INDEX.

Caveat.

To Frederick G. Stickel, Surrogate of the County of Essex, State of New Jersey.

I, William Feindt, the natural father of Frederick F. Book, an infant under the age of fourteen years, and who has petitioned the Court of Chancery for the adoption of said infant, and said infant is one of the heirs at law of William Book, deceased, do hereby caveat and protest against admitting to probate any paper purporting to be the Last Will and Testament of said William Book, until examination and decree thereon by the Orphans' Court of the said County of Essex and State of New Jersey.

WILLIAM FEINDT.

Dated January 12th, 1917.

Petition for Probate.

Filed January 16, 1917.

ESSEX COUNTY SURROGATE'S OFFICE.

In the Matter of the Probate of the Alleged Will of WILLIAM BOOK, deceased.	*On Petition for Probate.* *Petition.*

To the Surrogate of the County of Essex:

The petition of Emma M. Book, who resides at No. 145 Magazine St., Newark, N. J., and John T. White, who resides at No. 176 Remsen St., Brooklyn, N. Y., respectfully shows that:

1. William Book, late of the City of Newark, in the County of Essex and State of New Jersey, departed this life more than ten days ago, to-wit, on the 5th day of January, 1917, having first duly made and executed a paper writing purporting to be his last Will and Testament, bearing date the 25th day of May, 1915, wherein your petitioners are named as executors thereof.

2. The next of kin and heirs at law of the said testator, with their respective residences or post-office addresses and the manner and degree in which they severally stand related to the said testator, so far as the same are known to your petitioner, are as follows:

Names.	Residences.	Relationship.
Emma M. Book,	A Petitioner.	Widow.
Frederick F. Book,	145 Magazine St., Newark, N. J.	A Son, legally adopted.

All of the foregoing are of full age with the exception of:

Names.	Ages.
Frederick F. Book.	9 yrs.

Your petitioners therefore pray that the said paper writing be admitted to probate as the last Will and Testament of the said testator and that letters testamentary thereon be granted to your petitioners.

Dated, Newark, N. J., Jan. 16th, 1917.

EMMA M. BOOK,
JOHN T. WHITE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } *ss.*

Emma M. Book and John T. White, of full age, being duly sworn according to law upon their oaths, depose and say that they are the petitioners in the foregoing petition named and that the matters and things therein contained are true to the best of their knowledge and belief.

EMMA M. BOOK,
JOHN T. WHITE.

Subscribed and sworn to this 16th day of Jan.,
A. D. 1917, at Newark, N. J., before me.

OWEN A. HANRETTY,
Commissioner of Deeds of New Jersey.

IN THE NAME OF GOD, AMEN.

I, William Book, now residing at number 145 Magazine street, in the City of Newark, County of Essex, and State of New Jersey, being of sound mind, memory and understanding, do make, publish this as and for my last will and testament hereby revoking any and all wills by me heretofore made.

First. I order and direct that all my just debts and funeral expenses be paid and satisfied as soon as can conveniently be done after decease.

Second. I give and bequeath to my adopted son Frederick Book, when he arrives at the age of twenty-one years, provided he retains that name, all the jewelry of which I may be possessed at the time of my decease.

Third. I give, devise and bequeath to my wife, Emma M. Book the house and lot known and designated as number 145 Magazine street in said City of Newark, together with the furniture therein contained.

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

To divide the same into three equal parts or shares and two of those parts or shares I order and direct my Executors and Trustees

to transfer and pay over to my said wife Emma M. Book as soon after my decease as can conveniently be done. The remaining one Part or share so held in trust I direct to be held as follows: To use the income and profits thereof for the support, maintenance and education of my said adopted son Frederick Book until he arrives to the age of Twenty-Five years and he retains the name of Frederick Book then I order and direct my said Executors and trustees to transfer to the said Frederick Book the said remaining one part or share of my residuary estate. In case my said adopted son Frederick Book should change his name before arriving to the age of Twenty-five years then the said one part or share of my residuary Estate so held shall be transferred and conveyed to my said wife Emma M. Book, her heirs and assigns forever. In case my adopted son Frederick Book shall die before arriving to the age of Twenty-five years then the said portion or share so held in trust shall be transferred and conveyed to his lawful issue share and share alike. In case my said adopted son Frederick Book dies before arriving to the age of Twenty-five years and without leaving lawful issue, then the said share or portion of my estate so held in trust for him shall be transferred and conveyed to my wife Emma M. Book her heirs and assigns forever.

Fifth. I nominate and appoint my said wife Emma M. Book and my brother in law John T. White Executors and trustees of this my last will and testament and Guardians of my said adopted son Frederick Book (without giving Bond) and hereby giving them full power to sell and convey any or all of my residuary estate.

In witness whereof, I have hereunto set my hand and seal this Twenty-fifth day of May in the year of our Lord One Thousand Nine Hundred and Fifteen.

WILLIAM BOOK (L. S.)

Signed, sealed, published and declared by the testator as and for his last will and testament in our presence, who in his presence, at his request and in the presence of each other, have hereunto set our names as witnesses.

ARTHUR M. GOLDMAN,
315 New York Ave., Brooklyn, N. Y.

GUSTAVUS A. RICHARDS,
421 Ferry street, Newark, N. J.

Citation.

ESSEX COUNTY, SS. THE STATE OF NEW JERSEY,

(L. S.)

To William Feindt, GREETING:

We cite and command you, that you personally be and appear before the Orphans' Court, to be holden in Newark, in and for the County of Essex, on Friday, the Second day of February, A. D., 1917, at ten o'clock in the forenoon, in the matter of the caveat of William Feindt against admitting to probate any paper purporting to be the last Will and Testament of William Book, deceased, and to abide the judgment of the said Court in the premises.

Witness, Hon. William P. Martin, presiding Judge of our said Orphans' Court at Newark aforesaid, this seventeenth day of January, A. D. 1917.

FRED G. STICKEL, JR.,
Surrogate and Clerk.

Agreed State of Facts.

IN THE ORPHANS' COURT OF ESSEX COUNTY, N. J.

In the matter of the probate of will of WILLIAM BOOK,

The following facts are agreed to:

That William Feindt of the City of Newark, N. J., is the natural father of the minor, Frederick Book, now of about nine years of age. That Christiana L. Feindt was the natural mother of said minor. That she departed this life when said minor was three days old. That in consequence of the death of said infant's mother, the child was legally adopted by William Book, and Annie M. Book, on or about the 25th day of April, 1908. That on or about the month of November, 1911, said Annie M. Book, wife of William Book and mother by adoption of said minor, departed this life. That on or about the 12th day of November, 1912, said William Book remarried to one Emma Goldman who is now living. That on or about the 6th day of January, 1909, William Feindt was married to his present wife, Sophie H. Feindt. That both of the parents by adoption Frederick Book are now dead. That on the 25th day of May, 1915, said William Book executed what purports to be his last Will and Testament, a copy of which is hereto annexed. That there were no children born to said William Book by either of his wives during his lifetime, but that on Saturday, April 7th, 1917, the said Emma Goldman was delivered of a child, whose father was William Book, now deceased. Said William Book died on the fifth day of January, 1917.

JOHN E. HELM,
Attorney for Defendant.

THOMAS S. HENRY,
Attorney for Petitioner.

Gustavus A. Richards, direct.

Testimony.

Filed July 9, 1918.

ESSEX COUNTY ORPHANS' COURT.

Friday, April 13, 1917.

In the matter of the probate of a paper writing purporting to be the last Will and Testament of WILLIAM BOOK, deceased. } *On Caveat.*

Before Hon. Harry V. Osborne, *Judge.*

For the proponents, John E. Helm, Esq., and Harry Campton, Esq.

For the caveator, Thomas S. Henry, Esq., and Francis Child, Esq.

GUSTAVUS A. RICHARDS, sworn in behalf of proponents.

Direct examination by Mr. Helm.

Q Mr. Richards, did you know Mr. William Book in his lifetime? A I did.

Q Did you draw his last Will and Testament? A Yes, sir.

Q (*By the Court.*) Is that the paper you drew? A Yes, sir.

Q (*By Mr. Helm.*) I show you a paper and ask you whether you drew it? A I did.

Q Did you see Mr. Book sign it? A Yes, sir.

Q Did he declare it to be his last Will and Testament? A Yes, sir.

Q Who last witnessed the will? A Mr. Goldman.

Q Did you see him sign that? A I seen him sign it; the three of us was together.

Q And he declared it as his last Will and Testament? A Yes, sir.

Q And he declared it as his last Will and Testament? A Yes, sir.

By the Court.

Q Did you see Mr. Book sign the Will? A Yes, sir.

Q Who was present? A Mr. Goldman.

Q And who else? A Mr. Book, William Book, and myself.

Q Did Mr. Book say anything when he signed this Will? A He said he wanted this to be his last Will and Testament.

Q Did Mr. Book say anything when he signed this Will? A He said he wanted this to be his last Will and Testament.

Q Did he ask you to sign it? A He asked me to sign it.

Q Did he ask Mr. Goldman to sign it? A Yes, sir.

Q And did you do it upon his request? A Yes, sir.

Q Did you see Mr. Goldman sign? A Yes, sir.

Q Was Mr. Goldman present when you signed? A Yes, sir.

Arthur M. Goldman, direct.

Cross examination by Mr. Child.

Q In what order were the signatures made to that Will? A Mr. Book signed it, he signed the Will.

Q First? A First, and then I signed it and Mr. Goldman signed it, and we were all there together.

Q All there together? A All there together.

ARTHUR M. GOLDMAN, sworn in behalf of proponents.

Direct examination by Mr. Helm.

Q Did you know Mr. William Book? A Yes, sir.

Q During his lifetime? A Yes, sir.

Q Did you witness his last Will and Testament? A Yes, sir.

Q I show you that paper, which purports to be his last Will and Testament? A Yes, sir.

Q Did you see Mr. Book sign that Will? A Yes, sir.

Q Did he declare to you that was his last Will and Testament? A He did.

Q And he requested you to sign as a witness? A Yes, sir.

Q Who else signed the Will? A Mr. Richards.

Q And did you see him sign it? A I did.

Q And did you see Mr. Book sign the Will? A I sure did.

Q And you attached your signature to the Will as witness? A I did.

Q At his request? A At his request.

The Will referred to is marked Exhibit P. 1.

Not Cross Examined.

Conclusions of Judge Osborne.

Thomas S. Henry, Esq., and Francis Child, Esq., proctors for caveators.

John E. Helm, Esq., proctor; Harry Campton, Esq., of counsel for proponents.

OSBORNE, *J.*

The following state of facts have been agreed upon by the proponents and the caveators:

Frederick Book, now about nine years of age, is the only son of William Feindt and Christianna L. Feindt, of the City of Newark. Christianna L. Feindt died when Frederick was about three days old, and in consequence thereof Frederick was legally adopted by William Book and Annie M. Book on or about the 25th day of April, 1908.

William Feindt remarried to his present wife, Sophie H. Feindt, on the 6th day of January, 1909.

Annie M. Book died in or about the month of November, 1911. On or about the 12th day of November, 1912, William Book remarried to one Emma Goldman, who is now living.

On the 25th day of May, 1915, William Book executed what purports to be his last Will and Testament. William Book died on the 5th day of January, 1917. There were no children born to William Book by either his first wife, Annie M. Book, or his second wife, Emma Goldman, during his lifetime, but on the 7th day of April, 1917, said Emma Goldman was delivered of a child whose father was William Book, deceased.

The alleged will of William Book being offered for probate, a caveat is filed on behalf of the infant, Frederick Book, by William Feindt, his natural father.

Exception is taken to the filing of this caveat by William Feindt upon the ground that he had no standing in court to file the same. As it has been held in this State that a next friend may be substituted at any stage of the proceedings, and a petition for such appointment having been presented and signed by the Court, this objection is thereby disposed of.

The only other question, therefore, is whether William Book was without issue within the meaning of Section 20 of an act concerning wills (4 Comp. Stat., p. 865). This section provides as follows:

> "20. That every last will and testament made when the testator had no issue living, wherein any issue he might have is not provided for or mentioned, if at the time of his death he leave a child, children or issue, or leave his wife enceinte of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate." (Rev. 1877, p. 1246.)

Conclusions of Judge Osborne.

So much of the statute providing for the adoption of children as is applicable to the question here presented is found in P. L. 1912, p. 53, in an amendment to "An Act concerning minors, their adoption, custody and maintenance" (Rev. of 1902), and reads as follows:

> "* * * and the (adopted) child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock; provided, said child shall not be capable of taking property expressly limited to the heirs of the body of the adopted parent or parents, nor properly coming from the collateral kindred of such adopting parent or parents by right of representation."

The first adoption act in New Jersey was not passed until long after the enactment of the Wills Act and the Legislature therefore could not have had adopted children in contemplation in framing the provisions of the act concerning wills.

An examination of the language of section 20 of the act concerning wills indicates that the word "issue" was used synonymously with the words "child" or "children," and as adopted children were not known to the law at the time the Wills Act was passed it may be presumed that such was the case.

Furthermore, it seems to be recognized that the word "issue" may be used in the sense of "children." *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. Eq., p. 482.

An interesting and exhaustive analysis of the historical aspects of the subject of the adoption of children may be found in the footnotes to the *Lawyers' Reports, (N. S.), Annotated,* 8th Vol. 1907, 119, where the question is quite fully discussed:

> "The question presented being new, its answer must be got at by attending to the history of the law of adoption, its growth, the statute of adoption, the statute of descents and distributions, the analogies of the law to be searched out in cases decided by this Court on related questions, and to the persuasive authority of the pronouncements of the highest courts of other states. Adoption was unknown to the old common law of England. Ross *v.* Ross, 129 Mass., *loc. cit.* 262, 37 Am. Rep. 321; Schouler, Dom. Rel. 5th Ed., Sec. 232. It was known to the Roman Law, was attended by ceremonial dignity, and was of deep meaning and far-reaching results—a notable historical example of which is cited by Napton, *J.,* in Reinders *v.* Koppelman, 68 Mo. *loc cit.* 496, 30 Am. Rep. 802 (from the leading case of Vidal *v.* Commagere, 13 La. Ann. 517), whereby Tiberius, being the stepson and adopted son of Augustus, his nephew, Germanicus (adopted by Tiberius on the command of Augustus Caesar), became the grandson of Augustus himself.

'Adoption,' says Merrick, *Ch. J.,* in Vidal *v.* Commagere, *supra,* 'was known to the Athenians and Spartans, as well as the Romans and the ancient Germans, and was familiar to the writers of the New, if not the Old Testament.' See also Re Upton, 16 La. Ann. 8 L. R. A. (N. S.) 175; 1 Cyc. Law & Proc., p. 917; Abney *v.* DeLoach, 84 Ala. 393, 4 So. 757. It seems to have taken root in Egypt (Exodus) 11:10. Paul, himself a lawyer profoundly instructed in Hebrew jurisprudence, assumed the doctrine of adoption to be well known to his readers, and borrows the use of the doctrine as a hammer to clinch nails driven by him on matters of faith. Rom. VIII.: 16, 17, *q. v.* The doctrine was not unknown to the Babylonians—witness the Code of Hammurabi, compiled from 2285 to 2242 B. C. Sections 185 to 193 inclusive of that code are curious, and read as follows: * * * '' (Then follows a series of examples from the Code.)

''Adoption was also an incident of Spanish law; was incorporated into the Code Napoleon, and from that Code (or the Spanish law) found its way through Louisiana and Texas into the statute of their sister states. * * * ''

To one interested in the subject, a full perusal of this article will no doubt prove both interesting and instructive.

The subject is also treated from its historical aspect in *Humphries, Admr.,* v. *Davis,* 100 Ind. 274:

''The common law made no provision for the adoption of children, and we can get no light from that source. The Roman law made provision for adopting children, and the provisions of that law, as revised and changed by Justinian, formed a complete system. Sandars' Justinian, 103, 105, 109. The adopted child was, as that law declared, 'assimilated, in many points, to a son born in lawful matrimony.' That law preserved to the child all the family rights resulting from his birth, and secured to him all the family rights produced by the adoption. Sandars' Justinian, 105. The Supreme Court of Louisiana, in discussing this subject, says: 'And the effect was such that the person adopted stood not only himself in relation of child to him adopting, but his children became the grandchildren of such person.' * * * It is true that the law cannot do the work of nature and create one a child who by nature is a stranger, but it may fix the legal status of the child. While, therefore, the Pennsylvania Court is right in saying that the law cannot make the child a natural one, the conclusion that the status of the adoptive child to the adoptive father may not be fixed by law does not follow by any means. The law may declare the status, and from the status courts must determine the correlative rights of parent and child thus created.

Conclusions of Judge Osborne.

> * * * the Court correctly laid down the law as to the status of the child, but misled by confusing a natural relation with a legal status, was carried to an erroneous conclusion. The failure to give just importance to the difference between legal status and a natural relation is the error that invalidates the reasoning in that case, for the Court there affirmed the existence of the status, but stripped it of the incidents inseparably annexed to it, and this was a plain violation of the legal principle that where properties necessarily inhere in the thing, they cannot be separated from it. Having affirmed the existence of the legal status, the properties inseparably connected with it should also have been affirmed as governing the facts in the case. * * * The authorities we have discussed unite in affirming that the status of an adoptive child for all legal purposes, and as to the property inherited from an adoptive parent, is that of a natural child."

Batchelder v. *Waldworth, et al.* (Vermont), 82 Atl. Rep., 7, held:

The statutes of Vermont provide that on an adoption, the same rights, duties, and obligations and the same rights of inheritance shall exist "between the parties" as though the person had been the legitimate child of the adoptive parent except that the person so adopted shall not be capable of taking property expressly limited to the heirs of the body of the adoptive parent, and,

> "that, as by common acceptation of the word 'adoption' the relationship of parent and child with all the consequences of that relationship is understood" * * * "it is the rights, duties, and capacities arising from the event which creates a particular status that constitute the status itself, and afford the best definition of it. 2 Austin on Jurisprudence (3rd Ed.) 706, 709-712, 974." * * * "Furthermore, the status of parent and child is a correlative one. Where there is a legal child there is a legal father."

In *Sewall* v. *Roberts,* 115 Mass. 262, A created a trust for the benefit of his children, the terms of which he subsequently undertook to change; he later adopted a child pursuant to the statute and died, leaving no other child.

> "The statute provides that 'A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except, etc. * * *
>
> The term 'heir of the body' is a well-established technical term, with which the word 'children' or 'issue' or 'lawful issue' are not synonymous.
>
> Held, * * * that the adopted child took the remainder of the property as a 'child' under the settlement, as one of the

'legal consequences and incidents of the natural relation of parents and children' by virtue of the statute." * * *

It will be observed that the language of the Massachusetts statute, fixing the status of the adopted child, is quite similar in import to our New Jersey statute, and the construction of the one is equally applicable to the other.

In the well-considered case of *Ross* v. *Ross,* 129 Mass. 243, the question that arose was, whether an adopted child has the same rights of inheritance as legitimate offspring in the estate of the adopting father. The Court answered the question in the affirmative. The opinion, among other things, says:

"The legal adoption by one person of the offspring of another, giving him the status of a child and heir of the parent by adoption, was unknown to the law of England, or of Scotland, but was recognized by the Roman Law, and exists in many countries on the continent of Europe which derive their jurisprudence from that law. Co. Lit. b, 237 b. 4 Phillimore, 531. Mackenzie's Roman Law, 120-124. Whart. Confl. §251."

The Court then refers to the statutes of the Commonwealth, providing for the adoption of the child, and says:

" * * * and the child so adopted was thereafter to be deemed, for the purposes of inheritance and succession by such child, custody of his person, duty of obedience to such parents or parent by adoption, and all other legal consequences and incidents of the natural relation of parents and children, the same as if he had been born of such parents or parent by adoption in lawful wedlock. * * *"

The Court then discussing the statute of Pennsylvania and the cases of *Commonwealth* v. *Nancrede,* 32 Penn St. 389, and *Schafer* v. *Eneu,* 54 Penn. St. 304, and continues:

"But the opinion in each of those cases clearly recognizes, what is indeed expressly enacted in the statute, that, as between the adopted child and the adopting father, the child has all the rights and duties of a child, and the capacity to inherit as such. According to one of the most learned and thoughtful writers on jurisprudence of our time, it is the rights, duties and capacities, arising from the event which creates a particular status that constitute the status itself and afford the best definition of it. 2 Austin on Jurisprudence (3rd Ed.) 706, 709-712, 974. By the law of Pennsylvania, therefore, as enacted by its legislature and expounded by its highest judicial tribunal, the demandant, as between him and his adopting father, has in all respects the legal status of a child."

I quote further from the opinion, because of the applicability of its reasoning to the question at issue before us:

"The statute of descents which was in force at the time of the death of the intestate in 1873 enacts that when a person

dies intestate, seized of any real estate, it shall descend, subject to his debts, and saving rights of homestead, 'in manner following: First. In equal shares to his children, and to the issue of any deceased child by right of representation; and if there is no child of the intestate living at his death, then to all his other lineal descendants,' &c. 'Second. If he leaves no issue, then to his father. Third. If he leaves no issue nor father, then in equal shares to his mother, brothers and sisters,' &c. 'Eighth. If the intestate leaves a widow and no kindred, his estate shall descend to his widow, and if the intestate is a married woman and leaves no kindred, her estate shall descend to her husband. Ninth. If the intestate leaves no kindred, and no widow or husband, his or her estate shall escheat to the Commonwealth.'' Gen. Sts. c. 91, §1. See also St. 1876, c. 220.

''But this section must be understood as merely laying down general rules of inheritance, and not as completely and accurately defining how the status is to be created which gives the capacity to inherit. It does not undertake to prescribe who shall be considered a child, or a widow, or a husband, or what is necessary to constitute the legal relation of husband and wife, or of parent and child. Those requisites must be sought elsewhere. The words 'children' and 'child' for instance, in the first clause, 'issue,' in the phrase 'if he leaves no issue,' in subsequent clauses, and 'kindred,' in the last two clauses of this section, clearly include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth under §4 of the same chapter, or a child adopted under the provisions of c. 110 of the General Statutes, or c. 310 of the statutes of 1871.''

The *Matter of the Estate of Wardell* was a case where the testatrix had omitted mention in her will of an illegitimate daughter. The California Code provided that where a testator omits to provide in his will for any of his children, etc., such child must have the same share in his estate as if he had died intestate. In construing the word ''children'' as used in this code, the Court said:

''If courts were now to restrict the word to its common law meaning, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute law, the offspring of marriage null in law (§84, Civ. Code), children born out of lawful wedlock whose parents subsequently intermarried (Sec. 215, *id.*), and children by acknowledgment or adoption of their father (Secs. 224, 227, 228 and 230, *id.*) are all legitimate. These, although incapacitated at common law from succeeding to any rights of their father, are regarded for all purposes as legitimate from the time of their

> birth. Between them and the legitimate offspring of the same parents the law has established cognatic relations, and either is as capable as the other of exercising inheritable rights. Hence the term 'children,' as used in Sec. 1307 of the law of succession, must relate to *status,* not to origin—to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they may have been begotten. The word has, therefore, a statutory and not a common-law meaning; and its meaning includes all children upon whom has been conferred by law the capacity of inheritance." *Estate of Wardell,* 57 Cal., p. 484.

Interpreting the provision of the civil code in California concerning the adoption of children and the provision concerning the title to an estate left by a decedent, the Court, *in re Newman's Estate* (Sup. Ct. California), 16 Pac. Rep. 887, held that

> "The use of the word 'issue' (in the latter provision of the code) does not limit the right of inheritance to natural children only. That section prescribed the rule of inheritance. The word 'issue' is there used in the same sense as the words 'child' and 'children.' If the adopted child is, by virtue of its *status,* to be regarded and treated in all respects as the child of the person adopting, and is to have all the rights, and be subject to all the duties, of the legal relation of parent and child, the right to succeed to the estate of the parent must be included."

In *Johnson's Appeal,* 88 Penna. State Repts. 346, the testatrix devised her property to her executors in trust for the benefit of her son during his lifetime, and upon his death to such person or persons as would have been entitled to the same if the son had died intestate seized thereof in fee. The Court held that by virtue of the adoption act an adopted child was entitled to the estate, saying: "Thus we see that the appellant is so far as legislative power can make her, both child and heir of Samuel B. Johnson, and if notwithstanding she yet cannot inherit her adopted father's estate, it is because the courts, under the name of judicial interpretation, have repealed the statute."

In *Appeal of Roman* (Sup. Ct. Penna.), 19 Atl. Rep. 82, it was held:

> "The question here is whether, as between the widow and the adopted child of the decedent, said child has all the rights of an actual child in the distribution of his estate. * * * The act of 1855 is explicit that a child adopted under the provisions thereof 'shall assume the name of the adopting parent, and have all the rights of a child and heir of such adopting parent.' We think, with this explicit language of the act, and our construction of it in Johnson's Appeal, there should be no further doubt upon this question."

In *Riley* v. *Day* (Sup. Ct. Kansas), 129 Pac. Rep., p. 524, the Court said:

> "After prescribing the steps necessary to the adoption of a minor child, the statute declares that the person adopting the minor is entitled to exercise all the rights of a parent, and is subject to all the liabilities of that relation, and, as to the status and rights of the adopted child, it provides that: 'Minor children adopted as aforesaid shall assume the surname of the person by whom they are adopted, and shall be entitled to the same rights of person and property as children or heirs at law of the person thus adopting them.' Gen. Stat. 1909, Sec. 5066. According to this provision, which has been in force since 1868, the minor so adopted is not only given the position of a child, but is placed on an equality with the other children and heirs of the adopting parent as to all personal and property rights. It is claimed, however, that a provision of the act concerning descents and distributions limits the rank and rights thus conferred on an adopted child. After defining the rights and portions of a widow in the estate of her deceased husband and of the surviving husband in the estate of the deceased wife, it is provided that: 'Subject to the rights and charges hereinbefore contemplated, the remaining estate of which the decedent died seized shall, in the absence of other arrangements by will, descend in equal shares to his children surviving him, and the living issue, if any, of prior deceased children; but such issue shall collectively inherit only that share to which their parent would have been entitled had he been living.'' Gen. Stat. 1909, Sec. 2952.
>
> "It has been the generally accepted interpretation of this provision that 'issue' is used as the equivalent of 'children' and that an adopted child of an intestate would share in the estate with the widow, and that, if no wife was left, a surviving adopted child would take the estate rather than the parents of the intestate.
>
> "The word is used in different senses in the various statutes, and its interpretation depends largely on the connection in which it appears and the sense in which it is used in the same act or in others on related subjects.''

In *Shick, et al.* v. *Howe* (Sup. Ct. Iowa), 114 N. W. Rep. 916, held that a child legally adopted in New York was entitled to inherit through a foster parent the share that her father would have taken in the intestate's estate had he survived.

In *Atchison* v. *Atchison's Executors* (Court of Appeals, Kentucky), 12 S. W. Rep. 942, the Court held that under the Kentucky statute providing for adoption the person adopted will inherit in the same manner as a child in fact.

In *Virgin* v. *Marwick, et al.* (Sup. Ct. Maine), 55 Atl. Rep. 520, where the question was as to the rights of an adopted child to the

benefits of a life insurance policy, the Court held that where a statute authorizes a full and complete adoption the child adopted thereunder acquires all the legal rights and capacities, including that of inheritance, of a natural child, and that a policy of insurance passes to such adopted child.

Warren v. *Prescott, et al.* (Sup. Ct. Maine), 84 Me. 483, 17 L. R. A. 436; 30 Am. St. Rep. 370, 24 Atl. Rep. 948, holds that a legally adopted child is a lineal descendant of its adopting parents within the meaning of a statute which provides that an adopted child becomes "to all intents and purposes, the child of its adopters, the same as though born to them in lawful wedlock," except that it shall not inherit property expressly limited to the heirs of the body and that it shall not inherit property from the adopters lineal or collateral kindred by right of representation. The Court says:

> "It is as competent for the legislature to place a child by adoption in the direct line of the descent as for the common law to place a child by birth there. And that is precisely what the legislature has done, and what it undoubtedly intended to do, when, in strong, emphatic language, it declared that a legally adopted child becomes to all intents and purposes the child of the adopters, the same as if he were born to them in lawful wedlock, with the two exceptions named, neither of which, as we have already seen, is applicable to such a case. This conclusion is, in our judgment, as undisputable as a mathematical demonstration."

The legislative intent, in passing the Adoption Act, was evidently to place the adopted child upon the same footing as a natural born child, as indicated by the language of the act.

Other jurisdictions have adopted a contrary view, and therefore the question presents some difficulty, as it has not been passed upon in New Jersey, but I am of the opinion that an adopted child is "issue" within the meaning and intent of our statute except for the purpose expressly indicated therein, and therefore find that testator died leaving issue and that section 20 of the Wills Act does not apply. The Will must be admitted to probate.

H. V. OSBORNE,
Judge.

Order Granting Probate.

Filed.

This matter being opened to the Court by John E. Helm, proctor for proponent, and it appearing that Emma M. Book and John T. White, the executors named in the last Will and Testament of William Book, late of the County of Essex, deceased, duly presented the said paper to the Surrogate of the County of Essex for probate, and that afterwards the said John T. White withdrew the application for

probate of said Will on his part and duly filed a renunciation of his right of executorship under said Will as appears from his said renunciation.

And it appearing that a caveat against the probate of said Will has been duly filed with the said Surrogate, and citations having been issued to all persons in interest and returned duly served, and the matter coming on to be heard, and the Court having taken testimony and examined into the matter, and being of the opinion that the paper writing was duly executed by the said William Book as and for his last Will and Testament in manner and form prescribed by the Statute in such case made and provided that said William Book at the time of making said Will was of sound and disposing mind, memory and understanding.

It is thereupon on this 28th day of June, 1918, ordered, adjudged and decreed that the aforesaid paper writing be and the same is hereby established as the last Will and Testament of the said William Book, deceased, and that the same be admitted to probate. And it is further ordered that letters testamentary thereon be issued to the said Emma M. Book, the executrix in said Will named, upon her duly qualifying as such.

And it is further ordered that a counsel fee of twelve hundred and fifty dollars ($1,250) be allowed to John E. Helm and Harry Campton, proctors and counsel for proponent, and the Court being satisfied that the caveator herein had reasonable cause for contesting the validity of the said Will.

It is further ordered that a counsel fee of twelve hundred and fifty dollars be allowed to Thomas S. Henry and Francis Child, proctors, and counsel for caveator, the aforesaid counsel fees to be paid by the said Emma M. Book, the executrix named in said Will, out of the estate of the testator.

H. V. OSBORNE,
Judge.

Notice of Appeal.

Filed.

ESSEX COUNTY ORPHANS' COURT.

In the matter of the probate of the Will of WILLIAM BOOK, deceased.	*On Petition of Appeal.* *Notice of Appeal.*

WILLIAM FEINDT, the natural father and as next friend of Frederick Feindt Book, on behalf of the said Frederick Feindt Book, one of the next of kin of William Book deceased, hereby appeals to the Prerogative Court from the decree entered herein on the 28th day of June, 1918, admitting to probate a certain paper writing, as the last Will and Testament of William Book, deceased, and from every part of said decree excepting only the allowance of counsel fees to the proctors for the proponent and caveator.

THOMAS S. HENRY,
and
FRANCIS CHILD,
Proctors for Appellant.

Dated, Newark, N. J., July 26, 1918.

Petition of Appeal.

Filed August 15, 1918.

New Jersey Prerogative Court

In the Matter of the Appeal from the Decree of the Orphans' Court of Essex County admitting to probate a certain paper writing as the Last Will and Testament of WILLIAM BOOK, deceased.	*On Petition of Appeal.* *Petition of Appeal.*

To the Ordinary of the State of New Jersey:

The petition of William Feindt, the next friend of Frederick Feindt Book, of the City of Newark, in the County of Essex and State of New Jersey, respectfully shows:

1. Petitioner is the next friend of Frederick Feindt Book, an adopted child of and one of the next of kin of William Book, late of the County of Essex, deceased. On the 28th day of June, 1918, the Orphans' Court of Essex County made its order admitting to probate a certain paper writing purporting to be the last will and testament of the said William Book, deceased.

2. Your petitioner complains and alleges that the whole and every part of the aforesaid decree is erroneous, improper and illegal, so far as the said decree admits said paper writing to probate, as the last Will and Testament of William Book, deceased, and that your petitioner is aggrieved thereby.

Your petitioner therefore prays that the aforesaid order of the said Orphans' Court and every part thereof, except the part thereof making allowances to the proctors for the caveator and proponent, be reversed by this Court.

Dated, Newark, N. J., August 2nd, 1918.

THOMAS S. HENRY,
and
FRANCIS CHILD,
Proctors for and of Counsel with Appellant.

Formal answer to Petition of Appeal filed.

Opinion of Vice-Ordinary.

Filed October 21, 1918.

NEW JERSEY PREROGATIVE COURT.

In the matter of the appeal from the decree of the Orphans' Court for Essex County admitting to probate a certain paper writing as the last Will and Testament of William Book, deceased.	*On appeal from the Essex Orphans' Court.* *Opinion.*

1. An adopted child is not issue within the purview of section 20 of an act concerning wills, 4 C. S. of N. J., p. 5,865, and the will of a testator who, at the time of making had no issue although he had an adopted child and who subsequently died with his wife enceinte of a child, which was thereafter born, is void.

Mr. Thomas S. Henry and Mr. Francis Child, for appellant.

Mr. John E. Helm and Mr. Harry Campton, for respondent.

LANE, *V. O.*

The testator adopted a child in accordance with the provisions of an act concerning minors, their adoption, custody and maintenance, Revision of 1902, 2 C. S. of N. J., p. 2,807, amended P. L. 1912, p. 53. His wife at the time of the adoption died. By her he had no children. He remarried. He then made his will. He died and after his death a posthumous child of the second marriage was born. The will was admitted to probate by the Orphans' Court. It provides substantially that two-thirds of his estate should go to his wife and that one-third should be held in trust for the benefit of (and ultimately to go to) the adopted child under certain conditions.

A caveat was filed against probate by William Feindt, the natural father of the adopted child. Although not so stated in terms, it is apparent that the caveat was filed on behalf of the adopted child. Subsequently an order was made appointing the natural father next friend of the adopted child.

The contention of the respondent that the appellant had no standing in the court below is untenable I think for the reasons stated below.

The insistence of the appellant is that under section 20 of an act concerning wills, 4 C. S. of N. J., p. 5,865, the will is void, having been made at a time when the testator had no issue living, the testator dying with his wife enceinte of a child, which was thereafter born.

The single question presented for determination is whether the testator having an adopted child at the time of the making of the will had issue within the purview of section 20. Sections 20 and 21

of the Wills Act read as follows (p. 5,865): Section 20: "That every last will and testament made when the testator had no issue living, wherein any issue he might have is not provided for or mentioned, if at the time of his death he leave a child, children or issue, or leave his wife enceinte of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate." Section 21: "That if a testator having a child or children born at the time of making and publishing his last will and testament, shall at his death, leave a child or children born after the making and publishing of his said last will and testament, or any descendant or descendants of such after-born child or children, the child or children so after-born, or their descendant or descendants respectively, if neither provided for by settlement nor disinherited by the said testator, shall succeed to the same portion of the father's estate as such child or children or descendants as aforesaid would have been entitled to if the father had died intestate; towards raising such portion or portions, the devisees and legatees or their representatives, shall contribute proportionately out of the part devised and bequeathed to them by the same will and testament."

At the time these sections were originally enacted there was no statute of this State providing for adoption. The Legislature therefore could not have had adopted children in contemplation. It is clear that the words "issue," "child" or "children" in sections 20 and 21 are used in their strict and natural sense and that the words "child" or "children" refer to a child or children born to the testator. The word "issue" may include descendants of every degree. In *Wright* v. *Gaskill,* 74 N. J. E. 742, the present Chancellor, then Vice Chancellor, held that that word "issue" in a device is equivalent to heirs of the body. The Court of Errors and Appeals in *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. E. 475 at p. 486, said that the word issue when not restrained by the context, is co-extensive and synonymous with descendants, comprehending objects of every degree. Considering the context, it is clear I think that the legislative intent was that a will should be considered void if it appear that it was made at a time when the testator had no descendants (by blood) living and that after the making thereof there had been a child or children born to the testator and that at the time of death or at the conclusion of the period of gestation such child or children or his or their descendants are living.

The respondent insists that the effect of the Adoption Act is to make an adopted child issue for all purposes not expressly excepted by the terms of the act. The conclusion that I have reached renders it unnecessary for me to pass upon the question raised by the appellant as to whether, if the Adoption Act can be so construed, it is to such extent unconstitutional upon the ground that its purpose is not expressed in its title upon the reasoning of the case in which the act abolishing dower and curtesy has been held unconstitutional. The respondent would have the statute (sections 20 and 21 of the Wills Act) read as follows: Section 20: "That every last will and

testament made when the testator had no issue (or adopted child) living, wherein any issue (or adopted child) he might have is not provided for or mentioned, if at the time of his death he leave a child, children (natural or adopted) or issue, or leave his wife enceinte of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate." Section 21. That if a testator having a child or children born (or adopted) at the time of making and publishing his last will and testament, shall at his death, leave a child or children born (or adopted) after the making and publishing of his said last will and testament, or any descendant or descendants of such after-born (or adopted) child or children, the child or children so after-born (or adopted), etc. Turning to the Adoption Act we find that the effect of adoption is as follows (P. L. 1912, p. 53): "And the adopting parent or parents of the child shall be invested with every legal right in respect to obedience and maintenance on the part of the child as if said child had been born to them in lawful wedlock; and the child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock; provided, said child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents, nor property coming from the collateral kindred of such adopting parent or parents by right of representation; and provided also, on the death of the adopting parent or parents and the subsequent death of the child so adopted, without issue, the property of such deceased parent or parents shall descend to and be distributed among the next of kin of said parent or parents and not to the next of kin of the adopted child; and provided also, if such adopting parent or parents shall have other child or children, then, and in that case the children by birth and by adoption shall, respectively, inherit from and through each other as if all had been children of the same parents born in lawful wedlock."

Adoption was unknown at the common law and it has been universally held in common law states that the provisions of the statutes providing for it, being inderogation of the common law, must be strictly construed.

The Legislature intended to permit the creation of an artificial status which would have so many of the incidents of the natural status of parent and child as indicated by the act, but it does not follow from this that it was the legislative intent, because it attached to the artificial status most of the attributes which attach to the natural status, to create a status which, aside from the exceptions specifically provided for by the act, should be in all respects equal to the natural status. In other words, it does not follow that the Legislature intended that in all cases, except those expressly excepted by the act, the adopted child should be considered as issue, or, as a child where the term "child" is used as synonymous with a child born of the parent.

Opinion of Vice-Ordinary.

The case is novel in this State, and when resort is had to other jurisdictions it is found that the cases are in conflict, especially if headnotes alone are considered. A critical examination of the opinions will disclose that they are not in such hopeless conflict as otherwise would seem. *1 Ruling Case Law,* title "Adoption," section 30, section 33; 46 L. R. A. 171, 17 L. R. A. 435, 7 L. R. A. 485, 30 L. R. A. N. S. 914, 44 L. R. A. N. S. 296, 8 L. R. A. N. S. 117.

But slight assistance, however, can be obtained from an extended consideration of these cases. Many of them have been determined upon statutes differing in some respects from those here in force. Others rest upon local law not applicable in this State, and in others it will be found that the statutes under consideration were adopted contemporaneously whereas in this State they were not. Before the Court can find that an adopted child is within the purview of section 20 of the Wills Act I think it must be made clear to appear that there can be no logical argument that there should be a distinction, as to the revocation of a will, between those cases in which the testator may have issue of his body at the time he makes the will and those cases in which he may have an adopted child, and also between those cases in which he may have issue born of the body after he has made his will, and those cases in which he may have adopted a child. I am of the opinion that this does not clearly appear. The reason that the Legislature has provided that a will should be revoked if made when there is no issue living and afterwards there be issue born, etc., is that it was contemplated that the testator if he had realized the situation would, in all probability, have made other disposition of his entire estate and the reason why, in case the will be made when there is issue living and thereafter children be born, that the after-born children or their descendants are let in to share in the estate as if the testator had died intestate and the legacies, etc., abate sufficiently to make up the shares, must be that the testator having issue living at the time he made his will, in making it and providing for others, must be assumed to have considered the claim and demand of the issue. I do not think it necessarily follows that the effect of adopting a child is the same upon the mind as having issue born.

In *Davis* v. *Fogle,* Supreme Court of Indiana, 1890, 124 Ind. 41, 23 N. E. 861, 7 L. R. A. 485, the Court held, under a statute which provided that a will should be deemed revoked if the testator should have born to him legitimate issue who should survive him, or should have posthumous issue, that the will was not revoked by the adoption of a child although by the adoption statute the child was entitled to receive all the rights and interests in the estate of the adopting parent by descent or otherwise that such child would if the natural heir of such parent. The Court said: "To hold that the adoption of a child revokes the will, it is necessary to interpolate into section 2,560, after the words 'legitimate issue,' the words 'or shall adopt a child,' or words to the same effect. * * * * It would be legislation and enacting a statute to so construe it, and would be putting an unwarranted construction upon the statute to hold that the words 'the testator shall have born to him legitimate issue' mean the same

as or include an adopted child, or that by the adoption of a child a parent has born to him or has legitimate issue. The one is made a legal heir by legal proceedings under the statute, and the other is an heir by reason of being born in lawful wedlock; for one the parent has natural love and affection, for the other the parent may or may not have. The one the parent is bound to by nature and under moral obligation to support, maintain, educate and provide for, and to the other the parent is made under such obligations as the statute imposes and none other. The statute gives to the one certain rights and imposes certain obligations on the adopting parents, but it does not make it the legitimate child and issue of the adopting parents or a child born to them."

Although there is no case in this State in which the precise question now before the Court has been determined, there are two cases from our court of last resort that seem to me, particularly when considered in conjunction with the cases from foreign jurisdictions, to point irresistibly to the manner in which it must be decided.

In *Heidencamp* v. *Jersey City, &c., Ry. Co.*, 69 N. J. L. 284, the Court of Errors and Appeals held that under the Death Act the next of kin of a deceased was the next of kin by blood and not by the adopting parents. The Court considering the effect of the Adoption Act upon the Death Act said: "The statute expressly invests the adopting parent with every legal right in respect to obedience and maintenance on the part of the child as if the child had been born to them in lawful wedlock, but it wholly fails to bestow upon the adopting parent any right to inherit the estate of the adopted child."

In *Stout* v. *Cook*, 77 N. J. E., p. 153, Vice-Chancellor Howell held that an adopted child was not within the term "child or children," as used in a will made by the father of the adoptive parent prior to the enactment of the Adoption Act. The Vice-Chancellor said: "The will speaks only of 'child or children,' which could mean to the mind of the testator only blood relations, and not relations by adoption. To hold in her favor would be to hold that she is within the terms of the will a child, and that, in the face of the fact that Thomas Stout never had any children, and in face of the other fact, which must be conceded by the allegation of adoption, that she was somebody else's child, and therefore not the child of Jacob Stout. Neither is she Jacob Stout's child by implication of the statute. Section 4 of the act of 1877 provides that a child or children (so adopted) shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the right of inheritance to real estate or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock. In other words, such adopted child may inherit from the foster parent, but the adoption shall not operate to create a capacity to take as a child under the will of some other person." Upon this branch of the case this Court was affirmed in the Court of Errors and Appeals, 79 N. J. E. 640, for the reasons stated by Vice-Chancellor Howell.

The effect of *Heidencamp* v. *Jersey City, &c., Ry. Co., supra,* is to render the case of *Humphries* v. *Davis,* 100 Ind. 274 (1884) and the cases resting upon its reasoning, relied on by the respondent and by the court below, of little authority in this State. In that case the Indiana court, in a particularly hard situation, held that the adoptive parents inherited the property of the adopted child to the exclusion of the natural parents. Even in Indiana when the question arose as to whether a will was revoked, under a statute similar to that in effect here, by the adoption of a child subsequent to the making of the will, the Court, after considering the case of *Humphries* v. *Davis,* held that the will was not revoked. (*Davis* v. *Fogle,* 124 Ind. 41, 23 N. E. 860 (1890), 7 L. R. A. 485.)

It is true that the Indiana court in *Markover* v. *Krause,* 132 Ind. 294, 31 N. E. 1047 (1892), held, two judges dissenting, under a statute providing that if a man marry a second wife and has by her no children but had children living by a former wife, the fee in his lands should, on his death, vest in such children subject to a life estate of the widow, that a person adopted by decedent under the provisions of an adopting statute, under which it was provided that the adopted child should receive all the rights and interests in the estate of the adopting father and mother as if he were their natural heir, was in the position of a natural heir and inherited the adopting father's land subject to the life estate of the second wife. But the majority of the Court in its opinion reaffirmed the case of *Davis* v. *Fogle,* holding that the question then before the court was not involved in that decision. The Court stated: "The Court correctly decided that the adoption of a child was not having a child 'born to' the maker of the will. Only the birth of a child can have the effect of revoking a will."

The force of *Sewall* v. *Roberts,* 115 Mass. 262, also relied upon by the respondent and the court below, is weakened by our determination in *Stout* v. *Cook, supra.* The Massachusetts court held that an adopted child was within the term "child or children" as used in a voluntary settlement made by a testator long prior to the adoption in which he made provision for the special use and benefit of any of his children. The trust was created in 1825. In 1865 he adopted a child. In 1872 he died leaving no other child. The settlement was irrevocable. The first legislation in Massachusetts with respect to adoption was in 1851. The trust instrument also provided that if the settlor should die without leaving any issue then the principal should go to his mother; that in case he should die without leaving "any lawful issue" and his mother should die before him, then to his heirs at law and the heirs at law of his mother. The Massachusetts statute provided that an adopted child should he deemed for the purposes of inheritance by such child *and all other legal consequences and incidents of the natural relation of parents and children,* the child of the parents by adoption, the same as if born to them in lawful wedlock; except that he should not be capable of taking property expressly limited to the heirs of the body or the bodies of the parents by adoption, nor property from the lineal or

collateral kindred of such parents by right of representation. The court construing the terms of settlement held that the term "child or children," "issue and lawful issue" and "heirs" were not confined to heirs of the body and that the adopted child took under the terms of the settlement as a legal consequence and incident of the natural relation of parent and child. In view of our determination in *Stout* v. *Cook* it is at least doubtful whether our court would have decided as the Massachusetts court did. *Stout* v. *Cook* may, I suppose, be distinguished upon the ground that although the settlor in the Massachusetts case in 1825 could not have had in contemplation an adopted child when he used the terms "child or children," "issue and lawful issue" and although the settlement was irrevocable, yet when he adopted a child in 1865 he performed a voluntary act which brought the child of a stranger within the term "child or children" or "issue" used in the settlement. The case of *Sewall* v. *Roberts* is distinguished in the last paragraph of the opinion of the court in *Davis* v. *Fogle.*

In the court below the statute in Massachusetts under consideration in *Sewall* v. *Roberts* was considered similar in import to the statute in effect in this State. An examination of the Massachusetts statute will disclose that it provides that the adopted child should be deemed for the purposes of inheritance * * * * *and all other legal consequences and incidents of the natural relation of parent and child,* the child of the parents by adoption the same as if he had been born to them in lawful wedlock, whereas our statute provides that the child should be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate, or to the distribution of personal estate * * * * as if born to them in lawful wedlock. The Massachusetts court rested its determination upon the use in the Massachusetts statute of the term "all other legal consequences and incidents," absent in our statute.

Those cases holding that an adopted child is within the terms "child," "children," "issue" or "lawful issue" as used in statutes of descent and distribution are not at all applicable. It must be conceded that the Legislature having vested an adopted child with the right of inheritance and of sharing in the distribution of personal property as a natural child, the words "child," "children" or "issue" used in statutes of descent and distribution must be construed to include an adopted child unless some good reason appears why a distinction should be made between a natural child and an adopted one. Of such cases the following are examples relied upon by the court below and by the respondent: *Batchelder* v. *Walworth,* 82 Atl. Rep. 7; *Ross* v. *Ross,* 129 Mass. 243; In Appeal of Rowan, Supreme Court of Penna., 19 Atl. Rep. 82; *Riley* v. *Day,* 88 Kansas 503, 129 Pac. Rep. 524, 44 L. R. A. N. S. 296; *Atchison* v. *Atchison,* 89 Ky. 488, 12 S. W. 942, 11 Ky. L. 705; *Buckley* v. *Frazier,* 153 Mass. 525, 27 N. E. 768; *Warren* v. *Prescott* (Maine) 84 Me. 483, 24 Atl. 948, 17 L. R. A. 435; *Virgin* v. *Warwick,* 97 Me. 578, 55 Atl. 520; *Chick* v. *Howe,* Supreme Court of Iowa, 137 Iowa, 249, 114 N. W. 916, 14 L. R. A. N. S. 980;

Martin v. *Aetna Life Ins. Co.*, 73 Me. 25; Estate of Wardell, 57 Cal. 484; In re Newman's Estate, Supreme Court of California, 16 Pac. Rep. 887.

In *Morse* v. *Osborne,* New Hampshire (1910), 77 Atl. 403, 30 L. R. A. N. S. 914, the New Hampshire Supreme Court held that an adopted child was not issue within the meaning of a statute giving the widow certain rights in her husband's estate in the absence of issue of the marriage, although the statute provided that an adopted child should, for the purpose of inheritance by it and all other legal consequences and incidents of the natural relation of parents and children, be deemed the child of the parents by adoption. It reaffirmed its determination in *Murdoch* v. *Murdoch,* 74 N. H. 77, 65 Atl. 392, that the statutory adoption of a child did not invest the husband with the common law right of curtesy. It distinguished *Moran* v. *Stewart,* 122 Mo. 295, 26 S. W. 962, upon the ground that under the Missouri statute the right of the widow to take one-half in fee in lieu of dower was made dependent on the husband dying without leaving a child capable of inheritance, and inasmuch as under the adoption statute the adopted child was made capable of inheritance it was within the statute. *Buckley* v. *Frazier,* 153 Mass. 525, 27 N. E. 768, was distinguished upon the ground that a Massachusetts statute provided that the word "child" should include adopted child. It agreed with the dissenting opinion in *Markover* v. *Krauss,* 132 Ind. 294, 17 L. R. A. 806, 31 N. E. 1047. It is not necessary in my view to go as far as the New Hampshire court did to determine the case *sub judice* for, as I have above indicated, it seems to me that cases dealing with the construction of statutes of descent and distribution have but little, if any, application to a case resting upon a construction of our statute of wills. The distinction is clearly drawn in the Indiana opinion in *Markover* v. *Krauss,* 132 Ind. 294, 31 N. E. 1047, and has been recognized in California. While the California court held in the matter of Wardell, 57 Cal. 484, that under a statute which provided that where the testator omits to provide in his will for any of his children, such child should have the same share in his estate as if he had died intestate; that an adopted child was within the term "children," yet it also held in re *Estate of Comassi,* 28 L. R. A. 414, that under a statute providing that a will should be revoked upon marriage and the birth of issue, that the adoption of a stranger in blood was not an issue of the marriage and could not be treated as its equivalent.

In *Hockaday* v. *Lynn,* 200 Mo. 456, 98 S. W. 585, 8 L. R. A. N. S. 117, it was held under a statute permitting a person to adopt a child as his heir that an adopted child is not, by right of representation, entitled after the death of his adoptive parent, to take the intestate estate of the latter's brother as his heir. In *Phillips* v. *McConica,* Supreme Court of Ohio, 59 Ohio State, 1, 51 N. E. 445, it appeared that the Ohio statute provided that the adopted child should be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such persons, begotten in lawful wedlock. The Court said: "But this is far from providing

that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors," and it reached the conclusion that the adopted child although enabled to inherit from its adopter was not enabled through him to inherit from his ancestors. The Court further said: "The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this State; and to allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors." This case is in line with the determination in *Stout* v. *Cook.* A case in line with *Stout* v. *Cook* and *Phillips* v. *McConica* is *Jenkins* v. *Jenkins,* Supreme Court of New Hampshire, 11 Atl. 557. There the testator left a will under which he gave to his son all his estate and if the said son should die leaving no issue, then to the next surviving brother. The statute in reference to the adoption of children provided that the adopted child should for the purpose of inheritance by such child and all other legal consequences and incidents of the natural relation of parent and child be deemed the same as if he had been born to them in lawful wedlock except that he should not be capable of taking property expressly limited to the heirs of the body of the parent or parents by adoption. The Court held that notwithstanding the will did not expressly limit the device to the heirs of the body, yet it was clear that the intention was that if the son died without leaving lawful heirs of his body the brother should have his estate, and the Court said: "That intention could not be defeated by the substitution, after the testator's death, of a different event from the one intended by him, nor by the attempt to supply the want of an heir of the body by any other than the natural, ordinary, and lawful means. The testator would not have contemplated the adoption of a child to supply the want of an heir to William. He could not have intended by the word 'issue,' a child unlawfully begotten, and never made legitimate by marriage with the mother. He intended an heir in fact, and not one created for the purpose, by subsequent legislation and judicial proceedings."

When we turn to cases from foreign jurisdictions in which the precise question now before the Court had been at issue, we find the following situation: Under statutes similar to our Wills and Adoption acts Indiana has held that the adoption of a child does not operate to revoke a will. *Davis* v. *Fogle,* 7 L. R. A. 485, approved *Markover* v. *Krauss,* 31 N. E. 1047. So has the California Supreme Court in re *Estate of Comassi,* 28 L. R. A. 414; likewise the New York Surrogate's Court, in re *Gregory's Estate,* 37 N. Y. Supp. 925. Such undoubtedly will be the ruling in Ohio. In Iowa it has been held, *Hilpipre* v. *Claude,* 46 L. R. A. 171, that under statutes of that State a subsequent adoption of a child operates to revoke a will. But the Iowa court rested its determination upon the ground that under the

local law of the State wills might be revoked other than by the methods prescribed by the statute, and that the Adoption Act permitted adoption which would confer upon the adopted child all of the rights, privileges and responsibilities which would pertain to the child if born to the person adopting in lawful wedlock without qualification. The Iowa Court distinguished *Davis* v. *Fogle,* in re *Gregory* and in re *Estate of Comassi.* It seems to me that our statutory provisions are more nearly akin to those which were under consideration in the three latter cases than to those under consideration in the Iowa case. The Iowa Court said: "The reasons for the rule that subsequent birth of a legitimate child to the testator before his death operates as a revocation of his prior will apply with equal force to a subsequent adoption under a statute like ours, containing no exceptions or qualifications, and declaring that the rights, duties and relations between parent and child by adoption shall in all respects, including the right by inheritance, be the same that exist by law between parent and child by lawful birth." The Supreme Court of Illinois, in *Flannigan* v. *Howard,* 65 N. E. 782, held that under a statute providing that if, after making a last will and testament a child should be born to any testator and no provision be made in such will for such child, the will should not on that account be revoked, but, * * * etc.; that an adopted child was within the meaning of the act. At the time the act was passed the Adoption Act of Illinois, providing that the adopted child should be deemed for the purpose of inheritance by such child, and his descendants and husband or wife, *and other legal consequences and incidents of the natural relation of parents and children,* the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he should not be capable of taking property expressly limited to the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation, was in effect. The Illinois Court held that the effect of adoption was, under such a statute, the same as birth. It relied upon the Iowa case of *Hilpipre* v. *Claude,* 46 L. R. A. 171, and the Massachusetts case of *Sewall* v. *Roberts,* 115 Mass. 262. It is significant that the Adoption Act was in effect at the time of the passage of the act with respect to wills, and that the Adoption Act conferred upon the parties all legal consequences and incidents of the natural relation of parents and children as did the Massachusetts act considered in *Sewall* v. *Roberts.*

I am unable to agree with the Iowa Court that there may not be a legitimate argument made that the same reasoning does not apply in cases of adoption as in cases of birth and issue. *Davis* v. *Fogle,* 7 L. R. A. 485; *Phillips* v. *McConica,* 51 N. E. 445; *Stout* v. *Cook,* 77 N. J. E. 153. And as I have indicated, the Court should go slow in interpolating words in the Wills Act which must be interpolated in order that the position of the respondent may be sustained if such an argument can be made.

Opinion of Vice-Ordinary.

The underlying reasons which actuate me in reaching the conclusion that I do are: Under the common law of this State wills were not revoked by the birth of subsequent issue *Van Wickle* v. *Wickle,* 14 Dick. 317; revocation is worked solely by virtue of the provisions of the statute (contrary to the rule in Iowa); the Adoption Act was not in force at the time of the passage of the provisions of the Wills Act under discussion; it clearly appears from the context that the words in the Wills Act, "child," "children" or "issue," had reference to progeny; the provisions of the Adoption Act being in derogation of the common law, must be strictly construed; although that act purports to, in certain particulars, create a status similar to that of the natural relation of parent and child, it does not operate to confer upon such status all of the consequences and incidents, with certain exceptions, as does the statute of Massachusetts, or with no exceptions, as does the statute of Iowa; it does not appear that within the legislative contemplation there may not be a legitimate distinction between the effect of the birth of issue and the adoption of a child; the Court ought, therefore, to go slow in amending by implication the clear language of the provisions of the Wills Act; the determinations of the Court of Errors and Appeals in *Heidencamp* v. *Jersey City, &c., Ry. Co.,* 68 N. J. L. 284, and *Stout* v. *Cook,* 79 N. J. E. 640, affirming 77 N. J. E. 153, seem to indicate that *Humphries* v. *Davis,* 100 Ind. 274, and *Sewall* v. *Roberts,* 115 Mass. 262, and those cases resting upon the broad language of the courts there used are not persuasive in this State; the weight of authority in foreign jurisdictions where the statutes under consideration and the situations have been identical with those at bar is in accord wih my conclusion.

Some of the cases, notably *Humphries* v. *Davis,* have been hard ones. This case is: The equities are with the proponent of the will. The testator adopted a child, the caveator here, and made such adequate provision for him as he thought proper. He created a trust. The result of denying probate to the will will be that the testator will be considered as having died intestate and the adopted child will receive a larger interest in the property than contemplated by the testator. The result is unfortunate, but I think relief must be had of the Legislature and not of the judiciary. When the Legislature used in section 21 of the Wills Act the words "child or children born" and referred to "after-born child" and "after-born children," it defined the word "issue" used in the 20th section to mean "heirs of the body." To bring an adopted child within its provision, the date of adoption must be considered the date of birth; for, of course, the adopted child may, although adopted after the making of the will, have been born before, and it is preposterous to suppose that, if adopted children are within the purview of the statute, if they were born before but adopted after the making of the will, the will remains valid. So under section 21, if adopted children are within the purview of the statute, the date of birth must be disregarded and the date of adoption substituted.

Supplemental Opinion.

My conclusion is that an adopted child is not issue within the purview of section 20 of the act concerning wills, and that, therefore, testator having no issue living at the time of the making of the will, and as he died with his wife enciente of a child who was thereafter born, the will is void and the testator must be deemed to have died intestate.

The decree of the Orphans' Court admitting the will to probate will be reversed and the record remanded with direction to enter a decree denying probate.

Settle decree on two days' notice.

Supplemental Opinion.

Filed November 15th, 1918.

Mr. Thomas S. Henry and Mr. Francis Child, for appellant.

Mr. John E. Helm and Mr. Harry Campton, for respondent.

LANE, *V. O.*

Since the filing of the opinion in the above entitled matter, the case of in re *Puterbaugh's Estate,* Supreme Court of Pennsylvania, has been reported 104 Atl. 601. In that case the Court held that under a will providing for a gift over after the death of an individual to his child or children and their heirs, the words child or children did not include an adopted child where the adoption occurred after the death of the testator, notwithstanding the fact that it was assumed that testator knew of existing legislation that enabled any proper person to adopt a child as his child and heir. This case is in line with our holding in *Stout* v. *Cook,* 77 N. J. E., p. 153, and is opposed to *Sewall* v. *Roberts,* 115 Mass. 262.

Decree Denying Probate, etc.

Filed October 22, 1918.

NEW JERSEY PREROGATIVE COURT.

In the matter of the Appeal from the decree of the Orphans' Court of Essex County admitting to probate a certain paper writing as the last Will and Testament of WILLIAM BOOK, deceased.	*On Appeal from Essex County Orphans' Court.* *Decree Reversing Decree of Essex County Orphans' Court and Denying Probate and Revoking Letters Testamentary.*

WILLIAM FEINDT, the next friend of Frederick Feindt Book, an adopted child of William Book, late of the County of Essex, deceased, having presented his petition of appeal from a decree of the Orphans' Court of Essex County, made on the 28th day of June, 1918, admitting to probate a certain paper writing purporting to be the last will and testament of the said William Book, deceased, and granting letters testamentary thereon to Emma M. Book, executrix therein named, and said appeal having been set down for hearing and argument before this Court on the 2nd day of October, 1918, and the Court having heard the argument of counsel and having examined the record and testimony taken in the Essex County Orphans' Court, and being satisfied that the said William Book, at the time of executing the aforesaid paper writing, had no issue living, and that subsequent to the making of said will issue was born to the said William Book, which said issue was not disinherited or otherwise provided for in said will, and that said paper writing purporting to be the last will and testament of William Book is void and should not have been admitted to probate as the last will and testament of William Book by the Essex County Orphans' Court.

It is, thereupon, on this 23rd day of October, 1918, on motion of Thomas S. Henry and Francis Child, proctors for the appellant, ORDERED, ADJUDGED AND DECREED that the aforesaid paper writing is not the last will and testament of the said William Book, deceased, and that the decree made by the Essex County Orphans' Court on the 28th day of June, 1918, admitting said will to probate as and for the last will and testament of the said William Book, deceased, be and the same is hereby reversed and set aside, and that the letters testamentary issued thereon be and the same are hereby revoked.

And it is further ORDERED that a counsel fee of $250.00 be allowed to Thomas S. Henry and Francis Child, counsel for the said William

Notice of Appeal.

Feindt, the appellant herein, and that a counsel fee of $250.00 be allowed to John E. Helm and Harry Campton, counsel for the respondent herein, and that said counsel fees, together with the costs of this appellant, be paid from the estate of the said William Book, deceased.

E. R. WALKER,
O.

Respectfully advised,

MERRITT LANE,
V. O.

Notice of Appeal.

Filed October 29, 1918.

EMMA M. BOOK, executrix of the last will and testament of William Book, deceased, hereby appeals from the decree reversing the decree of the Essex County Orphans' Court and denying probate and revoking letters testamentary, filed in this cause and dated October 23, 1918, and from every part thereof to the Court of Errors and Appeals in the last resort in all causes.

HARRY CAMPTON,
Proctor for and of Counsel with Emma M. Book, Executrix of the Last Will and Testament of William Book, Deceased.

Dated, October 28, 1918.

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

GEORGE D. MULLIGAN,
Of Counsel with Emma M. Book, Executrix of the Last Will and Testament of William Book, Deceased.

Service of a copy of the within notice of appeal is hereby acknowledged this 29th day of October, 1918.

FRANCIS CHILD,
Proctor.

Petition of Appeal.

Filed November 3, 1918.

New Jersey Court of Errors and Appeals

In the matter of the Appeal from the decree of the Orphans' Court of Essex County admitting to probate a certain paper writing as the last Will and Testament of WILLIAM BOOK, deceased.	*On Appeal from Prerogative Court.* *Petition of Appeal*

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

The petition of Emma M. Book, executrix of the last will and testament of William Book, deceased, appellant, respectfully shows that your petitioner finds herself aggrieved by a decree made in the Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, on October 23, 1918, in that the said decree recites and adjudges that the aforesaid paper writing is not the last will and testament of the said William Book, deceased, and that the decree made by the Essex County Orphans' Court on June 28, 1918, admitting said will to probate as and for the last will and testament of the said William Book, deceased, be reversed and set aside, and that the letters testamentary issued thereon be revoked, and your petitioner appeals from the said decree and from every part thereof upon the ground that the same is erroneous for that the said Ordinary should have recited and adjudged that the aforesaid paper writing is the last will and testament of the said William Book, deceased, and that the decree made by the Essex County Orphans' Court on June 28, 1918, admitting the said will to probate as and for the last will and testament of the said William Book, deceased, be affirmed.

Your petitioner, therefore, prays that the said decree may be reversed, rescinded and for nothing holden, and that your petitioner may have such further relief as shall be meet.

HARRY CAMPTON,

GEORGE D. MULLIGAN,

Proctors for and of Counsel with Appellant.

Answer to Petition of Appeal.

Filed November 22, 1918.

The answer of William Feindt, as next friend of Frederick Feindt Book, respondent, to the petition of Emma M. Book, the appellant, in the above matter.

This respondent, not admitting that any or all of the matters which in said petition of appeal are contained to be true, but in answer thereto, nevertheless, says and admits that a decree was on the 23rd day of October, 1918, made and entered in the Prerogative Court by his Honor, Edwin Robert Walker, Ordinary of the State of New Jersey, in the cause, for that purpose mentioned in said petition of appeal, 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 in all respects just, legal and proper, and prays that the same may be affirmed, with costs to be adjudged to this respondent.

THOMAS S. HENRY,

FRANCIS CHILD,

Proctors for and of Counsel with Respondent.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

In the Matter of the Appeal from the Decree of the Orphans' Court of Essex County, admitting to probate a certain paper writing as the Last Will and Testament of William Book, deceased.

On Appeal from Prerogative Court.

Brief of Respondent.

Facts.

The facts in this case are as follows: William Book, deceased, married twice; by his first wife he had no children, and during her life legally adopted Frederick Book. After the death of his first wife, William Book married Emma Goldman, by whom he had one child which was born after the death of William Book. No provision was made for this child in the will of William Book, and said child was not provided for or mentioned in said will. Frederick Book, the adopted child, the posthumous child and his widow survived William Book.

The question to be decided by this appeal is whether an adopted child is "issue" within the meaning of the 20th section of the Wills Act of this State, 4 Compiled Statutes, page 5865, which reads as follows:

> Section 20. "That every last will and testament made when the testator had no issue living, wherein any issue he might have is not provided for or mentioned, if at the time of his death he leave a child, children or issue, or leave his wife enceinte of a child or children which shall be born, such will shall be void, and such testator be deemed to die intestate." (Rev. 1877, p. 1246.)

Under the terms of the will of William Book, his widow took outright two-thirds of his estate, which consisted of real and personal property, and his adopted child took one-third subject to certain conditions.

It will be seen at once, that if the decree of the Prerogative Court is affirmed and the will denied probate, the widow will be entitled only to dower in the real estate, instead of a two-thirds interest therein.

It is the contention of the appellant that the will of William Book is not void, but is valid and is subject only to the provisions of the 21st section of the Wills Act, Compiled Statutes, N. J., Vol. 4, page 5865, which reads as follows:

Section 21—

"That if a testator having a child or children born at the time of making and publishing his last will and testament, shall at his death, leave a child or children born after the making and publishing of his said last will and testament, or any descendant or descendants of such after-born child or children, the child or children so after-born, or their descendant or descendants respectively, if neither provided for by settlement nor disinherited by the said testator, shall succeed to the same portion of the father's estate as such child or children or descendants as aforesaid would have been entitled to if the father had died intestate; towards raising which portion or portions, the devisees and legatees or their representatives, shall contribute proportionately out of the part devised and bequeathed to them by the same will and testament." (Rev. 1877, p. 1246.)

The appellant insists that the term "issue" as used in the 20th section of the Wills Act includes an "adopted child" and contends that the act of the legislature of this State entitled "An Act Concerning Minors, their adoption and maintenance." 2 Compiled Statutes, N. J., page 2808, and particularly sections 3 and 4 of said Act have the effect of making an adopted child issue within the meaning of section 20 of the Act Concerning Wills.

The Essex County Orphans' Court held that an adopted child was issue, and granted probate of the will of William Book, deceased.

An appeal was taken from the decree of the Essex Orphans' Court, and the Prerogative Court decided that an adopted child was not issue within the meaning of the 20th section of the Wills Act, and reversed the decree of the Essex County Orphans' Court.

It is not contended by appellant that section 20 of the Wills Act standing alone is sufficiently broad to include an adopted child.

The section of the Wills Act under consideration was enacted by the legislature of this State on December 28, 1824.

At common law, a will made by a husband was not revoked by the birth of a posthumous child. *Van Winkle* v. *Van Winkle,*

59 N. J. Eq., 317, at page 319. It was in order to remedy the hardship worked by this rule of law that section 20 of the Wills Act of this State was passed. The hardship worked by the common law rule, that the birth of a child to a testator having no issue, at the time of making his will, would not make such will void is apparent. He might have left his property to his widow for life with a remainder over to collaterals or to strangers, thereby entirely disinheriting his own child.

The 21st section of the Act Concerning Wills was enacted at the same time as the 20th section, and was designed to meet the situation of where the testator had issue living at the time of making his will, and took into consideration the fact that the testator with full knowledge of the fact that he had issue at the time of making his will, made certain provisions with reference to such issue, and taking that fact into consideration had disposed of his property in a certain way. The wishes, as expressed by the testator were by the 21st section of the act to be carried out, except that contribution was to be made by the legatees to provide for the after-born child.

II.

AN ADOPTED CHILD IS NOT A "CHILD" OR "ISSUE" WITHIN THE MEANING OF THE 20TH SECTION OF THE ACT CONCERNING WILLS.

The words "child," "children," or "issue" used in the 20th section of the Act Concerning Wills, at the time of the enactment of that section had but one meaning, and that, broadly speaking, was "descendants," and it is insisted that it has no other meaning and can have no other meaning today.

Theoretically, "All men are brothers." This, from a broad standpoint, may be true, yet no court would even consider such a proposition in construing the act relative to the descent of real estate.

When a word which has a known legal meaning is used in a statute, it must be assumed that the term is used in its legal sense, in the absence of an indication of a contrary intent. 26 *Amer. & Eng. Ency. of Law,* 2nd Ed., Title Statutes, page 606.

The Court in the case of *State* v. *Engle,* 21 N. J. L., 347, at page 360, speaking of the word "heir" says:

> "It is a well settled principle, that if a statute makes use of a word, the meaning of which is well known, and

> which has a definite sense at common law, it shall be received in that sense, unless from some reason it clearly appears that it was intended to use the word in a different signification. * * * An *heir* is the person upon whom the law casts the inheritance, and the word must be so understood in this act, unless there is something that shows it to have been used in some other sense."

Technical words in a statute, unless a different meaning clearly appears, are to have their legal signification. 1 *Kent's Commentaries*, 462-464.

Bouvier defines "issue" as follows: "Descendants. All persons who have descended from a common ancestor. Citing 3 *Ves. Ch.*, 257; 17 *id.*, 481; 19 *id.*, 547; 1 *Roper. Leg.*, 90."

Since the word "issue" is a word, the meaning of which is well known, and has a definite sense, at common law, as was said above, it must be received in that sense, and its use in section 20 of the Act Concerning Wills can therefore not be held to include an adopted child. The same reasoning applies to the construction to be placed upon the term "child" as used in that section for as adoption was unknown to the common law, it necessarily follows that the child provided for was a natural and not an adopted child.

The term "issue" in a deed, will or statute does not include illegitimates nor adopted children. 17 *Amer. & Eng. Ency., 2nd Ed.*, page 544.

The courts of this State have uniformly held "issue" to mean descendants. In *Wright* v. *Gaskill*, 74 N. J. Eq., 742, the question presented for solution concerned the construction of the will of John Gaskill under whom the parties, complainant and defendants, claim by way of devise: "* * * I give and bequeath unto my nephew, John Gaskill, and my niece, Elizabeth P. Gaskill, children of my brother, William Gaskill, all the farm * * * to them or the survivor of them for and during the term of their natural life or lives of them for the said John and Elizabeth P. Gaskill, and after their death to their lawful issue in fee simple * * *." Walker, *V. C.*, at p. 744, says:

> "Where there is a life estate jointly to two or more persons, who are incapable of having a common heir (which is this case), and the remainder is to 'the heirs of their bodies' (and the words 'their issue' in a devise mean the same thing)."

To the same effect is *Beckley* v. *Riegert* (Pa., 1905) 61 Atlantic Rep., 641, in which the Court at page 642, says:

"In a will 'issue' *prima facie* means 'heirs of the body' * * * *."

To the same effect is *Stayman* v. *Paxson* (Pa., 1909), 70 Atlantic Rep., 803.

In *Weehawken Ferry Co.* v. *Sisson,* 17 N. J. Eq., 475, the Court of Errors and Appeals, at page 485, says:

"Standing uncontrolled by the context, the word 'issue' is synonymous with descendants."

Issue in statutes, wills, deeds or other instruments is defined by the following authorities to be "descendants" or "heirs of the body."

Lamb v. *Medsker* (Ind.), 74 N. E. Rep., 1012.
Holland v. *Adams* (Mass.), 3 Gray, 188.
Jordan v. *Roach* (Miss.), 32 Miss., 431.
Drake v. *Drake* (N. Y.), 134 N. Y., 20.
Wister v. *Scott* (Pa.), 105 Pa. St., 200.
1 *Jarman on Wills,* 89.
2 *Redfield on Wills,* 2nd Ed., 235.
Johnson v. *Johnson,* 59 Ky., 331.
Coats v. *Burton,* 191 Mass., 180.
Robinson's Estate, 24 Atl. Rep., 297.
Granger v. *Granger,* 44 N. E., 189; aff. 147 Ind., 195.

The 20th section of the Act Concerning Wills is a statute in derogation of the common law, and is to be strictly construed. 12 *Corpus Juris,* pp. 186-187.

III.

THE RIGHTS OF AN ADOPTED CHILD, AS SUCH, ARE PURELY STATUTORY.

An adopted child is a creature of the statute, first enacted in this State in 1877, before which time there were no legally adopted children, for there was no statute by virtue of which an adoption could take place. *Stout* v. *Cook,* 77 N. J. Eq., 153; affirmed 79 N. J. Eq., 640. In other words, whatever rights the child had by adoption are only such as the statute has given it. As was said in *re Carrol's Estate* (Pa.), 68 Atl. Rep., 1038: "The legal act of adoption, in so far as it carries with it the right to inherit, is purely statutory." In that re-

spect the adopted child's rights and powers are limited, as those of a statutory tribunal are by the creating statute.

The Adoption Act not only could not but does not attempt to make the adopted child issue, but merely gives it the right of inheritance from the adopting parents, as if born to them in lawful wedlock.

IV.

THE ADOPTION ACT DOES NOT MAKE AN ADOPTED CHILD *ISSUE* WITHIN THE PURVIEW OF SECTION 20 OF THE ACT CONCERNING WILLS.

The Adoption Act fixes the right of the adopted child to inherit as though it were born in lawful wedlock of the adopting parents, but does not make the child *issue* within the purview of section 20 of the Act Concerning Wills. Such a contruction is implied from the very language of the Adoption Act, namely:

> " * * * Said child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents, nor property coming from collateral kindred of such adopting parent or parents by right of *representation.*" 2 Comp. Stat. 2809, Sec. 16.

In other words, if A, the heir at law of B, had adopted a child C, upon A's death before B, C does not inherit from B as the representative or issue of A, nor would C take under a legacy from B to A as his issue.

As was said by Howell, *V. C.,* in *Stout* v. *Cook,* 77 N. J. Eq., 153, at page 165:

> "Section 4 of the act of 1877 provides that a child or children (so adopted) shall be invested with every legal right, privilege, obligation, and relation in respect to education, maintenance, or the rights of inheritance to real estate or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock. In other words, such adopted child may inherit from the foster parent, but the adoption shall not operate to create a capacity to take as a child under the will of some other person."

The learned Vice-Chancellor in the case just cited undoubtedly followed the principle enunciated in the case of *Den* v. *Emans,* 3 N. J. L., 522, in which the Court, at page 525, said:

> "The word 'issue' in a devise as a word of limitation is synonymous to 'heir.' It is a *nomen collectivum* and takes in the whole generation."

In *Powell* v. *Board of Domestic Missions,* 49 Pa. St., 46, the Court said:

> "Undoubtedly the word 'issue' is regarded primarily as a word of limitation, and as synonymous with the technical words 'heirs of the body'."

The very language of the Adoption Act shows that it was not the intention of the legislature to create the adopted child "issue" of the adopting parents. Section 4 of the act provides:

> " * * * provided, said child shall not be capable of taking property expressly limited to the heirs of the body of the adopting parent or parents, nor property coming from the collateral kindred of such adopting parent or parents by right of representation; * * * ."

This language is very significant as to the intent of the legislature to create a distinction between an adopted and a natural child. The language of this section certainly disposes of the contention of the appellant that the legislature did not intend to make any distinction between the rights of an adopted and those of a natural child.

In the case of *Heidecamp, Admr.* v. *The Jersey City, Hoboken and Paterson Street Railway Company,* 69 N. J. L., 284, the Court of Errors held that under the Death Act, the next of kin of a deceased was the next of kin by blood and not by the adopting parents. The Court considering the effect of the Adoption Act upon the Death Act, said, at page 285:

> "The statute expressly invests the adopting parent with every legal right in respect to obedience and maintenance on the part of the child as if the child had been born to them in lawful wedlock, but it wholly fails to bestow upon the adopting parent any right to inherit the estate of the adopted child."

It would seem by this decision and the decision in *Stout* v. *Cook, supra,* that our courts have held that an adopted child is not *issue* and is not considered as having the same status as a natural child.

Statutes containing provisions similar to those contained in our Act Concerning Wills and the Adoption Act are in effect in several other states where they have been construed. Invariably the question of what constitutes "issue" has been raisd. The definition of "issue" has been fully covered by the preceding paragraphs of this brief. This portion of the brief will therefore be confined to cases construing statutes similar to ours with reference to the rights of adopted children and the effect of adoption on the rights of inheritance dower and curtesy.

In *Davis* v. *Fogle* (Sup. Ct., Ind.), 124 Ind., 41; 23 N. E., 860, the Court says:

> "The question presented for decision is, does the adoption of a child, under the statute of this State, operate to revoke an antecedent will of the adopting father; he having made no provision in the will, or otherwise, for such adopted child? This question must be determined mainly by the construction to be given to our statutes. * * * So much of the statute providing for the adoption of children as is material reads as follows: 'Such Court, when satisfied that it will be for the interest of such child, shall make an order that such child be adopted; and, from and after the adoption of such child, it shall take the name in which it is adopted, and be entitled to and receive all the rights and interest in the estate of such adopted father or mother, by descent or otherwise, that such child would do if the natural heir of such adopted father or mother.' * * *
>
> "But we think that the *statute relating to the revocation of wills is decisive* of the question involved in this case. * * *" Section 2560 (Rev. St. 1881) "provides that 'if, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue.' * * * To hold that the *adoption* of a child revokes the will, it is necessary to interpolate into section 2560, after the words 'legitimate issue,' the words 'or shall adopt a child,' or words to the same effect; for the words of the statute are plain and explicit. They are: 'If, after the making of a will, the testator shall have born to him legitimate issue.' It would be legislation and enacting a statute to so construe it, and would be putting an unwarranted construction upon the statute to hold that the words 'the testator shall have born to him legitimate issue' mean the same as or include an adopted child, or that by the adoption of a child a parent has born to him, or has legitimate issue. * * * It seems clear to us that the adoption of a child does not revoke an antecedent will of the adopting parent; that it cannot be construed to operate the same as the testator having born to him legitimate issue."

It will be seen that while the above case is not exactly the same as the case now under review, still a statute relating to wills so similar to ours has been strictly construed, and it is contended that there is no difference in the legal meaning of *issue* and the words *legitimate issue.*

The case of *Humphreys* v. *Davies,* 100 Ind., 274, is, in effect, overruled by the case of *Davis* v. *Fogle.* The case of *Markover*

v. *Krauss,* 132 Ind., 294; 31 N. E., 1047, approved the case of *Davis* v. *Fogle, supra,* quoting from the last mentioned case as follows:

> "The Court correctly decided that the adoption of a child was not having a child born to the maker of a will. That only the birth of a child can have the effect of revoking a will."

In the matter of *Gregory,* reported in 15 Miss., 407, and 37 N. Y. S., 925, the Court held that:

> "The adoption of a child does not operate to revoke a prior will in which it was not mentioned; as the birth of a child revokes a prior will of the person adopting."

In the case of *Theobald* v. *Fugman,* section 5919 of the *Revised Statutes,* relating to devises for charitable purposes (Ohio Sup. Ct., 1901) 60 N. E., 606, the main question involved was whether a certain devise to a charitable institution was void by reason of section 5919 of the Revised Statutes which provided "That any Bequest or Devise to Charitable Purposes, If any Issue of Testator living, Void, unless made at least one year before his death." Such a bequest had been made. During the life time of the testatrix under sec. 4182 of the Revised Statutes she had designated as her heirs at law the plaintiffs, Frank Fugman and Katie Fugman, and to whom there were bequests in the will of the testatrix. Section 4182 provided as follows, at page 608:

> "A person of a sound mind and memory may appear before the Probate Judge of his county, and in the presence of such Judge and two disinterested persons of his or acquaintance, file a written declaration, subscribed by him, which declaration shall be attested by such disinterested persons, declaring that, as his or her free and voluntary act, he or she did designate and appoint another, naming and stating the place of residence of such person specifically, to stand toward him or her in the relation of an heir at law in the event of his or her death; thereupon the Judge, if satisfied that such declarant is of sound mind and memory, and free from any restrain, shall enter that fact upon his journal, and make a complete record of such proceedings; thenceforward the person thus designated shall be deemed and held to stand in the same relation, for all purposes, to such declarant as he or she could, IF A CHILD BORN IN LAWFUL WEDLOCK; and a certified copy of such record shall be *prima facie* evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud, or undue influence."

The Court held in the last mentioned case that the fact that under the designation of heirs act the persons designated were deemed and held in the same relation to declarant as if born in lawful wedlock to her, was not sufficient to make the designated heirs *issue* within the meaning of section 5919, Spear, *J.*, at p. 609, after quoting at length from the opinion in *Phillips* v. *McConica,* 59 Ohio St., 1; 51 N. E., 445, said:

> "We hold that heirs designated under favor of section 4182 are not within the purview of section 5919. It follows that in holding, as the Circuit Court did, that the legacies set forth in items 6, 7, 8, 19, 20 and 22 are invalid, under section 5919, Rev. St., that Court erred."

In the case of *Phillips* v. *McConica,* 59 Ohio St., 1; 51 N. E., 445, *supra,* the facts were as follows: Wilbert McConica, the legatee, having adopted Mary McConica, an infant, by legal proceedings in the Probate Court, died without issue of his body before the death of Thomas H. Madden, the testator. The question was whether the legacy to Wilbert McConica lapsed because of failure of issue of his body, or whether Mary McConica, his adopted child, was to be regarded in the law as the issue of Wilbert McConica, who was the grandson of the testator. Section 5971 of the Revised Statutes of Ohio, provides that when a devise of real or personal estate is made to any child or other relative of the testator and such child or other relative shall die, leaving issue surviving the testator, such issue shall take the estate. The Court said, at page 446:

> "The word 'issue' in this section means child of the body or heir of the body, of the deceased relative of the testator, and does not include a child adopted by such decedent. The issue in such case must be of the blood of the testator, and of the deceased child or other relative by birth. Adoption does not make the adopted child of the blood of its adopter nor of the blood of its ancestors.
>
> "True, section 3140, Rev. St., provides that such adopted child 'shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such person, begotten in lawful wedlock.' But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors."

As stated by the Vice-Ordinary in his opinion in the present case, the case of *Phillips* v. *McConica* is in line with the decision of our courts in the case of *Stout* v. *Cook, supra.* The statutes which were being construed in *Phillips* v. *McConica* are

almost identical in terms with the sections of our Act Concerning Wills and the Adoption Act now being considered in this appeal.

In *Jenkins* v. *Jenkins* (Sup. Ct., N. H.), 14 Atl. Rep., 557, the question involved was whether a remainder created by will and contingent upon the devisee leaving no issue failed because the devisee had an adopted child. The statute in reference to the adoption of the child provided that the adopted child shall, for the purpose of inheritance by such child, and *all other legal consequences and incidents of the natural relation of parent and child*, be deemed the same as if he had been born to them in lawful wedlock, except that he should not be capable of taking property expressly limited to the heirs of the body of the parent or parents by adoption. The Court in this case held that notwithstanding the will did not expressly limit the devise to the heirs of the body, yet it was clear that the intention was that if the son died without leaving lawful heirs of his body, the brother should have his estate. The Court said, at page 558:

> "That intention could not be defeated by the substitution, after the testator's death, of a different event from the one intended by him, nor by the attempt to supply the want of an heir of the body by any other than the natural, ordinary and lawful means. * * * The testator intended an heir in fact, and not one created for the purpose, by subsequent legislation and judicial proceedings."

ALLEN, *J.*, at page 557, says:

> "The statute for the adoption of children (*Id.* c. 188, sec. 4) provides that the adopted child shall be 'for the purpose of inheritance by such child, and all other legal consequences and incidents of the natural relations of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock, except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption.' * * * Adhering to the statutory definition of the word 'issue,' and to the meaning generally given to the word at common law, it was as if the testator had devised the land to the plaintiff upon William's dying leaving no heirs of his body, nor issue of such heirs; and it could not be the legal consequence of the adoption of a child not such an heir that the contingency, upon the happening of which the plaintiff would take the property, was prevented, enlarged, or changed to a different one after the death of the testator, when the will took effect."

The courts of California in *re estate of Comassi,* 28 L. R. A., 414, hold that under a statute providing that a will should be revoked upon marriage and the birth of issue, that the adoption of a stranger in blood was not an issue of the marriage and could not be treated as its equivalent. This last mentioned case is clearly distinguishable from *In the matter of Wardell,* 57 Cal., 484, in which case the Court had under consideration a statute which provided that where the testator omits to provide in his will for any of his children, such child should have the same share in his estate as if he, the testator, had died intestate. The Court in this case held that an adopted child was within the term children. There is, no doubt, a provision in the California Adoption Act which provides that an adopted child shall inherit equally with natural children, and the situation that arose in the matter of Wardell was practically the same as if the testator had died intestate.

In the case of *Morse* v. *Osborne,* N. Y., 1910; 77 Atl. Rep., 403; 39 L. R. A., N. S. (1910), the New Hampshire Supreme Court held that an adopted child was not issue within the meaning of the statute, giving the widow certain rights in her husband's estate in the absence of issue of the marriage, although the statute provided that an adopted child should, for the purpose of inheritance by it and all other legal consequences and incidents of the natural relation of parents and children, be deemed the child of the parents by adoption. In deciding this last mentioned case, the Court re-affirmed its determination in *Murdock* v. *Murdock,* 74 N. H., 77; 65 Atl. Rep., 392, that the statutory adoption of a child did not invest the husband with the common law right of curtesy.

As the Vice-Ordinary said in his opinion, a distinction is drawn between the statutes of descent and distribution and statutes relating to wills, and it is the construction to be placed on section 20 of our Act Concerning Wills that the decision in this case must be made. This distinction is clearly drawn in *Markover* v. *Krauss, supra,* and *re Estate of Comassi,* 28 L. R. A., 414.

It is true that in *Flanagan* v. *Howard* (Ill.), 65 N. E., 782, it was held that under a statute providing that if after making a last will and testament, a child should be born to any testator, and no provision be made in such will for such child, the will should not, on that account, be revoked, but the Adoption Act of Illinois was in effect at the time of the passage of the

act in respect to wills. The courts of Massachusetts have held that an adopted child is issue within the meaning of the wills act, but the statute of adoption in both Massachusetts and Illinois contained the following words which do not appear in our Adoption Act: *"And other legal consequences and incidents of the natural relation of parents and children."* This gives to the Adoption Acts of those states a far wider meaning than can be given to our act; and if the words above quoted had been in our Adoption Act, a different decision might have been reached in the case of *Stout* v. *Cook and Weehawken Ferry Co.* v. *Sisson, supra.* It would seem that the trend of our decisions is in support of the doctrine laid down by the courts of New Hampshire, Pennsylvania and Indiana. The courts of Pennsylvania have consistently held that an *adopted* child is not issue. In the case of *Commonwealth* v. *Nancrede,* 8 Casey, 389 (32 Pa. St.), the Court held that property descending to an adopted child is subject to the collateral inheritance tax, which it could not be if the adopted child were regarded in the same light as a child born to the testator.

In the case of *Shaefer* v. *Eneu,* 54 Pa. St., 304, in which there was a devise to trustees for the use of a married woman for life, and upon her death the property was to be conveyed to her children or heirs, the *cestui que* trust had no children born to her, but pursuant to the law of the State of Pennsylvania, adopted three children in 1860. The conveyance was made to the trustees in 1849 and the Adoption Act was passed in 1855, subsequent to the death of the testator. The question to be decided was whether the adopted children took title under the will as children of the *cestui que* trust, or whether the property devised to the trustees passed to the children of the testator. The Court held that the adopted children were not the heirs of the deceased *cestui que* trust, and could not take under the will of the testator who created the trust. That one adopted has the rights of a child without being a child, and cites approvingly the case of *Commonwealth* v. *Nancrede, supra.*

In a very recent case in Pennsylvania, In re *Puterbaugh's Estate,* 104 Atl. Rep., 601, the Court held:

1. That the law gives an adopted child the right to inherit, but does not change his identity nor make him a child in fact.

2. That under a bequest to "children," grandchildren and other remote issue are excluded unless an intention is shown by the will to provide for children of a deceased child in cases

where the will would otherwise remain inoperative, or the will clearly shows that the word "children" was used in a more extensive sense.

3. Where the testator gave his residuary estate in trust for his son for life and on his death absolutely to his child or children and their heirs, and the son died leaving only a child adopted after the testator's death, the adopted child was not a "child" within the meaning of the will. The Court in this case considered the fact that while the adoption did not occur until after the death of the testator, still the testator was presumed to know that it was within the power of his son to adopt a child. The Court cites with approval the case of *Commonwealth* v. *Nancrede* and *Shaefer* v. *Eneu, supra.*

V.

THE ADOPTION ACT DOES NOT REPEAL OR AMEND SECTION 20 OF THE ACT CONCERNING WILLS, AND NOTHING THEREIN CONTAINED CAN BE CONSTRUED TO ALTER OR AMEND SUCH ACT.

The title of the Act Concerning Adoption reads as follows: "An Act Concerning Minors, their Adoption, Custody and Maintenance."

The title above is not broad enough to embrace any amendment or repeal of the Act Concerning Wills. Justice Depue, in the case of *Dobbins* v. *North Hampton,* 50 N. J. L., 496, at page 499, says:

> "The constitutional mandate that the object of every law shall be expressed in its title, has given the title of an act a two-fold effect. It has added additional force to the title as an indication of legislative intent in aid of the construction of a statute couched in language of doubtful import, and it also operates as a constitutional limitation upon the enacting part of the law. The enacting part of a statute, however clearly expressed, can have no effect beyond the object expressed in the title. To maintain any part of such a statute, those portions not embraced within the purview of the title must be exscinded; and if the superaddition to the declared object cannot be separated and rejected, the entire act must fail."

The repeal of a statute by implication is not favored.

In the recent case of *Reese* v. *Stires,* 87 N. J. Eq., 32, in which an act of the legislature of this State entitled, "An Act amend-

atory of and supplemental to 'An Act directing the descent of real estates,' approved April 16, 1846," which in terms abolishes estates and interests of dower and curtesy, was held to violate article 4, section 7, placitum 4 of the Constitution of this State which provides "that every law shall embrace but one object, and that shall be expressed in its title," the Chancellor at page 37 says:

> "In my opinion, however, the seventh section of the act of 1915 (P. L. 1915, p. 65) is unconstitutional and void because not within the title of the act. Legislation respecting dower and curtesy, which arise out of the marriage relation and vest in the relicts of deceased spouses, and which do not descend as to an heir-at-law, cannot, in my judgment, be constitutionally included in an act whose object is the direction of the descent of real estate. The very words of the constitutional provision that 'every law shall embrace but one object, and that shall be expressed in the title,' plainly forbid the legislation attempted in section 7 of the act under review. I deem it unnecessary to cite any of the numerous cases in our state which have construed statutes with reference to the constitutional provision above mentioned. * * * The act under review in six sections legislates with reference to its primary object, namely, the descent of real estates—the only object expressed in its title. The seventh section is alien to its object and cannot constitutionally be made one of its subjects. This section is opposed to the organic law and is, consequently, null and void."

Certainly nothing is expressed in the title of the act entitled, "An Act Concerning Minors, their Adoption, Custody and Maintenance," that could possibly be construed to affect in any way the provisions of An Act Concerning Wills. The two titles are even more foreign to each other than is the title of the act relating to descent from its provision relative to the abolition of dower and curtesy. Nothing in the title of the act concerning minors would indicate to any person that it might apply to the act concerning wills.

In the case of *Industrial School District* v. *Whitehead,* 13 N. J. Eq., 291, the Court said:

> "But the repeal of a statute by implication is not favored. Unless a latter statute is manifestly inconsistent with and repugnant to the former, both remain in force. Courts are bound to uphold the prior law if the two may subsist together. The matter must be so clearly repugnant that it necessarily implies a negative." *Cites Dwarris* on Stat., 674; 1 Bl. Com. 89 and *cases cited* in note 34 (Sharswood's ed.); *Beals* v. *Hale,* 4 Howard (U. S.) 37; *Bowen* v. *Lease,* 5 Hill. 221, *and cases cited.*

It is, therefore, respectfully submitted that the word *issue* as used in the 20th section of the Act Concerning Wills, does not include an adopted child. That the Adoption Act does not attempt to make an adopted child issue but merely gives him certain rights of inheritance. That an adopted child is but the creature of the statute, and can have no rights except such as are conferred upon him by statute. That the wills act is an act in derogation of the common law, and the word *issue,* as therein used, must be given its common law meaning which was "heirs of the body or descendants." That there is nothing inconsistent or repugnant between our act concerning wills and our adoption act; both may subsist together, and it cannot be held that it was the intention of the legislature at the time it passed the adoption act, to amend or repeal the act concerning wills. That the title of the act concerning adoption is not sufficiently broad to amend or repeal any part of the wills act.

The attention of the Court is respectfully directed to the consequences which would ensue if the word issue, as used in the act concerning wills, is construed to include adopted child. It would permit persons to whom estates had been given for life with the remainder over to their children, to defeat the intention of the testator, as to the ultimate disposition of the property devised, by the adoption of a child.

It is therefore respectfully submitted that the will of William Book is void under the 20th section of the act concerning wills, and that the decision of the Prerogative Court should be affirmed.

THOMAS S. HENRY AND FRANCIS CHILD,
Proctors for and of Counsel with Respondent.

AUTHORITIES REFERRED TO IN THIS BRIEF.

Den *v.* Emans, 3 N. J. L., 522.

Dobbins *v.* North Hampton, 50 N. J. L., 496.

Heidecamp, Admr. *v.* Jersey City, Hoboken & Paterson Street Railway Co., 69 N. J. L., 284.

Industrial School District *v.* Whitehead, 13 N. J. Eq., 291.

Reese *v.* Stires, 87 N. J. Eq., 32.

State *v.* Engle, 21 N. J. L., 347.

Stout *v.* Cook, 77 N. J. Eq., 153 (aff. 79 Eq., 640).

Van Winkle *v.* Van Winkle, 59 N. J. Eq., 371.

Weehawken Ferry Co. *v.* Sisson, 17 N. J. Eq., 475.

Wright *v.* Gaskill, 74 N. J. Eq., 742.

Beals *v.* Hale, 4 Howard (U. S.), 37.

Beckley *v.* Riegert, 61 Atl., 641.

Bowen *v.* Lease, 5 Hil., 221.

Carrol, Re Estate of, 68 Atl., 1038.

Coats *v.* Burton, 181 Mass., 180.

Commonwealth *v.* Nancrede, 32 Pa. St., 389.

Commassi, Re Estate of, 28 L. R. A., 414.

Davis *v.* Fogle, 23 N. E., 869.

Drake *v.* Drake, 134 N. Y., 20.

Flanagan *v.* Howard, 65 N. E., 782.

Granger *v.* Granger, 44 N. E., 189 (aff. 147 Ind., 195).

Gregory, in the Matter of, 37 N. Y. S., 925; 15 Miss., 407.

Humphreys *v.* Davies, 100 Ind., 274.

Holland *v.* Adams, 3 Gray, 188.

Jenkins *v.* Jenkins, 14 Atl., 557.

Jordan *v.* Roach, 32 Miss., 431.

Johnson *v.* Johnson, 59 Ky., 331.

Lamb *v.* Medsker, 74 N. E., 1012.

Markover *v.* Krauss, 31 N. E., 1047.

Morse *v.* Osborne, 77 Atl., 403.

Murdock *v.* Murdock, 65 Atl., 392.

Phillips *v.* McConica, 51 N. E., 445.

Powell *v.* Board of Domestic Missions, 49 Pa. St., 46.

Puterbaugh's Estate, 104 Atl., 601.

Robinson's Estate, 24 Atl., 197.

Shaefer *v.* Eneu, 54 Pa. St., 304.

Stayman *v.* Paxson, 70 Atl., 803.

Theobald *v.* Fugman, 60 N. E., 606.

Wardell, In the Matter of, 57 Cal., 484.

26 Amer. & Eng. Ency. (2nd Ed.), 606.
1 Kent's Commentaries, 462-464.
17 Amer. & Eng. Ency. (2nd Ed.), 544.
12 Corpus Juris, 186-187.
1 Jarman on Wills, 89.
2 Redfield on Wills (2nd Ed.), 235.
4 Comp. Stat., 5865.
2 Comp. Stat., 2808.
P. L., 1915, 53.
2 Comp. Stat., 2809.