

20

**INDEX.**

---

	PAGE
Protest .....	1
Caveat .....	2
Application for Probate .....	4
Citation .....	7
Petition .....	9
Will .....	11
Application for Revocation .....	13
Notice .....	16
Motion to Revoke Certificate .....	17
Conclusion on Motion to Revoke Certificate ..	19
Order .....	20
Notice of Appeal .....	22
Certificate for Trial Before a Jury .....	25
Opinion .....	29
Order .....	33
Rule on Affirmance .....	34
Petition .....	35
Notice of Appeal .....	37
Answer to Petition of Appeal .....	38



To JOSEPH L. DONAHAY,  
Surrogate of the County of Monmouth,  
Freehold, New Jersey.

I, James Pritchard, of the City of Long Branch, in the County of Monmouth, and State of New Jersey, one of the children and heirs of James Pritchard, Sr., late of the City of Long Branch, County of Monmouth, and State of New Jersey, deceased, do hereby caveat and protest against admitting to probate any paper purporting to be the last Will and Testament of the said James Pritchard, until examination and decree thereon by the Orphans' Court of said County of Monmouth.

Witness my hand and seal, this twenty-ninth day of February, A. D. nineteen hundred and sixteen.

JAMES PRITCHARD.



- Emma Howell, daughter (widow), Long Branch,  
New Jersey.
- James Pritchard, Jr., son, Long Branch, New  
Jersey.
- Daniel Pritchard, son, 637 Halsey Street, Brook-  
lyn, N. Y.
- Minnie Hanson, daughter (widow), 21 Roswell  
Place, Union Course, Brooklyn, N. Y.
- William Pritchard, son, 128 Linden Street, Brook- 10  
lyn, N. Y.
- May Hill, granddaughter, wife of Frederick Hill,  
342 Nostrand Ave., Brooklyn, N. Y.
- Jennie Conroy, granddaughter, wife of John Con-  
roy, 342 Nostrand Ave., Brooklyn, N. Y.
- John Pritchard, grandson, 342 Nostrand Avenue,  
Brooklyn, N. Y.
- Margaret Pritchard, granddaughter (Minor), 18  
years, 342 Nostrand Avenue, Brooklyn, N. Y.

Children of John Pritchard, a deceased son of 20  
testator.

That said testator died seized of real estate to the  
value of \$11,000.00, and was possessed of personal  
property to the value of \$4,000.00.

Therefore the said Augusta R. Pritchard respect-  
fully applies for probate of the last Will and Testa-  
ment and for Letters Testamentary thereon.

Dated March 2nd, A. D. 1916.

AUGUSTA R. PRITCHARD. 30

Monmouth County, ss.:

Augusta R. Pritchard, named in the above ap-  
plication, being duly sworn, on her oath says that  
the matters and things set forth in the above ap-  
plication are true, to the best of her knowledge  
and belief.

AUGUSTA R. PRITCHARD.

Sworn before me at Freehold, }  
N. J., March 2nd, 1916. } 40

JOSEPH L. DONAHAY,

Surrogate.

Application for Probate and Letters Testamen-  
tary.

MONMOUTH SURROGATE'S OFFICE.

10

Estate of JAMES PRITCHARD,  
Deceased.

Filed Mar. 2, 1916.

JOSEPH L. DONAHAY,  
Surrogate.

IN THE NAME OF GOD, AMEN :

20 I, James Pritchard, of the City of Long Branch,  
in the County of Monmouth, and State of New Jer-  
sey, being of sound disposing mind and memory,  
do make and publish my last Will and Testament  
in manner following, namely:

First. I direct all my just debts and funeral ex-  
penses be paid as soon as may be reasonable after  
my decease.

30 Second. I direct my executrix, hereinafter  
named, to purchase a half plot of ground in Glen-  
wood Cemetery, in the Borough of West Long  
Branch, Monmouth County, New Jersey, for myself  
and wife to be buried in as agreed, and also to pur-  
chase and put up a suitable headstone with the  
following inscription upon it: "James Pritchard,  
born in England, October 12, 1834. Augusta R.  
Pritchard, born in Amsterdam, Holland, January  
5, 1853." I further direct that my funeral be in  
charge of my Masonic Lodge with the Masonic  
Rights of the order.

40 Item. I give, devise and bequeath to each of my  
six children, the sum of two hundred dollars in  
cash.

Item. All the rest and residue of my estate, both real and personal, I give, devise and bequeath to my wife, Augusta R. Pritchard, absolutely and forever and I appoint her the sole executrix of this my last Will with full power and authority to grant, bargain and sell all of my estate, both real and personal, at either public or private sale, upon such terms as she shall deem for the best interests of my estate. I hope that she will be generous to my family because she has none of her own. 10

In witness whereof, I have hereunto set my hand and seal this twenty-seventh day of June, nineteen hundred and fourteen.

JAMES PRITCHARD (L. S.)

Signed, sealed, published and declared by James Pritchard, the above named Testator, as and for his last Will and Testament in the presence of us, who at his request, in his presence and in the presence of each other, have hereunto subscribed our names as witnesses. 20

Henry William Ruther, 1435 Boscobel Ave.,  
Bronx, New York.

Geo. W. VanGelder.

State of New Jersey, }  
Monmouth County, } ss.:

To Augusta R. Pritchard, Widow, Emma Howell, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson, William Pritchard, May Hill, Jennie Conroy, John Pritchard, and Margaret Pritchard, heirs at law and next of kin, and the legatees and devisees named in the last Will and Testament of James Pritchard, deceased. You are cited and warned to appear before the Orphans Court, to be held at Freehold, in and for the County of Mon- 30

mouth, on Thursday, the twentieth day of April, 1916, at the hour of 10 o'clock A. M., to answer unto the Caveat of James Pritchard, against admitting to probate a paper purporting to be the last Will and Testament of James Pritchard, deceased, and to abide the judgment and decree of the said Court in the premises.

10 Witness, Rulif V. Lawrence, Esquire, Presiding Judge of the said Court, at Freehold, the thirteenth day of March, nineteen hundred and sixteen.

(L. S.)

JOSEPH L. DONAHAY,  
Clerk.

20

30

40

## Citation on Caveat.

## MONMOUTH ORPHANS' COURT.

---

THE STATE OF NEW JERSEY,

to

AUGUSTA R. PRITCHARD, *et als.*

---

10

Returnable April 20th, 1916.

JOSEPH L. DONAHAY,  
Clerk.

Service acknowledged this 17th day of March, 1916, for all parties except Augusta R. Pritchard.

THOMAS P. FAY,  
Proctor. 20

State of New Jersey, }  
Monmouth County, } ss.:

To Augusta R. Pritchard, widow, Emma Howell, James Pritchard, Sr., Daniel Pritchard, Minnie Hanson, William Pritchard, May Hill, Jennie Conroy, John Pritchard, and Margaret Pritchard, heirs at law and next of kin, and the legatees and devisees named in the last Will and Testament of James Pritchard, deceased. You are cited and warned to appear before the Orphans' Court, to be held at Freehold, in and for the County of Monmouth, on Thursday, the twentieth day of April, 1916, at the hour of ten o'clock, A. M., to answer unto the Caveat of James Pritchard, against admitting to probate a paper purporting to be the last Will and Testament of James Pritchard, deceased, and to abide the judgment and decree of the said Court in the premises.

30

Witness, Rulif V. Lawrence, Esquire, Presiding Judge of the said Court at Freehold, the thirteenth day of March, nineteen hundred and sixteen. 40

(L. S.)

JOSEPH L. DONAHAY,  
Clerk.

## Citation on Caveat.

## MONMOUTH ORPHANS' COURT.

---

THE STATE OF NEW JERSEY

to

AUGUSTA R. PRITCHARD, *et als.*

---

10

Returnable April 20th, 1916.

JOSEPH L. DONAHAY,  
Clerk.

20 Due and legal service of the within Citation acknowledged this 17th day of March, 1916, for Augusta R. Pritchard.

GEO. W. VANGELDER,  
Proctor.

30

40

On Caveat to Probate Will of James Pritchard,  
Dec'd.

MONMOUTH COUNTY ORPHANS' COURT.

AUGUSTA R. PRITCHARD,  
Opponent,

vs.

EMMA HOWELL, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson and William Pritchard, *et als*,  
Caveators.

10

The petition of Emma Howell, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson, and William Pritchard, children and heirs at law of James Pritchard, deceased, and John Pritchard, Jr., May Pritchard Hill, wife of Frederick Hill, and Jennie Pritchard Conroy, wife of John Conroy, children of John Pritchard, deceased, and grandchildren of James Pritchard, deceased, respectfully shows that James Pritchard, late of the City of Long Branch, County of Monmouth, and State of New Jersey, died on the nineteenth day of February, nineteen hundred and sixteen, and more than ten days ago, leaving a paper in writing, purporting to be his last Will and Testament, a copy of which is hereto annexed. That said paper writing has been offered for probate on the first day of March, nineteen hundred and sixteen, and more than ten days after the death of said James Pritchard, to the Surrogate of the County of Monmouth, and that your petitioners, children and grand-children and next of kin of the said James Pritchard, have filed a caveat through James Pritchard, Jr., and protesting against the probate thereof.

20

30

40

And your petitioners further show that the Surrogate has duly cited all persons concerned, as next of kin, heirs at law, devisees and legatees, to appear before this Court to show cause why said will should not be admitted to probate.

10 Your petitioners therefore pray that the questions involved in such controversy may be certified into the Circuit Court of this County for trial before a jury, pursuant to the statute in such case made and provided.

Dated, March 13th, 1916.

Witness

J. ADELE PRESLEY.

EMMA HOWELL,  
DANIEL PRITCHARD,  
MINNIE HANSON,  
WILLIAM PRITCHARD.

20

THOMAS P. FAY,  
Proctor.

State of New Jersey }  
Monmouth County, } ss.:

30 Emma Howell, William Pritchard, Jr., Daniel Pritchard, Minnie Hanson, William Pritchard, being duly sworn upon their oaths, depose and say that they are the petitioners in the foregoing petition named, and that the matters and things therein contained are true to the best of their knowledge and belief.

EMMA HOWELL,  
DANIEL PRITCHARD,  
MINNIE HANSON,  
WILLIAM PRITCHARD.

Sworn and subscribed before me this }  
thirteenth day of March, A. D., 1916.)

40

J. ADELE PRESLEY,  
Notary Public of N. J.

## IN THE NAME OF GOD, AMEN.

I, James Pritchard, of the City of Long Branch, in the County of Monmouth, and State of New Jersey, being of sound and disposing mind and memory, do make and publish my last Will and Testament in manner following, namely:

First. I direct all my just debts and funeral expenses be paid as soon as may be reasonable after my decease. 10

Second. I direct my executrix, hereinafter named, to purchase a half plot of ground in Glenwood Cemetery, in the Borough of West Long Branch, Monmouth County, New Jersey, for myself and wife to be buried in as agreed, and also to purchase and put up a suitable headstone with the following inscription upon it. "James Pritchard, born in England, October 12, 1834, Augusta R. Pritchard, born in Amsterdam, Holland, January 5, 1853." I further direct that my funeral shall be in charge of my Mason Lodge with the Masonic Rights of the Order. 20

Item. I give, devise and bequeath to each of my six children the sum of two hundred dollars in cash.

Item. All the rest and residue of my estate, both real and personal, I give, devise and bequeath to my wife, Augusta R. Pritchard, absolutely and forever, and I appoint her the sole executrix of this my last Will with full power and authority to grant, bargain and sell, all of my estate, both real and personal, at either public or private sale, upon such terms as she shall deem for the best interest of my estate. I hope that she will be generous to my family because she has none of her own. 30

In witness whereof, I have hereunto set my hand and seal this twenty-seventh day of June, nineteen hundred and fourteen.

JAMES PRITCHARD (L. S.)

10 Signed, sealed, published and declared, by James Pritchard, the above named testator, as and for his last Will and Testament in the presence of us, who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses.

Henry William Ruther, 1435 Boscobel Ave.,  
Bronx, New York.

George W. VanGelder.

20

30

40

On Caveat to Probate Will of James Pritchard,  
Dec'd.

MONMOUTH COUNTY ORPHANS' COURT.

AUGUSTA R. PRITCHARD,  
Opponent,

10

vs.

EMMA HOWELL, JAMES PRITCH-  
ARD, JR., DANIEL PRITCHARD,  
*et als.*,  
Caveators.

THOMAS P. FAY,  
Attorney for Caveators, 20  
196 Broadway,  
Long Branch, N. J.

Filed March 30, 1916,  
R. V. L.,  
P. J.

Filed March 30, 1916,  
JOSEPH L. DONAHAY,  
Surrogate.

30

40

## On Caveat to Probate, &amp;c.

## MONMOUTH COUNTY ORPHANS' COURT.

---

In the Matter

of

10

The Probate of the last Will and  
Testament of JAMES PRITCH-  
ARD, deceased.

---

To Thomas P. Fay, Esq.,  
Long Branch, N. J.

Dear Sir:

20

You are hereby notified that upon Thursday, the thirteenth day of April, 1916, application will be made to His Honor, Rulif V. Lawrence, for reconsideration and revocation of an order made by him as judge of the Orphans' Court of Monmouth County in the above entitled matter certifying the questions involved therein into the Circuit Court of this County for trial before a jury, on the ground that the petition on file and upon which the order in question was granted does not set forth any reason

30

or ground showing the necessity of a trial before a jury; also because said order was made without notice to the Proponents of the last Will and Testament of said James Pritchard, deceased, and granted *ex parte*; and also because the case in question is not within the meaning of the statute per-

40

mitting the certifying of probate of Will to Circuit Court for trial before a jury.

Dated April 4th, 1916.

Very truly yours,

GEO. W. VANGELDER,  
Proctor for Augusta R. Pritchard,  
Proponent.

10

State of New Jersey, }  
County of Monmouth, } ss.:

William Fisher, of full age, being duly sworn on his oath according to law, says that on the fifth day of April, nineteen hundred and sixteen, he served a true copy of the within notice upon Thomas P. Fay, personally, by handing the same to him, he endorsing service thereon on the within notice at the same time.

20

WILLIAM FISHER.

Sworn and subscribed to before me, }  
this fifth day of April, 1916. }

SARAH J. VANGELDER,  
Commissioner of Deeds  
of New Jersey.

30

40

On Caveat to Probate, Etc.—Notice.

MONMOUTH COUNTY ORPHANS' COURT.

10

In the Matter  
of  
The Probate of the Last Will  
and Testament of JAMES PRIT-  
CHARD, deceased.

GEORGE W. VANGELDER,  
Proctor for Proponent.

20

Filed Apr. 13, 1916.  
JOSEPH L. DONAHAY,  
Surrogate.

Due and legal service of the within Notice  
acknowledged this 5th day of April, 1916.

THOMAS P. FAY,  
Proctor for Caveators.

30

40

On Motion to Revoke Certificate Transferring  
Proceedings to Circuit Court for Trial by Jury.

MONMOUTH COUNTY ORPHANS' COURT.

<p style="text-align: center;">In the Matter of The Probate Proceedings of a pa- per purporting to be the Last Will and Testament of JAMES PRITCHARD, deceased.</p>	}	10
---	---	----

A motion is made to revoke a certificate granted by this Court on March 30th, 1916, transferring the probate proceedings in the above matter to the Circuit Court for trial by jury. 20

The motion was argued on April 13th, 1916. It appears that the certificate although signed on the date granted was not actually filed with the Clerk of the Circuit Court until the day of the hearing of the motion to revoke. The notice of the motion was given, as appears by due acknowledgment of service, on April 5th, 1916. The Circuit Court did not, therefore, have jurisdiction, by virtue of the certificate, of the matter when the notice of the motion to revoke was given. The power of this Court to revoke the certificate if found to have been in- 30  
providently granted would seem to be unquestioned.

C. S. 3818, Secs. 18, 19.

In *Vincent vs. Vincent*, 70 N. J. E., 274 (second paragraph), it is held that the probate of a will is within the jurisdiction of this Court and that courts invested with such jurisdiction have generally power to "check and revise proceedings for probate tainted with mistake, fraud, or illegality \* \* \*" &c. 40

Section 18 of the Orphans' Court Act permitting certification to the Circuit Court is in no sense mandatory, but resort to it rests in the sound discretion of this Court.

Brothers vs. Pickel, 31 N. J. E., 647.

10 The application for the Certificate of Transfer was made *ex parte* on a petition containing merely *pro forma* declarations and an examination fails to disclose any question of doubt or difficulty respecting facts in controversy which would justify a resort to the Section of the Orphans' Court Act sought to be invoked thereby. The supporting affidavit, likewise, is merely a formal verification and contains no special matter which would appeal to the exercise of the Court's discretion.

20 No notice was given to the proponents of the paper writing in question of the hearing on the application, and consequently, no opportunity was given them to present answering affidavits in opposition to the motion.

The Certificate granted, however, sets forth that all the parties in interest have been before the Court and that due consideration was given the matter on its merits appears on the face of the certificate. Such a certificate, however, was not warranted by the petition, affidavit, and *ex parte* application.

30 The application being one which peculiarly appeals to the Court's discretion, notice should have been given to all parties in interest, to the end that affidavits and answering affidavits might have been presented and the motion considered on its merits.

In view of the absence of such notice and an opportunity given the proponents to be heard on the application, as well as the fact that the certificate is irregular in that it is based on an insufficient petition and affidavit, an order may be entered revoking such certificate.

40

RULIF V. LAWRENCE,  
P. J.

Conclusion—On Motion to Revoke Certificate  
Transferring Proceedings to Circuit Court for  
Trial by Jury.

MONMOUTH COUNTY ORPHANS' COURT.

<p style="text-align: center;">In the Matter</p> <p style="text-align: center;">of</p> <p>The Probate Proceedings of a paper writing purporting to be the last Will and Testa- ment of JAMES PRITCHARD, de- ceased.</p>	}	10
---	---	----

R. V. LAWRENCE, 20  
P. J.

Filed Apr. 19, 1916.

JOSEPH L. DONAHAY,  
Surrogate.

30

40

## On Caveat, &amp;c.—Order.

## MONMOUTH COUNTY ORPHANS' COURT.

10

---

AUGUSTA R. PRITCHARD,  
Proponent,

vs.

JAMES PRITCHARD, JR., *et als.*,  
Caveators.

---

20

Application having been made to the Court on the part of the proponents for an order revoking an order of this Court made on the thirtieth day of March, 1916, in the above matter, certifying into the Circuit Court of Monmouth County for trial before a jury certain questions pursuant to the 18th Section of the Orphans' Court Act of this State (Revision of 1898), on the ground that said application had been made without notice to proponent, and on the further ground that the case was not one wherein the discretion of the Court as provided in said statute should be exercised by certifying the questions involved into the Circuit Court for jury trial.

30

And due notice of this application having been given Thomas P. Fay, Proctor of the Caveators, and the matter having been heard and argued before the Court by George W. VanGelder, Proctor of Proponent and by the said proctor of the caveators, and it appearing to the Court that the said order or certificate should be revoked because of insufficiency of the petition and affidavit upon which said certificate was originally made, in that the said petition and affidavit contained no special matter which would appeal to the exercise of the Court's discretion, and further because no notice

40

was given the said proponent of the hearing of the application for said certificate, and consequently, no opportunity was presented for appearing in opposition to said application.

It is thereupon, on this twentieth day of April, 1916, Ordered, that the order or certificate entered in the above entitled cause on the thirtieth day of March, 1916, directing said questions set forth in said certificate to be certified into the Circuit Court of Monmouth County for trial before a jury, be and the same is hereby revoked. 10

RULIF V. LAWRENCE,  
P. J.

On Caveat, &c.—Order.

MONMOUTH COUNTY ORPHANS' COURT. 20

AUGUSTA R. PRITCHARD,  
Proponent,

vs.

JAMES PRITCHARD, JR., *et als.*,  
Caveators.

30

GEORGE W. VANGELDER,  
Proctor for Proponent,  
Long Branch, N. J.

Filed April 20th, 1916.

JOSEPH L. DONAHAY,  
Surrogate.

40

On Caveat to Probate Will of James Pritchard,  
Dec'd.—Notice of Appeal.

MONMOUTH COUNTY ORPHANS' COURT.

AUGUSTA R. PRITCHARD,  
Proponent,

vs.

EMMA HOWELL, JAMES PRITCH-  
ARD, JR., DANIEL PRITCHARD,  
MINNIE HANSON and WILLIAM  
PRITCHARD, *et als.*,  
Caveators.

10

20

Take notice, that the caveators and petitioner, Emma Howell, James Pritchard, Jr., Minnie Hanson and William Pritchard, *et als.*, hereby appeal from the order of Rulif V. Lawrence, Judge of the Orphans' Court of the County of Monmouth, vacating and setting aside the certificate and order for a trial by jury in the Circuit Court of the County of Monmouth, and State of New Jersey, in the matter of the probate of the will of James Pritchard, deceased.

The appeal is taken from the entire order and part thereof to the Prerogative Court of the State of New Jersey.

30

To GEORGE W. VANGELDER,  
Proctor for Proponent of said Will.

THOMAS P. FAY,  
Proctor and of Counsel with Cavea-  
tors and Petitioners, Emma How-  
ell, James Pritchard, Jr., Daniel  
Pritchard, Minnie Hanson and  
William Pritchard, *et als.*,

40

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

THOMAS P. FAY,  
Proctor and of Counsel with Cavea-  
tors, Emma Howell, *et als.*,

On Caveat to Probate of Will of James Pritchard,  
Dec'd.—Notice of Appeal.

MONMOUTH COUNTY ORPHANS' COURT.

<p style="text-align: center;">AUGUSTA R. PRITCHARD, Proponent,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">EMMA HOWELL, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson and William Pritchard, <i>et als.</i>, Caveators.</p>	}	10
--	---	----

THOMAS P. FAY,  
Proctor for Caveators, 20  
196 Broadway,  
Long Branch, N. J.

Filed Apr. 22, 1916.

JOSEPH L. DONAHAY,  
Surrogate.

Long Branch, N. J., April 24th, 1916. 30

Joseph L. Donahay, Esq.,  
Surrogate,  
Freehold, N. J.

Dear Sir:

Yours of the 22nd inst., enclosing copy of notice  
of appeal in Augusta R. Pritchard, Proponent vs.

Emma Howell, *et als.*, caveators, *in re* will of  
James Pritchard, deceased, received this day.

Yours truly,

GEO. W. VANGELDER.

State of New Jersey, }  
Monmouth County, } ss.:

10 I, Joseph L. Donahay, Surrogate of said County,  
do certify the foregoing to be a true copy of all  
the proceedings on file in the Surrogate's Office  
of Monmouth County, in the matter of the estate  
of James Pritchard, deceased, as the same remains  
of record in my office.

In witness whereof, I have hereunto set my  
hand and affixed my seal of office, the twenty-ninth  
day of May, in the year of our Lord, one thousand  
nine hundred and sixteen.

20

JOSEPH L. DONAHAY,  
Surrogate.

Revenue stamp, May 29, 1916.  
(Surrogate's seal of the County of Monmouth.)

30

40

On Caveat to Probate of Will of James Pritchard,  
Dec'd.—Certificate for Trial Before a Jury.

MONMOUTH COUNTY ORPHANS' COURT.

AUGUSTA R. PRITCHARD,  
Proponent.

vs.

EMMA HOWELL, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson and William Pritchard, *et als*,  
Caveators.

10

Emma Howell and others having filed a caveat against the probate of a paper, purporting to be the last Will and Testament of James Pritchard, deceased, which paper was presented to the Surrogate of the County of Monmouth for probate and said will having been offered for probate by Augusta R. Pritchard, and the Surrogate having cited all persons concerned as next of kin, heirs at law, or devisees to appear before this Court to show cause why said will should not be admitted to probate, and the matters in controversy and the said parties now being before the Court, and the said caveators having presented their petition praying that the questions involved in such controversy be certified into the Circuit Court for trial before a Jury.

20

30

It is, on this thirtieth day of March, nineteen hundred and sixteen, on motion of Thomas P. Fay, of counsel, with caveators, ordered, that the following questions involved in this case be and the same are hereby certified into the Circuit Court of said County of Monmouth for trial before a jury, pursuant to the statute in such case made and provided.

40

1. Whether the paper writing presented to the Surrogate of said County of Monmouth for probate,

as and for the last will of James Pritchard, deceased, was duly signed, witnessed, published and declared by the said James Pritchard as his last Will and Testament, according to the statute in such case made and provided.

10           2. Whether the said James Pritchard at the time of making and executing his alleged will aforesaid, was of sound and disposing mind and memory.

3. Whether the said alleged will of said James Pritchard, deceased, was the result of undue influence, imposition or fraud exercised upon the said James Pritchard, by any of the legatees or devisees in said will named, or by any other person or persons.

20           4. Whether certain marks or lines appearing upon said instrument were the act of said James Pritchard, and if so, whether they were intended by him as a cancellation of said will.

RULIF V. LAWRENCE,  
P. J.

State of New Jersey, }  
Monmouth County.    }ss.:

30           I, Joseph McDermott, Clerk of said County, do hereby certify that the foregoing copy of certificate for trial before a jury, is true and correct as the same remains on file in my office, as of April 13, 1916.

In witness whereof, I have hereunto set my hand and affixed the official seal of said County, this fifth day of May, A. D. 1916.

JOSEPH McDERMOTT,  
Clerk.

40           (Seal of the  
County of Monmouth.)  
I. R. Stamp,  
5/16,  
J. McD.

On Caveat to Probate Will of James Pritchard,  
Dec'd.—Certificate for Trial Before a Jury.

MONMOUTH COUNTY ORPHANS' COURT.

AUGUSTA R. PRITCHARD,  
Opponent,

vs.

EMMA HOWELL, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson, and William Pritchard, *et als.*,  
Caveators.

10

Emma Howell and others having filed a caveat against the probate of a paper, purporting to be the last Will and Testament of James Pritchard, deceased, which paper was presented to the Surrogate of the County of Monmouth for probate, and said Will having been offered for probate by Augusta R. Pritchard, and the Surrogate having cited all persons concerned as next of kin, heirs at law or devisees to appear before this Court to show cause why said will should not be admitted to probate, and the matters in controversy and the said parties now being before the Court, and the said caveators having presented their petition praying that the questions involved in such controversy be certified into the Circuit Court for trial before a jury.

20

30

It is, on this thirtieth day of March, nineteen hundred and sixteen, on motion of Thomas P. Fay, of counsel with caveators, Ordered, that the following questions involved in this case be and the same are hereby certified into the Circuit Court of said County of Monmouth for trial before a jury,

40

pursuant to the statute in such case made and provided.

1. Whether the paper writing presented to the Surrogate of said County of Monmouth for probate, as and for the last will of James Pritchard, deceased, was duly signed, witnessed, published and declared by the said James Pritchard as his last Will and Testament, according to the statute in such case made and provided.

10

2. Whether the said James Pritchard at the time of making and executing his alleged will aforesaid, was of sound and disposing mind and memory.

3. Whether the said alleged will of said James Pritchard, deceased, was the result of undue influence, imposition or fraud exercised upon the said James Pritchard, by any of the legatees, or devisees in said will named, or by any other person or persons.

20

4. Whether certain marks or lines appearing upon said instrument were the act of said James Pritchard, and if so, whether they were intended by him as a cancellation of said will.

RULIF V. LAWRENCE,  
P. J.

State of New Jersey, }  
Monmouth County, } ss. :

30

I Joseph L. Donahay, Surrogate of said County, do certify the foregoing to be a true copy of the certificate for trial before a jury, in the matter of the caveat to probate of Will of James Pritchard, deceased, as the same remains of record in my office.

In witness whereof, I have hereunto set my hand and affixed my seal of office, at Freehold, the thirtieth day of March, in the year of our Lord, one thousand nine hundred and sixteen.

40

(Seal of the Surrogate's Court of Monmouth Count)

JOSEPH L. DONAHAY,  
Surrogate.

On Appeal from Monmouth Orphans' Court—  
Opinion.

NEW JERSEY PREROGATIVE COURT.

---

AUGUSTA R. PRITCHARD,  
Proponent and Respondent,

vs.

EMMA HOWELL, *et als.*,  
Caveators and Appellants.

---

10

1735.

The Orphans' Court, being a Court of general jurisdiction, has power to revoke its certificate transferring questions involved on the probate of a will into the Circuit Court for trial, when the certificate was made without notice of the application therefor to the adversary party, because it is a principle of law that in every proceeding concerning the rights of individuals they are entitled to notice of any motion affecting those rights, even though notice be not directed by the statute under which the proceeding is had.

20

On appeal from an order of the Monmouth Orphans' Court revoking a certificate transferring the questions involved on the probate of a will into the Circuit Court for trial.

30

MR. THOMAS P. FAY, for Appellants.  
MESSRS. JOHN S. APPLIGATE & SON, for  
Respondent.

WALKER, Ordinary.

A paper writing purporting to be the last will and testament of James Pritchard, deceased, was offered for probate before the Surrogate of Monmouth County. A caveat was lodged against the

40

probate by the decedent's heirs-at-law and next of kin. The parties were duly cited and warned to appear before the Orphans' Court on the issue of will or no will. After the cause was transferred to the Orphans' Court, the caveators, or some of them, petitioned that Court to certify the questions involved in the controversy into the Circuit Court for trial before a jury pursuant to the statute. The certificate prayed for was granted.

Section 18 of the Orphans' Court act, *Comp. Stat.* 3818, provides that the Orphans' Court may, on application of the caveator, appellant or proponent, certify the questions involved in proceedings respecting the probate of a will into the Circuit Court for trial before a jury, and that upon filing such a certificate with the Clerk of the Circuit Court, that Court shall have jurisdiction to try the cause upon an issue to be framed. The certificate in question was made on March 30, 1916, but, not being filed with the Clerk of the Circuit Court, notice was given on April 8, 1916, of a motion before the Orphans' Court on April 13, then instant, to revoke the certificate. On the day the motion was argued the certificate was filed with the Clerk of the Circuit Court. The judge of the Orphans' Court held that the Circuit Court did not have jurisdiction by virtue of the certificate on the day the notice of the motion to revoke it was served. He further held that he had jurisdiction to make the revocation, which was ordered, citing *Brothers vs. Pickel*, 31 N. J. Eq., 647, and *Vincent vs. Vincent*, 70 N. J. Eq., 274. The reason which provoked the motion to revoke the certificate was that it was made without notice and that no opportunity was afforded the proponents to be heard.

In the case of *Brothers vs. Pickel*, Chancellor Runyon, sitting as ordinary, held that the section of the Orphans' Court act providing for the certification of questions involved in a controversy over the probate of a will, was discretionary and not mandatory. And in *Vincent vs. Vincent*, Vice

Chancellor Emery held that the Orphans' Court is a Superior Court of general jurisdiction and has the same authority over its decrees as may be exercised by any Court of general jurisdiction. These authorities, I think, sustain the asserted power of the Judge of the Orphans' Court in this case.

The Orphans' Court is a Court of general jurisdiction over the subjects within its cognizance and partakes of the powers of the Chancery and Prerogative jurisdictions. *In re Hathorne's Will*, 97 Atl. Rep., 262. In that case I held that the Orphans' Court had power to vacate its decrees in a probate case.

10

In *Mellor vs. Kaighn*, 99 Atl. Rep., 207 (Court of Errors and Appeals), the difference between the Orphans' Courts as Courts of general jurisdiction and the Surrogate's Courts as Courts of special jurisdiction, was pointed out. And it was held that a Surrogate's jurisdiction is purely statutory, and that where he exercises jurisdiction his power is exhausted and he cannot open or vacate his decree for any cause.

20

The decisions, and they are quite numerous, support the power of the Orphans' Court as a Court of general jurisdiction, to deal with its orders and decrees in the same way and with like authority as other Courts of general jurisdiction.

The caveators, as stated, filed an appeal from the order of the Orphans' Court vacating the certification of the issue into the Circuit Court, and make the point that no notice was required to be given of the application for certifying, because the statute does not in terms require it. True, the statute does not require it, but the proponent has rights in the subject matter of the controversy, including the right to be heard as to the *forum* in which those rights should be tried. And where a statute clothes Courts with jurisdiction without prescribing the method of procedure, that procedure should be adopted which is usual in like cases. *In re Foran*, 85 N. J. Eq., 288; *In re Martin*, 98 Atl. Rep., 510, 513.

30

40

That the proponent had a right to notice and opportunity to be heard upon the question of certification into the Circuit Court, I think is free from doubt.

Chief Justice HORNBLOWER, in *N. J. Turnpike Co. vs. Hall*, 17 N. J. L., 337, at p. 339, said:

10 "Independent of the express provision in this statute, requiring a notice to be served on the *nearest* gatekeeper, no principle or rule of action is better settled at the common law, than that whenever a court or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected is to have reasonable notice of the time and place, when and where such act is to be done, to the end that he may be heard in defense, or for the protection of those rights."

20

In *Chosen Freeholders of Hudson Co. vs. The State*, 24 N. J. L., 718, Mr. Justice ELMER, at p. 719, said:

30 "It is a dictate of natural justice, that when an act is to be done by a court, or other authority, which is specially to affect a particular individual, reasonable notice should be given to him, so that he may appear and be heard, if he thinks proper."

In *Van Tilburgh vs Shann, Ib.*, 740, it was held that in every proceeding affecting property of individuals, the owners are entitled to notice of the proceeding although not directed by statute. The property of individuals cannot be affected without affecting their rights.

40 The order of the Orphans' Court revoking the certificate for trial in the Circuit Court will be affirmed.

Endorsed:

"Filed Jan. 18, 1917,  
THOMAS F. MARTIN,  
- Register."

## Order.

## NEW JERSEY PREROGATIVE COURT.

---

AUGUSTA R. PRITCHARD,  
Proponent and Respondent,

vs.

EMMA HOWELL, *et als.*,  
Caveators and Appellants.

---

10

It is on this 26th day of February, nineteen hundred and seventeen, ordered, that the defendants have five days from the date of this order upon which to serve the notice of appeal, in the above entitled cause upon the respondents; upon terms, that is, that they bring the cause on for hearing, orally or on briefs, at the approaching March Term, 1917, of the Court of Errors and Appeals, if the respondents shall so elect.

20

E. R. WALKER,  
Ordinary.

ENDORSED—Filed Feb. 27, 1917, Thomas F. Martin,  
Register.”

30

A true copy.

THOMAS F. MARTIN,  
Register.

40

On Appeal to the Prerogative Court—Rule on  
Affirmance.

NEW JERSEY PREROGATIVE COURT.

Between

10

AUGUSTA R. PRITCHARD,  
Proponent and Respondent,

and

EMMA HOWELL, *et als.*,  
Caveators and Appellants.

20 This cause having been duly argued before the Prerogative Court by Thomas P. Fay, Esq., Proctor for the Appellants and George W. Van Gelder, Proctor, and John S. Applegate, Jr., of Counsel for the Respondent, and the Court having considered the same, and finding no cause for reversal in the record or proceedings in the Monmouth County Orphans' Court:

30 It is thereupon ordered and adjudged that the order of the said Orphans' Court be affirmed with costs, and that the record and transcript be remitted to the Monmouth County Orphans' Court to be proceeded with in accordance with this judgment and the practice of said Court.

E. R. WALKER,  
Ordinary.

On motion of

GEO. W. VANGELDER,  
Proctor.

40 Dated February 9th, 1917.

Endorsed—"Filed Feb. 9, 1917, Thomas F. Martin,  
Register."

## NEW JERSEY PREROGATIVE COURT.

I, Thomas F. Martin, Register of the Prerogative Court of the State of New Jersey, do hereby certify that the foregoing is a true copy of Rule of Affirmance between Augusta R. Pritchard, Proponent and Respondent, and Emma Howell, *et als.*, Caveators and Appellants, as the same is taken from and compared with the original filed Feb. 9, 1917, and now remaining on file and of record in my office. 10

Witness my hand and the Seal of the Prerogative Court, at Trenton, this ninth day of February, A. D. 1917.

(Seal) THOMAS F. MARTIN,  
Register.

---

 Petition. 20

To the Court of Errors and Appeals in the last resort in all Causes:

The petition of Emma Howell, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson and William Pritchard shows that your petitioners find themselves aggrieved by a decree made by the ordinary in the Prerogative Court, dated the ninth day of February, nineteen hundred and seventeen, in the matter of the estate of James Pritchard, deceased, in that the said decree adjudges that, 30

“It is ordered and adjudged that the order of the Orphans’ Court be affirmed with costs and the record and transcript be remitted to the Monmouth County Orphans’ Court there to be proceeded with in accordance with this judgment and the practice of this Court.”

And these petitioners appeal from said decree upon the ground that the same is erroneous and 40



## Notice of Appeal.

## NEW JERSEY PREROGATIVE COURT.

---

In the Matter  
of  
The Estate of JAMES PRITCHARD,  
Deceased.

---

10

Emma Howell, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson and William Pritchard, appellants, hereby appeal to the Court of Errors and Appeals of the State of New Jersey in the last resort in all causes from a decree entered herein on the ninth day of February, nineteen hundred and seventeen, and from each and every part thereof.

20

Dated, February 9th, 1917.

THOMAS P. FAY,  
Of Proctor and Counsel for Appellants.

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

THOMAS P. FAY,  
Of Counsel.

30

Endorsed.

New Jersey Prerogative Court. In the Matter of the Estate of James Pritchard, deceased. Notice of Appeal. Thomas P. Fay, Of Proctor and Counsel for Appellants, 196 Broadway, Long Branch, N. J. Service of a Copy of the within notice acknowledged this 27th day of February, 1917. Geo. W. Van Gelder, Proctor of Proponent & Respondent. Filed Feb. 9th, 1917, Thomas F. Martin, Clerk.

40

## Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10

---

AUGUSTA R. PRITCHARD,  
Proponent and Respondent,

vs.

EMMA HOWELL, *et als.*,  
Caveators and Appellants.

---

The answer of the above named respondent to the petition of appeal of the above named appellant :

20

1. This respondent denies the sufficiency both as to form and substance of the petition of appeal, on the ground that it does not sufficiently set forth the grounds of said appeal as required by the rules of this Court.

30

2. Respondent further answering, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, nevertheless says and admits that a decree was on the 9th day of February, 1917, made by the Ordinary and entered in the Prerogative Court for the purpose mentioned in said petition as is therein stated; but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to law and not erroneous, and prays that the same

40

may be affirmed with costs to be adjudged to this respondent.

GEO. W. VANGELDER,  
Proctor of Proponent-Respondent.

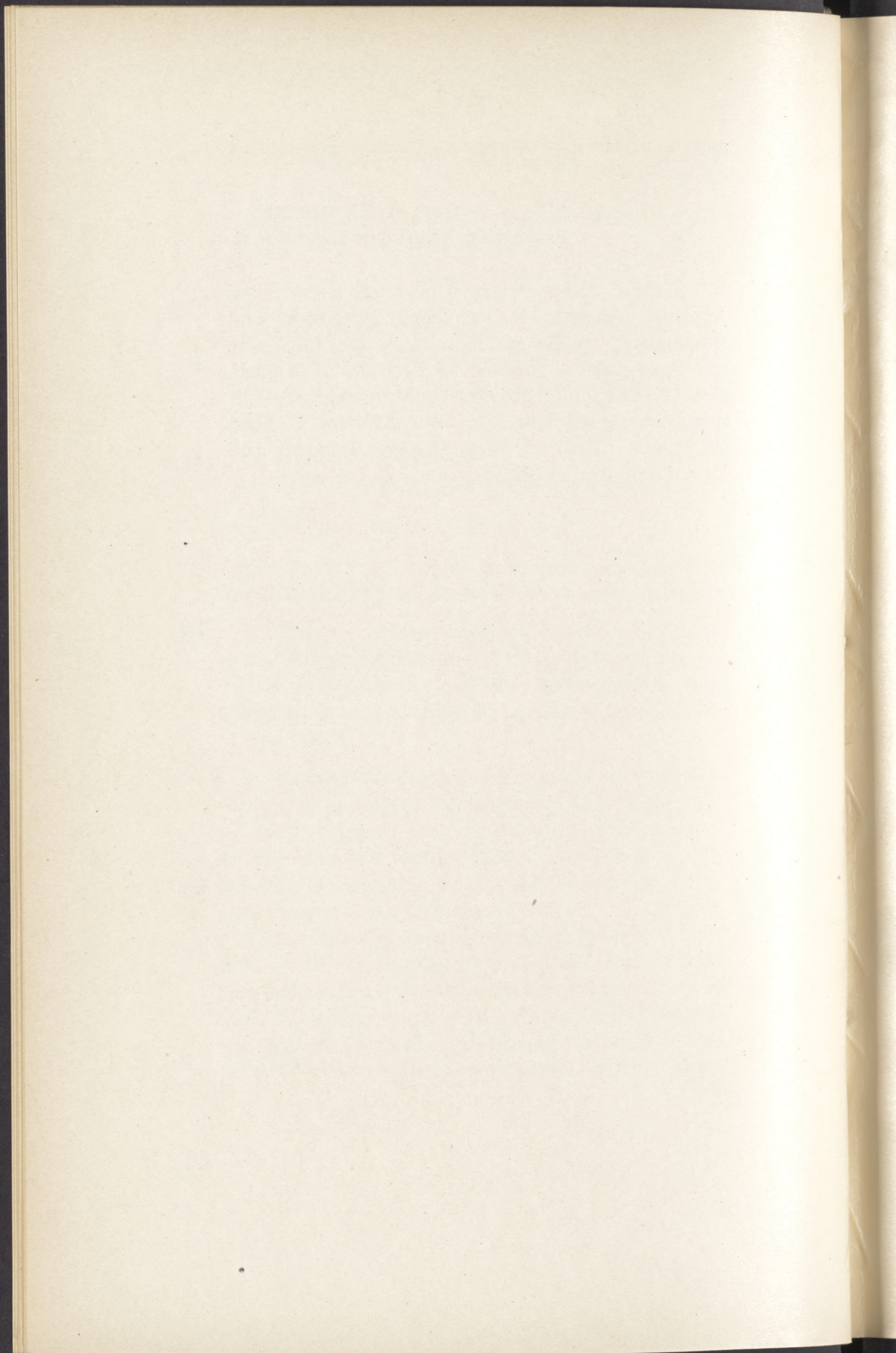
Endorsed.—New Jersey Court of Errors and Appeals. Augusta R. Pritchard, Proponent and Respondent, vs. Emma Howell, *et al.*, Caveators and Appellants. Answer to Petition of Appeal. Geo. W. VanGelder, Proctor for Proponent and Respondent. Filed March 2, 1917, Thomas F. Martin, Clerk. Geo. W. Van Gelder, Counsellor-at-Law, Long Branch, N. J.

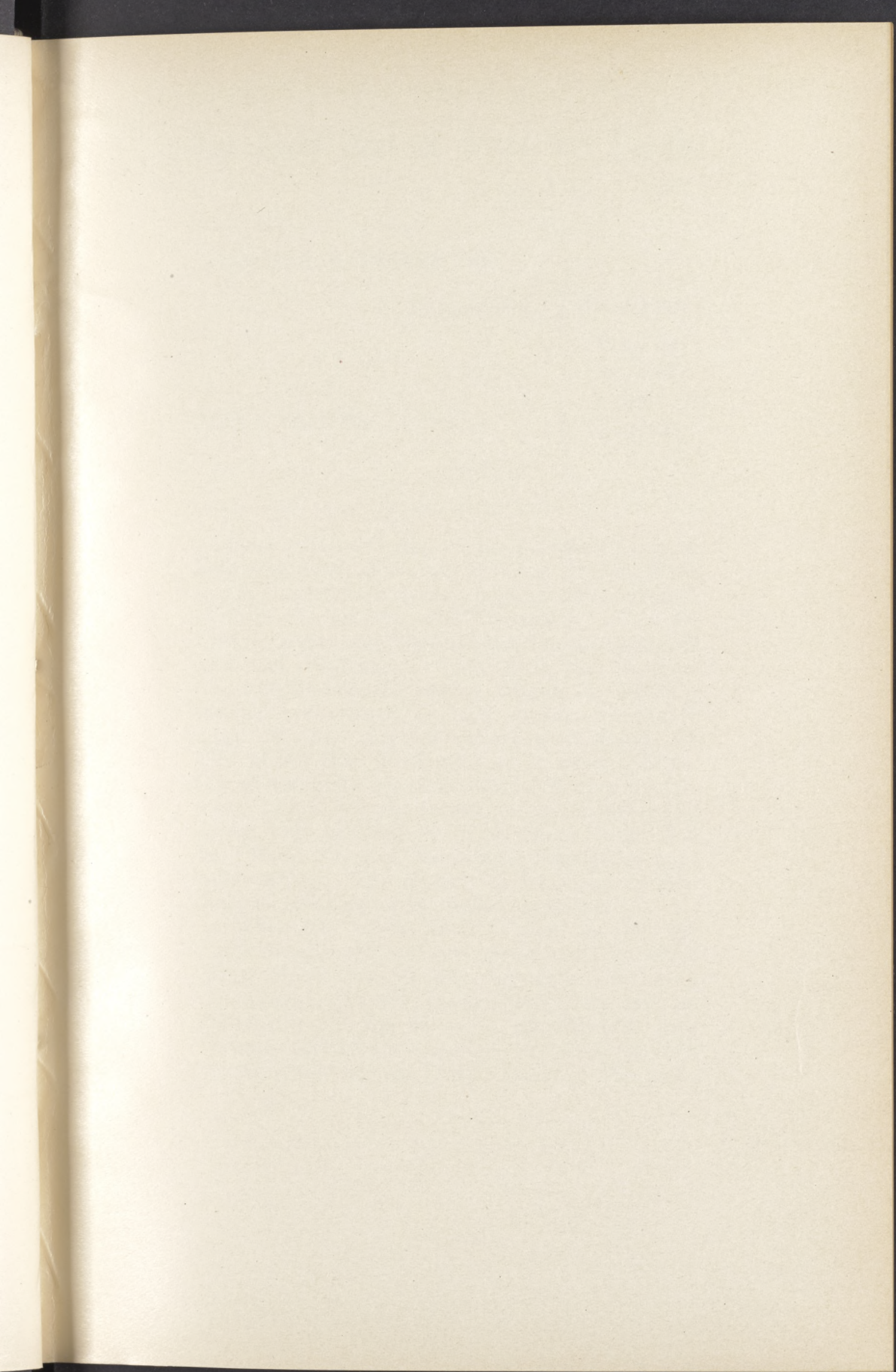
10

20

30

40







## New Jersey Court of Errors and Appeals.

---

AUGUSTA R. PRITCHARD,

Respondent.

vs.

EMMA HOWELL, et als.,

Appellant.

---

**On Appeal.**

**Brief on  
part of  
Re-  
spondent.**

James Pritchard died on the nineteenth day of February, 1916, in the city of Long Branch, Monmouth County, New Jersey, leaving what purported to be his last Will and Testament. Feb. 29, 1916, a caveat was filed against the probating of said last Will and Testament in the Orphans Court of Monmouth County. March 13, 1916, Citations were issued on said caveat, returnable April 20, 1916, but not served until March 17, 1916. March 30th, 1916, upon an ex parte application of caveators under the 18th section of the Orphans Court Act, the issues presented under the caveat were certified by the Orphans Court into the Circuit Court of Monmouth County for trial before a jury. The application for such certification was made under the following statute:

“When any caveat shall be filed against the  
“probate of a will, or any appeal shall be taken  
“from proceedings of any surrogate respecting  
“the probate of a will, the Orphans Court may, on  
“application of the caveator, appellant or pro-  
“ponent, certify the questions involved in such  
“controversy into the Circuit Court of the same

“county for trial before a jury; and upon filing of  
 “such certificate with the clerk of the Circuit  
 “Court the said Court shall have jurisdiction to  
 “try the said cause upon an issue to be framed  
 “by the judge holding said court.

“The notice of trial and proceedings for sum-  
 “moning and impanelling a jury and for the trial  
 “of the cause shall be the same as in causes con-  
 “menced in the Circuit Court; the same costs  
 “shall be taxable as in other causes in said court.  
 “The verdict of the jury shall be subject to be set  
 “aside and a new trial granted in the Supreme  
 “Court as in other cases in said court, and the  
 “judge may on application for a new trial certify  
 “the same to the Supreme Court for its advisory  
 “opinion.”

Comp. Stat. Vol. 3, p. 3818, §18.

The certificate so granted was first filed by cav-  
 eators in the Surrogate's office of Monmouth  
 County March 30th, 1916, but subsequently, to  
 wit, on the morning of April 13th, 1916, the said  
 certificate was taken from the Surrogate's files  
 and filed with the Clerk of the Circuit Court of  
 said county.

The statute providing for the granting and fil-  
 ing of such a certificate directs that “Upon filing  
 “of such certificate with the Clerk of the Circuit  
 “Court, the said court shall have jurisdiction to  
 “try the said cause upon an issue to be framed by  
 “the judge holding said court.”

April 5th, 1916, respondent gave notice to cav-  
 eators, returnable April 13th, 1916, that upon the  
 return day application would be made to the  
 judge of the Orphans Court of Monmouth County  
 for an order revoking the certificate theretofore  
 given certifying the case into the Circuit Court  
 for jury trial, on the ground that the petition up-  
 on which the certificate had been issued set forth  
 no sufficient reasons for the necessity of trial by  
 jury, that the application and order were made

without notice to the proponent and that the issues raised under the caveat filed did not warrant the Orphans Court sending the issues to the Circuit Court for trial.

At the time the notice of April 5th was served upon the caveators the certificate was still on file in the Surrogate's office. On April 13th, 1916, the return day of the notice, the motion to revoke the certificate was argued before his Honor Rulif V. Lawrence, Judge of the Monmouth County Orphans Court, and all parties interested were represented before him by Counsel. On that morning, just before the argument, the certificate was removed from the Surrogate's office and filed in the office of the Monmouth County Circuit Court.

April 17th, 1916, an order was entered in the Monmouth Orphans Court revoking the certificate, and the Court filed its written opinion giving its reasons for said revocation. See printed case page 17.

The caveators appealed from the order of revocation to the Prerogative Court, their contention being that the Orphans Court, having certified the questions involved into the Circuit Court for Jury trial, had lost jurisdiction and was without power to revoke its certificate. The Prerogative Court affirmed the order of the Orphans Court. See opinion of Ordinary Walker. (Case page 29.)

#### I.

### **THE ORPHANS COURT HAS POWER TO REVOKE OR MODIFY ITS OWN JUDGMENTS OR ORDERS.**

“It is a general rule of law that all judgments and orders of courts, however conclusive in their character, are under the control of the court which pronounces them during the term in which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court. *Ronson v. Schulten*, 104 U. S. 410.”

Fraley v. Feather, 17 Vr. 429, 430.

Such a power is incident to all courts of general jurisdiction and is essential to prevent failure of justice. To say that a court has general jurisdiction, but deny it the right to correct its own orders or judgments given through error, fraud or mistake, is a contradiction of terms. It is true that the jurisdiction of the Orphans Court is statutory, but although confined by statute within certain limitations, within that limitation its jurisdiction is general and not special.

“It is settled under our decisions that the Orphans Court is a superior court of general jurisdiction in probate and other special cases, not an inferior court of limited or special jurisdiction.”

Vincent v. Vincent, 70 N. J. Eq. 272, 275.

See also Clark v. Costello, 30 Vr. 234, 237.  
(Court of Errors and Appeals.)

Diehl v. Page, 3 N. J. Eq. 143.

Plume v. Howard Savings Bank, 46 N. J. L. 211.

Hohokus v. Erie R. Co. 65 N. J. L. 353.

In re Hathorns Will, 97 Atl. Rep. 262.

Because a court's jurisdiction is limited by statute that fact does not make it any the less general. There is a vast difference between the word “limited” and the word “special.” The Supreme Circuit and Common Pleas Courts are courts of limited jurisdiction, limited by statute, yet each exercises a general jurisdiction within the scope of its authority.

“But the Orphans Court is not organized for a single purpose. It has a general jurisdiction as broad as the Common Pleas or Circuit Court, or perhaps the Supreme Court itself, exclusive of its appellate and superintending authority. Like them it has a permanent location, a public seal, established terms, records not ambulatory, but

"fixed in the custody of a distinct officer; it has  
 "organized process, executive officers, and its  
 "functions do not expire with the fulfilment of  
 "any particular duty. The statute of the 16th of  
 "December, 1784, Pat. Rev. Laws, 59, though  
 "made as far back as the Revolution, did not cre-  
 "ate a court before unknown; it did no more than  
 "give a new dress to powers coeval with the pro-  
 "vince, and which the Ordinary and his Surro-  
 "gates had always exercised in the Prerogative  
 "Court; professing in its title only to ascertain,  
 "to regulate and to establish. It confers no attri-  
 "bute of a special court for one purpose only; but  
 "a jurisdiction for the general administration of  
 "justice within certain great departments. The  
 "presumptions in favor of limited and general  
 "jurisdiction are the same. In *Turner vs. the*  
 "*Bank of North America*, 4 Dal. Rep. 8, the Su-  
 "preme Court of the United States acknowledge  
 "a Circuit Court to have only a limited jurisdic-  
 "tion extending to citizens only of different  
 "states. It distinguishes jurisdictions into such  
 "as are general, such as are limited, and such as  
 "are special or inferior, and decides that the Cir-  
 "cuit Court though limited is 'entitled to as lib-  
 "eral intendments or presumptions in favor of its  
 "regularity, as any Supreme Court.' Therefore  
 "if the Orphans Court exercises a limited juris-  
 "diction, still it is not a special one, and is en-  
 "titled to the same liberal presumptions as any  
 "Supreme Court; that what is done, is rightly  
 "done until revised. \* \* \* It is no special  
 "jurisdiction for a particular purpose, but a per-  
 "manent court for the administration of justice;  
 "that its powers are inexhaustible by action;  
 "that its jurisdiction operates over vast depart-  
 "ments of matter."

Obert v. Hammel, 18 N. J. L. p. 73 and 80.  
 To the same effect see Hesse v. Cole, 23  
 N. J. L. 116-121.

In *Mellor vs. Kaighn*, 99 Atl. Rep. 207 (Court of Errors and Appeals), the difference between the Orphans' Courts as Courts of general jurisdiction and the Surrogate's Courts as Courts of special jurisdiction, was pointed out. And it was held that a Surrogate's jurisdiction is purely statutory, and that where he exercises jurisdiction his power is exhausted and he cannot open or vacate his decree for any cause.

Being a court of general jurisdiction there seems to be no reason why the Orphans Court should not have that power inherent in courts of like character of controlling its own orders and judgments whenever in the judicial administration of justice it becomes necessary to invoke it.

The following cases present particular instances when the courts have recognized the power of the Orphans Court to review its own orders.

See the case of *Vincent v. Vincent*, 70 N. J. Eq. 272. In that case the Court of Chancery refused to entertain jurisdiction to set aside a will or the probate thereof, basing its refusal on the ground that the Orphans Court has the power generally to revise proceedings for probate tainted with mistake, fraud or illegality.

"Where a decree is entered in this court against a defendant on an unnoticed appearance of a solicitor, the decree will be set aside as against the defendant on motion."

*Mutual Life Ins. Co. vs. Perrine*, 43 N. J. Eq. 52.

In the case *In re Myers Estate*, 67 N. J. Eq. 560, the right of the Orphans Court and of the Ordinary on appeal to pass upon the question of vacating the probate because of fraud in the proceedings, was acted on without question.

"If the probate of a will is irregular or avoidable for any cause the remedy is by appeal to the Ordinary, or by proceedings for the revocation of the letters."

Ryno v. Ryno, 27 N. J. Eq. 522, 525. (Court of Errors and Appeals.)

In Clements Appeal, 25 N. J. Eq. 508, an order of the Orphans Court revoking letters of guardianship obtained through false representations was sustained on appeal, and the power of the court to guard against frauds perpetrated on the court itself was held to be sustained by the authorities.

All of the above cited cases are referred to and commented on in the case of Vincent v. Vincent, *supra*.

The case of *In re Hathorn's Will*, 97 Atl. Rep. p. 262, decided April 10th, 1916, expressly holds that a decree of the Orphans Court may be vacated by that court.

## II.

### THE COURT WAS NOT DIVESTED OF ITS JURISDICTION BY THE FILING OF CERTIFICATE.

But the appellant contends that the Orphans Court lost its jurisdiction by reason of the filing of the certificate with the Clerk of the Circuit Court, as required by the statute. (See 18, Orphans Court Act, see page 1 of this brief.)

The Orphans Court had jurisdiction of the case at the time the notice of application to revoke the certificate was given, because the certificate had not then been filed in the Circuit Court. It was filed with the Surrogate on the thirtieth of March, the same day that it was issued, and remained on file in the Surrogate's office until April 13th, 1916. After the notice of application to revoke had been given, neither party could alter or change the rights of the other. The caveators by removing the certificate from the Surrogate's files after the notice of application to revoke had been given them, and filing the certificate with

the Clerk of the Circuit Court, could not change the rights of the proponent as they existed at the time the notice was served. So that assuming that the Orphans Court under the wording of the statute, could be deprived of its jurisdiction by the filing of the certificate in the Clerk's office, said court had jurisdiction at the time the notice was served, as the certificate had not then been filed in the Circuit Court, and after the notice was served, the court having jurisdiction at the time of service thereof, it could not subsequently be deprived thereof by any act of the parties.

But even if the certificate had been duly filed with the Clerk of the Monmouth Circuit Court as required by section 18 of the Orphans Court act, and before the notice of application to revoke it had been given, still the Orphans Court had jurisdiction and power to revoke said certificate. The statute provides—"And upon filing of such certificate with the Clerk of the Circuit Court, the said court shall have jurisdiction to try the said cause upon an issue to be framed by the judge holding said court." The Circuit Court is given jurisdiction to try the cause upon an issue. Its jurisdiction is special. The Orphans Court is not thereby deprived of its general jurisdiction over the cause. The Circuit Court for the trial of the issue before a jury is given a special jurisdiction only, and for a single purpose. The Orphans Court still retains its original jurisdiction. If appellants' contention be sound, then a reference to a Master in Chancery proceedings is irrevocable, or a reference in the Supreme Court in matters of account, or of matters of law to the Supreme Court by the Court of Chancery. That a Court of Chancery after referring an issue to a jury may revoke the order before trial.

"After referring an issue to a jury the court may revoke the order before trial, or it may proceed to a decree without trying the issue or setting aside the order, for the general rule is that an issue may be withdrawn by the court direct-

“ing it at any time and be decided by the court itself. Even after empaneling the jury the court, “if it be the same which directed the issue, may “discharge them and itself find on the evidence.”

16 Cyc. 419.

The language of the statute directing the filing of the certificate with the Circuit Court Clerk and vesting the Circuit Court with jurisdiction to try the issues raised, did not deprive the Orphans Court of its jurisdiction over the suit. That court still had general jurisdiction over the case, particularly in view of the fact that the certificate had not been filed with the Clerk of the Circuit Court. So that if said court had the power to reconsider its order directing the issuing of the certificate and to revoke the same, the statute presents no obstacle to the exercise of that power.

### III.

#### THE ORPHANS COURT WAS JUSTIFIED IN REVIEWING AND REVOKING THE ORDER.

If the Orphans Court had the power to review and vacate its own order, this Court will not consider its reasons for so doing or determine whether its action was justifiable.

But the point having been made in appellant's brief of the absence of any irregularity in the application for the order, and consequently a lack of justification on the part of the Orphans Court in reviewing its order, we are out of an abundance of caution impelled to present the following circumstances indicative of irregularity in the application for and the granting of the order of certification, which, upon being brought to the attention of the Court fully justified it in exercising its power of review and revocation.

(1) The certificate was granted *ex parte*. But it sets forth that the matters in controversy and the parties in interest were before the court; in

short that the application had been considered on its merits. Both allegations were untrue in point of fact. The respondent had no notice of the application and was not represented. The matters in controversy could not very well have been considered without all parties interested having been heard.

(2) The petition sets forth no special ground or reason for the granting of a certificate for trial in the Circuit Court. Nothing to call for the exercise of the court's discretion. Now it is well recognized that it is the duty of the Orphans Court to retain jurisdiction of the case unless there is some special reason shown for sending it to the Circuit.

“It is clear to my mind that the legislature did not intend to provide that all cases in which a caveat is filed should on application be certified to the Circuit Court, but only in exceptional cases—cases in which it appears that some doubtful, intricate and perplexing question of fact will be presented, such as would induce the Chancellor to send an issue to a law court to be determined by a jury.”

Re Stevenson's Will case, 6 N. J. L. J. 142.

In the Court of Chancery it is the rule that nothing but imperious necessity will induce the court to direct an issue.

Trenton Banking Co. vs. Woodruff, 2 N. J. Eq. 117.

Bassett v. Johnson, 3 N. J. Eq. 576, 589.

“To justify a court in awarding a jury trial there must be a material fact or facts in dispute. This must appear not only by allegation, but also by evidence on which the court could sustain a verdict for the demandant.”

16 Cyc. 418.

“Where a motion for jury trial was predicated upon the naked assertion of the facts in defendant’s answer, not under oath, it was held that there was no chancery practice which would require a court to submit a question of fact to the jury upon the bare assertion of counsel that the fact existed unsupported by any evidence whatever.”

16 Cyc. 418.

Sea Ins. Co. vs. Day, 9 Paige (N. Y.) 369.

The petition asking that the questions involved under the caveat be certified into the Circuit Court states no grounds upon which the application is based, but merely recited the death of the testator, the fact that he left a paper purporting to be a last Will, that it was offered for probate, and that a caveat had been filed protesting against its probate. No reason either general or special is alleged indicating any necessity for the certification of the caveat into the Circuit Court, nor upon which the Orphans Court might rely in determining whether or not it should exercise its discretion. In that respect the petition was irregular.

It may be that no written application is required, but such would seem to be the better practice; at any rate the petitioners having made application by petition are bound by its contents.

(3) No notice was given to proponent of caveators’ intention to apply for the certificate in question. Without doubt proponent was entitled to notice as a matter of right. Upon notice it is fair to presume that the prononents would have been represented at the hearing upon said application, and both sides having been fully heard, the court would have had before it all the facts and been in a position to fairly exercise its discretion by either granting the certificate or withholding it. Instead of which the court had before it no more than the allegations contained in the petition.

The fact that no notice was given the respondent of the intended application for a certificate, was alone adequate reason for the Orphans Court action in reconsidering the application and the revocation of the certificate granted.

The application for the certificate under the statute was a step in the suit pending in the Orphans Court commenced by the filing of the caveat. If granted, the trial of the issues of fact presented would be transferred from the forum in which the proceedings were then pending to another court, namely, the Circuit. It would seem, therefore, that the proponent of the will, the present respondent, was entitled to notice of the application which contemplated transferring the cause, from a tribunal into which she had been brought by the act of the caveators, into another court. The respondent was entitled to be heard, before the court undertook to decide whether its discretion should or should not be exercised. The respondent was entitled to assume that the suit instituted in the Orphans Court would be continued in that court, at least until she had been notified that good grounds existed why the suit should be transferred. This was a right that respondent could not fairly be deprived of until the court had been persuaded by sufficient facts or proof that the issues were of such extraordinary character, or because of the perplexing facts and contradictions involved, as to require the exercise of its discretion affirmatively; and until the court was apprised of the facts upon which the application was based, it could not fairly be said to be in a position to determine whether its discretion should be exercised in favor of the application, and all facts necessarily could not be before the court until both sides had been heard.

The respondent had property rights at stake. Under the will she was a beneficiary and therefore had sufficient interest in the question of the court or forum before whom her rights were to be determined to entitle her to notice of an applica-

tion which contemplated transferring the trial of the issues involved to another court.

“Independent of the express provision in this statute requiring a notice to be served on the nearest gate keeper, no principle or rule of action is better settled at the Common Law than that whenever a court or any person acting under legal authority is to act judicially or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected is to have reasonable notice of the time and place when and where such act is to be done to the end that he may be heard in defense or for the protection of those rights.”

N. J. Turnpike Co. v. Hall, 17 N. J. L. 337, 339.

“In every proceeding affecting the property of individuals, the owners of the property affected are entitled to notice of the proceeding, although not directed by statute under which the proceedings are had.”

VanTilberg v. Shann 24 N. J. L. 740.

See also Mann Bros. v. Jersey City 24 N. J. L. 662, 666.

Chosen Freeholders of Hudson Co., v. State 24 N. J. L. 718, 719.

Overseers of Poor v. Overseers of Poor 6 N. J. L. 177.

29 Cyc. 1117.

“There being no provision in the statute for notice to the party who is alleged to be incompetent by reason of insanity to manage his estate, it seems that the judge of probate did not think such notice essential. But we are of opinion that notwithstanding the silence of the statute, no decree of a probate court so materially affecting the rights of property and the person, can be valid unless the party to be affected has

“had an opportunity to be heard in defense of  
“his rights.”

Chase v. Hathaway, 14 Mass. 222.

It would seem as though a notice was <sup>as</sup> necessary in the case of application for transfer of a cause to another tribunal as in the case of an application for a stay of proceedings. In the latter case such notice is required.

See 1 Cyc. 755.

Den v. Fen, 17 N. J. L. 354.

For the reasons above set forth the proceedings and the petition for certificate were irregular, and the certificate itself was improvidently and improperly granted, and because of such irregularity, the result of misrepresentations, the Orphans Court was justified in exercising its inherent right of reviewing its order and revoking its certificate.

Respectfully submitted,

GEORGE W. VAN GELDER,  
Proctor for Respondent.

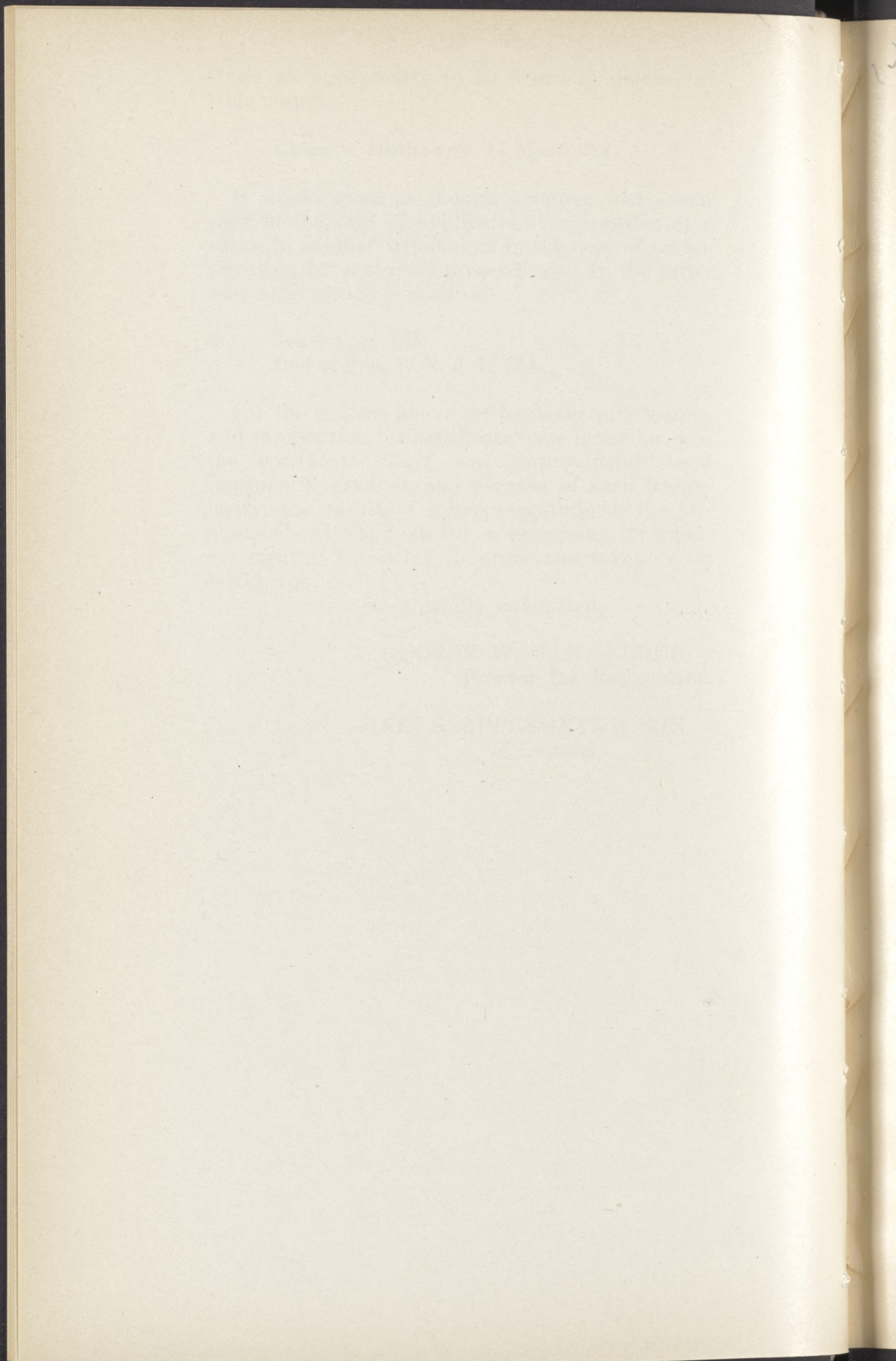
JOHN S. APPELGATE & SON,  
of Counsel.

... ..

...

...

...



## New Jersey Prerogative Court.

AUGUSTA R. PRITCHARD,  
Proponent-Respondent,

vs.

EMMA HOWELL, James Pritchard, Jr., Daniel Pritchard, Minnie Hanson, and William Pritchard, *et als*,  
Caveators-Appellants.

Brief.

### Statement.

An alleged will of James Pritchard, dated June 27th, 1914, was offered for probate in the Monmouth County Surrogate's office and a petition filed for probate by Augusta R. Pritchard, his widow, as executrix, on the second day of March, 1916; that James Pritchard died on the 19th day of February, A. D. 1916, that a caveat was filed by James Pritchard against the probate of said alleged will on the 29th day of February, 1916; that on the 13th day of March, 1916, citations were issued on the said caveat, returnable April 20th, 1916; service of said citations were acknowledged on the seventeenth day of March, 1916; on the 13th day of March, 1916, a verified petition was made and signed by Emma Howell, Daniel Pritchard, James Pritchard, Jr., Minnie Hanson, in which petitioners prayed that the questions involved in the controversy may be certified to the Circuit Court for trial before a jury; said petition was presented to the Monmouth County Orphans' Court, and on said 30th day of March, 1916, a certificate for trial by jury was made.

by Rulif V. Lawrence, Judge of the Orphans' Court of the County of Monmouth, certifying the following questions to the Monmouth County Circuit Court to be tried before a jury.

1. Whether the paper writing presented to the Surrogate of said County of Monmouth for probate, as and for the last Will of James Pritchard, deceased, was duly signed, witnessed, published and declared by the said James Pritchard as his last Will and Testament, according to the statute in such case made and provided.

2. Whether the said James Pritchard at the time of making and executing his alleged will aforesaid, was of sound and disposing mind and memory.

3. Whether the said alleged will of said James Pritchard, deceased, was the result of undue influence, imposition or fraud exercised upon the said James Pritchard, by any of the legatees or devisees in said will named or by any other person or persons.

4. Whether certain marks or lines appearing upon said instrument were the act of said James Pritchard, and if so, whether they were intended by him as a cancellation of said will.

That a certified copy of said order, certifying said cause to the Monmouth County Circuit Court for trial by jury was filed in the office of the Clerk of the County of Monmouth, on April 13th, 1916; that on the fifth day of April, 1916, a notice was served by George W. VanGelder, Proctor of Augusta R. Pritchard, the proponent, that application would be made to the Judge of the Orphans' Court for a reconsideration and revocation of the order certifying the questions involved to the Circuit Court for trial by jury; said notice was dated April 4th, 1916, and acknowledged April 5th, 1916, and returnable on the 15th day of April, 1916, and filed

in the office of the Surrogate on April 16th, 1916; that prior to the hearing upon said notice the certified copy of the order of March 30th, 1916 was filed in the office of the Clerk of the County of Monmouth.

That after the hearing on said notice Rulif V. Lawrence filed on April 19th, 1916, his conclusions revoking said certificate, and on the 20th day of April, 1916, made an order revoking the certificate of trial by jury, which order was filed April 20th, 1916, in the office of the Surrogate of the County of Monmouth, that on the 22nd day of April, 1916, notice of appeal to the Prerogative Court from the Monmouth County Orphans' Court was filed in the Monmouth County Orphans' Court, and service of the notice of appeal was acknowledged on the 24th day of April, 1916; that on April 19th, 1916, notice of trial in the Circuit Court was served upon George W. VanGelder, and the cause was placed upon the calendar of Monmouth County for trial and went off pending the disposition of this cause; that on the 10th day of May, 1916, a copy of the petition of appeal in this cause was served upon George W. VanGelder, the proctor for the proponent, and the same was duly filed with the Clerk of the Prerogative Court.

The Orphans' Court Act, Sections 18 and 19 sets out the procedure for the certification of the cause to the Circuit Court; in the present proceeding, we are only concerned with Section 18, which reads as follows:

“When any caveat shall be filed against the probate of a will, or any appeal shall be taken from any proceedings of any surrogate respecting the probate of a will, the Orphans' Court may, on application of the caveator, appellant, or proponent, certify the questions involved in such controversy into the Circuit Court of the same County, for trial before a jury; and upon filing of such certificate with the Clerk of the Circuit Court, the said Court shall have juris-

diction to try the said cause upon an issue to be framed by the judge holding said Court; the notice of trial and proceedings for summoning and impaneling a jury and for the trial of the cause shall be the same as in causes commenced in the Circuit Court, the same costs shall be taxable as in other causes in said Court; the verdict of the jury shall be subject to be set aside and a new trial granted in the Circuit Court as in other cases in said Court, and the judge may on application for a new trial, certify the same to the Supreme Court for its advisory opinion." Compl. Statutes, Sec. 18, Orphans' Court Act, p. 3818 (P. L. 1898, p. 719).

The Act merely provides that the order certifying the questions involved in such controversy in the Circuit Court for trial before a jury may be made upon application to the caveators, etc., it does not require any petition, notice or other formality.

It does not require that there should be any proceeding in writing whatever; or that there should be even a petition; the application can be made orally, and does not require that any question of doubt or difficulty respecting the fact in controversy should be presented to the Court for the exercise of its discretion, or that any special matter should be presented to the Court, while in this case it was made to appear in the oral application to the Court for the certificate that Augusta Pritchard, the proponent, was the second wife of James Pritchard, alleged testator, and that the caveators were all children of the first wife; that the caveators alleged that Augusta Pritchard had married James Pritchard by perpetrating a fraud upon him and representing that she had considerable wealth and that the children of the alleged testator had helped to earn the money and built up a business which the testator was leaving to the step-children.

The statute says that on application of the caveators, the Court may certify the questions involved into the Circuit Court for trial by jury.

This application may be orally. It is not required to be in writing. *Corpus Juris*, p. 1399, Note 9 A.

The term on application as used in the insolvent debtors' act does not necessarily imply an application in writing, "nor is it so technically understood in the language of our statute." *State vs. Stiles*, 7 Hals., 12 N. J. L., p. 339. Star, page 296.

### POINT

#### Notice of the Application under Section 18 of the Orphans' Court need not be given.

The answer to the objection that no notice was given is "that such notice is not required by the Statute nor by any practice under it." *State vs. Stiles*, 7 Hals., 12 N. J. L., p. 343. Star, page 299.

The statute under which the decision of *State vs. Stiles*, 7 Hals., p. 343, was decided is found in *Elmer's Digest*, under the head of Insolvent Debtors, p. 251, Sec. 6, the part of the proviso reading as follows:

"And on failure of payment of each weekly sum, such debtor shall on application to the Court of any three charges thereof be forthwith by order as aforesaid discharged."

Under this statute it was held that no notice was necessary and that the application did not have to be in writing and this has stood the test and been the law of this State for over ninety years.

No notice was necessary and no petition was required by the statute, permitting application for jury trial on contest or probate of will in the Circuit Court.

The first case under the statute seems to be the case of *Embly vs. Hunt*, which is reported in 2

Stewart, p. 281, in the Prerogative Court, and 2 Stewart, p. 306, in the Court of Errors and Appeals.

In this case, it appears in the opinion of the Court of Appeals that the application was granted and a certificate filed with the Clerk of the Circuit Court for a jury trial; it does not appear that there was any notice of the application nor that there was any written petition, but merely a motion made at the Orphans' Court by the caveator.

The Monmouth County Orphans' Court, in the opinion filed, states:

1. "That the application for the certificate of transfer was made *ex parte* on a petition containing merely *pro forma* declarations and an examination fails to disclose any question of doubt or difficulty respecting facts in controversy which would justify a resort to the section of the Orphans' Court Act sought to be invoked thereby. The supporting affidavit, likewise, is merely a formal verification and contains no special matters which would appeal to the exercise of the Court's discretion."

2. "No notice was given to the proponents of the paper writing in question of the hearing on the application, and consequently no opportunity was given them to present answering affidavits in opposition to the motion."

3. "The certificate granted, however, sets forth that all the parties in interest had been before the Court and that due consideration was given the matter on its merits appears on the face of the certificate. Such a certificate, however, was not warranted by the petition, affidavit and *ex parte* application."

4. "The application being one which peculiarly appeals to the Court's discretion, notice should have been given to all parties in interest, to the end that affidavits and answering affidavits might have been presented and the motion considered on its merits."

5. "In view of the absence of such notice

and an opportunity given the proponents to be heard on the application, as well as the fact that the Certificate is irregular in that it is based on an insufficient petition and affidavit, an order may be entered revoking such Certificate."

In answer to the Third Paragraph above, it may be pointed out that all the parties in interest had been before the Court; the proponent had presented the will for probate and the caveators and all parties in interest had been cited to appear, and citation for them duly acknowledged, so as to that part of the Certificate "that all parties in interest had been before the Court" was true in fact as will be seen by an examination of the record in this case.

As to the second part of Paragraph Three, that "due consideration was given the matter on its merits." Beside the petition and affidavits the certificate for transfer to the Circuit Court for trial by jury settling the issues to be tried in the Circuit Court show that other matters were considered besides the matters contained in the petition and affidavit.

I herewith quote the issues submitted to the Circuit Court:

1. "Whether the paper writing presented to the Surrogate of said County of Monmouth for probate, as and for the last Will of James Pritchard, deceased, was duly signed, witnessed, published and declared by the said James Pritchard as his last Will and Testament, according to the statute in such case made and provided.

2. Whether the said James Pritchard at the time of making and executing his alleged will aforesaid, was of sound and disposing mind and memory.

3. Whether the said alleged will of said James Pritchard, deceased, was the result of undue influence, imposition or fraud exercised

upon the said James Pritchard, by any of the legatees or devisees in said will named, or by any other person or persons.

4. Whether certain marks or lines appearing upon said instrument were the act of said James Pritchard, and if so, whether they were intended by him as a cancellation of said will."

It will be seen that not only the question of the due execution of the will, undue influence, mental incapacity, fraud, and interlineations upon the face of the will and whether the interlineations were the act of the testator and intended for cancellation or not.

An examination of the cases will show that there were more reasons raised in this case than any decided cases in which the question of a certificate to the Circuit Court for a trial by jury was involved.

In *Embley vs. Hunt*, 2 Stew., 29 N. J. Equity, p. 309, in the Court of Errors and Appeals, opinion by Judge DALRYMPLE, in the last paragraph of the opinion, the Court said:

"The other objections urged before the Orphans' Court relate to the form of the issue and want of proper notice of trial, and notice of settling the issue in the Circuit Court."

It further appears that a motion was made in the Circuit Court for the above reasons for a new trial and the Court of Errors held that the motion was rightly disposed of in the Circuit and affirmed the decree of the Prerogative Court and also the Orphans' Court.

The above opinion clearly settles the question that no notice of the application is required for settling the issue in the Circuit Court and that the Judge of the Court had ample power to settle the issues to be tried in the Circuit Court without notice to the opposing parties and having exercised that power it cannot be reviewed by the Judge of

the Orphans' Court, and his discretion once exercised is not the subject of review.

That part of the opinion set forth in the first paragraph above quoted in the opinion of the Judge of the Monmouth County Orphans' Court, and which I quote here again, which says:

"The application for the certificate of transfer was made *ex parte* on a petition containing merely *pro forma* declarations, and an examination fails to disclose any question of doubt or difficulty respecting facts in controversy which would justify a resort to the section of Orphans' Court Act sought to be invoked thereby. The supporting affidavit, likewise, is merely a formal verification and contains no special matter which would appeal to the exercise of the Court's discretion."

First. There is nothing in the statute which requires that there should be anything in the petition outside of a *pro forma* declaration.

Second. There is nothing in the practice or in the statute or in any reported decision of the Court of Appeals which requires that it should appear that any question of doubt or difficulty respecting facts in controversy should be presented to the Orphans' Court.

Third. There is nothing in the statute or in any reported decision that requires that the verification of a supporting affidavit should contain any special matter which would appeal to the exercise of a Court's discretion.

Upon any one of the questions of undue influence or mental incapacity, or improper execution or fraud, or interlineations, the Court can grant an application for trial by jury in the Circuit Court.

It is not required to try the case on petition and affidavits or on rule to show cause on an application to refer the case to the Circuit Court for trial by jury.

This argument and the case of *Embley vs. Hunt* and the particular section on page 309 above quoted

disposed of that part of the opinion above quoted in reference to notice because it is based upon the fact that no notice was give of the settling of the issues while *Embley vs. Hunt*, above quoted, says that none is required, and the fourth paragraph saying that notice should have been given is settled in the same paragraph of *Embley vs. Hunt*, and also *State vs. Stiles*.

In the case of *Sutton vs. Morgan*, 30 N. J. Equity, in the Prerogative Court, Theodore Runyon, Chancellor, on page 633 of the opinion, the Court deals with the question of certifying questions involved in controversy to the Circuit Court.

In that case it appears that there was only testamentary capacity and undue influence involved.

The application was not made until after the testamentary witnesses had been examined, and then the caveators applied to certify the questions involved into the Circuit Court. The Court there held that the application was made too late, and it should have been made before the trial was begun.

There is no evidence of any petition or affidavits upon the application, or of any notice of the application.

In that case it was contended that the Court was bound at any time to certify the questions involving the controversy into the Circuit Court on the application of either the caveators or executors whenever the Court was required so to do, whether the trial had been actually commenced in the Orphans' Court, or at any time during the trial, and the Court merely held in that case that the application should have been made before the trial begun, but it has been held since that it is a matter of discretion and that the Court is not bound to make the certificate merely upon the application.

In that case, however, the Court did not require notice or a petition or affidavits.

In the leading case of *Rusling vs. Rusling*, recorded in 35 N. J. Equity, p. 120, in the Preroga-

tive Court, opinion by Chancellor Runyon, and in the Court of Errors and Appeals, 36 N. J. Equity, p. 603, opinion by Justice Dixon; in that case, in the opinion in the Prerogative Court, 35 N. J. Equity, p. 151, the opinion recites, on application of the caveators the Orphans' Court under provisions of the statute certifying the questions involved into the Circuit Court of the County of Mercer for trial by jury.

In that case the question certified the due execution of the will, testamentary capacity, and undue influence, but did not have the additional one of interlineations.

It does not appear that anything more was done than a formal verbal application; it does not appear that any notice was given or required and from the eminent counsel employed in that case, it is quite evident that if notice and verified petition with counter affidavits were required, they would not have been overlooked by such eminent counsel.

In the opinion in the Court of Errors and Appeals, on page 604, upon the question of certifying the matter to the Orphans' Court, the Court merely says:

“Upon their caveat against its probate the Orphans' Court of Mercer County certifying the questions involved to the Circuit Court for trial before a jury, pursuant to the 19th Section of the Orphans' Court Act.”

The case of Schuchhardt vs. Schuchhardt is the first one which says that a petition was used and merely recites the facts that they file their caveats against its admission to probate and petition the Orphans' Court to certify into the Circuit Court of that County the questions which were thereby raised, which petition was granted, and the only question raised there was that they had misquoted the time in which the act had been approved and evidently the petition was in the form of a petition used in this case.

In the case of *Youmans vs. Petty*, 33 N. J. Equity, p. 532, on page 534 of the opinion, objection was made by the Court certifying the question into the Circuit Court, and the order was not appealed from.

The Court said that there was no error in exercising the discretion which the act gives to the Orphans' Court.

It does not appear in the above case what questions were certified but the opinion seems to indicate if a party wishes to question the exercise of discretion of the Orphans' Court, it must do so by appeal.

The case of *Bumstead vs. The Judge of the Monmouth Pleas*, 56 N. J. Law, p. 414, is an example of the strictness with which Section 19 is construed.

In the case of *Smith vs. Smith*, opinion by Chancellor Megill, 48 N. J. Equity, the Prerogative Court merely stated that under authority of the statute the Orphans' Court certified the questions involved in the appeal to the Circuit Court of Burlington County for trial before a jury, and then says that the charges were framed by the Judge holding the Circuit Court but does not pass upon the question as to whether that was proper procedure.

There seems to have been no question raised concerning the regularity of the proceedings before the Orphans' Court, or the power of the Orphans' Court, or whether the application should have been made in writing or upon notice, although able counsel were associated on both sides.

The case of *Brothers vs. Pickel*, 31 N. J. Equity, p. 647, was an attempt to construe the word "may" in the statute as mandatory, but there the Court held that it was not mandatory but was merely discretionary.

In the case of *Sanderson vs. Sanderson*, 52 N. J. Equity, p. 243, the points involved were the due execution, mental capacity, and undue influence; there does not seem to have been any

other intricate questions involved, nor does it refer to any petition or notice certifying the case into the Circuit Court, the regularity of the method of certifying the question into the Circuit Court does not seem to have been questioned.

In *Kitchell vs. Beach*, in which Vice Chancellor Pitney was one of the counsel, 35 N. J. Equity, p. 446, the only comment as to the procedure of certifying from the Orphans' Court to the Circuit Court is as follows:

“Caveats to the admission of the will and codicils to probate were filed and the Orphans' Court on application under the statute ordered an issue which was tried in the Circuit Court of Monmouth County.”

It will be observed that the only procedure by which the cause was referred from the Orphans' Court to the Circuit Court was an application under the statute, and that the Orphans' Court ordered the issuing.

THOMAS P. FAY,  
Of Counsel with Appellant.

