

New Jersey Court of Errors and Appeals

IN THE MATTER

—of—

The Appeal of Neva M. Harrison, administratrix, &c., of Lottie Lee Tipper, deceased, from an Order or Decree of the Orphans' Court of Bergen County, dismissing the Appeal of said Neva M. Harrison, administratrix, &c., from the Order of the Surrogate of Bergen County admitting to probate a certain paper writing as the Last Will and Testament of John Tipper, deceased.

On Appeal from Prerogative Court.

RESPONDENT'S BRIEF.

Statement.

The respondent takes exception to certain statements of alleged fact appearing in appellants' brief, upon the grounds that they are unsupported by anything in the State of the Case or are disproved by matters contained therein. These statements of fact are the following:

1. Counsel for the executors prepared for trial, issued subpoenas, and on July 10th, the day fixed by the Court, appeared before the Orphans' Court with witnesses, including an expert,

whose services, *at considerable expense to the executors, had been engaged for the day.* (Brief, page 3.)

2. No notice of this application for continuance had been given to counsel for the executors, who by reason of the fact that the case *had been peremptorily set for trial for that day*, had witnesses in Court, under subpoena, and also Dr. Britton D. Evans, an expert in mental diseases, with whom the executors *had an agreement to pay for his attendance at the Court that day.* (Brief, page 9.)

3. He (Mr. King), read an affidavit of the Administratrix, which is printed in Case, page 9, which stated that she *had engaged new counsel, Warren Dixon, Esquire, &c.* (Brief, page 4).

4. In opposition to the granting of the continuance, counsel for the executors urged (1) the Court's previous fixing of a day *peremptorily.* (Brief, page 4.)

5. *No action being taken on either appeal*, counsel for the executors gave notice on October 18, 1917, of a motion to dismiss the appeal. (Brief, page 4.)

The State of Case fails to show that the executors had engaged for the day, the services of Dr. Evans, *at considerable expense to the executors.*

In the colloquy between Court and counsel, held July 10, 1917, on motion for adjournment, the State of Case shows the following remarks to have been made:

Court: I am inclined, Mr. Engelke, to put this down for another date, on payment of the costs of the day.

Mr. Engelke: Does that mean the payment of our expert witness?

Court: I think so.

Mr. King: The expert witness is called here today. I do not think that it is quite fair to the appellants to have the fees of the expert witnesses taxed.

Court: I see no reason why the estate should be charged with the incidental expenses and disbursements and costs of this day, which would include the fee that they would have to pay the expert, because it is absolutely a loss to the estate. Why should it be charged with it? They have to pay it.

(Case, page 20, l. 10, &c.)

Mr. King: If your Honor please, do I understand that the expert witnesses will be paid for by the appellants?

Court: One, I understand, the cost of the day.

Mr. King: Can I get an approximate cost?

Mr. Engelke: \$100, that is right, is it not, Doctor? \$100 and expenses is what we have to pay?

Mr. King: If your Honor please, I now withdraw my consent to the taxation of the cost of the day, conditional on the adjournment. I do not think it is fair to the appellants to be taxed with the cost of the expert.

(Case, page 33, l. 20, &c.)

Mr. Engelke: If the Court please, I should like to ask if that is the disposition, that these costs be paid now.

Court: The costs will be paid within five days.

Mr. King: If your Honor please, I must again renew my objection to the taxation of costs of the expert.

Court: You have heard the decision of the Court.

(Case, page 24, l. 9, &c.)

Mr. Engelke: Within five days the taxation of the costs of the day and expert witness fees, plus expense?

Court: Yes.

(Case, page 25, l. 1, &c.)

There was no evidence before the Orphans' Court to show any agreement between the executors and Dr. Evans whereby the services of Dr. Evans had been engaged for the day, *at considerable expense to the executors*, or at what expense, if any, I think I have quoted above all that appears in the State of the Case, relative to that matter, as having taken place before the Orphans' Court—whatever further appears, appears in the order.

The case had not been set for trial, *peremptorily*, for July 10th, nor had Mr. Engelke urged such a reason before the Court.

The order of continuance to July 10th does not appear in the State of the Case. All that does appear is, that Mr. Engelke, on July 17th, says he told a young man from the office of Collins & Corbin, as they were on their way to a train, after the adjournment of June 25th had been granted—that he “would not consent to any further postponement in the matter.” (Case, page 15, l. 30, &c., Page 16.)

The affidavit of Miss Harrison (Case page 9) does not state that she had engaged new counsel, but does state that “she consulted with Mr. Warren Dixon, on the 6th day of July, 1917,” and that he “expressed his willingness to take care of the interests of this deponent in this liti-

gation, but stated that it would be impossible for him to thoroughly master the case so as to be able to properly present it before the Court on July 11, 1917." (Case page 9, l. 40 &c. and page 10.)

On the date of the application for adjournment (July 10, 1917) Messrs. Collins & Corbin were still the proctors of record of Miss Harrison. (Case page 19, l. 3 &c.)

While it is true that counsel for the executors gave notice before the Prerogative Court to dismiss Miss Harrison's appeal on the ground of want of prosecution (Case page 39, l. 20 &c.), yet the State of the Case fails to show what the Prerogative Court did with that matter. As a matter of fact, the motion was denied, as it appeared that the reasons alleged for dismissal, were unfounded.

In appellant's Brief, seven points are stated upon which their argument for a reversal of the decree is based.

The respondent deems it unnecessary to attempt to refute the correctness of the abstract legal propositions contained in the first four points, as they were practically acquiesced in by the Vice-Ordinary in his opinion in the Court below.

As to points five and six, even though the abstract legal propositions contained therein be correctly stated, they nevertheless do not apply to the case in hand.

The validity of the seventh point is denied.

POINT I.

The respondent refused to accept the continuance upon the terms stated by the Orphans' Court Judge, as soon as they were made known to her representative upon the application for such continuance.

As soon as the Orphan's Court Judge declared that the respondent would be obliged to pay one hundred dollars and expenses (unstated and unknown), together with the taxed costs of the day, Mr. King, representing the respondent, said: "If Your Honor please, I now withdraw my consent to the taxation of the costs of the day, conditioned on the adjournment. I do not think it is fair to the appellant to be taxed with the costs of the expert." (Case, page 23, l. 27.) And again,

"The Court: The costs will be paid with five days.

Mr. King: If Your Honor please, I must again renew my objection to the taxation of costs of the expert."

(Case, page 24, l. 12 &c.).

After this disposition of the matter, nothing further was done by the respondent and no order was taken for an adjournment by her, but it appears that subsequently an order was prepared by Mr. Engelke and presented to the Court and signed. (Case, page 25, l. 30.)

It will be noted that this order provided for its service upon Warren Dixon, who was then not the proctor of Miss Harrison, and the proof of service subsequently made was that it was served on said Dixon and not on Miss Harrison nor

upon her proctors of record. The fact that the said Dixon was not then the proctor of Miss Harrison, must have been known to Mr. Engelke, who prepared the order, as the recital in the order contains the following language: "And the matter being opened to the Court by Adolf L. Engelke, proctor of the estate of John Tipper, deceased, &c. * * * and Michael J. King, Esq., representing Warren Dixon, Esq., and the said Michael J. King, Esq., representing Warren Dixon, Esq., stating to the Court that a substitution of proctors for the appellant, Neva M. Harrison, Administratrix as aforesaid, *was about to be given to the said Warren Dixon*, and further stating that the said Warren Dixon, Esq., had gone over the case of the appeal for the said appellant and had expressed his willingness to take care of her interests in this litigation &c." (Case, page 26, l. 1 &c.).

Mr. Engelke was under no misapprehension regarding who were Miss Harrison's proctors of record, as the case discloses that during the discussion concerning an adjournment, in the presence of the Court, he asked who appeared as proctors of record to which the Clerk replied: "Collins and Corbin," and Mr. Engelke remarked: "There appears to be no substitution." (Case, page 19, l. 10 &c.)

While the learned Vice-Ordinary treated this service as valid, we deem it proper to call this Court's attention to the fact, more particularly as the appellant's contend that the respondent accepted the continuance with the conditions annexed.

The Vice-Ordinary held that "timely objection was made to the allowance of the expenses for the expert," and we submit that the correctness of this holding is disclosed by the State of the Case above referred to.

POINT II.

The Orphans' Court Judge did not exercise a sound discretion, after a full hearing of the merits of the application, but on the contrary, made an arbitrary ruling without a full knowledge of the facts or without any legitimate evidence of the facts upon which his decision was based.

In his opinion, the Vice-Ordinary says:

“The allowance rests in a sound discretion and in its exercise it seems indispensable that the propriety of hiring the expert and the value of his services be judicially determined, otherwise how could the Court hold that the terms imposed were reasonable? The Court examined into and passed upon neither question, but left the first to the judgment of counsel and the amount to be arbitrarily fixed by the party who was to receive it. This is evident from the minutes and appears by the order requiring the payment of such expenses as the proctors should certify. The statement made at the time of the motion, that the fee was one hundred dollars does not relieve the situation and besides the certificate of the proctor fixes the expenses at a larger sum. Failure to state in the order of continuance the precise terms, is fatal, and as the dismissal was based solely upon a non-compliance, the order dismissing must be reversed.” (Case, page 48, l. 20, &c.)

The situation, presented to the Orphans' Court at the time of the application for continuance, was as follows:

Neva M. Harrison, as Administratrix of Lottie Lee Tipper, had appealed from an order of the Surrogate admitting to probate, a paper writing purporting to be the last will of John Tipper, deceased. John Tipper had been the husband of Lottie Lee Tipper, and had pre-deceased his wife by a few weeks. If he died intestate, the major part of his estate would go to his wife, and through her, to her heirs and representatives. If he died testate, a large part, if not the major part, will go to some institutions.

The property which up to the present time has come into the hands of Neva M. Harrison, as Administratrix, amounts to a couple of hundred dollars, (not sufficient to pay her funeral expenses) while the estate which has come into the hands of the appellants, as Executors of the estate of John Tipper, amounts to considerably over fifty thousand dollars.

The attack upon the will was made on behalf of the respondent by Messrs. Collins and Corbin, as proctors, and under the immediate charge of Mr. George S. Hobart. The case had been prepared so that it was set down for a hearing for July 10, 1917, but on June 3rd, Miss Harrison received a letter from Mr. Hobart wherein he stated that on account of illness, and through his doctor's orders, he would be unable to personally attend the hearing of the case, and notifying her that it had been adjourned over until July 11th and 12th and with further assurance "that the preparation of the case will be thorough and no avenue of inquiry that can be made will be

left uninvestigated." (See letter of Mr. Hobart, Case, pages 11 and 12.)

No intimation was conveyed that the firm would not be able to prepare and try the case. Miss Harrison then expected that Mr. Gilbert Collins would be able to present it and did not learn to the contrary until a day or two prior to July 6th, when, learning that Mr. Collins could not personally look after her interests, she sought other counsel and on July 6th, consulted with Mr. Dixon, who expressed his willingness to take hold of the case, but stated that it would be impossible for him to do so and prepare for trial on July 10th or 11th. (See affidavit of Miss Harrison, Case, pages 9 and 10.)

Four days after this interview, an application for the adjournment upon the above, and another ground, was made and was refused, except upon submission to the imposition of harsh and unreasonable terms, which the Administratrix of the estate of Lottie Lee Tipper refused to accept, and as a penalty, her appeal was dismissed.

The Judge of the Orphans' Court took no means of ascertaining why Dr. Evans was in court on that date and whether he was there under the contract to be paid one hundred dollars or any other sum for mere attendance and if he had taken steps to ascertain the conditions of his employment it might have developed that the Doctor was to be paid one hundred dollars a day for his testimony taken in Court, and that his mere appearance without furnishing such testimony was not to be paid for at such a rate, or at all.

That Mr. Engelke had reasonable grounds to suppose that the case would not proceed on July 10th may be gathered from a conversation which he says took place between himself and Mr. Mark-

ley (connected with the firm of Collins and Corbin) on July 9th, when he states that Mr. Markley told him on that date that the firm of Collins and Corbin was out of the case, and in reply to the inquiry as to what position he, Engelke, was then in, Mr. Markley laughingly said, "I really don't know—don't take anything I say for granted, that you should not prepare—if I were you I would prepare." (Case, page 19, l. 30, &c.)

This was surely notice to Mr. Engelke that something had occurred which would probably necessitate a postponement of trial. Notwithstanding this, Mr. Engelke made no inquiries of Messrs. Collins and Corbin respecting substitution, but produced his high-priced expert in Court.

Among the facts which might have been considered by the Orphans' Court, but which apparently were overlooked or given very slight consideration, were the capacity in which the respondent was seeking to establish the rights of the estate which she represented, the relative amount of the estates interested in the litigation and the relations of the parties one to the other.

The policy of the State, as established by statute, is that costs cannot be assessed against a plaintiff suing in a representative capacity. (3 Comp. Stat., Page 4123, Section 229.)

Such is not only the statutory rule but was the general rule of practice applicable to actions in the common law courts. (Norcross vs. Boulton, 16 N. J. L., 310, citing Smith vs. Barrow, 2 T. R., 477; Hooker vs. Quilter, 1 Wils. R., 172 and other cases.)

While this legislative rule has not been adopted with respect to cases in equity, nevertheless, in its spirit, it is generally followed.

In *Clifford, Administrator, vs. Thorn*, 9 Eq., 725 (decided in 1855) Chief Justice Green, sitting for the Chancellor, said:

“The general rule in equity (as well as at law) is that persons suing in *autre droit* are not responsible for costs. An executor or administrator, complainant in equity, will not be ordered to pay costs unless the suit be clearly groundless or vexatious.” (Citing *Executors of Getman vs. Beardsley*, 2 J. C. R., 274; *Goodrich vs. Pandleton*, 3 J. C. R., 520.)

In the case of *Shepard, Executrix, vs. McClain*, 18 Eq., 131, the Chancellor said:

“In this Court (Chancery) costs, by the statute are in the discretion of the Court. In general that discretion is exercised according to rules that have been fixed by practice. Courts of law, by statute, cannot award costs against executors or administrators when plaintiffs, but must, if they are unsuccessful defendants. Courts of equity are not within that statute and have not adopted it in practice.”

In that case, the Chancellor held that where the suit was brought in bad faith by the complainant, he will be ordered to pay the costs out of his own estate, and when brought upon an instrument obtained by the decedent by a breach of faith, costs will be ordered to be paid out of the estate of such decedent.

While the Orphans' Court may not be classified as a common law court, neither may it be properly classified as an equity court. Its jurisdiction is prescribed by statute.

The Orphans' Court Act (3 Comp. Stat., Page 3884, Sections 196 and 197) provides that in all litigated suits in the Orphans' Court, the Court shall adjudge and direct which party shall pay the costs and expenses of such litigation, and shall have the power to apportion and determine the costs and expenses to be paid by either party and also that in causes respecting the probate of a Will the Court may order the costs and expenses of the litigation to be paid by the person or persons propounding the Will or to be paid out of the estate of the deceased. "But, if probate be granted, the Court shall order the party or parties contesting such Will to pay the costs and expenses of the litigation, *unless it shall appear to the Court* that the person or persons contesting such Will or codicil had reasonable cause for contesting the validity of the same, or shall not have offered on the trial or hearing any evidence other than the subscribing witnesses to the Will or codicil; and in case it shall appear to the Court that the person or persons contesting such Will or codicil had reasonable cause for contesting the validity thereof, the Court may order that the costs and expenses of the litigation, as well on the part of such contestant or contestants as on the part of the person or persons propounding such Will or codicil for probate, be paid out of the estate of the deceased."

This is the statutory power conferred on the Orphans' Court with respect to the direction for payment of costs and expenses in Will contests. It unquestionably applies to the allowance of costs upon the final determination of the cause by the Orphans' Court after hearing upon the merits and by its terms confers upon the Court a discretion to impose the costs upon the estate of the

deceased whose Will is under question, not only when probate is refused but also where probate is allowed, when it shall appear that there was reasonable cause for contest, or the contestants shall ~~not~~ have offered on the trial any evidence other than the subscribing witnesses to the Will or codicil.

The statute likewise provides that such bill of costs as is taxable under the Act "shall be drawn, taxed and filed by the Surrogate" (Sect. 198, Page 3885, of Comp. Stat.). The statute then fixes certain costs which are taxable under the statute. It does not embrace expert witness fees paid by either party.

In legal terminology, "costs are certain allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court. The theory upon which they are allowed to a plaintiff is that the default of the defendant made it necessary to sue him, and to a defendant, that the plaintiff sued him without cause. Thus the party to blame pays costs to the party without fault."

11 Cyc. (2nd Edition), Page 24.

Stevens vs. Boston Cent. Nat. Bank, 168
N. Y., 560.

"The word 'costs' seems to have a technical meaning, and is usually applied to the legal charges of a proceeding."

Brower vs. Maiden, 4 Fed. Cas., No. 1917.

As this One hundred and seven dollars and seventy-five cents (\$107.75) was imposed under the guise of costs as a condition precedent to giving a hearing upon the merits of the controversy and under penalty of failure to pay same the appellant was denied a right to a hearing, it has no statutory authority behind it at least. The prescribed statutory penalty for failure to pay costs properly taxed is by attachment or other process in the same manner as other orders and decrees of Court are enforceable. No authority can be found for the enforcement of payment of taxed costs by dismissal of proceedings.

Outside of the statute there can be found no accepted practice of the Orphans' Court or of the Prerogative Court justifying the imposition of expert witness fees for services when such services are the result of private contract between the witness and one of the parties and in which the court and other parties in no way participated.

In *Sanderson vs. Sanderson*, 52 Eq. (7 Dick.), 243, an appeal was taken from the Orphans' to the Prerogative Court on a matter of probate of a Will and objection was made to allowance of One hundred and fifty dollars for the payment of an expert in mental diseases. The expert witness having been produced by the contestant and the Will having been declared invalid by the Orphans' Court, the Orphans' Court ordered payment of this as an expense in the nature of costs, out of the estate of the decedent. The Prerogative Court, in reversing this ruling, said: "It appears that the expert was selected by the respondents without previous conference or agreement with the proponents, and without previous authority from the Court, and that he went upon the witness stand in the belief that the respondents were

his employers and responsible for his compensation. The influence of his employment was upon him, he did not come into the case clothed as a disinterested arbiter of the matter submitted to him, he was the exponent of the party producing him, assuming the attitude of one who challenges combat with his arguments and conclusions." "I think it would establish an unwise precedent to mulct a decedent's estate with the charges of such witnesses. Produced at the will of the parties to the contest, their multiplication, necessary, perhaps, to enable the Court to reach a correct conclusion, would be apt to entail serious expense upon the estate and bring the administration of justice, through such expensive practice, into just condemnation." "If it be necessary to have the assistance of experts, whose charges are to be borne by the estate, their production should be authorized and they should be chosen by the Court after hearing the parties to the contest." (At Pages 255 and 256.)

It has been held that sums paid for compensation of expert witnesses beyond the ordinary fees authorized by statute for witnesses generally are not taxable as costs,

See *Wm. Branfoot vs. Hamilton*, 52 Fed., 390.

Mark vs. Buffalo, 87 N. Y., 184.

The matter of Bender, 86 Hun, 570,

and that fees of witnesses of the unsuccessful party should not be included in a judgment against him for costs,

11 Cyc., Page 118 and cases cited,

and in a number of States, including New Jersey, it has been held that where a statute contains

a fee bill enumerating items which may be recovered no other costs are taxable than those so enumerated.

11 Cyc. Page 100.

Anonymous, 20 N. J. L., 112.

We do not contend that, under proper circumstances, the Orphans' Court may not order the payment of such expenses to be imposed on the estate of deceased. Under the authority conferred by the statute the Court would probably have such power. (In re Sebring, 84 Eq., 453; Vioren vs. Nesler, 76 Eq., 576.) But I have not found any case in which such expenses, *eo nomine*, have been allowed, even out of the estate, tho if they be on a parity with counsel fees then such power is undoubtedly conferred.

We do insist, however, that no power is conferred either by the statute or under the practice of the court, to impose such expenses upon an unsuccessful contestant, even after final hearing.

"Costs are awarded or refused according to the justice of each particular case, but this discretion is not arbitrary. It is a judicial discretion, calling for sound judgment upon all the facts and circumstances of the case and must not be so exercised as to result in injustice or oppression. In case the Court's discretion is improperly exercised its action may be reviewed and its decree in respect to costs reversed or modified."

Woodford vs. Bucklan, 14 Hunn, 444.

11 Cyc., Page 33 and cases cited in Note 62.

In Van Meter vs. Knight, 32 Minn., 205 (cited in 11 Cyc. page 33), it was held that the term

“costs,” as used in the statutes providing that in equitable actions they shall be in the discretion of the Court, did not include “disbursements.”

It is respectfully submitted that the Orphans' Court, in imposing the terms complained of, did not exercise a sound judicial discretion, but that said terms were wholly unjust, and that the decree of the Prerogative Court should be affirmed, with costs.

WARREN DIXON,
Of Counsel with Respondent.

New Jersey Court of Errors and Appeals

In the Matter

of

The appeal of NEVA M. HARRISON, Administratrix, &c., of Lottie Lee Tipper, deceased, from an order or decree of the Orphans' Court of Bergen County, dismissing the appeal of said Neva M. Harrison, Administratrix, &c., from the order of the Surrogate of Bergen County admitting to probate a certain paper writing as the last will and testament of John Tipper, deceased.

On Appeal
from Prerogative Court.

ANSWERING BRIEF OF APPELLANTS.

Owing to exceptions taken by counsel for respondent to the summarized facts stated in opening pages of appellants' brief, it is imperative that an answer be made to point out to this Court that *such exceptions are unfounded*.

In appellants' original brief, the matters of fact are summarized with citations where the facts may be found in the state of the case. The

answers will be made *seriatim* to the items of exception contained on pages 1 and 2 of respondent's brief.

1. It is a fact that Dr. Evans was engaged *at considerable expense to the executors*. The record shows:

"Mr. Engelke: * * * Now it seems to me, under the circumstances, where I have gone to the trouble of subpoenaing witnesses—we have Dr. Evans here, ready to meet the issue—it would be a hardship upon us at this time" (Case, p. 16, line 26).

"Mr. Engelke: * * * We are paying experts in addition" (Case, p. 19, line 19).

"The Court: I can see no reason why the estate should be charged with the incidental expenses and disbursements and costs of this day, which would include the fee that *they would have to pay* the expert, because it is absolutely a loss to the estate. Why should it be charged with it? They have to pay it" (Case, p. 20, line 26).

"Mr. King: Can I get an approximate cost?"

"Mr. Engelke: \$100. That is right, is it not, Doctor? \$100 and expenses is what we have to pay" (Case, p. 23, line 25).

(It will be noted that this citation is incorrectly punctuated in respondent's brief by a "?" where it should have been punctuated with a "." The statement was declarative and not interrogative.)

The inquiry: "That is right, is it not Doctor?" was directed to Dr. Evans, who was seated within the rail and less than twenty feet from Mr. King, who was propounding the inquiry as to the cost. The doctor answered the inquiry stating that he was to receive \$100 and his expenses. Counsel immediately continued the colloquy, which the stenographer has then put in the notes, as follows: "\$100 and expenses is what we have to pay." The conclusion in counsel's original

brief, page 3, is properly deducible from the minutes above set out. \$100 is "considerable expense." It is stated that "we," meaning, of course, counsel's clients, have an expert, Dr. Evans, well known to the courts of this as well as the courts of many another state, here ready to meet the issue. It is judicially noticed that an expert cannot be subpoenaed to give his expert opinion and that his services in testifying must be paid for. The Court so inferred, as is evidenced by the preceding minutes. That this was the opinion of counsel present and representing Miss Harrison clearly appears throughout the minutes and is emphasized by his inquiry where he desires to be informed of the approximate cost of the expert and is told that it amounts to \$100 and expenses, and "*that is what we have to pay.*" That \$100 is a "considerable expense" is self-evident.

2 and 4. The case had been peremptorily set by Judge Seufert, for July 10th, but no order of continuance to that date was drawn or entered as it was the distinct understanding between all counsel in the case, Collins & Corbin then representing the respondent, that the case should be peremptorily tried on July 10th.

The record shows:

"Mr. Engelke: I realize that, but we are here and ready and I understood that the matter was set down at that time. I know that Collins & Corbin knew *it was set down peremptorily for to-day.*

"The Court: *That undoubtedly is so * * **"
(Case, p. 21, l. 24).

Counsel urged as a reason for the refusal of the continuance, and the Court agreed with the reason *urged*, that the case had been *peremptorily* set down for trial on July 10th.

3. The administratrix says in her affidavit (Case, p. 10):

“Deponent and Mr. Stockton went over the matter with Mr. Dixon, *and he expressed his willingness to take care of the interests of this deponent in this litigation * * **”

If an expression of willingness on the part of newly consulted counsel, to undertake a litigant's interests, does not indicate his engagement to fulfill such obligation, then Mr. King, who appeared in Court and represented such newly consulted counsel, and the Court, to whom the affidavit was read, were deceived as to its terms. The application for the continuance was made by a representative, who said:

“Mr. King: I appear *on behalf of Mr. Dixon*, and ask for an adjournment” (Case, p. 14, l. 40).

“The Court: * * * The only question that I am considering at all is *the question of substitution of counsel*” (Case, p. 16, l. 33).

“The Court: Why, *your own papers* show that you knew of this since the 6th of July, when it was *transferred into Mr. Dixon's hands*” (Case, p. 17, l. 23).

It is respectfully submitted that the conclusion stated in appellants' brief, that the administratrix “had engaged new counsel,” is one justified by the evidence and supported by the state of the case.

5. Notice to dismiss the appeals to the Prerogative Court, as stated and of the purport as stated, was served, and truly showed the state of the case in the Prerogative Court when it was served. Although the petition of appeal was filed in the Prerogative Court August 31, 1917, and the answer thereto on September 13, 1917, *no action was taken thereon* by the appellant,

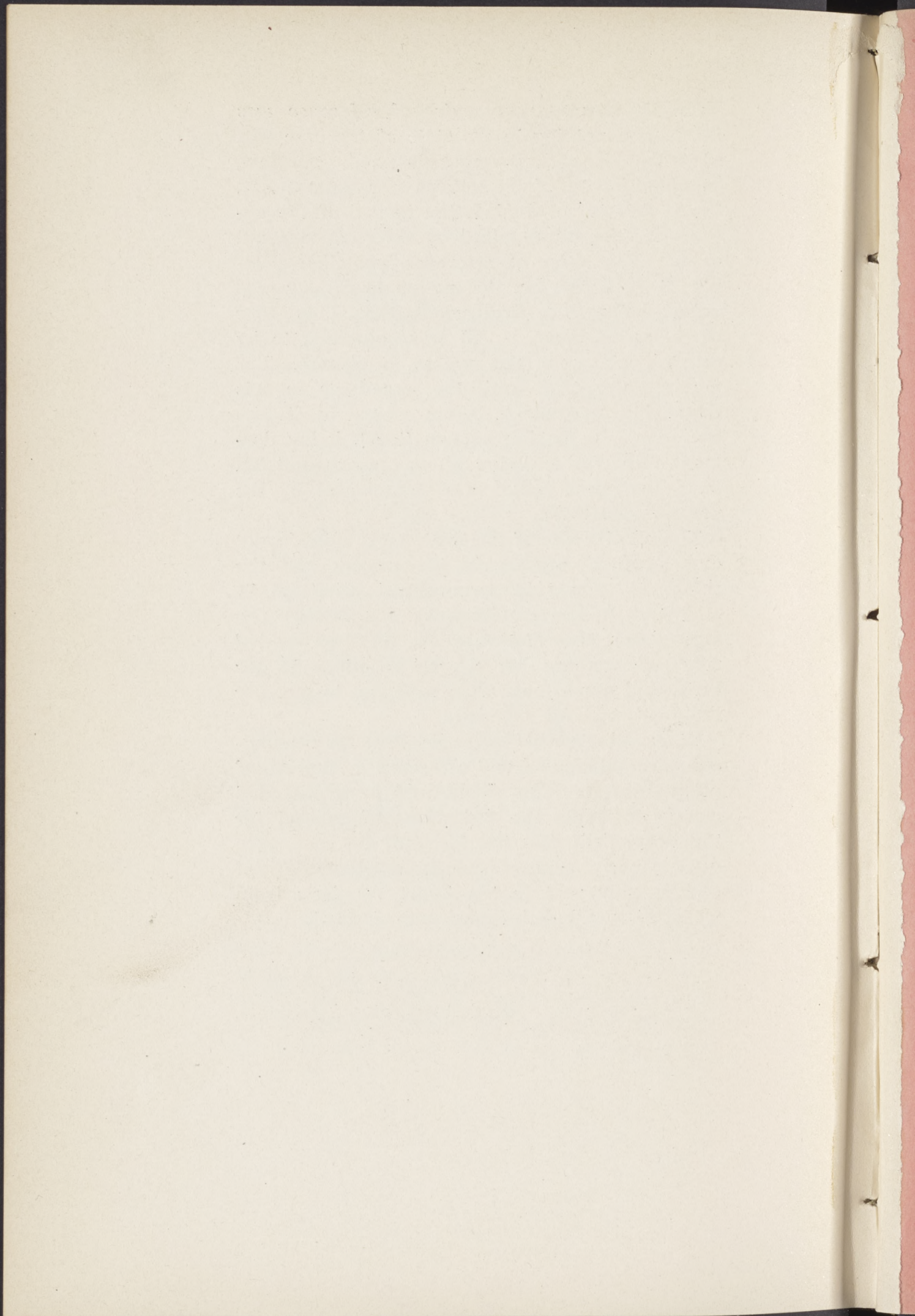
Neva M. Harrison; *no order of reference was taken*, and nothing in the state of the case will show that the notices were unjustified. The fact, as stated in one of the notices to dismiss (Case, top p. 42), is not denied that in one of the appeals the deposit required by the rules was not made. The order of reference was filed October 23, 1917, the day the motion to dismiss was argued before Vice Ordinary Backes. This order of reference (Case, p. 43) was consented to by counsel, who gave the notices to dismiss. The fact remains that, until the appellants in this Court, the respondents below, moved to dismiss the appeal in the Prerogative Court, it lay dormant there for a period of one month and ten days, and then action was commenced by the present appellants.

The relative size of the two estates is irrelevant and nowhere appears in the record, and the reference thereto in respondents' brief (p. 9) ought not to be considered by this Court. The fact is that the administratrix received *several times the amount* her counsel mentions in her brief, and much more than sufficient to pay her intestate's funeral expenses.

Other points raised in the brief for the respondent were anticipated and answered in appellants' original brief. This memorandum is intended merely to refute the deductions of counsel for the respondent that the facts of the case were not properly summarized in appellants' brief and to point out to the Court the facts from which counsel's deductions were derived.

Respectfully submitted,

ADOLF L. ENGELKE,
Of Counsel with Appellants.



MITT

HAWMEE

MILL

HAMME