

New Jersey Court of Errors and Appeals

SARAH C. DORSETT,
Plaintiff and Respondent,

vs.

SAMUEL P. VOUGHT,
Defendant and Appellant.

On Appeal
from Supreme
Court.

APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF.

It appears from respondent's brief (p. 1) that two pieces of property are involved in this case. One of them is situated on the north side of Market Street, in the City of Paterson, about forty feet wide, front and rear, and 100 feet deep, with an easement of about three feet reserved from the adjoining property. On this land a brick building, known as Pope's Hall, is erected. In fact, the name "Pope's Hall" is applied to the whole tract. This is the property described in the first count of the complaint (Case, p. 2). The street there called "Congress Street" is now, and was when Mr. Pope made his will, a part of Market Street. The other piece of property consists of three tracts of land evidently united, at Haledon, in the Township of Manchester and County of Passaic, containing about seventy acres, and known as "Smith's

Quarry." The Court will, no doubt, take judicial notice of the fact that Haledon adjoins the City of Paterson. Both properties are, therefore, virtually Paterson properties.

There is nothing in the record to show the value of these pieces of property, either at the present time or when Mr. Pope made his will; but it is apparent that they must now be, and must then have been, of considerable value; and must then, in fact, have been of such value as to render an intention on the part of Mr. Pope to die intestate of them, after the termination of his wife's life estate therein, extremely improbable, to say the least. We start out, therefore, with a strong presumption, from the nature of the case, that Mr. Pope did not intend to die intestate of his remaining interest in these properties. And here we have the aid of the established rule upon the subject set out at pages 18 and 19 of our first brief, and approved of by the Court in *Woodruff v. White*, as shown on page 8 of respondent's brief.

As to Alleged Intention to Die Intestate in Respect to Other Property.

The respondent's counsel in their brief say: "The will all the way shows, in reference to other property, that the testator intended to die intestate in case of certain events" (Case, p. 6). Those events were certain contingencies, neither of which was likely to happen, and none of which, so far as appears, has happened. The contingency in 7th item of the will, referred to by counsel, was the death of both Samuel and Effie Vought before their arriving at the age of twenty-one years without lawful issue, and not merely without lawful issue as stated by the counsel (Case, p. 36); the contingency in the 17th item, referred to by the counsel, was the death

of Samuel Vought before the death of Mrs. Pope, or before his arrival at the age of twenty-one years, without lawful issue (Case, p. 38); the contingencies in the 15th and 16th items referred to by the counsel was the failure in either case of the association to which the gift was made to keep the principal invested and the interest applied as in the will directed (Case, pp. 35 and 36); the contingencies in the 18th paragraph referred to by the counsel were the death of both Samuel and Effie before their arrival at the age of twenty-one years, without lawful issue, or the death of both of them before the death of Mrs. Pope.

The bequests and devises in 7th, 17th, 15th and 16th items, if not in the 18th, gave vested estates in the things bequeathed and devised, only liable to be divested by the happening of the contingencies mentioned (*Harris v. Taylor*, 2 *South.*, 13; *Condit v. King*, 2 *Beas.*, 375, 376; *Ackerman v. Vreeland*, 1 *McC.*, 23, 25).

The object of the reverting provisions in items 7, 17 and 18 was manifestly to prevent the property bequeathed and devised from going, upon the death of Samuel and Effie under items 7 and 18, or upon the death of Samuel under item 17, to their blood relations other than their own issue, who would have been, in case of their death without issue, their heirs at law and next of kin (*Hogencamp v. Jersey City, &c., Ry. Co.*, 40 *Vr.*, 264). And the object of the reverting provisions in items 15 and 16 was clearly to conserve the fund bequeathed for the perpetual use and benefit of the respective associations.

As stated in our first brief, "A failure to make disposition of property bequeathed or devised subject to such contingencies, cannot, obviously, be considered as constituting a case of intestacy" (p. 26).

The object of the counsel in presenting this point

is not stated in their brief; but it is, no doubt, to convey the idea that as Mr. Pope "intended" to die intestate of property upon the happening of such contingencies, ^{he} very likely also "intended" to die intestate of his interest in the lands in question after the carving of Mrs. Pope's life estate out of the same. But we respectfully submit that such idea is altogether too "far fetched." These undisposed of contingent reversions do not afford the slightest indication that Mr. Pope intended to die intestate of such interest.

Rules for Construction of Wills.

This is the next subject treated of in the respondent's brief.

The counsel referred to *Woodruff v. White*, 78 *N. J. Eq.*, 410, and *Adrian v. Koch*, 91 *Atl. Rep.*, 123, as "two recent decisions in this State defining the rules for construction of wills which apply to the case at bar" (Brief, p. 8).

The counsel then quote the first paragraph of the Syllabus to the said first mentioned case, as follows: "The words of a will must be taken in their natural meaning"; and afterwards quote the first paragraph of the Syllabus to the other case, the first part of which reads as follows: "Where the language of a will can be read in its ordinary and natural sense, no construction is necessary." The last part of said last mentioned Syllabus is, however, not correctly stated by the counsel.

After making these quotations, the counsel proceed, "In the case at bar the *language of the will can be read, without question, in its ordinary and natural sense, and no construction is necessary.*" The italics are those of the brief (Brief, p. 9).

It appears from what follows in the brief that the counsel refer here to the 18th paragraph of the

will. We admit that this paragraph, *so far as it goes*, "can be read without question in its ordinary and natural sense, and no construction is necessary," as the counsel say. But in determining whether or not Mr. Pope intended to devise the premises in question after the termination of the life estate therein, as we claim he did, we are not confined to that paragraph as it appears in the will; such devise may have been omitted therefrom by inadvertence or otherwise; and we must consequently take the whole will into consideration, and may even take into view the surrounding circumstances (*Graydon v. Graydon*, 10 *C. E. Gr.*, 561; *Rogers v. Rogers*, 4 *Dick. Ch.*, 98; *Leigh v. Savidge*, 1 *McC.*, 124, 132 and 133; *Wiggins v. Wiggins*, 20 *Dick Ch.*, 417).

The counsel also quote the second paragraph of the Syllabus to the case so first mentioned to them: "The heirs are not to be disinherited by a will unless a clear intent appears by its language to that effect"; which matter we have fully dealt with in our first brief.

Then comes the quotation of the 4th paragraph of the Syllabus to that case, as follows: "If possible, a will must be so construed as to dispose of all [of] testator's estate; *but the Court, to prevent intestacy, may not disregard unambiguous and clear language producing intestacy.*" The italics are the counsel's. There is nothing novel or questionable about the part of this quotation italicized by the counsel. And it will be seen by an examination of that case that it was a clear case of "unambiguous and clear language producing intestacy."

All there is in our case that looks toward intestacy in respect to the premises in question is the fact that said premises, except as to the life estate therein, were not devised in express terms as the will reads. This fact is, of course, to be regarded

in determining the question whether or not the testator intended to die intestate as to this property, but it is not by any means conclusive. It does not debar us from taking into view the whole will and the surrounding circumstances in settling that question. In such examination we must take for our guide the rule so clearly and emphatically enunciated in that case that, "if possible, a will must be so construed as to dispose of all of testator's estate," and determine whether or not this will can be so construed notwithstanding that fact. This matter having been fully considered in our first brief, we will not deal with it further here

In the matter of the construction of wills, the counsel further quote from *Aveson v. Aveson*, 3 *Denio*, 458-461, and *Graydon v. Graydon*, 25 *N. J. Eq.* (10 *C. E. Gr.*), 561, etc.

As statements of general principles, we see nothing much out of the way in those quotations, except so far as it may be inferred from the quotation from the first mentioned case that the Court there held that there could not be a devise by implication, which is not the law in this State, as we showed in our former brief. But statements of general principles in Court decisions, taken apart from the facts involved, are apt to be misleading; for they are usually no more than statements of general rules so far as necessary for the case in hand, irrespective of qualifications and exceptions. Such was particularly the case with *Graydon v. Graydon*, so stated by the counsel. If we look at page 563 of the report of that case, near top, we find that the language quoted by the counsel applied to that particular testator and particular will in that particular case; or, in other words, that there was nothing in that case that required anything else than a construction of the exact language of the will.

In construing wills, in this State at least, the Courts do not confine themselves to the exact lan-

guage of the wills. They strive to ascertain from the will and the surrounding circumstances in cases where such circumstances can be considered, what the intention of the testator was, and having satisfied themselves as to what such intention was they mold the language of the will by construction so as to express that intention. That such is the case appears from *Van Houten v. Pennington*, 4 *Halst. Ch.*, 745, and *Nelson v. Coombs*, 3 *Harr.*, 27, referred to in our former brief on page 21. The counsel in their brief at last admit the correctness of our position upon this point, for, in referring to these two cases, it says: "The intention of the testator [in those cases] is clear, and the rule is that the necessary words will be supplied to carry out the intention in the cases cited. The language there used indicated a clear intention on the part of the testator as to the disposition of his property. The Court there supplied the necessary words to carry out that intention" (p. 12). The difference between those cases and this one, according to the counsel, is that in those cases the intention of the respective testators was clear, whereas the intention of the testator claimed by us in this case is not clear. Which, however, must be determined by the Court.

See also upon this point *McMurtrie v. McMurtrie*, 3 *Gr.*, 276, where the Court declared that, "In order to attain intent of testator, words of limitation shall operate as words of purchase; implication shall supply verbal omissions, the letter shall give way; every inaccuracy of grammar, every impropriety of terms, shall be corrected by the general meaning, if that is clear and manifest."

On pages 10 and 11 of their brief, the counsel cite several authorities upon the subject of the disinheritance of heirs, on which subject we have said all we desire to say in our first brief. But some-

what dove-tailed into that subject, and extended somewhat beyond it, the counsel take up the subject of devises by implication. They say:

“The full force of the rule laid down in *McCoury’s Exrs. v. Leek*, 1 *McC.*, 70, is not obtained from the quotation in defendant’s brief. The Court says: ‘In construing a will, conjecture must not be taken for implication. Necessary implication means so strong a probability of intention that an intention to the contrary to that which is imputed to the testator cannot be supposed.’”

The “full force” of this is obtained by garbling the rule as stated by the Court. The rule, as stated in the case and as correctly stated in our first brief, is as follows:

“In construing a will, conjecture must not be taken for implication, but necessary implication means, not *natural necessity*, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.” The italics are ours.

The words in italics are omitted in the counsel’s quotation. So it seems that in order to give “full force” to this rule the words “not natural necessity” have been stricken out. We think the rule will have to stand as laid down by the Court, notwithstanding the vigorous attempts of the counsel to mutilate it.

The counsel further say upon the same subject:

“To raise an implication or show an intention on the part of the testator, there must be some usual word used by the tes-

tator which would indicate his intention to make such disposition of his property, which does not appear in the will."

This is not true in the case of either implication or intention without implication. That it is not true in case of implication is shown by the example of a devise by implication given in that same case of *McCoury v. Leek*, which is as follows:

"The devise of real estate to the heir upon the death of the wife is a devise to the wife for life by implication; for the intent of the testator is clear to postpone the heir till the death of the wife. And if the wife does not take, no one else can" (1 *McC.*, p. 73).

Now, there are no "usual words" used by the testator which would indicate his intention to make such disposition of his property; that is to say, to give her a life estate in the property; she got that estate by implication from the fact that if she did not take, no one else could.

The counsel would have us believe that the wording of Mr. Pope's will is so clear that no construction thereof is necessary. That such is not the case clearly appears from the fact that the will has already been before the Court of Chancery for construction. The fact is that the executors of this will could do hardly anything, outside the collection of the assets, paying the debts and investing funds, until they had ascertained from that Court the meaning of the will in several particulars. This will construction suit is referred to on page 6 of the respondent's brief.

Of course, the Court in that suit could pass only upon questions that had then arisen. And if so many questions had then arisen requiring a judicial construction, it would be very natural for questions

to afterwards arise requiring such construction. In our first brief we pointed out the fact that after the testator had given by his will \$20,000 to certain charitable institutions, he, according to the wording of the will, gave the same money to this defendant (pp. 21 and 22). Here, certainly, was a matter requiring very careful consideration to determine by construction the actual intention of the testator.

The Matter of Estoppel.

The counsel being evidently satisfied that they have established the fact that Samuel Pope died intestate as to this property, excepting, of course, the life estate therein, go ahead upon that assumption.

They say: "The defendant claims that because Samuel Pope in his will described Samuel Vought and Effie Vought as two minor children of his adopted daughter, Ida Vought, now deceased, and because the plaintiff took a legacy under the will, she is estopped from showing that Ida Vought was not the legally adopted daughter of Samuel Pope, the testator. The plaintiff insists that she is not estopped by any such intention" (p. 13).

The counsel then proceed to give three reasons why the plaintiff, as he calls her, is not so estopped, and then presents these three reasons, somewhat differently stated, under Sub-divisions A, B and C. We will consider them as so presented.

Sub-division A. is: "The complainant is not claiming Pope's Hall and Smith's Quarry under the will of Samuel Pope, and is not bound by any declaration of his will."

We are unable to see what bearing this proposition has upon the point under consideration. If the counsel had said "the plaintiff is not claiming

Pope's Hall and Smith's Quarry under the will of Samuel Pope, and is therefore not estopped by any declaration of his will," the proposition would come somewhere near, but not quite, to the point in question. In order to do that, it would have to read like this: "The plaintiff is not claiming Pope's Hall and Smith's Quarry under the will of Samuel Pope, and is therefore not estopped by receiving benefits under the will by any declaration of the will." This would present the point in question and raise the issue as to whether it is necessary for the plaintiff to claim under the will in order to be estopped by declarations of the will. That it is not, can easily be shown.

Suppose Mr. Pope had devised to defendant a piece of land owned by the plaintiff, and which he had received by deed from John Doe, and the defendant after the death of Mr. Pope had taken possession of this piece of land under the will, and the plaintiff had brought an ejectment suit to recover possession thereof, and the defendant had set up in defense that the plaintiff having received a benefit under the will was estopped and precluded from disputing his title to this land under the same will, and the plaintiff had thereupon, according to her present contention, responded that she was not so estopped and precluded for the reason that she was not claiming under the will, but under the deed from John Doe; according to the established doctrine upon the subject, she would have been held to be so estopped and precluded. See remarks on this subject on page 10 of our former brief.

Then the plaintiff is claiming title to property which, taking the declarations of the will to be true, did not descend to her and the others of Mr. Pope's cousins as his heirs at law, but to the defendant or his sister as such heirs at law. Therefore, although she is not claiming under the will,

she is claiming in opposition to the declarations of the will, which, we conceive, brings her within the rule.

The counsel cite several cases under this sub-division, but we fail to see the applicability of them. We will, however, briefly review them.

Skellenger v. Skellenger, 32 N. J. Eq. (5 Stew. Eq.), 659.

The point in that case, as appears from an examination of it, was simply this: When a testator dies intestate of certain property, that property goes to his heirs at law or next of kin, as the case may be, according to law, without regard to the testator's supposed intention whether it should do so or not; for a testator's intention as to where his property shall go can be ascertained only from his will; if such intention appears in the will it controls, and the property goes under the will; but if such intention does not appear in the will, there is no intention to control, and the property goes to the testator's heirs at law or next of kin. It will be observed that no question of estoppel or preclusion was involved here, which renders that case inapplicable to this case.

Ward v. Dodd, 41 N. J. Eq. (14 Stew. Eq.), 415.

In that case the testator divided up his entire estate among his relatives, leaving nothing undisposed of. Among the gifts was one to his nephew, Moses J. Williams, "as his full portion of" his "estate." Some of the devisees died in the lifetime of the testator, so that their shares lapsed. The Court held that the lapsed shares did not fall into the residue, so that as to them the testator died intestate; and the question was whether Moses J.

Williams was debarred from participating therein under the law of descents on account of the statement in the will that the gift to him was his "full portion," and the Court held that he was not. We do not see how the Court could have held otherwise. What the testator clearly meant by the gift to Moses being his "full portion" was that it was his full portion of the estate as it was divided up by the will. There is no indication that he intended to debar Moses from his part under the law of descents of any share that might lapse. The Court evidently considered Moses as standing upon the same footing as the other surviving devisees in this respect, for it says in the part quoted by the counsel, "in making such dispositions, he [the testator] declared that the gift to Moses J. Williams was in full for his portion, and so, too, he undoubtedly thought (although he did not say so), that the gifts to those to whom he gave the residue were their full portion of the estate." We do not see anything in this case to help the plaintiff.

Nagel v. Conrad, 79 N. J. Eq. (9 Buch.),
124.

The decision in that case was based upon the well-known rule that the disinheritance of an heir, without a devise over to someone else, is ineffectual to debar the heir from his share under the law of descents of any lands of which the testator might die intestate.

Hunt ex rel. Streeter v. Evans, 134 Ill.,
496; 11 L. R. A., 185.

In that case the drafting of the will and of the deed therein recited were contemporaneous acts. The will was executed, but the deed was not; held, that the executed will did not carry the property

described in the recited unexecuted deed. This does not conflict at all with the effect of recitals in wills of prior execution of deeds, instances of which are stated in our former brief.

We have not seen *Benson v. Hoffman* cited by the counsel.

Zimmerman v. Hafer, 81 Md., 347; 32 Atl., 316.

In that case it was claimed that the recital of the deed in the will created an estate by implication; but it was held that the fact that the deed had been declared to be invalid rendered such recital erroneous, so that it could not have the effect so claimed for it. The question of estoppel is not raised in the case. And it was held in that case that the recital in the will that testator did not wish any of his heirs to participate in his estate did not defeat their right to inherit for the reason that the will failed to devise such estate to someone else; which was in accordance with the rule upon which the decision in the case of *Nagel v. Conrad*, *supra*, was based.

Sub-division B is: "The reference to Ida Vought as his adopted daughter is merely descriptive and surplusage, and in no way estops the plaintiff from claiming the property" (p. 15).

The counsel began this sub-division thus: "William Pope was called the nephew of the testator in the bequest to him. If he was living to-day he might just as well come in and claim that there was a devise to him of all testator's property because testator called him his nephew, when, as a matter of fact, in the testimony in the suit in the Pope estate above cited, he admitted that he was no relation of Samuel Pope."

Now, the testimony referred to is not before this Court, and was declared to be inadmissible by the

Court below (Case, p. 55). So far as appears, therefore, he was the nephew of Samuel Pope, the declaration of the will being *prima facie* evidence of that fact (*Estate of Keenan, Myrick Prob. [Calif.]*).

If he was not Mr. Pope's nephew, but was merely called so in the will, and was living to-day, he might, of course, "*just as well*" come in and claim that there was such devise to him; but it is not claimed in this case that the calling of Ida Vought "adopted daughter" constituted a devise to Samuel and Effie; and so the calling of William Pope "nephew" could not, according to our view, constitute a devise to him. The counsel seem to have got mixed up in this matter.

The expression that "the reference to Ida Vought as his adopted daughter is merely descriptive," no doubt means that the words "adopted daughter" were merely intended to describe her, and not to operate as a devise; which we conceive to be the true view of the matter. These words, being descriptive of Ida Vought as the adopted daughter of the testator, of course described her as his adopted daughter; which amounts to a declaration that she was his adopted daughter. This is just our position on this subject; and it is just this virtual declaration that, according to our view, estops and precludes plaintiff from claiming this property after having received the benefits she received under the will.

The words "descriptive and surplusage" here used do not seem to us to hitch together very well. If the words referred to are descriptive, they are used to describe; and words used to describe cannot be said to be "mere surplusage," even if not necessary to effectuate the purpose of the instruments in which they are used.

In *Rollins v. Atlantic City R. R. Co.*, 44 Vr., 64, a deed executed by a man and his wife Mary contained this recital concerning Mary: "she being the issue and heir at law," etc., and another deed by Sarah Hastings recited that she was a widow, "and that she was formerly Sarah Richards, and the sister of Mary Ball, who was the mother of Joseph Ball, deceased." Now, these recitals were not necessary to effectuate the purposes of the deeds in which they occurred; nevertheless, they had the effect in that case of settling the title to real estate. Surely, then, those recitals were not "mere surplusage," nor are the recitals or statements or declarations in question in this case "mere surplusage."

Washburn in his work on Evidence, Vol. 1, 3rd Ed., says:

"Solemn written declarations, when not self-serving, are admissible for the reasons thus stated. Among such writing we may notice a provision in a will by a deceased person recognizing or ignoring certain persons as his children; a description in a will; an acknowledgment of a deed by certain persons styling themselves heirs at law; a recital in a family settlement; recitals of consistent antecedent deeds and wills; and generally a recital in a deed executed by a member of the family." § 210

The only authority cited under this sub-division that can possibly require notice is the case of *Lines Estate*, 221 Pa., 374; 70 Atl., 791. That was a case where a half-brother was called a brother in a will. The decision was based upon the will taken as a whole; the matter of estoppel or preclusion was not involved therein. The other cases cited under this

sub-division not appearing to militate against any claim of ours, we pass them over.

Sub-division C is: "The use of the words 'adopted daughter' in describing Ida Vought in the will could not operate as a legal adoption, for it would be an adoption by parol, instead of the statutory provision" (p. 18).

We do not dispute that proposition, and, therefore, have not taken the trouble to examine the authorities under that head on that page.

We do not claim that the testator calling Ida Vought his adopted daughter made her his adopted daughter; or that the use of those words operated as a devise. The basis of our claim is stated on page 9 of our first brief. Applying the proposition there stated to this case, it would read as follows:

"Samuel Pope, having declared in his will that Ida Vought was his adopted daughter, and thus placed her in such relation to himself that she, if really occupying that relation, would be entitled to any real estate of which he might die intestate, and the respondent having received benefits under the same will, she is estopped and precluded from setting up, claiming or proving anything to the contrary or in contravention thereof, so far as relates to the devolution of such real estate."

The counsel review many of the authorities upon which we rely, but it strikes us that such review does not weaken our position in the least. At any rate, we do not feel disposed to review their review. The lumbering up of our brief in that way does not seem to be worth while. The Court has our respective views in respect to these authorities, and can examine the authorities itself so far as it may deem

it necessary so to do. There is one case, however, to which we think we should call attention. It is that of *Tilley v. Collyer*, 3 *Keb.*, 389. In respect to this case the counsel says:

“The Court did not give to S. the property, because the testator referred to her six times in his will as his heir, but because the language of the will clearly showed the testator’s intention to devise to her his property, and required her to make certain payments to the other children. These payments were ~~for~~ \$1,000 each. The case was decided on the question of intention of the testator” (pp. 21 and 22).

Of course, the case was decided on the question of intention of the testator; but how was that intention determined? The Court states how, thus: “Albeit, there is no express devise to S. yet she being named as heir, this is sufficient to exclude the rest, and to make her sole heir.” And this although she was not sole heir at all, but her two sisters were heirs the same as she was. So far as I have taken the pains to examine the counsel’s review, this appears to be a fair sample of it.

As to Section III of Respondent’s Brief.

We do not see anything in this section that requires notice excepting the last statement, which is that the plaintiff has shown affirmatively that Ida Vought was never adopted by Samuel Pope or his wife (p. 25).

That affirmative proof was negative evidence. All the evidence on this point was that there is nothing in the Court records to show such adoption. We suppose this was sufficient for the Court

to make its finding upon this point. But the evidence was objected to (Case, p. 49), and its admission made one of the grounds of appeal (Case, p. 62, No. 5). If the respondent was estopped and precluded, as we claim she was, the admission of this evidence was erroneous, and sufficient ground for reversing the judgment below

As to Section IV of Respondent's Brief.

There is nothing here that requires notice.

As to Section V of Respondent's Brief.

This is as follows: "If Ida Vought had been legally adopted, the defendant would not inherit because she died before the testator."

The only remark under this section is: "The statute provides for inheritance in the adopted child and not in her children. *C. S.*, 2809-2816."

That statutory provision reads as follows:

"The [adopted] child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance, and the rights of inheritance of real estate, or to the distribution of personal estate on the death of such adopted parent or parents as if born to them in lawful wedlock."

Now, when do legitimate and natural children become invested with rights of inheritance? Bouvier says: "A bastard has no inheritable blood in him, and therefore no estate can descend to him" (1 *Law Dict.*, Title, "Bastard"). Kent says: "Un-

der the English law, illegitimate children cannot take by descent, for they have not, in contemplation of law, inheritable blood" (4 *Com.*, 13th Ed., p. 413).

It is, therefore, the possession of inheritable blood that gives such rights to such children; and, of course, such children possess such blood from the time of their birth, and transmit the same to their children; and if they died in the lifetime of their parents, leaving children, their children take by descent in their place and stead by virtue of such blood so transmitted to them.

By the act of adoption, according to the statute, an adopted child becomes invested with the same inheritable blood that a legitimate natural child is invested with upon its birth, the act of adoption being in effect an infusion of inheritable blood into its veins; and these inheritable qualities must be transmitted by it to its children the same as in the case of a legitimate child.

Of course, this right of inheritance, although existing in a legitimate natural child from the time of its birth, and in an adopted child from the time of its adoption, does not come into effective operation until the death of the parent; and then it comes into such operation for the benefit of the child if then living, or, if not then living, for the benefit of its children if any it leaves. That such is the case in respect to legitimate natural children there can be no dispute, and there cannot be any distinction in this matter between them and adopted children under the statute.

Let us see what this doctrine of the counsel would lead to:

A man and wife in good position, financially and otherwise, while still young, adopt a child as their own; that child marries and has children, while the adopting parents have none born to them; the adopt-

ing parents consider and treat the children of their adopted child as their own grandchildren, and ultimately die intestate. Now, under the counsel's view, if the adopted child survives its adopting parents, it takes their property, but if the adopted child should happen to die, say, just before the death of the adopting parents, then their property does not come to its children, but shoots off to the adopting parents' blood relations, how distant soever they may be, contrary to the expectations of the adopting parents and of the children of the adopted child.

We do not think that this is the meaning of the statute. The counsel do not cite any authorities in support of their position in respect thereto. They show great diligence in searching for authorities on their other points, and cannot be supposed to have neglected this one in their investigations. The presumption, therefore, is that they have been unable to find anything that favors their view on the subject.

On the other hand, this point has been recently decided by the Supreme Court of Missouri adversely to the counsel's view. I refer to the case of *Bernero v. Goodwin*, decided in October Term, 1915, of that court. I quote from the opinion:

"The question now presented for our review is whether or not the natural child of an adopted child shall share in the distribution of the estate of the adopting parent dying intestate, the adopted child having pre-deceased the adopting parent. This identical question has never been before the Court for determination. After a careful consideration of the question, we have reached the conclusion that the question should be answered in the affirmative. The rule, here applicable, and supported by the great weight

of authority is stated in *L. R. C. L.*, 614, as follows:

'If an adopted child dies during the life of its adopting parent, leaving children, such children are for most, if not for all, purposes regarded as natural grandchildren of the adopting parent, and are entitled to represent their parent and to receive from the estate of his adopting parent what he would have been entitled to receive had he lived until after such parents' death.'

To the same effect and directly in point are the following authorities: *Gray v. Holmes*, 57 *Kansas*, 217; *Power v. Hafley*, 85 *Ky.*, 671; *Pace v. Klink*, 51 *Ga.*, 220; *In re George Walworth's Estate*, 85 *Vt.*, 322; *In re Estate of Winchester*, 140 *Calif.*, 468; *In re Webb's Estate*, 91 *Atl. Rep.*, 419 (Pennsylvania Supreme Court, not yet officially reported); 1 *Corpus Juris*, 1402, Sec. 137."

As to Section VI of Respondent's Brief.

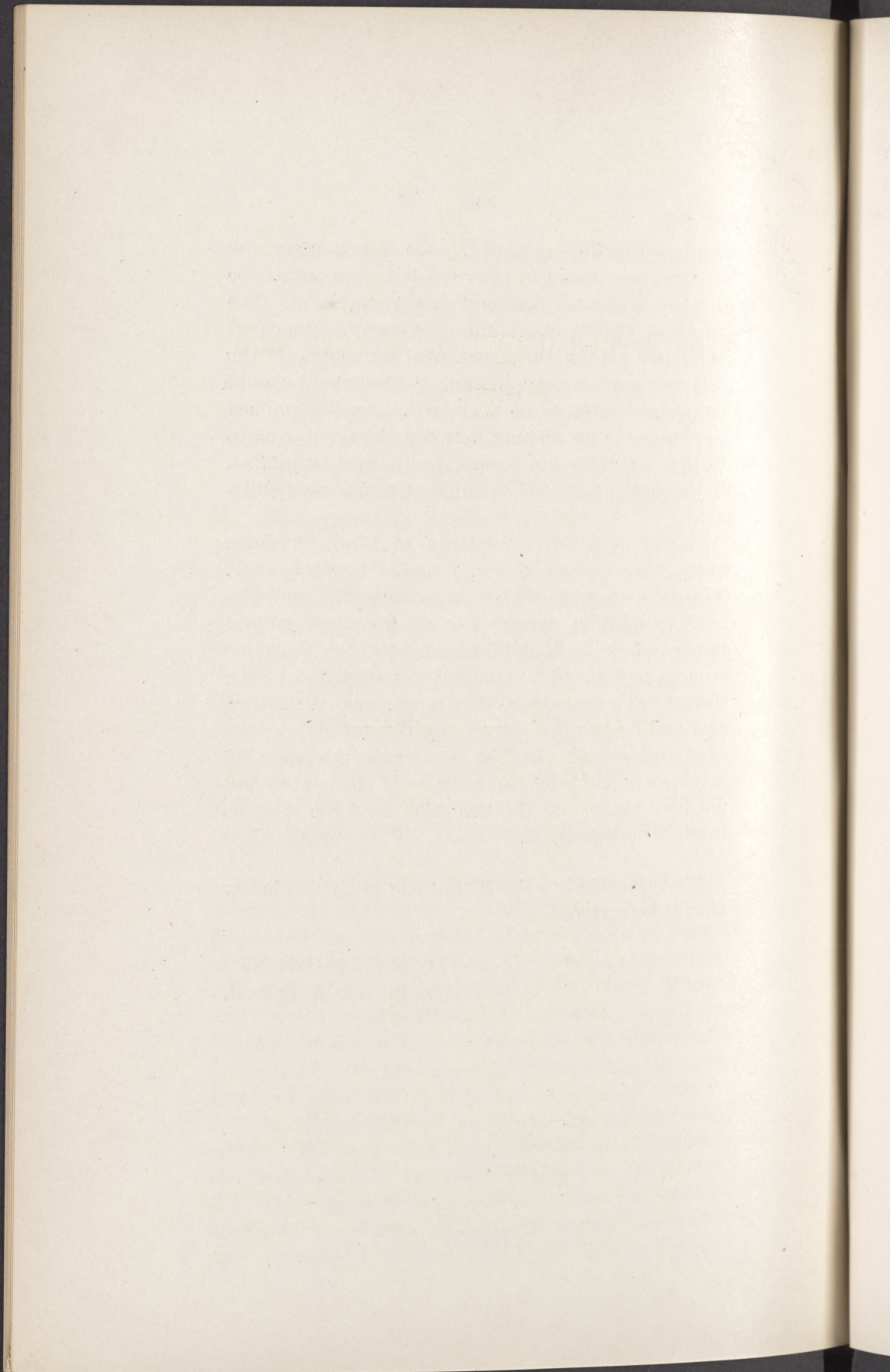
This section relates to the form of the judgment entered. The suit is for "the possession of the equal undivided one-fourth part" of four tracts of land, each particularly described by metes and bounds (Case, pp. 2-6). The finding of the Court below was, "that the plaintiff, Sarah C. Dorsett, as one of the heirs at law of the said Samuel Pope is entitled to an equal undivided one-fourth part of the several tracts of land described in the complaint" (Case, p. 58). The judgment is, "That the plaintiff recover of the defendant the possession of the premises mentioned in the said complaint" (Case, p. 60). The respondent's counsel claim that the "equal undivided one-fourth part of the several tracts of land described in the complaint" are "the premises

mentioned in the complaint." On the contrary, the premises mentioned in the complaint are the entire four tracts of land described in the complaint. The judgment, therefore, should have been for the equal undivided one-fourth part of said premises. If the case goes against the appellant, the judgment should be affirmed only as so corrected. As the counsel say, "there is no dispute between the parties as to the interest in the lands described in said complaint, to which the plaintiff is entitled under said judgment."

In the amended exceptions to Court findings which were drawn by me, I find a clerical error. Section 6, on page 60, reads as follows: "Supplement to findings excepted to on the same ground as next above." It should have been "on the same ground as 4 above." I called the attention of the respondent's counsel to this error some little time ago, and he has not shown any disposition to take advantage of it. Indeed, he treats the question involved in his brief the same as if such error had not been made, and the exception read the same as it ought to have read.

We respectfully submit that the judgment below should be reversed.

GEO. S. HILTON,
Counsel for Appellant.



New Jersey Court of Errors and Appeals

SARAH C. DORSETT,
Plaintiff and Respondent,

vs.

SAMUEL P. VOUGHT,
Defendant and Appellant.

On Appeal
from
Supreme
Court.

BRIEF OF RESPONDENT.

This suit was brought by Sarah C. Dorsett, the plaintiff, against Samuel P. Vought, the defendant, to recover possession of an undivided one-fourth part of certain properties in the County of Passaic of which Samuel Pope died seized.

One of the properties is situated on the north side of Market Street in the City of Paterson and is known as Pope's Hall. It is about 40 feet front and rear and 100 feet deep, with an easement of about 3 feet reserved from the adjoining property. On said land is erected a brick building known as Pope's Hall.

The other property consists of a tract of land at Haledon, in the Township of Manchester, in the County of Passaic, of about seventy acres, and is known as Smith's Quarry.

Samuel Pope died March 21, 1889, leaving a last Will and Testament dated December 6, 1888, duly

probated in the Surrogate's office of the County of Passaic on the 1st day of April, 1889.

The nearest blood relations of Samuel Pope living at the time of his death were his four first cousins, Sarah C. Dorsett (the respondent), Jeremiah VanInderstine, Mary J. Goble and Harvey Beyea.

Ida, the daughter of William Davis (who is also known as William Pope), went to live with Samuel Pope when she was a little girl, and long before the statute was enacted in New Jersey providing for the adoption of children.

Ida Davis continued to live with Samuel Pope until she was married to one Edward T. Vought. She had two children, Samuel P. Vought and Effie Vought, and died on the 1st day of January, 1888, aged twenty-three years. This was prior to the death of Samuel Pope. She left two children, Samuel P. Vought and Effie Vought.

Effie Vought died about two years after the death of Samuel Pope leaving Samuel P. Vought, the defendant in this cause, as her only heir at law.

In the will of Samuel Pope he refers to these children, Samuel P. Vought and Effie Vought, as "the two minor children of my adopted daughter Ida Vogt, now deceased," although Ida Vought was never legally adopted, just as in the ninth paragraph of his will, in a legacy to William Pope, he calls him his "nephew William Pope," although he was no relation to him.

The use and income of Pope's Hall and Smith Quarry properties was given to his wife, Eliza Pope, during her life.

She died in the year 1910. After her death said Samuel P. Vought claimed said premises.

The respondent, Sarah C. Dorsett, brought suit, as heir at law of Samuel Pope, against the said Samuel P. Vought for the undivided fourth part

of Pope's Hall and Smith's Quarry property, claiming that Samuel Pope died intestate as to these properties, except as to the life estate of his widow, Eliza Pope.

The appellant, Samuel P. Vought, claims, first, that Samuel Pope did not die intestate as to said Pope's Hall and Smith's Quarry, but that the same were devised to him and his sister, Effie Vought, and second, that, if he did die intestate as to these properties, by reason of the fact that the deceased referred to their mother as his adopted daughter, and the plaintiff had taken a legacy under said will, she was estopped and precluded from claiming this property as an heir at law of said Samuel Pope.

The case was tried before Judge SILZER at the Passaic Circuit, and judgment rendered in favor of the plaintiff.

I.

The respondent insists that the said Samuel Pope died intestate as to the premises in question, except as to the life estate devised in said will to his widow, Eliza Pope.

The said Samuel Pope was the owner of a large number of tracts of land in the City of Paterson and vicinity, as is shown by his will.

The only mention of the premises in question is made in the fifth paragraph of his will, which is as follows:

"I give, devise and bequeath unto my said wife Eliza, *for and during the term of her natural life*, my homestead farm consisting of eleven and one-half acres situate on

Broadway in the City of Paterson, my three mills and mill properties situate on the north bank of the Passaic River in the first ward in said city; *my brick building situate on the north side of Market Street in said City, known as Pope's Hall*; my two double frame dwelling houses, situate on the south side of Jay street in said city; my frame dwelling house situate on the corner of Jay and Arch Streets in said city; my frame store and dwelling house situate on Arch Street adjoining the Arch Street Bridge in said city; a tract of land belonging to me situate on the southwest side of Morris Canal in said city, containing about twenty acres, and known as Pope's Quarries, *and the tract of land belonging to me containing about seventy acres situate at Haledon in the Township of Manchester, known as Smith's Quarry.*"

The properties under this fifth item of his will were given to his wife Eliza *for and during the term of her natural life.*

Each property herein mentioned is particularly set forth and described by testator.

The defendant claims this property, if at all, under the eighteenth item of said will, but plaintiff insists that there is no disposition of the premises in question or any part thereof under this item of the will.

This eighteenth item provides, at the death of his wife Eliza, for the appointment of trustee or trustees for the said Samuel P. Vought and Effie Vought, in place of his said wife, Eliza Pope, and gave to such trustee or trustees in trust his three mill properties situate on the north bank of the Passaic River in the First Ward of the City of

Paterson, his two double-frame dwelling houses situate on the south side of Jay Street in said City of Paterson, his frame dwelling house situate on the corner of Jay and Arch Streets in said City, and his frame store and dwelling house situate on Arch Street adjoining the Arch Street Bridge in said City, and the lands whereon the same are erected or belonging or appertaining thereto.

This is the only portion of said eighteenth item which relates to real estate, and clearly does not include the premises in question.

Every piece of real estate in this eighteenth item disposed of is clearly and accurately described. Then comes the provision in this eighteenth item for personal property and says:

“Also all moneys, bonds, mortgages, or other securities undisposed of, belonging to my estate or which at any time shall have from any cause reverted to my estate, or which upon the death of my said wife will again become part and parcel of my estate; in trust for the uses and purposes following,” etc.

This last clause relates entirely to personal property and cannot in any way be construed to relate to real estate.

The words “moneys,” “bonds,” “mortgages” and “securities” all relate to personal property and not real estate.

The eighth item gives to Sarah C. Dorsett and his other cousins, “bonds, mortgages or other securities of the value of Fifteen thousand dollars.”

The eighteenth item of the will, after referring to specific property, says that he gives also all “moneys, bonds, mortgages and other securities” undisposed of.

The only difference in the language is adding the word "moneys." Moneys certainly could not mean real estate as used in this connection.

The language has been considered by the Court of Chancery in the case of *Blundell et als. v. Pope et als.*, 21 *Atl. Rep.*, p. 456.

In this case the terms "bonds, mortgages or other securities" were taken in their order and meaning and were held not to include real estate or to create a charge upon real estate.

There is no attempt in this eighteenth item of the will to dispose of the residuum of the estate. The language was clear and does not need any construction.

In this case, 21 *Atl. Rep.*, 456, the Court also held that there was not sufficient funds, "bonds, mortgages and other securities," with which to pay the legacies of \$15,000 above mentioned, and if the real estate claimed by the defendant was included in such words, the said legacies would not have abated.

The entire will shows that it was drawn by a man thoroughly familiar with the law, an expert in the use of legal terms, and in its terms clearly distinguishes the difference between real and personal property.

The will all the way through shows, in reference to the other property, that the testator intended to die intestate in case of certain events; that is to say, in the seventh item of the will he leaves his wife, Eliza Pope, in trust, several valuable properties and provides at the end of the seventh item that, in case of the death of Samuel P. Vought and Effie Vought without issue, "all of the properties herein devised and bequeathed in trust, together with all accumulations of rents, income and profits, shall revert to and again become part and parcel of my estate."

The testator in his will makes no disposition or attempts to make any disposition of the residue of his real estate in the event of the death of said Samuel P. and Effie Vought without issue.

Again, in the seventeenth item of his will, he devises after the death of Eliza Pope, his wife, his homestead farm in trust, the same to be conveyed to Samuel P. Vought on his arriving at the age of twenty-one years, but further provides that in case of the death of said Samuel P. Vought without lawful issue before arriving at the age of twenty-one years, said homestead farm, together with accumulations of rents, income and profits derived therefrom, shall become part and parcel of his estate. (See also fifteenth and sixteenth items of will.)

In the above-mentioned eighteenth item of the will he provides that in case of the death of the said Samuel P. Vought and Effie Vought before the death of his said wife Eliza,

“the gifts, devises and bequests, in and by this the eighteenth item, paragraph or clause of this my will made, shall in all things be taken and considered as being null, void and of no effect, and that all the buildings, lands, moneys, bonds, mortgages or other securities, herein and hereby given, devised and bequeathed, shall be taken, held and considered as still belonging to, and being part and parcel of my undisposed of estate.”

The will clearly shows that under certain circumstances there was an intention on the part of the testator to die intestate of all his real property. If there had not been, he certainly would have provided a residuary clause.

The rules for construction of wills in this State are clearly defined.

There are two recent decisions in this State defining the rules for construction of wills which apply to the case at bar.

First, the case of *Woodruff v. White*, 78 N. J. Eq., page 410, affirmed by the Court of Errors and Appeals in 79 Eq., 225. In this case the Court holds:

“The words of a will must be taken in their natural meaning.

“The heirs are not to be disinherited by a will unless a clear intent appears by its language to that effect.”

And again:

“If possible, a will must be so construed as to dispose of all testator’s estate; *but the court, to prevent intestacy, may not disregard unambiguous and clear language producing intestacy.*”

Second, the case of *Adrain v. Koch*, 91 Atl. Rep., page 123.

In this case Vice-Chancellor HOWELL says:

“Where the language of a will can be read in its ordinary and natural sense, no construction is necessary, but where it cannot be so read, it must be interpreted as a whole to make it speak, and speak intelligibly, the intention of the testator.”

In the case at bar the language of the will can be read, without question, in its ordinary and natural sense, and no construction is necessary.

In order to claim that this eighteenth item of the will disposes of the premises in question, the Court would have to give the words other than their ordinary meaning and read into the will words the testator never used, and, by doing this, the disposition of the testator's property would have to be made by the Court instead of the testator.

In *Aveson v. Aveson*, 3 Denio, 458-461, the Court held:

“The policy of the law in this country as well as in England, favors the descent of property of the intestate to the heir, and the right to make a will is a privilege of the testator. That the intention of the testator is to give to the property a different direction from that prescribed by the common rules of descent is a fact not to be implied, but affirmatively made out or clearly expressed in the will (*Moore v. Heaseman, Willes' R.*, 141), and that the intention must be collected from the words used, and not from conjecture (*Hay v. The Earl of Coventry*, 3 T. R., 83-86; *Moor v. Denn*, 2 Bos. & Pull., 247; *Wheaton v. Adres*, 23 Wend., 452). If the doctrine contended for by the defendant and sustained by the Court below be true, then the operation of the will is to disinherit the heirs, a conclusion not to be inferred from doubtful terms, but requiring unequivocal language.”

In *Graydon v. Graydon*, 25 N. J. E., 561, the Court held:

"The question is not what the testator supposed he had done or intended to do, aside from the language of the will. It is the duty of the Court to construe the will in the light of the terms used and give to them their legal and natural import."

"The heir-at-law will not be disinherited, nor forfeiture of an estate decreed, except upon words free from doubt."

In the case of *Leigh v. Savidge*, 14 N. J. Eq., page 124, the Chancellor says:

"Heirs have always been looked upon with favor by courts of justice, and the rule is well settled that plain words are required to disinherit them, and equally plain words are necessary to charge the estate of an heir, for a charge is pro tanto a disinherison of the heir."

What testator said in reference to his property in his will does not in any way affect the property of which he died intestate, is clearly shown in the cases of

Skellenger v. Skellenger, 32 N. J. E., 659.
Ward v. Dodd, 41 N. J. E., 415.

In the case of *Leigh v. Savidge*, 14 N. J. E., 124, cited in defendant's brief, on page 134 the Chancellor says:

"If, therefore, there was an heir to take the estate undisposed of by the will, the legal presumption would be that it was not the design of the testator that he should be disinherited, or the inheritance charged with legacies."

In *Yawger v. Yawger*, 37 N. J. E., 216, and *Keen v. Plume*, 12 Buchanan, 526, etc., cited in defendant's brief, the same rule is stated, that it is presumed when a will is executed the testator designs to dispose of his entire estate.

Smith v. Greene, 35 Atl. Rep., 148, and citation from *Roper on Legacies*, and *Birdsall v. Applegate*, *Spencer*, 244, etc., all state the same general doctrine, but in this case of *Birdsall v. Applegate*, Chief Justice HORNBLOWER says:

"The great rule says the heir at law cannot be disinherited but by express words or necessary implication."

The full force of the rule laid down in *McCoury's Exrs. v. Leek*, 1 McC., 70, is not obtained from the quotation in defendant's brief. The Court says:

"In construing a will, conjecture must not be taken for implication. Necessary implication means so strong a probability of intention that an intention to the contrary to that which is imputed to the testator cannot be supposed."

The mistake of the defendant is that he takes a conjecture to be an implication. There is nothing in the case to show that the favor with which the heirs are looked upon by courts of justice in matters of this kind depends upon the closeness of relationship between them and the testator. The defendant does not cite any case to sustain such contention. The case of *Leigh v. Savidge* holds to the contrary.

But again there are no words requiring construction. The words "moneys, bonds, mortgages and other securities" as used in the will are in no place used to refer to real estate, and in the case brought

by defendant's counsel as executor and as solicitor of the estate of Samuel Pope for a construction of the eighth and other paragraphs of this will, 21 *Atl. Rep.*, 456, the Court held that these words did not include or create a lien on real estate.

To raise an implication or show an intention on the part of the testator, there must be some usual words used by the testator which would indicate his intention to make such disposition of his property, which does not appear in this will.

In the case of *Van Houten v. Pennington*, 4 *Halsted Chy.*, and *Nelson v. Combs*, 3 *Harrison*, 28, the intention of the testator is clear, and the rule is that the necessary words will be supplied to carry out that intention in the cases cited. The language there used indicated a clear intention on the part of the testator as to the disposition of his property. The Court there supplied the necessary words to carry out that intention.

The defendant admits that the supplying of words is only done to carry out an *obvious* intention of the testator.

In the case at bar the language is very clear. He disposes of his real estate by naming the exact properties. He gave a life interest in the particular properties in question in this suit to his wife, and then left them undisposed of, showing his intention clearly to die intestate of these properties.

The language of the will is drafted by a man skilled and expert in the law. When he used the word "moneys," he meant moneys, not real estate. When he used the word "bonds," he meant bonds, not real estate. When he used the word "mortgages," he meant mortgages, not real estate. And when he used the words "other securities," he meant securities, not real estate. Whenever real estate is disposed of under the will, proper words of a devise are used.

II.

Samuel Pope having died intestate as to the premises in question, the plaintiff is not estopped by any recital in the will from maintaining her action.

The defendant claims that because Samuel Pope in his will described Samuel P. Vought and Effie Vought as two minor children of his adopted daughter, Ida Vought, now deceased, and because the plaintiff took a legacy under said will, she is estopped from showing that Ida Vought was not the legally adopted daughter of Samuel Pope, the testator.

The plaintiff insists that she is not estopped by any such contention.

(1) Plaintiff is not claiming under the will of Samuel Pope. The property to which she claims title was not disposed of by will, but descended to the plaintiff and the other heirs at law of the said Samuel Pope.

(2) The reference to Ida Vought, as testator's adopted daughter, is merely descriptive and surplusage and in no way operates as an estoppel.

(3) The use of the words "adopted daughter," in describing Ida Vought in the will, could not operate as a legal adoption, for it would be an adoption by parol instead of the statutory provisions.

A.

THE PLAINTIFF IS NOT CLAIMING POPE'S HALL AND SMITH'S QUARRY UNDER THE WILL OF SAMUEL POPE, AND IS NOT BOUND BY ANY DECLARATION OF HIS WILL.

In the case of *Skellenger v. Skellenger*, 32 N. J. E., 659, the Court says:

"The intention of the testator is to govern only so far as he has declared it by his will. With regard to that part of his property which his will did not pass, it must be declared he had no will, and, therefore, the Court cannot know his intentions concerning it. The next of kin cannot take until intestacy is found, and then they take not in pursuance of the testator's intention, but by force of the law, regardless of what his intentions were" (663).

In *Ward v. Dodd*, 41 N. J. E., 415, where the testator declared that the gift therein to Moses J. Williams was his full portion, the Court says:

"In making such disposition he declared that the gift to Moses J. Williams was his full portion. But so, too, he undoubtedly thought (although he did not say so) that the gifts to those to whom he gave the residue were their full portions of his estate; and yet those gifts will not bar those whose share have not lapsed from their legal rights, as heirs and next of kin, in the lapsed shares."

"Moses J. Williams is entitled to his legal rights in the lapsed shares."

In the case of *Nagle v. Conard*, 79 N. J. E., 124, the testator gave his nieces, Elanor Lynch and

Dorothea Nagle, \$2,000, "in lieu of all interest to which they may be entitled in my estate, by virtue of this will or otherwise," etc. The Court held that they were entitled to participate in the intestate property as tenants in common.

A recital in a will to the effect that the testator had deeded certain of his property in trust to found a public charity, which deed was drafted at the same time as the will, but which the testator failed to execute before his death, will not be effective to pass the title to such property to the persons named as such trustee in the recital.

Hunt ex rel. Streater v. Evans, 134 Ill., 496; 11 L. R. A., 185.

Benson v. Hoffmann, 158 Ill., 486.

The recital in a will of the execution of a deed to property, with an expression of a desire that the grantee should enjoy such property to the exception of the testator's other relatives, but which has been set aside as secured by undue influence, is inoperative as a devise.

Zimmerman v. Hafer, 81 Md., 347; 32 Atl., 316.

B.

THE REFERENCE TO IDA VOUGHT AS HIS ADOPTED DAUGHTER IS MERELY DESCRIPTIVE AND SURPLUSAGE, AND IN NO WAY ESTOPS THE PLAINTIFF FROM CLAIMING THE PROPERTY.

William Pope was called the nephew of the testator in the bequest to him. If he was living to-day he might just as well come in and claim that there was a devise to him of all testator's property because testator called him his nephew, when, as a matter of fact, in the testimony in the suit in the

Pope estate above cited, he admitted that he was no relation to Samuel Pope.

In re Hughes Estate, Appeal of Landy,
225 Pa., 79 (73 Atl. Rep., 1061).

In this case, Henry L. Hughes in his will devised as follows:

“I will to my daughter Jane Cease, and my daughter’s children Margaret Lamoreaux, now dead, and Annie Griffith, an adopted daughter, the remainder of my property, which consists of house and lot,” etc. “My daughter Annie Griffith shall not be debarred from remaining on the homestead during the lifetime of my widow.”

In a codicil to his will he bequeaths to his daughter Sarah the homestead during her lifetime “and the money that I hold in the bank shall be equally divided among all of my children.”

The Court says:

“For Annie Griffith it is contended that the will of the testator in which he speaks of her as his daughter and his adopted daughter, operates as a deed of adoption, under the Act of April 2, 1872 (P. L. 31). Whether this will is in compliance with the act, we need not say, as it is held in *Carroll’s Estate*, 219 Pa., 440; 68 Atl., 1038, that in Pennsylvania there is no authority for the proposition that a child may be adopted by parol. We have no evidence of her adoption by decree of court, and we must, therefore, conclude that she was never legally adopted by the testator. It is further contended on behalf of Annie Griffith that the testator intended to include her in the term ‘children’

as found in the codicil, as manifested by the language employed in the body of the will. He makes devise to her as 'Annie Griffith, an adopted daughter,' and as 'My daughter Annie Griffith.' These words are merely descriptive of the person intended. They did not, in fact, make her a daughter or an adopted daughter, for she was neither."

In the case of *Line's Estate*, 221 Pa., 374; 70 Atl., 791, the testator says, "I nominate and appoint my brother Lute A. Line" executor, etc. Again in his will he says, "in addition to what I have given to my brother Lute A. Line, as one of my heirs and distributees under the foregoing will, I give, devise and bequeath unto him my \$5,000 in Capital Stock," etc.

Lute A. Line was not a brother of the testator, but was his half-brother. The testator directed that all the residue of his estate be divided among his heirs under and according to the Intestate Law of Pennsylvania. The Court held that the word "heirs" included those entitled to inherit personal as well as real property, and *that the testator's use of the word "brother" did not indicate an intention to treat the half-brother as a brother of the whole blood*, and that the half-brother was not entitled to a share of the residue of the estate.

In *Smith v. Allen*, 161 N. Y., 478, testator referred to a legatee in his will as his adopted daughter. The Court held that she could not inherit unless she showed a legal adoption.

There is only one way which a child can be adopted in this State so as to inherit and that is in the manner prescribed by statute.

THE USE OF THE WORDS "ADOPTED DAUGHTER" IN DESCRIBING IDA VOUGHT IN THE WILL COULD NOT OPERATE AS A LEGAL ADOPTION, FOR IT WOULD BE AN ADOPTION BY PAROL, INSTEAD OF THE STATUTORY PROVISIONS.

In *Re Carroll's Estate*, 219 Pa., 440, the Court held that there is no such thing as parol adoption known to the law of Pennsylvania.

The legal act of adoption in so far as it carries with it the right to inherit is wholly statutory.

"However against an adopted child, the statute *shall be strictly construed*, because it is in derogation of the general law of inheritance, which is founded on natural relationship and is a rule of succession according to nature which has prevailed from time immemorial. Hence a child by adoption cannot inherit from the adopting parents unless the act of adoption has been done in strict according with the statute."

1 *Cyc.*, 932.

Smith v. Allen, 161 N. Y., 478.

Ferguson v. Jones (Oregon), 3 L. R. A., 620.

The plaintiff insists that the words used, "Samuel Vought and Effie Vought (minor children of my adopted daughter Ida Vought, now deceased)," these latter words always in parentheses in said will, were *merely descriptive* and in any event no estoppel results therefrom, and that *there cannot be an adoption by estoppel*, and, again, the testator not having disposed of this real estate under the

will, *the plaintiff is not estopped by any language used in the will.* The defendant in his brief, under the same subject sets forth that the plaintiff received \$14,707.24 under a legacy of \$15,000, and also received a diamond ring under the will.

Accepting these gifts does not prevent the full operation and effect of the will; consequently no estoppel could arise as to any provision of the will and most certainly not concerning property not disposed of thereunder.

The plaintiff is described in the will as a cousin of the testator. He did not thereby make her a cousin, and she is not claiming anything by reason of this description in the will, and could not claim anything by reason of that description in the will.

The doctrine of election does not apply, neither does this suit come within the principle of the doctrine of election.

The cases cited in the defendant's brief under this subject do not support his contention.

In the case of *Adams v. Lansing*, cited as *Jones v. Lansing*, 17 Cal., 629, the Court held:

“The language as used in the will in question was equivalent to saying, ‘I have given these lands in certain proportions to my sons, and I hereby ratify and confirm the gifts.’”

The will in this case, the Court held, was executed with all the formalities of a deed, and was admissible in evidence without regard to its testamentary character (p. 640).

In *Denn v. Cornell*, 3 Johns. Cas., 174, cited in defendant's brief, the Court held:

“The language used clearly operated as a devise, ratifying the title in his two sons.”

The language was not used as a recital, but showed the intention of testator. In the case at bar the language is not used as a recital, but for the sole purpose of identifying the beneficiaries.

In *Smith v. Waite*, 4 *Barbour*, 28, cited in said brief, the Court held that the will operated as a direct devise to the testator's son George. The testator said that he had executed a deed to his son George for the lands in question, which title deed and possession should not pass until after the death of the testator and upon certain conditions set forth in said will.

The Court held that the intention of the testator was for his son George to have this property, and that the language operated as a devise.

The case of Keenan, Myrick Prob. Cal.

I have not been able to find any report of this case, but it clearly does not relate to the subject-matter of the case at bar. According to defendant's brief, the Court held that, in proceedings for the probate of a will, the statement in the will that a person was the adopted son of the testator was *prima facie* evidence of his adoption. Of course this is subject to rebuttal. The case does not sustain the contention of defendant in the case at bar.

The *Keenan* case does not relate to any provisions under the will, but to proceedings for the probate of a will.

The case at bar relates neither to proceedings under nor to disposition by the will, but to property of which Samuel Pope died intestate.

Further, plaintiff has proved that there was no adoption (State of Case, pp. 48-57).

The case of *Smith v. Waite*, 4 *Barbour*, 28, is again referred to in defendant's brief.

In the first place, the case does not relate to the question arising in the suit at bar, and, in the second, the Court of Appeals, in *Smith v. Allen*, 161 N. Y., 478, where the testator, in his will, says that he gives to his adopted daughter, Sarah F. M. Green, \$10,000, and gives all the rest, residue and remainder of his estate, real and personal, remaining after the death or remarriage of his wife and payment of the legacies, to such person or persons as would be legally entitled to succeed to and inherit the same as in case he died intestate, and where, in a codicil to his said will, he again described said Green as his adopted daughter and revoked the legacy to her on account of the debt owing by her husband to the testator, held that she could not take the remainder of the property under the will, as she had not been legally adopted.

The words calling her "his adopted daughter" did not entitle her to inherit.

In *Parker v. Nickson*, 1 *De Gex, Jones & Smith*, 191, the testator made Thomas Nickson, his second cousin, *to be his next of kin and heir at law* to certain real estate. The Court said that it was the intention of the testator by this clause of the will so to devise said property to Thomas Nickson. The Chancellor held these words to operate as a devise to Thomas Nickson.

There is no such language in the will in the case at bar to indicate any intention on part of testator to devise lands in question by use of the words or describing these persons as "children of his adopted daughter."

In the case of *Tilley v. Collyer*, 3 *Keb.*, 589, the Court did not give to S. the property because the testator referred to her six times in his will as his heir, but *because the language of the will clearly showed the testator's intention* to devise to her all

his property, and required her to make certain payments to his other two children. These payments were £100 each. The case was decided on the question of intention of the testator.

The authorities above cited do not sustain the first proposition in the defendant's brief.

The defendant then cites from Jarman on Wills, where it says that he who accepts a benefit under a deed or a will must adopt the whole contents of the instrument, conforming with all its provisions and renouncing every right inconsistent with it.

There is no right inconsistent with the terms of the Pope will, or any part relating to any property disposed of under the will, to which the plaintiff is making any claim.

It is in reference to *property not affected by the will*, or attempted to be disposed of under the will, that this suit is brought.

In *Stephenson v. Brown*, 3 Gr. Ch., 503, cited in defendant's brief, the testator charged lands with the payment of legacies, and devised the use of the lands to his wife in lieu of dower.

Of course she could not accept the devise of the use of the lands and claim her dower also as against the legacies, but nothing of that kind applies to the case at bar.

In *VanDuyne v. VanDuyne*, 1 McC., 49, cited in said brief, the testator's son Isaac was given certain property, and as a charge against the same he was to support his mother. The Court held that he could not hold the property without complying with the requirements of the will. This also clearly does not apply to the case at bar.

In the case of *Yawger v. Yawger*, 10 Stew., 216, the testator devised a farm to his son, for which he

was to pay \$80 an acre. It was held that the payment was a lien upon the farm, and that he who accepts a benefit under a will must bear the burden imposed. There is nothing in the case at bar to which this case applies, because the plaintiff is not claiming anything which the testator disposed of under his will.

Exactly the same doctrine is laid down in *Hyde v. Baldwin*, 17 *Pick.*, 308, and *Watson v. Watson*, 126 *Mass.*, 152, as in the case last cited; and in *Aird's Estate*, 12 *Chy. Div.*, 291, and in *Re Woods*, 32 *Chy. Div.*, 517, and in the other cases cited in the brief taken from Jarman on Wills. In each of these cases the beneficiary under the will was charged with certain payments or given certain property, the taking of which was inconsistent with some other provision of the testator's will, and the general doctrine laid down that the beneficiary by making election took the legacy or devise with the burden.

The defendant then cites 1 Pomeroy Equity Jurisprudence, 102, and several other cases relating to the doctrine of equitable estoppel. Where this has any application to the case at bar, I do not comprehend.

The acceptance of the legacies to the plaintiff do not in any way interfere with or affect the devises, legacies and bequests under said will to the defendant. He got everything that was given to him under the will or attempted to be given to him under the will, and the plaintiff got part of what was given to her under the will, so, by her acceptance of what was given to her, there could be no application of the doctrine of equitable estoppel.

In re Cooper's Will, 75 N.J.E., 186-187, the Court said, Mrs. Marks had lived with the testatrix from the age of five until twenty one, when she was married and during all that time and in her Wills and Codicil was called by testatrix her "adopted daughter", and was nearer and dearer than any one else, but that

III.

In the case at bar there is no attempt to claim that Ida Vought had ever been adopted by the said Samuel Pope, and therefore neither she nor her children could inherit from the said Samuel Pope.

The first statute in this State providing for adoption of children and giving them the right of inheritance is found in Public Laws of 1877, page 123. The act provides:

Section I: That any person not married, or any husband with wife's consent, or any wife with her husband's consent, or any husband and wife jointly, may petition the Circuit Court or the Orphans' Court of the county wherein he, she or they may reside for permission to adopt any minor child or children and also to petition for a change of the name of such child. If the child is over the age of fourteen, the written consent of such child must be obtained, duly acknowledged and presented with the petition, also the written consent of the parent or parents, if living, and not hopelessly intemperate or insane, etc.

Section II: For the form of petition and what is to be set forth in the petition.

Section III: For the presentation of the petition to the Court and the examination of the parties in interest; the appointment of a next friend for the child and publication in the newspapers of the time and place of such appointment, and notice of the petition, and the making of the decree by the Court.

Section IV: For the recording of the petition, decree, testimony and proceedings at large in the book to be kept for that purpose, properly indexed, and that, *upon the entry of such decree of adoption*, the parents of the child, if living, shall be divested of all legal rights and obligations of or from them to the child or from the child to them, etc., and the child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance, and right of inheritance to real estate and distribution of personal estate on the death of such adopting parent or parents, as if born to them in lawful wedlock.

This act was afterwards revised in 1902, P. L. 259 (C. S., 2807).

The revised act has substantially the same provisions as the Act of 1877 above cited, but limits the proceedings for adoption to the Orphans' Court of the county wherein any minor child may reside, or of the county wherein such petitioner may reside.

Both acts make the entering of the decree of adoption essential to the right of inheritance.

The burden of proof is on the defendant to prove a strict compliance with the statute in order to inherit.

The plaintiff, however, has shown affirmatively that Ida Vought was never adopted by Samuel Pope or his wife. (See State of Case, pp. 48-57.)

IV.

Neither the defendant nor his sister Effie Vought acquired title to any real or personal property under said will by reason of their relationship to Ida Vought or any reference to their mother as the adopted daughter of said testator.

All of the devises and bequests made under the will of Samuel Pope to or for the benefit of the said Samuel P. Vought and Effie Vought would be clear and definite if no reference whatever was made to their mother, Ida Vought. They take nothing, under the will, by reason of their being children of Ida Vought, and the references to their being her children and to their mother as "my adopted daughter" are mere surplusage and add nothing to, or detract nothing from, the devises and bequests in which they are made.

These references being unnecessary and mere surplusage and not affecting the construction or interpretation of the will or the devises and distribution of the estate thereunder, the plaintiff could not, by anything they contained, be estopped from claiming or accepting anything to which she was entitled under said will or any interest she might receive or be entitled to as one of the heirs at law and next of kin of the said Samuel Pope.

It has also been shown that, although William Pope was called "nephew" of Samuel Pope, he was no relation to Samuel Pope, clearly indicating that the terms "cousin," "nephew" and "adopted daughter" were simply used in said will as descriptive, and not with the intention of operating as a devise or bequest.

See ninth paragraph of the will; also *Blundell v. Pope*, 21 *Atl. Rep.*, 456; also *State of Case*, p. 49.

V.

If Ida Vought had been legally adopted the defendant would not inherit because she died before testator.

The statute provides for inheritance in the adopted child and not in her children.

C. S., 2809-2816.

VI.

The objection of the defendant to the form of the judgment is without merit.

The defendant objects to the form of the judgment because it "adjudges that the plaintiff recover of the defendant possession of the premises mentioned in the said complaint."

The premises mentioned in the complaint are *the undivided one-fourth part of Pope's Hall and Smith's Quarry*—fully described in said complaint.

In order to find out what the premises are which the plaintiff is claiming and for which possession is awarded, we are compelled to go to the complaint, and there we find that the plaintiff claims the undivided one-fourth part of the said tracts of land. There can be no question but that the undivided one-fourth part of said tracts of land in the complaint are "the premises mentioned in the complaint," or the premises in question in this suit.

In dealing with real estate, the phrase "premises in question" is used when referring to an individual interest as well as to the whole interest in land.

If, however, it should be determined that there is a mistake in the form of the judgment, the Court has power to make such correction, as there is no

dispute between the parties as to the interest in the lands described in said complaint to which the plaintiff is entitled under said judgment.

Practice Act 1912, p. 382, Secs. 27 and 28.
Practice Act, C. S., 4091, Sec. 126.

The respondent insists that, for the reasons above given, the judgment rendered in her favor in the court below should be affirmed.

J. W. & E. A. DEYOE,
Of Counsel with Respondent.

New Jersey Court of Errors and Appeals

SARAH C. DORSETT,
Plaintiff and Respondent,

vs.

SAMUEL P. VOUGHT,
Defendant and Appellant.

On Appeal from
Supreme Court.

APPELLANT'S BRIEF.

Samuel Pope died in the City of Paterson on March 31st, 1889, at the age of seventy-six years, seized of the lands in question in this case. He left a will, dated December 6th, 1888, which was duly probated, and by which he gave said lands to his wife, Eliza Pope, during her life. Said Eliza Pope died on or about June 23rd, 1910.

Said Samuel Pope never had any issue, and his nearest blood relations at the time he made his will were his five cousins, Sarah C. Dorsett (the respondent), Jeremiah Van Iderstine, Mary J. Goble, Harvey Beyea and Patience Ferris; and between the time of the making of the will and the time of his death, said Patience Ferris died. Therefore, his said cousins that survived him were the respondent, Jeremiah Van Iderstine, Mary J. Goble and Harvey Beyea.

The testator in his will mentioned one Ida Vought, under the name of "Ida Vogt," as his

adopted daughter. This Ida Vought died in the lifetime of the testator a short time before he made his will, at the age of twenty-three years. She left two children, namely, Samuel Vought and Effie Vought, called in said will "Samuel Vogt" and "Effie Vogt." Effie Vought died in 1891, which was after the death of Samuel Pope, and before the death of Eliza Pope. She died intestate, under the age of twenty-one years, without leaving lawful issue, and leaving said Samuel Vought her only heir at law, who became twenty-one years of age in 1904. This Samuel Vought is the appellant in this case, under the name of "Samuel P. Vought."

Said Samuel Pope by his will gave his wife, as trustee of said Samuel Vought and Effie Vought, and to such person or persons as might be appointed to succeed her as trustee considerable real and personal estate (Section 7 of will), and upon the decease of his said wife he gave her successor or successors in the trust considerable additional real and personal estate (Section 18 of will). According to the provisions of the trust, Samuel Vought, upon the death of said Effie Vought without issue, became the sole beneficiary thereof. After the death of the said Eliza Pope, Edward T. Vought, the father of said Samuel Vought, was appointed by the Court of Chancery trustee of said Samuel Vought in her place and stead.

Said testator also, by his will, gave the respondent bonds and mortgages and other securities of the value of \$15,000 (Section 8), and his diamond ring (Section 11). And according to the agreed facts in the case, of this \$15,000 she received \$14,707.24; the reason the rest of the \$15,000 was not paid her being an alleged deficiency of securities and cash applicable to the payment of such legacies. And according to said agreed facts, she also received said diamond ring.

The respondent claims that upon the death of said Samuel Pope, said lands descended to herself and Mr. Pope's other three surviving cousins, as tenants in common, subject to said life estate, which has now terminated, and she brings this suit to recover one undivided fourth part thereof.

The appellant claims that he, instead of the respondent, is entitled to said undivided fourth part of said lands, and in support of that claim we urge:

FIRST.

That Samuel Pope having, in his will, mentioned Ida Vought, under the name of "Ida Vogt," as his adopted daughter, and the respondent having received said legacies under said will, she is estopped and precluded from setting up, claiming or proving in this case that said Ida Vought was not his adopted daughter.

This point is embodied in the second and third grounds of appeal. It is presented first instead of the point first mentioned in said grounds of appeal for the reason that it was first presented in the Court below and first considered in said Court's memorandum decision.

If said Ida Vought was the adopted daughter of the testator, she would, if she had survived him, have been his heir at law; and as she did not survive him, the appellant and his said sister were, in that case, his heirs at law; and upon the decease of appellant's said sister, intestate and without issue, her interest as such ^{her} heir at law in said premises descended to him as ~~his~~ heir at law. And, of course, if the complainant is so estopped and precluded, the appellant and his said sister must be considered as treated in this case as the heir at law of said Samuel Pope. It is immaterial, therefore, whether

the respondent was actually such heir at law or not.

We will now present the instances in which the testator speaks of said Ida Vought as his adopted daughter, with comments thereon and authorities applicable thereto.

In the sixth paragraph of said will said testator says: "I hereby nominate and appoint my said wife Eliza, trustee of Samuel Vogt and Effie Vogt (the two minor children of my adopted daughter, Ida Vogt, who is now deceased)," etc.; in the seventh paragraph he says: "I give, bequeath and devise unto my said wife, as trustee of Samuel Vogt and Effie Vogt (the two minor children of my adopted daughter, Ida Vogt, now deceased)," etc.; in the tenth paragraph he says: "I give, devise and bequeath unto Samuel Vogt (the son of my deceased adopted daughter, Ida Vogt)", etc.; in the twelfth paragraph he says: "I give, devise and bequeath unto Samuel Vogt and Effie Vogt (children of my adopted daughter Ida, now deceased)," etc.; and in the eighteenth paragraph he says: "After the decease of my said wife Eliza, I give, devise and bequeath unto such person or persons as may be appointed by the Chancellor, or any competent Court of this State, Trustee, or Trustees of Samuel Vogt and Effie Vogt (minor children of my adopted daughter Ida Vogt now deceased)," etc.

These are clear declarations of said Samuel Pope that said Ida Vought was his adopted daughter.

And when the testator thus declared that she was his adopted daughter, he said what was equivalent to his saying that she was the person who, if she should survive him, would be his heir at law.

And then when he spoke of Samuel Vought and Effie Vought as being the children of his adopted daughter Ida Vought, he said what was equivalent to his saying that the said Samuel Vought and Effie Vought were his heirs at law.

In the case of *Jones v. Lansing*, 17 *Calif.*, 629, there was a recital in a will of certain conveyances of lands by the testator in his lifetime; and the Court held that the heirs at law of the testator, and all claiming under them, were estopped by this recital from denying that the title to said lands had so passed.

And in *Denn v. Cornell*, 3 *Johns. Cas.*, 174, a recital in a will of a conveyance of land by the testator in his lifetime to a certain person was held to be evidence of such conveyance and to estop an heir of the testator from denying the conveyance.

It would seem that if a recital in a will that certain conveyances had been made by the testator in his lifetime estopped the heir of the testator from denying the conveyance, the statement by Mr. Pope in his will that Ida Vought was his adopted daughter, which, of course, is equivalent to the statement that she had been adopted by him, would estop those who would otherwise have been his heirs from denying such adoption.

But however that may be, it is clear that this statement in Mr. Pope's will is, to say the least, evidence of such adoption, which, if not rebutted is conclusive, as appears from the case last cited and the following cases.

Smith v. Wait, 4 *Barb.*, 28. An ejectment case. The will there in question said: "To my son, George Wait I have executed a title deed of the farm on which I now reside, containing about seventy acres of land." The Court said:

"The recital in the will that the testator had *executed* a deed to the defendant George Wait, was evidence of a perfect execution of said deed, and that he had the title to the premises in question."

Estate of Keenan, Myrick Prob. (Calif.). The matter of who was entitled to letters of administration, the public administrator or the nominee of George B. Keenan, the right thereto of such nominee being based on the ground that said George B. Keenan was an adopted son of the testator. The Court said:

“The public administrator was by law entitled to letters as against all of the above-named persons except the nominee of George B. Keenan. There is no evidence of the adoption of George by testator except the clause in the will where he speaks of him as ‘my adopted son, George B. Keenan’; and the point in controversy is, do the statements in the will that he was the adopted son of testator afford *prima facie* evidence of the adoption. The Supreme Court have held that a statement in a will as to parentage by birth may be received as *prima facie* evidence, and no reason is apparent where the same rule should not apply to this case.”

Letters were accordingly granted to said nominee.

It will be observed that in the case of *Smith v. Wait*, the recital in the will that the testator had executed the deed in question was held to be evidence of a perfect execution thereof, whatever the formality required by law in the execution of a deed may have been. And then in the other case the statement in the will that the person named was the adopted son of the testator was held to be *prima facie* evidence that he was such adopted son, whatever the formality required by law for the adoption of children may have been.

In the case of *Smith v. Wait*, and also in the case of *Denn v. Cornell, supra*, the recitals of the conveyances were held to be conclusive evidence in the respective cases; and in the case of *Estate of Keenan*, the statement that the person named was the adopted son of the testator, being sufficient evidence to secure the appointment of his nominee as administrator, was no doubt sufficient evidence, if not rebutted, to secure to him all the property rights to which an adopted son was entitled under the law.

As bearing on the subject I will now give two cases in which the word "heir" was actually used.

Parker v. Nickson, 1 *De. Gex. Jones & Smith*, 181. In that case the Court said:

"The first part of the codicil is in these words: 'I, Samuel Newns, acknowledge Thomas Nickson, my second cousin, * * * to be my next of kin and heir at law to all my real and personal property, situate in the parish of Manchester,' and I am of opinion that these words constitute a good devise to Thomas Nickson in fee simple of all the testator's lands in the parish of Manchester. Nothing is better settled in our law than that the words 'I make A. B. my heir,' or 'I declare A. B. to be my heir,' or even the words, 'A. B. is my heir,' amount to a devise to A. B. of all the inheritable lands of the testator" (pp. 181 & 182).

The Court further said in that case:

"In Mr. Powell's work on devises, it is said, and I think correctly, 'If one claims under the description of heir, he must show that he is heir in that sense in which the

testator has used the term. Now, an heir may be in four ways—first, heir with relation to the ancestor of the person so described, as heir general; secondly, heir by particular description of the testator, as heir special; thirdly, heir in relation to the property or thing to be inherited; fourthly, heir by inference” (p. 182).

Tilley v. Collyer, 3 ^k Neb., 589. In that case the testator had three daughters, S, A, and E; he made no express devise to S, who was the eldest daughter, but mentioned her as his heir six times in his will. He appears to have had the mistaken idea that his property would go to S as his sole heir under the law, whereas, in fact, all three were equally entitled thereto as heirs. *Albeit*, the Court said, “there is no express devise to S, yet, she being named as heir, this is sufficient to exclude the rest, and to make her sole heir.” See this case as stated in 1 Jarman on Wills, 6th Ed. by Bigelow, p. 496, star paging.

It appears from the first of these two cases, or at least from the observations of the Court thereon, that it is not necessary that a person designated in a will as heir of the testator should actually be such heir under the law; such designation alone making him such heir, at least so far as the testator and his property are concerned; and it appears from the other of these cases that it does not make any difference if the testator designates one of his heirs as sole heir, when he or she is in fact one of several heirs; such designation making the one so designated sole heir to the exclusion of the others.

According to the observations of the Court in the first of these cases, such designation as heir operates as a devise to the person so designated; in the other of said cases it does not appear from

the report of the case in Jarman whether such designation so operated in that case or not; but as the statement of the case there is made where the author is treating of devises by implication, we presume such designation merely laid the foundation for such a devise.

Under these authorities, taken together, it seems quite clear that this declaration of Mr. Pope is unassailable by anyone; that it must stand as the establishment of the fact that Ida Vought was his adopted daughter, and that as a consequence thereof this appellant and his sister were his heirs at law, to whom the premises in question descended upon his decease, subject to said life estate therein. We are aware, however, that this is a debatable point, and as its establishment is not essential to our case, we will not urge it here. But there can be no doubt that according to the authorities mentioned, this declaration of Mr. Pope, if it is unassailable in this case, must be taken, so far as this case is concerned, as true, with the consequence resulting therefrom above indicated. And we claim that such declaration is unassailable in this case, and that consequently the evidence upon the subject that was introduced is irrelevant.

Our position is, that when a testator makes a declaration or statement in his will which places any person in such relation to himself that such person if occupying such relation would be entitled by virtue of such relation to any real estate of which such testator might die intestate, any other person who receives a benefit under the same will is estopped and precluded from setting up, claiming or proving anything to the contrary or in contravention thereof, so far as relates to the devolution of such real estate.

It has already been shown that the respondent received a large benefit under the will. Such being

the case, if the above proposition is correct, she is estopped and precluded as aforesaid in respect to the aforesaid declaration in said will.

This case, therefore, clearly comes within the scope of what is called the "doctrine of election," or, at least, within the principles of that doctrine.

Jarman says:

"The doctrine of election may be thus stated: that he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it."

1 Jarman on Wills, 6th Ed. by Bigelow, p. 415, star paging.

Therefore, one entitled to such benefit must elect whether to accept the same with such attending consequences or not.

Pomeroy says:

"This doctrine originated in inconsistent and alternative gifts, with the intent, either express or implied, that the one shall be the substitute for the other."

1 Pom. Eq. Jur., Sec. 461.

It appears that the doctrine was at first applied to cases where, for instance, A gave to B property belonging to C, and by the same instrument gave to C other property belonging to himself. In such a case C had to elect whether he would retain the property belonging to himself or take the property devised to him by A; if he elected to take the property so devised to him, he had to give up to B his own property devised by A to B. (*Ibid*, 426.)

The doctrine was, however, in time extended to cases where a husband devised or bequeathed property to his wife, and the question arose whether or not the wife was bound to elect between this benefit under the will and her dower, or whether she was entitled to both. (*Ibid*, Sec. 492.)

In *Stevenson v. Brown*, 3 *Gr. Ch.*, 503, this doctrine was applied in a dower case.

But the application of the doctrine, or of the principles thereof, have not been confined to these two classes of cases; it being now, in fact, of general application.

It was applied in *Van Duyne v. Van Duyne*, 1 *McC.*, 49, and *Yawger v. Yawger*, 10 *Stew. Eq.*, 216, neither of which cases came within either of those two classes.

See also *Hyde v. Baldwin*, 17 *Pick.*, 308, and *Watson v. Watson*, 128 *Mass.*, 152.

In *Van Duyne v. Van Duyne*, *supra*, the rule was enforced against an heir of the testator.

See also, as to general application, *In re Airds Estate*, 12 *Chy. Div.*, 291. The syllabus to that case says:

“A testator by his will, gave a legacy, and by a codicil, after reciting that he had advanced to the legatee a certain sum, he directed that sum to be considered as a payment on account of the legacy. *Held*, that the sum mentioned should be deducted from the legacy, though the advance in fact made was less than that sum.”

In that case, Macnaughten for the plaintiff said:

“It has always been taken for granted that a person deriving a benefit under a will must be bound by the statements in the will.”

The Court said:

“If the testator was in error in the view in which he was proceeding, it appears to me that the error is binding on those who benefit under the will.”

In re Wood, 32 Chy. Div., 517, was a similar case. The syllabus to the case says:

“*Held*, that the sons were bound by the statements in the will of the amounts of the advances made to them, and were not entitled to adduce evidence that the advances which had been made to them were in fact of less amounts.”

It is true the rule in question is stated in some of the authorities as a rule in equity; but it is applied in courts of law just the same.

A note to the statement of the doctrine of election given by Jarman above quoted says: “The rule holds good at law as well as in equity,” citing the following authorities:

Watson v. Watson, 128 *Mass.*, 152.

Smith v. Smith, 14 *Gray.*, 532.

Brown v. Brown, 108 *Mass.*, 386.

Hopgood v. Houghton, 22 *Pick.*, 480, 483.

Doe v. Cavendish, 3 *Doug.*, 48, 55; *S. C.*, 4 *T. R.*, 741, 743, note.

Wilson v. Townshend, 2 *Ves. Jr.*, 693, 696.

Birmingham v. Kiernan, 2 *Schoales & L.*, 444, 450.

Equity rules and doctrines are being more and more applied by courts of law.

Take, for instance, the doctrine of equitable estoppel, which, as Pomeroy says, "is pre-eminently a creature of equity." He adds:

"It has, however, been incorporated into the law, and is continually employed by courts of law at the present day in the decision of legal controversies. Preserving its original character and depending upon equitable principles, it is administered in the same manner, and in conformity to the same rules, by the courts, both of law and equity."

1 Pom. Eq. Jur., Sec. 802.

See also, upon the same point:

Kronson v. Lipstitz, 2 Robb., 367, and
Monmouth County Electric Co. v. Eatontown, 5 Buch., 578.

Now the rule in relation to this matter, as stated by Jarman as aforesaid, and confirmed and in substance repeated in *Stevenson v. Brown*, 3 Gr. Ch., 503; *Van Duyne v. Van Duyne*, 1 McC., 49, and *Yawger v. Yawger*, 10 Stew. Eq., 216, and other cases above cited, is that he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it.

And Mr. Pope having in his will recognized said Ida Vought as having been, and declared her to have been, his adopted daughter, the plaintiff, by receiving and accepting said benefits under said will, became, under the application of said rule, or the principles thereof, to this case, bound by such

recognition and declaration, and is estopped and precluded from setting up, claiming or proving anything to the contrary, or in contravention thereof, so far as relates to the devolution of said lands, in case said testator dies intestate thereof, as claimed by the defendant in his bill of particulars.

The Court below in its memorandum decision says:

“Defendant’s first contention is, that since the testator frequently refers in his will to Ida Vought as his adopted daughter, that that, *per se*, establishes the relation, and hence she and her children inherit.”

No such contention was made in behalf of the defendant. The contention in behalf of the defendant in this matter was precisely the same in the Court below as it is here. And that contention is, as must clearly appear from what we have said, not that the mention in the will of Ida Vought as the testator’s adopted daughter established the relation *per se* or otherwise, but that the respondent having received a benefit under the will, is estopped and precluded from denying that such relation existed; in other words, she must take and stand by the will as it reads. The other remarks of the Court upon this point are based upon the same misconceptions of our position thereon.

The Court further says: “The words ‘adopted daughter’ are used merely in a descriptive sense.” Exactly. By the words being used in a descriptive sense is meant, of course, that they are used to describe a person; and they describe Ida Vought as the testator’s adopted daughter. And it is on the fact of such description that we stand in this part of our case.

The consideration of the intention of the testator

as to the disposition of these lands under this point is irrelevant; the only intention of the testator that is relevant under this point is the intention, clearly expressed, to call Ida Vought his adopted daughter. And the consideration of the force of certain words as to effecting a devise of land, is also irrelevant under this point, for we are not contending under this point that the testator's calling Ida Vought his adopted daughter operated as a devise of said lands to her. The case of *Adrian v. Koch, A. R.*, 123 (erroneously referred to in the decision ^{at} 213), partakes of the same irrelevancy. There was no question of estoppel, or preclusion, or election, whatever it may be called, involved in that case.

We further urge in support of our claim to these lands:

SECOND.

That under a true construction of said will, said lands, subject to said life estate therein, were thereby devised, directly or by implication, to the appellant and said Effie Vought, or to their trustee in trust for their use and benefit.

(a) As to direct devise:

The eighteenth paragraph of said will is the residuary clause thereof, taking effect after the decease of testator's widow, by which the entire residuum of the estate, with everything that might in any contingency fall into it, excepting the remainder or reversion, whichever it may be called, of the lands in question, after the decease of said Eliza Pope, is expressly given said trustee; that is, the trustee of the appellant and his sister, hereinbefore mentioned.

We claim, however, that this paragraph of the will, taken in connection with the other parts of the will and the circumstances of the case, must be so construed as to include such remainder or reversion of the lands in question.

And here we have to begin with the recognition and declaration of the testator as to Ida Vought having been his adopted daughter.

And here, whether or not she was legally adopted, is entirely immaterial.

To him she was his daughter; and to him her children were his grandchildren; and the nearest blood relations he had were his cousins.

And if he had any intention at all as to where these lands should ultimately go, and that he did not have any is inconceivable, the natural presumption is that he intended that they should ultimately go to these children.

We have seen that the Court in the case of *Parker v. Nickson* declared that, "Nothing is better settled in our law than that the words * * * 'A. B. is my heir' amounts to a devise to A. B. of all the inheritable lands of the testator."

Although we are not claiming here that the virtual declaration in Mr. Pope's will that these children were his heirs amounts to a devise to them, we do claim that it affords a very strong argument in a support of a construction of the will in their favor.

After his wife, the appellant and his sister, Effie Vought, as would naturally be the case, were the special objects of the testator's bounty. By the second, third, fourth, and fifth paragraphs of his will he provided for his wife; by the sixth and seventh paragraphs he makes a general provision for the appellant and his sister; by the twelfth paragraph he gives them and their heirs forever, the use of his burial plot; by the tenth paragraph he

gives the appellant his diamond pin and gold watch and chain; and after the death of his wife, he, by the seventeenth paragraph, gives the appellant his homestead farm; and then comes the eighteenth paragraph, being the residuary clause, and which in express terms carries, among other things, everything that had been given to or for the use of the widow, with the exception of the remainder or reversion of the lands in question.

Now, let us see what he did for his cousins.

By the eighth paragraph of his will he gave each one of four of them, namely, Mary J. Goble, Jeremiah Van Iderstine, Patience Ferris and Sarah C. Dorsett (the respondent), bonds and mortgages, or other securities of the value of \$15,000; and by the eleventh paragraph he gave the respondent his diamond ring.

To his cousin Harvey Beyea he did not give anything, for the manifest reason that he did not want this cousin to have anything out of his estate.

Now observe the part of the eighth paragraph that follows the bequests there made, which reads as follows:

“In case any or all of my said cousins depart this life before me, then it is my will that the share such deceased cousin or cousins would receive, if living, shall be and remain part and parcel of my estate, as it is not my intention to make, and I do not make, any bequest to the heirs or next of kin of any cousin above named.”

This excludes issue as well as others that may be heirs at law or next of kin. There are exclusions upon the bequests and devises to the appellant and his sister, as will be seen by reference to paragraphs seven, ten, twelve, eighteen, but they

do not include issue; their object being manifestly to keep out these children's blood relations, outside of their issue.

It is clear that the testator considered and treated the appellant and his said sister just the same as if they had been his own grandchildren by blood, and considered and treated his said four cousins as remote, or at least not very near, relatives, deserving of a respectable provision by him in case they should survive him, and no more and no further.

He was particular to cut out from any benefits under his will the heirs and next of kin of his said cousins; but if these premises descended, as the respondent claims they did, then in case of the death of either of them after the testator's death, the heirs of the one so deceased would take his or her ancestor's share.

And besides, under the respondent's view of the matter, Harvey Beyea, who the testator clearly did not mean to have anything out of his estate, came in for a share of the premises as a tenant in common with the other cousins.

There does not seem to be any room for doubt that the testator not only did not intend that these premises should go to his cousins, but that he meant that they should not go to them, and that no more of his estate should go to them than he had actually bequeathed to them.

And, besides, it is to be presumed that he did not intend to die intestate of these lands after the termination of the life estate therein.

"The natural and reasonable presumption is, that when a will is executed the testator designs to dispose of his entire estate, and does not intend to die intestate as to any part of his property."

Leigh v. Savidge, 1 *McC.*, 124, 134.

See cases :

Yawger v. Yawger, 10 *Stew. Eq.*, 216, 218.
Keen v. Plume, 12 *Buch.*, 526, 528.

“It is not to be presumed that a testator intends to leave portions of his estate not disposed of, and, therefore, that portions of the estate would not be disposed of if a particular construction were adopted is a strong argument against such construction.”

Smith v. Green, 35 *Atl. Rep.*, 148.

This last case is a Rhode Island case, reported, if my memorandum is correct, in 19 R. I., 558.

Roper, in his work on legacies, under the heading “On the Construction of Wills Generally,” says:

“Under this head, it may be acceptable to the reader, in the first place, to enumerate some of the leading rules of construction generally applicable to wills of real as of personal estate. * * *

“9. Where a residue is given, every presumption is to be made that the testator did not intend to die intestate. * * *

“13. Of two modes of construction that will be preferred which will prevent intestacy” (Roper on Legacies, pp. 1460 etc.).”

It is true the Court said in *Leigh v. Savidge*, *supra*:

“Heirs have always been looked upon with favor by courts of justice, and the rule is well settled that plain words are required to disinherit them” (1 *McC.*, 134).

The term used is "plain words," not "express words," and an heir can be disinherited by either express words or necessary implication.

Birdsall v. Applegate, Spencer, 244, 248.

This "necessary implication" is no doubt the same "necessary implication" that is required to raise an estate under a will by implication, where "Necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed" (*McCoury v. Leek, 1 McC., 70, 72*).

Now it is clear that an intention on the part of this testator to do otherwise than disinherit these pretended cousinly heirs, so far as any part of his estate not expressly given them is concerned, cannot be supposed.

The favor with which heirs are to be looked upon by courts of justice in matters of this kind must depend in a great degree upon the closeness of the relationship between them and the testator; and when it comes to cousins, such favor cannot be very great.

And it must disappear entirely when, as in this case, it appears that the testator considered and treated, and virtually designated, some other persons than those claiming to be heirs, as his heirs.

The persons to be so favored in this case are those so considered and treated and virtually designated by the testator.

Then it must be borne in mind that in this case there was a residuary clause in the will which takes the residuum of the estate away from the heirs, and that, as stated by Rule 9 in Roper on Legacies, stated above, "Where a residue is given, every presumption is to be made that the testator did not intend to die intestate."

We do not know of any case in which any particular favor has been shown the heirs when the will in question contained a residuary clause from which they were excluded.

Here, then, we have the natural presumption that the testator intended that these lands should ultimately go to the appellant and his sister, and the legal presumption that he did not intend to die intestate as to them, that is to say, that he intended to include them in his will, and the undoubted fact that he did not intend that they should go to his cousins, his nearest blood relations; and the conclusion seems to be irresistible that he intended to give them by his said will to the appellant and his sister, subject to the life estate therein.

This being so, the testator must have inadvertently omitted the same from the residuary clause of his will. If the Court is satisfied that the testator intended to include the same in said clause and inadvertently omitted them therefrom, it can construe the will accordingly.

Van Houten v. Pennington, 4 *Halst. Ch.*,
745, 749.

Nelson v. Coombs, 3 *Harr.*, 27, last two
paragraphs of the Syllabus on p. 28.

In the first of these cases a whole clause was injected by construction into the will in order to prevent an estate from going from the testator's son to "remote kindred having no special claim upon his (the testator's) estate or his sympathy" (pp. 748, 749).

This is not the only instance in which the wording of this will did not accord with the testator's obvious intention.

By the fourth paragraph of the will the testator gave his wife, for her sole use and benefit for and during the term of her natural life, the interest

money derived from bonds and mortgages or other interest-paying securities of the value of \$30,000; "and," he adds, "in order that she may receive the same I do hereby order and direct my executors hereinafter named, or the survivor of them, to select from the securities belonging to my estate, bonds and mortgages and other interest bearing securities of the value of thirty thousand dollars, and to hold the same until the decease of my said wife, and during her lifetime, to collect the interest and profits arising therefrom when due and pay the same to my said wife."

Nothing was said here about what was to be done with those securities after the death of the testator's wife; but by the fifteenth paragraph, he gave, after the decease of his wife, to the Paterson Orphan Asylum Association, bonds and mortgages, or other interest-paying securities of the value of \$10,000; and by the sixteenth paragraph he made the same bequest to the Paterson General Hospital Association.

Now there is no doubt that he intended this \$20,000 worth of securities to be taken from the \$30,000 worth that he had directed to be set aside for the benefit of his wife as aforesaid; they could not come from any other source, for there was not enough left to meet the requirements of other bequests, as will appear from the agreed facts in the case; and yet, in the eighteenth paragraph, after the death of his wife, he gives to the trustee of Samuel and Effie Vought as follows:

"All moneys, bonds, mortgages, or other securities, undisposed of belonging to my estate, or which at any time shall have from any cause reverted to my estate, or which upon the death of my said wife will become part and parcel of my estate."

Now here is a clear gift to this trustee of the entire \$30,000 of securities aforesaid, after he had already given away \$20,000 of securities obviously intended to come out of said \$30,000 of securities.

This gift to this trustee, being subsequent in the will to the gift to said benevolent associations, supplanted, under the well-established rules of construction of wills, said last before-mentioned gifts; and yet it is so clear that such was not the intention of the testator that no court would have determined that it was, said established rule of construction to the contrary notwithstanding.

In drafting the residuary clause (paragraph 18) of the will those bequests to these associations were manifestly overlooked; and so we may reasonably conclude that the remainder or reversion of the premises in question, in drafting said clause, were also inadvertently overlooked, and consequently omitted.

(b) As to devise by implication:

In the opinion in the case of *McCoury v. Leek*, 1 *McC.*, 70, by Chancellor HENRY W. GREEN, I find the following:

“All estates by implication are founded upon the intent of the testator; and where implications are allowed, they must be such as are necessary (or at least highly probable), and not merely possible implications.

‘In construing a will, conjecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed.’

The whole will, taken together, must produce the conviction that the testator's intention was to create the estate raised by implication" (pp. 72 & 73).

In cases of this kind there is not an express devise, even by construction, but simply an implied devise; which is the reason such devises are called devises by implication.

This example of a devise of this kind is thus stated in the case just referred to:

"The devise of real estate to the heir upon the death of the wife is a devise to the wife for life by implication; for the intent of the testator is clear to postpone the heir till the death of the wife. And if the wife does not take, no one else can."

There is, it will be seen, no express devise to the wife; nor are any words inserted in the will by construction in order to make out such a devise.

Therefore, to make out a devise by implication in this case, it is not necessary to insert any additional words, or to change any words, by construction.

According to the statement of the Chancellor in the case last referred to, in order to make out a devise by implication, the implication must be necessary, or at least highly probable; and according to the case cited by him, there must be "so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." And the Chancellor adds: "The whole will, taken together, must produce the conviction that the testator's intention was to create the estate raised by implication."

We claim that this case clearly meets these requirements.

As what we have said under the next preceding head is for the most part applicable here, we will not now repeat the same, but merely refer thereto.

We will merely call attention here to the fact that the testator virtually designated this defendant and his sister as his heirs, and that in the case of *Tilley v. Collyer, supra*, where one of three heirs was called the heir, the other heirs were held to be excluded, and the statement obviously served as foundation for an estate by implication in the person so called.

THE MATTER OF "UNDISPOSED OF ESTATE."

There is no mystery or uncertainty about the matter of "undisposed of estate" mentioned in the last part of the eighteenth paragraph of the will. That "undisposed of estate" consisted of the properties that were bequeathed or devised subject to reversion upon contingencies, and not again and ultimately disposed of upon the happening of such contingencies. A large part of the bequests and devises were subject to such reversions. (See paragraphs 7, 8, 13, 14 and 17, as well as 18, now in question.) Any reversions under paragraphs eight, thirteen and fourteen, not required to pay the remaining legacies under those paragraphs, are disposed of in paragraph eighteen. But reversions under paragraphs seven and seventeen are not disposed of and so, upon the happening of the contingencies on which they depend, would constitute "undisposed of estate." And these paragraphs take the greater part of the testator's estate. And, of course, upon the happening of the contingency mentioned in the eighteenth paragraph, the property thereby bequeathed and devised would become, in the language used, "part and parcel of my undis-

posed of estate." And this would include such of the reversions under paragraphs eight, thirteen and fourteen as might have been carried by this paragraph eighteen, and which would, therefore, "still" belong to the "undisposed of estate."

It will be observed that this "undisposed of estate" was a contingent estate, depending on contingencies not likely to happen, and which did not in fact happen.

A failure to make disposition of property bequeathed or devised subject to such contingencies upon the happening of the contingencies cannot, obviously, be considered as constituting a case of intestacy.

THE DEFENDANT'S STANDING IN THE CASE.

If the defendant's first claim is sustained, he will hold one-half of the premises in question as heir at law of Samuel Pope, and the other half as heir at law of his sister, Effie Vought.

If this claim is not sustained and ~~one~~ of the other is, the nature of the defendant's title will depend upon whether the devise is considered as having been made to him and his said sister, or to their trustee for their use and benefit.

In the former case he will hold one-half as devisee and the other half as heir at law of his sister; in the latter case he will hold the whole as beneficiary under the will.

It does not make any difference which view may be taken of such devise, nor can there be any trouble about whether or not a court of law will take cognizance of an equitable estate.

The question in the case is, not the nature of the defendant's title, but whether the plaintiff has any title.

It is admitted in the agreed facts that the de-

defendant has continuously, since the death of said Eliza Pope, been in possession of and claimed title to the whole of said premises, and to the exclusion of the plaintiff; and she cannot turn him out of possession by this suit unless she shows a good title, even if his title is a defective one, or, in fact, even if he has no title at all.

Boylan ads. Meeker, 4 Dutch., 274, 297.

Jennings v. Burnham, 27 Vr., 289, 297.

Meyers v. Conover, 36 Vr., 187, 189.

We submit that the defendant ^{was} ~~is~~ entitled to the verdict of Not Guilty, *and that the judgment below should be reversed.*

GEO. S. HILTON,
Counsel for ~~Defendant~~ *Appellant.*

Additional Points.

(A). In case the first point should be sustained then the admission of testimony with the view to showing that Ida Vought was not adopted by Samuel Pope was erroneous. Admission of same objected to. Case, p. 49, l. 9. See 5th Ground of Appeal, Case, p. 62.

(B). The suit is for an equal undivided one fourth part of the premises, and so was the finding. Case, p. 58, § 2. But the judgment was for the whole premises. Case, p. 60. Doubtless a clerical error; but if not corrected before argument will be urged as ground for reversal as an error apparent on the record. Grounds of Appeal, Case, p. 62, § 7.

Geo. S. Hilton,
Counsel for Appellant.

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Notice of Appeal.

New Jersey Supreme Court

10

SARAH C. DORSETT,
Plaintiff,

vs.

SAMUEL P. VOUGHT,
Defendant.

Action at Law.
In Ejectment.
Notice of
Appeal.

20

(Served Dec. 4th, 1915; filed Dec. 6th, 1915.)

To:

J. W. & E. A. DEYOE,
Attorneys of Plaintiff.

TAKE NOTICE, that the defendant appeals to the
Court of Errors and Appeals from the whole of the
judgment entered in this cause.

30

GEO. S. HILTON,
Attorney of Appellant.

40

Amended Complaint.

SUPREME COURT OF NEW JERSEY,
PASSAIC COUNTY.

10

SARAH C. DORSETT,
Plaintiff,

vs.

SAMUEL P. VOUGHT,
Defendant.

Amended
Complaint.
Action at
Law.

(Served Aug. 14, 1914.)

20

1. Plaintiff, Sarah C. Dorsett, residing in the City of Columbia, in the County of Richland and State of South Carolina, demands of Samuel P. Vought, the defendant herein, the possession of the equal undivided one-fourth part of a tract of land, with appurtenances, situated in the City of Paterson, in the County of Passaic and State of New Jersey.

30

Beginning at a stake in the line of Congress Street in the said Town of Paterson forty feet easterly from Prospect Street and running thence on the line of Congress Street north sixty-seven degrees and forty-five minutes east forty feet, thence north twenty-two degrees and fifteen minutes west one one hundred feet, thence south sixty-seven degrees and forty-five minutes west forty feet, thence south twenty-two degrees and fifteen minutes east one hundred feet to the place of beginning.

Containing four thousand square feet.

40

Together with all the lands adjoining said tract of land, now occupied by the buildings erected there-

Amended Complaint.

on, and the premises known as Pope's Hall; also a space of three feet wide reserved by the said Samuel Pope, in a certain deed made by him and his wife to James Bell, dated November 24, 1865, and recorded in the Register's Office of Passaic County, in Book Y-2 of Deeds, pages 388, etc., running from the rear of the Pope's Hall or where the water is taken from said hall across the premises conveyed to Bell by said deed to Prospect Street for the purpose of carrying off the water and sewage from the said hall. 10

And the plaintiff says that her right to the possession of the same accrued on the twenty-third day of June, 1910, and that the defendant wrongfully deprives her of the possession thereof. 20

SECOND COUNT.

1. Said plaintiff demands of said defendant the possession of the equal undivided one-fourth part of a tract of land, with the appurtenances, situated in the Borough of North Haledon and the Township of Wayne, in the County of Passaic and State of New Jersey.

Beginning at the southwest corner of a tract of land containing one hundred and five acres, strict measure, returned to Derrick Van Houten, and recorded in Book S-2, page 277, running thence (1) north four degrees fifteen minutes west along the lands of David Benson and John R. Berdan, twenty-five chains and eighty links to a stone heap in the line of Richard DeGray; (2) along his line south eighty-six degrees west four chains to the southwest corner of DeGray's lot; (3) along DeGray's lot north four degrees and fifteen minutes west nineteen chains and eighty links to a stone heap, being a corner of DeGray's lot; (4) north eighty-one degrees west along another line of DeGray's 30 40

Amended Complaint.

10 nine chains and fifty-seven links to a stake and stone heap on the brow of the mountain; (5) south eleven degrees and thirty minutes east along the line of land now in possession of the heirs of Garrabrant Van Houten, deceased, thirty-nine chains and thirty links to a stone heap lying at a ravine; (6) southerly in a straight line to the place of beginning.

Containing thirty acres and forty-four hundredths of an acre, be the same more or less.

And the plaintiff says that her right to the possession of the same accrued on the twenty-third day of June, 1910, and that the defendant wrongfully deprives her of the possession thereof.

THIRD COUNT.

20

1. Said plaintiff demands of said defendant the possession of the equal undivided one-fourth part of a tract of land, with the appurtenances, situated in the Borough of North Haledon and the Township of Wayne, in the County of Passaic and State of New Jersey.

30 Beginning at a large hickory tree for a corner standing on a northwesterly course from the Quarry lot, thence running (1) from said tree north sixty-five degrees and forty-five minutes west twelve chains and fifty links to a stake standing in swampy ground, thence (2) north thirty-six degrees west thirteen chains and twenty-five links to a stake, thence (3) south fifty-one degrees west eight chains and thirty-three links to a stone heap in the line formerly of Samuel Crowell, thence (4) south thirty-nine degrees and twenty minutes east eleven chains and ninety-two links to a stone heap, thence
40 south sixty-eight degrees east four chains and forty links to a corner, thence (6) south seventy-one de-

Amended Complaint.

degrees and thirty minutes east ten chains to a corner, thence (7) north eighteen degrees and thirty minutes east two chains to a corner, thence (8) south sixty-three degrees east nine chains and fifty links to a black oak tree, thence (9) north forty-three degrees west seven chains and fifty links to the place of beginning. 10

Containing eighteen acres and seventy-five hundredths of an acre, more or less.

And the plaintiff says that her right to the possession of the same accrued on the twenty-third day of June, 1910, and that the defendant wrongfully deprives her of the possession thereof.

FOURTH COUNT.

Said plaintiff demands of said defendant the possession of the equal undivided one-fourth part of a tract of land, with appurtenances, situated in the Borough of North Haledon and the Township of Wayne, in the County of Passaic and State of New Jersey. 20

Beginning at an ash tree in the northerly line of lands of Thomas Neill where the same intersects the easterly line of David Quackenbush, and running thence (1) north three degrees and eight minutes west thirteen chains and eighty-eight links; thence (2) north thirty minutes west one chain seventeen links to a stake; (3) north eighty-six degrees and forty-five minutes east thirteen chains and twenty-two links to a stake in the westerly line of lands of Thomas Neill; (4) south three degrees and ten minutes east fifteen chains and five links to the line of lands of Thomas Neill; (5) south eighty-six degrees and forty-five minutes west thirteen chains and thirty links to the place of beginning. 30

Containing nineteen and ninety-six hundredths acres, more or less. 40

Amended Complaint.

Known and designated as lot Number twenty-one, as laid down on map of the lots late of John Burhans, deceased, made by J. H. Goetschius, Civil Engineer.

10 And the plaintiff says that her right to possession of the same accrued on the twenty-third day of June, 1910, and that the defendant wrongfully deprives her of the possession thereof.

Plaintiff demands:

1. On the First Count, possession of the undivided one-fourth part of the tract of land therein described and One thousand dollars damages.
- 20 2. On the Second Count, possession of the undivided one-fourth part of the tract of land therein described and One thousand dollars damages.
3. On the Third Count, possession of the undivided one-fourth part of the tract of land therein described and One thousand dollars damages.
4. On the Fourth Count, possession of the undivided one-fourth part of the tract of land therein described and One thousand dollars damages.

30 J. W. & E. A. DEYOE,
Attorneys of Plaintiff

Answer to Amended Complaint.

[TITLE OMITTED.]

(Filed Sept. 2nd, 1914.)

Defendant, Samuel P. Vought, of the City of Passaic, in the County of Passaic and State of New Jersey, says that he denies the truth of the matters contained in the complaint. 10

GEO. S. HILTON,
Attorney for Defendant.

Plaintiff's Bill of Particulars.

[TITLE OMITTED.]

20

The following is a bill of particulars of the claim or title of the plaintiff to the premises mentioned in the plaintiff's complaint, the same being, among other things, an abstract of such documentary evidence of title as the said plaintiff intends to give in evidence on the trial of the above-mentioned cause, viz.:

1. A Warranty Deed, dated November 10, 1860, made and executed by Ebenezer F. Smith and Margaret, his wife, John N. Mitchell and Mary L., his wife, of the Township of Hanover, in the County of Morris and State of New Jersey, to Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of Eighteen hundred dollars, and recorded in the Passaic County Register's Office in Book H-2 of Deeds for said County on page 530, etc. 30
2. An Agreement, dated September 21, 1861, made and executed by and between the said Samuel 40

Plaintiff's Bill of Particulars.

10 Pope, of the City of Paterson, County of Passaic and State of New Jersey, and Klemens Schnell, of the City of Paterson, County of Passaic and State of New Jersey, for the consideration of the mutual covenants and agreements therein contained, and recorded in the Passaic County Register's Office in Book M-2 of Deeds for said County on page 193, etc.

20 3. An Agreement, dated September 21, 1861, made and executed by and between the said Samuel Pope, of the City of Paterson, County of Passaic and State of New Jersey, and Klemens Schnell, of the City of Paterson, County of Passaic and State of New Jersey, for consideration of the mutual covenants and agreements therein contained, and recorded in the Passaic County Register's Office in Book W-11 of Deeds for said County on page 433, etc.

30 4. A Warranty Deed, dated November 24, 1865, made and executed by the said Samuel Pope and Eliza, his wife, of the City of Paterson, County of Passaic and State of New Jersey, to James Bell, of the City of Paterson, County of Passaic and State of New Jersey, for the sum of Nine thousand dollars, and recorded in the Passaic County Register's Office in Book Y-2 of Deeds for said County on page 388, etc.

40 5. A Bargain and Sale Deed, dated May 8, 1880, made and executed by Albert A. Van Voorhis, Sheriff of the County of Passaic, to the said Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of Fifteen hundred and fifty dollars, and recorded in the Passaic County Register's Office in Book O-6 of Deeds on page 70, etc.

Plaintiff's Bill of Particulars.

6. A Warranty Deed, dated March 19, 1884, made and executed by Daniel McGrogan and Ann, his wife, of the City of Paterson, in the County of Passaic and State of New Jersey, to the said Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of Five hundred dollars, and recorded in the Passaic County Register's Office in Book R-7 of Deeds on page 113, etc. 10

7. A Warranty Deed, dated October 1, 1881, made and executed by Jemima Ackerman, executrix, of the Township of Acquackanonck, in the County of Passaic and State of New Jersey, to the said Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of One thousand dollars, and recorded in the Passaic County Register's Office in Book Y-6 of Deeds on page 112, etc. 20

8. The Petition for the Probate of the last Will and Testament of Samuel Pope, deceased, dated April 1, 1889, and recorded in Book B of Petitions for Probate of Wills, in the Passaic County Surrogate's Office, on page 53, etc.

9. A true copy of the Certificate of Death of the said Samuel Pope, on file in the office of the Bureau of Vital Statistics of the State of New Jersey, under the seal of the said Bureau and the signature of Jacob C. Price, M. D., Medical Superintendent, and attested by David S. South, Register, dated September 16, 1914. 30

10. The Petition for the Probate of the last Will and Testament of Eliza Pope, deceased, wife of the said Samuel Pope, deceased, dated July 8, 1910, and recorded in Book I of Petitions for Probate of 40

Plaintiff's Bill of Particulars.

Wills, in the Passaic County Surrogate's Office, on page 294.

10 11. A Transcript from the Records of Deaths in the office of the Registrar of Vital Statistics of the City of Paterson, Passaic County, New Jersey, under the seal of the Board of Health of said City and the signature of Charles S. Gall, Registrar of Vital Statistics of said City, and dated September 14, 1914, showing the death of the said Eliza Pope.

20 A. The said Samuel Pope became seized in fee simple of the premises described in the complaint filed in this suit by virtue of the several deeds of conveyance above mentioned, subject to the several agreements and conveyances above mentioned made and executed by him, and was so seized at the date of his death.

B. The said Samuel Pope departed this life on or about the twenty-first day of March, 1889, so seized of the said premises and intestate as to his said fee simple title therein.

30 C. The said Samuel Pope left him surviving his widow, Eliza Pope, and his four cousins, Mary J. Goble, Jeremiah Van Iderstine, Harvey Beyea and the plaintiff, Sarah C. Dorsett, his only heirs at law, to which said four cousins, upon the death of the said Samuel Pope as aforesaid, the said fee simple title in said premises descended, and to which they thereupon became seized, subject, however, to an estate for life therein of the said Eliza Pope, acquired by her under and by virtue of the provisions of the last Will and Testament of the said Samuel Pope, deceased, dated December 6, 1888, probated
40 April 1, 1889, and recorded in the Passaic County

Plaintiff's Bill of Particulars.

Surrogate's Office in Book L of Wills on page 584,
etc.

D. The said plaintiff, Sarah C. Dorsett, as one of
the said four cousins of the said Samuel Pope, de-
ceased, upon his death intestate as aforesaid, be-
came seized of and entitled to an undivided one-
fourth part of the said fee simple title in said prem-
ises, subject, however, to the said estate for life
therein of the said Eliza Pope. 10

E. The said Eliza Pope departed this life in or
about the twenty-third day of June, 1910.

F. The said plaintiff, Sarah C. Dorsett, upon the
death of the said Eliza Pope, who held said life es-
tate in said premises, was seized of and entitled to
an undivided one-fourth part of the said fee simple
title in said premises and became entitled to the
right of the possession thereof. 20

Dated this twenty-fourth day of September, 1914.

J. W. & E. A. DEYOE,
Attorneys of Plaintiff.

To: 30
GEORGE S. HILTON,
Attorney of Defendant.

Defendant's Bill of Particulars.

[TITLE OMITTED.]

10 The following is a bill of particulars of the claim or title of the defendant to the premises mentioned in the plaintiff's complaint, the same including, among other things, a statement of such documentary evidence of title, etc., as defendant intends to give in evidence in the trial of the above-stated cause.

Defendant claims title to said premises as follows:

FIRST: As devisee under the last Will and Testament of Samuel Pope, deceased, hereinafter mentioned.

20 SECOND: As one of the two heirs at law of said Samuel Pope, namely, defendant and Effie Vought, now deceased, and, as heir at law of said Effie Vought, defendant and said Effie Vought having been the only children of Ida Vought, an adopted daughter of said Samuel Pope, who died in his lifetime.

30 THIRD: Said Samuel Pope, in his said will, recognized said Ida Vought under the name of Ida Vogt as having been, and declared her to have been, his adopted daughter, and plaintiff received and accepted certain benefits under said will by way of legacies, whereby she became bound by the aforesaid recognition and declaration by the said Samuel Pope, and is estopped and precluded from setting up, claiming or proving anything to the contrary, or in contravention thereof, so far as related to the devolution of any of the real estate of which said
40 Samuel Pope may have died intestate.

Defendant's Bill of Particulars.

The following is the documentary evidence of title, etc., above referred to:

1. A Warranty Deed, dated November 10, 1860, made and executed by Ebenezer F. Smith and Margaret, his wife, John N. Mitchell and Mary I., his wife, of the Township of Hanover, in the County of Morris and State of New Jersey, to Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of Eighteen hundred dollars, and recorded in the Passaic County Register's Office in Book H-2 of Deeds for said County on page 530, etc. 10
2. An Agreement, dated September 21, 1861, made and executed by and between the said Samuel Pope, of the City of Paterson, County of Passaic and State of New Jersey, and Klemens Schnell, of the City of Paterson, County of Passaic and State of New Jersey, for the consideration of the mutual covenants and agreements therein contained, and recorded in the Passaic County Register's Office in Book M-2 of Deeds for said County on page 193, etc. 20
3. An Agreement, dated September 21, 1861, made and executed by and between the said Samuel Pope, of the City of Paterson, County of Passaic and State of New Jersey, and Klemens Schnell, of the City of Paterson, County of Passaic and State of New Jersey, for the consideration of the mutual covenants and agreements therein contained, and recorded in the Passaic County Register's Office in Book W-11 of Deeds for said County on page 433, etc. 30
4. A Warranty Deed, dated November 24, 1865, made and executed by the said Samuel Pope and 40

Defendant's Bill of Particulars.

10 Eliza, his wife, of the City of Paterson, County of Passaic and State of New Jersey, to James Bell, of the City of Paterson, County of Passaic and State of New Jersey, for the sum of Nine thousand dollars, and recorded in the Passaic County Register's Office in Book Y-2 of Deeds for said County on page 388, etc.

5. A Bargain and Sale Deed, dated May 8, 1880, made and executed by Albert A. Van Voorhies, Sheriff of the County of Passaic, to the said Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of Fifteen hundred and fifty dollars, and recorded in the Passaic County Register's Office in Book O-6 of Deeds on page 70, etc.

20 6. A Warranty Deed, dated March 19, 1884, made and executed by Daniel McGrogan and Ann, his wife, of the City of Paterson, in the County of Passaic and State of New Jersey, to the said Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of Five hundred dollars, and recorded in the Passaic County Register's Office in Book R-7 of Deeds on page 113, etc.

30 7. A Warranty Deed, dated October 1st, 1881, made and executed by Jemima Ackerman, executrix, of the Township of Acquackanonck, in the County of Passaic and State of New Jersey, to the said Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, for the sum of One thousand dollars, and recorded in the Passaic County Register's Office in Book Y-6 of Deeds on page 112, etc.

40 8. A true copy of the Certificate of Death of the said Samuel Pope, on file in the office of the

Defendant's Bill of Particulars.

Bureau of Vital Statistics of the State of New Jersey, under the seal of said Bureau, and the signature of Jacob C. Price, M. D., Medical Superintendent, and attested by David S. South, Register, dated October 5th, 1914.

9. The Petition for the Probate of the last Will and Testament of Samuel Pope, deceased, dated April 1, 1889, and recorded in Book B of Petitions for Probate of Wills, in the Passaic County Surrogate's Office, on page 53, etc. 10

10. Last Will and Testament of Samuel Pope, deceased, dated December 6th, 1888, and recorded in the Surrogate's Office of the County of Passaic in Book L of Wills on page 584, etc. 20

11. Proof of said last Will and Testament before CHARLES M. KING, Surrogate of said County, made on April 1st, 1889, and recorded in said Surrogate's Office in Book L of Wills on page 596.

12. Qualification of James Blundell and George S. Hilton, the executors of said will, as such executors, made on April 1st, 1889, before CHARLES M. KING, Surrogate as aforesaid, and recorded in said Surrogate's Office in Book L of Wills on page 596, etc. 30

13. Order of said Surrogate admitting said will to probate, made on April 1st, 1889, and recorded in said Surrogate's Office in Book L of Wills on page 597.

14. Letters testamentary on said will, issued by said Surrogate to said executors on April 1st, 1889, and recorded in said Surrogate's Office in Book L of Wills on page 597, etc. 40

Defendant's Bill of Particulars.

15. Receipt and release from Sarah C. Dorsett to James Blundell and George S. Hilton, executors of Samuel Pope, deceased, dated March 24th, 1890, and recorded in said Surrogate's Office in Book H of Releases, etc., on page 451, etc.

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16. Receipt and release from Sarah C. Dorsett to James Blundell and George S. Hilton, executors as aforesaid, dated September 27th, 1890, and recorded in said Surrogate's Office in Book H of Releases, etc., on page 458, etc.

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17. Receipt and release from Sarah C. Dorsett to James Blundell and George S. Hilton, executors as aforesaid, dated November 26th, 1890, and recorded in said Surrogate's Office in Book H of Releases, etc., on page 455, etc.

18. Receipt and release from Sarah C. Dorsett to James Blundell and George S. Hilton, executors as aforesaid, dated July 14th, 1891, and recorded in said Surrogate's Office in Book H of Releases, etc., on page 460, etc.

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19. Receipt and release from Sarah C. Dorsett to James Blundell and George S. Hilton, executors as aforesaid, dated October 23rd, 1891, and recorded in said Surrogate's Office in Book H of Releases, etc., on page 463, etc.

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20. Final decree of the Court of Chancery of New Jersey, in a cause therein depending, wherein James Blundell and George S. Hilton, executors as aforesaid, were complainants, and Eliza Pope *et als.* were defendant, dated and filed in the office of the Clerk in Chancery of New Jersey on the 29th day of September, 1890, certified under the seal of said Clerk.

Defendant's Bill of Particulars.

21. A Transcript from the Records of Deaths in the office of the Registrar of Vital Statistics of the City of Paterson, Passaic County, New Jersey, under the seal of the Board of Health of said City and the signatures of Charles S. Gall, Registrar of Vital Statistics of said City, and dated October 22nd, 1914, showing the death of the said Eliza Pope. 10

22. The Petition for the Probate of the last Will and Testament of Eliza Pope, deceased, wife of the said Samuel Pope, deceased, dated July 8, 1910, and recorded in Book I of Petitions for Probate of Wills, in the Passaic County Surrogate's Office, on page 294.

A. The said Samuel Pope became seized in fee simple of the premises described in the complaint by virtue of the several deeds of conveyance above mentioned, made and executed by him, subject to the several agreements and conveyances above mentioned, made and executed by him, and was so seized at the date of his death. 20

B. The said Samuel Pope departed this life on or about the 21st day of March, 1889, so seized of the said premises. 30

C. The said Samuel Pope, in and by his will, devised the said premises to his wife, Eliza Pope, for and during the term of her natural life, and after her decease, as we claim as aforesaid, to or for the use and benefit of defendant.

D. The said Eliza Pope departed this life on or about the 23rd day of June, 1910. 40

Defendant's Bill of Particulars.

E. The said Effie Vought departed this life on or about the 31st day of August, 1891, intestate, leaving defendant her only heir at law her surviving.

10 Dated, October 30th, 1914.

GEO. S. HILTON,
Attorney of Defendant.

To:

J. W. & E. A. DEYOE,
Attorneys of Plaintiff.

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Agreed Facts.

[TITLE OMITTED.]

Samuel Pope died in the City of Paterson, in the County of Passaic and State of New Jersey, on or about March 21st, 1889, seized in fee simple of the premises in question.

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He left a will, duly executed, dated September 6th, 1888, and duly probated in said County of Passaic on April 1st, 1889.

By his will he appointed James Blundell and George S. Hilton the executors thereof, who duly qualified as such executors on April 1st, 1889.

By his will he devised the premises in question to his wife, Eliza Pope, for and during the term of her natural life.

The said Eliza Pope died on or about June 23rd, 1910.

20

The nearest blood relations of the said Samuel Pope living at the time of his death were Sarah C. Dorsett (the plaintiff), Jeremiah Van Iderstine, Mary J. Coble and Harvey Beyea, who were his first cousins.

The same persons, with Patience Ferris, another first cousin of the said Samuel Pope, were his nearest blood relations at the time he made his will, the said Patience Ferris having died between the time he made his will and the time of his death.

30

Said Samuel Pope never had issue.

Of the bonds and mortgages or other securities of the value of \$15,000 given to plaintiff by the Eighth paragraph of said Will, \$14,707.24 were paid her in cash, pursuant to a decree of the Court of Chancery of this State, in a cause therein depending, wherein James Blundell and George S. Hilton, executors as aforesaid, were complainants, and the said Eliza Pope and others were defendants, dated and filed on September 29th, 1890, as follows:

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Agreed Facts.

10 \$3,750 on or about March 24th, 1890; \$3,750 on or about November 26th, 1890; \$3,750 on or about July 14th, 1891, and \$3,457.24 on or about October 23rd, 1891, for which said plaintiff executed, acknowledged and delivered releases to said executors; the reason the balance of said \$15,000 was not paid was an alleged deficiency of securities and cash applicable to the payment of such legacies.

The diamond ring given the plaintiff by the Eleventh paragraph of said will was delivered to her by said executors on or about September 27th, 1890, for which she executed, acknowledged and delivered a release to said executors.

20 The persons called in said will "Ida Vogt," "Samuel Vogt" and "Effie Vogt" are also known as "Ida Vought," "Samuel Vought" and "Effie Vought," the said Samuel Vought being the defendant in this case. The defendant and the said Effie Vought were the children and only children of the said Ida Vought.

30 The said Ida Vought died in the lifetime of said Samuel Pope, and before he made his said will; and Effie Vought died on or about August 31st, 1891, intestate, under the age of twenty-one years, without leaving lawful issue, and leaving defendant her only heir at law; and defendant became twenty-one years of age on or about November 16th, 1904.

The Court of Chancery of this State, in the matter of the application of Samuel P. Vought for the appointment of a trustee under said will of said Samuel Pope, made an order dated March 6th, 1911, and filed March 9th, 1911, appointing Edward T. Vought as such trustee.

40 Said Edward T. Vought as such trustee, by deed of conveyance, dated March 11th, 1911, purported to convey to the said Samuel P. Vought certain real estate of which the said Samuel Pope died seized.

Agreed Facts.

The said defendant, Samuel P. Vought, has continuously since the death of the said Eliza Pope been in possession of and claimed the title to the whole of said premises in question and to the exclusion of the plaintiff.

The documents and papers stated in the bills of particulars, and the testimony of the plaintiff taken in Columbia, South Carolina, *de bene esse*, are to be considered as in evidence in the case, and subject to use by Court and counsel accordingly. 10

That the said Ida Vought was born in the County of Passaic, N. J., and was resident in said County of Passaic continuously until the date of her death, and that continuously throughout the lifetime of the said Ida Vought the said Samuel Pope and Eliza Pope, his wife, were residents of the said County of Passaic. 20

The said Ida Vought died on the first day of January, eighteen hundred and eighty-eight, aged twenty-three years, eight months and nine days.

The plaintiff reserves the right to offer evidence to prove that there is not remaining in the records of any of the courts of the County of Passaic, or in the offices of any of the clerks thereof, including the offices of the Surrogate and County Clerk of said County, any record of any adoption or proceedings to adopt the said Ida Vought or Vogt by the said Samuel Pope and the said Eliza Pope, or either of them. 30

The right and privilege is reserved to either party to object to the relevancy, competency or pertinence to the issue of any of the aforesaid facts or documents.

J. W. & E. A. DE YOE,
Attorneys of Plaintiff.

GEO. S. HILTON, 40
Attorney of Defendant.

**Deposition of the Plaintiff Taken at
Columbia, S. C.**

SCHEDULE.

Be it remembered that on this 17th day of October, in the Year of Our Lord One Thousand Nine Hundred and Fourteen, at room No. 708, Palmetto Building, in the City of Columbia, County of Rich-
 10 land and State of South Carolina, at ten o'clock a. m., being the time and place to which this hearing was adjourned by consent of the parties hereto, and otherwise in accordance with the annexed notice for taking the examination of the witness named in said notice, I, Paul A. Cooper, the commissioner therein named, having first taken the oath required by me in this behalf, proceeded to examine
 20 the witness aforesaid in pursuance of said notice, and caused such examination to be taken down in writing and signed by the witness and signed the same myself as hereinafter follows. Present: Albin Smith, representing George S. Hilton, counsel for Samuel P. V. Vought; W. T. Aycock, of Weston & Aycock, of counsel for Sarah C. Dorsett. Sarah C. Dorsett, the witness, appearing before me and being by me duly sworn that the answers she should give to the interrogatories put to her should be the truth, the whole truth and nothing but the truth,
 30 said:

By Mr. Aycock.

Who was your grandfather? A. Jeremiah Pope.

Where did he live? A. The family came from Scotland and settled in the upper part of New York State.

Where and when did Jeremiah Pope die? A. He went to the War of 1812, and died of camp fever.

40 Where do you live? A. I live at College Place, a suburb of Columbia, South Carolina.

Deposition of Plaintiff.

How long have you lived in Columbia? A. Since February 8, 1888.

What is the condition of your health? A. My health is very good, considering my age.

What is your age? A. I was sixty-nine years old the 7th day of last May.

What children did your grandfather Jeremiah Pope have? A. He raised five children—two died in infancy.

What five were raised? A. Samuel, Elizabeth, Margaret, Mary and Sarah.

Who did your Aunt Elizabeth marry? A. John Van Iderstine.

Whom did your Aunt Margaret marry? A. She married Phillips—I do not know his name.

Whom did your Aunt Mary marry? A. She married John Beyea.

What was your relation to Sarah Pope? A. I was her youngest child.

Whom did she marry? A. B. C. Murch.

What children did your Aunt Elizabeth Van Iderstein have? A. I think she raised four—Jeremiah, Cornelius, Mary Jane and Margaret Ellen.

What became of Cornelius? A. Died in the Civil War; I suppose he died, as he never came back.

What became of Jeremiah? A. He died in Michigan a few years back. I do not know just when.

Was he living at the time when your Cousin Samuel Pope died? A. Yes. I saw him six months afterwards.

How about Mary Jane Van Iderstein? A. She married John Gobel.

When did she die? A. She died in 1903. Mr. Hilton told me they were all dead.

Was Mary Jane Gobel living when your Cousin Samuel died? A. Yes, I saw her since his death.

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Deposition of Plaintiff.

Whom did Margaret Ellen marry? A. She married Fairclough. I think his name was Napoleon.

What children did your Aunt Margaret Pope have? A. I saw four when I was in Paterson six months after Cousin Samuel Pope died, in October, 1889.

10

You say you saw four children of your Aunt Margaret at that time? A. Yes. I spent a day with them.

Children or grandchildren? A. Children.

Were any children of your Aunt Margaret Pope living in 1889, when your Cousin Samuel Pope died? A. All four of them were living.

What children did Mary Pope have? A. She had three to grow up.

20

What were the names of these children of Mary Pope? A. Patience, Harvey, Sarah.

What became of Sarah Beyea? A. She died young. She married William Vanderbilt.

Did they have any children? A. No.

When did they die? A. Harvey told me they were both dead; he told me that in 1889, when I was in Paterson.

Did Sarah and her husband have any children? A. No.

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What became of Patience? A. She died on the 10th day of March, 1889, just a little before Samuel Pope died.

When did Harvey die? A. Harvey died the 6th of January, 1912.

40

What children did your mother have? A. My parents raised five children; three boys and two girls. My oldest brother was Charles C. Murch, the next oldest was Benjamin F. H. Murch, the next was Jeremiah Pope Wellington Murch. My sister's name was Mary Elizabeth Murch, and my name is Sarah Carolina.

Deposition of Plaintiff.

When did you marry Mr. Dorsett? A. I married the 18th of September, 1866.

What is his full name? A. William Henry Dorsett.

Did your Uncle Samuel Pope have any children? A. He left two little boys. 10

What were their names? A. John and Samuel.

Was that the Samuel who left the will in Pater-son? A. Yes.

Did he have any children? A. No.

What was his wife's name? A. Eliza Rose, of Haverstraw, New York.

Did your Cousin John grow up? A. Yes.

Did he marry? A. I suppose so; he had one son—John—Cousin Samuel raised him.

What became of that son John? A. He died of sunstroke when quite young. 20

Did he die after or before his father? A. He died long before.

He died of sunstroke and your Cousin Samuel Pope raised this cousin called John? A. Yes.

Did your Cousin Samuel Pope die before his son John? A. No.

Was your Cousin John and his son John dead when your Cousin Samuel died? A. Yes. Cousin Samuel wrote me through the eighties, and told me he had fitten up a tombstone to his brother John. 30

When your Cousin Samuel died in 1889, how many first cousins of his were living? A. Four—Jeremiah Van Iderstein, Mary Jane Gobel, Harvey Beyea and myself.

When you said that Margaret Pope had some children living at that time and who would have been first cousins of Samuel Pope, you were incor-rect in that statement? A. I thought you were talking about Margaret Fairclough. 40

How many children did your Aunt Margaret

Deposition of Plaintiff.

have? A. Two children—Sarah and Elizabeth. Sarah died. She married Dr. Johnson. Elizabeth married George Reincor.

Then both of your Aunt Margaret's children were dead when your Cousin Samuel died? A. Yes.

10 Your Uncle Samuel had two sons, John and Samuel? A. Yes.

Which died first? A. John.

Did John leave any children? A. He had one son, do not know whether he or my Cousin John died first. His son died of sunstroke.

Did he have any children? A. No.

Is your husband, Mr. Dorsett, living? A. Yes.

He is in your presence now? A. Yes.

20 When did your mother die? A. She died on the 22nd day of September, 1865.

Were all your brothers and sisters dead at the time when your Cousin Samuel Pope died? A. Yes.

SARAH C. DORSETT.

Sworn to before me this
17th day of October, 1914.

30 PAUL A. COOPER,
(Seal) Commissioner.

Will of Samuel Pope.

In the name of God, Amen, I, Samuel Pope, of the City of Paterson, in the County of Passaic and State of New Jersey, being of sound mind, memory and understanding, do make and publish this my last will and testament in manner following, that is to say:

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FIRST: It is my will and I do order that all my just debts and funeral expenses be duly paid and satisfied as soon as conveniently can be done after my decease.

SECOND: I give, devise and bequeath unto my beloved wife, Eliza Pope, all my household furniture, farm stock, farm utensils, horses, carriages, harness and other things appertaining thereto.

20

THIRD: I give, devise and bequeath unto my said wife Eliza, bonds and mortgages or other securities of the value of twenty thousand dollars.

FOURTH: I give, devise and bequeath unto my said wife Eliza, for her sole use and benefit for and during the term of her natural life, the interest money derived from bonds and mortgages or other interest paying securities of the value of thirty thousand dollars; and in order that she may receive the same I do hereby order and direct my executors hereinafter named, or the survivor of them, to select from the securities belonging to my estate, bonds and mortgages or other interest bearing securities of the value of thirty thousand dollars, and to hold the same until the decease of my said wife, and during her lifetime to collect the interest and profits arising therefrom when due and pay the same to my said wife. In case the whole or any part of the money secured by the bonds and mortgages or other interest bearing securities so selected shall be re-

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Will of Samuel Pope.

paid during the lifetime of my said wife, then I do order and direct my executors hereinafter named, or the survivor of them, to immediately reinvest the monies repaid, in first mortgages upon first class property worth at least double the amount invested, or in other good, interest paying securities; and to keep the same reinvested during the lifetime of my said wife and collect and pay the interest derived therefrom to her.

FIFTH: I give, devise and bequeath unto my said wife Eliza, for and during the term of her natural life, my homestead farm containing about eleven and a half acres situate on Broadway in the City of Paterson, my three mills and mill properties situate on the North bank of the Passaic River in the First Ward in said City; my brick building situate on the North side of Market street in said City known as Pope's Hall; my two double frame dwelling houses situate on the south side of Jay street in said City; my frame dwelling house situate on the corner of Jay and Arch streets in said City; my frame store and dwelling house situate on Arch street adjoining the Arch street bridge in said City; the tract of land belonging to me situate on the Southwest side of the Morris Canal in said City containing about twenty acres, and known as Pope's Quarries, and the tract of land belonging to me containing about seventy acres situate at Haledon, in the Township of Manchester, known as Smith's Quarry.

SIXTH: I hereby nominate and appoint my said wife Eliza, Trustee of Samuel Vogt and Effie Vogt (the two minor children of my adopted daughter Ida Vogt, who is now deceased), and as such Trustee, it is my will that she shall not be required to give bonds; after her decease I would respectfully request the Chancellor, or any competent Court of

Will of Samuel Pope.

this State, to appoint some proper person or persons as Trustee or Trustees of the said Samuel Vogt and Effie Vogt in her place and stead; such appointed Trustee or Trustees to give such bond or bonds as the said Chancellor or Court may deem sufficient.

SEVENTH: I give, devise and bequeath unto my said wife Eliza, as Trustee of Samuel Vogt and Effie Vogt (the two minor children of my adopted daughter Ida Vogt, now deceased), and to such person or persons as may after her decease be appointed by the Chancellor or any competent Court of this State to succeed her as such Trustee, my frame dwelling house situate No. 32 Smith street in the City of Paterson, known as the Hudson house; my frame dwelling situate No. 30 Smith street in said City known as the Polhemus house; my double frame houses situate Nos. 69 and 71 Ward street in said City, together with the small house and the barn in the rear of the same; my two brick buildings situate at Nos. 299 and 301 Main street in said City; my frame building situate on the corner of Main and Smith streets in said City known as the Museum; my one-half of the double brick building on Main street in said City adjoining the Museum, and my three frame buildings situate at Nos. 9, 11 and 13 Smith street in said City known as the Garrison row, and the brick barn in the rear of the same; and the lands whereon all of said buildings are erected, and belonging or appertaining thereto; in trust, for the uses and purposes following, that is to say, First: To rent said buildings and lands and to keep the same rented during the minority of the said Samuel Vogt and Effie Vogt; to collect the rents, income and profits arising therefrom, and out of the monies received therefrom to pay the cost and expense of all repairs, taxes, insurance and

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Will of Samuel Pope.

10 other necessary charges; and after such payments, to pay out of the balance the necessary cost and expense of the proper maintenance and education of the said Samuel Vogt and Effie Vogt until their arrival at the age of twenty-one years; such cost and expense of maintenance and education to be limited
20 to forty dollars per month for each of them, until they shall respectively arrive at the age of fourteen years; after that time such further sum as said Trustee or Trustees may deem necessary and advisable. The balance of said rents, income and profits (if any) remaining after the payments above ordered have been made, to quarter yearly invest in bonds, mortgages or other good interest paying securities, or deposit same in some safe and reliable interest paying institution, and the same, with the interest, income and profits arising therefrom, to keep invested until the elder of the said two children shall attain the age of twenty-one years, and after the arrival of the elder of said children at the age of twenty-one years, to keep the equal one-half part of the same, with the interest, income and profits arising therefrom, invested until the younger of said children shall arrive at the age of twenty-one years. Second: Upon the arrival of each of the
30 said children at the age of twenty-one years, to render to the proper court a correct account of such Trusteeship, and after approval of the same by such court to convey in fee simple, by good and sufficient conveyances, in the law, to such child as shall have attained his or her majority, the equal undivided one-half part of all the buildings and lands in this item mentioned, and assign, transfer and set over to such child the equal one-half part of all monies, bonds, mortgages or other securities, in his, her or their hands as Trustee or Trustees as afore-
40 said, less such sum or sums as the Court may allow

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such Trustee or Trustees for their services in and about the premises; in case either or both of the two children above mentioned should die before his, her or their arrival at the age of twenty-one years, leaving lawful issue, the lawful issue of such deceased child shall be entitled to have and receive (share and share alike, if more than one) the share or proportion of his, her or their parent; and to that end I do hereby authorize and direct the Trustee or Trustees above mentioned to convey, transfer and set over, as soon as practicable after the decease of said parent, to the legally appointed Guardian or Trustee of such lawful issue, the equal undivided one-half part of the lands and buildings herein above mentioned in fee simple, and so much of the accumulated income and profits derived therefrom as may be decided by a Court of competent jurisdiction as fairly and equitably belonging to the share or proportion of his, her or their parent at the time of his or her decease; in case either of the two children above mentioned should die before his or her arrival at the age of twenty-one years without leaving lawful issue, and leaving the other of said children him or her surviving, then in that case the share or proportion of such deceased child, shall go to his or her survivor, and shall be conveyed, assigned, transferred and set over in the manner herein before provided for, to the said survivor upon his or her arrival at the age of twenty-one years; in case either of the said two children should die before his or her arrival at the age of twenty-one years, and after the death of the other of said children, and without leaving lawful issue, and there shall at the time of his or her death, lawful issue of the other of said children living, then his or her share shall go to said lawful issue (share and share alike if more than one); the same to be, as soon as

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10 practicable, after his or her decease conveyed, assigned, transferred and set over by the Trustee or Trustees first above mentioned, to the legally appointed Guardian or Trustee or such lawful issue; in case both the said children should die before their arrival at the age of twenty-one years, without lawful issue, then and in that case, after the death of the survivor of them, it is my will, and I do order and direct that the trusts hereby created shall cease and be determined, and that all the properties herein devised and bequeathed in trust, together with all accumulation of rents, income and profits shall revert to, and again become part and parcel of my estate.

20 EIGHTH: I give, devise and bequeath, unto each one of my four cousins, viz: Mary J. Goble, Jeremiah Van Iderstine, Patience Ferris and Sarah C. Dorsett, who shall survive me, bonds and mortgages, or other securities of the value of fifteen thousand dollars. In case any or all of my said cousins depart this life before me, then it is my will that the share such deceased cousin or cousins would receive, if living, shall be and remain part and parcel of my estate, as it is not my intention to make, and I do not make any bequest to the heirs
30 or next of kin, of any cousin above named.

NINTH: I give, devise and bequeath unto my nephew William Pope, for his sole use and benefit for and during the term of his natural life, the interest money derived from bonds and mortgages, or other interest paying securities of the value of ten thousand dollars; and in order that he may receive the same, I do hereby order and direct my executors hereinafter named, or the survivor of them, to
40 select from the securities belonging to my estate, bonds and mortgages, or other interest bearing

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securities of the value of ten thousand dollars, and to hold the same until the decease of the said William Pope, and during his lifetime to collect the interest and profits arising therefrom when due, and pay the same to the said William Pope; in case the whole or any part of the money secured by the bonds and mortgages or other interest bearing securities so selected, shall be repaid during the lifetime of the said William Pope, then I do order and direct my executors hereinafter named, or the survivor of them, to immediately reinvest the monies repaid, in first mortgages, upon first class property worth at least double the amount invested, or in other good interest paying securities, and to keep the same reinvested during the lifetime of the said William Pope, and pay the interest derived therefrom to him during his lifetime. After the death of the said William Pope, I give, devise and bequeath the above mentioned sum of ten thousand dollars in bonds and mortgages or other securities to Willie Pope the son of the said William Pope, to him and to his heirs forever.

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TENTH: I give, devise and bequeath unto Samuel Vogt, (the son of my deceased adopted daughter Ida Vogt), my diamond pin and gold watch and chain.

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ELEVENTH: I give, devise and bequeath unto my cousin, Sarah C. Dorsett, my diamond ring.

TWELFTH: I give, devise and bequeath unto Samuel Vogt and Effie Vogt, (children of my adopted daughter Ida, now deceased), and to their heirs forever, the use of my burial plots in Mount Hebron Cemetery in the County of Essex and my burial plots in the Cemetery of the First M. E. Church of Paterson, on Willis Street, in the City

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of Paterson; with full right and privilege to them, or either of them, of making interments in either of said burial plots. The use of my burial plots in the Mount Hebron Cemetery to be subject to an annual charge of two dollars, such charge to be annually paid during the minority of the said Samuel Vogt and Effie Vogt, by the Trustees of their estates, and after their arrival at the age of twenty-one years by them, to the proper officers of the said cemetery, for the cost and expense incurred by said officers in and about the proper care of said burial plots.

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THIRTEENTH: I give, devise and bequeath, unto each one of the three daughters of John Varick, viz: Catharine Moore, Hester Varick and Maria Healey, who may be living at the time of my decease, bonds and mortgages or other securities of the value of ten thousand dollars; in case any or all of the persons in this item named, depart this life before me, then it is my will that the share such deceased person would receive, if living, shall be and remain part and parcel of my estate, as it is not my intention to make and I do not make any bequest to the heirs, or next of kin of any of the persons herein named.

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FOURTEENTH: I give, devise and bequeath unto Jane Harley if she be living at the time of my decease, bonds and mortgages or other securities of the value of three thousand dollars; in case the said Jane Harley shall depart this life before me, then it is my will that the bonds and mortgages or other securities by this item devised to her, shall be and remain part and parcel of my estate, as it is not my intention to make and I do not make any bequest to the heirs or next of kin of the said Jane Harley.

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FIFTEENTH: After the death of my said wife Eliza, I give, devise and bequeath unto the The Paterson Orphan Asylum Association of the City of Paterson, bonds and mortgages, or other interest paying securities of the value of ten thousand dollars, to them and to their successors; in trust, for the uses and purposes following, that is to say: First, to keep the principal money secured by said bonds and mortgages or other securities, at all times unimpaired, and the same at all times invested, in first class, interest paying securities; and in order to enable them to keep the same so invested the proper officers of said Association are hereby authorized, in case of the re-payment at any time of the whole, or any part of said principal sum, to receive the same, and they are hereby further ordered and directed to immediately reinvest the same, in the name of "the Paterson Orphan Asylum Association" of the City of Paterson in first class bonds and mortgages, or other good, interest paying securities. Second: To collect and receive the interest and profits arising therefrom, and apply the same toward the payment of the necessary current expenses of the said Association; in case of the failure or refusal of the said Association, or its proper officers, to keep the principal money invested, or the interest money applied as above directed, then the whole amount hereby devised shall revert to and again become part and parcel of my estate.

SIXTEENTH: After the death of my said wife Eliza, I give, devise and bequeath unto the Paterson General Hospital Association of the City of Paterson (formerly called the Ladies' Hospital Association of the City of Paterson), bonds and mortgages, or other interest paying securities, of the value of ten thousand dollars, to them and their

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10 successors; in trust, for the uses and purposes following, that is to say: First: To keep the principal money secured by said bonds and mortgages, or other securities, at all times unimpaired, and the same at all times invested, in first class, interest paying securities; and in order to enable them to keep the same so invested, the proper officers of said Association are hereby authorized, in case of the repayment at any time of the whole or any part of said principal sum, to receive the same, and they are hereby further ordered and directed, to immediately reinvest the same in the name of the Paterson General Hospital Association of the City of Paterson, in first class bonds and mortgages, or other good interest paying securities. Second:

20 To collect and receive the interest and profits arising therefrom, and apply the same toward the payment of the necessary current expenses of the said Association. In case of the failure or refusal of the said Association, or its proper officers, to keep the principal money invested, or the interest money applied as above directed, then the whole amount hereby devised, shall revert to and again become part and parcel of my estate.

30 SEVENTEENTH: After the death of my said wife Eliza, I give devise and bequeath unto such person or persons as may be appointed by the Chancellor, or any competent Court of this State, Trustee or Trustees of Samuel Vogt, in the place and stead of my said wife Eliza, and to their successors in the trust, my homestead farm, containing about eleven and a half acres, situate on Broadway in the City of Paterson, in trust for the uses and purposes following, that is to say: First: to allow and permit the said Samuel Vogt to occupy so much and

40 such parts thereof as he may from time to time require, and the balance (if any), from time to time

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to rent or lease, until the said Samuel Vogt shall arrive at the age of twenty-one years; to collect and receive the rents, income and profits arising therefrom, and out of the same to pay all charges for repairs, taxes and insurance, and the balance (if any), to quarterly invest in bonds, mortgages, 10
or other good interest paying securities, or deposit the same in some safe and reliable interest paying institution, and the same, with the interest, income and profits arising therefrom, to keep invested, until the said Samuel Vogt shall arrive at the age of twenty-one years: Second: Upon the arrival of the said Samuel Vogt at the age of twenty-one years, to render to the proper court a correct account of such Trusteeship, and after approval of the same by such Court, by good and 20
sufficient conveyances in the law, to convey the homestead farm above mentioned to the said Samuel Vogt in fee simple, and to assign, transfer and set over unto the said Samuel Vogt all monies, bonds, mortgages, or other securities, in his, her, or their hands, arising from the rents, income and profits derived from said homestead farm, less such sum or sums as the Court may allow such 30
Trustee or Trustees for his, her or their services in and about the premises; in case of the death of the Samuel Vogt before his arrival at the age of twenty-one years, leaving lawful issue, such lawful issue shall be entitled to have and receive, share and share alike, said homestead farm and the accumulated rents, income and profits derived therefrom (if any), and to that end I do hereby authorize and direct the Trustee or Trustees of the said Samuel Vogt to convey, transfer and set over, as soon as practicable after his decease, to the legally 40
appointed Guardian or Trustee of such lawful issue, the said homestead farm in fee simple, and all

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10 accumulated rents, income and profits derived therefrom, less such commissions as may be allowed said Trustee or Trustees for their services in the premises; In case of the death of said Samuel Vogt before my said wife Eliza, or before his arrival at the age of twenty-one years, without leaving law-
ful issue, then in either case, it is my will, and I do order and direct, that the trusts hereby (by this item) created, shall cease, and be determined, and that said homestead farm, together with all accumulation of rents, income and profits derived therefrom, shall revert to, and against become part and parcel of my estate.

20 EIGHTEENTH: After the death of my said wife Eliza, I give, devise and bequeath unto such person or persons as may be appointed by the Chancellor, or any competent Court of this State, Trustee or Trustees of Samuel Vogt and Effie Vogt (minor children of my adopted daughter Ida Vogt now deceased) in place and stead of my said wife Eliza, and to their successors in the trust, my three mills and mill properties situate on the north bank of the Passaic river in the First ward in said City, my two double frame dwelling houses situate on the
30 South side of Jay street in said city, my frame dwelling house situate on the corner of Jay and Arch streets in said City, and my frame store and dwelling house situate on Arch street adjoining the Arch street bridge in said City, and the lands whereon the same are erected and belonging or appertaining thereto; also all monies, bonds, mortgages, or other securities, undisposed of belonging to my estate, or which at that time shall have from any cause reverted to my estate, or which upon the
40 death of my said wife will again become part and parcel of my estate; in trust for

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the uses and purposes following, that is to say:
First: To rent or lease said mills and mill proper-
ties, buildings and lands, and to keep the same
rented or leased, during the minority of the said
Samuel Vogt and Effie Vogt, to collect and receive
the rents, income and profits arising therefrom, and
out of the same to pay all charges for repairs, taxes
and insurance, and the balance to quarterly invest
in bonds, mortgages or other good interest paying
securities, or deposit the same in some safe and reli-
able interest paying institution, and the same with
the interest, income and profits arising therefrom,
to keep invested, until the elder of said two children
shall attain the age of twenty-one years, and after
the arrival of the elder of them at the age of twenty-
one years, to keep the equal one-half part of the
same, with the interest, income and profits arising
therefrom, invested, until the younger of said chil-
dren shall arrive at the age of twenty-one years.
Second: To invest all monies, undisposed of, which
may come into their hands, or which may be derived
from the bonds, mortgages or other securities undis-
posed of belonging to my estate, or which shall have
reverted to my estate, or which upon the death of
my said wife will again become part and parcel of
my estate, in bonds, mortgages or other good inter-
est paying securities, or deposit the same in some
safe and reliable, interest paying institution, and
the same with the interest, income and profits aris-
ing therefrom, to keep invested, until the elder of
said two children shall attain the age of twenty-
one years, and after the arrival of the elder of them
at the age of twenty-one years, to keep the equal
one-half part of the same, with the interest, income
and profits arising therefrom, invested, until the
younger of said children shall arrive at the age of
twenty-one years. Third: Upon the arrival of each

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of the said children at the age of twenty-one years, to render to the proper court a correct account of such Trusteeship, and after approval of the same by such Court, to convey in fee simple, by good and sufficient conveyances in the law, to such child as shall have attained his or her majority, the equal undivided one-half part of all the buildings and lands in this item mentioned, and assign, transfer and set over to such child, the equal one-half part of all monies, bonds, mortgages, or other securities, in his, her or their hands as Trustee or Trustees as aforesaid, less such sum or sums as the Court may allow such Trustee or Trustees for their services in and about the premises; in case either or both of the two children above mentioned, should die before his, her or their arrival at the age of twenty-one years, leaving lawful issue, the lawful issue of such deceased child shall be entitled to have and receive (share and share alike, if more than one), the share or proportion of his, her or their parent; and to that end I do hereby authorize and direct the Trustee or Trustees above mentioned to convey transfer and set over, as soon as practicable after the decease of said parent, to the legally appointed Guardian or Trustee of such lawful issue, the equal undivided one-half part of the lands and buildings herein above mentioned, in fee simple, and so much of the accumulated income and profits derived therefrom, and so much, and such part of the moneys, bonds, mortgages or other securities herein above mentioned, and the accumulations thereof, as may be decided by a Court of competent jurisdiction, as fairly and equitably belonging to the share or proportion of his, her or their parent at the time of his or her decease; in case either of the two children above mentioned should die before his or her arrival at the age of twenty-one years, without leaving lawful

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issue, and leaving the other of said children him or her surviving, then and in that case, the share or proportion of such deceased child shall go to his or her survivor, and shall be conveyed, assigned transferred and set over, in the manner hereinbefore provided for, to the said survivor upon his or her arrival at the age of twenty-one years; in case either of the said two children should die before his or her arrival at the age of twenty-one years, and after the death of the other of said children, and without leaving lawful issue, and there shall be at the time of his or her death lawful issue of the other of said children living, then his or her share shall go to said lawful issue (share and share alike if more than one), the same to be, as soon as practicable after his or her decease, conveyed, assigned, transferred and set over, by the Trustee or Trustees first above mentioned, to the legally appointed Guardian or Trustee of such lawful issue; in case both of the said children should die before their arrival at the age of twenty-one years, without lawful issue, then and in that case, after the death of the survivor of them, it is my will and I do order and direct that the trusts by this item created shall cease and be determined, and that all the buildings, lands, monies, bonds, mortgages and other securities, herein devised and bequeathed in trust, together with all accumulations of rents, interests, income, and profits, shall revert to, and again become part and parcel of my estate; in case both of the said children should die before my said wife Eliza, then and in that case it is my will, and I do order and direct, that the gifts, devises and bequests, in and by this, the eighteenth item, paragraph or clause of my said will, made, shall in all things be taken and considered as being null, void and of no effect, and that all the buildings, lands, monies, bonds, mortgages, or other se-

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Will of Samuel Pope.

curities, herein and hereby given, devised and bequeathed, shall be taken, held and considered as still belonging to, and being part and parcel of my undisposed of estate.

10 NINETEENTH: Should any of the devisees or legatees herein named, see fit, at any time hereafter, to commence proceedings, in any competent court, to set aside, annul or defeat, in any manner or form, this my last will and testament, it is my will and I do order, that the lands, monies, securities or other properties herein bequeathed to such devisee or legatee shall immediately revert to, and again become part and parcel of my estate: and I do further order and direct, my Executors hereinafter named, or the survivor of them, under no circumstances to pay, 20 out of the monies of my estate, any part of the expenses incurred by any person, whether devisee, legatee, or otherwise, who shall attempt to annul or defeat in any way this my last will and testament:

TWENTIETH: In order that no differences may arise between the different devisees or legatees herein named as to what particular bond, mortgage, or other security shall become part and parcel of his, her or their share, it is my will, and I do hereby 30 order and direct my Executors hereinafter named, or the survivor of them, to give to each of the said devisees or legatees, the amounts herein devised to them, in such bonds, mortgages or other securities, as to my said Executors, or the survivor of them shall seem equitable and just. And I do further order and direct my said Executors, or the survivor of them, to make, execute and deliver, to each of the said devisees or legatees, all assignments, or transfers, necessary to legally vest in said devisees or leg- 40 atees, the ownership of the bonds, mortgages, or other securities herein devised to them.

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LASTLY: I hereby revoke all former wills made by me, and I do hereby appoint my trusty friends, James Blundell and George S. Hilton, Executors of this my last will and testament; to each of whom, in order that they may be properly compensated for the services they may be required to render, in and about the settlement of my estate, I do hereby give, devise and bequeath, the sum of two thousand dollars, and I do hereby charge my estate with the payment of the same without any abatement; said sums to be in lieu, and place, of the fees and allowances, they might be, by law or the order of any Court, entitled to receive. 10

In witness whereof, I the said Samuel Pope have hereunder set my hand this sixth day of December, A. D. eighteen hundred and eighty-eight. 20

SAMUEL POPE.

Signed, acknowledged and declared by the said Samuel Pope, as and for his last will and testament, in the presence of us, (both being present at the same time), who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our name as witnesses.

GEORGE H. WORDEN, 30
406 Totawa avenue.
JACOB H. BLAUVELT,
61 Paterson street.

Court's Memorandum Decision.

(Title omitted.)

MEMORANDUM.

This case is submitted to the Court, without jury, upon an agreed state of facts.

10 The plaintiff seeks to recover in an action of ejection, claiming title to the land in question, as heir at law of Samuel Pope, deceased. Mr. Pope died testate; but the plaintiff's claim is that the will contains no residuary clause, and, hence, as to the property in question, there was no disposition, so that it descends to his heirs at law.

The defendant, on the other hand, contends that the property, by the will, went to the defendant.

20 Samuel Pope died March 21, 1889, he left a will dated December 6, 1888. His widow, Eliza Pope, died on or about June 23, 1910.

Mr. Pope never had issue, and his nearest blood relations at the time he made his will were his cousins, of whom the plaintiff was one.

The land in question consists of a property on Market Street, Paterson, known as Pope's Hall; and a farm of seventy acres at Haledon, known as Smith's Quarry.

30 The only mention of the properties is in the 5th clause, wherein he devises them to his wife Eliza for life, specifically mentioning each property so devised.

Defendant claims the property under the 18th clause of the will, which provides that after the death of the widow, certain property, specifically named (but not including the premises in question) shall go to trustees for the benefit of the children of Ida Vogt.

40 Defendant's first contention is, that since the testator frequently refers in his will to Ida Vought, as his "adopted daughter," that that, *per se*, establishes

Court's Decision.

the relation, and hence she and her children inherit.

The use of this term does not *ipso facto* work an adoption, which must be in conformity with our statute, to be effective.

The words "adopted daughter" are used merely in a descriptive sense. They are nowhere essential to the passing of title to any of the property, real or personal. If these words had been omitted, the property would nevertheless have passed. 10

The testator nowhere displays an intention, in the use of these words, of anything more than description. He nowhere indicates an intention to give more, than what he *specifically* sets out, to those whom he describes a "adopted daughter" or children of "my adopted daughter."

I cannot gather from his language any intention to give these descriptive words the meaning that all his residuary estate should go to said persons; and such intention must clearly appear, before it can be read into the will. 20

The testator, apparently, was free in the use of such terms, for it appears that he also described one as his nephew, although he was not such.

See *Blundell v. Pope*, 21 A. R., 456.

Naming one as an "heir" is much different; for there a donative intention is expressed which must be carried out; and there may be cases where calling one a daughter may have binding effect, if it clearly appears that it expresses an intention on the part of the testator, and is not used merely by way of description. 30

In *Adrain v. Koch*, 91 A. R., 213, Mrs. Koch was not only a granddaughter, but also a legally adopted daughter. She was not recognized as a daughter by the court, for the purposes of sharing in the residu- 40

Court's Decision.

ary estate, because it did not clearly appear that it was the testator's intention that she should do so.

Here no such intention can be found, either by the use of these words, or from any other part of the will.

10 Describing one as his "adopted daughter" is not equivalent to naming her as his heir at law. It was, to say the least, descriptive, and may have been used to satisfy the outer world and to justify the giving of large sums to the Voughts'; toward whom Mr. Pope evidently *felt* like a father.

That the testator did not intend that his residuary estate should go to his "adopted daughter" or her children clearly appears by the 18th paragraph.

20 The testator either intended to die intestate as to his residuary estate, or forgot to insert such a clause. In either event, his residuary estate would go, as if he had died intestate.

In the 18th paragraph the testator provides that in case of the death of both of the Vought children, the trust shall cease, and the property devised shall "be considered as still belonging to, and being part and parcel of my *undisposed* estate."

30 It is quite clear then that Mr. Pope had in mind an "undisposed estate," of which this should become a part.

Whether he thought this necessary to provide for his legacies; or intended to let the residue go as if he had died intestate, is not clear. But it is clear that he had in mind an "undisposed estate"; and if there was such "undisposed estate," it was not his intention that everything should go to his "adopted daughter" or her children, for then there would have been no "undisposed estate" or any necessity for one.

40 At any rate I cannot find in the will any clear intention on Mr. Pope's part of giving his residuary estate to the Voughts.

Court's Decision.

Under the view that the Court has taken, it, of course, follows that there is no estoppel. By accepting the gifts made to him in the will, the plaintiff may still consistently ask for his share of the residuary, after the terms of the will have been carried out, as indicated. His present is not inconsistent with his former action. 10

Defendant's second contention is that the lands were devised by the will to her.

It is undoubtedly the law that "it is not to be presumed that a testator intends to leave portions of his estate undisposed of, but the natural and reasonable presumption is that he designs to dispose of his entire estate."

It is also true that such a construction must be adopted as will carry out this view. This, however, can only be done where the intention appears by necessary implication. 20

And "necessary implication" means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed. *McCoury v. Leek*, 1 McCarter, 70, 72.

There is nothing in this will which indicates "so strong a probability of intention" as requires us to read the will as the defendant contends. It is, from all the facts, quite easy to suppose that the testator had intentions other than to give all his residue to the defendant. 30

Testator's designation of Ida Vogt as his "adopted daughter" was no indication that he intended to make her his residuary legatee. The language of the will indicates nothing more than that he intended to give her certain things, set forth specifically and in detail. Had he intended to dispose of his residuary estate to her, he could readily have done so by a very short clause added to a very long will. 40

Court's Decision.

Evidence may be adduced to show that Ida Vought was not the adopted daughter of Samuel Pope, in order that all the facts may be of record.

If from said evidence it does not appear that Ida Vought was a legally adopted daughter, judgment
10 will be entered for the plaintiff, with costs.

Testimony.

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

20

SARAH G. DORSETT,
Plaintiff,

vs.

SAMUEL P. VOUGHT,
Defendant.

30

Before:

Hon. GEORGE S. SILZER, *J.*

Paterson, N. J., November 8th, 1915.

APPEARANCES:

Messrs. J. W. and E. A. DEYOE, for the Plaintiff.

GEORGE S. HILTON, Esq., MICHAEL DUNN, Esq., for
40 the Defendant.

C. W. Goble—For Plaintiff—Direct.

CORNELIUS W. GOBLE, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. DeYoe.

Mr. Hilton: It being understood that the testimony now to be taken in this case is for the purpose of showing that Ida Vought was not adopted by Samuel Pope, the evidence is objected to as incompetent and irrelevant. 10
Objection overruled; defendant excepts.

Q. You live in the City of Paterson? A. Yes, sir.

Q. How long have you lived in the City of Paterson? A. All my lifetime. I was born and brought up here.

Q. You were acquainted with Samuel Pope? A. 20
I was, sir.

Q. And Eliza Pope? A. I was.

Q. Were you any relationship to Samuel Pope?
A. My mother was an own cousin.

Q. Did you know Ida Vought? A. I knowed her as Ida Davis, her name is Ida Vøgt now, or Vought, whatever it may be.

Q. You say you knew her as what? A. Ida Davis.

Q. What was her father's name? A. William Davis. 30

Q. Did he go under any other name besides William Davis? A. Well, he would go by the name of William Pope and William Davis.

Q. Did you know her mother? A. I have seen her mother, and that was when I was younger. I have not seen her in a good many years.

Q. Do you know when Ida Pope or Ida Davis was married, who she married? A. She married a fellow by the name of Vought or Vogt, I don't know which way they pronounce it, you know. 40

C. W. Goble—For Plaintiff—Direct.

John Grimshaw, Jr.—For Plaintiff—Direct.

Q. Where did Ida Pope or Davis live when she was small? A. She was taken off, she was put to Samuel Pope and raised there, and the Popes lived in Paterson here, but I could not just tell you the place where they lived.

10

Q. At the time she went to live with Samuel Pope were William Pope, or William Pope and his wife, living together? A. No, sir, they parted.

Q. Her mother, after the separation, did she get married again? A. She got married again.

Q. Who did she marry? A. She married Wakefield, I understand. That is what I have been told. She married Mr. Wakefield.

NO CROSS-EXAMINATION.

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JOHN GRIMSHAW, JR., sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. DeYoe.

Q. You are the Deputy Surrogate of this county? A. No, sir.

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Q. What are you? A. One of the clerks.

Q. A clerk in the Surrogate's office? A. Yes, sir.

Q. And are you familiar with the records in the Surrogate's office? A. Yes, sir.

Q. Have you searched the records in the Surrogate's office of the County of Passaic, and the records of the Orphans Court of the County of Passaic for adoption proceedings by Samuel Pope or Eliza Pope of Ida Vogt, or Ida Vought, or Ida Pope, or Ida Davis or Ida Wakefield? A. Yes, sir.

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Q. Are there any such records in your office? A. No, sir.

John Grimshaw, Jr.—For Plff—Direct—Cross.
M. J. Towers—For Plaintiff—Direct.

Q. There are no records of any such adoption? A. No, sir.

Cross-examination by Mr. Hilton.

Q. How are the records in regard to such matters kept in the Surrogate's office? A. Both the papers and the record of the papers. 10

Q. You mean, by the record of the papers, the book that the proceedings are recorded in? A. Yes, sir.

Q. What papers have you looked for? A. I have looked over all the adoption papers under those names, and also all papers under those names in the docket, and also the records, that is, the adoption books. 20

The Court: Does it appear on the record that Ida Vought was always a resident of this county?

Mr. DeYoe: Yes, sir, and also that Samuel Pope and his wife were always residents of this county. That is admitted in the State of Facts.

MORT J. TOWERS, sworn as a witness on behalf of the plaintiff, testifies as follows: 30

Direct examination by Mr. DeYoe.

Q. You are a clerk in the County Clerk's office of the County of Passaic? A. I am Deputy County Clerk.

Q. Have you any books of record in your office of adoption? A. We have one record of adoption in the County Clerk's office. 40

M. J. Towers—For Plaintiff—Direct.

Q. Is that in the Circuit Court of the County of Passaic? A. Yes, that is.

Q. That is a Circuit Court record? A. Yes, sir.

10 Q. You have no other books in your office at all as County Clerk, or as Clerk of the Circuit Court, containing a record of adoptions, except that one book, is that correct? A. That is the only book we have.

Q. That is the only record you have? A. No, that is the only book. I only know of one book in the office.

Q. Have you any other record that you know of, in your office, besides that book of adoption? A. Not that I know of.

20 Q. You have searched for any other books, haven't you? A. Yes, sir.

Q. And you did not find any other book? A. No, sir.

Q. That book you found? A. That is the only book that I found.

Q. Have you searched the records of adoption for the adoption by Samuel Pope or Eliza Pope of Ida Vought, spelled Vogt or Ida Vought, or Ida Pope or Ida Davis or Ida Wakefield? A. I cannot say without making reference to that.

30 Q. Will you look at that book, please, and tell us? A. Yes, sir, I will have to go down to the office to examine the book.

Q. Will you go down and look at the book and tell us? A. Yes, sir.

(The witness is excused temporarily while he makes the search.)

(Upon the return of the witness the examination was continued.)

40 Q. Have you now searched the records of adoption for the adoption by Samuel Pope or Eliza Pope

M. J. Towers—For Plaintiff—Cross—Redirect.

of Ida Vought, spelled Vogt or Ida Vought, or Ida Pope or Ida Davis or Ida Wakefield? A. I have.

Q. Have you found any such record of adoption?
A. No, sir.

Cross-examination by Mr. Hilton.

10

Q. What records did you search? A. I searched the record entitled Adoption of Infants.

Q. That is all that you searched? A. That is the only book that I know of in the office, the only book that I can find.

Q. You only searched the book, you did not search the files? A. Only that record.

Q. You did not search the files? A. No, I did not search the files, no, sir.

20

Redirect examination by Mr. DeYoe.

Q. Have you searched any files at all in your office? A. Only this record. That is the only record that I know of.

Q. Are there any files in your office in reference to adoption, other than those in that record? A. The only record I searched is this one here entitled Adoption of Infants.

30

The Court: Counsel wants to know if there are any files in your office entitled Adoption of Infants?

The Witness: None that I know of.

Q. Have you looked to see if there were? A. No, sir. We had this matter up some time ago.

The Court: I understood from Mr. Tower that the matter had entirely gone out of his mind until suddenly confronted by it this morning.

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M. J. Towers—For Plaintiff—Redirect.

Mr. DeYoe: The subpoena was served on him some time ago.

The Witness: Well, we were told only to bring this book up here.

10 The Court: I suppose, Mr. DeYoe, if you want anything further, we can continue the matter.

The Witness: We could not take the time to hunt up all our files down in the vault, for the reason that it would take so much time and there is no index to them. We had this same matter up the last time.

20 Mr. DeYoe: I think it is up to the County Clerk's office to search. Of course, I don't think it is important. This is the only record in the office and the law requires that it shall be recorded in a book. At the same time I shall serve them with a subpoena and it is up to them to search the records in their office so that they will know. If it is necessary for them to search the files, let them search the files.

The Court: I understand there is a great big vault full of files.

30 Mr. DeYoe: Well, the adoption papers should be under one class of files.

The Court: If they are not, what are you going to do?

Mr. DeYoe: The law requires that they should be recorded.

The Court: I don't know that the law requires the County Clerk to put all the force in his office to searching the files. Are not the records in some indexed state?

40 The Witness: As far as I know, some of the very old books are downstairs.

The Court: How old?

M. J. Towers—For Plaintiff—Redirect.

Mr. DeYoe: 1877 is when the act was passed authorizing adoptions.

The Court: Are those before that time?

The Witness: That I cannot say offhand.

The Court: Suppose you and Mr. Tower confer about the matter.

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Mr. DeYoe: It may be that when he starts in looking for the files for adoption he may find the files for adoption are all together.

The Court: Suppose you and the County Clerk get together and confer about the matter. I will adjourn the matter until such time as you can determine.

Mr. DeYoe: I have other evidence. I have the testimony of the father and mother, both, in another proceeding. The father is dead, the mother is dead, but I have the testimony of the father and mother in proceedings which Mr. Hilton took, both, concerning the matter, and both swearing there was no adoption.

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The Court: You mean the father and mother of the child?

Mr. DeYoe: The father and mother of the child, they both testified to the fact, in proceedings which Mr. Hilton brought, that there was no legal adoption of the child.

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The Court: Were any of the parties to the present suit parties to that suit?

Mr. DeYoe: No.

The Court: Then it could not be admissible. I suggest that you talk the matter over with the County Clerk and see exactly what the situation is, and you can probably work out some plan. I will adjourn the matter a short time until you can do that.

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H. J. Corwin—For Plaintiff—Direct.

The further hearing was thereupon adjourned to November 17th, 1915, at 10 o'clock A. M.

SECOND DAY.

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Paterson, N. J., November 17, 1915.

The hearing was continued pursuant to adjournment.

HARRY J. CORWIN, sworn as a witness on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. DeYoe.

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Q. You are a clerk in the County Clerk's office in this county? A. Yes, sir.

Q. Since the last adjournment of this case have you made a search in your office to see if there is any other record of adoption except this book which you have before you which was in court at the last hearing? A. I have.

Q. Is there any other book of records of adoption except that book in your office? A. No, sir.

30

Q. Is there any record in that book of the adoption by Samuel Pope or Eliza Pope, his wife, of Ida Vogt, Ida Vought, Ida Davis, or Ida Wakefield, or Ida Pope? A. No, sir.

Q. Have you searched the records and files of the Circuit Court of the County of Passaic in your office for any record of the adoption by Samuel Pope or Eliza Pope, of Ida Vogt, Ida Vought, Ida Pope, Ida Davis or Ida Wakefield? A. I have.

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Q. Is there any adoption in the records of the Circuit Court of the County of Passaic? A. No, sir.

NO CROSS-EXAMINATION.

Findings.

The Court: Has the defendant any testimony in opposition to this which has been given?

Mr. Hilton: No, sir, none.

Mr. DeYoe: I will draw the postea in this case and your Honor will sign it? 10

The Court: Yes, I will sign it. Submit whatever you have to send, to your adversary first, so that he may see it.

Paterson, N. J., November 29, 1915.

The matter coming up this day before the Court, parties being present in open Court,

The Findings of the Court being presented to Hon. George S. Silzer, J., for his signature, Mr. Hilton, for the defendant, excepts to the rulings of Court on all findings, both as to law and fact; and an exception is allowed; objection to be entered and findings signed. 20

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Findings and Postea.

(Title omitted.)

The trial of this case was commenced before Hon. GEORGE S. SILZER, Judge of the Passaic County Circuit Court, without a jury, at the Passaic Circuit Court March 8, 1915.

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After hearing the evidence and counsel for the plaintiff and for the defendant the court finds on this twenty-ninth day of November, Nineteen Hundred and Fifteen:

1. That Samuel Pope died intestate as to the premises set forth in the bill of complaint filed in this cause.
- 20 2. That the plaintiff, Sarah C. Dorsett, as one of the heirs at law of the said Samuel Pope, is entitled to an equal undivided one-fourth part of the several tracts of land described in said complaint.
3. That the defendant wrongfully deprives the plaintiff of the possession thereof.
4. That the plaintiff is not estopped by anything contained in said will from claiming her undivided interest in the premises described in said complaint.
- 30 5. That the Court finds for the plaintiff and against the defendant upon all the counts set forth in said complaint and renders a general verdict against Samuel P. Vought and finds him guilty of the trespass and ejectment above laid to his charge in manner and form as the said Sarah C. Dorsett hath complained against him and directs judgment to be entered against the defendant with costs.

GEO. S. SILZER,
Judge.

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Supplement to Findings.

(Title omitted.)

The Court further finds:

(1) That the plaintiff is not estopped by anything contained in said will or by accepting any legacy thereunder from claiming her undivided interest in the premises described in said complaint. 10

GEO. S. SILZER,
Judge.

Amended Exceptions to Court's Findings Filed with Consent of Respondent's Attorneys.

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(Title omitted.)

1. No. 1 excepted to on the ground that said Samuel Pope left a duly executed and proved will under which said premises, subject to the life estate of his wife, Eliza Pope, since deceased, therein, were devised, either directly or by implication, to the defendant and his sister, Effie Vought, or to their trustee for their use and benefit.

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2. No. 2 excepted to on the ground above stated and also on the ground that the said testator, having in his will mentioned Ida Vought, under the name of "Ida Vogt," as his adopted daughter, and the plaintiff having received and accepted certain benefits under said will by way of legacies, she is thereby estopped and precluded from setting up, claiming or proving that the said Ida Vought was not his adopted daughter, so far as relates to the devolution of any real estate of which the testator might have died seized.

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Amended Exceptions.

3. No. 3 excepted to on the ground that it is based on the said first and second and the fourth erroneous findings, and that the defendant does not wrongfully deprive the plaintiff of the possession of any interest in the premises therein mentioned and referred to.

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4. No. 4 excepted to on the ground that its denial of such an estoppel, especially when taken in connection with the facts stated in the above exception to paragraph No. 2 of the findings under the second ground therefor, is erroneous, and that it erroneously assumes that the plaintiff has an undivided interest in said premises.

5. No. 5 excepted to on the ground that the Court should have found for the defendant and against the plaintiff and rendered a verdict accordingly.

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6. Supplement to findings excepted to on the same ground as ⁴next above.

Exceptions allowed.

GEO. S. SILZER,
Judge.

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Judgment.

Whereupon it is adjudged that the plaintiff recover of the defendant the possession of the premises mentioned in the said complaint and also the sum of Fifty dollars and ninety cents for her costs in said suit expended.

Judgment entered November 30, 1915.

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WM. S. GUMMERE,
C. J.

Amended Grounds of Appeal.

(Title omitted.)

The appellant states the following grounds of appeal:

1. The Court decided and found that Samuel Pope died intestate as to the premises set forth in the complaint, whereas the said Samuel Pope left a duly executed and proved will under which said premises, subject to the life estate of his wife, Eliza Pope, therein, were devised, either directly or by implication, to the appellant and his sister, Effie Vought, or to their trustee for their use and benefit. 10

2. The Court decided and found that the respondent, as one of the heirs at law of the said Samuel Pope, is entitled to an equal undivided one-fourth part of the several tracts of land described in said complaint, whereas the said Samuel Pope not only devised said lands as above stated, but having in his said will mentioned Ida Vought, under the name of "Ida Vogt," as his adopted daughter, and the respondent having received and accepted certain benefits under said will by way of legacies, she is thereby estopped and precluded from setting up, claiming or proving that the said Ida Vought was not his adopted daughter so far as relates to the devolution of any real estate of which the testator might have died seized. 20 30

3. The Court decided and found that the respondent is not estopped by anything contained in said will, or by accepting any legacy thereunder, from claiming her undivided interest in the premises described in the complaint, which, especially when taken in connection with the facts stated in the next preceding paragraph hereof, is erroneous, and it erroneously assumes that the respondent has an undivided interest in said premises. 40

Amended Grounds of Appeal.

10 4. The Court decided and found that the appellant wrongfully deprives the respondent of the possession of said part of said tract of land, which decision and finding is erroneous because the same is based upon the above mentioned erroneous findings, and the appellant does not wrongfully deprive the respondent of any part of said premises.

5. The Court erroneously admitted evidence offered by the respondent with a view to showing that the person mentioned in said will as "Ida Vogt" had not been legally adopted by said Samuel Pope.

20 6. The Court found for the respondent and against the appellant upon all the counts set forth in said complaint, and rendered a general verdict accordingly, whereas it should have found for the said appellant and against the respondent and rendered a verdict accordingly.

7. Said Court in divers other matters apparent on the record, ruled, adjudged, decided and found erroneously.

GEO. S. HILTON,
Attorney of Appellant.

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Endorsement.

We consent to the filing of the within amended grounds of appeal, the same to stand in the place and stead of the grounds of appeal originally filed.

February 11th, 1916.

J. W. and E. A. DEYOE,
Attorneys of Respondent.

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