

NEW JERSEY
COURT OF ERRORS AND APPEALS.

Between

SARAH A. HOIT,

Appellant,

and

NATHAN HOIT,

Respondent.

ON APPEAL.

Points of the Brief of Oscar Jeffery,
COUNSEL WITH APPELLANT.

The appeal is taken from a decree advised by Vice-Chancellor Bird.

His opinion is found on p. 24 of the case.

The clause of the will upon which the complainant rests her suit is found p. 4 of the case, and reads as follows:

"If any or either of my children shall enter a caveat against this my last will, he or they shall pay all the expenses on both sides."

I.

There is nothing in that clause that is contrary to the provisions of the Orphans' Court act or any other law. See Revision 756, sec. 20, and 789, sec. 168 and 169.

1st. It impliedly admits the right of the defendant as a

child to contest the validity of the will and also impliedly admits the possibility that the Orphans' Court may decree that the costs be paid out of the personal estate (which is bequeathed to the complainant. See p. 2 of the case, lines 1 to 20)

2nd. There is no forfeiture of the devise except the amount of costs that should be incurred by a contest over the will.

3d. The provisions of the statute *supra* which empower the Court to direct the payment of costs, do not confer jurisdiction upon that Court to construe wills or adjudge upon them except the right to admit them to probate or reject them.

4th. The sections referred to, do no more than give the Orphans' Court the right to direct the costs to be paid in such manner as will insure a speedy settlement of the same, and do not intend to give that Court the power to pass upon the rights any legatee may have in a Court of equity.

5th. The foregoing sections of the Orphans' Court act do not interfere in any way with a testator's right to dispose of his property as he may deem best, nor do they impose any conditions upon him ; they simply empower the Court to provide for the payment of costs, and if any questions arise under the will as to which legatee or devisee should bear the burden, Courts having jurisdiction in equity have the power to settle them as they did prior to the passage of those acts.

6th. That those provisions of the Orphans' Court act do not preclude a Court of equity from enforcing the provisions of the will is seen in the fact that no mode of procedure is adopted in trying such an issue.

The Orphans' Court had no power to pass upon the provisions of the will in any form, and it could not consider them ; they were to be enforced in another tribunal. And further, it does not appear by the record (see case, pp. 16, 17 and 18 in the decree and the other schedules) that at the time the decree directing the executrix to pay the costs was made, the will was before the Court, or that its provisions

were in any way considered, and the Court was not bound to consider them.

7th. The Orphans' Court is limited in its jurisdiction to the following matters :

- (a) The existence of wills.
- (b) The fairness of inventories.
- (c) The right of administration and guardianship.
- (d) The allowance of the accounts of administrators, executors, guardians, trustees. Revision 753, sec. 2
- (e) The trial of suits for the recovery of legacies. Revision 754, sec. 3. The 165th and 166th sections provide the mode of procedure in such suits.

The power to award costs is confined to the litigation of the above matters.

8th. The complainant was the executrix, and she was directed by the Orphans' Court to pay the costs out of the personal estate, and it is not inconsistent with any part of the Orphans' Court act for the complainant to come in a Court of equity as a legatee, to have the provisions of the will enforced.

9th. The will having directed the costs of a contest to be paid otherwise than out of the personal estate, and the Orphans' Court by a statutory power conferred upon it, directed the costs to be paid otherwise without considering the provisions of the will or giving judgment upon the legality of the condition, does not make the provisions of the will invalid, and the decree of the Orphans' Court directing the payment of the costs out of the personal estate, can be no estoppel in this suit, for the following reasons :

(a) The decree in the Orphans' Court was against her as an executrix, and not against her in her individual capacity.

A former recovery, to be an estoppel, must be in an action in which the same question between the same parties was submitted to a Court of competent jurisdiction and was adjudicated.

"A verdict against a man suing in one capacity will not estop him when he sues in another distinct capacity, and in fact as a different person in law.

Comyns, Digest Estoppel C.

The complainant is in the same situation in this suit as though she had not been executrix. If a stranger had acted as executor, the decree of the Orphans' Court could not be interposed in this application for relief.

"A question which has been settled after a full and regular trial and which has been the object of *direct* investigation, and to which parties have had their attention drawn in such manner as to warrant the supposition that a new trial would but repeat the former process only can be rejected. *It would be unjust and dangerous to permit a party to bring up an important question incidentally, then bind conclusively the other party by the result.*"

2d Parsons on Contracts, sec. 40.

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A judgment rendered against a plaintiff in a strict legal proceedings is no bar to a suit in equity upon the same subject matter when the complainant presents equitable grounds of relief *which were not and could not be considered in the former tribunal.*

Staates vs. Bergen, 2d C. E. G., 297.

Affirmed on Appeal " " 554.

"But neither the judgment of a Court having concurrent or exclusive jurisdiction is evidence of any matter between the same parties which came collaterally in question, though within their jurisdiction, *nor of any matter incidentally cognizable.*"

Opinion of DeGrey, Lord Chief Justice in Duchess of Kingston's case.

2d Smith's L. C. 425 (marginal paging)

"An estoppel only operates, in so far as it is certain, and it cannot be extended by intendment or implication to matters which are not clearly within its terms."

2d Smith's L. C., American notes, p. 579, 4th American edition

Hopper vs. Chamberlain, 5th Vr. 220. See page 224.

In this case Mr. Justice Scudder says there will be no intendment or presumption in favor of tribunals exercising a special statutory authority. See p. 226.

The Orphans' Court having only the jurisdiction above referred to, makes the Court a statutory tribunal, and no intendment or implication can be made at least in extending their jurisdiction.

(b) The question of the payment of costs in the Orphans' Court came incidentally in the case; the real questions submitted to the Court were these:

1. Was the paper presented, the will of John G. Hoit?
2. Had the testator testamentary capacity?
3. Was the will made under undue influence?
4. Was it the will of John G. Hoit?

See page 12 of the case.

The question of construing the will or giving force and effect to the last clause was not before that Court.

(c) The bill of complaint ought to be considered as in the nature of a bill asking for a construction of the will; the costs having been paid, the aid of the Court is asked to give force and effect to the provisions of the will.

II.

The clause in the will alluded to is valid.

"A clause in a will that any devisee under it shall not take if he disputes the same, is good, as it tends to prevent litigation.

"In this country any such condition which is reasonable, as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation, will be held valid and binding."

2d Redfield on Wills, ch. 2, sec. 18, pl. 34.

"There is no more reason why a person may not be restrained by a condition from disputing sanity than from disputing any other question of fact or law on which the title to a devise or grant may depend."

Cooke vs. Turner, 14th Vesey. The quotation is found on p. 500 of the vol.

A clause in the following words, "Now if any of my heirs are dissatisfied and goes to law to break this will, then my

will is and I direct that they shall have no part of my estate and debar them from any part of my estate whatever," was held good and the Court held the doctrine cited from Redfield.

Bradford vs. Bradford's Ex'rs, 19th Ohio, 546.

Haggood vs. Houghton, 22d Pick. 480.

"It is an established rule that a condition attached to a legacy is good unless the same is against the policy of the law."

2nd Redfield on Wills, ch. 2, sec. 18, p. 8.

2nd Jarman on Wills, 582, R. and T. Ed., and note thereto. 582 + 584 all yr 584

The condition in the will in this suit is in no way contrary to the provisions of any law, or public policy.

III.

The Court of Chancery has jurisdiction and power to grant the relief prayed for.

The relief sought is that the costs which the appellant as executrix was directed to pay out of the personal estate which was bequeathed to her, may be decreed to be paid out of the devise of the defendant in accordance with the provisions of the will, and is based on the ground that the defendant having accepted the devise under the will which was admitted to probate against his protest, he is bound to comply with all its provisions.

"All matters of election and suits to compel an election are exclusively enforced in Courts of Equity."

2nd Story Eq. Juris, S. 1081.

The will devised a farm to the defendant and his wife, at their death to their children. He accepted the devise and is now in possession of the farm. Having accepted the devise after entering a caveat and making a vigorous contest against its probate, a Court of equity will enforce the election which he made.

The defendant cannot accept the gift and at the same time repudiate the burden imposed upon the gift. If he

accepts the one he accepts both.

“Courts of equity have adopted the principle that a person shall not be permitted to claim under any instrument, whether it be a deed or will, without giving full effect to it in every respect so far as such person is concerned.

1st Bouvier Law Dictionary title election, sec. 7.

The doctrine is conclusively established that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions.

2nd White and Tudor's Leading Cases.

Note to *Streatfield vs. Streatfield*, p. 511.

In connection with this case a note of Mr. Swanton's to *Gratten vs. Haward*, 1st Swanton, 433, is referred to, in which it is stated that to take against the instrument, *Courts of equity* assume jurisdiction to sequester the benefit intended for the refractory devisee in order to secure to those whom his election disappoints.

On p. 541 the American editor says the doctrine rests upon the equitable ground that any one who claims under an instrument is bound to give full effect to that instrument as far as he can. *A person cannot accept and reject the same instrument, or having availed himself of it as to a part, defeat its provisions in any other part.* And this applies to deeds, wills, and all other instruments whatsoever. The following cases are cited :

Willbanks vs. Willbanks, 18th Ill., 18.

Waters vs. Howard, 1st Md. Ch., 112.

McElfresh, Admr., vs. Siple et al., 2d Gill, 180, p. 202.

Field vs. Eaton, 1st Devereaux Eq., 286—287.

Cogdells, Ex'r, vs. Widow, 3d Dessareau, 348—387.

Whildin vs. Whildin, Riley's Ch., 205—207.

Cauffman vs. Cauffman, 17 S. and R., 162—428

Stump vs. Ferdly, 2d Rawle, 168—174.

George vs. Bassing, 15 B. Munroe, 508.

Turreau vs. Turreau, 3d Harris, 430—450.

Patten vs. Moore, 1st Casey, 468.

Smith vs. Gould, 54 Maine, 442.

Glenn vs. Fisher, 6th Jones Ch., 3335.

Smith vs. Gould, 7 W. and S., 238.

He who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions and renouncing every right inconsistent with it.

2d Jarman on Wills, p. 1 (R. and T. edition.)

Ins. Co. vs. Jones, 8 C. E. Green, 171.

Stinson

~~Stinson~~ vs. Brown, 3d Gr. Ch., 508. 503

"It is now a well settled rule in equity that if any person shall take any beneficial interest under a will he shall be held thereby to conform and ratify every other part of the will."

Hughes vs. Baldwin, 17th Pick., 303.

The above quotation is found on page 308.

For the devisee to accept the benefit while he declines the burdens to defraud the design of the donor. In short, Courts of equity in such cases adopt the rational exposition of the will that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions and renouncing any right inconsistent with it.

2d Story Eq. Jur., sec. 1076.

IV.

There is ground for equitable relief.

The testator bequeathed all his personal estate to his wife, the complainant, expressing that only his debts, funeral expenses, the expense of a grave stone, and the costs of settling the estate should be taken out of that fund, and in order to protect the legacy against the burden of the costs that might be incurred by a contest over admitting the will to probate, he expressly provides that such costs should be paid by the child or children who should make the contest, clearly indicating that the complainant [who is the appellant] should have all the personal estate, excepting the four specified items—debts, funeral expenses, costs of settling the estate, and the grave stones [see page 2 of the case, lines 1

to 20]. Without giving effect to the last clause in the will the complainant does not get what the testator intended she should have, and the Court of Chancery should give her what the testator intended she should have.

The intent of the testator is our ground of relief.

"The rule of law is imperious that every clause in a will shall be made to operate if possible."

Somers vs. Pierson, 1st Harr., 181.

It is the duty of the Court to sift out the intention of the testator, and to carry out that intent when it can be done consistently with the rules of law. *Nelson vs. Combs*, 3d Harr., 28, on p. 41 of that case. The Court say "The cases are numerous which go to show that the Court have, and it is their duty to supply necessary words which by the want of knowledge of the testator or the want of skill in the scribe have been omitted, whenever from the whole will it appears that the intent of the testator will be entirely frustrated if such words are not supplied." Again, on same page the Court say "It is the intention which is to direct the construction of a will where the intent is not contrary to law. Citing 1st Atk., 585.

The Court will give effect to the devisor's general intention although they may thereby defeat a particular devise inconsistent therewith.

Doe d. Bean vs. Hally, 8th T. R., 5.

In *Baddely vs. Lippingwall*, 3d Burr, 1535, Mr. Justice Wilmot on p. 1541 says: "The intention of a testator is to be collected from the whole of his will, so as to leave the mind satisfied about what the testator meant; and as a will of lands must be in writing, such collection of the testator's intention must be founded upon the writing itself."

Where the omission of words has been made in the drawing of a will, the omitted words will be supplied to carry out the intent of the testator.

Lowndes vs. Lowndes, 4th Burr, 2246.

Den vs. Combs, 3d Harr., 27.

On p. 38 the Court held that where a testator has omitted words obviously necessary to express his meaning,

and the intention can be plainly gathered from the contents of the will, Courts have considered it their duty to supply such omitted words rather than do violence to his plain intention by pertinaciously adhering to his words without regard to the sense of the instrument.

2d Jarman on Wills, p. 60 [R. and T.] Edition.

Lord Mansfield in *Strong vs. Cummins*, 2d Burr., on p. 70, says the rule of construction of wills is, "That no technical form is necessary to convey the testator's meaning."

There can be no doubt as to the fact that the complainant was to have the personal estate, and to protect it from the burden of costs of a contest the testator expressly provides that the child who should make the contest should pay the costs.

V.

The intention of the testator as expressed in the will is not contrary to public policy or against the statute concerning the Orphans' Court.

As to being against public policy, the charge of the Chief Justice to the jury on the trial in the Circuit Court, found on pp. 14, 15 and 16 of the case, shows the caveat and the whole proceedings on the part of the caveator to have been without any cause and was a piece of useless and expensive litigation, and a shameful exposure of family difficulties and disputes, and it was a wise policy on the part of the testator to try and prevent it.

To be against public policy the conditions of the will must be in restraint of marriage or trade, or against morality. As to make a devise to a son upon condition that he will not live with his wife; such a condition is bad as against public policy.

Neither is the intention of the testator against any statute of our State.

Suppose the last clause of the will had been in this form:
"If my executor shall be directed by the order of any

Court to pay any costs which shall be incurred by any litigation that may arise by reason of a caveat being entered by any of my children against admitting this my last will and testament to probate, and if this my will shall be admitted to probate, then and in that case I direct my executor to collect all costs which he shall be directed to pay by any order of a Court of competent jurisdiction, and all expenses he shall necessarily incur by reason of such litigation, out of the devise hereby devised to the child or children who shall enter such caveat, and in case he or they refuse to pay the same, to sell the lands hereby devised to him or them either at public or private sale; [then proceed to dispose of the proceeds]." It is clear such a clause would not be against any of the provisions of the statute concerning the Orphans' Court. The intention of the testator expressed in the will now before the Court is just the same as if expressed in the form I have improvised.

If the intention of the testator is to govern the Court in the construction of this will, the complainant will be entitled to the legacy bequeathed her without its being despoiled to the amount of one thousand dollars.

The intention of the testator must not be presumed to be in violation of any law, or of public policy, and if any construction can be given to the will that will be consistent with law, such construction is to be adopted. No construction will be put on the will that makes its provisions void, unless the intention of the testator clearly appears to be in violation of the law. This is an elementary principle and needs no citations.

In *Covenhoven vs. Shuler*, 2d Paige, 122, it was held that where the clear intention of the testator is incorrectly expressed, the Court will carry it into effect.

The whole will must be looked through in order to discover the sense of the testator, and when the sense and intention is ascertained, the Court may transpose or if necessary add words such as will carry into effect the intention.

2d Redfield on Wills, 454, 455 and 456.

The prayer of the complainant is not that the Court of Chancery shall annul the judgment of the Orphans' Court or in any wise interfere with it, but that the election which the defendant made to contest the will shall be enforced against him.

The judgment of the Orphans' Court has been satisfied by the complainant out of her legacy. The decree prayed for could not affect it. It had spent its force on the complainant, and she, having borne the heavy burden, comes here to a Court of equity and asks that she may have relief, and the fact that an order of the Orphans' Court directed to her, not as a legatee but as an executrix, can not by any possibility be annulled. The learned Vice Chancellor says that to enforce the provisions of the will is in effect to annul the judgment of the Orphans' Court (see p. 25 of the case, line 10). The error of this statement is very manifest.

(a) It implies that the judgment of the Orphans' Court is an estoppel to the complainant coming to a Court of equity and seeking its aid to enforce the provisions of the will.

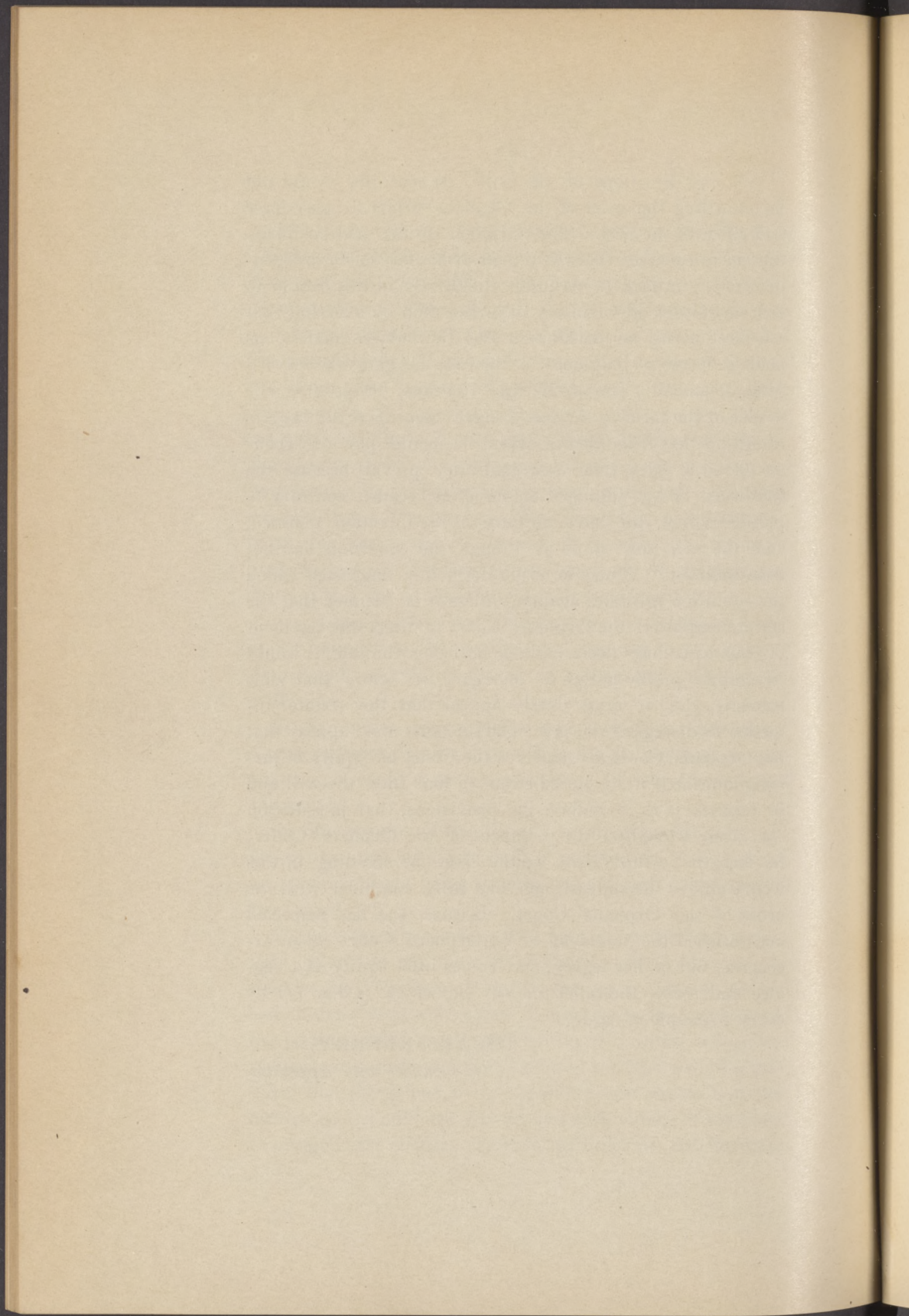
(b) It implies that a testator is precluded by the Orphans' Court act from making a provision for the payment of costs that may arise by a contest over his will, out of any part of his estate.

(c) The opinion of the Vice Chancellor would debar the Court of equity from entertaining jurisdiction of suits which an executor might bring to seek the aid and instruction of the Court.

Suppose the complainant had been a stranger and having been ordered to pay the costs as she was, and had come into the Court of equity and stated that as executrix she had been ordered by the Orphans' Court to pay the costs out of the personal estate, and exhibited the will which bequeathed the personal estate to the widow, and that the will also provided that the defendant who filed a caveat was to bear that burden, and should ask the aid and instructions of the Court to reconcile the conflict between the order of the Orphans'

Court and directions of the will. It certainly would not be annulling the order of the Orphans' Court to give force and effect to the will. The Orphans' Court had no jurisdiction to construe the will; their order was made independent of it; in fact, to maintain the decree in this case is to oust the Court of Chancery of jurisdiction by averring that a Court having no jurisdiction over the subject matter has made a decree or judgment in the case. Again the learned Vice Chancellor [on p. 27, line 10] says, "Supposing the devise of the farm to the son to have been upon the express condition that if he filed a caveat he should pay all expenses on both sides, this view could not prevail because the condition being adjudged of no effect because contrary to public policy, can have no force in the direction claimed, and the will must stand as though the condition had not been inserted." There is no public policy suggested which the condition militates against, unless it is the fact that the statute empowers the Orphans' Court to direct the payment of costs as it may deem best; such being the law it would be against public policy to disregard it; before that view prevails, [1st] it must clearly appear that the testator intended to disregard the law; [2d] it must also appear that the Orphans' Court act deprives the Court of equity of jurisdiction, for if it has jurisdiction to look into the will and so construe it as to enforce its provisions, that jurisdiction can in no way affect the judgment of the Orphans' Court; in fact, the complainant would have no standing in this Court unless she showed she had fully complied with the order of the Orphans' Court. Because she has respected and satisfied the judgment of the Orphans' Court as an executrix, out of her legacy, she comes into equity as a legatee and seeks the relief prayed for, which is due her by every principle of equity.

OSCAR JEFFERY,
Of Counsel with Appellant.



IN CHANCERY OF NEW JERSEY.

Between

SARAH A. HOIT,

Compl't,

and

NATHAN HOIT,

Deft.

ON BILL.

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OSCAR JEFFERY,

Solicitor. 20

[Filed Dec. 9, 1885.]

TO THE HON. THEODORE RUNYON, Chancellor of the State
of New Jersey :

Humbly complaining, your oratrix, Sarah A. Hoit, of the township of Oxford, in the county of Warren, State of New Jersey, showeth unto your Honor that she is the widow of John G. Hoit, deceased, late of the said township of Oxford aforesaid, who died in the month of April, A. D. 30 eighteen hundred and eighty-four, and that before his death to wit, on or about the day of August, A. D. eighteen hundred and eighty-two, he made his last will and testament, in words following, to wit :

In the name of God, Amen. I, John G. Hoit, of the township of Oxford, in the county of Warren and State of New Jersey, being of sound and disposing mind and memory, make and publish this my last will and testament as follows: First—I give, bequeath and devise unto my be-40

loved wife, Sarah A. Hoit, all that portion of my farm at Buttzville (known as the Vassbinder farm) lying on the north side of the Warren railroad, also a wood lot adjoining George Wildrick's and Selden T. Scranton, containing about twenty acres, during the term of her natural life; I also give, bequeath and devise unto my wife the house and lot containing about five acres in Hope township (known as
 10 the Drake lot), adjoining the grave yard, in fee simple, she to sell, use or dispose of as she may desire, and if she sells, she to use the proceeds, and her deed to be good; also I give and bequeath unto my wife all of my personal property, all live stock, household goods, farming tools and machinery, bonds and mortgages, notes, book accounts, and all personal property of all kinds to be at her own disposal, and she to pay all my just debts and funeral expenses and other expenses and the expenses of erecting a monument over our graves to cost not less than four hundred dollars.

20 Item. I give, bequeath and devise to my son, Nathan Hoit, and his wife Ellen, all that tract or parcel of land (known as the Frome farm) in Oxford township, contains about one hundred and seven acres and seventy eight hundredths more or less, during the term of their natural lives; and after their death to be sold, the proceeds after the expense of burial and grave stones are taken out to be equally divided between Nathan Hoit's children share and share alike (except Nathan's son John, he to have one hundred dollars the most, because he is named after me)

30 Also I give my son Nathan a wood lot on the high rock mountain adjoining lands with Stewart B. Hoit and S. T. Scranton's land:—Beginning at the foot of the mountain at a pair of bars, the northwest part is to be the corner and the line is to run along the foot of the mountain to S. T. Scranton's, the distance along Scranton's line is to be one hundred yards shorter, the line along Stewart B. Hoit's so as to leave the lot below in good shape; this wood lot is to be Nathan's and his wife during their natural life and after their death to be sold, and the proceeds divided among Na-
 40 than's children share and share alike.

Item. I give, bequeath and devise to my son, John B. Hoit, the farm (known as the Beaver Brook farm):—Beginning at the west side of the stone bridge adjoining lands of Charles Barton, this corner must be made six feet from the bank of the creek from low water mark, thence up the creek forty feet to another corner, the same distance from low water mark (six feet), thence across the creek a south-east course to the fence forty feet from bridge or road, thence 10 up the fence to Moses Albert's line, then to Dill's line, thence to Acker's line, thence along the Drake line to the end of a lane east of the barn and then to a corner of said fence, and there to make a corner on said fence running southwest to the public road, and then to follow the road to the place of beginning, containing about one hundred and twenty acres more or less, during the term of his natural life, and at his death to be sold and the money to be divided as follows:—Sarah A., his daughter, to have two hundred dollars, and John, his son, to have two hundred 20 dollars, and his other children each to have one hundred and fifty dollars, after the funeral expenses and grave stones for said John B. Hoit are paid; the balance of the money to be equally divided between my own sons, the youngest of my sons to administer on the property and sell the same and divide the proceeds as above described.

Item. I give, bequeath and devise unto my son Stewart B. Hoit, the farm (known as the Ash Swamp farm) in the township of Hope, beginning in the forks of the road leading from Townsbury to Buttzville by the way of John Al-30 bert's and the Anderson farm (the private road to be the line out to the turn opposite the lime kiln), then the line shall follow the fence to the top of the mountain which will be called the west corner to Scranton's line, thence along Scranton's line to Parks' line, thence to Babcock's line, thence along Babcock's to Charles H. Cook's line, thence to Scranton's and along Scranton's line to said road, and thence along the said road to the place of beginning, containing one hundred and twelve acres more or less, during the term of his natural life, and at his death to be sold, and 40

the proceeds thereof, after the funeral expenses and grave stones are paid for, then each of his own children to have one hundred and fifty dollars and the balance to go to my sons that may be living, the youngest son living to administer on the property.

Item. I give, bequeath and devise to my son, Lewis B. Hoit, the farm (known as the Drake farm) in the township
10 of Hope, except the house and lot by the grave yard; I also give, bequeath and devise to the said Lewis B. Hoit all the James Iliff lot except one field which I have left to John B. Hoit; the said Lewis B. Hoit to have all during the term of his natural life, and at his death to his children, if any; if he should die without leaving any children, then to my remaining living children, funeral expenses and grave stones to be first paid.

Item. I give, bequeath and devise unto my son, Caleb B. Hoit, all that tract of land on the southeast side of the
20 Warren Railroad, what I own of that tract at my death, six acres of the said land adjoining Buttzville he can sell and dispose of as he sees fit, and his deeds for the same to be good; the balance of the land he shall hold for life and after his death to his children, if any; if he die without children then to his living brothers, also my son, Caleb B. Hoit, to have all the land on the northwest side of the Warren Railroad of the Vassbinder farm after the death of my wife during his life, also the twenty wood lot left to
30 death to be disposed of as the first mentioned lot devised to my son Caleb. If any or either of my children shall enter a caveat against this my last will, he or they shall pay all the expense of both sides.

And lastly I hereby constitute and appoint my beloved wife, Sarah A. Hoit, executrix of this my last will and testament.

In witness whereof, I have hereunto fixed my hand and seal this day of August, A. D. eighteen hundred and eighty-two.

Sealed, published and declared by the said John G. Hoit to be his last will and testament in the presence of us, who were present at the same time and saw him sign the same, and subscribed our names as witnesses in the presence of the testator and of each other.

N. B.—The words “his death to” interlined on last page before signing.

WM. M. MACKEY, 10
JOHN S. COWELL.

And your oratrix further shows unto your Honor that Nathan Hoit, one of the devisees named in the said last will and testament, and one of the children of the said John G. Hoit, did on or about the 24th day of April, A. D. 1884, file in the Surrogate's office of the county of Warren aforesaid, a caveat against the said last will and testament, a copy of which said caveat is hereto annexed and marked Schedule [A], and on or about the 26th day of April, A. D. 1884, he, the said Nathan Hoit, filed in the said Surrogate's office another caveat against the said will, a copy of which caveat is hereto annexed and marked Schedule [B], and citations were issued and such proceedings were had in the Orphans' Court of the said county of Warren that the same were certified into the Circuit Court of said county, in pursuance of the statute in such case made and provided, as will appear by the record of the order granted by the said Orphans' Court on the 13th day of June, A. D. 1884, a copy of which order is hereto annexed and marked Schedule [C].

And your oratrix further shows unto your Honor that an issue was made up in pursuance of the said statute, signed by James M. Robeson, attorney of the said caveator, Nathan Hoit, and by Joseph M. Roseberry, attorney of your oratrix, the proponent of the said last will and testament, and the case came on for trial before his Honor, Mercer Beasley, Chief Justice, the Judge of the said Circuit Court, and a jury at the December term of the year eighteen hundred and eighty-four, and after the subscribing witness-40

es were sworn and the evidence of the caveator had been submitted, the Chief Justice charged the jury to bring in a verdict for the proponent, which the jury did as appears by the certificate of the said Chief Justice and a copy of the said charge to the jury, copies of which are hereto annexed and made a part of this bill and marked Schedules [D] and [E].

- 10 And your oratrix further shows unto your Honor that on the third day of April, A. D. 1885, the Orphans' Court entered a decree admitting the said last will to probate, and directing that letters testamentary should issue to your oratrix, and in said decree did order and direct that all the costs on both sides, should be paid by your oratrix out of the said estate, and that a counsel fee of one hundred and twenty-five dollars should be paid to J G Shipman & Son proctors and counsel for said caveator, and that one hundred dollars counsel fee be paid Henry S. Harris, Esq., one of the
- 20 counsel of the said caveator ; a copy of the said decree of the Orphans' Court is hereto annexed and marked Schedule [F]. And your oratrix further shows unto your Honor that the costs of your oratrix in the said Circuit Court, were taxed at the sum of one hundred and fourteen dollars and seventy-nine cents ; a copy of said taxed costs is hereto annexed and marked Schedule [G]; and the said clerk taxed the costs of the caveator at the sum of seventy-six dollars and seventy-four cents ; a copy of which said costs are hereto annexed and marked Schedule [H].
- 30 And your oratrix further shows unto your Honor, that the said Warren County Orphans' Court, on the 14th day of May, A. D., 1885, without the knowledge of your oratrix, opened the decree of the said Court, made on the third day of April, A. D., 1885, and amended the said decree by allowing to Chauncey H. Beasley, Esq, one of the counsel of your oratrix in the trial of the said will in the said Circuit Court, a counsel fee of one hundred and fifty dollars ; a copy of which decree is hereto annexed and marked Schedule [I].
- 40 And your oratrix further shows unto your Honor, that

on the tenth day of June, A. D., 1885, the said Orphans' Court again opened the decree made on the 3rd day of April 1885, without the knowledge and consent of your oratrix and amended the said decree by allowing to Joseph M. Roseberry, jr., Esq., one of the counsel of your oratrix. a counsel fee of one hundred and fifty dollars, a copy of which amended decree is hereto annexed and marked Schedule [J].

And your oratrix further shows unto your Honor, that on 10 the 8th day of July, A. D., 1885, George M. Shipman, Esq., (one of the firm of J. G. Shipman & Son,) one of the proctors of Nathan Hoit, the caveator, made application to the said Orphans' Court for an order that a writ of execution issue against your oratrix, for the payment of the costs in the said matter, and the said Court on the 8th day of July aforesaid, ordered that a copy of the decree admitting the will to probate, made on the 3rd day of April, A. D., 1885, and the amendments thereto, also a certified copy of the taxed bill of costs in the matter be served on your oratrix ; a 20 copy of which order is hereto annexed and marked Schedule [K].

And your oratrix further shows unto your Honor, that on the 9th day of July A. D., 1885, William O'Niel, Surrogate of the county of Warren, served a copy of the said decrees and a copy of the taxed bill of costs; a copy of which is hereto annexed and marked Schedule [L].

And your oratrix further shows that was the first time she ever knew that a counsel fee was awarded to her counsel, that it was done without her knowledge and that as soon as 30 she learned of the facts, she took immediate steps to have the decree of the Court set aside. She employed a counsel and appealed the cause to the Prerogative Court of New Jersey ; she filed the notice of appeal on the 14th day of July, A. D., 1885 ; the appeal was brought to a hearing before the Ordinary on the 20th day of October, A. D., 1885, and on the 18th day of November, A. D., 1885, the Ordinary filed an opinion dismissing the appeal because the same was not taken within thirty days, but your oratrix shows that she appealed promptly as soon as she learned the decree. 40

And your oratrix further shows unto your Honor that on the 13th day of July, A. D., 1885, the said Orphans' Court ordered and directed that a writ of execution do issue out of the said Orphans' Court, for the said taxed bill of costs and the writ of execution so ordered, was drawn and sealed commanding the Sheriff of the County of Warren, to make the sum of eight hundred and eighteen dollars and 10ninety-eight cents, and the said Sheriff made a levy on the goods and chattels of your oratrix and advertised the same for sale, but your oratrix procured a restraining order from the Ordinary restraining the Sheriff from selling until the further order of the Court, and your oratrix further shows that as soon as her appeal was dismissed, she took steps to pay off the said execution, and on the 24th day of November, A. D., 1885, she paid the Sheriff of the said County of Warren, the amount of the said execution and costs, which 20and twelve cents, being the amount of costs, interest and execution fees; and your oratrix paid to J. G. Shipman & Son, the sum of nineteen dollars and thirty-two cents, the costs of the respondent on the appeal, and that her own costs on the said appeal were taxed at the sum of twenty-six dollars and eighteen cents, which she has paid; and that she has paid to Oscar Jeffery, her counsel on appeal, the sum of one hundred and five dollars, for counsel fees and services in conducting the said appeal, and that she paid to the Surrogate \$13.80 for transcript; which sums of 30money your oratrix has been compelled to pay on account of the caveat of the said last will, which said costs amount in the aggregate to the sum of one thousand and twenty-three dollars and forty-two cents.

And your oratrix further shows unto your Honor, that the said Nathan Hoit accepted the devise given him in the said last will, that he entered upon the said farm and occupied the same and still does occupy the same under the terms of the said last will and testament; and your oratrix shows by the terms of the said will, 40he should have paid all the costs, and that having filed

a caveat against admitting the said last will to probate, your oratrix has been compelled to pay all the costs out of her legacy, and the whole burden has fallen upon her and that said Nathan Hoit has refused to pay your oratrix the said costs and expenses or any part thereof, though he has been requested so to do; that the said caveat was without any cause as set forth, in the said charge of the Chief Justice aforesaid, which has been set forth as hereinbefore stated. 10

And your oratrix further shows unto your Honor, that the said Nathan Hoit knew by the terms of the said last will and testament he would have to pay all of said costs, and that your oratrix having been compelled to pay them, she is entitled to be reimbursed out of the estate devised to him the said Nathan Hoit in the said last will and testament.

All which actings, doings and pretences are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your oratrix in the premises.

In tender consideration whereof and forasmuch as your 20
oratrix is without adequate remedy in the premises at and by the strict rules of the common law and can only obtain relief in this Honorable Court where matters of this nature are properly cognizable and relievable. To the end therefore that the said Nathan Hoit may without oath to the best and utmost of his respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here again repeated and he distinctly interrogated thereto, and more es-30
pecially may in manner aforesaid answer and set forth whether the said John G. Hoit deceased, did not make, publish and declare the aforesaid will, as his last will and testament as above set forth and whether he did not file a caveat as hereinbefore stated and whether the courts did not make the decree aforesaid, and whether your oratrix did not pay the costs as above stated, and if the said costs above set forth did not amount to the sum of one thousand and nine dollars and sixty-two cents, and whether he the said Nathan Hoit did not accept the devise under the said last40

will and testament, and if he does not still enjoy and occupy the farm so devised to him.

And your oratrix prays that he the said Nathan Hoit, may be decreed to pay to your oratrix, all the costs she has been compelled to pay by reason of the costs and expenses in contesting the caveat against the said will and testament out of said devise or otherwise, as this Honorable Court may
10 direct, and that your oratrix may have such other and further relief in the premises, as to your Honor may seem meet and agreeable to equity and good conscience.

May it please your Honor the premises considered to grant unto your oratrix the State's writ of subpœna issuing out of and under the seal of this Honorable Court, to be directed to the said Nathan Hoit, commanding him by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then
20 and there to answer all and singular, the said premises and to stand and abide by and perform such order and decree therein as to your Honor shall seem meet and be agreeable to equity and good conscience.

And in duty bound will ever pray, &c.

OSCAR JEFFERY,

Sol. for and of Counsel with Complainant.

SCHEDULE A.

To Martin C. Swartsweller, Surrogate of the County of
Warren: 10

I, Nathan Hoit one of the children and heirs of John G. Hoit, late of the township of Oxford, in the County of Warren, deceased, do hereby caveat and protest against admitting to probate any paper purporting to be the last will and testament of the said until examination and decree thereon by the Orphans' Court of said County of Warren.

Witness my hand this twenty-second day of April A. D. 1884.

NATHAN HOIT.

Caveat filed April 24, 1884. 20

SCHEDULE B.

To Martin C. Swartsweller, Surrogate of the County of
Warren.

I, Nathan Hoit one of the children and heirs-at-law of³⁰ John G. Hoit, late of the township of Oxford, in the County of Warren, deceased, do hereby caveat and protest against admitting to probate any paper purporting to be the last will and testament of the said John G. Hoit, until examination and decree thereon by the Orphans' Court of Warren.

Witness my hand this twenty-sixth day of April, 1884.

NATHAN HOIT.

Caveat filed April 26th, 1884.

SCHEDULE C.

WARREN COUNTY ORPHANS' COURT.

In the matter of the alleged Will of John G. Hoit, certified for trial by Jury in Warren Circuit.

The above named proponent having presented a paper purporting to be the last will and testament of John G. Hoit, late of Warren County, deceased, to the Surrogate of said County, and the above named caveator having filed his caveat within ten days after the death of the said John G. Hoit against the same, and the Surrogate having cited all persons interested in the estate of the said John G. Hoit, deceased, as heirs-at-law, next of kin or devisees under said alleged will, to appear before the said Court, to show cause why said will should not be admitted to probate, and the said matters and the same parties being now before the Court.

It is on this thirteenth day of June A. D., eighteen hundred and eighty-four, upon the affidavit and application of caveator, ordered that the following questions involved in this case, be certified into the Circuit Court of said County of Warren for trial before a jury, pursuant to the statute in such case made and provided.

FIRST—Was the paper presented for probate, purporting to be the last will and testament of John G. Hoit, deceased, signed, witnessed and declared by him according to the statute in such case made and provided.

SECOND—Was the said John G. Hoit, at the time of making and declaring said will, of sound mind, memory and understanding sufficient to make and publish a will.

THIRD—Was the making, signing and publishing of said alleged will, procured through undue influence, imposition or fraud from or by the devisees or legatees named in said will or by any other person or persons.

FOURTH—Is the said paper purporting to be a last will now presented for probate by the proponent, the last will and testament of John G. Hoit, deceased.

S. W. DEWITT,
GEORGE H. BEATTY, } *Judges.*

SCHEDULE D.

WARREN CIRCUIT COURT,
December Term, 1884.To the Judges of the Orphans' Court of the County of
Warren

I, Mercer Beasley, Judge of the Circuit Court of the County of Warren, do hereby certify that the issues in the¹⁰ matter of the probate of a paper writing, purporting to be the last will and testament of John G. Hoit, deceased, came on to be tried *pro ab* the same hereto annexed, before the Circuit Court, holden at Belvidere, in and for said County of Warren, on the fourteenth day of January, in the year of our Lord, one thousand eight hundred and eighty-five, before the said Court and a jury impanelled and sworn to try said issues. The counsel for proponent opened the case to the Court and jury and the Court and jury having heard the evidence of the subscribing witnesses to said will, and²⁰ the evidence of witnesses for the caveator and the argument of counsel for the caveator; thereupon the Court delivered his charge to the jury and instructed the jury that by law they were bound to return a verdict in favor of the proponent of said will, and jury having considered of their verdict, agreed upon a verdict upon all the issues, and being asked by me, say that they find upon all the said issues in favor of the proponent. And I do further certify and return to the Orphans' Court the testimony given at the trial reduced to writing, a copy of the charge to the jury, together³⁰ with all exceptions reduced to writing, which were taken at the trial to the admission or rejection of testimony, or to the charge to the jury and a certified copy of the costs which have been taxed and a statement of the expenses of the said trial.

Witness my hand this fourteenth day of February, A. D. eighteen hundred and eighty-five.

M. BEASLEY, C. J.

Filed March 4, 1885.

SCHEDULE E.

Charge to the Jury.

THE COURT.—I have been engaged in a good many of these cases both as counsel and as judge, and I have read about a good many cases, but I have never yet seen an attempt made to overthrow a will because a man's wife was a
10 termagant. That is about in my view what this case is and nothing else, and counsel seem boldly to take the ground that for the last ten years, this man who is now dead, who moved among his neighbors and known to be possessed of intelligence, worked his own farm, transacted his own business, according to the theory now set up, for the last ten years or something like that he has been incapable of making a will, if he makes a will it is the will of his wife, or his children or some of them. Now I haven't seen a single fact
20 in this case that would lead any rational man to draw the conclusion, that there was either fraud practiced in obtaining this will, or any undue influence about it, even if we admit that the wife was a passionate woman, and in some instances controlled the husband. There is no evidence here, not a particle, to show that with regard to this will she exercised any influence at all. It may be that in some of its features that the husband and wife agreed about their children and their deservings, that is very probable, and it may be that the wife knew of what the husband had done and that the son knew.

30 It appears in evidence that the old man wanted to tell one of the sons, and why shouldn't he have told the son, the son that lived at home with him or his own wife as to the provisions of the will. The idea that if I tell my family or my wife, what is in my will, it is evidence that I have been subject to undue influence, or that any other man under similar circumstances, is subject to undue influence is intolerable. Here is a man in the full possession of his faculties as evidently as this man was; under the evidence, beyond a doubt there hasn't been a single instance mentioned when his
40 ability failed. As to the opinion of one witness, that he was

not what he had been, amounts to nothing at all; as all know that the idea of a man coming in and saying another man's mind was'nt as strong as it was before amounts to nothing at all, he has got to base it upon facts. But here we have a man of that character, in the full possession of his mind, unimpaired in any way. How does he make his will? He makes his own memorandum as far as we know, takes that memorandum by himself, consults a lawyer about 10 it, has two or three interviews with that lawyer, directs the whole thing himself, not a particle of evidence to show that anybody ever mentioned the word will to him or told him how to make it or endeavored to get him to make it, or attempted to control him in any way, or desire him in any way, not a particle; and then we are told that that man, the evidence is, was under undue influence. I don't think there is any case can be found in any book that has ever been published, where such evidence as this was presented—presented by anybody—to be urged by any body, then, in 20 no case. Why the verdict couldn't stand a moment. If any jury could be found so ridiculous as to say that that old man was not competent to make this will, in the way he did, why the verdict would be set aside instantly, it wouldn't stand in any court, in my judgment, and I wish it to be understood in the county. I should be unwilling to let it be understood in this county, that wills of men in their senses can be broken down in this way, by guess work and suspicion and because a woman is high tempered and the husband chooses in order to have peace in some instances to 30 give way to her and submit to her, when she is in a passion; the idea of saying when a man makes a will and executes it, that that will can even be drawn in question; I wish it to be understood that my idea is that it cannot be.

I know very well in the city of New York wills of this kind are contested; why to use the language of one of the English Justices, "it adds additional honor to death." Why a man in New York can't make a will, (it is so bad,) if he is wealthy but runs a risk of having his will contested; they are not satisfied, they think it is an unjust will, they don't 40

know what influences have been at work, but they say it isn't a fair will, and they go at work in any case, no matter what his abilities are, how he is in possession of his faculties, they contest it. It is gravely talked of in New York to pass a law, it has come to such a pass, this contesting of wills, is such a public nuisance, such a public outrage, that they have actually discussed in New York, some means of
 10 abating it, it has been proposed that if a man files his will, so long before his death, unless they contest it while he is living, they shall not contest at all.

I am happy to say that we have not arrived at that pass in New Jersey, we don't allow wills to be contested on slight grounds here. There must be some substance in the contest of a will and I never before heard of a man in the full possession of his faculties, making his own will, going and having it executed, drawing it himself, giving his own instructions; I never before heard of any attempt to break down a will of
 20 that kind, this is the first case, and I therefor say that I shall instruct the jury immediately, that by the law they are bound to return a verdict in favor of the proponents of this will. I instruct the jury as a matter of law and give counsel on the other side an exception.

Exception taken by counsel for caveators.

A. B. C. SALMON, *Stenographer*.

Filed March 4th, 1885.

SCHEDULE F.

Decree.

Whereas upon the application of Nathan Hoit, caveator herein, this Court certified to the Circuit Court, in and for the county of Warren, to be tried before the said Court and a jury, upon an issue to be framed by the judges of said Circuit Court, the following questions involved in the controversy, concerning the probate of the alleged will of John G. Hoit, deceased.

40 FIRST—Was the paper presented for probate, purporting

to be the last will and testament of John G. Hoit, deceased, signed, witnessed and declared by him according to the statute in such case made and provided.

SECOND—Was the said John G. Hoit, at the time of making and declaring said will, of sound mind, memory and understanding sufficient to make and publish a will.

THIRD—Was the making, signing and publishing of said alleged will, procured through undue influence, imposition or fraud from or by the devisees or legatees named in said will or by any other person or persons.

FOURTH—Is the said paper purporting to be a last will propounded for probate by the proponent, the last will and testament of John G. Hoit, deceased.

And the certificate of this Court having been filed with the Clerk of said Circuit Court, an issue was agreed upon by the attorneys of the caveator and the attorney of the proponent of the will, and a trial had in the ordinary manner of causes commenced in said court; that at the conclusion of said trial the proceedings thereon had and the verdict of the jury, and the testimony and a copy of the charge to the jury, together with all exceptions reduced to writing, which were taken at said trial to the admission or rejection of testimony or to the charge to the jury, and a certified copy of the costs and statement of the expense of said trial, being duly certified to our said Court, and filed in the office of the Surrogate.

It is on this third day of April, A. D., 1885, on motion of J. M. Roseberry, Jr., proctor for proponent Sarah A. Hoit, ordered and decreed that the paper writing purporting to be the last will and testament of John G. Hoit, deceased, is the last will and testament of John G. Hoit, deceased, by the finding of the jury upon the above issue, framed and tried in the Circuit Court of Warren County, and that the said last will and testament of John G. Hoit, deceased, is hereby admitted to probate and that letters testamentary issue thereon to Sarah A. Hoit, named as executrix in said last will and testament. And it is further ordered that the costs on both sides, including counsel fees be paid out of the 40

personal estate of John G. Hoit, deceased, and that one hundred dollars be paid to Henry S. Harris, and one hundred and twenty-five dollars to J. G. Shipman and Son, proctors of Nathan Hoit, caveators.

S. W. DEWITT,
 GEORGE H. BEATTY, } *Judges.*

10

SCHEDULE I.

Amended Decree.

WARREN ORPHANS' COURT, May 14, 1885.

20 Chauncey H. Beasley, one of the Counsel for the proponents in the above stated matter, having made application to this Court for counsel fee, for services rendered, while engaged as such counsel as aforesaid.

30 It is on this 14th day of May, A. D., 1885, ordered and decreed, that the final decree admitting the said will to probate, be amended so as to read, that Chauncey H. Beasley, one of the counsel of said proponent, be allowed a counsel fee of one hundred and fifty dollars, to be paid out of the estate of the said John G. Hoit, deceased, said counsel fee to be inserted in the taxed bill of costs.

S. W. DEWITT,
 GEO. H. BEATTY,
 U. CANFIELD,

Judges.

40

SCHEDULE G.

Proponent's Costs in Circuit Court.

	Att'y	Cl'k.	C't.	Als.
Vacation and April Term, 1884.				
Retaining fee,	1.00			
Motion for entering suit in Circuit,	2.05	28	2.00	10
Filing papers in Circuit,		8		
Entering, recording and filing issue,		1.00		
Certified copy of issue,		1.50		
Motion that issue be framed & filed,	1.25	18		
Term and Crier's fees,	80	9		
Vacation and September Term, 1884.				
Notice of trial for Def't.,	20			
1 Subpœna, seal, &c.,	34	14		
1 Ticket & service,	10			35
1 foreign witness 1 day and mileage,				6.00
Term and Crier fee,	80	9		20
Vacation and December Term 1884.				
Notice for trial for Def't.,	20			
2 Subpœnas, seal, &c.,	68	28		
25 Tickets and service,	2.50			8.75
Clerk and Crier swearing 3 witnesses		36		
17 Domestic witnesses 131 days,				55.00
1 Foreign witness 8 days and mileage				13.00
Clerk taking and entering verdict,		20		
Breviat and attorney,	2.54			
Taking and ent verdict & c't. trial fee		20	3.00	
Motion for judg't. nisi and clerk en't.	2.05	30		30
Motion for judgment final.	1.25	18		
En't., signing and recording judg't.		1.08	2.00	
Drawing, taxing and filing costs,	70	78		
Term and Crier fees,	80	9		
Certified copy of costs,		50		
	17 26	7.43	7.00	83.10
	7.43			
	7.00			
	83 10			
	\$114.79			40

20 COURT OF ERRORS AND APPEALS.

Taxed at the sum of one hundred and fourteen dollars and seventy-nine cents.

Dated May 24th, 1885.

WM. L. HOAGLAND, Clerk.

Filed March 4, 1885.

Costs in trial of proponent.

10

SCHEDULE H.

Costs of Caveator in Circuit Court.

	Att'y	Cl'k.	C't.	Als.
Vacation and April Term, 188				
Retaining fee,	1.00			
Term and Crier's fee,	80	9		
Vacation and September Term, '84.				
20 Notice of trial, copy, service and fil'g.	45	8		
Venire, seal and service,	60	48	200	1.00
Term and Crier's fee,	80	9		
Vacation and December Term, 1884.				
Notice of trial, copy and service, &c.	60	48	200	1.00
Motion for trial,	1.25	18		
Motion for Sheriff to return panel,	1.25	18		
4 Subpœnas, seal, &c.,	1.36	56		
15 Tickets and service,	1.50			5.25
Clerk & Crier swearing jury & cons't.		38		
Swearing 16 Witnesses,		1.92		
30 13 Witnesses 25 days,				32.50
2 Foreign witnesses 10 days & mile'g				13.00
Breviat and Counsel fee,	2.54			
Drawing and taxing costs, &c.,	70	78		
Certified copy of costs,		50		
Term and Crier's fees,	80	9		
	14.10	5.89	400	52.75
	5.89			
	4.00			
	52.75			
	76.74			

40

Taxed at the sum of seventy-six dollars and seventy-four cents.

Dated May 24, 1885.

WM. L. HOAGLAND, Clerk.

Costs on trial of Caveator.

Filed March 4, 1885.

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SCHEDULE J.

Amended Decree.

WARREN ORPHANS' COURT, June 10, 1885.

Joseph M. Roseberry, jr. proctor and one of the counsel of proponent in the above stated matter, having made application to this Court for counsel fee, for services rendered while engaged as such counsel as aforesaid.

It is on this tenth day of June, A. D., 1885, ordered and decreed that the final decree admitting the said will to probate, be amended so as to read, that Joseph M. Roseberry, jr., one of the counsel of the said proponent be allowed a counsel fee of one hundred and fifty dollars, to be paid out of the estate of the said John G. Hoit, deceased, said counsel fee to be included in the taxed bill of costs.

S. W. DEWITT,
GEO. H. BEATTY,
U. CANFIELD,

Judges.

STATE OF NEW JERSEY, }
WARREN COUNTY } ss.

30

L. S. I, WM. O'NEIL, Surrogate of the County of Warren, do hereby certify the foregoing to be true copies, as the same appears upon the records of the Orphans' Court of said County.

Witness my hand and seal of office, this ninth day of July, A. D., 1885.

WM. O'NEIL, *Surrogate.*

40

10

SCHEDULE K.

Order for Execution.

WARREN ORPHANS' COURT, July 8, 1885.

George M. Shipman, one of the proctors in the above stated matter, having made application to the Court, for an order for a writ of execution against Sarah A. Hoit, the executrix of John G. Hoit, deceased for the payment of the costs in the said matter. The Court ordered that a certified copy of the decree admitting to probate the will of the said John G. Hoit, deceased, and of the amendments thereto, also a certified copy of the taxed bill of costs in said matter, be served upon Sarah A. Hoit, and a demand for the payment of the same, and upon the filing of the proof of such service, said order would be made directing a writ of execution to issue.

30 By the Court,

WM. O'NEIL, *Clerk.*

40

SCHEDULE L.

Costs in Orphans' Court.

WARREN ORPHANS' COURT, April Term, 1885.

	Als.	C't.	Cl'k.
1884, May 23, Issuing & sealing 3 citation,			1.50
Appointing to serve do			50
Sheriff serving do	7.80		
June 2, Copy of Will,			1.50
4, 1 sub. 2 tickets on part of			10
proponent,			73
13, Filing petition,			10
Reading do			12
Recording do			50
Court fee on order,		20	
Filing,			10
Recording do			50
Aug 31, Certified transcript,			3.75
Costs of proponent in Cir-			
cuit Court,	114.79		
do Caveator,	76.74		
1885, April 3, Decree adm'g. will & pro'b.		80	20
Entering Decree,			1.00
Filing do			10
Order amending decree,		20	
Drawing, ent. & filing order			75
Filing testimony,			10
Taxed bill of costs,			20
Taxing costs, Orphans' Ct.			1.30
Stenographer & Clerk for			
transcript,	57.00		22.80
Filing certificate, Judge &			
Court fee,			10
J. G. Shipman & Son, coun			30
sel fee,	125.00		
Henry S. Harris,	100.00		
Chauncey H. Beasley,	150.00		
Joseph M. Roseberry,	150.00		
Order amending decree,		20	
Entering & filing order,			60
Others,	781.33	140	36.25
Court,	1.40		
Clerk,	36.25		
	8189.8		40

The Surrogate taxes the above bill of costs at the sum of eight hundred and eighteen dollars and ninety-eight cents.

W. M. O'NEIL, *Surrogate*.

A true copy,

G. S. DURYEE, Clerk.

10

OPINION.

HOYT v. HOYT.

The testator said, in his will, that if any of his children filed a caveat against the probate of his will, he should pay all the costs; in case a caveat is filed, the statute authorizes the Orphans' Court to order the costs, expenses and counsel fees to be paid out of the estate: The Orphans' Court ordered all costs and expenses paid out of the estate; HELD, that the provisions of the will must give way to the statute; HELD, also, that the doctrine of election cannot be applied in such case.

20

ON DEMURRER TO BILL.

Mr. J. G. Shipman, *for the Demurrer*.

Mr. Oscar Jeffery, *Contra*.

BIRD, V. C.

It is said there is no equity in this bill. It is also said that the question involved has been adjudicated in a suit between the same parties before a competent tribunal.

30 The complainant is the widow of John G. Hoyt, who made his will and made his wife executrix and also a legatee. The defendant is the son of John G. and also devisee under the will. One of the clauses of the will was in these words: "If any or either of my children shall enter a caveat against this my last will, he or they shall pay all the expenses on both sides." Nathan, the defendant, filed a caveat, and the questions raised thereupon were finally disposed of, and the Orphans' Court directed the costs to be paid out of the personal estate, which to the whole extent
40 thereof affected the legacy given to the widow. The bill is

framed upon the theory that the clause imposing the condition upon the children is legitimate, and that whatever might have been right and proper for the Orphans' Court to do under the statute in this State, this Court has the right to enforce such provision of the will and thereby effectually to annul the judgment of the Orphans' Court.— Authority is relied upon for this position. I am referred to 2nd Redfield on Wills, ch. 2, sec. 18, p. 1-34 The language is, "In this country any such condition which is reasonable, as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation, will be held valid and binding." In *Cooke v. Turner*, 14 Sim. 493, it is said, "There is no more reason why a person may not be restrained by a condition from disputing sanity than from disputing any other doubtful question, whether of law or fact; on which a title to a devise or grant may depend." The insistent in the case just cited was that the condition was contrary to the policy of the law; that view was not entertained favorably by the Court. And I think the question before me must be disposed of by determining whether or not the condition named was void because contrary to the policy of our law. The 20th section of the Orphans' Court Act provides that the Orphans' Court shall make a decree touching the probate of wills in accordance with the finding of issues certified from the Circuit Court, and may make such order concerning the costs and expenses and allowance of counsel fees as may be made in cases where the hearing upon a caveat against proving a will is had before the Orphans' Court. The 169th section provides that if probate be refused the Court may order the costs and expenses to be paid by the person propounding the will or to be paid out of the estate of the deceased; but if granted, the Court shall order the parties contesting such will to pay the costs and expenses of the litigation, unless it shall appear to the Court that the person contesting such will had reasonable cause for contesting the validity of the same. A supplement provides that if there be reasonable cause the Court may order the costs and

expenses of both sides paid out of the estate of the deceased. Can the power thus conferred upon the Orphans' Court be overcome by the will of a testator? Is it the policy of our law to preserve to legatees and devisees and all others interested the right to file caveats of wills without any condition or qualification except those imposed by the statutes above quoted, or is it the policy of the law to allow testators to
10 impose any conditions respecting costs, expenses and counsel fees which they may desire, and thereby annul the provisions of the statute, or render the decree of the Orphans' Court, pronounced by virtue of the statute, nugatory. I do not feel at liberty to disregard the ample provisions of the statute. It is a manifest declaration of the public policy of this State upon the subject. It seems to me it would be just as unwise to permit testators to impose conditions in violation of such public policy as to allow conditions in contracts, of any character, which are in violation of public
20 policy, to prevail. This view is in harmony with the principles established in *Cooke v. Turner supra*.

But it is claimed that the application of the doctrine of election will in equity, impose the burden of this litigation upon the defendant. It is said since he chose to accept the devise, he must pay the costs of the litigation. Supposing the devise of the farm to the son to have been upon the express condition that if he filed a caveat he should pay all the expenses on both sides this view could not prevail because the condition, being adjudged of no effect because
30 contrary to public policy, can have no force in the direction claimed, and the will must stand as though the condition had not been inserted therein. I cannot but conclude that when a condition contrary to law or to public policy, is imposed upon a devisee or donee, the devise or gift may be sustained, though the condition fail.

I think the demurrer should be sustained with costs.

DECREE.

The bill having been demurred to, and the case having been argued by Oscar Jeffery for complainants, and J. G. Shipman for defendant, and the Court being of opinion that the bill contains no equity, and that the provisions of the will must give way to the statute, and that the doctrine of election does not apply to this case, and that the demurrer¹⁰ must be sustained with costs,

It is thereupon, on this sixth day of February, A. D. 1886, ordered that the demurrer be sustained and the bill dismissed with costs.

THEODORE RUNYON, C.

Respectfully advised,

JOHN T. BIRD, V. C.

A true copy,

G. S. DURYEE, Clerk.

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NOTICE OF APPEAL.

The appellant hereby appeals from an order made on the sixth day of February, A. D. 1886, in this Court in the above stated cause, which sustains the demurrer filed in the above cause by the said respondent, and orders that the bill of complaint be dismissed with costs, to the Court of Errors and Appeals in the last resort in all causes.

OSCAR JEFFERY, 30

Solicitor for and of Counsel with Appellant.

Dated March 17th 1886.

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

OSCAR JEFFERY,
Counsel with Appellant.

Service of a copy of the within notice acknowledged this 16th day of March, 1886.

J. G. SHIPMAN,
Solicitor of Respondent. 40

PETITION OF APPEAL.

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

The humble petition of Sarah A. Hoit, the appellant in the above stated cause, respectfully showeth that your petitioner finds herself aggrieved by a final decree made in
 10 the Court of Chancery by his Honor, Theodore Runyon, Chancellor of New Jersey, bearing date the sixth day of February, A. D. eighteen hundred and eighty-six, wherein your petitioner was complainant and the said Nathan Hoit was defendant, in this respect, to wit: that the said decree adjudges that the bill contains no equity and that the provisions of the will must give way to the statute, and that the doctrine of election does not apply in this case, and that the demurrer be sustained and the bill be dismissed with costs.

20 And your petitioner humbly appeals from the whole of the decree aforesaid upon the ground that the same is erroneous, for that the demurrer aforesaid should have been overruled and dismissed because there was equity in her said bill of complaint, and that your petitioner is entitled to the relief she prayed for in her said bill of complaint, and that your petitioner should not have been decreed to pay the costs as aforesaid.

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

OSCAR JEFFERY,

Solicitor for Appellant and of counsel with Appellant.

A true copy from the original filed in my office this 19th day of March, A. D. 1886.

HENRY C. KELSEY, Clerk.

We hereby acknowledge service of the within petition of appeal this 24th day of March, 1886.

J. G. SHIPMAN & SON,

Solicitors of Respondent.

Answer to Petition of Appeal.

This Respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says and admits that a decree was on the sixth day of February, A. D. 1886, made and entered in the Court of Chancery in the cause for that purpose mentioned in the 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 equity, and he prays that the same may be affirmed with costs to be adjudged to this Respondent.

J. G. SHIPMAN & SON,
Solicitors of Respondent.

