. 733, where the Court found that the discretion was left to the legatee herself and so gave an absolute estate. The distinction is further brought out in *Bradway v. Holmes*, 50 N. J. Eq. 311 (Ch., 1892), where Vice-Chancellor Pitney admitted that *Rodenfels v. Shuman*, 45 N. J. Eq. 333 (Ch., 1839), established the rule that an uncontrolled power of disposal gives a fee, but found that the legatee's power of disposal was limited to her actual needs. In so far as the finding in that case conflicts with *Wills v. Wills*, which was affirmed by this court, it must be considered as over-ruled.

Deats v. Ziegner, 82 N. J. Eq. 605, and *Lienau v. Summerfield*, 41 N. J. Eq. 381, are not in point, for in the former case there was a mere gift for life without more, and in the latter, the Court simply held that the complainants had power to convey a good title; whether it arose through a fee or a power to convey a fee is immaterial.

Wooster v. Cooper, 53 N. J. Eq. 682 (Ct. of E. & A., 1895), and *Robeson v. Shotwell*, 55 N. J. Eq. 318, affirmed *Id.* 824, are the only cases lending any color of support to the appellant's contention, but that support is only colorable. Those cases merely decided that an express life estate is

not enlarged by a power of disposal. This court has never intimated that such a rule conflicted with its other decisions, that an absolute power of disposal gives a fee. The distinction would seem to be found in the language of Chancellor Runyon in *Kendall v. Kendall*, 36 N. J. Eq. 91 (Chan., 1882), at page 96: "The authority to sell is evidence of the extent of the interest to be given and it is not a mere power." Where the intent of the testator is clearly to give the devisee or legatee the right to consume for her own benefit, it is interpreted as delimiting the extent of the estate granted and not merely conferring a power. Evidence of this distinction is to be found in the decisions in this state holding that the devisee or legatee takes a fee when he or she is given the right to consume even though the estate is expressed to be "during life."

Thus in *The Dutch Church v. Smock*, 1 N. J. Eq. 148, where the testator had bequeathed to his wife the sum "of six hundred dollars to be at her disposal during life," Chancellor Vroom held that the wife took an absolute interest in the legacy, and not a mere life estate with a power of disposal.

Again in *Kendall v. Kendall*, 36 N. J. Eq. 91 (Ch., 1882), the testator left household furniture and other personalty to his wife "to have and to hold during her natural life and to use as she may deem needful or best." Chancellor Runyon held that it was an absolute gift to the wife. The *ratio decidendi* of the case is stated in the words of the Chancellor, "The authority to sell is evidence of the extent of the interest intended to be given, and is not a mere power."

So, too, in *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21 (Ch., 1883), where the will read: "I give and

bequeath unto my wife M. all my estate for her use and enjoyment during the term of her natural life, and after her death it is my wish, unless she shall have earlier divided the same or disposed of it by will, that the same shall be equally divided among my children," the widow was held to get an absolute estate.

If these cases and the opinion of Mr. Justice Swayze, speaking for this court in *McCloskey v. Thorpe*, 74 N. J. Eq. 413, are to be accepted as stating the correct rule of law it would seem clear that, as applied to the Charles Hyde will, it would give Mrs. Elizabeth Hyde an absolute estate in the personalty left her by her husband. Certainly "the language of the will is such as necessarily to imply an absolute power of disposition" for, in the language of Mr. Justice Swayze, "such power of disposition is to be implied from an untrammelled power to expend the legacy." The attempt of the appellants to draw a distinction between an "absolute power of disposal" and "a power of absolute disposal" (appellants' brief, p. 15), as applied to the case now before the court, must be doomed to failure in view of the explanation of Mr. Justice Swayze in the case referred to, where in the closing paragraph of his opinion, he says: "We are satisfied that the testator intended that his wife should expend the proceeds of the sale if she wished. To do this she must have an absolute power of disposition, and the case is within the principle relied on by Chancellor Green in *Annin's Executor v. Van Doren's Administrator*."

In the case at bar the appellants do not dispute that Charles Hyde intended that his wife Elizabeth Hyde, should expend the legacy if she wished.

II.

“WHERE PROPERTY IS BEQUEATHED OR DEvised IN THE FIRST INSTANCE IN LANGUAGE INDETERMINATE AS TO THE QUANTITY OF THE ESTATE FROM WHICH AN ESTATE FOR LIFE WOULD RESULT BY IMPLICATION AND WORDS ADAPTED TO THE CREATION OF A POWER OF DISPOSAL WITHOUT RESTRICTION AS TO THE MODE OF EXECUTION ARE ADDED, THE CONSTRUCTION WILL BE THAT AN ESTATE IN FEE IS GIVEN, * * *”

Even granting that the absolute power of disposition, when conferred upon the taker of an estate which is expressly defined in the first instance to be a life estate, does not enlarge the life estate, nevertheless, under the rule of *Downey v. Borden*, above stated, the estate of the first taker, in order to be cut down to a mere life estate, must in the first instance be expressly defined to be for life only.

The appellants' contention (page 8 of appellants' brief) that the intention to give a mere life estate must be derived from an inspection of the whole will is clearly untenable. In no case has the limiting rule been applied except where, clearly and in most explicit language, the testator defines the estate in the very beginning as a life estate. The appellants' contention would overthrow the whole doctrine of *Downey v. Borden* and the long line of cases decided on that principle. In every one of those cases it is clear that the testator meant the first taker to have the uncontrolled enjoyment of the estate for life only, and wished to dispose of any possible remainder in his own way. There is no denying the fact that the testator in each of these cases impliedly gives a life estate to the first taker, but as that

is coupled with untrammelled power of disposal the Court has said that the first taker gets a fee and the attempted gift over is void as inconsistent. In addition to the cases above cited, the following cases have been decided on this principle:

McClellan v. Larchar, 45 N. J. Eq. 17 (Chan., 1889).

Tuerk v. Schueler, 71 N. J. L. 331 (E. & A., 1904).

Wills v Wills, 72 N. J. Eq. 782 (Chan., 1907), *affirmed* by Ct. of E. & A., in 73 N. J. Eq. 733.

Bohn v. Berner, 77 Atl. 517.

Bennett v. Home for Friendless, 79 N. J. Eq. 76, *affirmed* by Court of E. & A. (1910), in 78 N. J. Eq. 302.

Huston v. Boyd, 92 Atl. 794 (Chan., 1914).

Bunnell v. Beam, 97 Atl. 494 (Chan., 1916).

By the fourth clause of the will of Charles Hyde, his widow Elizabeth Hyde, was given an indeterminate estate in one-third of the residuary personalty, together with her dower interest in his realty. Such is the clear intent of the second paragraph of the fourth clause in which the testator, Charles Hyde, instructs his executors to divide and distribute all the balance of his residuary estate among his "widow and heirs at law and next of kin in the same manner and proportions as said widow, heirs and next of kin would be entitled to, and would take the same under the laws of descent and distribution in vogue and force in the State of New Jersey at the time of my death in case I had died intestate." By the laws in force in New Jersey on June 12, 1901 (the date of the testator's death), his widow was

entitled to a dower right in his realty (C. S., 2043) and an absolute estate in one-third of his residuary personalty. (P. L., 1899, p. 203, sec. 169; 3 C. S., 3874, sec. 169.) Such portions of his estate the testator's executors were expressly directed to turn over to his widow, not to hold in trust. If the will stopped with that paragraph there could not be the slightest doubt but that Mrs. Elizabeth Hyde had been given a dower interest in the realty and an absolute one-third interest in the residuary personalty. He expressly states that his widow is to have the full custody and control of her share, thus negating any theory of a trust, and making it clear that Mrs. Hyde was to use all if she so desired. It would be hard to grant an absolute gift in more unqualified terms. But the testator proceeds to add a limitation over of whatever shall remain after his widow's death. Such a provision falls well within the rule established in *Downey v. Borden* and the other cases cited *supra*, that such an attempted limitation over after a fee is void. Here an absolute estate has first been given to Mrs. Hyde and then the testator has attempted to add a repugnant limitation over which the law does not allow.

The mere explanation of the testator that while it is his intention that his widow shall have undisputed disposal of her share "during her life," that "so much thereof as shall remain at her death" shall go over to his children, does not cut down the fee to an express life estate. The long line of cases cited, *supra*, show that the words must show an express life estate in the first instance in order to prevent the gift from being interpreted as a fee under the rule of *Downey v. Borden*.

In the face of the well settled line of authorities the appellants' further contention (appellants' brief, p. 13) that Mrs. Hyde had only a limited power of disposal because her husband's will impliedly restricted the exercise of that power to her life by indicating a gift over of what remained, merits little consideration. The authorities cited for this proposition (*Kent v. Armstrong*, 6 N. J. Eq. 637; *Cantine v. Brown*, 46 N. J. L. 599; *Kellers v. Kellers*, 79 N. J. Eq. 412) do not sustain it in the least, for in each one of those cases the will was construed to give a mere life estate with a testamentary power of disposition, there being no intention to give the beneficiary power of disposal during life as was the case in the will now before the court. The construction urged by the appellants is contrary to all the cases cited earlier by the defendants where the Court found an absolute power of disposition though the testator clearly contemplated that the first taker should only dispose of the property while living.

III.

THOUGH THE TESTATOR'S INTENTION IS TO BE GATHERED FROM THE WHOLE WILL, THE WILL MUST BE READ IN THE LIGHT OF ESTABLISHED RULES OF CONSTRUCTION, AND IS TO BE REGARDED AS HAVING BEEN EXECUTED WITH A KNOWLEDGE OF THOSE RULES.

An acceptance of the complainants' contention that Mr. Charles Hyde's desire to dispose of any residue must control his clearly expressed intent to allow his widow free and untrammelled power of expenditure, would, as stated before, overthrow the well established line of decisions

in this state. In each of the cases cited earlier in this brief where the Court held that the first legatee took a fee, it was possible to say that the testator had clearly expressed his intention of limiting the first taker's interest to a life estate, in the sense that the testator intended that, after the first taker died, that part of the estate which remained unconsumed should go over to other designated beneficiaries. The testamentary disposition of this residue by the will of the first taker is not contemplated by the testator in any of the above mentioned cases more than it is in the case now before the Court.

That the testator's intent is to be construed in the light of existing legal rules has so often been declared by this court, that it would now seem to be beyond question.

Thus in *Tuerk v. Schueler*, 71 N. J. L. 331, at page 333, Mr. Justice Pitney in speaking for this court said:

"It is strenuously argued that this defeats the expressed intent of the testator that Anna Schueler should take the property at Mrs. Wey's death if she did not dispose of it in her lifetime. But while full force should be given to the intent of the testator, yet that intent must be gathered by the application of known rules of construction and interpretation, established by oft-repeated and long-standing adjudications."

In *Wills v. Wills*, 72 N. J. Eq. 782, 783 (Chan. 1907), affirmed by Court of Errors and Appeals 73 N. J. Eq. 733, and *Bunnell v. Beam*, 97 Atl. 494 (Chan. 1916), the language of Mr. Justice Pitney, cited above, was adopted and applied in cases very much like that now before this court.

It is submitted therefore that under the will of Charles Hyde, his widow took an absolute estate in one-third of the residuary personalty and that this passed to the defendants in this suit by the will of the said Elizabeth Hyde.

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