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## New Jersey Court of Errors and Appeals

In the Matter of the Probate of  
the Last Will and Testament  
of EMMA C. BOLLES, deceased.

*On Petition  
to  
Prerogative  
Court.*

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## STATE OF THE CASE

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HENN & BURR,  
Proctors for Petitioner-Respondent,  
The Fifth Avenue Bank of New York.

ABE J. DAVID,  
Proctor for Appellant.

CONOVER ENGLISH,  
Of Counsel with Appellant.

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*Notice of Appeal.*

**NOTICE OF APPEAL.**

Filed May 1, 1933.

**New Jersey Prerogative Court**

In the Matter of the Probate of the Last Will and Testament of EMMA C. BOLLES, deceased.	}	10 <i>On Petition, etc. Notice of Appeal.</i>
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TAKE NOTICE that Henry L. Bolles, sole next of kin and heir at law of Emma C. Bolles, deceased, (sometimes known as Harry L. Bolles), appeals from the whole and every part of an order of consolidation made in the above entitled matter on March 23rd, 1933 on the advice of John O. Bigelow, Vice-Ordinary, to the Court of Errors and Appeals in the last resort in all causes. 20

ABE J. DAVID,  
Proctor for Appellant.

I conceive there is good cause for the above appeal. 30

CONOVER ENGLISH,  
Of Counsel with Appellant.

*Petition of Appeal.*

**PETITION OF APPEAL.**

Filed May 18, 1933.

**New Jersey Court of Errors and Appeals**

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In the Matter of the Probate of  
the Last Will and Testament  
of EMMA C. BOLLES, deceased.

*On Petition.  
On Appeal.  
Petition of  
Appeal.*

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

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The petition of Henry L. Bolles, sole next of kin and heir-at-law of Emma C. Bolles, deceased, (sometimes known as Harry L. Bolles), the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by an order made in the Prerogative Court of New Jersey by His Honor, Luther A. Campbell, Ordinary of the State of New Jersey, on the advice of the Honorable John O. Bigelow, Vice-Ordinary, bearing date March 23rd, 1933,

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in the matter of the probate of the Last Will and Testament of Emma C. Bolles, deceased, in this respect, to wit:

That the said order ordered that the proceedings now pending before the Union County Orphans' Court with respect to the Will of Emma C. Bolles, deceased, admitted to probate by the Surrogate of Union County, be consolidated with the proceedings pending in the Prerogative Court of New Jersey wherein the alleged Last Will and Testament of Emma C. Bolles, deceased,

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*Petition of Appeal.*

dated May 14, 1924, had been offered for probate, in accordance with the statute in such case made and provided, and further ordered that a certified copy of said order of consolidation be served upon the Surrogate of Union County, and that forthwith upon such service being made the Surrogate of the Orphans' Court of Union County transmit to the Prerogative Court of New Jersey the record of the proceedings had with respect to the said alleged Will of Emma C. Bolles, deceased, and further ordered that service of a copy of said order be made upon your petitioner and upon all other persons in interest. 10

And your petitioner humbly appeals from the whole and every part of the said order of the Ordinary which orders as aforesaid, and for grounds of appeal says: 20

1. The statute in accordance with which the said order purports to be made is Chapter 72, P. L. 1933, entitled,

“A supplement to an act entitled ‘An act respecting the Orphans' Court and relating to the powers and duties of the Ordinary and the Orphans' Court and Surrogates’, (Revision One Thousand Eight Hundred Ninety-Eight)” 30

which said statute is unconstitutional in that it fails to express the object of the law in the title.

2. The statute in accordance with which the said order purports to be made is said Chapter 72, P. L. 1933, which said statute is unconstitutional in that it intermixes in one and the same act such things as have no proper relation to each other.

3. The statute in accordance with which the said order purports to be made is said Chapter 40

*Petition of Appeal.*

72, P. L. 1933. Said statute is illegal and void in that it is in effect retroactive.

10 4. The statute in accordance with which the said order purports to be made is said Chapter 72, P. L. 1933. The said order is illegal and void in that the said statute has no application to proceedings then pending at the time of its adoption.

5. The statute in accordance with which the said order purports to be made is said Chapter 72, P. L. 1933. The said order is illegal and void in that it attempts to consolidate a proceeding pending in the Orphans' Court with a proceeding pending in the Prerogative Court, contrary to said statute.

20 6. The statute in accordance with which the said order purports to be made is said Chapter 72, P. L. 1933. The said order is illegal and void in that it attempts to consolidate a proceeding then pending before the Union County Orphans' Court relating to a Last Will and Testament of Emma C. Bolles, deceased, which had been admitted to probate prior to the passage of said act, with a proceeding pending in the Prerogative Court relating to an alleged Last Will and Testament of Emma C. Bolles, deceased, which had only been offered for probate.

30 Your petitioner therefore prays that the said order of the said Ordinary may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

ABE J. DAVID,  
Solicitor for Appellant.

40 CONOVER ENGLISH,  
Of Counsel with Appellant.

*Petition and Affidavit.*

**PETITION AND AFFIDAVIT.**

Filed March 23, 1933.

**PREROGATIVE COURT OF NEW JERSEY.**

To the Honorable Luther A. Campbell, Ordinary 10  
or Surrogate General and Judge of the Pre-  
rogative Court of the State of New Jersey:

The petition of The Fifth Avenue Bank of  
New York, with its principal office in the City  
of New York, one of the executors named in the  
last will and testament of Emma C. Bolles, late  
of the City of Elizabeth, in the County of Union  
and State of New Jersey, dated May 14, 1924,  
respectfully shows that the said Testatrix 20  
died on the 2nd day of September, 1932, and that the  
next of kin and heirs-at-law of the said Testatrix,  
with their respective residences or post office  
addresses, and the manner and degree in which  
they severally stand related to the said Testatrix  
so far as the same are known to your petitioner  
are as follows, to wit:

Henry L. Bolles (also known as Harry L.  
Bolles), Westerly, Rhole Island—nephew.

Your petitioner further shows that two other 30  
paper writings were offered for probate to the  
Surrogate of Union County, as the alleged last  
will and testament of said Emma C. Bolles, and  
were admitted to probate by said Surrogate, and  
from the order of said Surrogate thereon, an  
appeal has been taken to the Orphans' Court of  
Union County, and citations issued by said Sur-  
rogate. Said appeal is pending and undisposed  
of.

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*Petition and Affidavit.*

Your petitioner, therefore, prays that the aforesaid will be admitted to probate and that letters testamentary thereon be issued to your petitioner, and that an Order may be made herein consolidating the proceedings to determine the validity of the said wills.

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Dated March 22, 1932.

THE FIFTH AVENUE BANK  
OF NEW YORK,

By WILLIAM C. MURPHY,  
Vice Pres. & Trust Officer.

HENN & BURR,  
Proctors for Petitioner.

20 STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

WILLIAM C. MURPHY, of full age, being duly sworn according to law, upon his oath, says: That as the \_\_\_\_\_ of The Fifth Avenue Bank of New York, the petitioner above named, he has read the foregoing petition and knows the contents thereof, and the same are true to the best of his knowledge, information  
30 and belief.

WILLIAM C. MURPHY.

Sworn to and subscribed before me  
this \_\_\_\_\_ day of March, 1933.

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*Order of Consolidation.*

**ORDER OF CONSOLIDATION.**

Filed March 23, 1933.

PREROGATIVE COURT OF NEW JERSEY.

In the Matter of the Probate of the Last Will and Testament of EMMA C. BOLLES, deceased.	}	<i>On Petition,          &amp;c.          Order of          Consoli-          dation.</i>	10
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Upon reading and filing the duly verified petition of The Fifth Avenue Bank of New York, one of the executors named in the Last Will and Testament of Emma C. Bolles, offering the said Last Will and Testament, dated May 14, 1924, for probate, and it appearing that said Emma C. Bolles died on September 2, 1932, and that two other paper writings have been offered for probate to the Surrogate of Union County, as the alleged last will and testament of said decedent, which writings were admitted to probate by said Surrogate and from the order entered an appeal has been taken to the Orphans' Court of Union County, and citations have been issued by said Surrogate and said appeal is pending and undisposed of, and that the sole next of kin and heir at law of said decedent is Henry L. Bolles (also known as Harry L. Bolles, a nephew, residing in Westerly, Rhode Island), and to the end that the controversies with respect to said will shall be promptly and finally determined;

It is, on this 23rd day of March, 1933, ORDERED that the proceedings now pending before the

*Order of Consolidation.*

Orphans' Court with respect to the will of said Emma C. Bolles, deceased, be and they are hereby consolidated with this proceeding pending in this Court; in accordance with the statute in such case made and provided;

10 And it is FURTHER ORDERED that the proctor for the petitioner, within 2 days from the date hereof, serve a certified copy of this Order of Consolidation upon the Surrogate of Union County, and that forthwith upon such service being made, the Surrogate and the Orphans' Court do transmit to this Court the record of the proceedings had with respect to the said alleged Will of said Emma C. Bolles, deceased.

20 And it is FURTHER ORDERED that service of a copy of this Order, certified by the proctor of the petitioner to be a true copy, be made upon said Henry L. Bolles (also known as Harry L. Bolles), the next of kin and heir at law of said decedent, or upon his proctor or attorney, and upon all other persons in interest, or their proctors or attorneys, at their last known post office addresses, so far as the same can be ascertained, personally, of residents, and by mail of non-residents, said service or mailing to be had within

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LUTHER A. CAMPBELL,  
Ordinary.

Respectfully advised,

JOHN O. BIGELOW,  
V.-C.

A true copy.

HENN & BURR,  
Proctors for Petitioner,

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The Fifth Avenue Bank of New York.

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53 OCT. 1. 1933

## New Jersey Court of Errors and Appeals

<p style="text-align: center;">In the Matter</p> <p style="text-align: center;">of the</p> <p style="text-align: center;">Probate of the Last Will and Testament of EMMA C. BOLLES, deceased.</p>	}	<p>On Petition to Prerogative Court.</p> <p>On Appeal.</p>
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### BRIEF FOR APPELLANT.

This appeal brings up for review a most unusual order made by the Prerogative Court (BIGELOW, *V. C.*), consolidating a proceeding in the Prerogative Court, with a proceeding in the Orphans' Court. The order is based on Ch. 72, P. L. 1933. The appellant is Harry L. Bolles, sole heir at law of the decedent, Emma C. Bolles.

Emma C. Bolles died September 2, 1932. She left a Will dated May 14, 1924 in which the Fifth Avenue Bank of New York was named as one of the executors (p. 5, ll. 1-20). By its petition (p. 5) filed in the Prerogative Court, the bank offered that Will for probate (p. 6, ll. 1-10).

The petition shows that prior to this offer of probate of the Will of May 14, 1924, another Will and codicil (referred to in the petition [p. 5, l. 30] and in the order [p. 7, l. 24] as "two other paper writings") had been admitted to probate by the Union Surrogate and that an appeal had been taken from the order of probate to the Union Orphans' Court, and that this appeal was pend-

ing and undetermined at the time of the filing of the petition in the Prerogative Court for the probate of the earlier Will of May 14, 1924 (p. 5, ll. 30-40; p. 7, ll. 24-32).

Although the petition does not specifically state, counsel will not deny that the records of the Union Surrogate show that those "two other paper writings" consist of a Will dated July 14, 1927 and a codicil dated November 30, 1929, and that both were admitted to probate and letters testamentary issued thereon on September 14, 1932.

Chapter 72, P. L. 1933 was approved March 21, 1933 and took effect immediately. The petition was filed and the order appealed from was made on March 23, 1933, (pp. 5 and 7).

The situation therefore was that a Will and codicil of Emma C. Bolles had been *probated* by the Union Surrogate, and that an appeal from such order of probate was pending and undetermined in the Union Orphans' Court, at the time the Will of May 14, 1924 was *offered* for probate in the Prerogative Court, and at the time Ch. 72, P. L. 1933 was enacted.

Upon the filing of the petition of the Bank (p. 5), the Prerogative Court made an order (p. 7) consolidating that proceeding in the Union Orphans' Court on the appeal from the order admitting the Will and Codicil to probate, with the proceeding in the Prerogative Court for the probate of the Will of May 14, 1924 (p. 7, l. 39 to p. 8, l. 9).

This order not only consolidated the two causes, it also required the Union Surrogate and Orphans' Court to transmit to the Prerogative Court the record of the proceedings on the Will and Codicil which had been probated there. (p. 8, ll. 10-18)

This order was based on Ch. 72, P. L. 1933 and the questions on this appeal are: does that statute apply to this case, and if so, is the statute constitutional?

This statute is revolutionary and contrary to established policy and decision. It interferes with the established jurisdiction of the Orphans' Court, as the same has been recognized since the creation of that Court. It deprives the Surrogate of his jurisdiction to admit Wills to probate (3 C. S. p. 3816, sec. 13) in certain cases; it nullifies the decree of the Surrogate and divests the parties of their fixed rights thereunder in certain cases; and it deprives the Orphans' Court both of its jurisdiction to hear and determine all controversies respecting the existence of Wills (3 C. S. p. 3813), and also of its jurisdiction to hear and determine appeals from orders of the Surrogate (3 C. S. p. 3888, sec. 201) admitting Wills to probate in certain cases.

This statute violates that whole body of law laid down by our courts, which holds that where the Surrogate or Orphans' Court have once taken jurisdiction, the Prerogative Court, although having concurrent jurisdiction, has no right to interfere.

The statute (Ch. 72, P. L. 1933) is entitled: "A Supplement to an act entitled 'An act respecting the Orphans' Court, and relating to the powers and duties of the Ordinary and the Orphans' Court and Surrogate's (Revision 1898), approved June fourteenth, one thousand eight hundred and ninety-eight."

The statute reads in full as follows:

"1. Whenever a will has been offered for probate before the Surrogate or Orphans' Court, or shall be hereafter offered for probate before the Surrogate or Or-

phans' Court, and another will, whether of earlier or later date has been or shall be offered for probate in the Prerogative Court, the Prerogative Court shall take jurisdiction of the complete controversy with respect to said wills and shall make an order to consolidate the proceedings to determine the validity of the said wills; and upon filing a certified copy of said order of consolidation with the Surrogate of the county wherein the Orphans' Court proceedings are pending, the Orphans' Court and the Surrogate shall forthwith transmit or cause to be transmitted to the Prerogative Court a record of the proceedings before said Surrogate and Orphans' Court. The proceedings in the Prerogative Court with respect to the probate of said wills shall be the same as if said wills were originally offered for probate in the Prerogative Court.

"2. All acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed.

"3. This act shall take effect immediately."

## I.

**The statute can have no application, unless it be given a retroactive effect, and statutes are not to be construed retroactively.**

(Grounds of Appeal Nos. 3 and 4, p. 3, l. 39 to p. 4, l. 11.)

Both the petition and the order of consolidation refer to two different wills of Emma C. Bolles. The will, dated May 14, 1924, was offered for probate in the Prerogative Court by the petitioner (pp. 5 and 6). Both the petition and the order referred to "two other paper writings"

which, prior to the filing of the petition and making of the order, had been offered for probate in the Union County Surrogate's Office and had, in fact, been admitted to probate; and at the time of the filing of the petition and the making of the order an appeal was pending from the order of probate in the Union Orphans' Court. (p. 5, ll. 30 to 40; p. 7, ll. 24 to 33).

The order of consolidation, therefore, ordered the consolidation of all hearings in the Prerogative Court on a will which had merely been offered for probate, with a hearing on appeal in the Orphans' Court on a will which had already been admitted to probate and from which order for probate an appeal had been taken and was then pending.

The statute, by its terms, applies to a situation "whenever a will has been offered for probate before the Surrogate's or Orphans' Court, or shall be hereafter offered for probate before the Surrogate's or Orphans' Court and another will, whether or earlier or later date, has been or shall be offered for probate in the Prerogative Court."

The statute applies only where a will has been *offered* for probate or shall hereafter be offered for probate before the Surrogate's or Orphans' Court. It says nothing whatever about a situation where a will *has already been admitted* to probate by the Surrogate's or Orphans' Court.

The evident intention of the act is to apply to those cases where a will has been offered for probate in the Surrogate's or Orphans' Court and a later will shall be offered in the Prerogative Court, or vice versa. The scope of the act looks to the future and not to the past.

To construe the act to relate to the past and to apply to a will which had been offered for probate in the Surrogate's or Orphans' Court prior

to the adoption of the act, would necessarily give the act a retroactive or retrospective effect.

In *Calder v. Bull*, 1 U. S. 172, the Supreme Court of the United States announced this definition of a retrospective law. The court said (p. 176):

“Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect.”

It is entirely settled by the decisions of our own Courts that a statute will never be given a retrospective effect, unless an intention to that end is plainly to be found in its language.

*Vreeland v. Bramhall*, 39 N. J. L. 1, p. 2.

In *McGovern v. Connell*, 43 N. J. L. 106, the statute under review, as stated by the Court, provided (p. 108):

“ \* \* \* that *when any judgment is obtained* in the court for the trial of small causes, and *execution shall issue* thereon and be returned unsatisfied, and if the person against whom such execution shall have been issued, shall reside in or be possessed of any goods and chattels in any other county of the state, then an *alias* or *pluries* execution may issue, directed to a constable of the latter county, and he, on having an authorization endorsed thereon by a justice of his county, may there execute the writ.”

The case turned on the proper construction of the words “when any judgment is obtained;” did those words relate to the past or the future? Justice Dixon said (p. 108):

“If it may mean ‘when any judgment *has been* obtained,’ it may, at least as plainly,

be understood to mean 'when any judgment *shall be* obtained.' For such language in a statute there is a long-established rule of interpretation.

“It is, in the general, true that no statute is to have a retrospect beyond the time of its commencement;’ for the rule and law of parliament is, that *nova constitutio futuris formam debet imponere, non proeteritis*. *Potter’s Dwar. on Stat.* 162.

“It is well settled that laws will be construed as prospective only, unless an opposite intention of the legislature appears clearly by the terms or by necessary implication. *White v. Hunt*, 1 Halst. 415; *Deegan v. Morrow*, 2 Vroom 136; *Town of Belvidere v. Warren R. R. Co.*, 5 Vroom 193; *Baldwin v. Newark*, 9 Vroom 158.

“This rule applies to all the facts or occurrences upon the existence of which the law is designed to be operative.”

Citing *United States v. Heth*, 3 Chanch. 399.

Justice Dixon then went on to say (p. 109):

“So it is applicable likewise to remedial statutes, notwithstanding the other rule that such laws shall be liberally construed. Thus, an act passed in the Revision of 1874, (rev., p. 671, §14,) provided ‘that at any time before judgment on a lien claim,’ the lien claim might be amended; and this court decided that a claim filed before the passage of the act could not be amended under it. *Vreeland v. Bramhall*, 10 Vroom 1.

“According to this rule, the expression in this statute ‘when any judgment is obtained,’ must be regarded as meaning ‘when any judgment is *hereafter* obtained.’”

In *Washung v. Hunt*, 47 N. J. L. 256, the case turned on the construction of Chapter 184, P. L. 1884, p. 269, which was a supplement to the Practice Act and read as follows:

“That no writ of certiorari shall hereafter be granted or allowed to review any assessment for taxes, to recover which taxes any sale has been had or made by virtue of any special or local law, or to review the proceedings of any such sale, unless such writ be granted or allowed within six years from the date or time of any such sale.”

The facts were that the land was sold for taxes January 5, 1878. The certificate of sale was dated March 20, 1878 and the writ was allowed October 20, 1884, more than six years after. The question was whether the statute should be given a retrospective effect so as to save the writ. The Court held that it should not. Justice SCUDDER said (p. 257):

“This sale was made under a special and local law, to wit, the charter of the City of Rahway, and is, in this respect, within the terms of the statute. But the important question is whether the whole act is intended to be retrospective, or prospective only. Its terms are prospective, and apply to all cases where, in the future, any sale had been had or made for the recovery of taxes. The fact of such sale is made the point on which the limitation shall begin to act, and the writ can only be granted or allowed within six years thereafter. It is true that the words ‘has been had’ or ‘has been made’ might apply to a sale that had been made before the law was enacted, but the construction already given, that it may indicate a sale in the future, is sufficient to decide which shall be adopted, for the rule of construction of statutes is, that every

reasonable endeavor shall be made so to interpret the statutory text as to give the law a prospective and not a retroactive effect. *Proprietors v. Jones*, 7 Vroom, 206; *State, Alden, pros. v. Newark*, 11 Vroom 92; *McGovern v. Connell*, 14 Vroom 106; *Citizen's Gas Light Co. v. Alden*, 15 Vroom 648; *Boyd v. Kelly*, 9 Stew. Eq. 331."

The parallel between the statute under consideration in the *Washung* case and the present statute is striking. In the *Washung* case the Legislature said that:

"no writ of certiorari shall *hereafter* be granted or allowed to review any assessment for taxes, to recover which taxes any sale *has been had* or made by virtue of any special local law."

Chapter 72, P. L. 1933 provides that:

"Whenever a will *has been* offered for probate \* \* \* or shall be *hereafter* offered for probate in the Prerogative Court, the Prerogative Court shall take jurisdiction over the complete controversy" etc.

The *Washung* case is based squarely upon the Court's contention that the words "has been had" or "has been made", while they "might apply to a sale that had been made before the law was enacted", shall be construed as applying solely to sales made subsequently to the enactment of the law under the similar rule of statutory interpretation which requires all laws, including remedial laws, to be given a prospective effect unless the statute contains a clear expression of a Legislative decision precluding any other reasonable interpretation. From this reasoning the conclusion seems inescapable that the words in the present law "*has been offered for*

*probate*”, while they might apply to a case where the will was probated prior to the enactment of the law, must be given a prospective construction.

As no language is to be found within the four corners of the statute evidencing a clear expression on the part of the Legislature requiring these words to be construed retrospectively, the Court must hold that the two cases which we have thus paralleled are so nearly on all fours, that either the *Washung* case requires disapproval, or it is clear authority for the contention here made.

We may easily test the scope of the statute under discussion by considering how it would have read had the Legislative intent been to include pending matters. In that case the language would have been “Whenever a will has been offered for probate either prior or subsequent to the time this Act takes effect”. That would have been a clear expression of Legislative retrospective design, otherwise the expression “has been” is left in doubt as to the time to which it refers and under the well recognized rule can have a prospective effect only.

In *Lydecker v. Babcock*, 55 N. J. L. 394, an amendment to the Practice Act, P. L. 1890, page 24, provided that

“All judgments recovered \* \* \* shall be assignable at law, and the assignee \* \* \* may sue thereon in his \* \* \* own name.”  
(p. 395).

The question was whether an assignment of a judgment, which judgment and assignment were dated prior to the passing of the act, was good. The Court held that the assignment was not good. Justice DIXON said (p. 395):

“It is well settled that laws will be construed as prospective only, unless an oppo-

site intention of the legislature appears clearly by the terms or by necessary implication. *Nova constitutio futuris formam imponere debet, non proeteritis*. *Broom's Leg. Max.* 28; *City of Elizabeth v. Hill*, 10 Vroom 555; *Alden v. Newark*, 11 Id. 92; *McGovern v. Connell*, 14 Id. 106; *Boylan v. Kelly*, 9 Stew. Eq. 331. A statute does not alter or affect the quality or legal relations of past acts and concluded transactions, unless there be found in it such clear and indubitable expression of the legislative design to do so as precludes any other reasonable interpretation of the words used. *Citizens' Gaslight Co. v. Alden*, 15 Vroom 648.

“The language of the statute now under consideration is plainly consistent with a purpose to legalize and define the force of subsequent assignments only. It therefore did not affect the assignments upon which the plaintiff relies.”

See also *In re Estate of Cascio*, 40 N. J. L. J. 334, where Judge Stickel, construing Chapter 153, P. L. 1917, p. 293, said (p. 338):

“As was stated in the case of *McGovern v. Connell*, 43 N. J. L. 106, ‘the most that can be said in favor of this construction (a retroactive construction for the Act under examination) is that the language used is indefinite as to time.’ For such language is a statute, the Court finds there can be but one interpretation, namely, that the Act is prospective only in operation, and this interpretation applies even though the statute, as in this case, is a remedial one. *McGovern v. Connell*, *supra*; *Vreeland v. Bramhall*, 39 N. J. L. 1.”

Applying the rule laid down in these cases to the statute under construction in this case, the statute can have no application to a situation

arising before the passage of the Act. In order to make the statute applicable, it would be necessary to say that the words "whenever a will has been offered for probate," refers to all wills offered for probate before the Surrogate's or Orphans' or Prerogative Court at any time in the past and prior to the passing of the act. Such a construction necessarily makes the statute retrospective in effect.

There is no clear intention on the part of the Legislature to make the statute retrospective. If the statute is susceptible to two different constructions, that construction must be given to it which holds it to be prospective and not retrospective.

An analysis of the statute indicates that the proper construction of the statute is as follows:

1. That the time to which the words "has been" and "shall be" refer is not the date of the passage of the Act but the relative times when the wills in any particular contest are offered (a) in the Orphans' Court and (b) in the Prerogative Court.

2. In other words, where a will "has been" offered to the Orphans' Court and later a will "shall be" offered to the Prerogative Court, the Prerogative Court may consolidate. *Vice versa*, where a will "has been" offered to the Prerogative Court and another will later "shall be" offered in the Orphans' Court, the Prerogative Court may consolidate. The use of the words "has been" and "shall be" in both clauses in the initial sentence of the Act is necessary to cover both contingencies, i. e. (1) Where the first will is offered for probate in the Orphans' Court and (2) Where the first will is offered in the Prerogative Court.

But assuming for the sake of the argument that a retroactive construction could be given to this Act (a very large assumption) the statute can have no application under the facts here.

## II

### **The statute has no application to the Wills in question or under the facts.**

(Grounds of Appeal Nos. 5 and 6, p. 4, ll. 12 to 30.)

The statute, by its terms, applies to a will which has been *offered* for probate before the Surrogate's or Orphans' Court. The statute has no application whatever to a will which has been *admitted* to probate by the Surrogate's or Orphans' Court.

That is the situation here. The will dated May 14, 1924 has been offered for probate in the Prerogative Court, but the other and later will, which is referred to as "two other paper writings", was, as both the petition and order show, *admitted to probate* by the Surrogate of Union County, and, further, an appeal has been taken from the order of probate to the Orphans' Court and that appeal is now pending and undisposed of in the Orphans' Court.

If, by any liberality of statutory construction, it can be said that the statute is retrospective and applies to a will offered for probate prior to the date of the act, there is no theory of construction whatever from which it can be said that the statute applies to a will which has been already *admitted* to probate prior to the making of the order of consolidation.

With this thought in mind let us test the mean-

ing of the language used in the statute. Had the Legislature intended to confer upon the Prerogative Court the power to oust the Surrogate or Orphans' Court where the will had been admitted to probate, it would have used some such clear expression as this:

“Whenever a will has been offered for probate before the Surrogate, or has been admitted to probate and an appeal therefrom is pending in the Orphans' Court”,

Or, to go a step further: if the Legislature had intended that this power might be exercised by the Prerogative Court where the will had been admitted by the Surrogate and no appeal had been taken to the Orphans' Court, so that the Surrogate's decree had become final under the decision in *In re Whitehead Estate*, 85 N. J. E. 114, discussed *infra*, the Act would then have read:

“Whenever a will has been offered for probate before the Surrogate, or having been admitted to probate no appeal shall be pending in the Orphans' Court, or the time within which such appeal must be taken shall have expired.”

The absence of any such language is significant and controlling. To impute an intention on the part of the Legislature to include cases where the will has been admitted to probate, either by the Surrogate *ex parte* or by the Orphans' Court after caveat, as well as cases where the decree of probate has become final, would require the Court to assume legislative functions, which is precisely what the respondent would have us do.

If so far reaching a construction should be sought to be given to the Act, then the further question arises of the power of the Legislature to set aside a decree of the Surrogate by legis-

lative fiat as well as to deprive the Orphans' Court of jurisdiction over a Will that is pending before it on appeal. This leads to the next point, namely:

### III.

**The statute is unconstitutional in that by legislative fiat it sets aside a decree of the Surrogate, a constitutional officer, and further deprives the Orphans' Court of a Will over which it has already taken jurisdiction.**

(Grounds of Appeal No. 4, p. 4, ll. 3-10)

The Prerogative Court is a court of both original and appellate jurisdiction. Under the Constitution, Article VI, Section IV, paragraph 2, the Chancellor is constituted the Ordinary or Surrogate-General and Judge of the Prerogative Court and his original jurisdiction as such is state-wide.

Where, however, the Surrogate's or Orphans' Courts acting within their prerogatives under the Orphans' Court Act, have taken jurisdiction of a will, the Prerogative Court cannot deprive the Surrogate's or Orphans' Court of that jurisdiction, and he can review the Surrogate's or Orphans' Court proceedings only by appeal. In *Coursen's Will Case*, 4 N. J. Eq. 408, Chancellor PENNINGTON, as Ordinary, writing before the adoption of the amended Constitution in 1844, gives a concise history of the Prerogative Court, tracing it back to its original English sources, and discusses the relationship of the Ordinary to the Surrogate. He expressed himself as having no doubt at all that the Ordinary's original jurisdiction over the probate of wills and the granting of letters of administration was general and full, and not limited and special. (p. 415).

He held further, however, that the jurisdiction of the Ordinary was concurrent with that of the Surrogate. He said (p. 418):

“Notwithstanding the complete original jurisdiction which the ordinary has in all cases of probate and administration, his jurisdiction is concurrent with that of his surrogate. These officers have long been recognized by the laws, and although they at first derived their powers from the ordinary, as his deputies, those powers have been confirmed to them by long usage and successive declaratory acts of the legislature; and the ordinary cannot now resume them at will, nor supersede their proceedings under and by virtue of those powers. And it follows as a necessary consequence, that whenever a surrogate has *obtained cognizance* of a particular case, the ordinary cannot interfere *pendente lite*. He may review the surrogate’s proceedings by appeal, but in no other way.”

By the present constitution (Art. VII, Sec. II (6)) the surrogates are constitutional officers.

Please observe that the effect of the present statute (Chap. 72, P. L. 1933) is to have the ordinary interfere *pendente lite* with the Union Orphans’ Court in the matter of the Bolles will now pending before it, and to oust that Court of jurisdiction and to review the order of the Surrogate direct, contrary to all established practice and statute.

In *In re Whitehead’s Estate*, 85 N. J. Eq. 114 (approved by this Court in *Mellor v. Kaighn*, 89 N. J. L. 543, at p. 547), Leaming, V. O., refused a petition to set aside an order for probate theretofore made by the Surrogate of Cumberland County. The petition was a meritorious one on the facts (p. 115), but the learned Vice-Ordinary,

after a scholarly review of the cases, concluded he was without power to interfere with the order of the Surrogate, the statutory time for appeal having expired. He quoted from Coursen's case (4 N. J. Eq. at p. 418) quoted *supra* and then said (p. 118):

“The courts of this state have given uniform recognition to the view that the proceedings of the surrogate, in admitting a will to probate, are those of a regularly established court in which the surrogate exercises judicial functions, and that such proceedings can only be reviewed by appeal.”

citing and quoting from

*Quidort's Administrator v. Pergeaux*, 18 N. J. Eq. 472, at p. 477;

*Ryno's Executor v. Ryno's Administrator*, 27 N. J. Eq. 522, at p. 524;

*In re Evans*, 29 N. J. Eq. 571, at p. 575;

*Steele v. Queen*, 67 N. J. L. 99;

*Murray v. Lynch*, 64 N. J. Eq. 290, at p. 302; and

*Crawford v. Lees*, 84 N. J. Eq. 324.

He then said (p. 120):

“It thus appears that while the present petition invokes the exercise by the ordinary of that part of his jurisdiction which empowers him to entertain proofs of wills in solemn form, the exercise of that jurisdiction is here sought as a means to set aside and supersede a decree of probate of another judicial tribunal which has acted within its original jurisdiction and from whose decree the statutory period of review has expired.”

and, as already stated, he held he had no such power.

But if the statute (Ch. 72, P. L. 1933), is to be construed as giving the Prerogative Court the power to make an order in a case where a will has been admitted to probate before the Surrogate, the Prerogative Court, in a case where the time to appeal from the Surrogate's decree admitting the will to probate had fully expired could upon the filing of another will make an order or determination which would nullify the Surrogate's decree and divest the parties in the estate of their fixed right thereunder. This would be directly contra to the holding of Vice Chancellor Leaming in *re Whitehead Estate*, above adverted to, and the statute, if so construed is unconstitutional.

The Bolles will, which was admitted to probate by the Surrogate of Union County, is now in the jurisdiction of the Union Orphans' Court by virtue of the appeal to that Court from the order for probate.

In *Mellor v. Kaighn*, 89 N. J. L. 543, this Court, while holding that the jurisdiction of a surrogate is purely statutory, also held that the Orphans' Court is a court of general jurisdiction over the matters committed to it by statute. This Court said (p. 548):

“But the Orphans' Court is a court of general jurisdiction over the matters committed to it by statute. *Hess v. Cole*, supra; *Pyatt v. Pyatt*, 46 N. J. Eq. 285, 286; *Dunham v. March*, 52 Id. 256, 261; *Vincent v. Vincent*, 70 Id. 272; *In re Hathorn's Will*, 97 Atl. Rep. 262.”

In *Chadwick's Case*, 80 N. J. Eq. 471, this Court emphasized the right of the Legislature to regulate the jurisdiction of the Surrogate's, Orphans' and Prerogative Courts (p. 476), but, nevertheless, adhered to the long settled proposition

that once a surrogate had taken jurisdiction, the Ordinary is deprived of all jurisdiction except on appeal (p. 477).

While the right of the Legislature to regulate the jurisdiction and proceedings of the courts of probate is undoubted, no case has gone so far as to say that the Legislature has power to oust the Surrogate's or Orphans' Court of jurisdiction in favor of the Prerogative Court, where the Surrogate's or Orphans' Court has once taken jurisdiction of a case. The original jurisdiction of the Prerogative Court is only concurrent with that of the Surrogate's Court in the County, and the general rule is well settled that where there are courts of concurrent jurisdiction, that court which first takes jurisdiction retains it to the end.

*In re Coursen's Will*, 4 N. J. Eq. 408;  
*Chadwick's Case*, 80 N. J. Eq. 471; page  
 477; and  
*In re Whitehead's Estate*, 85 N. J. Eq.  
 114.

If the Ordinary now takes jurisdiction under this new statute will he sit as an appellate court to continue the review of the order for probate already begun by the Orphans' Court!

If so he ousts the Orphans' Court of jurisdiction *pendente lite*, as the Orphans' Court has not yet declared the matter and no order has been made which the Ordinary can review on appeal.

On the other hand, will his taking jurisdiction automatically reopen the order for probate made by the Surrogate?

If so, he ousts the Surrogate of jurisdiction *pendente lite*.

By analogy the rule now laid down by the Supreme Court of the United States governing the time honored contest over jurisdiction between the State and Federal Courts is pertinent.

That rule is, that as between courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction is entitled to retain it without interference "and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute."

*Harkin v. Brundage*, 276 U. S. 36, p. 43.

To the same effect:

*Lion Bonding Co. v. Karatz*, 262 U. S. 77, p. 88.

*Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, p. 737.

But, if it be assumed that the legislature under the authority of *Chadwick's Case*, 18 N. J. Eq. 471, has the right to regulate the jurisdiction of the Orphans' Court, particularly since that Court is a statutory Court and hence that the statute in question does not deprive the Orphans' Court of any constitutional rights, nevertheless the statute cannot escape the vice that it illegally affects the jurisdiction of the Surrogate.

The Surrogate is a constitutional officer (Constitution Article VII, Section II, Para. 6) although originally the Surrogate was the Deputy of the Ordinary as pointed out in the *Coursen's Case*, 4 N. J. Eq. 408. He had a recognized concurrent jurisdiction with the Ordinary for the probate of Wills within the boundaries of his County, at the time of the adoption of the Constitution of 1844.

That being so, he is vested with the authority which he originally had and cannot be deprived of it by the legislature.

In *In re Walker*, 95 N. J. Eq. 619, it was held that the Orphans' Court Act, Revision of 1898

which required that an account should be settled in the Orphans' Court where the letters testamentary had issued from the Prerogative Court, was clearly unconstitutional (p. 627) as it deprived the Prerogative Court, a constitutional tribunal, of the inherent jurisdiction which it had to entertain an accounting in a case where it had admitted a Will to probate and also issued letters testamentary. See pages 628 and 629. The Court said at page 629:

“\* \* \* the legislature cannot deprive the Prerogative Court of the right to take cognizance of accounting in cases where it has issued letters testamentary or of administration or of guardianship—a power inherently enjoyed by it and constitutionally saved and protected to it.”

The same rule will apply here.

The Surrogate has inherent power to probate Wills. His orders in that respect are subject to review only by appeal.

If Chapter 72, P. L. 1933 is upheld as applied to this case it will result in:

1. Eliminating the Orphans' Court as an intermediate appellate tribunal.
2. And authorize the Prerogative Court to ignore the probate of the Will of July 14, 1927 and the codicil of November 30, 1929 and proceed to re-probate that Will and codicil.

This is so because the statute says:

“The proceedings in the Prerogative Court with respect to the probate of said Wills shall be the same as if said Wills were originally offered for probate in the Prerogative Court.”

If the statute is to be carried out the original probate of the Will and codicil by the Union Surrogate is set aside by legislative fiat, and the Prerogative Court will proceed to re-probate the Will as though it had been offered for probate for the first time in that Court.

Such a statute unconstitutionally ousts the Surrogate of Jurisdiction, overrules his jurisdiction and nullifys his constitutional rights.

#### IV

**The statute (Chapter 72, P. L. 1933) is unconstitutional in that it fails to express the object of the law in the title and intermixes in one and the same act such things as have no proper relationship to each other.**

(Grounds of Appeal No. 1, p. 3, ll. 22-30 and No. 2, p. 3, ll. 33-38)

#### A.

The statute intermixes original and appellate jurisdiction in the Prerogative Court at one and the same time.

Certainly, appellate jurisdiction and original jurisdiction have no proper relation to each other when they are mixed up in one and the same proceedings in one court. That is quite different from a given court exercising original jurisdiction at one time and appellate jurisdiction at another.

Under this statute as applied to the Bolles Wills, the Ordinary in the one hearing would (1) sit as a court of first instance to probate the

Will of May 14, 1924 (2 C. S. p. 1722, secs. 1 and 2), and (2) sit either (a) as a court of appeal to hear the appeal from the order of probate of the Will and Codicil already admitted to probate by the Union Surrogate, or (b) act as a court of probate in the first instance, ignoring the probate by the Surrogate, and re-probate the Will of July 14, 1927 and the Codicil of November 30, 1929.

Moreover, the statute throws the entire appellate machinery in the probate courts, out of gear.

The Legislature has established a series of appeals: from the Surrogate to the Orphans' Court (3 C. S., p. 3888, sec. 201) and from the Orphans' Court to the Prerogative Court (3 C. S. p. 3889, sec. 204).

Appeals from orders granting probate go to the Orphans' Court, and the Prerogative Court has no jurisdiction to entertain an appeal direct from the order of the Surrogate granting probate, as Leaming, V. O. points out in *In re Frank*, 93 N. J. Eq. 405, p. 410.

As applied to the Wills in question here, Chapter 72, P. L. 1933 takes the appeal from the Surrogate's order of probate of the Will and Codicil already probated out of the hands of the Orphans' Court in which it is now pending and transfers it to the Prerogative Court. This transfers the hearing of the appeal from the order of the Surrogate direct to the Prerogative Court, or it ends the appeal entirely and requires the Ordinary to re-probate the Will and Codicil, notwithstanding they have already been admitted to probate by the Surrogate.

Granting that it is within the power of the Legislature to regulate the jurisdiction of the probate courts (*Chadwick's Case*, 80 N. J. Eq. 471, p. 476), that power must be exercised in a constitutional manner.

This statute, as applied to the Bolles Wills,

intermixes in one and the same act such things as have no proper relationship to each other.

By this statute the Orphans' Court is ousted of jurisdiction in the midst of an undetermined appeal and the Ordinary either becomes a direct Appellate Court from orders of probate by the Surrogate, or, the probate by the Surrogate having been set aside by legislative fiat, the Ordinary becomes a Court of Probate in derogation of the constitutional rights of the Surrogate, the Surrogate having already taken jurisdiction. (See Point III *supra*.)

Moreover a Will may not now be offered for probate in the Orphans' Court. Only the Surrogate and the Ordinary have such jurisdiction in the first instance.

If this statute stands is it to be construed as conferring by implication, jurisdiction on the Orphans' Court to probate Wills also!

If so, the statute further intermixes with its other provisions, the conferring of a new jurisdiction on the Orphans' Court: namely power to probate Wills in the first instance.

## B.

Not only is there this intermixing in the statute; the title also is defective. The object of this peculiar law is not expressed in its title.

The act is entitled:

“A Supplement to an act entitled ‘An act respecting the Orphans' Court, and relating to the powers and duties of the ordinary and the Orphans' Court and Surrogate's (Revision 1898), approved June fourteenth, one thousand eight hundred and ninety-eight.’”

The object of the act is *to oust* the Surrogate's or Orphans' Court of jurisdiction theretofore exercised by them in certain probate proceedings and *to confer* additional jurisdiction in such cases upon the Prerogative Court. The statute deals entirely with additional powers granted to the Prerogative Court, but no intimation of such an object is expressed in the title. Unquestionably, the statute should have been entitled as a supplement to the Prerogative Court Act (2 C. S. page 1722).

Is the act properly a supplement to the Orphans' Court Act? The Orphans' Court Act deals primarily with the powers, duties and functions of the Surrogate's and Orphans' Courts and has very little to say about the Prerogative Court, except to give the Ordinary power to make rules and orders to regulate the proceedings and practice in both the Prerogative and Orphans' Courts, (3 C. S., p. 3884, § 194) and to amend defects and errors in proceedings so as to prevent a failure of justice (§ 195). It also provides for an appeal to the Prerogative Court from orders or decrees of the Orphans' Court (3 C. S., p. 3889, § 204).

The Prerogative Court Act, on the other hand, is entitled:

“An Act respecting the Prerogative Court and the power and authority of the Ordinary.” (2 C. S., p. 1722).

The statute in question (Chap. 72, P. L. 1933) deals entirely with the power and authority of the Ordinary in those situations where a will has been offered for probate before the Surrogate's or Orphans' Court and a later or earlier will has been offered for probate in the Prerogative Court.

The title of the act, therefore, stating that it is a supplement to the Orphans' Court Act, comes

under the ban of Article IV, Sec. VII, (4) of the Constitution, which provides:

“To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object and that shall be expressed in the title.”

The constitutional provision quoted has frequently been construed by our courts.

In *Rader v. Township of Union*, 39 N. J. L. 509, Chief Justice Beasley said that the purpose of the provision requiring the object of the proposed law to be expressed in its title (p. 515)

“is to give notice of and publicity to the proposed legislation.”

And he said further (p. 515):

“It is true, that it may be difficult to indicate, by a formula, how specialized the title of a statute must be; but it is not difficult to conclude that it must mean something in the way of being a notice of what is doing. Unless it does this, it can answer no useful end. It is not enough that it embraces the legislative purpose—it must express it;”

In *Newark v. Mt. Pleasant Cemetery Co.*, 58 N. J. L. 168, this Court said (p. 171):

“The evil tended to be guarded against was not the inclusion in one act of more than a single matter, but the inclusion therein of matters not properly related among themselves.”

See also:

*Payne v. Mahon*, 44 N. J. L. 213, p. 216;

*Burlington v. P. R. R. Co.*, 104 N. J. L. 649, p. 657.

A case quite in point is *Plainfield v. Hall*, 61 N. J. L. 437. Chapter L, P. L. 1880, p. 58, was entitled:

“An Act to provide for the review by the Justices of the Supreme Court of this State of summary convictions by justices of the peace, police justices and recorders of Cities in this State.”

That act made it lawful for the Justices of the Supreme Court holding the circuit in the County, upon application of any person convicted before any justice of the peace, police justice, or recorder, to order the complaint and record of conviction to be forthwith brought before him that the legality of said proceedings and conviction might be reviewed and determined.

By Chapter XCVI, P. L. 1890, p. 149, a supplement to that act was passed, which was entitled:

“A supplement to an act entitled ‘An Act to provide for the review by the Justices of the Supreme Court of this State of summary convictions by justices of the peace, police justices and recorders of Cities in this State,’ approved February twenty-seventh, One thousand eight hundred eighty.”

The supplement gave to Common Pleas Judges concurrent jurisdiction with the Justices of the Supreme Court holding the circuit in the County, to order complaints, etc. in all cases of summary conviction to be brought before them and reviewed and if found illegal, be set aside.

This supplement was held unconstitutional by the Supreme Court in an opinion by Justice Dixon. The writ of certiorari brought up an order made by the President Judge of the Union Com-

mon Pleas, under the authority of the supplement. Justice Dixon said (61 N. J. L. 468):

“The constitution of this state requires (Art. 4, § 7, par. 4) that every law shall embrace but one object, and that shall be expressed in the title. Evidently the latter clause of this requirement is not met by the title of the law just mentioned. The object of the law is to confer on the judge of the Court of Common Pleas the same jurisdiction as was conferred by the original act upon a justice of the Supreme Court, but no intimation of such an object is expressed in the title.

“For this reason, without considering the other objections taken to the proceedings, the order under review must be set aside.”

The reasoning in that case is applicable here. So here the object of the present statute, which is to confer additional jurisdiction on the Prerogative Court, is not expressed in an act entitled “A supplement to an act entitled ‘an act respecting the Orphans’ Court’ ”. The title of the act should have contained express reference to the Prerogative Court and should, properly, have been “A supplement to an act entitled ‘an act respecting the Prerogative Court and the power and authority of the Ordinary’ ” (2 C. S. page 1722). The Court held that the object of the law, which was to confer jurisdiction on the Court of Common Pleas, was not expressed in an act entitled, “A supplement to an act to provide for review by Justices of the Supreme Court,” etc.

The conferring of additional jurisdiction upon a court even though it be exclusive, thereby involving a withdrawal of jurisdiction from other courts, should properly form part of the Act establishing the court in which the additional pow-

er is vested. Under universal practice, such an act is entitled as an amendment or supplement to the Act establishing the court upon which the additional jurisdiction is conferred.

So this Court held in the case of:

*Payne v. Mahon*, 44 N. J. Law 213.

That case involved the question of whether an Act "constituting district courts in certain cities in this state" was constitutional insofar as it conferred exclusive jurisdiction in certain cases, thereby depriving other courts of such jurisdiction theretofore vested in them. The court, holding that the act was properly entitled, said (p. 216):

"The granting of jurisdiction is a necessary incident to the establishment of the District Courts and the taking away of the jurisdiction conferred from other courts which, up to that time had exercised it, is germane to it. It cannot in any proper sense be said to have no proper relation to the subject of the district courts in certain places. It is not only not foreign to the subject but is manifestly cognate to it. Instances in which such legislature has been upheld are numerous."

Similar decisions in other jurisdictions sustaining as proper constitutional practice the entitling of an act conferring exclusive jurisdiction on a given court as an act to establish that court, or as an amendment or supplement thereto, are

*People v. Wong* (Calif.) 215 Pac. 409;

*Cofer v. The State*, 168 Ala. 171.

So here, the object of the act in question (Chap. 72, P. L. 1933) is to confer jurisdiction on the Prerogative Court of wills and proceedings relating to wills pending before the Surrogate's or

Orphans' Court. There is nothing in the title to the act, which is "A supplement to the Orphans' Court Act", to express this object of the law. The Statute takes away the jurisdiction of the Surrogate's and Orphans' Court and confers it on the Prerogative Court. To entitle the Act, "A supplement to the Orphans' Court Act," neither gives notice of what the statute is designed to do, nor does it express the legislative purpose.

*Rader v. Township of Union*, 39 N. J. L.  
509, p. 516.

**Upon all the grounds urged it is submitted  
that the order for consolidation should be set  
aside.**

Respectfully submitted,

ABE J. DAVID,  
Proctor for Appellant.  
CONOVER ENGLISH,  
Of Counsel.

## New Jersey Court of Errors and Appeals

In the Matter of the Probate of  
the Last Will and Testament  
of EMMA C. BOLLES,  
Deceased.

*On Petition  
to  
Prerogative  
Court on  
Appeal.*

### REPLY BRIEF FOR APPELLANT.

#### Answering Point I of respondent's brief:

Respondent argues (his brief, p. 3) that there are no "vested rights involved here."

We question this.

Sections 18 and 19 of the Orphans' Court Act permit the appellant from a decree of probate to apply to the Orphans' Court to

"certify the questions involved in such controversy into the Circuit Court of the same County for trial before a jury." (Section 18.)

Upon the certificate of the result of the trial being filed with the Surrogate,

"the Orphans' Court shall proceed to make a decree adjudging the probate of said Will in accordance with the finding of the said issue." (Section 19.)

Granting that the making of the certificate for a jury trial is discretionary, nevertheless, where a Will has been probated and an appeal has been taken, the appellant has a vested right to make application to the Orphans' Court to exercise its discretion to certify the case for trial by jury. Chapter 72, P. L. 1933 deprives the appellant of this right.

tion, with the *state of facts* to which the statute applies. Naturally, in directing that no writ of certiorari shall be granted, the Act speaks of the future; but when it describes the writ as one to review a tax assessment under which a "sale *has been had*" it distinctly refers to the past; just as the present Act, reading "Whenever a will *has been offered*" refers to the past. The force of the *Warshung* case as applied to Chapter 72, P. L. 1933 is inescapable.

Statutes affecting rules of evidence are not in point here, as exemplified in *Easterling v. Pierce*, 235 U. S. 380 (respondent's brief, pp. 4 and 5). The same is true of *Besson v. Cox*, 35 N. J. Eq. 87 (respondent's brief, p. 7). It is to be noted that this Court distinguished it on that ground in *Wittes v. Repko*, 107 N. J. Eq. 132, page 136. In that case this Court again re-affirmed (p. 133),

"the fundamental rule that a statute is to be considered prospective unless the language is such as to show clearly that it was intended to have retrospective effect."

And at page 134 this Court cited and quoted from the applicable cases, including *Vreeland v. Bramhall*, 39 N. J. Law, 1, *Warshung v. Hunt*, 47 N. J. Law, 256; affirmed, 48 N. J. Law, 613 (cited in our main brief, pp. 6 and 8).

And at page 135 this Court referred to:

"the general rule that in the construction of statutes, they are not to be given a retrospective effect or operation, if their language reasonably admits of another construction."

Respondent has not answered our Point II (our main brief, pp. 13 to 15), that the statute has no application to the Wills in question under the facts. The statute by its plain terms applies only where a Will has been or shall be

hereafter “*offered* for probate” before the Surrogate, or has been or shall be “*offered* for probates” in the Prerogative Court.

“Nothing in the statute authorizes the consolidation of proceedings where one Will has *already been probated* before either the Surrogate or the Prerogative Court.”

The respondent attempts to meet this argument by saying that it is “specious” (brief, p. 10). He does not point out in what respect it is specious, and we venture to suggest that unless the Court is going to read into the act words which are not there, the argument is sound and dispositive of the case.

#### **Answering Point II of respondent’s brief:**

Respondent appeals to Article VI, Sec. 1 of the Constitution, which permits the Legislature to alter or abolish inferior courts.

Even if we assume that the Surrogate is an “inferior court,” he is, nevertheless, a constitutional court. (Constitution, Article VII, Sec. II, paragraph 6—our main brief, p. 20.) See *Kenny v. Hudspeth*, 59 N. J. Law, 320, page 323.

His authority to probate Wills existed before the Constitution of 1844, and while the Legislature may regulate the procedure, it cannot deprive him of that power. In *re Walker*, 95 N. J. Eq. 619 (our main brief, pp. 20 and 21), particularly where he has once taken jurisdiction as in the case at bar. See cases cited, our main brief, pages 15 to 19.

It cannot be successfully argued that the Legislature can alter or abolish the office of Surrogate which is recognized by the Constitu-

tion. *A fortiori* the Legislature may not do this by indirection, by stripping the Surrogate of his recognized powers.

Chapter 72, P. L. 1933 by legislative fiat ousts the Surrogate of his constitutional jurisdiction over the Wills at bar which he probated (our main brief, pp. 21-22).

This is unconstitutional.

As to the vital defect in the title of the Act, we respectfully invite this Court's attention to the significant failure of the respondent to discuss, much less to distinguish, the cases cited in our main brief, Point IV, notably:

*Plainfield v. Hall*, 61 N. J. Law, 437;

*Payne v. Mahon*, 44 N. J. Law, 213.

The order for consolidation should be set aside.

Respectfully submitted,

ABE J. DAVID,  
Proctor for Appellant.

CONOVER ENGLISH,  
Of Counsel.

## New Jersey Court of Errors and Appeals

In the Matter  of  The Probate of the Last Will and Testament of EMMA C. BOLLES, Deceased.	}	On Petition to Preroga- tive Court on Appeal.
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### BRIEF FOR RESPONDENT

This is an appeal from an order of the Ordinary made on the advice of Vice-Ordinary BIGELOW, on or about March 23, 1933, consolidating a probate proceeding then pending in the Orphans' Court with a proceeding in the Prerogative Court.

#### POINT I.

**The order of consolidation was properly granted.**

Under Points I and II of his brief (pp. 4-15) appellant urges that chapter 72, Public Laws 1933, is not applicable to this proceeding, in that the statute was enacted subsequent to its institution. Before demonstrating the appellant's error in this regard an outline of the protracted and cumbersome procedure which previously prevailed in probate proceedings is pertinent.

An alleged will is offered to and probated by the *Surrogate* as the last will and testament of the decedent, no notice having been given or caveat filed. Thereafter, an appeal is taken from the proceedings to the *Orphans' Court*.

Under Section 18 of the Orphans' Court Act (3 N. J. Comp. St. 3818), upon application of the caveator, appellant or proponent, that court may certify the questions involved in such controversy into the *Circuit court* of the same county for trial before a jury.

From the decree entered by the Orphans' Court upon the return of the verdict at the Circuit, an appeal may be taken to the *Prerogative Court* (3 N. J. Comp. St. 3889), where the question of probate is presented to the Ordinary as the *original question*. He may determine the same either upon the evidence taken upon the trial in the Circuit or upon that evidence supplemented by other proof, or upon new proofs, at his discretion (*Smith v. Smith*, 48 N. J. Eq. 566; *Rusling v. Rusling*, 35 N. J. Eq. 120; 36 N. J. Eq. 603).

From the decree of the Ordinary, further appeal lies to the *Court of Errors and Appeals*.

Attacks on wills resulting in protracted litigation, with consequent dissipation of the assets of the estate, many of such attacks palpably without any merit, have long been a recognized evil and have been the subject of judicial condemnation upon many occasions. That wills should be the subject of judicial action before five successive tribunals (Surrogate, Orphans' Court, Circuit Court, Prerogative Court, and Court of Errors and Appeals) before their validity is finally determined, is certainly a condition warranting legislative action, particularly when the ultimate beneficiaries of the estate have to pay counsel on both sides of the contest. Legislation designed to ameliorate this evil is highly remedial and beneficial and should merit the approbation of the public and of the courts.

Appellant urges the general rule of statutory construction, namely, that statutes impairing *vested, basic* rights are generally construed as prospective.

Appellant fails to recognize the exceptions to this rule, which exceptions are controlling in the case at bar.

Although the general rule of statutory construction is as stated by appellant, the courts have universally held this general rule to be inapplicable where (1) *the statute deals with remedies and procedure*, and (2) where the clear import of the language used in the statute indicates that the legislature intended the same to have a present or retroactive effect.

In the case at bar, a pending controversy, the court is not dealing with "vested rights," but solely with procedural remedies.

The general rule applicable to statutes relating to remedies and procedure is stated in 59 *Corpus Juris*, title "Statutes," page 1173, Section 700, as follows:

"A difference is recognized between statutes affecting substantial rights and those affecting only procedure, the courts being more liberal in the interpretation relative to retrospective operation in the latter than in the former case. *The general rule that statutes will be construed to be prospective only and not retrospective or retroactive, ordinarily does not apply to statutes affecting remedy or procedure, or, as is otherwise stated, such general rule is subject to an exception in the case of a statute relating to remedies or procedure.* While it has been said that statutes relating to remedies or procedure may be given a retroactive operation, a more accurate statement of the principle intended is that, unless expressly prohibited by statute, and in the absence of directions to the contrary, or unless in doing so some contract obligation is violated or some

vested right divested, statutes merely affecting the remedy or law of procedure apply to actions thereafter, whether the right of action occurred before or after the change in the law. The legislature has full control over the mode, times and manner of prosecuting suits, and whenever, upon consideration of an entire statute relating to these matters, it appears to have been the legislative intent to make it retroactive, it will be given this effect.

\* \* \* \* \*

*"The presumption against retrospective construction of statutes as a general rule does not apply to statutes that relate merely to remedies and modes of procedure."* (Italics ours.)

In *Hollenbach v. Born*, 238 N. Y. 34, the New York Court of Appeals said:

"Unless a contrary intention appears, laws operate only in the future and upon future transactions (*Rhodes v. Sperry & H. Co.*, 193 N. Y. 223; *Standard C. & M. Corp. v. Waugh C. Corp.*, 231 N. Y. 51, 58), but changes in the form of remedies constitute an exception. (*Jacobus v. Colgate*, 217 N. Y. 235, 240)."

In *Russell v. Mechanics Realty*, 88 N. J. L. 532, it was held that a statute which related to remedy and procedure "should be liberally construed for the enforcement of legal rights."

In *Easterling v. Pierce*, 235 U. S. 380, an appeal was taken from a judgment entered in the State of Mississippi. The appellant urged the unconstitutionality of a state statute enacted after the accident occurred and after suit was instituted, but retroactively applied. The Supreme Court dismissed

the appeal stating "that the statute cut off no substantive defense but simply provided a rule of evidence controlling the burden of proof. That as thus construed, it does not violate the Fourteenth Amendment to the Constitution of the United States is also so conclusively settled as to again require nothing but a reference to the decided cases."

Furthermore, the language of the instant statute is clear, plain and unambiguous in its terms and expressly provides for the retroactive operation thereof. It provides that the same shall be applicable to an existing "*controversy*," "whenever a will *has been offered for probate* before a Surrogate or Orphans' Court, or shall be hereafter offered for probate before the Surrogate or Orphans' Court, and another will whether of earlier or later date *has been* or shall be offered for probate in the Prerogative Court."

In *Water Commissioner v. Brewster*, 42 N. J. L., it was said:

"No principle is better settled, said Justice Elmer, or more important to be faithfully adhered to by the courts called upon to enforce written statutes, than that, in the absence of ambiguity in the language used, no exposition shall be made which is in opposition to the express words; or, as the maxim is sometimes expressed, it is not allowed to interpret what has no need of interpretation. *State, West Jersey Ferry Co., pros. v. Rudderow*, 2 Vroom 512."

In the *Borough of Oakland v. Board of Conservation*, 98 N. J. L. 806, 122 Atl. 311, the Court of Errors and Appeals said:

“As a general rule, courts will accept the meaning of words in ordinary use found in a statute in their generic sense, unless there appears clearly a legislative intent to the contrary.”

Again in *Lake v. Ocean City*, 62 N. J. L. 160, 162, this court said:

“The rule for statutory construction is to give to words their ordinary rather than their extraordinary meaning, unless constrained by the context.”

In *re Passaic City Clerk*, 94 N. J. L. 384, the court said:

“Where an act is plain and unambiguous in its terms, the rule is fundamental that there is no room for judicial construction, since the language employed is presumed to evince the legislative intent. *Douglass v. Freeholders*, 38 N. J. L. 214; *State v. Brewster*, 42 N. J. L. 125; *Heston v. Atlantic City*, 93 N. J. L. 317, 107 Atl. 820.”

It cannot seriously be argued by appellant that the language of the statute “whenever a will has been offered for probate” means anything other than what it says. There is no room here for judicial construction since the language employed is clear and plain. The phraseology is neither technical nor ambiguous. To hold that this statute is not applicable to the instant controversy is not to construe the act, but is rather the enactment of legislation by the court.

Similarly worded statutes have been held to be retroactive in their operation. In *Skinkle v. Essex*,

47 N. J. L. 93, aff'd 49 N. J. L. 641, a statute was enacted respecting arbitration of any tax or assessment laid by any public road board in this state. The statute by its terms applied to "any assessment or assessments that may have been or may hereafter be laid or imposed." The court in its opinion stated that "this language clearly gives the act a retrospective effect."

Again, in *Russell v. Mechanics Realty*, 88 N. J. L. 532, a statute respecting executions against wages provided for a certain method of procedure. The statute read as follows:

"Hereafter when a judgment *has been recovered* and where an execution issued upon said judgment has been returned, wholly or partly unsatisfied," (then continuing with the rules of procedure).

It was urged that this section had no effect upon judgments entered prior to the enactment of the statute. The Court in overruling this argument said:

"On the contrary, we think the reasonable construction of the statute requires that it should be held applicable to any situation existing at the time of its passage or in the future \* \* \* The statute is remedial and should be liberally construed for the enforcement of legal rights."

In *Besson v. Cox*, 35 N. J. Equity 87, the court passed upon the admissibility and competency of testimony which only became admissible by reason of the passage of an Act subsequent to the institution of the action. The statute (Ch. 44, P. L. 1880) provided:

“That in all civil actions in any court of law or equity of this state any party thereto may be sworn and examined as a witness notwithstanding, any party thereto may sue or be sued in a representative capacity.”

The complainant objected to the testimony “for the reason that the present suit was pending before its (statute) passage.” The court held the testimony proper stating “I am of the opinion that the statute applies to suits pending at the time of its passage as well as to suits subsequently commenced.”

The statute is to be read with the view of ascertaining the legislative intent and putting the same into operation as promptly as possible. Technical and strained constrictions are not favored by the courts. In the instant proceeding the statute was enacted to correct an outmoded and fettering practice. No valid reason has been assigned why the courts should ignore the legislative fiat.

The principle is long established in our constitutional system that all doubts are resolved in favor of the constitutionality of a statute. All presumptions are in favor of the constitutionality of the act because the legislature, before passing the law, is required to consider the same, and before acting upon it, determine as to its constitutionality.

In *Booth v. Illinois*, 184 U. S. 425, Mr. Justice HARLAN, writing for the Supreme Court of the United States, said (p. 431) :

“We are unwilling to declare these views of the state court to be wholly without foundation and therefore cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question. *In reaching this conclusion, we have recognized the principle long es-*

*established and vital in our constitutional system that the courts may not strike down an act of legislation as unconstitutional unless it be plainly and palpably so."*

How can any one seriously urge that an act, supplying a long-felt want in the simplification of the procedure of the courts is "*plainly and palpably*" unconstitutional or that the same is "*wholly without foundation*" in the legislative prerogative?

The foregoing principles have been repeatedly recognized in innumerable decisions by the Court of Errors and Appeals, typical of which are:

*State v. De Lorenzo*, 81 N. J. L. 613;  
*E. Orange v. Hussey*, 70 N. J. L. 244.

The only case cited by appellant which requires discussion is *Washing v. Hunt*, 47 N. J. L. 256 (p. 8 of Appellant's Brief). That case is distinguishable upon a mere reading of the statute which provided:

"That no writ of certiorari *shall hereafter be granted* or allowed to review any assessment for taxes, to recover which taxes any sale has been had \* \* \*."

The foregoing language clearly implies a future condition or happening unlike the language in the instant statute which reads: "Whenever a will *has been* offered for probate \* \* \*"; which clearly embraces a present probate proceeding. This distinction in language was clearly recognized by the court in its opinion. Justice SCUDDER said (p. 257):

"Its terms are prospective, and apply to all cases where, in the future, any sale had been

had or made for the recovery of taxes. The fact of such sale is made the point on which the limitation shall begin to act, and the writ can only be granted or allowed within six years thereafter."

Furthermore, a *permissible construction* of the statute in that case was that it included a sale made before its enactment, but such a construction was not *required*. Applying the familiar rule of statutory construction that laws will be construed as prospective only, unless an opposite intention of the legislature appears clearly by the terms of the statute or by necessary implication, the court quite properly held that the statute did not apply to sale that had been made before the statute was enacted.

The appellant further argues that the language of the statute "whenever a will has been offered for probate before the Surrogate or Orphans' Court" does not include a will which has been admitted to probate by the Surrogate, and from which an appeal has been taken to the Orphans' Court. This argument is specious. The language of the statute in question is sufficiently comprehensive in scope to include a will which has been admitted to probate by the Surrogate and from which an appeal has been taken to the Orphans' Court.

It cannot be urged by the appellant that this statute in any way affects or impairs vested rights. It is clear that the statute affects procedure and remedy only. Every case cited by the appellant deals with a situation affecting vested or substantial rights as distinguished from procedure or remedy.

The appellant extends his argument beyond the facts in this case to deal with a situation where the Surrogate's decree had become final because no ap-

peal was taken within the time limited to appeal to the Orphans' Court. The effect of the statute under such circumstances is not presented for decision, but it should be pointed out that if that situation did exist, there would be no "controversy" to determine the validity of the wills, and there would be no proceedings pending in the Orphans' Court to be reached by an order of consolidation.

## POINT II.

### The Statute is Constitutional.

Appellant urges under Points III and IV of his brief (pp. 15-30) that the statute in question is unconstitutional because (1) it deprives the Orphans' Court of jurisdiction; and (2) the title of the statute fails to express the object of the law.

Under Point III of the appellant's brief, he indicates that he is arguing number 4 of the grounds of appeal. The assigned ground is as follows:

"The statute in accordance with which the said order purports to be made is said Chapter 72 P. L. 1933. The said order is illegal and void in that the said statute has no application to proceedings then pending at the time of its adoption."

The sole constitutional questions raised by the appellant are found in ground numbered 1 (C-3) and ground numbered 2 (C-3).

Nevertheless, the argument made under Point III points out no constitutional provision which has been invaded by the adoption of Chapter 72 of the Laws of 1933.

The cases cited have utterly no application to the Statute herein.

The Orphans' Court is a statutory court and it possesses only such powers as the legislature in its discretion sees fit to confer.

*In re Alexander*, 79 N. J. Eq. 226, 81 Atl. 732, this court in defining the powers of the Orphans' Court said:

“From the time of its creation it has been held that the Orphans' Court was the creature of statute, and that it cannot assume jurisdiction of any matter unless it is given by statute. In the case of *Gray v. Fox*, 1 N. J. Eq. 259, 272, 22 Am. Dec. 508, it was held that the ‘decree of the orphans' court on a matter over which it has jurisdiction, if fairly obtained, is certainly not to be questioned in a collateral way, even in this court.’ (Chancery.) ‘But that court is one of limited power and jurisdiction; if it transcends its jurisdiction its acts will pass for nothing.’ *Sherman v. Lanier*, 39 N. J. Eq. 249-258.”

See also *In re Struble's Estate*, 87 N. J. Eq. 311, 101 Atl. 177.

Although the constitution of 1844 made the Surrogate a constitutional officer it left to the legislature to define the scope and extent of the Surrogate's powers, and while it cannot destroy the office it may enlarge or decrease his jurisdiction at any time it sees fit.

The appellant argues (p. 20) that since prior to the adoption of the constitution of 1844 the Surrogate has had concurrent jurisdiction with the Ordinary for the probate of wills within his county, therefore, the legislature cannot take away the powers which he has so exercised since that time. For a complete answer to this contention it is only

necessary to refer to Article 6, § 1 of the Constitution, which reads as follows:

“The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes as heretofore; a Court for the trial of impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts; and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the Legislature may alter or abolish as the public good shall require.”

The Surrogate of a County, in probating a will, of course, acts judicially and holds a court.

The other ground urged for the unconstitutionality of this statute, i. e., that the title thereof is defective is equally without merit.

The statute is entitled as follows:

“A Supplement to an act entitled ‘An Act respecting the Orphans’ Court, and relating to the powers and duties of the Ordinary and the Orphans’ Court and Surrogate’s (Revision 1898) approved June fourteenth, one thousand eight hundred and ninety-eight.”

It is well settled by decisions in this court that the title of an act need only contain general mention of the subject matter therein dealt with. In *Vreeland v. Burdett*, 62 N. J. L. 163, the act was entitled: “An act to repeal an act concerning taxes.” It was urged that because of the failure of the title to contain the date of the passage of the act repealed that the same was void under Article 4, Section 7, Paragraph 4, of the amended Constitution, which directs that “every law shall

embrace but one object, and that shall be expressed in the title." The court in overruling this argument said:

"In the interpretation of this constitutional provision the 'object' of a law must not be confused with its product. \* \* \* The object of every law, by force of the constitution, must be single and be expressed in the title of the law; the product may be as diverse as the object requires and finds its expression in the terms of the enactment only. *In fine, the title of an act is a label, not an index.*

"If the title of an act, therefore, contain a mention of the subject-matter generally, together with a succinct indication of the legislation respecting it, it is all that is required by the constitutional prescription. *Mortland v. Christian*, 23 Vroom 520."

In the case of *Sawter v. Shoenthal*, 83 N. J. L. 499, the court said:

"Under the requirement of the constitution that the object of an act must be expressed in its title, the object expressed must give notice to the effect of the legislation to one conversant with the existing state of the law, and the validity of the title is not to be determined by nice distinction of etymology or definition of words."

In the case of *Richards v. Hammer*, 42 N. J. L. 435, aff'd 44 N. J. L. 667, the court said:

"Only in a plain case will a statute be declared void because its title does not express the object of the law."

See also *State v. Bader*, 101 N. J. L. 289, aff'd 102 N. J. L. 227, 131 Atl. 902.

In *McGovern v. Hope*, 63 N. J. L. 76, a statute was enacted entitled "An Act Concerning Evidence." The legislation dealt with the granting of orders directing physical examinations of plaintiffs in personal injury actions. It was urged in the case that by reason of the general caption of the statute the same was unconstitutional. The court held the objection puerile.

It cannot seriously be urged that this statute does not meet the constitutional requirements.

### POINT III.

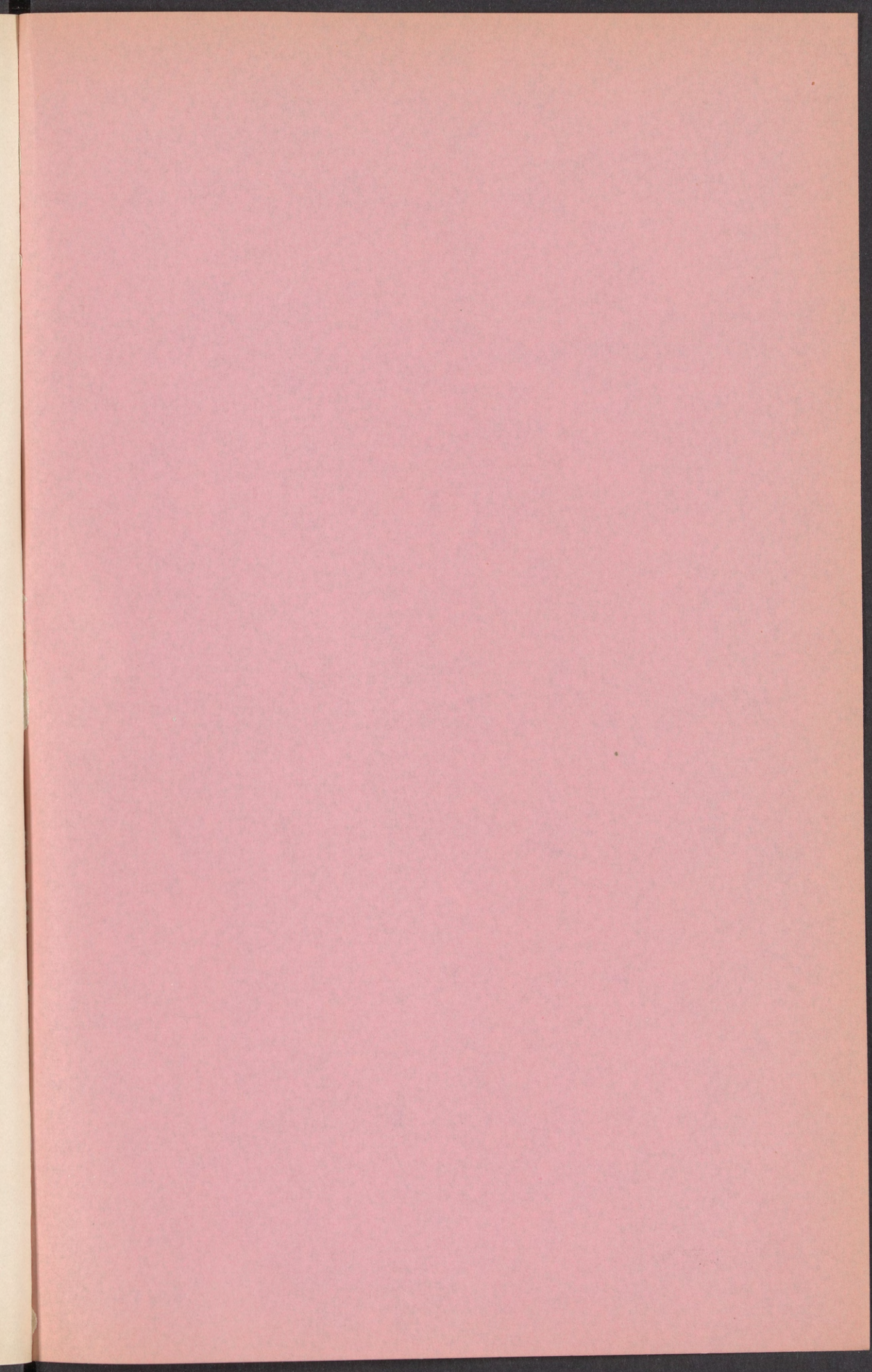
**The order of the Prerogative Court, dated March 23, 1933, should be affirmed.**

Respectfully submitted,

HENN & BURR,  
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