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ABRIDGEMENT OF PROOFS UNDER RULE 19...51

BILL OF COMPLAINT.

(Filed April 9, 1924.)

IN CHANCERY OF NEW JERSEY.

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

Complainants William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, respectfully show:

1. William Heron Trippe lives at Point Pleasant, County of Ocean, State of New Jersey; Lucy Seaver Trippe lives at East Orange, County of Essex, State of New Jersey; Grace Milton Trippe lives at East Orange, County of Essex, State of New Jersey.

2. William R. Trippe, late of the city of East Orange, County of Essex, and State of New Jersey, died on or about the twentieth day of May, 1923, having first made and published his last will and testament, which was duly probated by the Surrogate of the County of Essex on or about the fourth day of June, 1923, and was duly recorded in Book A 7 of Wills, page 541, &c., a true and correct copy of which will is attached hereto and made a part hereof and marked Exhibit 1.

3. At the time of the death of the said William R. Trippe, there had been born to him and he left him surviving the complainants William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, as his only children and heirs at law.

4. At the time of the death of the said William R. Trippe, the only lawful issue born to any of complainant's said three children were the following: One grandchild, a grandson William R. Trippe, being the son of complainant William Heron Trippe. No other children at the time of the death of the said William R. Trippe had been born of either complainant William Heron Trippe or of the said Lucy Seaver Trippe or the said Grace Milton Trippe.

5. Complainants Lucy Seaver Trippe and Grace Milton Trippe were at the time of the death of the said William R. Trippe unmarried and are still unmarried. Complainant William Heron Trippe now being 41 years of age, complainant Lucy Seaver Trippe 43 years of age and Grace Milton Trippe 32 years of age.

6. The complainants herein are not only the only children of the said William R. Trippe, but they were, by said last will and testament, appointed joint executors of said will and have duly qualified as such.

7. That after providing for sundry specific bequests in the first seven paragraphs of said will, the said William R. Trippe, testator, did by the eighth paragraph of said will attempt to create a trust in the National Newark and Essex Banking Company, a corporation of Newark, New Jersey, in the sum of $100,000, providing that the income from said trust fund should be paid in quarterly installments, in equal shares, to the three children of the testator, to wit, the complainants, during their respective lives, and did further provide that—

> "the child or children of any of them, who may die during my lifetime or prior to the termina-

tion of the trust, to take and receive the parent's share."

The testator did further provide with reference to said trust fund of $100,000 as follows:

"Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children without legal issue, then one-half of the income of said trust fund shall be paid, in like manner to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then to such lawful issue of his or her descendants until they severally attain the age of twenty-five years, at which time they are to receive the principal; the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto, shall be devoted, in conjunction with one-half the principal of another fund hereinafter directed to be established and held by my children as trustees, viz., the fund mentioned in Section Eleven, to the establishment, uses and maintenance of a Working Girls' Vacation Home and shall be held by the trustees and transferred, assigned, and paid over to the corporation hereinafter more specifically mentioned for those purposes."

8. That in and by the ninth paragraph of said will, the testator gave to William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, and to the survivors and survivor of them, trustees for William Richard Trippe, the sum of $10,000.00, with the di-

rection to hold said trust fund until the testator's grandson, William Richard Trippe, should arrive at the age of twenty-five years (October 26, 1940), and to pay semi-annually one-half of the income from said fund to his father, William Heron Trippe, until the said grandson should arrive at the age of twenty-one years, and thereafter, until said grandson should arrive at the age of 25 years, to pay one-half of said income semi-annually to him, the said grandson, the payment of the one-half of income to the father then to cease. Testator further directed, with reference to said trust fund, that when the grandson should reach—

> "the age of twenty-five years, the whole of the principal sum and any accumulated interest thereon, is to be paid to him and the trust hereby established is to terminate; should my said grandson die before he attains the age of twenty-five years leaving lawful issue, then this trust is to continue for the benefit of such issue until the youngest of such issue, if there be more than one child, and otherwise when his only child attains the age of twenty-five years, and thereupon the said trust fund, with any accumulated income thereof or accretions thereto is to be paid over to such child, and if there be more than one child, then, the same is to be divided between his children in equal shares. If, however, my said grandson shall die before he attains the age of twenty-five years and without lawful issue, then this trust is to be terminated at the time of his decease and the entire trust fund is to sink into and to become a part of the residue of my estate, and to be governed by the provisions for the trust fund hereinafter mentioned."

With reference thereto, complainants say that the said grandson, William Richard Trippe, survived the testator and is now living and is at the present time of the age of 8 years.

9. That in and by the eleventh paragraph of said will, the testator attempted to dispose of all the rest, residue and remainder of his estate and, to that end, gave, devised and bequeathed to William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, executors, all of said residue, in trust, with the direction to pay the net income from said residue to the testator's three children, to wit, the complainants, during their respective lives, and with further direction with reference to said income as follows:

> "the child or children of any deceased child, or his or their legally appointed guardian receiving the parent's share. Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children, without legal issue, then one-half of the income of said trust fund shall be paid, in like manner to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then, to such lawful issue or his or her descendants until they severally attain the age of twenty-five years, at which time they are to receive the principal; the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto, shall be devoted, in conjunction with one-half the principal of another fund hereinbefore directed to be established and held by National Newark

and Essex Banking Company as trustee, viz., the fund mentioned in Section Eight, to the establishment, uses and maintenance of a Working Girls' Vacation Home and shall be held by the trustees and transferred, assigned and paid over to the corporation hereinafter more specifically mentioned for those purposes.

The Working Girls' Vacation Home is to be established in case any two of my children shall die, leaving no lawful issue who attain the age of twenty-five years, or legal descendants of the same who attain said age, with one-half part of the principal of the trust fund mentioned in the Eighth Section or paragraph of this will immediately upon happening of that event, the remaining portion of the principal being held for the benefit of my surviving child, and his or her descendants, if any; and, in like manner, one-half of the trust fund hereby directed to be established from the residue of my estate is to be devoted and applied to that purpose immediately upon the death of any two of my children, without lawful descendants; and if all of my three children die without lawful issue and without lawful descendants of any such issue who shall attain the age of twenty- five years, then the remaining portion of the trust fund mentioned in said eighth section or paragraph as well as the remaining portion of the fund herein mentioned, with any accrued income or accretions, is to be applied and devoted to that purpose."

And in connection therewith, the testator did further provide in subsequent paragraphs of his will as follows:

"Twelfth: Should all of my children die prior

to May 1, 1940, leaving no lawful issue and no descendants of such issue, then the whole of said trust funds shall be used and devoted to the establishment, maintenance and purposes of said Vacation Home, under the conditions hereinbefore provided, in conjunction with a similar fund established by the will of my wife Lucy Jewett Trippe, if the same comes into existence under the terms of her will; and the trustees of said trust fund who may be appointed to succeed the last surviving child shall have power to sell, convey and lease any real estate that may then be unsold."

"Thirteenth. Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund, the income from which is to be applied to their support or added to the principal, as may be deemed best, until they severally reach the age of twenty-one years; thereafter, and until they severally reach the age of twenty-five years, such income is to be paid directly to them and upon their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be paid to them."

10. Complainants show that with reference to said trust fund of $100,000.00 under the language of the said testator in his said will the corpus of said fund is not to vest within the term measured by the life or lives of person or persons in being at the time of the death of the testator and 21 years thereafter. Complainants further show, as to the rest, residue and remainder of the testator's estate, as provided

for in paragraphs 11 to 13, inclusive, of said will, the corpus of said fund is not made to vest within the period of the life or lives of any persons in being at the time of the death of the testator or within twenty-one years thereafter, and further, that under the language of said will, there is not only the possibility of the time of vesting being postponed beyond the life or lives of persons in being and twenty-one years thereafter, but the possibility of the contingency never arising which would permit the creation of the Working Girls' Vacation Home, named by said testator as the lifetime beneficiary of the corpus of said trust.

11. All the property hereinbefore mentioned is in the possession of William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, executors under said will.

12. Complainants are advised that no "Working Girls' Vacation Home," either under that name or other name has been formed under and pursuant to the terms of said will.

13. Said property is all held by the said executors, subject to a determination by this Court as to the rightful owner of said property, and doubt has arisen as to the true meaning and construction of the said several provisions of the will of William R. Trippe—

(a) With respect to the trust fund of $100,000 created under the eighth paragraph of said will, and whether the trust thereby created is valid or whether under the language of the testator, the rule against perpetuities has been violated, and whether the testator died intestate as to the corpus of said fund.

(b) With respect to the trust fund of $10,000 created for the benefit of the grandson, William Richard Trippe, by the ninth paragraph of said will, and whether the language of said will violates the rule against perpetuities and whether any and, if so, what part of said paragraph 9 should be given effect.

(c) With respect to the rest, residue and remainder of testator's estate, covered by paragraphs 11 to 13, inclusive, of said will, and whether the language of the testator therein is violative of the rule against perpetuities and whether the testator died intestate with respect to the said rest, residue and remainder of his estate, and what, if any part of said will with respect to said residue should be given effect.

Complainants file this bill to ascertain and determine the true construction of said will.

14. The persons named in said last will and testament, who have an interest in the subject matter of this suit, in addition to the complainants, are as follows:

National Newark and Essex Banking Company, a corporation, of Newark, N. J., William Richard Trippe, a minor; William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, executors and trustees respectively under said will.

Complainants are without adequate remedy in the courts of law and, therefore, pray:

1. That the defendants National Newark and Essex Banking Company, William Richard Trippe, and William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, executors and trustees respectively under said will, may full, true and perfect

answer make to this bill of complaint and to each statement therein made.

2. That a decree may be entered by this Court with respect to the trust fund of $100,000, created under paragraph 8 of said will, to the effect that the language of said paragraph violates the rule against perpetuities, and the said William R. Trippe died intestate as to the corpus of said fund of $100,000, and that the said fund should be presently paid with accumulation of interest to the complainant.

3. That a decree may be entered by this Court with respect to the trust fund of $10,000 created under the ninth paragraph of said will, to the effect that the language of said paragraph violates the rule against perpetuities as to the provisions therein for great grandchildren of the testator.

4. That a decree may be entered by this Court with respect to the rest, residue and remainder of the estate of the testator, covered by paragraphs 11 to 13 of said will, to the effect that the language of said paragraphs is violative of the rule against perpetuities, and the said William R. Trippe died intestate as to the corpus of all of said rest, residue and remainder of his estate and that said corpus should be presently paid to the complainants, with any accumulation of income thereon.

5. That your complainants may have such other and further relief in the premises as to this Court may seem proper and equitable.

6. That the State's writ of subpoena may issue out of this Court, commanding the defendants, Na-

tional Newark and Essex Banking Company, William Richard Trippe, and William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, executors and trustees respectively under said will, and each of them, to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

I, William R. Trippe, of the City of East Orange, in the County of Essex and State of New Jersey, do make and publish this instrument as and for my last Will and Testament.

First: I order and direct the executors hereinafter named to pay and satisfy all my just debts, funeral and testamentary expenses, as soon as they can conveniently do so after my decease.

Second. I give and bequeath to my daughter-in-law Katherine Willson Trippe, the sum of two thousand dollars; should she die before receiving the same and leave lawful issue, then the same is to go to such issue, but if she shall die without issue the same is to be part of my residuary estate.

Third. I give and bequeath to my son William Heron Trippe, my gold watch and chain, the oil portrait of my grandfather, Doct. Mathews, my brother's sword used by him in the Civil War, my Victrola and my father's Family Bible.

Fourth. I give and bequeath to my daughter Lucy Seaver Trippe, the diamond ring worn by me and which was my mother's engagement ring; an old sil-

ver ladel formerly my grandmother's, her mother's watch and chain and my Family Bible.

Fifth. I give and bequeath to my daughter Grace Milton Trippe, the silver tea set, consisting of teapot, sugar bowl and pitcher, formerly my mother's, and my piano.

Sixth. I give and bequeath to my grandson William Richard Trippe, the wedding and engagement rings worn by my beloved wife, his grandmother, the oil portrait of my father and the oil painting of my wife and her brother, painted when they were children; my son to have charge of them all until, in his judgment, my said grandson is able to care for and appreciate them.

Seventh. I further give, devise and bequeath to my son William Heron Trippe, my house and lot situated at the northeasterly corner of River Avenue and McLean Avenue, Point Pleasant Beach, Ocean County, New Jersey, and the sum of Five Thousand Dollars; to my daughter Lucy Seaver Trippe the sum of Five Thousand Dollars and to my daughter Grace Milton Trippe the sum of Five Thousand Dollars.

Eighth. I give and bequeath to National Newark and Essex Banking Company, a corporation located in the City of Newark, Essex County, New Jersey, the sum of One Hundred Thousand Dollars, the same to be held by said corporation, or by such other corporation as may be appointed to succeed the same, in trust for the benefit of my children Lucy Seaver Trippe, Grace Milton Trippe and William Heron Trippe, hereby directing that the net income thereof shall be paid in quarterly installments, in equal shares, to my said children, the child or children of any of them who may die during my lifetime, or prior to the termination of the trust, to take and receive the parent's share; and I do direct that the

amount above mentioned may be paid to the said trustee in securities of a market value of not less than Ninety-five Thousand Dollars and at a face value of One Hundred Thousand Dollars or in securities and cash; any securities delivered to the trustee as a part of said trust fund which are not such as are authorized by the laws of the State of New Jersey for the investment of trust funds may be held by such trustee until maturity, whereupon the funds realized therefrom are to be reinvested in such securities as are authorized by the laws of said State for the investment of trust funds. Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children, without legal issue, then one-half of the income of said trust fund shall be paid, in like manner to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then to such lawful issue or his or her descendants until they severally attain the age of twenty-five years, at which time they are to receive the principal; the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto, shall be devoted, in conjunction with one-half the principal of another fund hereinafter directed to be established and held by my children as trustees, viz., the fund mentioned in Section Eleven, to the establishment, uses and maintenance of a Working Girls' Vacation Home and shall be held by the trustees and transferred, assigned, and paid over to the corporation hereinafter more specifically mentioned for those purposes.

Ninth. I give and bequeath to my son William Heron Trippe, and to my daughters Lucy Seaver

Trippe and Grace Milton Trippe, and to the survivors and survivor of them, in trust for the benefit of my grandson William Richard Trippe, the sum of Ten Thousand Dollars, upon the following trusts and not otherwise, viz., to hold the same until my grandson reaches the age of twenty-five years (October 26, 1940) and to pay semi-annually, one-half of the income therefrom to his father, William Heron Trippe, until my said grandson reaches the age of twenty-one years; then and after that time, and until my said grandson reaches the age of twenty-five years, to pay one-half of said income, semi-annually, to him; the payment to his father is then to cease. When my said grandson reaches the age of twenty-five years, the whole of the principal sum and any accumulated interest thereon, is to be paid to him and the trust hereby established is to terminate; should my said grandson die before he attains the age of twenty-five years leaving lawful issue then this trust is to continue for the benefit of such issue until the youngest of such issue, if there be more than one child, and otherwise when his only child attains the age of twenty-five years, and thereupon the said trust fund, with any accumulated income thereof or accretions thereto is to be paid over to such child, and if there be more than one child, then the same is to be divided between his children in equal shares. If, however, my said grandson shall die before he attains the age of twenty-five years and without lawful issue, then, this trust is to be terminated at the time of his decease and the entire trust fund is to sink into and to become a part of the residue of my estate, and be governed by the provisions for the trust fund hereinafter mentioned.

Tenth. I order and direct that all the rest, residue and remainder of my furniture, books, pictures, sil-

verware, clothing, automobiles, family mementoes and letters are to be divided among my three children, or the survivors and survivor of them, share and share alike, except that my brother Thomas M. Trippe may select for himself, if he so desires, any articles or letters from among those that originally belonged to either my father, my mother or my brothers.

Eleventh. All the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, I do hereby give, devise and bequeath to the executors, hereinafter named, and to the survivors and survivor of them, in trust, with full power to sell or lease any of my said real estate at such times, in such manner, and for such amounts as to them, and to the survivors and survivor of them, shall seem best to the interest of my estate. The proceeds of this residuary estate are hereby directed to be invested by the said executors in securities that shall be legal under the laws of New Jersey for the investment of trust funds by trustees and savings banks and the net income shall be paid in quarterly installments, in equal shares, to my said children, the child or children of any deceased child, or his or their legally appointed guardian receiving the parent's share. Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children, without legal issue, then one-half of the income of said trust fund shall be paid, in like manner, to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then, to such lawful issue or his or her descendants until they severally attain the age of twenty-five years, at

which time they are to receive the principal; the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto, shall be devoted, in conjunction with one-half the principal of another fund hereinbefore directed to be established and held by National Newark and Essex Banking Company as trustee, viz., the fund mentioned in Section Eight, to the establishment, uses and maintenance of a Working Girls' Vacation Home and shall be held by the trustees and transferred, assigned and paid over to the corporation hereinafter more specifically mentioned for those purposes.

The Working Girls' Vacation Home is to be established in case any two of my children shall die, leaving no lawful issue who attain the age of twenty-five years, or legal descendants of the same who attain said age, with one-half part of the principal of the trust fund mentioned in the Eighth Section or paragraph of this will immediately upon the happening of that event, the remaining portion of the principal being held for the benefit of my surviving child, and his or her descendants, if any; and, in like manner, one-half of the trust fund hereby directed to be established from the residue of my estate is to be devoted and applied to that purpose immediately upon the death of any two of my children, without lawful descendants; and if all of my three children die without lawful issue and without lawful descendants of any such issue who shall attain the age of twenty-five years, then the remaining portion of the trust fund mentioned in said eighth section or paragraph as well as the remaining portion of the fund herein mentioned, with any accrued income or accretions, is to be applied and devoted to that purpose.

If such Working Girls' Vacation Home shall be established, the same may be done by the creation of a separate corporation or, preferably, through some already organized charitable organization in successful operation and of good repute. It is to be known as "The Working Girls' Vacation Home," is to be established in memory of my wife Lucy Jewett Trippe and is to be strictly non-sectarian in its control and administration. The said Home is to be sustained in part by a charge for the board therein to be made to such working girls as may be admitted thereto and who are employed as wage earners; certain other girls who are temporarily out of employment may be admitted thereto for short periods in case they are without funds to pay for their board therein; it is to be established in the State of New Jersey and may be maintained in the discretion of the Board of Governors, managers or directors thereof in a building or buildings to be rented to, or purchased or built by said corporation for the purposes herein specified; the location of the Home may be changed from time to time as the said corporation may determine and if the income of the funds thereof shall be sufficient, its governing body may establish and maintain more than one such institution. It is my wish that so long as any of my children shall live the governing body of such corporation shall give great consideration to such suggestions as shall be made by my surviving child.

Twelfth. Should all of my children die prior to May 1, 1940, leaving no lawful issue and no descendants of such issue, then the whole of said trust funds shall be used and devoted to the establishment, maintenance and purposes of said Vacation Home, under the conditions hereinbefore provided, in conjunction with a similar fund established by the will of my wife Lucy Jewett Trippe, if the same comes into

existence under the terms of her will; and the trustees of said trust fund who may be appointed to succeed the last surviving child shall have power to sell, convey and lease any real estate that may then be unsold.

Thirteenth. Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund, the income from which is to be applied to their support or added to the principal, as may be deemed best, until they severally reach the age of twenty-one years; thereafter, and until they severally reach the age of twenty-five years, such income is to be paid directly to them and upon their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be paid to them.

Fourteenth. I hereby nominate, constitute and appoint my son William Heron Trippe as the executor, and my daughters Lucy Seaver Trippe and Grace Milton Trippe as the executrices, and the survivors and survivor of them, with full power to sell and convey real estate, and the said William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe as trustees under this will, with the express direction that neither of them, nor the survivors or survivor of them shall at any time, under any circumstances, whether in the State of New Jersey or elsewhere, be required to give bonds for the faithful performance of their trusts.

IN WITNESS WHEREOF I have hereunto set my hand and seal on this Eighth day of November in the year One Thousand nine hundred and twenty-two.

WM. R. TRIPPE, (L. S.)

Signed, sealed, published, pronounced and declared by the above named testator, William R. Trippe, as, for and to be his last will and testament in our presence who, at his request, in his presence and in the presence of each other have hereto subscribed our names as witnesses.

The above attestation clause was, on the day of the date of the foregoing instrument, read in the presence and hearing of the testator and of ourselves and we do hereby certify that all the things therein contained are true to our knowledge.

Philemon Woodruff, 66 No. Walnut Street, East Orange, N. J.

Harry J. Roberts, 16 Mitchell Place, E. O. N. J.

ANSWER OF THE DEFENDANT THE NATIONAL NEWARK & ESSEX BANKING COMPANY.

(Filed May 15, 1924.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM HERON TRIPPE and others, *Complainants,* and THE NATIONAL NEWARK & ESSEX BANKING COMPANY OF NEWARK and others, *Defendants.*	On Bill, etc. Answer of the Defendant, The National Newark & Essex Banking Company.

The answer of the defendant, The National Newark & Essex Banking Company of Newark, individually and as trustee of the trust created in and by the eighth paragraph of the will of William R. Trippe, deceased, to the bill of complaint of William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, complainants.

This defendant answering the bill of complaint says that:

1. This defendant admits the allegations of paragraphs 1, 2 and 3 of the bill of complaint, except that for the provisions of said will this defendant begs

leave to refer, at the hearing of this cause, to a certified copy of the same.

2. This defendant has no knowledge sufficient to form a belief as to the truth of the allegations of paragraphs 4 and 5 of the bill of complaint.

3. This defendant admits the allegations of paragraphs 6, 7, 8 and 9, except the characterization by the complainant of the various provisions of decedent's will. For the provisions of said will, this defendant begs leave to refer, at the hearing of this cause, to a certified copy of the same.

4. This defendant denies the allegations of paragraph 10, and for the provisions of said will begs leave to refer, at the hearing of this cause, to a certified copy of the same.

5. This defendant admits the allegations of paragraph 11.

6. This defendant has no knowledge sufficient to form a belief as to the truth of the allegations of paragraphs 12 and 13.

7. This defendant admits the allegations of paragraph 14 of the complaint.

This defendant is advised that it is entitled, under the provisions of the eighth paragraph of the will of said decedent, to receive the sum of $100,000, in manner and form as by said will provided, and to hold the same in trust as therein directed.

This defendant therefore prays that this Honorable Court may construe the provisions of the will,

and that costs and counsel fee may be awarded to this defendant in this matter.

This defendant, by way of answer in lieu of plea, says that:

The Attorney-General of the State of New Jersey, by reason of the charitable bequest in the will of said decedent contained, has an interest in the subject matter of this suit and is a necessary party.

PITNEY, HARDIN & SKINNER,
Solicitors for the Defendant The National Newark & Essex Banking Company of Newark.

ORDER TO AMEND BILL.

(Filed May 28, 1924.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM HERON TRIPPE, *et al.*,
Complainants,
and
NATIONAL NEWARK & ESSEX BANKING COMPANY, *et al.*, &c.,
Defendants.

On Bill, &c.
Order to Amend Bill.

Application for this purpose having been made by Bleakly, Stockwell & Burling, of counsel for the complainants, and it appearing that no answer has

been filed by any of the defendants, and it appearing that Edward L. Katzenbach, Attorney-General of the State of New Jersey, should be made a party defendant to said suit and that complainant's bill should be amended by making said Edward L. Katzenbach a party defendant;

It is thereupon on this fourteenth day of May, 1924, ordered, adjudged and decreed that the complainants' bill be and the same is hereby amended by adding a new paragraph No. 15, as follows:

> "15. Complainant shows that in view of the possible interest of the Working Girls' Vacation Home, the Attorney-General of the State of New Jersey is a proper party to this cause, and accordingly Edward L. Katzenbach, Attorney-General of the State of New Jersey, is made a party defendant herein."

and also by adding to paragraph 1 of the prayer for the answer the name "Edward L. Katzenbach, Attorney-General of the State of New Jersey."

And by adding to paragraph 6 of the prayer of the subpoena the name "Edward L. Katzenbach, Attorney-General of the State of New Jersey."

E. R. WALKER,
C.

We consent to the entering of the foregoing order.

BLEAKLY, STOCKWELL & BURLING,
Of Counsel with Complainants.

PITNEY, HARDIN & SKINNER,
Of Counsel with National Newark & Essex Banking Company.

EDWARD L. KATZENBACH,
Attorney-General.

ANSWER OF DEFENDANT, EDWARD L. KATZENBACH, ATTORNEY-GENERAL OF THE STATE OF NEW JERSEY, TO THE BILL OF COMPLAINT OF WILLIAM HERON TRIPPE, LUCY SEAVER TRIPPE AND GRACE MILTON TRIPPE, COMPLAINANTS.

(Filed June 18, 1924.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM HERON TRIPPE, *et al.*, *Complainants,* and NATIONAL NEWARK & ESSEX BANKING COMPANY, *et al.*, *Defendants.*	On Bill, &c., Answer of Defendant, Edward L. Katzenbach, Attorney-General of the State of New Jersey.

This defendant answering the bill of complaint, says:

1. This defendant admits the allegations of paragraphs 1, 2 and 3 of the bill of complaint, except that for the provisions of said will this defendant begs leave to refer at the hearing of this cause to a certified copy of the same.

2. This defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 4, 5 and 6 of the bill of complaint.

3. This defendant admits the allegations of paragraphs 7, 8 and 9, except the construction of the complainants as to the various provisions of decedent's will.

4. This defendant denies the allegations of paragraph 10 of the bill of complaint.

5. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraphs 11, 12 and 13 of the bill of complaint.

6. This defendant admits the allegations of paragraph 14 of the bill of complaint.

This defendant further answering says that William R. Trippe, deceased, the testator, devised his residuary estate to his executors in trust, so that one-half of the principal thereof, together with the income thereof, in case of the death of two of his three children shall be reserved for the establishment of a Working Girls' Vacation Home, and upon the failure of the grandson of testator to attain the age of twenty-five years without issue, said sum, together with any accretion thereto, shall become a part of said trust fund for the benefit of said Working Girls' Vacation Home, and that one-half of the principal of the $100,000 bequeathed and devised to the National Newark and Essex Banking Company, with accretions thereto, together with the aforementioned funds are to be used for said Working Girls'

Vacation Home, and that should all of testator's children die prior to May 1, 1940, without issue, that the whole of said trust funds is required to be used and devoted to the establishment, maintenance and purposes of said Working Girls' Vacation Home; that the testator's declared intention was that the said Working Girls' Vacation Home is to be established in case any two of his children shall die leaving no lawful issue to attain the age of twenty-five years or legal descendants of the same to attain said age with one-half part of the principal of the trust fund mentioned in the eighth paragraph of his will immediately upon the happening of that event, and the remaining portion of the principal being held for the benefit of any surviving child or issue thereof, and, in like manner, one-half of the trust fund directed to be established from the residue of his estate to be devoted and applied to that purpose immediately upon the death of any two of his children, without issue, and that if all three children die without lawful issue who shall not attain the age of twenty-five years, then the remaining portion of the trust fund mentioned in the eighth paragraph of said will is to be applied to that purpose.

This defendant, therefore, prays that this Honorable Court may construe the provisions of the will and make such decree as to effectuate the intention of the testator to the charitable use expressed therein.

EDWARD L. KATZENBACH,
Attorney-General.

ANSWER OF WILLIAM RICHARD TRIPPE, AN INFANT, BY THOMAS BARBER, CLERK OF THIS COURT, GUARDIAN AD LITEM OF SAID INFANT.

(Filed June 28, 1924.)

IN CHANCERY OF NEW JERSEY.

Between WILLIAM HERON TRIPPE and others, *Complainants,* and THE NATIONAL NEWARK & ESSEX BANKING COMPANY OF NEWARK and others, *Defendants.*	On Bill, etc. Answer of William Richard Trippe, an Infant, by Thomas Barber, Clerk of This Court, Guardian Ad Litem of Said Infant.

The answer of William Richard Trippe, infant, by Thomas Barber, clerk of this court, guardian *ad litem* of said infant, to the bill of complaint of William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, complainants.

This defendant answering the bill of complaint says that:

1. This defendant admits the allegations of paragraphs 1, 2, 3, 4, 5 and 6 of the bill of complaint, except that for the provisions of the will of William

R. Trippe this defendant begs leave to refer, at the hearing of this cause, to a certified copy of the same.

2. This defendant admits the allegations of paragraphs 7, 8 and 9 of the bill of complaint, except the characterization and construction by the complainants of the various provisions of said will. For the provisions of which will this defendant begs leave to refer, at the hearing of this cause, to a certified copy of the same.

3. This defendant denies the allegations of paragraph 10 of the bill of complaint, and for the provisions of said will begs leave to refer, at the hearing of this cause, to a certified copy of the same.

4. This defendant admits the allegations of paragraph 11 of the bill of complaint.

5. This defendant has no knowledge sufficient to form a belief as to the truth of the allegations of paragraph 12 of the bill of complaint.

6. This defendant, as to the allegations of paragraph 13 of the bill of complaint, aside from the allegations of said paragraph, has no knowledge as to the matters and things therein set forth, and answering said allegations, this defendant says that he is advised that the provisions made in behalf of this defendant in and by said will, by way of trust or otherwise, do not violate the rule against perpetuities, nor do any of said provisions violate the rule against perpetuities, and that said provisions are in all respects valid, and the same should be

carried out, so far as the interests of this defendant therein are concerned, as in and by said will provided.

7. This defendant admits the allegations of paragraph 14 of the bill of complaint.

This defendant therefore prays—

That this Honorable Court may construe the provisions of said will, and determine his rights thereunder, and that costs and counsel fee may be awarded to this defendant in this matter.

EDWARD M. COLIE,
Solicitor for the defendant William Richard Trippe, infant, appearing by Thomas Barber, Clerk of this Court, Guardian ad litem of said infant.

OPINION.

(Filed Dec. 4, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM HERON TRIPPE, *et al.*,
Complainants,
and
NATIONAL NEWARK & ESSEX BANKING COMPANY, *et al.*,
Defendants.

Opinion.

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1. If an estate vests within the prescribed period, the postponement of the time of enjoyment beyond lives in being and one and twenty years thereafter does not contravene the rule against perpetuities.

2. If the time of payment offends the rule against restraint upon enjoyment the restriction is void, not the gift.

For complainants, BLEAKLY, STOCKWELL & BURLING.

For defendant Bank, PITNEY, HARDIN & SKINNER.

For infant defendant, EDWARD M. COLIE.

BACKES, V. C.

William R. Trippe died May 20, 1923, leaving a last will and testament dated October 8, 1922, duly

probated. In the eighth paragraph of his will he gave to the National Newark & Essex Banking Company $100,000, in trust, to pay the income to his children, Lucy, Grace and William H. Trippe, in equal shares, their children to take the parent's share of the income if any should die before the termination of the trust; upon the death of one of his children without legal issue the income to be divided between the two survivors, and upon the death of a second of his children without legal issue,

> "then one-half of the income of said trust fund shall be paid, in like manner to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then to such lawful issue or his or her descendants until they severally attain the age of twenty-five years, at which time they are to receive the principal; the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto, shall be devoted, in conjunction with one-half the principal of another fund hereinafter directed to be established and held by my children or trustees, viz., the fund mentioned in Section Eleven, to the establishment, uses and maintenance of a Working Girls' Vacation Home and shall be held by the trustees and transferred, assigned, and paid over to the corporation hereinafter more specifically mentioned for those purposes."

By the eleventh paragraph he gave the residue of his estate to his executors (his three children) substantially upon the same trust imposed by the eighth paragraph, and then provided that:

> "The Working Girls' Vacation Home is to be established in case any two of my children shall

die, leaving no lawful issue who attain the age of twenty-five years, or legal descendants of the same who attain said age, with one-half part of the principal of the trust fund mentioned in the Eighth Section or paragraph of this will immediately upon the happening of that event, the remaining portion of the principal being held for the benefit of my surviving child, and his or her descendants, if any; and, in like manner, one-half of the trust fund hereby directed to be established from the residue of my estate is to be devoted and applied to that purpose immediately upon the death of any two of my children, without lawful descendants; and if all of my three children die without lawful issue and without lawful descendants of any such issue who shall attain the age of twenty-five years, then the remaining portion of the trust fund mentioned in said eighth section or paragraph as well as the remaining portion of the fund herein mentioned, with any accrued income or accretions, is to be applied and devoted to that purpose." (Then follows directions for operating the Home.)

By the twelfth and thirteenth paragraphs he testated as follows:

"Twelfth. Should all of my children die prior to May 1, 1940, leaving no lawful issue and no descendants of such issue, then the whole of said trust fund shall be used and devoted to the establishment, maintenance and purposes of said Vacation Home, under the conditions hereinbefore provided, in conjunction with a similar fund established by the will of my wife Lucy Jewett Trippe, if the same comes into existence under the terms of her will; and the trustees

of said trust fund who may be appointed to succeed the last surviving child shall have power to sell, convey and lease any real estate that may then be unsold."

"Thirteenth. Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund, the income from which is to be applied to their support or added to the principal, as may be deemed best, until they severally reach the age of twenty-one years; thereafter, and until they severally reach the age of twenty-five years, such income is to be paid directly to them and upon their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be paid to them."

The testator's three children and an infant child of his son survived him. The two daughters, aged respectively forty-three and thirty-two, are unmarried.

The three children of the testator filed this bill, claiming that the trusts, in respect of gifts of corpus, violate the rule against perpetuities and are void, and, consequently, that the testator died intestate as to corpus, and that as they hold the life interest and are next of kin they are entitled to the estate.

A slight rearrangement of the structure of the will removes whatever confusion there may be as to the testator's intent and purpose.

The income of the estate is given to testator's children for life, in equal shares; at their death to their issue until they arrive at the age of twenty-five years, when they are to have the principal. Un-

til twenty-one they may have the benefit of the income in the discretion of the trustees, and thence the use until they are twenty-five. If two of his children die without issue the share of the survivor and his issue is increased to one-half; the other half is to go to the Vacation Home. The whole of the estate is to go to the Vacation Home if all three children die leaving no lawful issue or lawful descendants who reach twenty-five years of age or die before 1940. By legal issue the testator meant children. It will be noted that if only one child dies without issue intestacy follows as to its share.

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

It would seem that the vested estates are subject to being divested or modified as to quantity, only,

if two or all three children die without issue or descendants attaining twenty-five years of age. It is suggested, not decided, that if the gifts, upon these events, under the eighth and eleventh paragraphs are void for remoteness, which seems to be the principal contention of the complainants, then, the limitations over, if they are such, being void, there would be no divestment.

The gifts of corpus to the grandchildren under the thirteenth paragraph are independent of and not at all implicated with the alleged invalid gifts of corpus under the eighth and eleventh paragraphs. McGill v. Trust Co., 94 N. J. Eq. 657.

We are not to assume that any of the three children of the testator will die without leaving issue, and, of course, not the more remote possibility that two or all of them will die without leaving lawful issue so as to bring into discussion the legality of the gifts of corpus under the eighth and eleventh paragraphs. It may well be, as complainants contend, that these gifts are void under McGill v. Trust Co., *supra*, but we are not at this time concerned with the disposition of the estate upon the events upon which they are predicated. Those contingencies have not arisen and may never happen. If they or either ever come to pass other may then have come into being and have the right to be heard. Nor are we to anticipate that all three children may die without issue before 1940, and what then would happen. It would be inappropriate to decide at this time the status of the trusts upon the happening of any of these contingencies. Nagle v. Conrad, 79 N. J. Eq. 124; Tanner v. Boynton Lumber Co., 129 Atl. Rep. 617.

The contention of the complainants that the testator tied up the principal of his estate for the benefit of his grandchildren in violation of the rule

against perpetuities is not sustained. His chief concern was the support of his children and his grandchildren, the latter until they arrived at mature judgment; and the postponement of enjoyment of the principal was in furtherance of his solicitude for his grandchildren during a period of possible indiscretion. Such restrictions upon enjoyment are permissible, 2 R. C. L. 347. Lembeck v. Lembeck, *supra*. At all events the complainants cannot impeach them. The *cestuis que trustant* alone may. Foulke Perp. 293.

The complainants are not entitled to the estate. Moreover the gifts of the income to the legal issue of the testator's children are valid and would bar recovery even if the gifts of corpus were void for remoteness. McGill v. Trust Co., *supra*.

Bill dismissed.

FINAL DECREE.

(Filed Dec. 22, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM HERON TRIPPE and others,
Complainants,
and
THE NATIONAL NEWARK & ESSEX BANKING COMPANY OF NEWARK and others,
Defendants.

On Bill, etc.
Final Decree.

This cause coming on to be heard in the presence of Bleakly, Stockwell & Burling, solicitors for and of counsel with the complainants, Edward M. Colie, solicitor for and of counsel with, by appointment of this court, Thomas Barber, guardian *ad litem* of the infant defendant, William Richard Trippe, and Pitney, Hardin & Skinner, solicitors for and of counsel with the defendant The National Newark & Essex Banking Company of Newark, and process having been served upon all of the defendants named in the bill of complaint as amended, and the Court having considered the pleadings and proofs taken in open court and the briefs of the respective counsel, and it appearing therefrom that

the complainants are not entitled to receive the corpus of the estate of William R. Trippe, deceased; that the $100,000.00 trust established by the eighth paragraph of said will with the defendant The National Newark & Essex Banking Company of Newark, as trustee, and the trust of the residue established by the eleventh paragraph of said will with the testator's children as trustees are not invalid as tying up the principal for the benefit of grandchildren in violation of the rule against perpetuities; that the corpus of the estate vests in the grandchildren of testator immediately upon the death of the parent; that the restriction upon enjoyment and time of payment, if invalid, voids the restriction but not the gift; that it is inappropriate to decide at this time whether or not limitations over upon certain contingencies, which may or may not happen, are valid; that the gifts of corpus to the grandchildren of testator are independent of and not at all implicated with the alleged invalid gifts over of corpus; that the gifts of income to the legal issue of testator's children are valid and would bar recovery by the complainants even if the gifts of corpus were void because of remoteness; that the bill of complaint should be dismissed, and that due notice of application to settle the form of this decree has been given:

It is on this 22nd day of December, A. D. 1925, on motion of Pitney, Hardin & Skinner, solicitors for the defendant, The National Newark & Essex Banking Company of Newark, ordered, adjudged and decreed that the bill of complaint be dismissed and that the complainants, as executors of the will of William R. Trippe, deceased, proceed with the administration of the estate of said decedent according to law.

It is further ordered that the taxed costs of the complainants and of the defendant, The National Newark & Essex Banking Company of Newark and of the infant defendant William Richard Trippe be paid by the executors of the will of William R. Trippe, deceased, out of the residue of the estate of said decedent, and that there be included in said taxed costs respectively, a counsel fee of $1500, for Bleakly, Stockwell & Burling, Esqs., of counsel with the complainants, and a counsel fee of $1500, for Edward M. Colie, Esq., of counsel with Thomas Barber, guardian *ad litem* of the infant defendant William Richard Trippe, and a counsel fee of $1500 for Pitney, Hardin & Skinner, Esqs., of counsel with the defendant The National Newark & Essex Banking Company of Newark.

Respectfully advised,

Approved as to form:

BLEAKLY, STOCKWELL & BURLING,

PITNEY, HARDIN & SKINNER,

EDWARD M. COLIES.

NOTICE OF APPEAL.

(Filed Dec. 31, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
WILLIAM HERON TRIPPE, *et al.*,
Complainants,
and
THE NATIONAL NEWARK & ESSEX BANKING COMPANY OF NEWARK, *et al.*,
Defendants.

On Bill, &c.
Notice of Appeal.

The complainants, William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, hereby appeal from the final decree made in the above entitled cause on the 22nd day of December, 1925, and from every part thereof, excepting the order for allowances contained in the last paragraph of said decree, to the Court of Errors and Appeals in the last resort in all causes.

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants.

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

H. F. STOCKWELL,
Of Counsel with Complainants.

Dated December 28, 1925.

[ENDORSED]

Service of a copy of the within notice of appeal is hereby acknowledged this 29th day of December, 1925.

Pitney, Hardin & Skinner,
Solr's. for National Newark & Essex Banking Co. of Newark.

Edward M. Colie,
Counsel for William Richard Trippe, minor.

Consent is hereby given to the filing of the within notice of appeal out of time.

Edward L. Katzenbach,
Attorney-General.

Due and legal service of a copy of the within notice of appeal is hereby acknowledged.

Edward L. Katzenbach,
Attorney-General.

PETITION OF APPEAL.

(Filed March 13, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM HERON TRIPPE, *et al.*, *Complainants-Appellees*, v. NATIONAL NEWARK & ESSEX BANKING COMPANY, *et al.*, *Defendants-Appellants.*	On Appeal from the Court of Chancery. Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, the appellees in the above entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the twenty-second day of December, 1925, in a certain cause in said Court of Chancery, wherein the said William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe were complainants and the National Newark & Essex Banking Company, William Richard Trippe,

William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, executors and trustees under the will of William R. Trippe, were defendants, in this respect, to wit:

That said decree adjudges that the bill of complaint of these complainants be dismissed and that the complainants as executors of the will of William R. Trippe, deceased, proceed with the administration of the estate of said decedent according to law.

And petitioner appeals from the decree of the Chancellor in the respects above mentioned, upon the ground that the same is erroneous in these respects:

1. The Court held that the complainants, William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe are not entitled to receive the corpus of the estate of William R. Trippe, deceased; whereas the Court should have held and decreed that the complainants, William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe are entitled to receive the entire corpus of said trust fund of $100,000, established under paragraph 8 of said will, and the corpus of the residue of said estate be disposed of under paragraphs 11, 12 and 13 of said will.

2. The Court held that the $100,000 trust established by the eighth paragraph of said will with the defendant, National Newark & Essex Banking Company, of Newark, as trustee, and the trust of the residue, established by the eleventh paragraph of said will, to testator's children as trustees, are not invalid; whereas the Court should have held and decreed that each of said trusts was and is invalid, being in violation of the rule against perpetuities.

3. The Court held that the corpus of the estate vests in the grandchildren of testator immediately

upon the death of the parent; whereas the Court should have held that the entire corpus of said trust fund of $100,000 and the corpus of the residue of said estate is vested in complainants.

4. The Court held that the restriction upon enjoyment and time of payment did not void the gift of corpus; whereas the Court should have held that the gifts of corpus under the terms of said will are void and the corpus of the trust fund of $100,000 and the corpus of the residue of said estate are vested in complainants.

5. The Court held that it is inappropriate at this time to decide whether the contingencies named in the will are valid or invalid; whereas the Court should have held that the provisions of the said will with respect to the trust fund of $100,000 and the residue of said estate are invalid and said corpus is vested in the complainants.

6. The Court held that the gifts of corpus to the grandchildren of the testator are independent of and not at all implicated with the alleged invalid gifts over of corpus; whereas the Court should have held that said provisions are interdependent and the entire trust fund of $100,000 and the corpus of the residue of said estate are vested in the complainants.

7. The Court held that the gifts of income to the legal issue of testator's children are valid and bar recovery by the complainants, even though the gifts of corpus might be void for remoteness; whereas the Court should have decreed that the entire corpus of said trust fund of $100,000 and the corpus of the

residue of said estate are vested in the complainants, together with the income therefrom.

8. The Court decreed that said bill should be dismissed; whereas the Court should have entered a decree awarding the entire corpus of the trust fund of $100,000 and the entire corpus of the residue of said estate, with the income therefrom, unto the complainants William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe.

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

BLEAKLY, STOCKWELL & BURLING,
Solicitors for and of Counsel with Complainants-Appellees.

[ENDORSED]

We consent this 10th day of March, 1926, to filing the within petition of appeal out of time.

Pitney, Hardin & Skinner,
Solicitors for and of Counsel with National Newark & Essex Banking Company.

Edward M. Colie,
Solicitor for and of Counsel with William Richard Trippe, a minor.

Consent is hereby given to the filing of the within petition of appeal out of time.

Edward L. Katzenbach,
Attorney-General.

Due and legal service of a copy of the within petition of appeal is hereby acknowledged.

Edward L. Katzenbach,
Attorney-General.

ANSWER OF DEFENDANT-RESPONDENT, NATIONAL NEWARK & ESSEX BANKING COMPANY, TO PETITION OF APPEAL.

(Filed March 19, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between WILLIAM HERON TRIPPE and others, *Complainants-Appellants,* and NATIONAL NEWARK & ESSEX BANKING COMPANY, a corporation, and others, *Defendants-Respondents.*	On Appeal from the Court of Chancery. Answer of defendant-respondent, National Newark & Essex Banking Company, to Petition of Appeal.

The answer of the above-named defendant-respondent National Newark & Essex Banking Company

(the correct corporate name of which is The National Newark & Essex Banking Company of Newark) to the petition of appeal of the complainants-appellants:

This defendant-respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was, on the 22nd day of December, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof this defendant-respondent prays to refer thereto when the same shall be produced. And this defendant-respondent is advised and believes that the said decree is agreeable to equity, and prays that the same may be affirmed, with costs to be adjudged to this defendant-respondent.

PITNEY, HARDIN & SKINNER,
Solr's. for and of Counsel with Defendant-Respondent, National Newark & Essex Banking Company.

ANSWER OF WILLIAM RICHARD TRIPPE, AN INFANT, BY THOMAS BARBER, HIS GUARDIAN AD LITEM, TO THE PETITION OF APPEAL.

(Filed March 25, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between WILLIAM HERON TRIPPE, *et al.*, *Complainants-Appellees*, v. NATIONAL NEWARK & ESSEX BANKING COMPANY, *et al.*, *Defendants-Appellants*.	On Appeal from the Court of Chancery. Answer of William Richard Trippe, an infant, by Thomas Barber, his guardian ad litem, to the Petition of Appeal.

The answer of the above-named respondent to the petition of appeal of William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, appellees. This respondent not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that the decree was made and entered in the Court of Chancery in this cause on December 22, 1925, for the purposes mentioned in said petition, as is therein stated; but as to the substance and form thereof this respondent prays to refer

thereto when the same shall be produced, and this respondent is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed, with costs to be adjudged to this respondent.

EDWARD M. COLIE,
Solicitor for and of Counsel with Thomas Barber, guardian ad litem of William Richard Trippe, an infant.

ABRIDGEMENT OF PROOFS UNDER RULE 19.

NEW JERSEY COURT OF ERRORS AND APPEALS.

WILLIAM HERON TRIPPE, and others,
Complainants-Appellants,
v.
NATIONAL NEWARK & ESSEX BANKING COMPANY OF NEWARK, and others,
Defendants-Respondents.

On Appeal from Chancery.
Abridgement of Proofs Under Rule 19.

The following is an abridgement of the proofs in the above cause, under Rule 19 of this court.

1. The testator, William R. Trippe, died May 20, 1923. His last will and testament, dated October 8, 1922, was duly probated by the surrogate of Essex County on June 4, 1923. The text of said will appears in full on pages 11 to 19, inclusive, of this State of the Case; which text of said will is intended to be incorporated in this abridgement by this reference thereto.

2. The complainants, William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, were the only children born to testator. All three of these children survived him.

3. The said William Heron Trippe was, when the bill of complaint was filed in this suit, forty-one years of age; and he is married and has one child, eight years of age, when the bill of complaint was filed, the only grandchild of testator, which child is the respondent, William R. Trippe. When the bill of complaint was filed, Lucy Seaver Trippe was forty-three years of age, and Grace Milton Trippe, thirty-two years of age. Both were and are unmarried.

4. The wife of testator, who was Lucy Jewett Trippe, predeceased him. She died March 11, 1916, leaving a last will and testament which was dated November 14, 1912, and which, together with a codicil thereto dated November 8, 1913, was duly admitted to probate by the surrogate of Essex County.

5. The said will of Lucy Jewett Trippe provided, *inter alia*, as follows:

"*Seventh.* All the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath to my children, William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe and the survivors of them, in trust until the first day of May, nineteen hundred and forty, with full power to lease any real property therein at such rentals as to them shall seem best for their interest. The income from the residue of my estate to be divided among them quarterly, share and share alike. Upon the termination of the above trust, the said residue to become the absolute property of my children or the survivor or survivors of them. And in the event of the decease of any of my children prior to the termination of the trust leaving lawful issue, the child or children

of said deceased parent to take the parent's share, including the income during the continuation of the trust.

I further order and direct that during the continuance of this trust, that the moneys arising therefrom shall be invested in securities such as are legal for savings banks and trustees under the laws of the State of New Jersey. In event of the decease of all my children, without leaving lawful issue them surviving, prior to the termination of the trust created under the clause of my will, the said fund herein held in trust shall be used jointly with a like fund created under the will of my husband, William R. Trippe, to establish a non-sectarian home for poor and friendless girls under the rules and regulations of which the annual expense to each applicant shall not exceed one hundred dollars per year. Such home is to be located in East Orange or its vicinity and is to be known as the Memorial School and Home. Its special object shall be to provide a home where girls shall be under strict, but kind control, where special effort shall be given to train them in habits of self-control, industry and economy and where they may be taught some useful trades or occupations by means of which they shall be self-supporting when leaving the same, and become useful and self-respecting young women.

Lastly, I nominate, constitute and appoint my husband, William R. Trippe, executor of this my last will and testament with full power and authority to sell and dispose of, at his discretion, for the best interests of my estate, any and all real estate which I may own, die seized of or possessed of, and further order and direct that at no time or under any conditions or circumstances shall my said executor be required

to give bonds for the faithful performance of the trust herein created."

6. The codicil to the will of Lucy Jewett Trippe provided as follows:

"It is my wish to and I hereby revoke that part of the seventh section of this will, which directs that in the event of none of my children surviving the expiration of the trust, created in said section and my said children leaving no lawful issue, the trust fund shall be devoted to the establishment of a non-sectarian home for poor and friendless girls. In its place it is my wish and I so direct that my husband, William R. Trippe, in case he survives me, may designate and direct to what purpose the said trust fund shall be devoted, either charitable or otherwise, in case none of my children survive the termination of the trust and leave no lawful issue. But in the event, however, of my husband not designating for what purpose the said trust fund shall be used, then the fund shall be used for the purpose and in the manner stated in said section seven, *i e.*, the establishment of a non-sectarian home for poor and friendless girls."

The parties hereto agree to the above as an abridgement of the proofs in the court below.

BLEAKLY, STOCKWELL & BURLING,
Sol'rs. for Complainants.

PITNEY, HARDIN & SKINNER,
Sol'rs. for Respondent, National Newark & Essex Banking Company.

EDWARD M. COLIE,
Sol'r. for William Richard Trippe, a minor.

EDWARD L. KATZENBACH,
Attorney-General.

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

New Jersey Court of Errors and Appeals

William Heron Trippe and others, *Complainants-Appellants,* *vs.* The National Newark & Essex Banking Company of Newark and others, *Defendants-Respondents.*	*On Appeal from Chancery.*

BRIEF OF RESPONDENT THE NATIONAL NEWARK & ESSEX BANKING COMPANY OF NEWARK.

1. Introduction.

Bill of complaint was filed in the court below by William Heron Trippe, Lucy Seaver Trippe and Grace Milton Trippe, the children and next of kin of William R. Trippe, deceased, who died a resident of East Orange, New Jersey, on May 20, 1923, having first made his last will and testament, the construction of which, to a limited extent, is involved in this case. This appeal is prosecuted from the decree of the Court of Chancery dismissing the bill of complaint and directing the executors to proceed with the administration of the estate according to law.

This respondent is firmly convinced that the opinion of Vice-Chancellor Backes filed in the court below (Case, pp. 30-36) and reported in 3 N. J. Adv. Reps. 1910, is a learned and complete answer to the contention that the complainants-appellants are entitled now to receive in hand the *corpus* of the estate of decedent.

The text of the will of William R. Trippe, deceased, is in the State of Case, pages 11-19. By the eighth paragraph of the will this respondent is named trustee of a fund of $100,000. The residue of the estate is given by the eleventh paragraph of the will to the three children of testator as trustees on trusts which may be considered identical with the trusts imposed on the gift to this respondent of the $100,000 fund. Part of the eleventh, and all of the twelfth and thirteenth paragraphs of the will have been treated by the parties to this suit as applicable alike to the trust of the $100,000 fund and of the residue. This, we think, is proper, although the thirteenth paragraph refers to "said trust fund." The twelfth paragraph expressly refers to "said trust funds." It is therefore considered that if the gift of the $100,000 fund were invalid, the gift of the residue would also be invalid and the next of kin would be entitled to receive the $100,000 fund with the residue.

2. McGill v. Trust Co. of N. J.

The principal features of the case presented by this appeal are similar to those of the case of *McGill* v. *Trust Co. of N. J.*, 94 N. J. Eq. 657, which was affirmed, with minor modifications, by opinion of this Court reported in 96 N. J. Eq. 331. The will of Dr. John D. McGill provided that the income of his estate should be paid to his two children, Alexander and Eleanor, for life, and at their deaths should be used for the support and education of their children, and that the *corpus* should go to such children of Alexander and Eleanor as should attain twenty-five years of age, upon their reaching that age. Speaking of the Alexander share, the Court found that the gift of *corpus* to Alexander's

children included the children, if any, who might be born after testator's death, and that the gift was to the children of Alexander when they attained the age of twenty-five. This attempted gift to Alexander's children was held to be void under the rule against perpetuities, even if it were considered that complainants (children of Alexander) would technically take a vested interest either at testator's death or at Alexander's death, subject to divesting by dying under twenty-five years of age. The Vice-Chancellor was of opinion that gifts made to a class may be technically vested, but at the same time be as repugnant to the rule against perpetuities as purely contingent gifts, and that when the time fixed for the closing of the class is so remote as to conflict with the perpetuity rule, the gift is void.

It was held, however, in the *McGill* case, that Alexander and Eleanor were not entitled to immediate full ownership of the estate. As stated by Vice-Chancellor Buchanan (94 N. J. Eq., at p. 669): "The invalidity of an attempted ultimate gift of *corpus* by no means vitiates the entire trust. The general rule is, I take it, rather the other way. The provisions of the will are to be disturbed no further than is absolutely required by the existence of the rule against perpetuities." The gifts of income to the grandchildren of testator were held to be valid. The children of Alexander were held to have equitable life estates commencing at Alexander's death and subject to being terminated prior to the ends of their lives by the taking effect of the gifts of *corpus* on the attainment of age twenty-five. But, the gifts of *corpus* being invalid, there was held to be nothing to cut through the life estates. The result was that Alexander and Eleanor, as testator's heirs at law and next of

kin at the time of his death, were held to be vested of the equitable remainder in the *corpus,* subject to Alexander's life estate and the succeeding life estate of his children; and similarly as to Eleanor's share.

Other cases may be urged upon the attention of this Court, but there can be little doubt that the decision of the case at bar must be controlled by the *McGill* case.

It seems unnecessary to re-examine the cases and reasoning upon which Vice-Chancellor Buchanan based his decision of that case in the Court of Chancery. He distinguished cases like *Hewitt* v. *Green,* 77 N. J. Eq. 345, and *Graves* v. *Graves,* 94 N. J. Eq. 268, as being cases where testators had made it obvious that the primary intent was to accomplish an unlawful tying up of principal. He expressly (94 N. J. Eq., at p. 672) disagrees with certain Pennsylvania decisions and "a number of decisions in Illinois and New York," which presume that preliminary gifts of income are invalid because incidental to ultimate invalid gifts of *corpus.* These distinguished and discredited decisions of New Jersey and other American courts seem to have been unduly stressed in the brief for the appellants now before this Court. The *McGill* decision has precedents, including *Stout* v. *Stout,* 44 N. J. Eq. 479, and the English authorities, such as *Leake* v. *Robinson,* 2 Meriv. 363, 35 Eng. Rep. 979. But in any event the McGill case is authoritative and must, we believe, control the case now presented.

3. Gifts to Grandchildren.

It follows from the decision of the *McGill* case that, since valid gifts to grandchildren are provided for by the will, the next of kin of testator

are not entitled to receive the *corpus* of the fund at this time and the trust must be set up as directed by the will.

This general result is not affected by any distinction between the nature or quantity of the estates vested in the grandchildren of McGill and Trippe respectively. As pointed out by Vice-Chancellor Backes, the gifts to the Trippe grandchildren under the thirteenth paragraph of the Trippe will are gifts made as of the death of the children of testator. "Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund, * * *." Such is the language (Case, p. 18) of the gift to grandchildren under the thirteenth paragraph, which then follows with directions respecting the use and payment of the income for the grandchildren and with direction for paying to them, upon their reaching the age of twenty-five years, the entire principal sum. It seems clear, under this language, that the class of grandchildren is closed on the death of a parent, and that, at that time, grandchildren take a vested and absolute share. If so, then if any grandchild should thereafter die before reaching the age of twenty-five years, the personal representative of such grandchild would be entitled to claim and receive such grandchild's share of the principal. In other words, there can be no divesting by reason of death of a grandchild subsequent to the death of the parent. The class is closed at the death of a parent, whose life was in being at the death of testator. This meets the rule laid down in the *McGill* case.

Vice-Chancellor Backes points out (Case, p. 34, ll. 36 and 37, and p. 35, ll. 1 to 8) that the vested estates of grandchildren seem to be subject to

being divested or modified, as to quantity only, if two or all three children die without issue or descendants attaining twenty-five years of age. Such possibility of divesting or modification arises from the language of the eighth paragraph (and of the eleventh paragraph with respect to the residue). If all three children die leaving issue, the thirteenth paragraph completely and alone takes care of the situation. If, however, two children die without leaving legal issue, a literal following of the will of testator would require that we move from the thirteenth paragraph to the eighth paragraph to measure the gifts to the grandchildren, the children of the surviving child. By the eighth paragraph, in this event, grandchildren are "to receive the principal" when "they severally attain the age of twenty-five years" (Case, p. 13, ll. 20-24). Under this language a grandchild dying after the death of its parent but before reaching the age of twenty-five years, would not receive the principal. The technical vesting at the death of the parent, or sooner, is subject to a divesting by death before reaching twenty-five. The class is not finally closed at the death of the parent, and the gift of the principal, under the authority of the *McGill* case, is void. But, and also under the authority of the *McGill* case, the grandchildren, in this event, should be considered as having a life estate, vested at the death of their parent, subject to be cut off by gifts to them of principal. The gifts to them of principal being invalid, there is nothing to cut through the life estates.

The suggestion being made is, in other words, that the absolute gift, vested in a closed class of grandchildren under the thirteenth paragraph, may be changed from an absolute gift of *corpus*

to a gift of life estate on the contingency which would remove the gift from the language of the thirteenth paragraph to the language of the eighth paragraph. Such moving over, changing absolute gifts to life gifts, results merely in a modification of the quantity of the estate. The life estate is included in the larger estate, the absolute gift, made by the thirteenth paragraph. The balance of the quantity of the gift in excess of the life estate is, it seems, subject to this divesting through this moving from the language of the thirteenth paragraph to the language of the eighth paragraph. As we understand the suggestion of Vice-Chancellor Backes at the top of page 35 of the State of Case, the result of moving from the thirteenth paragraph to the eighth paragraph may be a limitation over, which may happen more than twenty-one years after lives in being, and which may therefore be void. If such limitation over be void, the suggestion is that the effect thereof in divesting the full estates of grandchildren under the thirteenth paragraph is nothing. In other words, the will is invalid to the extent that it calls us from the thirteenth paragraph to the eighth paragraph for this purpose.

However, whether or not the grandchildren receive valid gifts of *corpus,* as appears to be the effect of the thirteenth paragraph of the Trippe will, or valid gifts of income, as in the *McGill* case and as may appear to be provided for under certain contingencies by the eighth paragraph of the Trippe will, the mere fact that the grandchildren receive valid gifts (whether of *corpus* or of income) prevents the appellants from now being entitled to the *corpus* of the fund.

The effect of the decision of the *McGill* case was to give life estates to the grandchildren of testator (Dr. McGill). The dissenting opinion of Judge White (96 N. J. Eq., at pp. 333-334) makes objection to what, in practical effect, is an enlargement of the gifts of income intended by testator. But Judge White concluded his comment on this phase of the decision by saying: "I could unite in upholding the trust until twenty-five as separable from the gift of the *corpus,* although I think that to do so would overrule *Hewitt* v. *Green,* 77 N. J. Eq. 345, and *Graves* v. *Graves,* 94 N. J. Eq. 268, but, further than this, I do not see my way to concur." In deference to this suggestion, we beg leave to point out, that, even if the Trippe grandchildren are said to have, under the will, equitable estates for years (until reaching age twenty-five), instead of life estates, these estates should be considered separable and valid, preventing any right in appellants to present absolute ownership and possession of the *corpus.* This appears to have been the view of Vice-Chancellor Buchanan, who said in the opinion below in the *McGill* case (94 N. J. Eq., at p. 670): "Assuredly where a trust is created to provide a life estate to A, and a subsequent life estate to B, and then a remainder to C, the invalidity of the gift to C will not vitiate the prior gifts to A or to B. So, also, if the gift to B were a term for years instead of a life estate."

The appellants contend in their brief that the *corpus* does not vest in the Trippe grandchildren until the grandchildren become twenty-five years of age, and that there is no absolute gift of income to any grandchild until such grandchild arrives at the age of twenty-one years, because until that age is reached, the trustee has discre-

tion as to the payment of income for the use of grandchildren. If we concede the whole of this contention (which we do not), grandchildren of testator at least receive vested gifts of income when they reach the age of twenty-one years, which cannot be later than twenty-one years after the death of children of testator, whose lives were in being at his death. We therefore point out that, even though the ultimate gifts of *corpus* are invalid, the gifts of income to children of testator and the gifts of income to grandchildren, whether at the death of their parent or at the age of twenty-one, and whether gifts for life or for term of years, would prevent appellants from now having a right to the possession of the fund. This follows clearly from the *McGill* case. Such is the concluding thought of Vice-Chancellor Backes in his opinion below, in the following words (Case, p. 36): "Moreover, the gifts of income to the legal issue of the testator's children are valid and would bar recovery even if the gifts of *corpus* were void for remoteness. *McGill* v. *Trust Co., supra.*"

It may be observed at this point that it is only necessary at this time to construe the will to such an extent as will make possible a decision as to whether or not the complainants-appellants are entitled now to receive payment of the *corpus.* Whether or not the gifts of *corpus* made by the will are invalid, or whether or not complainants are vested with estates in remainder in the *corpus,* as next of kin of testator, has only academic importance at this time, if, as we believe, the gifts of income prevent the complainants from having a right to receive the fund in hand.

4. Gifts to Children.

Because of the valid gifts to grandchildren, Vice-Chancellor Backes, following the *McGill* case, has found that the complainants are not now entitled to have the *corpus* of the estate free of the trusts imposed by the will. We suggest that the same conclusion could be reached because of the valid gifts of income to the children of testator. These gifts of income to his children must have had individual and separate importance in the mind of the testator. The gift over of income, on the death of one child without issue, to the surviving two children, evidences a desire to furnish special support for the surviving children in the later days of their life. The desire to provide this possible additional support, through survivorship, would be defeated if the appellants were now found to be entitled to receive the *corpus* of the fund.

5. Gift to Working Girls' Vacation Home.

A. UNDER TWELFTH PARAGRAPH.

If it were necessary to consider other primary intentions of the testator, nothing could add more to the argument for the validity of the trust imposed by the will than the twelfth paragraph of the will, considered in connection with the will of Lucy Jewitt Trippe, wife of William R. Trippe. Mrs. Trippe predeceased her husband by some years. Her will and the codicil thereto are in evidence in this case (see Case, pp. 52 to 54). By the codicil to her will, she directed that the residue of her estate, in the event of the death of the three children prior to May 1, 1940, without issue, should be disposed of as her husband, in his will, might direct. In the twelfth paragraph of the will of

William R. Trippe, the testator exercises the power of appointment given to him by his wife and directs that on the condition mentioned in his will and in her will, namely, on the death of the three children before May 1, 1940, the residue of her estate and of his estate shall be turned over to the Working Girls' Home, as directed by his will. Certainly, the exercise of this power of appointment was one of the primary concerns of testator. The gift over of the residue of his estate under the twelfth paragraph, wrapped up with the power of appointment given to him by his wife, is not only clearly a valid disposition of the residue of his estate, but is clearly an independent and primary concern which will prevent this gift from being invalidated by any other parts of the will which might be invalid.

B. UNDER EIGHTH AND ELEVENTH PARAGRAPHS.

Indeed, we are convinced that this Court should, if it were necessary, go even further. If two of testator's children should die without issue, the gift over to the Home of one-half of the fund, *under the eighth and eleventh paragraphs,* would be a valid gift; and if three of the children should die without issue, although this should be later than May 1, 1940, the gift over of the whole fund to the Home would be a valid gift.

Complainants have contended that such gifts, although they would be valid if standing alone, are made invalid by the fact that the gifts over are not only on condition that two or three children die without issue, but also on condition that they leave no issue who attain the age of twenty-five years, or legal descendants of the

same who attain said age. We are moved to admit that gifts over on the latter contingencies are invalid, but we insist that the gifts in the valid contingencies, which must happen first if they happen at all, are not invalidated by the other contingencies. In support of this contention, a number of English cases are in point.

Longhead v. *Phelps,* 2 W. Black. 704, 96 Eng. Rep. 414 (K. B. 1770);

Goring v. *Howard,* 16 Sim. 394, 60 Eng. Rep. 926 (Sir L. Shadwell, *V.-C.,* 1848);

Leake v. *Robinson,* 2 Mer. 363, 35 Eng. Rep. 979 (Sir William Grant, *M. R.,* 1817);

Minter v. *Wraith,* 13 Sim. 52, 60 Eng. Rep. 21, at p. 25 (Sir L. Shadwell, *V.-C.,* 1842).

These English cases have been followed on this point, by at least one decision of the Court of Chancery of New Jersey. *Ackerman* v. *Vreeland,* 14 N. J. Eq. 23 (Green, *C.,* 1861). The will under consideration in that case directed a certain disposition of the estate, "if either of my daughters die without issue, or their child or children die before they have issue." It was pointed out that the limitation over, contingent on the death of the first legatee without issue, was good; but that the limitation over on the death of grandchildren, then unborn, without issue, was invalid. The Chancellor made the following statement of the law applicable to this situation (14 N. J. Eq., at p. 26):

> "When there is a limitation over to take effect in either of two events, one of which is too remote and the other not, if the latter happen, the limitation will take effect."

On this authority, we insist that the contingency of the death of two children without any issue them surviving will perfect a gift of one-half the *corpus* in the Home; and that the death

of three children without any issue them surviving will perfect a gift of the balance of the *corpus* in the Home. The contingency of children leaving issue or descendants who die before twenty-five, may be separated and may be treated as wholly void and invalid.

C. GENERAL REQUIREMENTS OF CHARITABLE BEQUEST.

The charitable gift meets the general requirements of such a gift. It is only necessary either that the object be specifically stated *or* that a person or persons be designated to select the beneficiaries. *Norcross* v. *Murphy,* 44 N. J. Eq. 522 (E. & A. 1888). There can be little question that one of these conditions has, or that both have, been met in the instant case. The object of the trust is certainly specified, and citation of authorities to support this statement seems hardly necessary. A gift to "the fresh air fund of Newark" has been held to be for a specified object, although no incorporated or unincorporated Fresh Air Fund existed in the City. *White* v. *City of Newark,* 89 N. J. Eq. 5 (Stevens, *V.-C.,* 1918).

It seems to us that the trustees of the residue and this respondent are intended to have, by necessary implication, joint authority to select the Home. If the two sets of trustees should be unable to agree, we would expect that the Court of Chancery could be successfully appealed to to select the agency to administer the trust. The case, in this respect, cannot differ from a case in which there are two, or four, or any even number of trustees with a discretionary power. It would not be seriously contended that they could defeat a charitable trust by proclaiming a deadlock.

6. Conclusion.

In conclusion, we urge affirmance of the decree of the Court of Chancery:

A. For the reasons stated in the opinion of Vice-Chancellor Backes:

1. The will provides valid gifts of *corpus* to grandchildren, not invalidated by provisions postponing enjoyment or provisions attempting to cut down gifts by limitation over.

2. The will provides valid gifts of income to grandchildren, separable from any subsequent invalid attempt to dispose of the *corpus*.

B. Also, or in the alternative, for the further reasons:

1. The will provides valid gifts of income to children, separate from any subsequent invalid attempts to provide other gifts.

2. The will provides valid contingent gifts of *corpus* for a charitable purpose, independent of any invalid attempts to provide other gifts of *corpus* on different contingencies.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

WILLIAM HERON TRIPPE, *et al.*, *Complainants-Appellants,*	*On Appeal from Chancery.*
vs.	*On Bill, &c.*
NATIONAL NEWARK & ESSEX BANKING COMPANY, *et al.*, *Defendants-Respondents.*	*Sat Below:* WALKER, *C.* BACKES, *V.-C.*

BRIEF OF EDWARD M. COLIE, COUNSEL FOR THOMAS BARBER, CLERK OF THE COURT OF CHANCERY, GUARDIAN AD LITEM OF THE INFANT DEFENDANT, WILLIAM RICHARD TRIPPE, BY APPOINTMENT OF THE COURT OF CHANCERY, DEFENDANT-RESPONDENT.

The learned Vice-Chancellor reached the conclusion that the provisions of the Will in question created certain trusts that were valid and declined to pass *at this time* on the validity of the other provisions of the Will attacked as violating the Rule against Perpetuities, for the reason that the provisions might never become operative or if they did become operative other parties than those before the Court might be interested and would be entitled to be heard thereon. The Bill was therefore dismissed. We submit that the learned Vice-Chancellor rightly held that the Will created certain valid trusts, and that he followed the well established rule in declining to pass upon the validity of the other trusts at this time on this Bill.

Ordinarily, this infant defendant in this Court would only be called upon to support the Opinion

of the Court and would not be called upon to enter into a discussion as to the validity of the provisions of the Will not now effective; but we represent, by appointment of the Court, this infant and as the complainants-appellants have seen fit to discuss all the provisions of the Will, it is necessary for us, at the sacrifice of brevity, to meet that discussion as to all the provisions of the Will, excepting those relating to the ultimate alternative gifts to the Charity which is in the care of the Attorney-General, the party to this cause representing the State.

We shall not follow seriatim the brief of the complainants-appellants because much of it is based upon paraphrases of the provisions of the Will which do not, in our view, accurately express the purport of the Will. The construction of the Will is rendered difficult by the arrangement of the provisions thereof, and by the failure of the draughtsman to accurately use the same language when referring to the same matter. For the convenience of ourselves and the Court, in considering the terms of the Will, we have hereinafter set forth in full the provisions relating to the issue now pending in relation to the rights of the infant we are defending.

The character of this litigation immediately attracts attention. It is a bill filed by the three children of William R. Trippe, who under his Will receive the life estate in substantially his entire property, and who are the executors of his Will, seeking to secure to themselves the absolute title of the entire estate aggregating about $200,000.00, excepting a pecuniary legacy of $2,000.00 and a trust of $10,000.00 to a son of one of testator's children, to wit, our infant William Richard Trippe, son of William Heron Trippe, one of the complainants.

The result sought by the complainants would render the testator intestate as to his entire estate, except some gifts of chattels, the pecuniary legacy of $2,000.00, and the trust of $10,000.00.

In the bill the complainants even questioned the $10,000.00 trust in favor of our infant. In their brief they have abandoned this contention of their bill.

Under settled principles, in interpreting a Will, regard must be had as to who constitute testator's family as the objects of his bounty, and the circumstances connected with them and his relations to them. The testator, who died May 20, 1923, left him surviving a son William Heron Trippe, aged 41, and an unmarried daughter Lucy Seaver Trippe, aged 43, and an unmarried daughter Grace Milton Trippe, aged 32; also an only grandchild, a grandson, William Richard Trippe, our infant, child of William Heron Trippe, born October 26, 1915, and who would reach the age of twenty-five years, the period referred to in the Will and the source of the controversy, on October 26, 1940, and therefore within a period of twenty-one years, to wit, in approximately seventeen years, from testator's death.

The brief we are answering does not give due weight to the settled rules in regard to a Will whose provisions are attacked on the ground of violation of the Rule against Perpetuities. The rule is thus laid down in Gray, Third Edition, Sec. 633, as follows:

> "When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result that would be bad for remoteness, it is a

> fair presumption that the testator meant to create a legal rather than an illegal interest. While it is not to be conclusively presumed that a testator knew the Rule against Perpetuities, for such a presumption would often involve the absurdity that a testator intended to make a will which he was aware the law would not carry into effect, there is, on the other hand, no presumption that he did not know it; and therefore the fact that a provision would be too remote, if construed in a certain way, is a reason for supposing that it was not intended to be construed in that way, which, although it cannot avail against a clear form of words, may well be held to govern when the expression is ambiguous."

The settled rules favoring the vesting of legacies are in full force and effect where the attack is on the ground of violation of the Rule against Perpetuities; so also are the rules relating to the use of words and phrases and the substitution of one word for another in order to express the manifest meaning of the testator; so also are the rules affecting the construction of the Will so as to avoid intestacy. There is a special rule applicable to the construction of Wills where the attack is on the ground of violation of the Rule against Perpetuities. It is thus stated in Gray, Sec. 341:

> "When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately, and upholding one, although the other fails. And the courts naturally, and properly, lean to construing the gifts separately, when it can be done."

The separability of gifts goes not only to separate gifts of principal, but to a distinction between the principal and income as constituting separate gifts.

In *Stout* v. *Stout,* 44 N. J. Eq. at p. 487, the Court held the gift of the interest of a fund to be good, though the gift of the principal was void.

This is illustrated by *Ogden* v. *McLane,* 73 N. J. Eq. at p. 167, where it is stated—

> "A severance between income and principal has been effected by the trust. The income exists as a distinct property independently of the *corpus.*"

and again in *McGill* v. *Trust Co. of N. J.,* 94 N. J. Eq. at page 669, not only as to the separability of gifts on various contingencies, but the separability of gifts of income and *corpus.* Buchanan, *V.-C.,* there says:

> "But the situation is very different where the trust is for the purposes of supporting several independent gifts, whether concurrent or consecutive. In such case, unless it be impossible so to do, the several gifts are to be separated and those preserved which do not violate the rule."

and on *page 671* he says:

> "In my opinion the gift of income to the children of Alexander is entirely separate from and independent of the (attempted) alternate gifts of the *corpus* and is therefore not vitiated by the invalidity of the latter, unless the will clearly shows such to be testator's intention; and no such intention is to be discerned in this will, but rather the contrary."

The general rule is thus laid down in *Lewin on Trusts,* 11th Eng. Ed. 1904, p. 119, quoted in *Hewitt* v. *Green,* 77 N. J. Eq. at p. 369, as follows:

> "If property be given upon trust to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then if the amount intended to be applied for the unlawful purpose cannot be

> so far ascertained as to make it clear that there would be a residue applicable to the lawful purpose, the whole gift will fall; but the mere fact that the amount to be applied for the unlawful purpose has not been expressly stated in the gift, will not make the whole gift void, and the court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose and thus uphold the gift."

In *Hewitt* v. *Green,* after the above quotation, Stevenson, *V.-C.,* goes on to show to what pains and calculations the court will resort in order to disentangle the good from the void gift and ascertain the amount of the good gift.

In that case Stevenson, *V.-C.,* found certain portions of the trust good and certain portions void.

In *Merkel* v. *Capone,* 81 N. J. Eq. at p. 286, on this question of separability, Emery, *V.-C.,* says—

> "Unless it appears that the testator clearly intended such inseparable connection of the two limitations, the court, in my judgment, will more probably carry out the testator's real intention by holding them to be separable."

We think that the brief we are answering does not give proper force and effect, if any at all, to the principles established as above set forth.

As we understand the law, if any of the trusts which are brought in question are valid, after the provision giving the present complainants-appellants for life the interest on the corpus of the trusts, then the trusts must be set up, and the complainants-appellants cannot prevail in this action, to wit, cannot secure to themselves, as they seek, the immediate payment to them of

the corpus of the trusts. As we understand it, the court will only construe a Will and instruct the executors or trustees so far as is necessary to perform present duties. (*Ogden* v. *McLane,* 73 N. J. Eq. 161.)

In *Van Riper* v. *Hilton,* 78 N. J. Eq. at p. 376, the court says:

> "And, to my mind, it is utterly immaterial that if the circumstances had been different than what they were the result would be different, because we are not dealing with the validity of this clause applied to different facts than those which existed, but with its validity tested by the existing facts."

As we understand it, neither under the general equity power, nor under the statute authorizing the making of a declaratory decree, will the court pass upon matters which may involve the rights of parties now not in existence and parties not before the court, unless it certainly appears that the provisions in which such parties may be interested are beyond all question void.

The brief we are answering seems to us to ignore the fact that in the construction of this Will this testator, as usual with others, undertook, having the situation of his family in mind, to provide for various *alternative* situations that might arise. These alternatives are not to be considered in hotchpotch, but are to be separately tested as to violation of the Rule against Perpetuities. In construing the provisions of a Will, even with reference to the Rule against Perpetuities, in order to determine the intent of the testator, regard must be always had as to his intentions towards the beneficiaries. The testator made the following remarkable bequest to our infant:

> "SIXTH: I give and bequeath to my grandson William Richard Trippe, the wedding

> and engagement rings worn by my beloved wife, his grandmother, the oil portrait of my father and the oil painting of my wife and her brother, painted when they were children; my son to have charge of them all until, in his judgment, my said grandson is able to care for and appreciate them."

He also created a special trust fund of $10,000.00 for him. He was, if the intention of the testator is to be carried out, a beneficiary to the possible extent of $50,000.00 under the $100,000.00 trust. He was also a beneficiary to the possible extent of one-half of the residuary trust. It plainly appears by the Will that, after providing that his children should have the income of his estate for their lives, excepting as to the small bequests and the creation of the $10,000.00 trust, his prime object as to at least one-half of his estate was that it should go to this grandchild upon the death of his father and two maiden aunts without further issue. All these gifts are destroyed if the contention of the complainants-appellants is correct.

For the convenience of the court we set forth in full the portions of the Will discussed in the brief we are answering and involved in the issue. The portions that are *bracketed* need not be considered, as they do not affect the rights of the infant defendant-respondent. So far as they relate to the question of the charity we shall refer to them later.

> "EIGHTH. I give and bequeath to National Newark and Essex Banking Company, a corporation located in the City of Newark, Essex County, New Jersey, the sum of One Hundred Thousand Dollars, the same to be held by said corporation, or by such other corporation as may be appointed to succeed the same, in trust for the benefit of my children Lucy Seaver Trippe, Grace Milton

Trippe and William Heron Trippe, hereby directing that the net income thereof shall be paid in quarterly instalments, in equal shares, to my said children, the child or children of any of them who may die during my lifetime, or prior to the termination of the trust, to take and receive the parent's share; [and I do direct that the amount above mentioned may be paid to the said trustee in securities of a market value of not less than Ninety-five Thousand Dollars and at a face value of One Hundred Thousand Dollars or in securities and cash; any securities delivered to the trustee as a part of said trust fund which are not such as are authorized by the laws of the State of New Jersey for the investment of trust funds may be held by such trustee until maturity, whereupon the funds realized therefrom are to be reinvested in such securities as are authorized by the laws of said State for the investment of trust funds.] Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children, without legal issue, then one-half of the income of said trust fund shall be paid, in like manner to the surviving child for and during the term or his or her natural life, and upon his or her decease leaving lawful issue, then to such lawful issue or his or her descendants until they severally attain the age of twenty-five years, at which time they are to receive the principal; [the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto, shall be devoted, in conjunction with one-half the principal of another fund hereinafter directed to be established and held by my children or trustees, viz., the fund mentioned in Section Eleven, to the establishment, uses and maintenance of a Working Girl's Vacation Home

and shall be held by the trustees and transferred, assigned, and paid over to the corporation hereinafter more specifically mentioned for those purposes.]"

"ELEVENTH. All the rest, residue and remainder of my estate, real and personal, whatsoever and wheresoever, I do hereby give, devise and bequeath to the executors, hereinafter named, and to the survivors and survivor of them, in trust, with full power to sell or lease any of my said real estate at such times, in such manner, and for such amounts as to them, and to the survivors and survivor of them, shall seem best to the interest of my estate. The proceeds of this residuary estate are hereby directed to be invested by the said executors in securities that shall be legal under the laws of New Jersey for the investment of trust funds by trustees and Savings Banks and the net income shall be paid in quarterly instalments, in equal shares, to my said children, the child or children of any deceased child, or his or their legally appointed guardian receiving the parent's share. Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children, without legal issue, then one-half of the income of said trust fund shall be paid, in like manner, to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then, to such lawful issue of his or her descendants until they severally attain the age of twenty-five years, at which time they are to receive the principal; [the remaining half of the principal of this trust fund, together with any unexpended income thereof, or accretions thereto shall be devoted, in conjunction with one-half the principal of another fund hereinbefore directed to be established and held by National Newark and Essex Banking Company as trustee, viz.,

the fund herein mentioned, with any ac- establishment, uses and maintenance of a Working Girl's Vacation Home and shall be held by the trustees and transferred, assigned and paid over to the corporation hereinafter more specifically mentioned for those purposes.]

"The Working Girl's Vacation Home is to be established in case any two of my children shall die, leaving no lawful issue who attain the age of twenty-five years, or legal descendants of the same who attain said age, with one-half part of the principal of the trust fund mentioned in the Eighth Section or Paragraph of this Will immediately upon the happening of that event, the remaining portion of the principal being held for the benefit of my surviving child, and his or her descendants, if any; and, in like manner, one-half of the trust fund hereby directed to be established from the residue of my estate is to be devoted and applied to that purpose immediately upon the death of any two of my children, without lawful descendants; and if all of my three children die without lawful issue and without lawful descendants of any such issue who shall attain the age of twenty-five years, then the remaining portion of the trust fund mentioned in said eighth section or paragraph as well as the remaining portion of the funds herein mentioned, with any accrued income or accretions, is to be applied and devoted to that purpose.

"If such Working Girl's Vacation Home shall be established, the same may be done by the creation of a separate corporation or, preferably, through some already organized charitable organization in successful operation and of good repute. It is to be known as "The Working Girl's Vacation Home," is to be established in memory of my wife Lucy Jewett Trippe and is to be strictly non-sectarian in its control and administration. The said Home is to be sustained in part by a charge for the board

therein to be made to such working girls as may be admitted thereto and who are employed as wage earners, certain other girls who are temporarily out of employment may be admitted thereto for short periods in case they are without funds to pay for their board therein; it is to be established in the State of New Jersey and may be maintained in the discretion of the Board of Governors, managers or directors thereof in a building or buildings to be rented to, or purchased or built by said corporation for the purposes herein specified; the location of the home may be changed from time to time as the said corporation may determine and if the income of the funds thereof shall be sufficient, its governing body may establish and maintain more than one such Institution. It is my wish that so long as any of my children shall live the governing body of such corporation shall give great consideration to such suggestions as shall be made by my surviving child.]"

"TWELFTH. Should all of my children die prior to May 1, 1940, leaving no lawful issue and no descendants of such issue, then the whole of said trust funds shall be used and devoted to the establishment, maintenance and purposes of said Vacation Home, under the conditions hereinbefore provided, in conjunction with a similar fund established by the will of my wife Lucy Jewett Trippe, if the same comes into existence under the terms of her will; and the trustees of said trust fund who may be appointed to succeed the last surviving child shall have power to sell, convey and lease any real estate that may then be unsold."

"THIRTEENTH. Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund, the income from which is to be applied to their support or added to the principal, as may be deemed best, until

> they severally reach the age of twenty-one years; thereafter, and *until* they severally reach the age of twenty-five years, such income is to be paid directly to them and *upon* their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be paid to them."

The one hundred thousand dollar trust of income after gifts for life to testator's three children is valid.

The gift of income after the gift of income for life to the testator's three children is made in the same sentence in which the gift of income to the testator's children is made. Section Eighth above. It is in language following:

> "hereby directing that the net income thereof shall be paid in quarterly installments, in equal shares to my said children, *the child or children of any of them who may die during my lifetime or prior to the termination of the trust to take and receive the parent's share.*"

Both gifts are made by a direction to the trustees to pay by the phrase but once used "shall be paid."

The gift after the gift for life to the testator's three children takes effect by the above language immediately upon the death of testator's children respectively. Thereupon the income of one-third of this trust which went to testator's children immediately vests in the child or children of the one dying. This would give to the child or children of testator's deceased child an estate for life in the income of the one-third, if there were no other provisions of the will respecting the same. But Section "THIR-

TEENTH" above provides as follows: (Italics ours.)

> "Should any of my children die leaving lawful issue, *then* the child or children of the deceased parent shall *receive* and *take* the parent's one-third share of said trust fund, the *income* from which is to be applied to their support or added to the principal, as may be deemed best, until they severally reach the age of *twenty-one years;* thereafter and until they severally reach the age of twenty-five years, such income is to be paid directly to them, and upon their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be paid to them."

By this section, independent of the gift of the principal fund, the infant has a partial enjoyment of the vested interest in the income until he is twenty-one. He may have the full enjoyment depending upon whether the trustees in their discretion apply the income to his support as they are authorized to do, and this discretion would have to be exercised if it was "best" for the interests of the infant, as expressly provided in the section. From twenty-one to twenty-five the infant would enjoy the full income. Our infant will be twenty-five years old in seventeen years from the date of the testator's death. Thus our infant not only has vested in him the right to his share of the income at the end of a life in being, to wit, his father's death, but obtains the full enjoyment of his share of the income within at the utmost thirteen years from testator's death.

In Section "THIRTEENTH" appears the word "fund." In the brief for the complainants-appellants this word is treated as "funds,"

which seemingly is a proper reading in view of the fact that the provisions thereof are complementary to the limitations as to the $100,000. trust and the residuary trust, the limitations as to which are substantially identical.

The provisions above considered constitute one of the situations which the testator had in contemplation in relation to the disposition of his property among his family, is complete in itself, must be judged with reference to the Rule against Perpetuities by itself, and so judged it is not void for remoteness.

The testator had another contingency in mind which he endeavored to provide for in this will. That contingency was that his children or some of them might die without legal issue. He provided for this contingency in the following language in Section "EIGHTH."

> "Upon the death of any child without legal issue, his or her one-third interest of the net income thereof shall thereafter be divided equally between the two surviving children; upon the death of a second of said children, without legal issue, then one-half of the income of said trust fund shall be paid, in like manner to the surviving child for and during the term of his or her natural life, and upon his or her decease leaving lawful issue, then to such lawful issue or his or her decendants until they severally attain the age of twenty-five years, at which time they are to receive the principal."

By the terms of the foregoing provision it will be seen that the words "lawful issue" and the words "his or her descendants" refer to the lawful issue and the descendants of the testator's children respectively. The use of the word "descendants" coupled with the words "lawful issue" requires that the words "lawful issue" should be read as equivalent to the words "child

or children." Such is the settled law in relation to the use of such terms in conjunction, *Tathan* v. *Vernon,* 29 Beav. 604. This construction is made doubly clear from the use of the word "issue" in Section "THIRTEENTH" where such issue is expressly stated to mean "child or children" of the deceased parent, such parent being stated to take the one-third share which is to go to each of testator's three children. The descendants here take in substitution for a then deceased child of testator's children, and the descendants take "stirpitally." *Randolph* v. *Randolph,* 40 N. J. Eq., p. 77. Who shall thus take is determined at the death of the parents of such child. This provision must take effect, if at all, at the end of lives in being.

These provisions, therefore, can transgress the Rule against Perpetuities in no event. Whether and how far our infant will take thereunder, time alone will tell, and we therefore need not concern ourselves at the present time with the question of whether he will become entitled on the death of his father to one-third or one-half of the income. He will on his father's death become entitled to one-third of the income in any event.

These provisions as to the income of the $100,000 trust, valid in themselves, are not rendered invalid even upon the assumption that the provisions as to the corpus of the trust are invalid.

The provisions as to income are clear and complete in themselves. In all of Section "EIGHTH," setting up the trust in question, the only words that refer directly and solely to the principal of the trust fund, in so far as they do not refer to the charity, with which we are

not now concerned, are the following: "At which time they are to receive the principal." Such clause refers to the time at which the final income takers attain the age of twenty-five years. Clearly any invalidity of the clause as to principal does not affect the completeness of the gift of income. The only words in the "THIRTEENTH" Section which could be read in connection with the "EIGHTH" Section, and which could in any wise suggest that the gift of principal is invalid *which we later show do not prove that effect,* are the following:

> "upon their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be paid to them."

But the clause leaves complete and entire the directions of the testator as to the gift of income to his children and grandchildren, either partially or wholly, till twenty-one, and to the full extent of the income from twenty-one to twenty-five. Under no circumstances then, is the gift or corpus necessary to complete and define the gift of income.

The provisions as to income are not incidental to the gift of principal. They are largely effectuated before the beneficiaries are to receive the principal. Our infant not only has the income prior to reaching twenty-one years of age as a fund to be resorted to on his behalf and in furtherance of his best interests by the trustees, but he receives the current income entirely from and after he is twenty-one until he is twenty-five. The facts do not bring this case within *Hewitt* v. *Green, supra,* nor the *Graves case,* 94 N. J. Eq. 468. *V.-C.* Buchanan, in the *McGill case,* 94 N. J. Eq. 657, in distinguishing that case

from the above cases, lays down the separability rule in cases such as this as follows: (p. 677.)

> "where one provision of a will is held invalid or void, the other provisions are to be disturbed thereby only where it is necessary."

The Court then shows that in the Hewitt and Graves cases, the interim gifts of income were but incidental to the invalid gift of corpus and fell therewith. Such was held to be testator's intention in the Hewitt case, because his Will provided for the accumulation of income until the gift of corpus occurred; and to have been testator's intention in the Graves case because the Will provided that the corpus should remain intact for future generations and "to that end" created the trust.

In the case at bar, however, the income is to be used for the benefit of the income takers, and not to be accumulated as in the Hewitt case, and there is no provision, here as in the Graves case, that the trust is created to the end of preserving the corpus for future generations. On the other hand, the trust as to income in the case at bar is complete in itself, and is, in fact, to provide for the care of testator's namesake, who was very dear to him, and of others of that generation until such grandchildren might reach an age of discretion when they would be in a position to look out for themselves.

In the brief of the complainants-appellants, they quote the statement of Buchanan, *V.-C.*, in the McGill case, as follows:

> "Not a part of it—not such part of it as may be necessary or reasonable; or as shall be suitable and proper; nor in the Trustee's discretion. There is no discretion given to the Trustee; neither is there any provision to accumulate or for any other disposition

of any unused portion." *McGill* vs. *Trust Company,* page 676.

These words are only an epitome of the provisions in the McGill Will, which the Vice-Chancellor was construing. They are no declaration as to a rule of law. We have been unable with the utmost diligence to find any cases where it has been held or suggested that where the income is partially payable to the infant and the rest of it is directed to be expended by the trustees for his best interests, the gift of income is bad, because a part of it may possibly be in the hands of the trustees to pay over at the time of payment of principal. Indeed, it may be said in this case that any possible accumulation of income is not for the purpose of increasing the principal fund when paid over, which would seem to be the proper test to determine whether a gift of income is incidental to a gift of principal, but the purpose here is to benefit and protect any infant issue of testator by preventing their wasting the income before they have reached their majority.

We have already shown how complete was the testator's interest in and affection for this grandchild, and it is written large in the Will that his grandchildren *per stirpes* should enjoy the income that he gave to their fathers.

The residuary trust of income in Section "Eleventh," after gifts for life to testator's three children, is good.

Section "ELEVENTH" should be read in connection with Section "THIRTEENTH." We call attention to the language in Section "ELEVENTH," after providing for the quarterly instalments of income to be paid to testator's

children, "the child or children of any deceased child, or his or their *legally appointed guardian* receiving the parent's share." These words clearly require that upon the death of testator's children respectively, their children shall take a beneficial interest immediately in the income.

In *Dusenbury* v. *Johnson,* 59 N. J. Eq. 337, from the syllabus it appears that the Will provided for the payment to the "guardian or guardians of the infant," and such provision for the infant was held to vest the gift. See at page 338 quotation from *Gifford* v. *Thorn,* 9 N. J. Eq. 702 (at p. 708), which is as follows:

> "Where the interest of the legacy is directed to be paid to the legatee until he receives the principal, or where the legacy is placed in the hands of Trustees for the exclusive benefit of the legatee until it is directed to be paid over, the legacy will be deemed vested."

The cases referred to in *Gifford* v. *Thorn* we shall consider later in this Brief.

The gifts of the corpus under Section "Thirteenth" and the gifts of the corpus of the $100,000 trust are valid.

Whether these trusts as to corpus in behalf of our infant and the children of testator's children are valid, in our view, depends upon whether they take a vested interest under the terms of the gift upon the death of their respective parents or stirps.

It is settled in this State that where a gift is vested, there may be a postponement of enjoyment, and such postponement shall not affect the vesting, even when to a period beyond that limited by the Rule against Perpetuities.

Illustrating this view are the following cases in this State:

Post v. *Herbert,* 27 N. J. Eq. 540 (Ct. of Err. & App.).

Dusenberry v. *Johnson,* 59 N. J. Eq. 336.

Lembeck v. *Lembeck,* 73 N. J. Eq. 427, affirmed Ct. of Err. & App.

Canda v. *Canda,* 92 N. J. Eq. 423 (Ct. of Err. & App.), reaffirming *Lembeck* v. *Lembeck.*

The following are cardinal rules in determining vesting.

The main object of the court in the construction of a Will is to effectuate the testator's intention, and any and all ambiguities in the Will will be resolved to that end. No citation of authorities is necessary in support of this proposition.

The law favors vesting. This is the settled rule in this State, the court saying in *Keen* v. *Plume,* 82 N. J. Eq. 526, at page 528:

> "in doubtful cases every intendment of the law is in favor of the vesting of estates, for the reason that it must be presumed that a person who goes through the formality of making a will intends to dispose of his whole estate unless the contrary clearly appears. This canon of construction is so well known as to need no citation of authorities."

See to the same effect:

Van Dyke, 14 N. J. Eq. 198.

Kimble v. *White,* 50 N. J. Eq. 28.

"The law favors the vesting of remainders, and does it at the first opportunity." *Moore* v. *Rake,* 26 N. J. L. 574, at p. 586.

A construction is always preferred which will avoid, as against one which will produce, an intestacy.

Peard v. *Kekewich,* 15 Beav. 177.
Wadley v. *North,* 3 Ves. Jr. 364.
Morton Trust Co. v. *Chittenden,* 70 Atl. 648 (Conn.).

Again, when the party receiving the corpus takes the income, such is indicative of a vesting concurrent with the taking of the income, and the use of words of *payment* of a gift such as "when" or "as" or "at such time" relates only to the time of *payment,* and not to the substance of the gift or the vesting.

The Rule against Perpetuities in this State relates to the time of vesting as distinguished from the time of enjoyment or of possession or of the power of alienation.

See
Re Smisson, 79 N. J. Eq. 233, at p. 242.
Lembeck v. *Lembeck, supra.*
Canda v. *Canda, supra.*

It is not necessary to cite authorities to the effect that the rule in favor of vesting is most strongly enforced where the gift is of a residue or an interest in a residue.

Bearing these rules in mind, let us consider the provisions of Section "THIRTEENTH" as effecting a valid gift of corpus. It is in language following:

> "THIRTEENTH. Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall *receive* and *take* the parent's *one-third share of said trust fund,* the *income* from which is to be applied to their support or added to the principal, as may be deemed best, until

> they severally reach the age of twenty-one years; thereafter, and until they severally reach the age of twenty-five years, such income is to be paid directly to them and upon their reaching the said age of twenty-five years the entire principal sum, with any accumulation of interest thereon or accretion thereto, of the parent's share of the trust fund shall be *paid* to them."

This Section of the Will the Vice-Chancellor held to be a valid gift of the corpus to testator's grandchildren. Case, p. 35, l. 10, *seq.*

The Appellants' Brief, in order to escape the conclusion reached by the Vice-Chancellor, and we think patent on reading the Section, first insists that the gift related only to income. They say that the words "parent's one-third share of said trust fund" relate only to the income of the trust fund, which is all that the parents are entitled to receive, but it is plain that the testator had in mind the corpus or principal of the trust fund, for the very next words are "the *income* from which is to be applied" &c. It was very natural for the testator to refer to the principal of which the parents took the income, as the parent's one-third of the trust fund. In the direction as to final payment, he refers to "the entire principal sum." A reading of Section "THIRTEENTH" will certainly satisfy anyone that the intention of the testator was to make a gift of the principal of the trusts of which the parent takes the interest.

The Appellants' Brief further insists that the language of the paragraph, "should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share" &c., is not only insufficient to vest the principal but that the vesting is not aided by the subsequent provi-

sion as to the application of the income until the child or children reach the age of twenty-one years, and it cites a number of cases as to the effect of a partial disposition of income or interest for maintenance or otherwise.

We have examined the cases cited in *Gifford* v. *Thorn, supra,* at page 708: *Hoath* v. *Hoath,* 2 Bro. Chan. Cas. 3; *Fonnereau* v. *Fonnereau,* 3 Atk. 645; *Hanson* v. *Graham,* 6 Ves. 249; *Lane* v. *Goudge,* 9 Ves. 225, together with the later case of *Fox* v. *Fox,* L. R. 19 Eq. 286. In all the cases the purpose is to determine the intention of the testator and if it appears by the provisions that the infant is to get the entire corpus and income ultimately within a period that does not violate the Rule against Perpetuities, then the gift of principal will be held vested by reason of the gift of the income.

In *Fox* v. *Fox,* the testator directed his trustees to raise a sum of 15,000£ and after the determination of certain prior life interests given to T. and his widow to divide and transfer one-fifth of the fund *to and amongst the children of T.* equally as and when they should respectively attain the age of twenty-five years, applying from time to time the income of the presumptive share of each child, or so much thereof as the trustees for the time being might think fit, for his and her maintenance and education until such share should become payable as aforesaid; but if T. should leave no children him surviving, or if he should, and they should all die before attaining the age of twenty-one years, then to pay and transfer the said fifth part to the other persons therein referred to. The authorities are reviewed in the Opinion and it was held that the children of T. took vested interests. We quote

the closing paragraph of Sir George Jessel's Opinion:

> "Being opposed to the frittering away of general rules, and thinking that such rules, so long as they remain rules, ought to be followed, I hold that a gift contained in a direction to pay and divide amongst a class at a specific age, followed by a direction to apply the whole income for maintenance in the meantime, is vested, *and not the less so because there is a discretion conferred on the trustees to apply less than the whole income for that purpose.*"

The gift in this case was to the children of T. equally. There is a provision exactly like that in Section "THIRTEENTH," above quoted.

The gift takes effect immediately when any of the testator's children die leaving lawful issue. The words of gift are "receive and take"—words which operate immediately on the death of the parent. The words of further direction are that upon the child or children reaching the age of twenty-five years the entire principal sum, with any accumulations of interest thereon or accretions thereto, are "*to be paid* to them."

There is a provision in Section "EIGHTH" by which the one-third share which the children take upon the death of their respective parents may be increased to one-half if two of the testator's children die without leaving lawful issue. Under this provision the one-third vested interest cannot be cut down—it may be augmented. There can be no question, in our view, that the income of the one-third is vested in the children immediately upon the death of his or her parent. That vesting is accomplished by the use of the words "*take and receive.*" If those words vest the income, the words "*receive and take,*" which are identical in significance,

must be taken to vest the principal under Section "THIRTEENTH."

In other words, these persons, ascertained within the period limited by the Rule against Perpetuities, are to receive and take the fund itself, both principal and income, immediately upon the termination of lives in being.

How can a person *receive* and *take* anything, in legal terminology, if the right thereto is not *vested* in him? The difference between *taking* the fund and having the fund *paid* is obvious, and clearly exemplified by testator's intention in this very case. The testator's intention was to prevent the squandering of the principal of the trust by young and inexperienced people who had not reached years of discretion. To accomplish this intention, testator used the very words most apt to that end.

There is not a word in the McGill Will which expresses testator's intention that the principal should be vested in the grandchildren until after lives in being and twenty-one years. But this Court held the income to be vested in the grandchildren within the period by testator's expression "used for (their) education and support." This is not as strong as the direction of testator in the Trippe Will, where he says his grandchildren shall themselves "receive and take" their parents' shares. This language gives the income to such grandchildren even more clearly than was the income given in the McGill case. But this share so vested is in the trust "fund," comprising both principal and income. Hence, in the Trippe Will the principal itself is given in express words, and in words stronger than were those in the McGill case construed as

creating a vesting. In the Trippe Will, the testator's language is:

> "Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund."

This language distinguishes this case from the *McGill case,* 94 N. J. Eq. 657; *Hewitt* v. *Green,* 77 N. J. Eq. 345; the *Graves case,* 94 N. J. Eq. 268, and *re Helmes Estate,* 123 Atl. 433, in none of which did any such language purporting a present gift at the end of a life in being exist.

It is very difficult to find precedents which contain all and only the language that a particcular testator may use in the disposition of his property, as Emery, V.-C., said in *Merkel* v. *Capone,* 81 N. J. Eq., at page 285, but the following cases dealing with gifts to be paid to parties upon attaining ages beyond twenty-one are helpful, and for the convenience of the Court we have quoted fully from them:

Farmer v. *Francis,* 2 Simons and Stuart 505 (1826).

Bill filed by those who would take if gift to infants failed.

The facts and findings of the court are set forth accurately in the syllabus, which is in language following:

> "*Residuary* devise of real and personal estate to all the issue, child or children of M. F. as should be alive at the time of the decease of the survivor of two successive tenants for life, equally amongst them if more than one, to be divided share and share alike, when and as they should respectively attain the age of twenty-four years,and to their

respective heirs, executors, administrators and assigns forever, as tenants in common; held, that the children living at the death of the tenants for life, took absolute vested interests in the personal as well as in the real estate."

At page 507 it appears that there was the following alternative gift:

"But, in case there shall be no such issue, child or children of my daughter, M. F., living at the time of the decease of the survivor of them my said wife and daughter, or, being such, all shall die without lawful issue under the said age of twenty-four years, then upon trust for, and I do hereby give and bequeath the said residuary trust estates, hereditaments and premises, residuary trust fund, property and effects, unto my sons Edmund and Titus Farmer, equally to be divided between them, share and share alike, and to their several and respective heirs, executors, administrators and assigns for ever, to take as tenants in common, and not as joint tenants, and to and for no other use, intent or purpose whatsoever."

This gift over did not take effect because the prior gift was held good.

Jackson v. *Marjoribanks,* 12 Simons 79 (1841).

The bill was filed against the trustees by a grandson of testator after death of life tenants and after reaching twenty-one.

The facts and findings of the court are set forth accurately in the syllabus, which is in language following:

"Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son, for life; and, in case his son should die, leaving behind him

no legitimate issue, then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child *then living* of his son, should have attained *twenty-five,* or in default of male issue, the eldest female child then living of his son, should have attained twenty-one, to convey all the estates to the eldest male child, or in default of male issue, to the eldest female child and *to his or her heirs of his or her body lawfully begotten, absolutely for ever.* The testator then (in case his son should die during the minority of such eldest male or female child) provided for their maintenance out of the rents until he or she should attain the respective ages before mentioned, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then that the trustees should after the death of the testator's wife, convey the estates to certain other persons. The testator's son married, and had a son born after the testator's death. The court held the trust for the grandson not to be void for remoteness; and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him."

Harrison v. *Grimwood XII,* Beav. 192 (1849).

Bill filed by administrator of the estate of the tenant for life being dead, and on behalf of the testator's grandchildren.

The provisions of the will as stated in the report are as follows:

"the testator John Nunn Grimwood directed his residuary estate to be converted into

money and invested at interest, upon trust that the trustees should, as the interest became due, *pay and apply* one third part of it to his daughter for life, 'for the support of herself and what issue she might have,' and after her decease, 'upon trust *to pay apply, and divide* one third part of the said principal trust monies unto and among all and every' her children *'when and as they should severally and respectively attain the age of twenty-six years;'* with benefit of survivorship, if any should die under twenty-six years of age without issue."

In case his daughter should die without leaving any child, or leaving only children who should die under the age of twenty-six years without issue, the trust was to go over to other parties.

At page 198 the Master of the Rolls says as follows:

"The question is, whether, under this particular will, the gift to the children of the testator's daughter is void for remoteness, or whether the children took vested interests, subject to be divested on an event which made the limitation over void for remoteness.

"When a gift is made to such of a class of description of persons who shall attain a certain age, those who do not attain the prescribed age are excluded from the character of legatees, by the description expressly employed by the testator himself in that part of his will.

"A direction to pay implies a gift, and a direction to pay only to such persons as shall attain a certain age (unless controlled by other words clearly and decidedly preventing that effect) will prevent the implied gift from vesting in any object of it who does not attain that age. But a direction to pay an indefinite class of persons, when and as they attain the age, is ambiguous. It does not necessarily, or at least so strongly as the description of the class before men-

tioned, tend to prevent the vesting in interest. The gift itself and the time of payment are not necessarily identical: though the gift itself is found in the direction to pay, the words may mean only to postpone the payment, without postponing the vesting of the gift.

"And though, when the gift is found or implied only on the direction to pay, and is not otherwise affected or explained by the context of the will, the court may reasonably construe the direction to be only for the persons to whom the payment is directed to be made, and who are to receive at the time indicated, yet, as the meaning is ambiguous, and as the nature of the gift is only known by implication, we must look at other parts of the will with a view to discover whether they afford any further indication or explanation of the implied gift.

"This case, like all others of the same class, appears to me, partly from the nature of the subject and partly from the state of the authorities, to be very doubtful; but observing the right given to the children to be maintained out of the interest or income given to their mother, and arising or accruing on the share eventually given to them: observing the direction, in the case of minorities, to place out that share, and apply the interest or a competent part of the interest arising from it (though it is not necessarily all the interest which is directed to be applied, and that only during minority),—and noticing also the power given to to the trustees, to advance them in the world;—I think that I ought to conclude that a vested interest was given to the children of the daughter."

The case of *Fox* v. *Fox* referred to in the foregoing portion of this brief was approved in *In re Turney,* 2 Chancery 739 (1899).

We quote the following from the opinion of Lord Jeune at page 747:

> "I agree, especially in the view that, when it is possible so to construe a will as not to render a material part of it void by an application of the rule against perpetuities, it is desirable to do so. Of course, as the Master of the Rolls has said, the Court has no right to misconstrue a will with that object, but, if the language of a will is ambiguous, it is right to lean rather to a construction which will undoubtedly carry out the intention of the testator, in the sense that it will make his will effectual and not render it void by means of a doctrine from which, if he had known of it, he would certainly have desired to steer clear."

In re Bevan's Trusts, L. R., 34 Ch. Div. 716 (1887).

The bill was filed by the children of Julia, the daughter, after her death and after testator's sister's death, the life tenants.

The facts and findings of the court are set forth accurately in the syllabus, which is in language following:

> "A testatrix by her will, dated in 1828, gave all her property to trustees upon trust as to the interest of a sum of £5,000, for her sister for life and after the death of such sister the interest to be paid to testatrix's daughter (she having first attained twenty-five); if the daughter married with the consent of the executors, and died *'leaving children* the interest to be appropriated for the maintenance and education of such children,' of whom the testatrix constituted the executors guardians as to the due application of the same according to their discretion, *'and the principal to be divided amongst them as they shall severally attain the age of twenty-five years;'* after the death of the sister and in the event of the daughter marrying with-

out consent, or marrying with consent 'and dying without leaving issue,' then over.

"The daughter survived the testatrix, attained twenty-five and in 1842 married with the necessary consent. The sister died in 1854 and the daughter in 1886, having had two children, who survived her:—

"*Held,* that the gift was not void for remoteness but that the fund vested in the children of the daughter living at her death."

At page 720 the court read the will as though the testatrix had said

"'upon the death of Julia the £5,000 shall vest in such of her children as may be then living, but I desire my executors to apply the income for the maintenance of them all until each attains twenty-five, when the share of that child is to be paid over to him.' This makes the gift over consistent. If any child survives Julia the gift over is inoperative.

"There is ample authority, as I have shown, for treating this case as an exception to the rule in Leake *v.* Robinson, 2 Mer. 363, by reason of the subject being a separated fund and the gift over being on the death of the tenant for life without leaving issue. That construction seems to me, for the reasons I have given, much more natural than the other, which would make the gift void. I therefore hold that the fund vested in the children of Julia who were living at her death."

We call attention specially to *Bland* v. *Williams,* 2 Mylne & Keen 411.

The bill was filed by Mr. and Mrs. Bland against the trustees and executors of the Will and against their infant children, Mrs. Bland being daughter of testator.

The facts and findings of the Court are set forth accurately in the syllabus, which is in language following:

> "A bequest to trustees of the testator's residuary estate, with a direction to apply so much of the interest, dividends and profits as may be necessary for the maintenance and education of the children of the testator's daughter until they should respectively attain the age of twenty-four, and then to divide the principal equally between them, with a gift over in case any of them should die under twenty-four without leaving issue, is not void as too remote, but gives a present vested interest, with an executory bequest over in case of death under twenty-four without leaving issue."

At page 411 appears the gift over:

> "But in case all and every of her said children shall happen to die under that age and without leaving lawful issue, as aforesaid, then upon trust to pay the interest, dividends and annual produce thereof unto my said son-in-law, William Bland, if he shall be then living, for and during the term of his natural life; and from and after his decease, in trust to pay, assign, transfer and convey all the said residue of my said estate and effects, unto such person or persons as may be entitled thereto as my next-of-kin."

The following is the Opinion of the Court:

> "Whether in a gift of this nature the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will. If the *gift over* is simply upon the death under twenty-four, then the gift could not vest before that age. In this case, the gift over is not simply upon the death under twenty-four, but upon the death under twenty-four without leaving issue. If upon a death under twenty-four, at whatever age issue was left, then the gift over is not to take place. It is in

> effect, therefore, a vested interest with an executory devise over, in case of death under twenty-four, without leaving issue."

Bland v. *Williams* is settled as the law in England after much discussion. *Jarman on Wills, Randolph & Talcott Edition,* Vol. 2, at p. 477, says of it:

> "the tendency of the modern decisions on bequests in this form," (referring to the bequest in Bland *v.* Williams and referring to that case), "whether residuary or not, is almost uniformly in favor of such a rule."

We have examined the English Edition of Jarman on Wills, which is the Sixth Edition not reprinted here so far as we know. At page 429 the editor there reiterates the same statement as to the authority of *Bland* v. *Williams.* In *Bland* v. *Williams* and the other cases construing gifts, that are by express words to go over in the event that the taker dies without lawful issue, as here, the gift over is held to involve a vesting in the taker, because it manifests the intent of the testator that the gift shall be retained by the taker, if he dies leaving lawful issue, and if the vesting is postponed beyond the limit prescribed by the Rule, there would be nothing for the gift over to operate upon.

Otis v. *McLellan XIII.* Allen 339 was a case of a trust for seven children by name, to pay them the income for their lives and the remainder to their issue on the death of the last surviving child, interposing a life estate of such child's wife or husband if surviving. It was there held to vest in the issue of such child at their parent's (testator's child) death, and therefore not too remote.

In *Loring* v. *Blake,* 98 Mass. 253, a leading case and cited in *Ogden* v. *McLane, supra,* a case

involving an appointment which was sustained as not violative of the Rule, there was a devise to trustees for the life of each child of testator, and of the surviving husband or wife of each, and on the death of the child without leaving husband or wife, or of such husband or wife, to the use of his or her children. In this case, Wells, *J.*, says:

> "It was possible that a child of the testatrix might marry a person not in being at the time of her decease and that such person might be the survivor of the marriage. In that case a limitation of her estate not to take effect until after the decease of such unborn person would be in violation of the rule against perpetuities because it would not be supported by the definite measure of a life or lives in being and 21 years after. * * * The rule however regards not the possession but the title or absolute right. If that vests within the prescribed period, the rule is satisfied. * * * The enjoyment is postponed to enable the surviving husband or wife to receive the income during life, but the title, the absolute interest in remainder, is fixed at the decease of the child. * * * The limitation of a life interest to a surviving husband or wife, who may not have been born at the time of testatrix's decease, does not tend to make a perpetuity, because the interest, although contingent during the life of the child, becomes vested at the death of the child, and the limitation over, as we have already seen, is not at all dependent upon such life interest, but itself also becomes vested absolutely at the same time."

Vice-Chancellor Buchanan in the McGill case refers to sections 110 and 110a of Gray. The view of the law there stated was in no way involved in the decision of that case, as there were no words in the McGill will vesting the

estate in the grandchildren on the death of their respective parents. But attention may be called to the fact, that Gray section 110a expresses his own view only, and he cites no authority in support of it, and it is opposed to the law as established by the cases above cited. In note 1 to section 110a Gray refers to the view of his "learned friend Roland R. Foulke." Foulke is the author of a learned book on the Rule against Perpetuities, which, while considering the subject generally, has special reference to the doctrine as established and applied in Pennsylvania. In the edition of Foulke published in 1909, sections 68 and 69, he comments adversely on the view expressed by Gray in his sections 110 and 110a, and in section 69 he states what he considers the correct doctrine. He there says:

> "It is suggested that the remainder is not to the class but to the members of the class as individuals. Those who are ascertained when the gift is made take vested remainders. The notion that the gift is to a class is a fiction, which no doubt played a part in the development of contingent remainders."

Referring to the language which we have above referred to from Section "EIGHTH," there is a gift to our infant of the income immediately upon the death of his father, and an equally clear gift of the corpus, under Section "THIRTEENTH." Upon the death of our infant's father, who are to take and their shares are definitely and finally determined, *and they all must come into being in the lifetime of testator's son, the father of our infant;* they are the children living at the death of the father, and the issue of any child of the father who predecessed the father and who are living at the death of the father.

It is to be remembered that the testator, having in mind his children, their ages, and the existence of this grandchild as the only child of his children, at his death attempted by this will to provide for various alternatives, looking to the future. Each alternative must be considered separately, and according to the intent of the testator as expressed in the words creating such alternatives. If under any one of such alternatives the trust does not violate the Rule, then the Court must set up the trust to await the outcome.

Under the decisions above referred to, by which a gift of income which does not violate the Rule against Perpetuities implies a gift of and a vesting of the principal at the time fixed at which the payment of income is to begin, the gift of principal or corpus in Section "EIGHTH" cannot affect the gift to our infant in Section "THIRTEENTH" except to augment the same.

The appellants' brief is insistent in asserting that the testator sets forth a primary and controlling scheme in his Will, to wit: the creation of the Charity, and that this suggested scheme controls all the other provisions of the Will if it should be adjudged violative of the Rule against Perpetuities. We think that a consideration of the varying provisions in relation to the Charity and the provisions for the testator's children, this infant grandchild and his other possible grandchildren, make plain that the primary and controlling scheme was the provision for his children, this infant grandchild and his other possible grandchildren.

In construing the provisions of a will, as distinguished from construing the provisions of a

deed, the last provision of the will is normally the controlling one and controls the other provisions that are not in harmony with or consistent therewith. The provision as to the $100,000 trust fund is the last donative provision in the Trippe Will, and we think expresses the ultimate definite intention of the testator as to the fund disposed of thereby.

Gifts to Charity.

The gifts to the Charity we are not concerned with except as they bear upon the general construction of the will, but it is plain that one of the gifts to charity is entirely valid, in our view; that is, the gift in Section "TWELFTH" which gives the Charity the entire estate in the event that all of the testator's children shall die prior to May 1, 1940, leaving no lawful issue and no descendants of such issue. This fact, together with the clearly valid contingency above, requires the present setting up of both trusts.

SUMMARY.

The fallacies underlying the appellants' brief, set forth fully above, are:

(a) It ignores the settled principles in relation to vesting.

(b) It ignores the separability of the various provisions of the will as to income and corpus, if the gifts of corpus should be held to be invalid.

Our infant defendant has a vested interest in the income of the trusts set up by the will and also in the corpus of the trusts set up by the will. By reason of these vested interests, the appellants are not entitled to the corpus of the estate

exclusive of the trust of $10,000 set up for our infant in Section "NINTH" of the will.

It is to be noted that upon the theory of the appellants' brief this trust is as vulnerable as the other trusts attacked by the appellants, and if this trust is bad then by the express provisions of the trust, the fund sinks into and becomes a part of the residue disposed of by Section "ELEVENTH" of the will. We do not see how the appellants can take the corpus of the residue disposed of by Section "ELEVENTH" and exclude therefrom the $10,000 trust fund given to our infant defendant by Section "NINTH," which falls into the residue if the trust is invalid. The situation is so anomalous that it seriously reflects upon the soundness of the contention on behalf of the appellants.

It is respectfully submitted that the Decree appealed from should be affirmed.

EDWARD M. COLIE,
Counsel for Thomas Barber, Clerk of the Court of Chancery, Guardian *ad Litem* of the infant defendant, William Richard Trippe, by appointment of the Court of Chancery.

NEW JERSEY COURT OF ERRORS AND APPEALS.

William Heron Trippe, *et al.*,
Complainants-Appellants,
v.
National Newark & Essex Banking Company, *et al.*,
Defendants-Respondents.

On Appeal, &c.

BRIEF FOR COMPLAINANTS-APPELLANTS.

STATEMENT.

The Bill of Complaint in this cause was filed on behalf of the three children of William R. Trippe, testator, by his three children who were also executors under his will, to obtain a construction of certain clauses of his will.

This appeal brings to this Court for review the final decree entered by Vice-Chancellor Backes construing that will.

STATUS AT DEATH.

Testator's will is dated November 8, 1922. Testator died May 20, 1923, leaving him surviving the following:

A married son, William Heron Trippe, aged 41.

An unmarried daughter, Lucy Seaver Trippe, aged 43.

An unmarried daughter, Grace Milton Trippe, aged 32.

A grandson, William Richard Trippe (child of William Heron Trippe), aged 8.

The total estate approximates $200,000, consisting for the most part of personal property and the balance in real estate at present undisposed of.

TRUSTS AFFECTED BY THE COMPLAINANTS' BILL.

1. Trust in the sum of $100,000, naming National Newark & Essex Banking Company, trustee (Sec. 8).

2. Residuary trust naming the testator's three children as trustees (Sec. 11).

3. Paragraph 9 of the will creates a trust for the benefit of the grandson, William Richard Trippe, and if the grandson dies before 25, then the principles applicable to the other two trusts might also be applicable to this $10,000 trust. No relief, however, is sought by the Bill in the matter of this trust of $10,000, nor is there any point made with respect thereto on this appeal.

QUESTIONS INVOLVED.

1. Are the two trusts for $100,000 and for the residue, respectively created under paragraphs 8, 11, 12 and 13 of the will, in violation of the Rule against Perpetuities and, therefore, void?

2. Are the gifts of the corpus and of accumulations of income to the so-called Working Girls' Home void, not only as violating the Rule against Perpetuities but as well because the donee of that trust is left uncertain by the terms of the will?

3. Does the corpus of the trust vest in the lawful issue of any deceased child immediately upon the death of that child under paragraph 13 of the will, or is the vesting of the corpus suspended until age 25, and does it thus violate the Rule against Perpetuities?

4. If the gifts of corpus under said trusts are void, did the corpus of each fund vest at once in the three complainants, being the children of the testator?

5. Do the intervening gifts of income fall with the gifts of corpus?

CONTENTION OF COMPLAINANTS-APPELLANTS.

1. The gifts of corpus under paragraphs 8 and 11 and under 13 are void as being too remote and in violation of the Rule against Perpetuities.

2. The donee of the gifts of corpus, to wit, so-called Working Girls' Home, is indefinite and uncertain and avoids those gifts.

3. Under paragraph 13 of the will the corpus does not vest upon the death of any child leaving lawful issue, but vests only when such issue arrives at age

25 and, therefore, this provision, as well as paragraphs 8 and 11, is in violation of the Rule against Perpetuities.

4. Upon the failure of the gifts of corpus, that corpus vests in the next of kin of the testator, to wit, the three complainants.

5. The intervening gifts of income fall with the gifts of corpus.

ARGUMENT.

I.

THE GIFTS OF CORPUS UNDER PARAGRAPHS 8 and 11 AND UNDER 13 ARE VOID AS BEING TOO REMOTE AND IN VIOLATION OF THE RULE AGAINST PERPETUITIES.

1. *Provisions of paragraph* 8—$100,000 *trust.*

(a) While all three children of testator live, the income is to be paid to them equally.

(b) If any child die "without legal issue," his one-third of income goes to the two surviving children.

(c) If a second child dies "without legal issue," *then both income and corpus are divided into two equal parts and disposed of as follows*:

(d) *As to disposition of first one-half*:

1. The income on first half after division is to be paid to the third or surviving child for life.

2. If this surviving child shall die "*leaving lawful issue,*" then this one-half of income shall go

> "To such lawful issue or his or her descendants until they severally attain the age of 25 years, at which time they are to receive the principal."

(e) *As to disposition of second one-half of fund*: Upon two of testator's children dying without issue, then the trust fund, as we have seen, was to be divided into two parts. However, the testator provides that the income on this second one-half part should be accumulated after the separation and be devoted, with the principal, to the establishment of a "Working Girls' Vacation Home," and in conjunction with a similar provision for one-half of the residue of his estate in Section 11 of the will. [NOTE: It should be noted that under this Section (8) this "Working Girls' Home" is to be established as "hereinafter directed" (under Section 11).] By reference to Section 11, we find that this girls' home is not to be established until two of testator's children shall die

> "Leaving no lawful issue who attain the age of 25 years or legal descendants of the same who attain the said age."

Therefore, beginning with the separation of the trust fund into two parts, upon the death of two children without issue, the income on the second half part of the fund is not disposed of at all, but is to be accumulated and added to the one-half of the principal supposed to be devoted to a Working Girls' Home, if and when established.

2. *Residuary trust fund* (*Section* 11).

(a) While all three children live, the income from the entire residue goes to them.

(b) If any child dies "without legal issue," that share of income goes to two surviving children of testator.

(c) If a second child dies "without legal issue," then immediately both corpus and income are divided into two parts and practically as in paragraph 8, covering the $100,000 trust fund.

(d) *As to disposition of first one-half part of residue*:

1. The income on this one-half part goes to the surviving child for life.

2. Upon the death of the surviving child leaving lawful issue, then the income goes to

"Such lawful issue or his or her descendants until they severally attain the age of 25 years, at which time they are to receive the principal."

(e) *As to disposition of second one-half part of residue*:

In similar fashion to that prescribed in paragraph 8, the testator here proposes to hold in abeyance the income on this second half part of residue until such time, if ever, as a Working Girls' Home shall come into existence and, if such contingency shall arise, then such accumulated income is to be added to this one-half of the corpus and to be devoted to such a Working Girls' Home, said Home to be established only in case two of testator's children shall die

"Leaving no lawful issue who attain the age of 25 years or legal descendants of the same who attain the said age."

In short, this Working Girls' Home cannot, under the terms of the will, come into existence at all until it can be finally determined that two of testator's children shall die leaving no lawful issue who attain age 25 or any legal descendants of any such lawful issue who may attain said age of 25.

(f) Section 13 of the will provides as follows:

"Should any of my children die leaving lawful issue, then the child or children of the deceased parent shall receive and take the parent's one-third share of said trust fund, the income from which is to be applied to their support or added to the principal *as may be* deemed best until they severally reach the age of 21 years; thereafter and until they severally reach the age of 25 years, such income is to be paid directly to them and upon their reaching the age of 25 years, the entire principal, with any accumulation of interest thereon or accretions thereto of the parent's share of the trust fund, shall be paid to them."

We shall consider, under a separate heading, the question of the time of vesting of the corpus under Section 13. At this point we need only call attention to the fact that if it be assumed that there is no vesting of the corpus until the lawful issue of a deceased child reaches 25, then this paragraph is in the same category with paragraphs 8 and 11 and all three alike violate the Rule against Perpetuities.

3. WE, THEREFORE, SUBMIT THAT UPON THE FACE OF THIS INSTRUMENT OF THE TESTATOR THE FOLLOWING PROPOSITIONS ARE CLEARLY ESTABLISHED:

A. While only one grandchild, in fact, survived the testator (William Richard Trippe, son of William Heron Trippe), it is perfectly possible for other children to be born to the son, William Heron Trippe.

B. The daughters at the death of the testator were and are still unmarried and were at that time 43 and 32 years of age, respectively. It is perfectly possible for those daughters to marry and for children to be born to them in the future.

C. The present grandchild may die before his father and without reaching the age of twenty-five years.

D. The daughters and the son or some of them may die when none of their children is more than three years old and one or more of them may thereafter reach 25 years of age.

E. SINCE IT IS ESTABLISHED LAW THAT IT IS THE POSSIBILITY AND NOT THE CERTAINTY WHICH COVERS THE APPLICATION OF THE RULE AGAINST PERPETUITIES, WE CONTEND THAT THE POSSIBILITIES INVOLVED IN THE PRESENT WILL MAKE THE GIFTS OF CORPUS UNDER THOSE QUESTIONED PARAGRAPHS TOO REMOTE AND BRING THEM IN CONFLICT WITH THE RULE AGAINST PERPETUITIES.

In the present case, there is involved a gift of corpus to a class. The class, in our judgment, must remain open until more than twenty-one years beyond the lives of persons in being. The rule is well cited by Vice-Chancellor Buchanan in *McGill v. Trust Co.*, 94 N. J. Eq. 665, as follows:

> "Gifts over to a class, where the class is open until some future time, are technically vested (unless they are made expressly subject to some other contingency), if there be one or more of the class *in esse* at the time of the making of the gift. Nevertheless, from the standpoint of the perpetuity rule, they stand on the same footing as purely contingent gifts, since the final membership of the class, and hence, the actual ascertainment of the persons who will take, will not be determined until the time fixed for the closing of the class. And when the time fixed for the closing of the class is so remote as to conflict with the perpetuity rule, the gift is void." Page 665.

The Court further says:

> "It is not enough that the contingency may happen within the time limited by the rule; it must necessarily happen, if it happen at all, within that time. If there be a possibility that it may happen after the time limited by the rule, the gift is void." Page 666.

It is quite obvious, under the admitted facts upon the face of the instrument, there is the possibility of the class being closed at a time far beyond the limits of the rule. As already stated, other children may be born to the son, who is at present married, and the two daughters may marry and in the future

have children, and any one of these grandchildren of the testator may arrive at the age twenty-five when such point of time would be more than twenty-one years after the lives in being.

This rule is established by *Graves v. Graves,* 94 N. J. Eq. 268; *McGill v. Trust Co.,* 94 N. J. Eq. 654-655, and cases cited; *Holmes Estate,* 123 Atl. Rep. 443; *Hewitt v. Green,* 73 N. J. Eq. 345.

(1) "The rule against perpetuities is in force in this State as a part of the common law."

McGill v. Trust Co., 94 N. J. Eq. 664.

Hewitt v. Green, 77 N. J. Eq. 345 (at p. 361).

In *re Smisson,* 79 N. J. Eq. 233 (at p. 242).

Camden Safe Deposit Co. v. Guerin, 87 N. J. Eq. 72. *S. C. on appeal,* 89 N. J. Eq. 556.

Kates v. Walker, 82 N. J. Law, 157.

Stout v. Stout, 44 N. J. Eq. 479.

(2) "The rule (against perpetuities) requires that all future interest, legal or equitable, in realty (except dower and curtesy and rights of entry for conditions broken) or personalty, which are contingent and indestructible, must be such as necessarily to vest, if at all, within the term measured by the life or lives of a person or persons in being at the time of the creation of the interest and twenty-one years thereafter; otherwise they are invalid and void."

McGill v. Trust Co. of N. J., 94 N. J. Eq. 664.

(3) "The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of construction, a test more or less artificial to determine intention. *Its object is to defeat intention.* Therefore, every provision in a will or settlement is

to be construed as if the rule did not exist and then to the provision so construed the rule is to be remorselessly applied." *Gray on Perpetuities,* 3 Ed. page 503.

(4) The principles enunciated in the cases and authorities above cited apply to the language found in paragraph 8, paragraph 11 and paragraph 13.

(a) The Working Girls' Home is not to be established until two of testator's children shall die

> "leaving no lawful issue who attain the age of twenty-five years or legal descendants of the same who attain the said age" (paragraph 8).

The same language is used in both Section 8 and Section 11 creating the two trusts in question. Therefore, the vesting of the corpus in the Working Girls' Home under Sections 8 and 11 of the will is suspended for more than twenty-one years after the life or lives in being at testator's death.

(b) Section 13 provides for the contingency of one or more children dying with lawful issue and thereunder such issue (grandchildren of testator) do not receive the corpus until age 25.

We shall discuss under a later heading in this brief the question raised by the learned Vice-Chancellor in his opinion whether the corpus does or does not vest in the grandchildren immediately upon the death of their parent. If it does not so vest, but is suspended until age 25, then the vesting would be too remote just as under paragraphs 8 and 11 and avoid the gift. In this connection we must, under the established authorities, read all paragraphs of this will together and from them all get the true in-

tention of this testator, so that 13 must be read in connection with and in the light of the language of paragraphs 8 and 11. It will not do to select any particular paragraph and treat that separately. We contend that all the paragraphs of the will, running from the eighth to the close, represent simply parts of *one entire scheme in the mind of the testator* and attempted by him to be given effect by his Will. The provisions relating to the $100,000 trust fund under paragraph 8 are tied up with and stand or fall with the provisions relating to the residuary trust fund under paragraph 11 and subsequent paragraphs.

Defendants have endeavored in this controversy to separate those parts providing for a suspension of the estate until grandchildren arrive at age twenty-five from those parts of the will which attempt to establish the so-called Working Girls' Home. We submit that this cannot be done and any such attempt to construe the Will, in our judgment, violates the rule requiring a reading of the entire instrument to ascertain the intentions of the testator. It is not the function of a Court to make a new Will, but to construe the Will as made by the testator—not to create from the language of the Will a new scheme which will avoid a conflict with the Rule against Perpetuities, but to ascertain what in reality was the scheme the testator had in mind and then, if in violation of that rule, to void the gift.

II.

THE GIFT OF CORPUS TO THE SO-CALLED WORKING GIRLS' HOME IS VOID, NOT ONLY BECAUSE OF THE PERPETUITIES RULE, BUT AS WELL BECAUSE THE DONEE OF THAT TRUST FUND IS LEFT UNCERTAIN BY THE TERMS OF THE WILL.

A. It lies between a corporation to be created for this specific purpose and

> "some already organized charitable organization in successful operation and of good repute" (Last paragraph of Section 11).

The exact language of the testator, showing the indefiniteness of the donee, is as follows:

> "If such Working Girls' Vacation Home shall be established, the same may be done by the creation of a separate corporation or, preferably, through some already organized charitable organization in successful operation and of good repute."

Therefore, so far as the testator is concerned, it remains undetermined whether a new corporation shall be formed to receive the trust funds, or whether the trust funds should be turned over to some already organized charitable organization.

B. There is no express power conferred upon the trustees under the will to exercise their discretion in this distribution, that is to say, in determining whether a new corporation shall be formed or an already existing organization shall be the beneficiary.

C. Furthermore, there cannot be raised from the language of the will an implied power in the trustees to exercise such a discretion.

——(1) The language itself does not sustain such an implication of discretionary power.

——(2) There are two sets of trustees involved under the will, namely, under the $100,000 trust in paragraph 8, the trustee is a banking corporation, while under the trust for the residue of the

estate, under paragraph 11, three individuals are the trustees.

——(3) The question is further complicated by a reference by the testator to the will of his wife, Lucy J. Trippe, to the effect that the funds for such charitable trust shall be used in connection with a similar fund created under the will of his wife.

——(4) In short, there is no designated individual or corporation qualified to exercise a discretionary power and determine this question. It cannot be said that a discretionary power is created where it is left to the decision of two or possibly three sets of trustees, part of whom are individuals and part a corporation or corporations. There is no certainty and no assurance that the trustees would or could agree in the exercise of any such discretion. The implication of a discretionary power itself implies a designated individual with power to determine on his own responsibility and without control from others.

Therefore, we have applied the well-known rule stated in *King v. Rockwell,* 93 Eq. 48, as follows:

> "A gift to a charitable use will not fail of effect because the donor has not pointed out the particular beneficiaries to whom he designs his bounty to go, provided he has endowed some person with express or implied power to select such beneficiaries."

As we understand the rule applicable to such cases, the "beneficiaries" of the testator, to wit, the working girls who may become inhabitants of this home, may be unknown and, in fact, they must be unknown and indefinite in order to constitute it a charitable trust. However, the institution which is to act as

trustee for such unknown or indefinitely described beneficiaries must be certain. That certainty must be fixed by express terms of the testator himself, by naming such donee, or he must lodge with some person under his Will an express or an implied discretion to select such donee.

See also cases cited in *Kitchen v. Pitney, Will of Mark L. Ward,* 94 N. J. Eq. page 489, paragraph 3.

Hyde's Executor v. Hyde, 64 Eq., at bottom of page 8, and cases cited under these authorities.

III.

WE CONTEND THAT THE CORPUS OF THE TRUST INVOLVED IN PARAGRAPHS 8 AND 11 DOES NOT VEST IMMEDIATELY UPON THE DEATH OF ANY CHILD LEAVING LAWFUL ISSUE; IN OTHER WORDS, IN OUR VIEW, UNDER SECTION 13 AS WELL AS UNDER SECTIONS 8 AND 11, THE VESTING OF THE CORPUS OF THE GIFT IS SUSPENDED UNTIL THE LAWFUL ISSUE OF ANY CHILD ARRIVES AT AGE 25, AT WHICH TIME THE TESTATOR INTENDED THE VESTING SHOULD TAKE PLACE. THEREFORE, THE GIFT OF CORPUS UNDER 13 IN THE CONTINGENCY OF ANY CHILD DYING WITH LAWFUL ISSUE IS SUCH AS TO MAKE THE VESTING TOO REMOTE AND PLACE IT IN CONFLICT WITH THE RULE AGAINST PERPETUITIES, THUS AVOIDING THE GIFT IN THAT CONTINGENCY.

The learned Vice-Chancellor who heard this case has taken the opposite view and has expressed that view in the following language:

> "The single question to be determined is whether the complainants are entitled to recover the corpus of the estate, and for answer we need look no further than the thirteenth paragraph of the will. By its provisions the lawful issue of the testator's children are, on the death of their parent, to receive and take their parent's one-third share of the trust funds. The gift of principal vests immediately upon the death of the parent, the enjoyment of the income being postponed until the issue severally reach 21, and of the principal until they reach 25, with possibly beneficial use of the income until twenty-one. If an estate vests within the prescribed period, the postponement of the time of enjoyment beyond lives in being and one and twenty years thereafter does not contravene the Rule against Perpetuities. If the time of payment offends the rule against restraint upon enjoyment, the restriction is void, not the gift."

As we read the authorities, the views so expressed by the learned Vice-Chancellor in his opinion are in conflict with the established principles of the common law. Our reasons for this view follow:

A. The language of Section 13 must be read with Sections 8 and 11 of the will. Together they form a complete scheme. The intention of the testator must be gathered from the entire instrument and not from one paragraph.

B. It is undoubtedly the law that, if the gift of principal or corpus *does, in fact, vest immediately* upon the death of the parent, then a mere postponement of time of enjoyment will not avoid the gift; the reason being that the Rule against Perpetuities has no application to a case where there has been an actual vesting of the corpus within the prescribed

period. We must, however, disagree with the learned Vice-Chancellor in the conclusion reached by him to the effect that the gift of principal *did, in fact, vest immediately upon the death of the parent.* The whole question involved is: Did the gift of principal vest within the prescribed period? We say it did not and call upon other parts of the instrument and the very language of paragraph 13 itself in support of that view.

C. The language cited in the Court below in support of the theory that there was a vesting immediately upon the death of the parent is as follows:

> "Thirteenth: Should any of my children die leaving lawful issue, then the child or children of the deceased parent *shall receive and take the parent's one-third share of said trust fund,* the income from which is to be applied to their support, etc."

We hold that the testator in using this language *referred to income only* and *not* to the corpus, because:

(1) The words *"take and receive the parent's one-third share"* are taken bodily from the language of paragraph 8, where the testator plainly refers only to income. Testator there says:

> "——In equal shares, to my said children, the child or children of any of them who may die during my lifetime or prior to the termination of the trust to *take and receive the parent's share.*"

That reference obviously can be to income only. The use of that language in paragraph 13 can, therefore, raise no presumption in favor of a reference by the testator to a principal instead of income. In fact, we hold the only fair inference to be drawn from

the use of the same language in paragraph 13 as in the 8th paragraph as quoted is that the testator intended to refer only to income by that language in paragraph 13.

(2) Furthermore, the language in paragraph 13,

> "the parent's one-third share of said trust fund,"

cannot refer to corpus, because the parent, under this will, is not given any one-third part of the corpus or any other part of the corpus under any circumstances. *The only interest of the parent in either trust fund consists of income.* Therefore, the use of the language in paragraph 13, to wit:

> "shall receive and take the parent's one-third share of said trust fund,"

can mean only one thing, to wit: The parent's share of income and not of principal, because the parent under no circumstances gets any share of principal.

(3) Our view in this respect is, we believe, further confirmed by a consideration of the following:

We think it must be conceded that under paragraphs 8 and 11 the testator's manifest intention was that there should be *no vesting* of the corpus in the lawful issue of a parent immediately upon the death of that parent. For in paragraphs 8 and 11 there are inserted in this connection additional words "his or her descendants."

> "——upon his or her decease leaving lawful issue, then to such lawful issue or his or her descendants until they severally attain the age of 25 years, at which time they are to receive the principal."

In other words, by the language from Sections 8 and 11 above quoted, the testator sought to control the disposition of this corpus, not merely stopping with grandchildren, but going on to great-grandchildren or descendants, and making it plain that no grandchild or great-grandchild should take until age twenty-five. The testator in these paragraphs 8 and 11, showed plainly an intention that there should be no vesting under any circumstances in any grandchild or great-grandchild until age 25. But if the view taken by the learned Vice-Chancellor in this case is to prevail, then it would mean that grandchildren upon the death of the parent would immediately take a vested interest, which would be transmissible either by will or by the intestate laws of our State—a situation unquestionably in conflict with the entire scheme laid down by this testator. It cannot be reasonably supposed that the testator had a different scheme simply because under Sections 8 and 11 there might be only one child who could die with lawful issue, whereas under paragraph 13 all of his children might die with lawful issue. There is nothing in either gift under either of these sections upon which to base any explanation of a change of view on the part of the testator with respect to the suspension of the principal until the absolute age of twenty-five is reached.

As illustrative of how the view taken by the lower Court must conflict with the clear intention of this testator, we may also consider the following situation:

——Under the view prevailing in the court below, a son might die leaving lawful issue. We will assume, however, that those grandchildren of the testator predeceased the son, but one of them left a great-grandson surviving. In the view of the Court below in that situation, the gift of principal or corpus upon the death of the son vested immediately in his

children, to wit, the grandchildren of the testator, and the interest, therefore, of each grandchild being vested would be transmissible by will or by intestate laws, uncontrolled by the provisions of the will of the present testator. Whereas, if we regard paragraphs 8 and 11, we find there admittedly a situation where there could be no vesting of the gift of principal upon the death of a child of the testator, but the disposition of the gift of principal is controlled by the testator's will right down through the grandchildren or other descendants of that son. We hold that these two propositions cannot be reconciled with the established principles governing the construction of wills. A manifest desire on the part of the testator to make it impossible for a grandson or a great-grandson to use that principal before twenty-five would thus seem to be set aside by the adoption of the view of the Court below in holding that the gift of principal immediately vested in the grandchild upon the death of the parent.

On the other hand, if this Court accepts the view for which we now contend, to wit, that the language

> "take and receive the parent's one-third share of said trust fund"

refers only to income and does not refer to principal, then there would be no vesting of the corpus upon the death of any child leaving lawful issue and the vesting would take place only if and when the lawful issue reaches twenty-five, thus being in harmony with the preceding paragraphs of the will.

Again, the conflict mentioned is well illustrated by consideration of paragraph 12 of the will in connection with paragraph 13.

We, therefore, believe the prevailing view in this Court should be that the language used in paragraph 13 does not import an intention to vest the principal

on the death of any child of the testator but rather an intention to suspend that vesting until the lawful issue of any child reaches age 25.

(4) The words in paragraph 13:

> "—— and *upon* their reaching the age of twenty-five years, the entire principal with any accumulation of interest thereon or accretions thereto, of the parent's share of the trust fund shall be paid to them"

impose as a condition precedent to the vesting of the principal that the issue shall reach twenty-five years of age.

(a) The word "upon" imports a condition precedent. It carries in this connection the same meaning as the word "when." "Upon" in this connection could not mean otherwise than "at the time of" and, therefore, must be synonymous with "when" and so used. The word "when" under the common law when so used implies a condition precedent.

> "The words 'on or upon' when affecting the quality of an estate in reference to the time (or times) of its vesting or enjoyment are substanially synonymous with 'when.' "
>
> *Hooker v. Bryan,* 53 S. E. 130 (140 N. C. 402).

Dusenberry v. Johnson, 59 N. J. Eq. page 339 (Vice-Chancellor Pitney):

> "But if the time is annexed to the substance of the gift, as a legacy, 'if' or 'when' he shall attain twenty-one, it will not vest before that contingency happens."

Gifford, administrator v. Thorn (E. & A.) 9 Eq. p. 31:

> "There is one case (May v. Wood, 3 Bro. Ch. C. 471) in which it is said that the word 'when' indicates only the intention of the testator to fix the time at which the legatee is to have possession—and is not to be held as interposing a condition precedent to its vesting in him. *But the weight of authority is undoubtedly the other way* and in Hansen v. Graham, 6 Ves. 239, Sir William Grant, referring to that case, repudiated the doctrine there held as unsupported by authority."

This Court of Errors case, *Gifford v. Thorne,* cites many authorities and even traces the use of the words "when" and "if" back to the civil law showing that

> "both are words of condition annexed to the very gift of the legacy when unexplained by the text of the will."

It must, therefore, be assumed as established that, apart from any other words in this paragraph 13 which might control or modify the use of the word "upon," that word irresistibly carries with it a condition precedent attached to the vesting of the gift itself.

(b) The question then arises whether there is any language in paragraph 13 or elsewhere in the will changing the meaning of the word "upon" and so changing a condition precedent attaching to the gift itself into a mere postponement of enjoyment. We can find no language in this paragraph or in the will itself changing the established use of the word "upon" when used as in paragraph 13.

1. *The implication of a condition precedent certainly is not changed by other parts of paragraph* 13, *providing for the use of the income from the fund*

until the grandchildren reach age twenty-five. There is undoubtedly an established rule under the English common law and accepted in this country to the effect, that where the testator *has made an absolute, exclusive and unconditional appropriation* of the *income* for the use or benefit of the beneficiary legatee *until he receives the principal,* then such exclusive appropriation of income will be construed as changing the meaning of the word "when" and removing the clause from the class of conditions precedent, and in such case the legacy will be deemed vested. This rule is expressed in different language by different authorities, but all to the same effect; but it will be found that the rule in every case requires that in order to raise such presumption of intention on the part of the testator to immediately vest in the legatee, *there must be an unconditional and exclusive appropriation of the income for the benefit of the legatee up to the time he receives the principal. Such appropriation cannot be left to the discretion of executors or trustees, it cannot be partial only, it cannot be merely an appropriation of a sum for maintenance or support, leaving the possibility of a balance of income "to follow the fate of the principal." The entire income must be so appropriated* to the use of the legatee and for his exclusive use and benefit. It is not such appropriation to simply have the income accumulate and attach to the principal, for in such a case it would simply mean that

> "the income would follow the fate of the principal."

Dusenberry v. Johnson, Ante, 59 E. 339.

In the cited case, the trustees were to invest the legacy of $2,000

> "and to pay the income thereof at stated and convenient intervals to the guardian or guar-

> dians of Nathaniel Johnson and Charles S. Johnson, children of my son, Nathaniel Johnson, until they respectively become of the age of twenty-one years."

The Court held there was an absolute and exclusive appropriation of income and, therefore, controlled the use of the word "when." The Court cites sundry English authorities, but the cases cited all show that in order for other language in the will to control the use of the word "when" or "if" (and, therefore, as we say also the use of the word "upon"), *there must be* an *absolute* appropriation of the *entire* interest for the *exclusive* benefit of the legatee until the principal is directed to be paid to that legatee.

Hansen v. Graham, 6 Ves. 239 (cited by our Court of Errors and Appeals in *Gifford v. Thorn, supra*). In this case the Court held that the interest was given to the legatee until the principal was to be paid—that not merely a part of the interest or for a part of the time was given, but

> "the interest entirely separated from the principal."

The Court's language is as follows:

> "The legacy is accompanied by an absolute gift of the interest, which, according to the established rule, has the effect of vesting it."

The Court, however, was careful to distinguish such appropriation of the entire interest from a mere appropriation of a part, in the discretion of trustees, for maintenance or other purposes.

> "It is true it has been held that (maintenance) has not the same effect as giving interest; upon this principle, that nothing more than a maintenance can be called for; what can be shown to be necessary for maintenance however large the

> interest may be; and, therefore, what is not taken out of the fund for maintenance must follow the fate of the principal whatever that may be. But by this will it is clear the whole interest is given. Can there be any doubt that in this case all the interest became, as it fell due, the absolute property of these infants as separated altogether from the residue? All that is left to the trustees is to determine in what manner it may be best employed."

In *Gifford v. Thorn,* 1 Stock. 708 (E. and A.), the Court of Errors and Appeals affirmed the opinion of Chancellor Green. The Chancellor, in his opinion, which is printed preceding the opinion of the Court of Errors and Appeals, holds that:

> "A gift 'at' twenty-one or 'if' or 'when' the legatee shall attain the age of twenty-one, were all one and the same, and in each of these cases, if the legatee die before that time the legacy lapses." Page 706.

And further:

> "The modern authorities regard the doctrine as fully settled, in accordance with the ancient rule and the views expressed in Hanson v. Graham, 1 Jarman on Rules, 764, &c."

And further:

> "Where the interest of the legacy is directed to be paid to the legatee until he receive the principal, or where the legacy is placed in the hands of trustees for the exclusive benefit of the legatee until it is directed to be paid over, the legacy will be deemed vested."

And the Court of Errors and Appeals in the opinion following that of the Chancellor holds that the word

"when," etc., used in this connection makes the legacy contingent. Citing numerous authorities to the same effect.

The Court cites *Fonereau v. Fonereau,* 3 Atkyns. 645, where the bequest was one of one thousand pounds to C. F., *when* he should attain the age of twenty-five; but the testator directed the money to be put at interest and the interest applied to the education of the legatee and part of the principal to be expended for his benefit by way of an apprentice fee. Therefore, Lord Hardwicke held that these subsequent words controlled the word "when" and indicated an intention to give a vested legacy. It will be noted, however, that there was an absolute appropriation of the entire interest or income for the benefit of a legatee.

Therefore, we believe that the words fixing the time of payment make the legacies contingent; that there are no words of the testator indicating to the contrary, but, in fact, the language of the balance of the instrument all points to an intention by the testator to have the vesting take place only when the grandchildren should reach twenty-five.

IV.

UPON FAILURE OF THE GIFT OF CORPUS, THAT CORPUS VESTS IN THE NEXT OF KIN OF THE TESTATOR, TO WIT, THE THREE COMPLAINANTS.

This proposition is sustained by *McGill v. Trust Co.,* 94 N. J. Eq. 654; *Hewitt v. Green,* 73 N. J. Eq. 345, and other cases above cited.

V.

WITH THE FAILURE OF THE GIFT OF CORPUS, THE INTERVENING GIFTS OF INCOME ALSO FALL, AND THE VESTING OF THE CORPUS IN THE NEXT OF KIN IS IMMEDIATE AND THEY ARE ENTITLED TO IMMEDIATE POSSESSION OF THAT CORPUS AND FOR THE FOLLOWING REASONS:

(a) During the lives of the three children, the income by the Will goes to them, that is, to the next of kin or those who would take the corpus.

(b) If the contingencies provided for in Sections 8 and 11 happened (where one or more of testator's children dies without lawful issue), then one-half part of income would go to the survivors or survivor of the three children, *i. e.*, to the next of kin.

(c) As to the other half part of the income provided for in Sections 8 and 11, the Will names no beneficiary whatever with respect to income in the absence of the Working Girls' Home. If our view be correct, to wit, that this institution cannot come into existence under the Will and cannot take the corpus, then this one-half part of income is in no wise provided for under the Will.

(d) If now we assume that a child dies with issue, the *income* on that one-third part of corpus *might*, under the will, be paid to the issue of that one child, but until such child arrives at the age of 21 years, such payment would be absolutely *in the discretion* of the trustee. There is no absolute gift of income to the issue of any child until such child arrives at the age of 21 years. From then on, until age 25, payment of income to the issue of such child is ab-

solute. We thus see that even if there should be grandchildren, those grandchildren might not take any part of the income, because they might not reach the age of 21 years.

This, with what follows, shows that the gifts of income are merely incidental to the main purpose of the testator, to wit, to tie up the corpus of his estate for the benefit of his grandchildren and great grandchildren and in the interest of a Working Girls' Home. His intention in both of these respects, however, could not be carried out because that intention contravenes the rule respecting perpetuities.

Assuming that the gifts of corpus fail, then in the following contingencies no one would take the income under the provisions of this will:

1. If two children of testator die without lawful issue, then one-half of income is undisposed of because of failure of Working Girls' Home to come into existence.

> Note—It should be recalled that testator had in mind that two of his children were unmarried daughters, age 43 and 32, respectively, and the possibility of their not marrying. In other words, the one thing upon which he centered his attention was the ultimate gift of corpus to the Working Girls' Home.

2. If a child or children of testator die leaving issue who fail to reach age 21. Until age 21 is reached the gift of income is not absolute, but discretionary with the trustee (Section 13 of will) and all or part of that income in the discretion of the trustee "may follow the fate of the principal."

It is impossible to separate the gifts of income from the gifts of corpus so as to leave the gifts of income distinct and independent. The testator's

whole scheme falls if we eliminate the possibility of the corpus, as well as one-half the income, vesting in the Working Girls' Home and if we also eliminate testator's intention that the corpus should remain suspended until at least his grandchildren (not to mention his great grandchildren) should arrive at age twenty-five.

In our view, this case is distinguishable from *McGill v. Trust Company,* insofar as the provisions respecting income are concerned. In the McGill case, there was a gift of the entire income ——

> "Not a part of it—not such part of it as may be necessary or reasonable; or as shall be suitable and proper; not in the trustee's discretion. There is no discretion given to the trustee; neither is there any provision to accumulate or for any other disposition of any unused portion." *McGill v. Trust Company,* page 676.

In the Trippe will, there is no absolute gift of income except to the next of kin (the three complainants); thereafter it is in the discretion of the trustee until a grandchild arrives at the age of 21 years. If the grandchild dies before 21, he may receive no income.

Under the Graves case, *Hewitt v. Green,* &c., upon the failure of the gifts of corpus, the attempted gifts of income should also be declared void.

VI.

The learned Vice-Chancellor, in his opinion, says:

> "If the time of payment offends the rule against restraint upon enjoyment the restriction is void, not the gift."

That undoubtedly is true *if in fact* the gift of principal vests immediately on the death of the issue of the deceased child, for in that event as already pointed out, the Rule of Perpetuities has no application. That rule applies only to estates *which have not vested.* The whole point to be determined under paragraph 13 is—did the gift of principal vest? In our view, it certainly did not vest and cannot vest until lawful issue of a deceased child arrive at age twenty-five. The citation by the learned Vice-Chancellor above quoted, therefore, has no application except upon the assumption that we have first determined that the principal has vested. Of course, if we first assume that as a fact, there is nothing left to the argument.

VII.

The Chancellor's opinion also uses the following language:

> "Such restrictions upon enjoyment are permissible. 2 R. C. L. 347. Lembeck v. Lembeck, *supra.* At all events the complainants cannot impeach them. The *cestuis que* trustant alone may. Foulke Perp. 293."

Here again, we say that that reasoning goes entirely upon an assumption which must first be made that the gift of principal has, in fact, vested. The rule that *cestuis que* trustant may alone impeach restrictions upon enjoyment belongs only to a situation *where there is a vested interest* followed by a restraint upon enjoyment and does not have any application, as we understand it, to an application of the Rule against Perpetuities as applied to a gift which has not, in fact, vested within the prescribed period.

Foulke, in his work, Section 488, page 293, is careful to distinguish between a case where there is a vested interest and the *cestui que* trust attempts to impeach a restraint on enjoyment and a case where, in fact, there is no vested estate. In the former, no one but the *cestui que* trust has any right to intervene.

> "In this respect the rule (as to restraints on enjoyment after estates are actually vested) differs from the Rule against Perpetuities. *Where the latter rule applies, it is the duty of the Court to destroy the invalid interests whether anyone interested complains or not.*"

VIII.

RESPONDENTS IN THE COURT BELOW CONTENDED THAT PARAGRAPH 12 CONSTITUTED A SEPARATE AND DISTINCT CONTINGENCY AND THAT THEY WERE, THEREFORE, ENTITLED TO TREAT IT AS SUCH AND TO ARGUE THAT IF IT WAS SUCH A SEPARATE CONTINGENCY, IT WAS A VALID CONTINGENCY, AND IN CONSTRUING THAT PARAGRAPH IGNORE ALL OTHER PARTS OF THE WILL.

We consider that this argument is not sound, and for the following reasons:

The 12th paragraph does not constitute a new disposition or a new contingency under this will. We have only to refer to the 11th paragraph and to the next to the last section of that 11th paragraph to demonstrate that fact. The testator provides in this 11th paragraph, among other things, as follows:

> "And if all of my three children die without lawful issue and without lawful descendants of

> any such issue who shall attain the age of 25 years, then the remaining portion of the trust fund mentioned in said eighth section or paragraph, as well as the remaining portion of the fund herein mentioned, with any accrued income or accretions, is to be applied and devoted to that purpose."

——When, therefore, the testator in paragraph 12 provides that ——

> "should all of my children die prior to May 1, 1940, leaving no lawful issue and no descendants of such issue, then the whole of said trust funds, etc."

he simply restates what he has already in more explicit and detailed language stated in the part of the 11th paragraph hereinabove stated. In fact, the testator could just as well have inserted in paragraph 12 in lieu of the date "May 1, 1940," January 1, 1926, or February 1, 1930, or, in fact, any other date. The insertion of the date does not change the character or the meaning of this provision in paragraph 12. Under the 11th paragraph just quoted, if all of the testator's children die without lawful issue and without lawful descendants who shall attain the age of 25 years (which includes, of course, their death without any issue at all) at any time after testator's death, paragraph 11 becomes operative and it would operate just as effectively in 1926 as it would in 1940 or 1950.

Therefore, paragraph 12 does not provide a separate or distinct contingency and does not do any more than restate, in different language, the provisions of paragraph 11.

Counsel for the defendants are, therefore, in error, in our judgment, in endeavoring to set up this twelfth

paragraph as something different from what has already been set up in the eleventh paragraph. Furthermore, we contend that the provision for the issue of testator's children up to the time they shall arrive at the age of 25 years runs through all of these paragraphs and cannot be eliminated from the general scheme of the testator. Testator formulated a distinct scheme for the disposition of his property, the keynote of which was the postponing of vesting of his property for an unlawful period and the ultimate vesting of the title of that property in the so-called Working Girls' Home or some other institution unnamed and unidentified.

Defendants below contended that even though all parts of the will besides paragraph 12 should be declared void that paragraph is valid and could be treated as a separate contingency disregarding all other parts of the instrument. While there are some English authorities holding that where there are two distinct and separable contingencies and where those contingencies are separated by the testator himself in his Will and one of them is good and the other bad, the Court may, under certain restricted conditions, sustain the good condition and invalidate the bad. However, this exception to the Perpetuities Rule will be construed strictly and it has no application whatever to the case in hand. The authorities in this country hold that such an exception to the Perpetuities Rule is never permitted where, to bring it into operation, the general scheme of the testator would be maimed or destroyed, or where the operation of such exception would do injustice to the natural beneficiaries of the decedent.

In *Eldred v. Meek,* Sup. Ct. of Ill. 55 N. E. Rep. 536, &c., at page 539, the Court says:

> "When some of the trusts in a will are legal and some illegal, if they are so connected to-

gether as to constitute an entire scheme so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, then all the trusts must be construed together and all must be held illegal and must fall."

In *re Butterfield,* 133 N. Y. 473;
Reid v. Voorhees, Ill. Sup. Ct. 74 N. E. Rep. 808.

In the last case, the Court held that the rule permitting illegal trusts to be cut off and legal ones to stand

"is of frequent application in the construction of wills, but it can be applied only in aid and assistance of the manifest intent of the testator, and never where it would lead to a result contrary to the will, or work injustice among the beneficiaries or defeat the testator's scheme for the disposal of his property, etc."

In reference to the same rule, the Court of Appeals of New York, in *Tilden v. Green,* 14 L. R. A., page 1, says:

"The rule as applied in all reported cases, recognizes this limitation: That when some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all the trusts must be construed together and all must be held illegal and must fall."

The Court also calls attention to the rights of the heirs and next of kin:

> "The rights of heirs and next of kin exist under the statutes of descent and distribution, and vest immediately upon the death of the testator. If the trust or power attempted to be created by the will or the disposition therein made is valid, their rights are subject to it; but if invalid, they immediately become entitled to the property."
>
> "Before applying these rules to the case before us, our duty is to ascertain the testator's intent, from an inspection of the will, and for this purpose we must read the whole instrument, including the provisions admitted to be void. These provisions though ineffectual to dispose of the property cannot be obliterated, when examining it for the purpose of ascertaining the testator's intention."

So also in *Hewitt v. Green,* 77 N. J. Eq. 342, the Court lays down the rule that,

> "Where it is reasonably plain what the testator's scheme was, and such scheme is illegal, the Court ought not to resort to a fanciful construction and by excluding the illegal intention from consideration find a legal intention which, in fact, the testator never had."

Vice-Chancellor Stevenson, in that case, made it plain that the Court is not to re-write a will for the testator and says:

> "When by an artificial and technical course of reasoning, the invalid gift which the testator intended to make is converted into an entirely different valid gift which the testator did not

intend to make, the result is a very gross injustice and a violation of the rights involved in the testamentary disposition of the property."

IX.

DEFENDANTS ALSO CONTENDED IN THE COURT BELOW THAT THEY WERE ENTITLED TO SEPARATE THOSE PARTS OF THE WILL PROVIDING FOR A SUSPENSION OF THE VESTING OF THE CORPUS UNTIL GRANDCHILDREN ARRIVE AT AGE TWENTY-FIVE FROM THOSE PARTS OF THE WILL ESTABLISHING OR ATTEMPTING TO ESTABLISH THE WORKING GIRLS' HOME, THEIR THEORY BEING THAT THE CONTINGENCY OF CHILDREN LEAVING ISSUE OR DESCENDANTS WHO DIE BEFORE TWENTY-FIVE COULD BE ENTIRELY DISREGARDED, SEPARATED FROM THE BALANCE AND TREATED VOID AND LEAVE THE GIFT TO THE SO-CALLED HOME VALID.

The reasoning applicable to paragraph 12 and in the preceding paragraph of this brief applies equally to this contingency.

X.

THE APPLICATION OF THE RULE AGAINST PERPETUITIES IS NOT SET ASIDE NOR IS IT ABRIDGED BY THE FACT THAT THE BENEFICIARY IN THE WILL IS A PUBLIC CHARITY.

30 *Cyc.* 1498:

"Every will is to be construed as though no rule against perpetuities existed. The intention of the owner having been thus determined, the rule is to be applied. If an instrument construed without reference to the existence of the rule is really ambiguous, the Courts will incline to such construction as makes the provisions consistent with the rule."

30 *Cyc.*, 1497—Section E:

"Thus, if property is given to an individual, with a gift over to a charity on a contingency which may not happen, within the limits of the rule, the gift over is bad."

Citing *Smith v. Townsend,* 32 Pa. State 434.

In *re Johnson,* L. R. 2 Eq. 716, 12 Jr. N. S. 616;

Commissioners v. De Clifford, 1 Dr. & War. 245;

Atty.-Gen. v. Gill, 2 P. Wms. 369; 24 Eng. Reprint 770.

While a casual reading of some opinions in our United States Courts might indicate that the rule against perpetuities should not be applied to charitable trusts, nevertheless, a careful analysis of all of these decisions discloses the fact that they are clearly in line with the principle above laid down in Cyc.

See *Hopkins v. Grimshaw,* 165 U. S. pp. 355-358 (41 Law Ed. page 743-744) and many cases cited therein.

The case of *Bower v. Myers,* Circuit Court of Appeals, 8th Circuit, 244 Fed. Rep. 892, etc., uses language which, on a hasty reading, might seem to indicate that the Rule against Perpetuities is never applied to a charitable trust. A careful reading of the opinion, however, together with the cases cited (among which is 165 U. S. 342, etc., quoted above) clearly shows that it is in line with the principle for which we are contending.

The bill in this case was filed for the purpose of construing the Will of this testator. Certainly such construction was demanded in view of its complicated character and the many provisions made by the testator. The appellants have the right to have a complete construction of the Will made. The appellants have a right to ask for a full and complete construction of the clauses of the Will involved in this appeal.

We hold that the testator's intention upon the face of the instrument should lead to reversal of the decree made in the Court below. The thing most prominent in the testator's mind and standing out from every part of the instrument is first, that no grandchild or descendant of a grandchild should take the corpus until he arrived at age twenty-five, and, in the second place, the desire on the part of the testator that ultimately his estate should vest in the so-called Working Girls' Home. That intention, therefore, was to postpone the vesting of the principal of these trust funds beyond the period permitted by law. The intention of the testator is first ascertained from the pages of the instrument itself and then the rule is applied with all strictness. If,

in fact, our view prevails, certainly it will not result in any injustice being done. The three and only children of the testator should have been his first concern, and we submit that this Court's construction of the Will in question should result in an award of the corpus of the two trust funds to the appellants.

Respectfully submitted,
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