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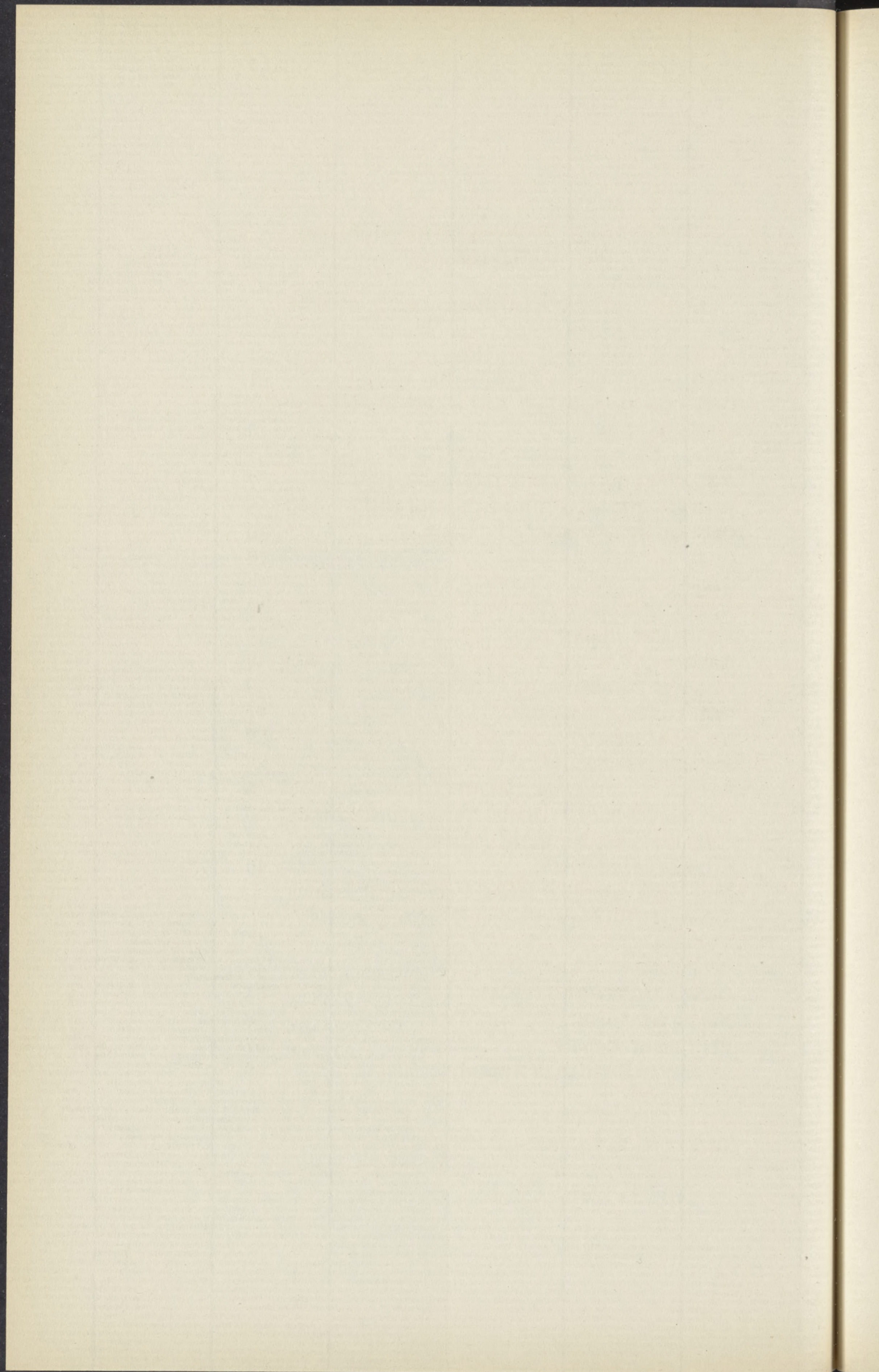

Petition of Charles Finkenzeller.

(Filed June 8, 1926.)

ESSEX COUNTY SURROGATE'S COURT.

To the Surrogate of the County of Essex:

The petition of Charles Finkenzeller respectfully shows that: 10

1. Petitioner resides at No. 472 DeWitt Avenue in the Town of Belleville, County of Essex, and State of New Jersey.

2. Annie Mathilda Finkenzeller late of the Town of Belleville in the County of Essex and State of New Jersey, died on the 12th day of March, 1926, possessed of goods, chattels, rights and credits of the value, as nearly as your petitioner can ascer- 20 tain of fourteen thousand dollars ($14,000), having first made and executed a certain paper writing, bearing date the 3rd day of February, 1926, purporting to be her last will and testament, in and by which she appointed Watson Current, and Herman N. Miller executors thereof.

3. That petitioner filed a caveat against the probate of said will and in due course citations were issued by the Surrogate of the County of Essex, on 30 the 14th day of May, 1926.

On the 28th day of May, 1926, the Honorable Edwin C. Caffrey heard testimony in open court on the petition for probate of the will of the said Annie Mathilda Finkenzeller, and being of the opinion that certain sheets referred to in said will and testament, and attached to the said paper writing purporting to be the last will and testament of the said Annie Mathilda Finkenzeller deceased, were not 40

executed in manner and form as is required by the statute in such case made and provided denied probate of the said sheets.

Petitioner further shows that at the aforesaid hearing the Honorable Edwin C. Caffrey was of the opinion that the said paper writing purporting to be the last will and testament of the said Annie
10 Mathilda Finkenzeller was duly executed by the said Annie Mathilda Finkenzeller, as and for her last will and testament in manner and form prescribed by the statute in such case made and provided, the Honorable Edwin C. Caffrey, Judge of the Essex County Orphans' Court, did thereupon on the 28th day of May, 1926, order adjudge and decree that the aforesaid paper writing which had been duly executed and attested by the said Annie
20 Mathilda Finkenzeller deceased, was established as the last will and testament of the said Annie Mathilda Finkenzeller deceased, the same was admitted to probate, and letters testamentary thereon were ordered to be issued to Watson Current and Herman N. Miller the executors in said will made, upon their duly qualifying as such.

Petitioner further shows that on the 8th day of June, 1926, the said Watson Current and Herman N. Miller, executors named in the said will, refused
30 to qualify as such and formally renounced their willingness to qualify and act as executors under the said will and testament of the said Annie Mathilda Finkenzeller.

4. The next of kin and heirs at law of the said Annie Mathilda Finkenzeller with their respective residence and post offices addresses, and the manner and degree in which they severally stand related to
40 the said Annie Mathilda Finkenzeller, so far as the

same are known to your petitioner are as follows, to wit:

Name	Relationship	Residences or Post Office Addresses
Albert Kumpa	Brother	Greeley, Pennsylvania
Robert Kumpa	Brother	Union City, New Jersey
Charles Kumpa	Brother	Brooklyn, New York
Katie Hildebrandt	Sister	Union City, New Jersey
Annie Lange	Sister	Union City, New Jersey
Julius Kumpa	Brother	Montclair, New Jersey
Arthur Kumpa	Nephew	Weehawken, New Jersey
Edmund Kumpa	Nephew	Weehawken, New Jersey
Gertie Kumpa	Niece	Weehawken, New Jersey
Gladys Kumpa	Niece	Weehawken, New Jersey

10

5. The residuary legatee or person first entitled to administration with the will annexed upon the said estate, is the following: Charles Finkenzeller, 472 DeWitt Avenue, Belleville, New Jersey.

20

6. All the persons entitled to administration with the said will annexed have duly renounced in writing their right to such administration with the said will annexed, and have requested and consented that the same be granted to petitioner. Due notice of this application has been given to all persons entitled to administration with the said will annexed.

30

Petitioner therefore prays that the aforesaid will be admitted to probate and that letters of administration with the said will annexed be issued to Charles Finkenzeller.

Charles Finkenzeller.

Dated, Newark, New Jersey, June 8, 1926.

40

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

Charles Finkenzeller, of full age, being duly sworn upon his oath, according to law, deposes and says:

10 1. I am the petitioner in the foregoing petition named, and the matters and things therein contained are true to the best of my knowledge and belief.

2. The value of the personal estate for the administration for which this application is made, will not exceed the sum of $14,000, and the value of the real estate whereof the testatrix died seized does not exceed in value the sum of $16,000, and that the in-
20 come from said real estate will not exceed the sum of $ annually.

Charles Finkenzeller.

Sworn and subscribed to this 8th day of June, 1926, at Newark, New Jersey, before me

30 George H. Renton,
Notary Public of N. J.

40

Order for Probate and Letters of Administration, C. T. A.

ESSEX COUNTY SURROGATE'S COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller, deceased.	On Petition for Probate and Letters of Adminis- tion, C. T. A

10

It appearing from the petition of Charles Finkenzeller that Annie Mathilda Finkenzeller, late of the Town of Belleville, in the County of Essex and State of New Jersey, heretofore departed this life, leaving a last will and testament, wherein and whereby she appointed Watson Current and Herman N. Miller the executors thereof; that said will was duly proved before the Orphans' Court of said County of Essex, and that no letters testamentary were issued, for the reason that the said Watson Current and Herman N. Miller refused to qualify as executors of the aforesaid will and testament and renounced their rights and willingness to qualify and act as executors of the will aforesaid.

20

It further appearing that the said Annie Mathilda Finkenzeller died possessed of goods, chattels, rights and credits of the value of Fourteen Thousand ($14,000) Dollars, and that petitioner is the person first entitled to be administrator of the estate, and has requested that letters of administration upon said estate be granted to himself.

30

And it further appearing that the instrument offered for probate in this matter was established as the last will and testament of the said Annie Mathil-

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Order for Probate and Letters of Administration, C. T. A.

da Finkenzeller, deceased, and that the same has been admitted to probate by the Essex County Orphans' Court on the 28th day of May, 1926.

It is thereupon on this 8th day of June, 1926, Ordered, Adjudged and Decreed, that letters of admin-
10 istration with the will annexed, be issued to Charles Finkenzeller, upon his qualifying as such administrator, and his giving bond to the Ordinary in the sum of Twenty-eight Thousand ($28,000.) Dollars, with sureties to be approved by the Surrogate.

E. Garfeld Gifford,
Surrogate.

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Report by Surrogate of Failure of Administrator C. T. A. to File Inventory.
(Filed March 4, 1927.)

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition, Etc.

10

To the Orphans' Court of the County of Essex:

I, E. Garfield Gifford, Surrogate of the County of Essex, do hereby report, pursuant to the request of Evelyn Bill, daughter of Annie Mathilda Finkenzeller, deceased, late of the County of Essex, that Charles Finkenzeller administrator c. t. a., has failed and neglected to file an inventory of the assets of the said Annie Mathilda Finkenzeller deceased, which have come into his hands as such administrator, for more than three months after letters testamentary issued to him as aforesaid. 20

Respectfully submitted this fourth day of March, Nineteen Hundred and Twenty-seven.

30

E. Garfield Gifford,
Surrogate.

40

Petition of Evelyn Bill by Charles Bill.
(Filed April 6, 1927.)

ESSEX COUNTY SURROGATE'S COURT.

In the Matter
of
The Estate of Annie Mathilda Finkenzeller.

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To E. Garfield Gifford, Surrogate of the County of Essex:

The petition of Evelyn Bill by Charles Bill, her next friend, of the City of Newark, County of Essex and State of New Jersey, respectfully shows

20 that:

1. Your petitioner is the daughter of Annie Mathilda Finkenzeller, late of the County of Essex, deceased. On June 8, 1926, Charles Finkenzeller, the husband of said Annie Mathilda Finkenzeller, was appointed administrator c. t. a. in said estate, your petitioner being one of the persons entitled to the personalty under said estate.

30

2. The said Charles Finkenzeller has failed and neglected to file an inventory of the estate of the said Annie Mathilda Finkenzeller, deceased, which has come into his hands, although more than three months has elapsed since his appointment as administrator c. t. a. and the issuance to him of letters testamentary thereon.

Your petitioner, therefore, prays that the Surro-

40 gate may report to the Orphans' Court the neglect

of the said Charles Finkenzeller, administrator c. t. a. as aforesaid to file his inventory within the time limited by law.

Dated Newark, N. J., April 1, 1927.

EVELYN BILL
by Charles Bill, Jr.,
Next Friend.

10

STATE OF NEW JERSEY, }
COUNTY OF ESSEX, } ss.:

EVELYN BILL being duly sworn according to law on her oath deposes and says that she is the petitioner in the foregoing petition named and that the matters and things therein set forth are true to the best of her knowledge and belief.

20

EVELYN BILL.

Subscribed and sworn to before me }
this 1st day of April, 1927. }

HARRY P. DAY,
Master in Chancery of New Jersey.

30

40

Order to Show Cause.

(Filed April 6, 1927.)

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition, Etc.

10

It appearing from the report of E. Garfield Gifford, Surrogate of the County of Essex, made upon the application of Evelyn Bill, daughter of Annie Mathilda Finkenzeller, late of the County of Essex, deceased, that Charles Finkenzeller, administrator c. t. a. of the estate of said Annie Mathilda Finkenzeller, deceased, has failed and neglected to file an inventory of the assets of the estate of the said Annie Mathilda Finkenzeller, deceasd, which have come into his hands, although more than three months have elapsed since the grant of letters testamentary to him as aforesaid, and no reason appearing or being alleged to the contrary,

20

It is thereupon, on this 6th day of April One Thousand Nine Hundred and Twenty-seven, Ordered that said Charles Finkenzeller, administrator c. t. a. as aforesaid, show cause before this Court on the 6th day of May One Thousand Nine Hundred and Twenty-seven at ten a. m. in the forenoon in the Essex County Court House, Newark, New Jersey, why he should not render an inventory of the personal estate of the said Annie Mathilda Finkenzeller, deceased, which has come into his hands as such administrator.

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40

Order to Show Cause.

And it is further ORDERED that a true but uncertified copy of this Order be served upon the said Charles Finkenzeller, personally or by leaving the same at his residence or usual place of abode with a member of his family over the age of fourteen years, or be served upon Abraham Levitan and Rosa Levitan, his attorneys, within 5 days from the date hereof. 10

EDWIN C. CAFFREY,
Judge.

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Order to Show Cause.

(Filed April 6, 1927.)

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.

10

Upon reading and filing the verified petition of Evelyn Bill, by Charles Bill, her next friend, the adopted daughter of Annie Mathilda Finkenzeller, deceased, alleging that Charles Finkenzeller, the administrator cum testamento annexo of the estate of Annie Mathilda Finkenzeller, has wasted and misappropriated the estate entrusted to him and asking the aid of this Court.

20

It is thereupon on this 6th day of April 1927 Ordered that said Charles Finkenzeller, administrator as aforesaid, show cause before this Court on the 6th day of May 1927 at ten o'clock in the forenoon, in the Essex County Court House, Newark, New Jersey, why he should not make discovery of the condition of the estate of the said Annie Mathilda Finkenzeller, deceased, and why he should not produce the books, checks, papers, securities and other documents relating thereto and why the testimony of witnesses acquainted with the assets of said estate should not be taken.

30

And it is further Ordered that a true but uncertified copy of this Order and of the petition herein be served upon the said Charles Finkenzeller, per-

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sonally, or by leaving the same at his residence or usual place of abode with a member of his family over the age of fourteen years, or be served upon Abraham Levitan and Rosa Levitan, his attorneys, within 5 days from the date hereof.

EDWIN C. CAFFREY,
Judge. 10

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Order.

(Filed April 4, 1928.)

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition.

10

The verified petition of Evelyn Bill by Charles Bill, her next friend, having been duly filed herein, whereby it appears that said petitioner was adopted by aforesaid Annie Mathilda Finkenzeller, and her husband Charles Finkenzeller, by order of the Surrogate's Court of the County and State of New York, on April 4, 1920, that said Charles Finkenzeller has been appointed as administrator cum testamento annexo in the above estate and that said Charles Finkenzeller, as administrator c. t. a. has failed and neglected to file an inventory of the estate of said decedent, and it appearing from the report of E. Garfield Gifford, Esq., Surrogate of the County of Essex, upon said application, that said Charles Finkenzeller, as administrator c. t. a. in said estate, has so failed and neglected to file an inventory of the assets of the estate of said Annie Mathilda Finkenzeller, deceased, which have come into his hands, and that more than three months have elapsed since the granting of letters testamentary to him as aforesaid, and

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Aforesaid matter having come before this Court in due course, on rule to show cause duly served on said Charles Finkenzeller as such administrator,

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and this Court having examined into said matter, and having heard the facts therein, and the arguments of Abraham Levitan, Esq., of Messrs. Levitan & Levitan, Proctors for said Charles Finkenzeller, administrator, c. t. a. as aforesaid, and of Richard Hartshorne, Esq., of Messrs. Stewart & Hartshorne, Proctors for Petitioner, and this Court being of the opinion that the matters set forth in aforesaid petition are true, and that said Charles Finkenzeller, as such administrator, has failed to file an inventory of said estate within the time required by law, and that the said Evelyn Bill is the adopted daughter of aforesaid decedent and said Charles Finkenzeller and is entitled to relief herein, as such.

10

It is on this 2nd day of April, Nineteen hundred and twenty-eight on motion of Stewart & Hartshorne, Proctors for Evelyn Finkenzeller Bill by Charles Bill, her next friend, ORDERED, that the Surrogate of the County of Essex cite the said Charles Finkenzeller, administrator c. t. a. of aforesaid estate to render an inventory of the personalty of the said Annie Mathilda Finkenzeller, deceased, which has come into his hands as such administrator, c. t. a.

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WALTER D. VAN RIPER,
Judge.

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Notice of Appeal.

(Filed April 18, 1928.)

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition of Appeal.

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Charles Finkenzeller, administrator cum testamento annexo of the estate of Annie Mathilda Finkenzeller, deceased, hereby appeals to the Prerogative Court from the order entered herein on the second day of April, 1928, wherein it was ordered that the Surrogate of the County of Essex cite the
20 said Charles Finkenzeller, administrator c. t. a. of aforesaid estate, to render an inventory of the personalty of the said Annie Mathilda Finkenzeller, deceased, which has come into his hands as such administrator, c. t. a.

Dated, April 18th, 1928.

Levitan, Levitan & Auerbach,
Proctors for Appellant.

30

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Petition of Appeal.

(Filed April 18, 1928.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of The appeal from the order of the Orphans' Court ordering the Surrogate of the County of Essex to cite the said Charles Finkenzeller, Administrator C. T. A. of the estate of Annie Mathilda Finkenzeller to render an inventory of the personalty of the said Annie Mathilda Finkenzeller deceased, which has come into his hands as such administrator, c. t. a.	On Petition of Appeal.

10

20

To the Ordinary of the State of New Jersey:

The petition of Charles Finkenzeller, Administrator c. t. a. of the estate of Annie Mathilda Finkenzeller, deceased, of the Town of Belleville, in the County of Bergen and State of New Jersey, respectfully shows that:

1. Petitioner is the administrator cum testamento annexo of the estate of Annie Mathilda Finkenzeller, late of the County of Essex. On the second day of April, 1928, the Orphans' Court of the County of Essex made its order that the Surrogate of the County of Essex cite the said Charles Finkenzeller, administrator c. t. a. of aforesaid estate, to render an inventory of the personalty of the said Annie Mathilda Finkenzeller, deceased, which has come into his hands as such administrator c. t. a.

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New Jersey State Library

2. Your petitioner complains and alleges that the whole and every part of the aforesaid decree is erroneous, improper and illegal, and that your petitioner is aggrieved thereby.

Your petitioner therefore prays that the aforesaid order of said Orphans' Court and every part there-
10 of, be reversed by this Court.

Dated: April 18, 1928.

Levitan, Levitan & Auerbach,
Proctors for Appellant.

Abraham Levitan,
Of Counsel.

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Answer.

(Filed April 20, 1928.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of The appeal from the order of the Orphans' Court ordering the Surrogate of the County of Essex to cite the said Charles Finkenzeller, Administrator C. T. A. of the estate of Annie Mathilda Finkenzeller to render an inventory of the personalty of the said Annie Mathilda Finkenzeller deceased, which has come into his hands as such administrator, c. t. a.	On Petition, of Appeal.

10

The Answer of Evelyn Bill by Charles Bill, her next friend, respondent to the petition of appeal of Charles Finkenzeller, administrator c. t. a. of the estate of Annie Mathilda Finkenzeller, deceased, appellant:

20

1. This respondent answering admits the allegations contained in the first paragraph of appellant's petition of appeal filed herein.

2. This respondent is advised, believes and submits that the portions of said decree complained of by appellant are just and lawful, and this respondent denies that the aforesaid portions of said decree, or any parts thereof, are erroneous, improper and illegal, and alleges that said portions of said decree are legal, proper and correct.

30

She therefore prays that the said petition of appeal may be dismissed, with costs.

Stewart & Hartshorne,
Proctors for and of
Counsel with Respondent.

40

Order of Reference.

(Filed July 31, 1928.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER of The Estate of ANNIE MATHILDA FINKENZELLER.	On Petition, Etc.

10

This matter being open to the court by Levitan, Levitan & Auerbach, Proctors for appellant, and it appearing that Stewart & Hartshorne, Proctors for respondent, have consented thereto,

IT IS on this 31st day of July, 1928, on motion of
20 Levitan, Levitan & Auerbach, Proctors for the appellant, ORDERED that the above entitled cause be referred to Hon. J. F. Fielder, one of the Vice-Ordinaries of this court, to hear the same for the Ordinary and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
Ordinary.

30

We hereby consent to the entry of the above order.

STEWART & HARTSHORNE,
Proctors for Respondent.

40

Order of Designation.
(Filed January 9, 1929.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER of The Estate of ANNIE MATHILDA FINKENZELLER.	On Petition, Etc.

10

This matter being opened to the Court by Levitan, Levitan & Auerbach, Proctors for Appellant, and it appearing that Stewart & Hartshorne, Proctors for Respondent, have consented thereto;

IT IS on this 9th day of January, 1929, on motion of Levitan, Levitan & Auerbach, Proctors for the Appellant, ORDERED that the 19th day of March, at the hour of ten o'clock in the forenoon, at the Chancery Chambers, #1 Exchange Place, Jersey City, N. J., be designated as the time and place for the hearing of the above entitled cause.

20

E. R. WALKER,
Ordinary.

JAMES F. FIELDER,
V. O.

30

We hereby consent to the entry of the above order.

STEWART & HARTSHORNE,
Proctors for Respondent.

40

Notice of Hearing.

(Filed January 19, 1929.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition, Etc.

10

To Stewart & Hartshorne, Proctors for Respondent, Evelyn Bill.

Take notice of the hearing of this cause before the Honorable James F. Fielder, the Vice Ordinary of this court, to whom the said cause has been re-
20 ferred, on the 19th day of March, 1929, at the hour of ten o'clock in the forenoon, at the Chancery Chambers, in the City of Jersey City, the time and place designated by the order of the said Vice Ordinary made on the 9th day of January, 1929.

Levitan & Levitan,
Proctors for Appellant.

Service acknowledged Jan. 15, 1929, by
30 Stewart & Hartshorne,
Proctors for Respondent.

40

Stipulation of Facts.
(Filed June 25, 1929.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition,

10

It is hereby stipulated by and between Levitan & Levitan, Proctors for Charles Finkenzeller, Appellant, and Stewart & Hartshorne, Proctors for Evelyn Bill, by Charles Bill, next friend, Respondent, in the above entitled cause:

20

1. Respondent, Evelyn Bill, a resident of New York, at the time of her adoption, was adopted by aforesaid decedent, Annie Mathilda Finkenzeller, and her husband, aforesaid Charles Finkenzeller, residents of New Jersey, by order of the Surrogates' Court of the County and State of New York, on April 4, 1920, a copy of the adoption record being annexed hereto, and marked Ex. A.

30

2. Decedent, Annie Mathilda Finkenzeller, and her said husband had one living, natural born, child, who pre-deceased her.

3. Decedent, Annie Mathilda Finkenzeller, died March 12, 1926, a resident of Essex County, New Jersey, without issue of her body then living, but leaving her husband, Charles Finkenzeller, and her said adopted child, Evelyn Bill.

40

4. Said decedent left a Will, duly admitted to probate, together with certain other papers, the which

papers were disconnected from said Will, and were not admitted to probate. Said Will, as probated, named executors as such, and named no beneficiaries, a certified copy being annexed hereto and marked Exhibit B.

5. Said executors have renounced, and said Charles Finkenzeller has been appointed as administrator cum testamento annexo of the above estate.

6. Said decedent left both realty and personalty to a substantial amount.

7. Said Charles Finkenzeller, as such administrator cum testamento annexo, has failed and neglected to file an inventory of the estate of said decedent, although requested, and although more than three months have elapsed previous to the filing of the petition herein since the granting of letters testamentary as aforesaid.

LEVITAN, LEVITAN, AUERBACH,
Proctors for Appellant.

STEWART & HARTSHORNE,
Proctors for Respondent.

Adoption Record in New York.

Exhibit A.

(Filed May 4, 1920, N. Y. June 25, 1929,
Preg. Ct. Ck.)

At a Surrogates Court of the County of New York, State of New York, held at the Hall of Records, in the Borough of Manhattan, in the City and County of New York, on the 4th day of May, 1920.

10

Present:—Honorable James A. Foley, *Surrogate.*

In the Matter
of
The Application of Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, for the adoption of Eva Yunkel, a minor.

20

On the annexed petition duly executed by Charles Finkenzeller—and, Annie Mathilda Finkenzeller, his wife, and the annexed affidavit of Catherine Irene Bowen, verified the 3rd day of May, 1920, whereby it appears that Eva Yunkel, an infant under the age of twelve years is a deserted child or foundling heretofore placed in the care and custody of The New York Foundling Hospital, a charitable corporation organized and incorporated under and pursuant to Chapter Three hundred and nineteen of the laws of this State for the year 1848, and the acts in addition thereto and amendatory thereof, and located in the County of New York, and sup-

30

40

ported in part by the City of New York from April 23, 1909 to December 11, 1919, by taxes imposed for that purpose: that since April 23, 1909 no inquiry has been made about the welfare of said infant and no board paid by its parents or guardian and no provision made by the parents, relatives or guardian of said infant for its support and maintenance, but
10 that the parents of said child have abandoned it and said infant has no general or testamentary guardian and no property or means of support; that the petitioners and said minor reside at No. 472 Dewitt Avenue Belleville, in the State of New Jersey; that on December 11, 1919, The New York Foundling Hospital placed the said Eva Yunkel, with said petitioners and since that day the said infant has remained with petitioners and been supported and
20 maintained by them, and that the petitioners are now desirous of adopting said Eva Yunkel as their own lawful child, and are amply able to provide sufficiently for a child entrusted to their care and are of the same religious faith as the parents of said Eva Yunkel, and on the promise of said Charles Finkenzeller—and Annie Mathilda Finkenzeller—his wife the petitioners herein to educate, support and protect the said child as their own lawful child which they have agreed to do; and on the annexed
30 agreement of adoption made by and between The New York Foundling Hospital signed and sealed in the corporate name of said Hospital and said Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, the petitioners herein, and all the parties hereto, other than The New York Foundling Hospital having appeared before me and having been examined as required by law, and it appearing to my satisfaction that the moral and temporal in-
40 terests of said child will be promoted by such adop-

Exhibit A.

tion by reason of the facts hereinabove recited, and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed.

Now, on Motion of Peck & Hancock, attorneys for the petitioners herein, it is

Ordered, that the said agreement of adoption be and the same hereby is in all respects allowed and confirmed, and it is 10

Further Ordered, that the minor, Eva Yunkel, shall be henceforth regarded and treated in all respects as the child of the said Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, and be known and called by the name of Evelyn Mathilda Finkenzeller. 20

(Signed) James A. Foley,
Surrogate.

30

40

Exhibit A.

SURROGATES' COURT,
NEW YORK COUNTY.

In the Matter
of
The Application of Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, for the adoption of Eva Yunkel, a minor.

10

To the Honorable James A. Foley, a Surrogate of the County of New York.

20 The Petition of Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, respectfully shows:

First: Upon information and belief that Eva Yunkel, is an infant of the age of eleven years and is a deserted child or foundling placed in the care and custody of The New York Foundling Hospital, a charitable corporation organized and incorporated under and pursuant to Chapter 319 of the Laws of this State for the year 1848 and the acts in addi-
30 tion thereto and amendatory thereof and supported in part by the City of New York from April 23, 1909 to December 11, 1919, by taxes imposed for that purpose.

Second: Upon information and belief that since April 23, 1909, no inquiry has been made about the welfare of said infant and no board has been paid by its parents or guardian and no provision has
40 been made by the parents, guardian or relatives of

said infant for its support and maintenance, but that the parents of said infant have abandoned it, and said infant has no general or testamentary guardian and has no property or means of support.

THIRD: That your petitioners are citizens of the United States, are legally married, and are of full age. 10

That the Post Office address and place of residence of your petitioners and of said minor is No. 472 Dewitt Avenue, Belleville, in the State of New Jersey.

That the location, and the Post Office address of, The New York Foundling Hospital, is Number 175 East 68th Street, in the Borough of Manhattan, City and County of New York.

That there are no persons other than those herein mentioned, interested in this proceeding, to the best of your petitioner's information and belief. 20

That petitioners have no knowledge or information as to whether the father or mother of said infant, or either of them is alive, or if alive, their or either of their Post Office addresses, and have no means of ascertaining such facts, but petitioners allege on information and belief, that said parents if living, have abandoned the said infant as above set forth. 30

FOURTH: That on December 11, 1919 The New York Foundling Hospital placed the said Eva Yunkel with your petitioners and since that day the said infant has remained with your petitioners and has been supported and maintained by them.

FIFTH: That your petitioners are desirous of adopting said Eva Yunkel as their own lawful child. 40

Exhibit A.

Sixth: That your petitioners are amply able to provide sufficiently for a child entrusted to their care and promise and agree to educate, support and protect the said Eva Yunkel and are of the same religious faith as the parents of said Eva Yunkel, as your petitioners verily believe.

10 That your petitioners present herewith the instrument required by section 115 of the Domestic Relations Law of this state, being Chapter 19 of the Laws of 1909.

That no previous application for the relief prayed for herein has been made to any other Court or Judge.

Wherefore, your petitioners pray for an order allowing and confirming the adoption and directing 20 that the said Eva Yunkel shall henceforth be regarded and treated in all respects as the child of the said Charles Finkenzeller and Annie Mathilda Finkenzeller his wife, your petitioners, and be known and called by the name of Evelyn Mathilda Finkenzeller.

Dated, New York May 4th, 1920.

30 (Signed) Charles Finkenzeller
(Signed) Annie Mathilda Finkenzeller
Petitioners.

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Exhibit A.

State of New York, }
County of New York, } ss.:

Charles Finkenzeller and Annie Mathilda Finkenzeller, being severally duly sworn, say and each for himself and for herself says that they are the petitioners in the above entitled proceeding; that they have read the foregoing petition and know the contents thereof; that the same is true to their own knowledge, except as to the matters therein stated to be alleged on information and belief and as to those matters they believe it to be true.

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Charles Finkenzeller
Annie Mathilda Finkenzeller

Sworn to before me this }
4th day of May, 1920. }

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James A. Foley,
Surrogate.

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Exhibit A.

This Agreement, dated the third day of May 1920, between The New York Foundling Hospital, and Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, of Belleville, in the State of New Jersey:

Witnesseth:

10 That Whereas Eva Yunkel, an infant deserted child or foundling born on the 26th day of December, 1908 has been since April 23, 1909, in the care of The New York Foundling Hospital, a charitable corporation organized and incorporated under the laws of the State of New York and supported in part by the City of New York by taxes imposed for that purpose, and

Whereas, since April 23, 1909, no inquiry has
20 been made about the welfare of said infant and no board has been paid by its parents or guardian, and no provision has been made by the parents, relatives or guardian of said infant for its support and maintenance, but the parents of said child have abandoned it and said infant has no general guardian and has no property or means of support, and

Whereas, The New York Foundling Hospital on December 4, 1919, did place said child with said
30 Charles Finkenzeller, and Annie Mathilda Finkenzeller, his wife, of No. 472 Dewitt Avenue, Belleville, in the State of New Jersey, and since that time the said infant has remained with the said Charles Finkenzeller and Annie Finkenzeller, his wife, by whom it has been supported and maintained, and

Whereas, the said Charles Finkenzeller, and Annie Mathilda Finkenzeller, his wife, are desirous of adopting said Eva Yunkel,

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Exhibit A.

Now therefore, in consideration of the mutual covenants of the parties hereto The New York Foundling Hospital hereby consents to the adoption of the said Eva Yunkel by said Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, and consents to the making of an order of adoption, and to a change of name of said Eva Yunkel to Evelyn Mathilda Finkenzeller, and said Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, do hereby jointly and severally *agree* upon the granting to them of the said child, Eva Yunkel, in adoption under an order of a Surrogate of the County of New York, State of New York, *to adopt and treat* the said infant Eva Yunkel, as *their own lawful child* and to fully and amply provide for her maintenance and improvement, as her lawful parents.

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The New York Foundling Hospital,
By Catherine Irene Bowen
Sister Anna Michella
Treasurer.

(L. S.)

In presence of
James T. Oates

Charles Finkenzeller, (L. S.)
Annie Mathilda Finkenzeller (L. S.)

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In presence of
Stanley W. Jones.

40

Exhibit A.

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

On this 3rd day of May, 1920, before me personally came Catherine Irene Bowen (Sister Anna Michella) to me known and who being by me duly sworn, did depose and say: that she resided in the
10 Borough of Manhattan in the City of New York, that she is the Treasurer of The New York Foundling Hospital the corporation described in and which executed the foregoing instrument; that she knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed to said instrument by order of the Board of Managers of such corporation and that she signed her name thereto by like order.

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JAMES T. OTES,
Notary Public, No. 1,
New York County,
New York Co. Reg. No. 1128.

(Seal)

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

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On this 4th day of May, 1920, before me personally appeared Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, proven to me by the oath of Stanley W. Jones, counsellor-at-law, to be the individuals described in and who executed the foregoing instrument, and they severally acknowledged that they executed the same.

JAMES A. FOLEY,
40 Surrogate.

Exhibit A.

SURROGATE'S COURT

NEW YORK COUNTY.

IN THE MATTER
of
The Application of Charles Finkenzeller and Annie Mathilda Finkenzeller, his wife, for the adoption of Eva Yunkel, a minor.

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

CATHERINE IRENE BOWEN, known in religion as Sister Anna Michella, being duly sworn, says that she is the Treasurer of The New York Foundling Hospital and as such Treasurer has charge of the records of said Hospital wherein are kept and entered the data relative to children coming under the control, and into the custody, of said Hospital and is familiar with the contents of said records.

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That the record in the case of the minor, Eva Yunkel, above mentioned, shows the following facts: that on the 23rd day of April, 1909, a woman left an infant female child at the Hospital and stated that she was the mother of the child, that the child was born on the 26th day of December, 1908, that she was unable to take care of it and that the name of the child was Eva Yunkel. The said woman stated also that she wanted to give the child to the Hospital and to surrender to it all her rights to the child and she did thereupon surrender and entrust to the Hospital the entire management and control

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of the child. That since the 23rd day of April, 1909, the said woman has not visited the Hospital or made any inquiry concerning the child, or made any provision for the support or maintenance of the child, and that no inquiries concerning the child have been made at the Hospital by any person whatsoever. That on the 11th day of December, 1919, the Hospital placed said minor with the petitioners herein.

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Deponent further says that The New York Foundling Hospital is a corporation of the State of New York, and is authorized under the laws of said state to place children for adoption.

Catherine Irene Bowen
Sister Anna Michella

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Sworn to before me this 3rd day of May, 1920.

James T. Oates
Notary Public, No. 1,
New York County,
New York Co. Reg. No. 1128.
(Seal)

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Exhibit B.

(Filed April 28, 1926.)

IN THE NAME OF GOD, AMEN.

I, Annie Mathilda Finkenzeller of #472 DeWitt Ave., of the Town of Belleville County of Essex, State of New Jersey being of sound and disposing mind and memory, and considering the uncertainty of this life, do make, publish and declare this to be my last will and testament as follows, hereby revoking all other and former wills by me at any time made.

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FIRST: I hereby give, devise and bequeath to my Executors, as hereinafter named (or to the survivor or their successors) of their full authority, all my Real and Personal estate, for the said Executors, to pay to grant, sell or convey, any or all of this estate, as soon as practical after my demise; and to use, dispose and maintain the proceeds for the purposes as set forth in this my last Will and Testament, in the following manner elsewhere in same:

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First: Funeral Expenses as specified in attached Page No. One.

Second: Real Estate, personal and mixed, of which I may die, seizen, or possessed, or entitled to at the time of my demise; as specified in attached page No. Three.

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Third: Legacies to Relatives and Friends; as specified in attached Page No. Four numbered from two to twenty inclusive.

Fourth: Legacies to Churches, Charities, etc., as specified in attached page No. Five numbered from twenty-one to thirty-two inclusive.

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Exhibit B.

Fifth: Legacies, jewelry and personal effects, etc., as specified in attached page No. Seven.

Sixth: Household goods, etc., as specified in attached page No. Eight and my last wishes as on Page No. Eight.

10 Further: I, Annie Mathilda Finkenzeller do hereby name and appoint Watson Current & Herman M. Miller, as my executors:

The former now residing at the corner of Union Ave & Holmes Street, Belleville, N. J. and the latter at #166 Van Riper Place, Belleville, N. J., the survivor or their successors and do hereby direct and empower the above named Executors, with full power and authority, to grant, bargain, sell and
20 convey, *or* any part, of my real estate, as soon as practical after my death; as it may seem best in their judgment, and most advantageous for the interest of my devices as set forth in the attached pages specifying all disposition of my estate, elsewhere in this will and testament;

Likewise, I make, constitute and appoint Watson Current & Herman M. Miller to be my executors of this, my last Will and Testament, of Annie Mathil-
30 da Finkenzeller, 472 DeWitt Ave., Belleville, N. J.

In Witness Whereof, I have hereunto subscribed my name and affixed my seal, the Third day of February, in the year of our Lord one thousand nine hundred and twenty-six.

ANNIE MATHILDA FINKENZELLER (L. S.)
Testatrix.

Attested by
EDWARD J. CULLAN (L. S.)
40 Notary Public.

Exhibit B.

We, whose names are hereto subscribed, do certify that Annie Mathilda Finkenzeller the testator, subscribed her name to this instrument in our presence, and in the presence of each of us, and at the same time she declared in our presence and hearing that the same was her last Will and Testament, and requested us, and each of us, to sign our names thereto as witnesses to the execution thereof, and which we hereby do in the presence of the testatrix and of each other, this Third day of February, 1926, the day of the date of the said Will, and write opposite our names our respective places of residence.

Kenneth M. Dewsnap residing at 79 Tappan Ave Belleville, N. J.

Lawrence L. Walker residing at 261 Greylock Pkway, Belleville, N. J.

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Stipulation of Facts.

ESSEX COUNTY ORPHANS' COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller.	On Petition.

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It is hereby stipulated by and between Stewart & Hartshorne, Proctors for petitioner, Evelyn Bill by Charles Bill, her next friend, and Levitan, Levitan & Auerbach, Proctors for Charles Finkenzeller, administrator cum testamento annexo in the above entitled cause:

1. Petitioner, Evelyn Bill, then a resident of New York, was adopted by aforesaid decedent, Annie Mathilda Finkenzeller, and her husband, aforesaid Charles Finkenzeller, by Order of the Surrogate's Court of the County and State of New York on April 4th, 1920.

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2. Charles Finkenzeller has been appointed as administrator cum testamento annexo in the above estate.

3. Said Charles Finkenzeller, as such administrator, has failed and neglected to file an inventory of the estate of said decedent although requested, and although more than three months have elapsed, previous to the filing of the petition herein, since the granting of letters testamentary to him as aforesaid.

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Stewart & Hartshorne,
Proctors for Petitioner.

Levitan, Levitan & Auerbach,
Solicitors of Charles Finkenzeller,
Administrator C. T. A.

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New York Adoption Laws, Domestic Relations Law, II Birdseye, Second Edition, Page 1937, *et seq*.

Sec. 110. Adoption is the legal act whereby an adult takes a minor into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect to such minor. Hereafter, in this article, the person adopting is designated the "foster parent". A voluntary adoption is any other than that of an indigent child, or one who is a public charge from an orphan asylum or charitable institution.

An adult unmarried person, or an adult husband or wife, or an adult husband and his adult wife together, may adopt a person of the age of twenty-one years and upwards or a minor in pursuance of this article, and a child shall not hereafter be adopted except in pursuance thereof. Proof of the lawful adoption of a person of the age of twenty-one years and upwards or a minor heretofore made may be received in evidence, and any such adoption shall not be abrogated by the enactment of this chapter and shall have the effect of an adoption hereunder. Nothing in this article in regard to an adopted child inheriting from the foster parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred and seventy-three, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, a child adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created; and nothing in this article in regard to an adult adopted pursuant hereto inheriting from the foster parent applies to any will, devise or trust, made or created before April twenty-second, nineteen hundred and fifteen, or alters, changes or interferes with such will, devise or trust, and as to any such will, devise or trust, an

adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created.

Sec. 111. Consent to adoption is necessary as follows:

10 1. Of the minor, if over twelve years of age;

2. Of the foster parent's husband or wife, unless lawfully separated, or unless they jointly adopt such minor;

3. Of the parents or surviving parent of a legitimate child, and of the mother of an illegitimate child; but the consent of a parent who has abandoned the child, or is deprived of civil rights, or divorced because of his or her adultery or cruelty, 20 or adjudged to be insane, or to be an habitual drunkard, or judicially deprived of the custody of the child on account of cruelty or neglect, is unnecessary; excepting, however, that where such parents are divorced because of his or her adultery or cruelty, notice shall be given to both the parents personally or in such manner as may be directed by a judge of a court of competent jurisdiction.

4. Of a person of full age having lawful custody 30 of the child, if any such person can be found, where the child has no father or mother living, or no father or mother whose consent is necessary under the last subdivision. If such child has no father or mother living, and no person can be found who has the lawful custody of the child, the judge or surrogate shall recite such facts in the order allowing the adoption.

5. Where a minor to be adopted is of the age of 40 eighteen years or upwards, the judge or surrogate may direct, in his discretion, that the consents of

the persons referred to in the preceding subdivisions of this section shall be waived, if in his opinion, the moral or temporal interests of such minor will be promoted thereby and such consents cannot, for any reason, be obtained. Where the person to be adopted is of the age of twenty-one years and upwards, the consents of the persons referred to in the preceding subdivisions of this section shall not 10 be required.

Sec. 112. In adoption the following requirements must be followed:

1. The foster parents or parent, the person to be adopted and all the persons whose consent is necessary under the last section, must appear before the county judge or the surrogate of the county where the foster parent or parents reside, or, if the 20 foster parents or parent do not reside in this state, in the county where the minor resides, and be examined by such judge or surrogate, except as provided by the next subdivision.

2. They must present to such judge or surrogate an instrument containing substantially the consents required by this chapter, an agreement on the part of the foster parents or parent to adopt and treat the minor as his, or her or their own lawful 30 child, and a statement of the age of the person to be adopted, as nearly as the same can be ascertained, which statement shall be taken prima facie as true. If a change in the name of the minor is desired, such instrument may also state the new name by which the minor shall be known. The instrument must be signed by the foster parents or parent and by each person whose consent is necessary to the adoption, and severally acknowledge by 40 said persons before such judge or surrogate; but

where a parent or person or institution having the legal custody of the minor resides in some other country, state or county, his or their written acknowledged consent, or the written acknowledged consent of the officers of such institution, certified as conveyances are required to be certified to entitle them to record in a county in this state, is equiva-
10 lent to his or their appearance and execution of such instrument. In all cases where the consents of the persons mentioned in subdivision one, two, three, and four of section one hundred and eleven have been waived as provided in subdivision five of such section, or where the person to be adopted is of the age of twenty-one years or upwards, notice of such application shall be served upon such persons as the judge or surrogate may direct.

20 Sec. 113. If satisfied that the moral and temporal interests of the person to be adopted will be promoted thereby, the judge or surrogate must make an order allowing and confirming such adoption, reciting the reasons therefor, and directing that the person to be adopted shall henceforth be regarded and treated in all respects as if the child of the foster parent or parents. If the judge or surrogate is also satisfied that there is no reasonable objec-
30 tion to the change of name proposed, the order must also direct that the name of the minor be changed to such name as shall have been designated in the instrument mentioned in the last section. Such order, and the instrument and consent, if any, mentioned in the last section must be filed and recorded in the office of the county clerk of such county. The fact of illegitimacy shall in no case appear upon the record.

40 Sec. 114. Thereafter the parents of the person adopted are relieved from all parental duties

toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. Where a parent who has procured a divorce, or a surviving parent, having lawful custody of a child, lawfully marries again, or where an adult unmarried person who has become a foster parent and has lawful custody of a child, marries, and such parent or foster parent consents that the person who thus becomes the step-father or the step-mother of such child may adopt such child, such parent or such foster parent, so consenting, shall not thereby be relieved of any of his or her parental duties toward, or be deprived of any of his or her rights over said child, or to his property by descent or succession. If the order allowing and confirming the adoption shall direct that the name of the child be changed, the child shall be known by the new name designated in such order. His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and the person adopted sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, except as the same is affected by the provisions in this section in relation to adoption by a step-father or step-mother, and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, but as respects the passing and limitation over a real or personal property dependent under the provisions of any instrument on the foster parent dying without heirs, the person adopted is not deemed the child of the foster parent so as to defeat the rights of remaindermen.

Sec. 115. An orphan asylum or charitable institution, incorporated for the care of orphan, friendless or destitute children may place children for adoption and the adoption of every such child, shall, when practicable, be given to persons of the same religious faith as the parents of such child. The adoption shall be effected by the execution of an instrument containing substantially the same provisions as the instrument provided in this article for voluntary adoption, signed and sealed in the corporate name of such corporation by the officer or officers authorized by the directors thereof to sign the corporate name to such instruments, and signed by the foster parent or parents and each person whose consent is necessary to the adoption; and may be signed by the child if over twelve years of age; all of whom shall appear before the county judge or surrogate of the county where such foster parents reside or, if such foster parents do not reside in this state, in the county where such institution is located, and be examined except that such officers need not appear; and such judge or surrogate may thereupon make the order of adoption provided by this article. Such instrument and order shall be filed and recorded in the office of the county clerk of the county where such adoption takes place and the adoption shall take effect from the time of such filing and recording.

N. B.—The adoption petition in question recites that it was had under the provisions of Section 115, Supra, as amended by the Laws of 1918, Chapter 280.

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Conclusions.

(Filed June 29, 1929.)

June 28, 1929.

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER of The Estate of ANNIE MATHILDA FINKENZELLER, deceased.	3403. On Appeal from Essex Orphans Court.

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An administrator entitled to all the personal estate of the deceased is not required to file an inventory unless the court, upon the application of a person interested in the estate, orders him to do so.

A child adopted by decree of a New York court, having jurisdiction to fix his status with respect to his adoptive parent, may take personal property under our statute of distribution on the death, intestate, of such parent domiciled here.

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Mr. Abraham Levitan, proctor for appellant.

Mr. Richard Hartshorne, proctor for respondent.

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FIELDER, V. O.:

While Charles Finkenzeller and Annie Mathilda, his wife, were domiciled in this state, they petitioned the Surrogate's Court of the County and State of New York for the adoption of an infant girl then in the care and custody of a charitable institution located in New York County, and in their petition, signed and sworn to by both husband and

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wife, they prayed for an order allowing the adoption and directing that said infant be thereafter regarded and treated in all respects as their own child and be known by their surname. At the same time they entered into a written agreement with the charitable institution agreeing (among other things) to adopt and treat said infant as their own lawful child. A decree was made by said court, dated May 4, 1920, ordering that said agreement of adoption be in all respects allowed and confirmed and ordering that said infant be thereafter regarded and treated in all respects as the child of the adoptive parents and be known by their surname. The adoptive parents and the child thereafter resided together in this state and while domiciled here Mrs. Finkenzeller died March 12, 1926, leaving her husband and said child surviving her. Mr. and Mrs. Finkenzeller had a child of their marriage who predeceased Mrs. Finkenzeller and at Mrs. Finkenzeller's death she had surviving her no child of her body, or any legal representative of her deceased child. Mrs. Finkenzeller left real and personal property and a will admitted to probate by the Surrogate of Essex County, whereon letters of administration with the will annexed were granted to Charles Finkenzeller, the husband. The distributive provisions intended to be made by the testatrix were not contained in the will, but were written on sheets of paper separate from the will, which sheets of paper were denied probate, so that the will as admitted to probate, contained no provision for the disposition of the testatrix's personal estate and the same will go to her next of kin under our statute of distribution. Upon the administrator's failure to file an inventory of the personal estate of the deceased, he was, on petition of the

adopted daughter, ordered by the Orphans Court to do so and from said order he now appeals. The claim made in his behalf is that the decree of adoption of the New York Court will not be recognized to affect the distribution of the testatrix's personal estate under the laws of this state; that our statute of distribution giving the right of inheritance to a child from his parent, applies to a child of the body and to a child adopted under the statutes of this state only and to extend this right to a child adopted under the laws of another state, would be in contravention of our statute of distribution and that since the testatrix died without issue, the administrator, as surviving husband, is entitled to all of his deceased wife's personal estate (Cum. Supp. 2628, Sec. 146-169, Sub. II) and cannot be required to file an inventory.

Comp. Stat. 3855, Sec. 120, makes it unnecessary for an administrator with the will annexed, who is entitled to all the personal estate of the testator, to file an inventory unless the Orphans Court, upon the application of "any person interested in the estate" shall order him to do so. It is necessary therefore to determine whether the adopted daughter is a person interested in the estate. (Fowler's case, 67 N. J. Equity, 570; affirmed on this point, 68 N. J. Equity, 728).

The weight of authority in this country is that a child adopted in a foreign state or country may take under local statutes of descent and distribution, if such foreign state or country had jurisdiction to fix his status with respect to his adoptive parents and if the law with regard to adoption, of the state in which the real and personal property is situated, does not differ essentially from the law of the state in which the adoption was had, so that

local public policy is not violated by recognizing and giving effect to the adoption proceedings of the foreign state or country (65 L.R.A. 187; 14 L.R.A., new series, 980; L.R.A. 1916 A, 666 and cases cited). New York Courts recognize and apply this doctrine under the comity between states (New York Life &c. v. Viele, 161 N. Y. 11; Matter of
10 Leask, 197 N. Y. 193).

A child adopted under the Adoption Act of this state (Comp. Stat. 2807, Secs. 13 et seq.; Cum. Supp. 1555, Sec. 97-16) occupies the same position as a natural born child of the adoptive parents, so far as concerns the right to take by inheritance from such parents (In re Book 90 N. J. Equity, 549). The New York Adoption Act (Domestic Relations Law, II Birdseye, 2nd Ed., page 1937, Secs.
20 110 et seq.) is quite similar to our statute. It confers jurisdiction upon the Surrogate of the County in which the infant resides, when the adoptive parents are not residents of New York, and Sec. 114 of the New York act provides (like Secs. 15 and 16 of our statute) that after the order for adoption is entered, the adoptive parents and the child shall sustain toward each other the legal relation of parent and child and have all the rights and be subject to all the duties of that relation, including the right
30 of inheritance from each other (except in certain instances with which we are not now concerned). The courts of New York, construing the provisions of their act, have held that under it the right of inheritance from the adoptive parents is conferred on the child (Matter of Cook, 187 N. Y., 253; Gilliam v. Guaranty Trust Company, 186 N. Y., 127; Matter of Mac Rae, 189 N. Y., 142). It would therefore seem that public policy requires that this state
40 should apply the rule approved by the weight of

authority in this country and give full recognition to the status of an adopted child as defined by the Adoption statutes of New York and as fixed by decree of a New York court pursuant to such statutes, including the right to take from the parents land and personal property having *situs* here, to the same extent as a natural born child would take and such conclusion finds support in Dayton v. Adkisson, 45 N. J. Equity, 603; Tuttle v. Woolworth, 74 N. J. Equity, 310; Stout v. Cook, 77 N. J. Equity, 153, aff. 79 N. J. Equity, 640. But Vice Chancellor Church reached the opposite conclusion as to real property in Frey v. Nielson, 99 N. J. Equity, 135, wherein he held that a child adopted under the New York law could not inherit from her adoptive father land in this state. 10

Reference to cases upon which the learned Vice Chancellor relied in arriving at his conclusion may be helpful in determining the instant case. Hood v. McGehee, 237 U. S. 611, involved the right of children adopted in Louisiana to inherit from the adoptive father land in Alabama, the claim on behalf of the children being that by virtue of Art. IV, Sec. 1 of the Federal Constitution and the Act of Congress pursuant thereto, the Louisiana record was entitled to full faith and credit in Alabama, but the United States Supreme Court held that the Alabama statute of descent, as construed by the Supreme Court of that state, excludes children adopted by proceedings in other states, citing Brown v. Finley, 157 Ala. 424 (also cited by the Vice Chancellor) in which a Georgia adoption was considered and that the full faith and credit clause of the Constitution could not apply because Alabama has the right by statute and decision of its highest court to determine the devolution of Ala- 20 30 40

bama land by descent. This is also the purport of the decision of the United States Supreme Court in Olmstead v. Olmstead, 216 U. S. 386 (also cited by the Vice Chancellor). Alabama is one of the few states which holds that a foreign adoption gives the adopted child no right to inherit from the adoptive parents land in another state and it is interesting to note that in a case involving the same adoption as in Brown v. Finley, supra, and upon the same state of facts, except that the land in question was in Tennessee, the Tennessee Supreme Court held that the children adopted in Georgia had, under the law of comity, the right to inherit Tennessee land because Tennessee had adoption laws similar to Georgia (Finley v. Brown, 122 Tenn. 316).

Birtwhistle v. Vardill, 2 Clark & Fin., 571, the leading English case on the subject, is also cited by the learned Vice Chancellor. This decision has been criticised by other English decisions and by decisions in this country, including Dayton v. Adkisson, supra. The English case involved the right of a child born in Scotland of parents domiciled there, who were unmarried at the time of his birth, which child was made legitimate by the law of Scotland through the subsequent marriage of his parents, to take lands of his father situate in England. The court held that the law of inheritance in England had been fixed by the so-called Statute of Merton (20 Hen. III. c. 9) under which none were legitimate heirs except those born in lawful wedlock, but the court did not deny the status of the child as a legitimate child under the law of Scotland, or that being legitimate in Scotland he was also legitimate in England.

The Birtwhistle case does not apply to personal property and we have no statute in this state simi-

lar to the Statute of Merton, but we have our adoption statute and statutes legitimating children born out of wedlock, whose parents afterward marry (P. L. 1915, p. 333) and children born of a ceremonial marriage afterwards annulled or declared void (P. L. 1924, p. 318) and giving such children the right of inheritance from their parents, which statutes are contrary to the Statute of Merton. Whatever may be the rule to apply in this state as to the right of a child under a foreign adoption to take land in this state by inheritance from an adoptive parent, I know of no case which is authority for denying the right of a child adopted under a New York Court decree to take by inheritance from her adoptive parent, personal property having its *situs* here and I shall hold that comity between states requires that the New York decree of adoption in question, should be recognized in this case as giving the adopted child the same status as a lawful child so far as concerns the personal estate of her adoptive mother and that therefore she is a person interested in such estate (Cum. Supp. 2628, sec. 146-169, Sub. I). The result is that the order of the Orphans Court directing the administrator to file an inventory, will be affirmed.

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Decree Dismissing Appeal.

(Filed September 25, 1929.)

NEW JERSEY PREROGATIVE COURT.

IN THE MATTER of The Estate of ANNIE MATHILDA FINKENZELLER, deceased.	3403. On Appeal from Essex Orphans' Court.

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This cause having been brought on for hearing on appeal from an order of the Essex County Orphans Court, made on the second day of April, 1928, directing Charles Finkenzeller, administrator cum testamento annexo of the estate of Annie Mathilda Finkenzeller, deceased, to file an inventory of the personal estate of said deceased, and the Court having considered the proofs and the stipulation of facts herein, and having heard and considered the arguments of Levitan & Levitan, proctors for the appellant Charles Finkenzeller, administrator as aforesaid, and Stewart & Hartshorne, proctors for the respondent Evelyn Bill, by Charles Bill, her next friend,

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It is, on this 26th day of September, 1929, ORDERED, ADJUDGED and DECREED, that the said order of the Essex County Orphans' Court appealed from, be and the same is in all things affirmed, and that the petition of appeal be dismissed.

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It is further ORDERED, ADJUDGED and DECREED, that the said Charles Finkenzeller pay to said respondent her costs on said appeal to be taxed, in which shall be included a counsel fee of Three Hundred Dollars ($300.00), said costs and counsel fee to be

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paid by the said Charles Finkenzeller personally, and not out of the aforesaid estate, and that said respondent have execution for the same.

E. R. WALKER,
Ordinary.

Respectfully advised, 10
JAMES F. FIELDER,
V. O.

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Notice of Appeal.

(Filed December 26, 1929.)

NEW JERSEY PREROGATIVE COURT.

In the Matter of The Estate of Annie Mathilda Finkenzeller, deceased.	On Appeal from the New Jersey Prerogative Court.

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Charles Finkenzeller, Administrator cum Testamento annexo of the Estate of Annie Mathilda Finkenzeller, deceased, hereby appeals from the final decree made in the above entitled cause, on the 26th day of September, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

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Dated: October 3, 1929.

Levitan & Levitan,
Solicitors for and of
Counsel with Charles
Finkenzeller, Adm. C.T.A.

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

Abraham Levitan,
Of Counsel with Charles
Finkenzeller, Adm. C.T.A.

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Petition of Appeal.
(Filed December 26, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of The Estate of Annie Mathilda Finkenzeller, deceased.	On Appeal from New Jersey Prerogative Court.

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

The petition of Charles Finkenzeller, Administrator, C.T.A. of the estate of Annie Mathilda Finkenzeller, deceased, the appellant in the above entitled cause, respectfully shows that:

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1. Petitioner finds himself aggrieved by final decree made in the New Jersey Prerogative Court by his Honor Edwin Robert Walker, Ordinary of the State of New Jersey, bearing date the 26th day of September, 1929, in a certain cause in said New Jersey Prerogative Court, wherein Evelyn Bill, by Charles Bill her next friend, was petitioner, and the said Charles Finkenzeller, Administrator, C.T.A. was defendant in this respect, to wit: that the said decree adjudged that the order of the Essex County Orphans' Court directing Charles Finkenzeller, Administrator, C.T.A. of the estate of Annie Mathilda Finkenzeller, deceased, to file an inventory of the personal estate of said deceased, be affirmed.

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2. And petitioner appeals from the decree of the Ordinary which decrees as aforesaid, upon the grounds that the same is erroneous in that;

a. Petitioner Charles Finkenzeller, Administrator, C.T.A. is the sole legatee under the will of Annie Mathilda Finkenzeller, deceased, and is therefore not required to file an inventory or settle his accounts.

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b. The respondent Evelyn Bill was adopted under a New York decree and according to the law of the State of New York, and is therefore precluded from sharing in the Estate of Annie Mathilda Finkenzeller, deceased.

c. The Courts of the State of New Jersey are not bound to give effect to adoption proceedings in another State and will not in this case.

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d. The Law of the State of New Jersey providing for adoption gives the right of inheritance only to children adopted under its provisions.

e. Petitioner appeals from the decree of the Ordinary which affirms the order of the Essex County Orphans' Court and dismisses petitioner's appeal in the Prerogative Court.

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Petitioner therefore prays that the said decree of the said Ordinary may be in the particulars aforesaid, wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

LEVITAN & LEVITAN,
Solicitors for Appellant.
ABRAHAM LEVITAN,
Of Counsel.

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Answer to Petition of Appeal.)
(Filed December 26, 1929.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of The Estate of Annie Mathilda Finkenzeller, deceased.	On Appeal from Prerogative Court.

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The answer of Evelyn Finkenzeller Bill, by Charles Bill, next friend, appellee, to the petition of appeal of Charles Finkenzeller, appellant.

This appellee, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that a decree, on September 26, 1929, was made and entered in the New Jersey Prerogative Court, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree this appellee begs leave to refer thereto when the same shall be produced. This appellee is advised and believes that the said decree is agreeable to law and equity; and she prays that the same may be affirmed with costs to be taxed in favor of this appellee.

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Stewart & Hartshorne,
Solicitors for and of Counsel with Appellee.

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New Jersey Court of Errors and Appeals

<table>
<tr><td>IN THE MATTER
of
The Estate of ANNIE MATHILDA FINKENZELLER,
Deceased.</td><td>On Appeal From the Prerogative Court.</td></tr>
</table>

BRIEF OF DEFENDANT-APPELLANT.

The defendant-appellant, Charles Finkenzeller, Administrator *Cum Testamento Annexo,* of the estate of Annie Mathilda Finkenzeller, appeals to this Court from the final decree of the Prerogative Court (p. 54, state of case), affirming an order of the Essex County Orphan's Court, ordering Charles Finkenzeller, Administrator C. T. A. of the estate of Annie Mathilda Finkenzeller to render an inventory of the personalty of the said Annie Mathilda Finkenzeller, which has come into his hands as such administrator, C. T. A. (p. 14, state of case).

The cause comes before this Court on an agreed state of facts stipulated between counsel for the respective parties (p. 23, state of case), which are briefly as follows:

1. Respondent, Evelyn Bill, a resident of New York, at the time of her adoption, was adopted by aforesaid decedent, Annie Mathilda Finkenzeller, and her husband, aforesaid Charles Finkenzeller, residents of New Jersey, by order of the Surrogates' Court of the County and State of New York, on April 4, 1920, a

copy of the adoption record being annexed hereto, and marked Exhibit A.

2. Decedent, Annie Mathilda Finkenzeller, and her said husband had one living, natural born child, who pre-deceased her.

3. Decedent, Annie Mathilda Finkenzeller, died March 12, 1926, a resident of Essex County, New Jersey, without issue of her body then living, but leaving her husband, Charles Finkenzeller, and her said adopted child, Evelyn Bill.

4. Said decedent left a Will, duly admitted to probate, together with certain other papers, which papers were disconnected from the said Will, and were not admitted to probate. Said Will, as probated, named executors as such, and named no beneficiaries, a certified copy being annexed hereto and marked Exhibit B.

5. Said executors have renounced, and said Charles Finkenzeller has been appointed as administrator *cum testamento annexo* of the above estate.

6. Said decedent left both realty and personalty in a substantial amount.

7. Said Charles Finkenzeller, as such administrator *cum testamento annexo,* has failed and neglected to file an inventory of the estate of said decedent, although requested, and although more than three months have elapsed previous to the filing of the petition herein since the granting of letters testamentary as aforesaid.

The contention of the administrator, C. T. A.—appellant, is that since the petitioner-respondent was adopted under the New York decree, she is precluded from any right of inheritance in any of the personalty of the estate of Annie Mathilda Finkenzeller, in the State of New Jersey.

It is further contended that since there are no other lawful heirs of the decedent, who are entitled to inherit the personalty, than Charles Finkenzeller the husband, he is the sole legatee, and under the law is not required to file an inventory.

Petitioner was adopted under a New York decree according to the law of the State of New York, and is therefore precluded from sharing in any personalty in the estate of Annie Mathilda Finkenzeller, in this State.

POINT I.

The Courts of the State of New Jersey are not bound to give effect to adoption proceedings in another State.

The question arises whether the State of New Jersey is required to give effect to the legislation of a sister state in adoption proceedings, so that petitioner-respondent herein may be allowed to share in the personal estate of her foster mother. This question has been definitely settled in the negative by the United States Supreme Court.

In the case of *Olmstead* vs. *Olmstead,* reported in 216 U. S., page 386, 30 S. C. 294, the question arose as to whether the Courts of the State of New York were *required* by full faith and credit clause of the federal Constitution to give effect to a *Michigan statute* legitimatizing a child born prior to the marriage of its parents, *so as to control* devolution of *title to lands in New York* where such statute was contrary to the law and policy of the State of New York. In deciding that the New York courts *were not* so required, Mr. Justice Day cites with ap-

proval an old and well established principle laid down in the case of *Clarke* vs. *Clarke,* 178 U. S. 186, 20 Sup. Ct. Rep. 874.

> "It is a doctrine firmly established that the law of a state in which land is situated controls and governs its transmission by will or its passage in case of intestacy. This familiar rule has been frequently declared by this court, a recent statement thereof being contained in the opinion delivered in De Vaughn vs. Hutchinson, 165 U. S. 566, where the court said, it is a principle firmly established that, to the law of the State in which land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances."

Squaring this doctrine up with the full, faith and credit clause of the federal Constitution the court quotes from the case of *Fall* vs. *Eastin,* 215 U. S. 1, 30 S. C. on page 8,

> "This doctrine is entirely consistent with the provision of the Constitution of the United States, which requires a judgment in any state to be given full, faith and credit in the courts of every other state. *This provision does not extend the jurisdiction of the courts of one state to property situated in another,* but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit.
>
> "It does not carry with it into another state the efficacy of a judgment upon property or persons to be enforced by execution. To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit."

The court then on page 294, says:

> "The principle established by these cases is applicable to the case at bar. The full faith

and credit clause of the Constitution *applies with no more effect to the legislative acts of a foreign state* than it does to the judgment of the courts of such state."

And on page 295,

> *"We hold that there is nothing in the Federal Constitution requiring the courts of the State of New York to give force and effect to the statute of the State of Michigan so as to control the devolution of title* to lands in New York."

Turning to a case involving the exact question in controversy. The case of *Hood* vs. *McGehee,* 237 U. S. 611, 35 Sup. Ct. Rep. page 718, decides the question of whether *adoption proceedings of the State of Louisiana must be recognized* under the full faith and credit clause of the Federal Constitution in the *State of Alabama.*

Mr. Justice Holmes says:

> "The Alabama statute of descents as construed by the Supreme Court of the State excludes children adopted by proceedings in other states. There is no ground upon which we can go behind these decisions, and the law, so construed, *is valid.* The construction does not deny the effective operation of the Louisiana proceedings, but simply reads the Alabama statute as saying, that whatever may be the status of the plaintiffs, whatever their relation to the deceased by virtue of what has been done, the law does not devolve his estate upon them. There is no failure to give full credit to the adoption of the plaintiffs, in a provision denying them the right to inherit land in another state. Alabama is sole mistress of the devolution of Alabama Land by descent."

It can readily be seen from the two federal cases above cited, that one state is the sole mistress of

property within its boundaries, and that it may if its courts so decide, ignore the legislation of a sister state, especially where that legislature is repugnant of the law of the State.

In concluding this point, petitioner being adopted under a New York decree, according to the law of the State of New York, is therefore precluded from sharing in the estate of Annie Mathilda Finkenzeller, in this State.

POINT II.

The law of New Jersey providing for adoption gives the right to inheritance only to children adopted under its provisions.

This state has construed its own adoption act with reference to the inheritance of property and the adoption proceedings of a sister state.

The leading case on the subject in New Jersey is the case of *Frey* vs. *Neilson,* 132 Atl. 765.

This case brought up the exact question involved in the case *sub judice* namely, whether a child adopted in the State of New York and under its laws, could inherit land in New Jersey.

Vice-Chancellor Church, after a careful examination of the whole subject decides that the child *may not* inherit land in the State of New Jersey.

This case is so exactly on all fours with the case *sub judice,* that we take the liberty of quoting it at length, as showing firstly the *policy of New Jersey* with regard to recognizing foreign adoption proceedings as a matter of comity, and secondly recognition of a foreign decree of adoption would be repugnant to our law.

Vice-Chancellor Church says on page 766 in the *Frey* case:

"It has been suggested that under the so-called full faith and credit clause of the United States Constitution (section 1, art. 4,) the courts of the state are bound to give effect to adoption proceedings of another state. This, however, has been definitely settled by the Supreme Court of the United States in Hood v. McGehee, 35 S. Ct. 718, 237 U. S. 611, 59 L. Ed. 1144 (1914). *It was in this case held that they are not required so to do.* This case followed Olmsted vs. Olmsted, 30 S. Ct. 292, 216 U. S. 386, 54 L. Ed. 530, 25 L. R. A. (N. S.) 1909. Here it was held that the full faith and credit clause *does not require the courts of one state to give effect to a statute of another state,* legitimatizing children born out of wedlock. In the Hood case the court rested its decision on the ground that the Alabama statute of descents, as construed by the Supreme Court of that state, excluded children adopted by proceedings in other states. *The court says, and this is significant,* 'Alabama is the sole mistress of the devolution of Alabama land by descent'."

He then says on page 766:

"A careful examination of these cases both pro and con indicates that the application of the doctrine of comity in each instance was largely governed by an analysis of the law of descent prevailing in the state where the opinion was rendered."

And on page 767 the learned Vice-Chancellor says:

"In 1877 a statute was enacted in our state (Act March 9, 1877 P. L. p. 123), providing for the adoption, custody, and maintenance of minors, giving them rights on inheritance (revised P. L. 1902 p. 259). *It is clear that this statute gives rights of inheritance only to children adopted under its provisions."*

"That it was the Chief Justices' opinion that our law of descent was modified *only to the extent of letting in children adopted under a decree of a New Jersey court and by virtue of the New Jersey statute appears not only* from the foregoing language but also from the following, 107 A. 436, 90 N. J. Eq., at page 552.

"The act concerning wills, the statute of descents and the statute of distribution composed the entire legislative system regulating the transmission of the estates of decedents, testate or intestate, prior to the passage of the act for the adoption of minor children. By the enactment of this latter statute that system, as we have just said, was, to some extent, changed. To determine the purpose of the Legislature in making that change, and the extent thereof, all of these statutes must be read together."

* * * * * *

It will be observed from the foregoing opinion that the rule of the common law that the heir must be born in lawful wedlock is recognized as a fundamental part of the law of descent, and that effect is given to statutory modifications of the rule only within the precise limits of the modifying statutes.

This strict rule of statutory construction was expressed by Justice Minturn, speaking for the Court of Errors and Appeals, in Dorsett vs. Vought, (1916) 98 A. 248, 249, 89 N. J. Law, 303, 305. He said:

"*The effect of these adjudications* (certain cases in other states applying the general rule) *is to determine that the right of a child by adoption to inherit is entirely of statutory creation;* that the right being in derogation of the common law must be strictly construed, and will be denied unless the act of adoption shall have consummated in strict accordance with the statute."

My opinion is that our statute of descent precludes inheritance by any except children

born in wedlock, and that the modification by statute permitting adopted children to inherit applies only to children adopted under the provisions of the New Jersey statute. *The doctrine of comity should not in this class of cases be applied because to extend this courtesy to the adoptive acts of other states would be in contravention of our own statute of descent.* In other words, quoting from the United States Supreme Court in Hood vs. McGehee, supra:

"Alabama (in the instant case New Jersey) is sole mistress of the devolution of Alabama (New Jersey) land by descent."

In *Re: Dennis Estate,* 129 Atl. page 166, the question involved was, would Vermont recognize and extend comity to the legal status acquired by one adopted under the laws of New Hampshire, and who now claims personal property under the will of one who was domiciled and died in Vermont.

The court held on page 167:

"So far, then, as the adoption went in constituting the claimant an heir of the decedent, with rights equal to those of a natural child, we will give it effect to the same extent as the New Hampshire court would if intestate distribution of the estate was to be there made; for thus far their statute is in accord with ours. G. L. Par. 3762. But this is as far as we can go. Her right to inherit any part of this estate depends upon our law. 5 R. C. L. Par. 1017. The statute, giving a child a share in its parent's estate when left out of the will, has no counterpart in our statutes. It is not consistent with our law, which allows a testator to do as he will with his property, so far as his children are concerned."

This case wherein the State of Vermont did not extend and recognize the adoption proceedings of another State, so as to permit the adopted child to

inherit personal property in its State, is on all fours with the instant case.

From the foregoing it can be seen that our statute of adoption together with our laws governing distribution and descent, have always been strictly construed and zealously guarded from any encroachment, so that effect is given to statutory modifications only when the act of adoption has been consummated in strict accordance with our statute, and that for New Jersey to recognize the foreign decree of adoption would be, in effect, to deny our court's interpretation of our adoption act and to nullify the policy our state has expressed towards foreign legislation giving rights in property within the boundaries of New Jersey repugnant to its legislation as interpreted by our courts.

It is respectfully urged therefore that the petitioner herein cannot share in the estate of Annie Mathilda Finkenzeller, firstly, because she was not adopted under the provisions of our adoption act, and secondly, that being adopted under a New York decree ,our state will not as a matter of comity recognize such decree because it is repugnant to the policy of our law to do so.

POINT III.

The policy of New Jersey with regard to personalty is the same as that to realty.

It is admitted in this Court that Annie Mathilda Finkenzeller was domiciled in the State of New Jersey at the time of her death and that her property was located in the State of New Jersey, and under these circumstances the distribution of her

estate both real and personal *is governed by the law of New Jersey.*

In the case of *Re Grattan's Estate,* 78 Atl. 813, Pitney Ordinary says on page 816:

> "Mrs. Grattan having been domiciled in Pennsylvania, her personal property was distributable according to the laws of that state."

It was so held in the case of *Griswold* vs. *Kelly-Springfield Tire Co.,* Reported in 120 Atl. 324 on page 327.

> "The feebleness of the second ground is so apparent that little need be said. The law is well settled that, in case of intestacy, personal property in a foreign jurisdiction will devolve according to the laws of the domicile."

This being so, it is most respectfully urged that the reasoning applicable in the case of *Frey* vs. *Neilson* and the other cases cited *supra* applies with as much force and effect to personalty as it does to realty.

The State of New Jersey, it has been shown is not required to give full faith and credit to the adoption proceedings of a sister state, but it may choose whether it will or not, and it has further been shown that New Jersey has expressed its policy with reference to foreign adoption proceedings (and we respectfully ask the court to note that the opinion rendered in the *Frey* vs. *Neilson* case was expressed as to, a New York decree of adoption and the petitioner in case *sub judice* asks this court to recognize a New York decree of adoption) to the effect that it will not recognize a foreign decree of adoption because it is repugnant to our legislation, *and that for an adopted child to share, it must be adopted under the New Jersey statute.*

In concluding this point, it is most respectfully suggested that the words of Mr. Justice Holmes in the *Hood* case, *supra,* that:

> "Alabama is sole mistress of the devolution of Alabama by descent,"

may be paraphrased to read:

New Jersey is sole mistress of the devolution of New Jersey personal property and it may, and has seen fit by the decision in the *Frey* case, to hold that an adopted child, in order to inherit, must be adopted under and in accordance with the New Jersey statute.

POINT IV.

The Courts distinguish between adoption and legitimation proceedings.

From a thorough examination of the cases involving adoption proceedings and those instituted for the legitimation of illegitimate children, a different policy seems to be followed:

In the case of *Dayton* vs. *Adkisson,* 45 Eq. page 603, Vice-Chancellor Pitney, speaking for the Court, in reference to the legitimation statutes, says on page 609:

> "Statutes similar to that in Pennsylvania exist in many, if not most, of our sister States, and also statutes which provide, as our own does, for the adoption of children by legal proceedings. Many persons come to reside among us from neighboring States, and from those countries of Europe governed by the civil law system, and bring with them children whom they suppose to be their lawful heirs for all

> purposes, but who would be denied the right of heirs as to real estate by the rule adopted in England in Doe v. Vardill, while, as to personal property, they would be lawful next of kin. I do not think such a state of the law a desirable one, and am not willing to be the first judge to declare such to be the law in this State. Nor do I think a law enabling, or even encouraging, parents to do simple justice to their innocent offspring, begotten out of wedlock, by investing them with the complete attributes of heirs, is immoral or tends to promote immorality. I see no reason why a man should not be permitted to adopt and invest with rights of heirship his own illegitimate child by marrying its mother."

This case expresses the policy of New Jersey in furthering the legitimation by and extending comity and giving full faith and credit to laws of sister states, whereby illegitimate children acquire a legitimate status as the result of the subsequent marriage of the parents, and have rights and privileges as children lawfully born out of wedlock, in certain cases excepted as where heirs of blood can only inherit. The decree of the Court in this case permitted a child born out of wedlock in Pennsylvania and rendered legitimate by the subsequent marriage and cohabitation of its parents in Pennsylvania, competent to inherit land in New Jersey.

The State of New Jersey's policy in improving and aiding the status of illegitimate children is enunciated by the statutes in 2 Cumulative Supplement, C. S. P. 2629, sub-div. 5.

> "If the mother of any illegitimate child or children not embraced within the class mentioned in paragraph VI hereof, shall die without leaving a husband surviving her, and leaving no lawful issue, or the issue of any, then the surplusage of her goods, chattels and personal estate shall be distributed equally to and among such illegitimate child or children."

The above statute gives an illegitimate child as such, a status whereby it can inherit property. Which goes much further than the recognition of an illegitimate child legitimated by the subsequent marriage and co-habitation of its parents, as in the case of *Dayton* vs. *Adkisson, supra.*

Sub-division VI provides and is in line with the case of *Dayton* vs. *Adkisson, supra,* where an illegitimate child whose parents subsequently married are recognized and given the same rights as children born out of lawful wedlock.

The law however is different in cases of adoption. The general policy being to encourage the legitimation of illegitimate children in every possible way, even considering it retroactively, as where illegitimate children are considered legitimate where the parents subsequently marry.

The law however is contrary in respect to adoption. Here a total stranger to the parents comes in as a lawful heir and this is in strict derogation of the common law rights, as is shown in the case of *Frey* vs. *Neilson, supra,* where on page 767, Vice-Chancellor Church says:

> "In 1877 a statute was enacted in our state (Act March 9, 1877 P. L., p. 123), providing for the adoption, custody, and maintenance of minors, giving them rights of inheritance (revised P. L. 1902, p. 259). *It is clear that this statute gives rights of inheritance only to children adopted under its provisions"* (Italics ours).
>
> "That it was the Chief Justices' opinion that our law of descent was modified *only to the extent of letting in children adopted under a decree of a New Jersey court and by virtue of the New Jersey statute appears not only* from the foregoing language but also from the following, 107 A. 436, 90 N. J. Eq. at page 552" (Italics ours).

A further expression and statutory construction of the adoption act was enunciated in *Dorsett* v. *Vought,* 98 Atl., *supra,* where Justice Minturn speaking for the Court of Errors and Appeals, says in 98 Atl., page 249:

> "*The effect of these adjudications* (certain cases in other states applying the general rule) *is to determine that the right of a child by adoption to inherit is entirely of statutory creation;* that the right being in derogation of the common law must be strictly construed, and will be denied unless the act of adoption shall have been consummated in strict accordance with the statute" (Italics ours).

As can readily be seen the Courts take the policy of standing aloof or discouraging, in every possible way, the inheritance by adopted children, where the adoption has taken place in a sister state. Of course where the adoption occurs within the State where the inheritance exists, a different and more liberal principle is applied.

In concluding this point, it is most respectfully urged that as petitioner is an adopted child, adopted in the State of New York, she therefore cannot as such, inherit property in the State of New Jersey.

Where an executor or administrator is the sole legatee under a will or otherwise, he is not required to file any inventory or settle his accounts.

Section 120 of the Orphans' Court of New Jersey provides as follows:

> "It shall *not* be necessary for an executor or administrator under any last will and testament who is entitled to all the personal estate of the testator, after payment of debts and specific requests, legacies or trusts, to file any

inventory, or settle his accounts in the Surrogate's Office."

Home Brewing Co. vs. *Marler,* 92 Eq., p. 323, 112 Atl. 506, on page 508,

"The failure to file the inventory, I presume, is excused or justified by section 120 of the Orphans' Court Act (C. S. 3855), which makes it unnecessary to file an inventory where the executor is sole legatee."

CONCLUSION.

It is therefore respectfully urged that the petitioner-respondent in this case is not entitled to any right of distribution of any of the personalty in the estate of Annie Mathilda Finkenzeller, and the decree of the Prerogative Court affirming the order of the Essex County Orphans' Court, requiring the Administrator, C. T. A., to file an inventory, be reversed, and the petition dismissed with costs.

Respectfully submitted,

LEVITAN & LEVITAN,
Attorneys for Appellant.

ABRAHAM LEVITAN,
Of Counsel.

New Jersey Court of Errors and Appeals

In the Matter
of
The Estate of Annie Mathilda Finkenzeller,
Deceased.

On Appeal from the Prerogative Court.

BRIEF FOR RESPONDENT.

The Issue.

The facts in this case are succinctly stated in the Stipulation of Facts (Record, page 23).

The issue is whether decedent's daughter, adopted in New York, shares here in decedent's personalty.

It would almost seem that to state the proposition was to answer it. However, the issue is settled both on reason and authority.

1. The adopted daughter is decedent's lawful child, and entitled to take under the New York statute.

2. She is decedent's lawful child in New Jersey, and is entitled to share in her personalty in New Jersey.

3. *Frey* vs. *Nielson*, 99 N. J. E. 135, (Chancery) does not question this doctrine.

4. *Frey* vs. *Nielson* decides not this, but a different point, as to which there is indeed serious question.

LAW.

I.

Respondent is the lawful child of decedent and lawfully entitled to take under the New York statute.

There is and can be no question as to this. The fact that, not only decedent, but the administrator C. T. A., who now denies respondent's standing, applied by verified petition to adopt her, is a matter of record and is stipulated as a fact in this cause. That the adoption decree was entered on April 4, 1920 is similarly stipulated. The New York adoption laws specifically provide:

> "The foster parent or parents and the person adopted, sustain toward each other the relationship of parent and child and have all rights and are subject to all the duties of their relationship, *including the right of inheritance from each other.*"

Birdseye N. Y. Stats., Vol. 2, page 1943 (Record, page 45). Respondent's status, as adopted child of decedent, and her right to take in New York are therefore settled. Her status as adopted child is as fully established as would be her status as wife, were she married in New York, or as would be her status as divorcee, were she legally divorced in New York, or as lawful child, were she legitimized as provided by law.

II.

Respondent is decedent's lawful child in New Jersey and is entitled to share in her personalty in New Jersey.

Respondent's status as adopted child is definitely fixed by her adoption in New York, where she was then domiciled. In the absence of fraud or a direct contravention of the public policy of a sister STATE, this status as such lawful child will be recognized throughout the United States, by comity, if not by virtue of the "full faith and credit" clause of the Federal constitution. This rule is being constantly applied to the relationship of husband and wife in regard to foreign marriages and foreign divorces, and is similarly applicable to exactly the same extent in regard to the other domestic status of parent and child. Story, Conflicts of Law, section 93; Wharton, Conflicts of Law, Section 240.

This disposes of appellant's point, that the Adoption Act of New Jersey is the only act by virtue of which an adopted child can either inherit realty, or take personal property, in New Jersey. The taking of realty in New Jersey is governed generally by the Descent Act; the taking of personalty, by the Distribution Act. If a person comes within the provisions of either Act, he can take accordingly. Natural-born children, of course, so take, without reference to the Adoption Act. Husbands and wives also take dower and curtesy, as fixed by statute. No one would claim for a minute that they had to be married in New Jersey, according to the New Jersey Marriage Act, in order to be recognized as lawfully married persons. No one would claim for a minute that when lawfully married elsewhere, in a

manner not contrary to the policy of this State, they would not take their dower and curtesy here. Similarly, if not contrary to the public policy of this State, a person adopted elsewhere will take under the Distribution Act here, not at all by virtue of the New Jersey Adoption Act, but quite without regard to such Act.

Respondent's status as the lawful child of decedent is, therefore, established in this State in the absence of fraud or a direct contravention of the public policy of New Jersey.

There is not the slightest suggestion of fraud in the adoption. In fact, since the adopting parents were the decedent and the administrator themselves, who petitioned under oath, it will not lie in their mouths to admit the commission of perjury, even assuming, for the sake of argument, that such were the case.

Appeal of Wolf, 13 At. 760 (Pa.).

Far from being in contravention of the policy of New Jersey, the adoption of respondent in New York is directly in accord with the policy of New Jersey, which expressly provides for the adoption of children. Compiled Statutes, 1910, Volume 2, Infants, page 2807, Section 13.

Moreover, respondent's right to take personalty from the estate of her adopted parents in New York is not in contravention of, but in exact accord with, the policy in New Jersey, since the New Jersey adopting statute expressly provides that "The adopted child shall be invested with the right of inheritance to real estate or to the distribution of personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock." Compiled Statutes, 1910, Volume 2, Infants, page 2809, Section 16. New York Statute, *supra*:

> "The foster parent or parents and the person adopted, sustain toward each other the relationship of parent and child and have all rights and are subject to all the duties of their relationship, *including the right of inheritance from each other.*"

Respondent's status, as lawful child of decedent, and her right to take the personalty having been thus settled by the concurrent policy of both New York and New Jersey, we turn to the Distribution Act to ascertain the amount which this lawful child can take. Thereby it is provided that "One-third part of the said surplusage to the husband * * * of the intestate and all the residue by equal portions to and among the children of such intestate, * * *." II Cumulative Supplement, 1924, Orphans Court, page 2628, Distribution, Sections 146-169, sub. 1.

Accordingly, on the very face of the statutes, respondent, being the only known child of decedent, is entitled to two-thirds of the personalty.

Nor is this a case of novel impression. This state has already held such to be the law. Not only has this been so held by the Essex County Orphans' Court and by the Court of Chancery in a similar situation, but the Prerogative Court, in a comprehensive opinion by Vice-Ordinary Fielder, has laid down the reasons and the authorities accordingly (Record, p. 47). In the course of his opinion, the Vice-Ordinary says:

> "The weight of authority in this country is that a child adopted in a foreign state or country may take under local statutes of descent and distribution, if such foreign state or country had jurisdiction to fix his status with respect to his adoptive parents and if the law with regard to adoption, of the state in which the real and personal property is situated does not differ essentially from the law of the state in which the adoption was had, so

that local public policy is not violated by recognizing and giving effect to the adoption proceedings of the foreign state or country (65 L. R. A. 187; 14 L. R. A., new series, 980; L. R. A. 1916 A, 666, and cases cited). New York courts recognize and apply this doctrine under the comity between states (New York Life, &c. *v.* Viele, 161 N. Y. 11; Matter of Leask, 197 N. Y. 193).

"A child adopted under the Adoption Act of this state (Comp. Stat. 2807, Secs. 13 *et seq.*; Cum. Supp. 1555, Sec. 97-16) occupies the same position as a natural born child of the adoptive parents, so far as concerns the right to take by inheritance from such parents (In re Book 90 N. J. Equity, 549). The New York Adoption Act (Domestic Relations Law, II Birdseye, 2nd Ed., page 1937, Secs. 110 *et seq.*) is quite similar to our statute. It confers jurisdiction upon the Surrogate of the County in which the infant resides, when the adoptive parents are not residents of New York, and Sec. 114 of the New York Act provides (like Secs. 15 and 16 of our statute) that after the order for adoption is entered, the adoptive parents and the child shall sustain toward each other the legal relation of parent and child and *have all the rights and be subject* to all the *duties of that relation, including the right of inheritance from each other* (except in certain instances with which we are not now concerned). The courts of New York, construing the provisions of their act, have held that under it the right of inheritance from the adoptive parents is conferred on the child (Matter of Cook, 187 N. Y. 253; Gilliam *v.* Guaranty Trust Company, 186 N. Y. 127; Matter of MacRae, 189 N. Y. 142). It would therefore seem that public policy requires that this state should apply the rule approved by the weight of authority in this country and give full recognition to the status of an adopted child as defined by the Adoption statutes of New York and as fixed by decree of a New York court pursuant to such statutes, including the right to take from the

parents land and personal property having situs here, to the same extent as a natural born child would take and such conclusion finds support in Dayton *v.* Adkisson, 45 N. J. Equity 603; Tuttle *v.* Woolworth, 74 N. J. Equity 310; Stout *v.* Cook, 77 N. J. Equity 153, aff. 79 N. J. Equity 640.''

Moreover, the Essex County Orphans' Court in *Re Estate of Sarah Peddie,* 20 N. J. L. J., page 279, by Judge Fort, considered the question of whether decedent's daughter adopted in Connecticut was in the status of a child born of the marriage under the inheritance tax act. He held that it was:

> ''Our statute with relation to the adoption of children declares that a child adopted shall be invested with every legal right, privilege, relationship, in respect to its education, maintenance and the right of inheritance to real estate or the distribution of personal estate on the death of such adopting parent or parents, as if born to them in lawful wedlock. The terms of this statute are very similar to those of the statute of Connecticut under which the adoption in this case occurred. *An order directing an adoption by our Courts, under our statute, would be entitled to as much force in Connecticut, as here. So with a Connecticut decree here, made under that statute,* if the effect of the decree of their Probate Court, under their statute, is to create the status of a child, then the statute here is the same. In my view property passing to a child under our statute, would be exempt from the tax under our collateral inheritance tax act. *Such an adopted child is a child within the exemption of our statute— The Courts of this State are required to give force to this (Connecticut) Statute as we would if it were our own. I hold that under the Connecticut statute, an adoption as shown in this case, creates the relationship of parent and child, that a child so adopted is*

> *a child in law, with all the rights of a child with blood relationship."*

This state has, therefore, flatfootedly held that a child adopted in Connecticut under a statute similar to ours, is entitled to take here as a child. The New York statute being to the same effect, the present case is on all fours, and this Court will hold respondent similarly entitled. *Stare decisis.*

Not only is this so in the Orphans' Court, but the Peddie case has been approved by the Court of Chancery in an opinion by Vice-Chancellor Howell in the case of *Tuttle* v. *Woolworth,* 74 Eq. 310, involving the right of an illegitimate child to take under a Will. The Court of Chancery in *Tuttle* v. *Woolworth* in turn approved a previous decision by this Court entered by Vice-Chancellor Pitney in the case of *Dayton* v. *Adkisson,* 45 Eq. 603, holding that a child born out of wedlock in Pennsylvania, and thereafter legitimatized according to the Pennsylvania statutes by a subsequent marriage in that State, inherits land in this State. It will be noted that this last case goes much further than the instant case in two particulars, (1) it applies the doctrine as to land, (2) it applies the doctrine to bastards, and not to children as to whom no stigma has ever been attached, which is the situation in the case at bar. Even as to the right of those formerly bastards to inherit land in this State the Court of Chancery holds them entitled as follows:

> "The children were rendered legitimate by the Pennsylvania act of 1857 *and being legitimate they are in my opinion legitimate in this State."*

The Court's opinion is so pertinent and helpful that we quote it at length:

"I do not deem it worth while to state at any considerable length the grounds upon which I reach this conclusion. They are stated elsewhere much better than I could state them. The question involved was elaborately discussed in England in Doe *v.* Vardill, 5 Barn. & C. 438; same case *sub non.* Birtwhistle *v.* Vardill, 2 Clark & F. 571, 7 Clark & F. 895; in New York in Miller *v.* Miller, 91 N. Y. 315; and in Massachusetts in Ross *v.* Ross, 129 Mass. 243. In the latter case Chief Justice Gray cites and comments upon every case up to that date (1880), and, after an exhaustive discussion of the whole subject, comes to the conclusion that the particular reasons that influenced the English court in holding in Doe *v.* Vardill that an heir to land in England must be actually born in wedlock do not apply in this country; and that a person declared to be a legitimate child of another by the law of the state of the domicile must be held to have all the rights of a legitimate child wherever he goes. The Court of Appeals of New York in 1883, in the case above cited, came to the same conclusion in a case where a son born out of wedlock in Germany was legitimized by the subsequent marriage and cohabitation of his parents in Pennsylvania by force of the same statute above quoted, and held such son entitled to inherit lands in New York. The result in these cases has the support of Judge Story in his Conflict of Laws (section 93, *et seq.*); of Dr. Wharton in his work on the same subject (section 240, *et seq.*); and of Professor Parson in 2 Pars. Cont. (5th Ed.) 600. An examination of these cases will show that the contrary result in England was attempted to be justified by the language of the statute, so called, of Merton (20 Hen. III, c. 9), which it was claimed negatively enacted that the English heir must be born in lawful wedlock. Lord Brougham in 2 Clark & F., and again in 7 Clark & F., combats this position with arguments that the courts of New York and Massachusetts seemed to think un-

answerable, and they appear so to me. And see the strictures upon the result of the English decision in the judgment of Lord Justice James in Goodman's Trusts, L. R. 17 Ch. Div. 296-298. The English judges in Doe *v.* Vardill did not deny, but admitted, that the effect of the Scotch marriage in that case was to legitimize the previous born issue, and that, being legitimate in Scotland, the country of his domicile, he was also legitimate in England. But they held, as before stated, *that a person who inherits land* in England must not only be legitimate, but must have been actually born in wedlock. 129 Mass. 252, 254; 91 N. Y. 321, 322.

"It is worthy of remark that the famous statute of Merton (20 Hen. III. c. 9) is in fact not a statute, but a mere entry on the minutes of parliament of a refusal by the English lords to assimilate the laws of England to that of the other civilized countries, by affirmatively declaring that the marriage of the parents subsequent to the birth rendered the child legitimate. An equivalent of this statute of Merton was enacted in Pennsylvania (Purd. Dig. 9th Ed. 565; P. L. 1833, P. 318; see Report of Judges, 3 Bin. 595-600); and while in force produced the decision in Smith *v.* Derr, 34 Pa. St. 126, the hardship of which probably led to the passage of the law of 1857, above quoted. *I am unable to find, among our statutes, any enactment equivalent to the statute, so called, of Merton, and I think that public policy at this date favors the adoption of the rule which I have concluded to apply in this case, and that that rule is supported by the weight of authority in this country.* Statutes similar to that in Pennsylvania exist in many, if not most, of our sister states; and also statutes which provide, as our own does, for the adoption of children by legal proceedings. Many persons come to reside among us from neighboring states, and from those countries of Europe governed by the civil-law system, and bring with them children whom they suppose to be

> their lawful heirs for all purposes, but *who would be denied the right of heirs as to real estate by the rule adopted in England in Doe* v. *Vardill, while, as to personal property, they would be lawful next of kin.* I do not think such a state of the law a desirable one, and am not willing to be the first judge to declare such to be the law in this state. Nor do I think a law enabling, or even encouraging, parents to do simple justice to their innocent offspring begotten out of wedlock, by investing them with the complete attributes of heirs, is immoral, or tends to promote immorality. I see no reason why a man should not be permitted *to adopt and invest with rights of heirship* his own illegitimate child by marrying its mother, and I see no difference in morals between *such mode of adoption* and that provided *by our statutes, which enables a man to adopt with that effect even the illegitimate child of unknown parents.*"

Remarkably enough, appellant, in Point IV of his brief, cites this case as an authority with apparent approval. Since the main point decided here is that children legitimated elsewhere must be treated as legitimate here, such admission by appellant would seem to admit practically his entire case. Moreover, if such case is the law, since it holds that the so-called statute of Merton is not effective in New Jersey, appellant must discard the case of *Frey* v. *Nielson,* which relies entirely thereupon, and which in turn is substantially appellant's mainstay. The only theory by which appellant can rely both upon *Dayton* v. *Adkisson* and *Frey* v. *Nielson,* one of which holds that the child can inherit land, the other that it cannot, is that the legitimation of a child is different from its adoption. Exactly why, it is difficult to see, particularly since the Court, in *Dayton* v. *Adkisson,* as quoted above, specifically speaks of a person's being "*permitted to adopt and invest with rights*

of heirship, his own illegitimate child"; and immediately thereafter said: "*I see no difference in morals between such mode of adoption and that provided by our statutes, which enables a man to adopt with that effect, even the illegitimate child of unknown parents.*" To Vice-Chancellor Pitney, an adoption by legitimation and an adoption by the ordinary Adoption Act, appeared one and the same, in policy and in morals. Nor does the citation from the Distribution Act change the case, since an illegitimate child as such does not take if there are lawful issue, and a regularly adopted child, under the New Jersey statute, is such lawful issue, as even appellant will admit. Hence, by this Act, this state has shown its indubitable policy as to the protection of adopted children. Nor is *Dorsett* v. *Vought,* 98 Atl. 249, in point, since same has no bearing on a foreign adoption whatever.

Thus the law has apparently been definitely settled in this state, not only in the Orphans' Court and in the Prerogative Court, but in Chancery, and not only as to the rights of adopted children in personalty, but as to the rights of former illegitimate children in realty.

This rule is practically universal throughout the United States. It has been adopted in the courts of Massachusetts, New York, Connecticut, Vermont, New Hampshire, Rhode Island, Iowa, Texas, Louisiana, Kansas, Illinois, Tennessee, Washington. The law is well summarized in Wharton, paragraph 251, page 568, where that learned author says:

> "There is, however, no doubt as to the general principle that the status acquired by adoption in the state or country having jurisdiction, will be recognized both for the purpose of descent of real and distribution of personal property in other states, or coun-

tries, at least in those whose laws provide for adoption.''

As is said in the case of *Melvin* vs. *Martin,* 30 Atl. 467, R. I.:

''The status of the person which may exist in another state with the incidental right of succession and inheritance is to be determined by the law of his domicile; and his status with its incidental rights, should be recognized in another state when there is nothing in its laws to prevent it. The law of this State as to the right of succession in an adopted child, is like that of Massachusetts (where the adoption was had) and hence the status being recognized, it should be applied the same way as it would be in the case of a child adopted here.''

See, to exactly the same effect, the cases of:

Appeal of Woodward, 70 Atl. 453, Connecticut;
Re Dennis Estate, 129 Atl. 166, Vermont;
Anderson vs. *French,* 93 Atl. 1042, New Hampshire;
Ross vs. *Ross,* 129 Massachusetts 243;
Foster vs. *Waterman,* 124 Massachusetts 592;
Schick vs. *Howe,* 114 N. W. 916, Iowa;
McColpin vs. *McColpin Estate,* 77 S. W. 238, Texas;
Re Caldwell, 38 Southern 140, Louisiana;
Finlay vs. *Brown,* 123 S. W. 359, Tennessee;
Gray vs. *Holmes,* 45 Pacific 596, Kansas;
Van Matre vs. *Sankey,* 36 N. E. 628, Ill.;
McNamara vs. *McNamara,* 135 N. E. 410, Illinois;
James vs. *James,* 77 Pacific 1082 (Wash.);
Miller vs. *Miller,* 91 N. Y. 315.

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It is interesting to note that appellant has cited the above case of *Re Dennis Estate,* 129 Atl. 166, Vermont, as in support of his contention. It would seem that even a reading of the excerpts given from the opinion in appellant's brief would show that it was an authority against appellant and in favor of respondent. In that case, the child was adopted in New Hampshire, and claimed personal property under the Will of a person who died leaving property in Vermont. The Court, as quoted by appellant's brief, says:

> "So far then as the adoption went, constituting the claimant, an heir of the decedent, with rights equal to that of a natural child, we will give it effect to the same extent as the New Hampshire Court would, if intestate distribution of the estate was to be there made, for thus far this statute is in accord with ours."

This is a paraphrase of the rule laid down by Vice-Ordinary Fielder in this case (Record, p. 49), as follows:

> "The weight of authority in this country is that a child adopted in a foreign state or country may take under local statutes of descent and distribution, if such foreign state or country had jurisdiction to fix his status with respect to his adoptive parents and if the law with regard to adoption, of the state in which the real and personal property is situated, does not differ essentially from the law of the state in which the adoption was had, so that local public policy is not violated by recognizing and giving effect to the adoption proceedings of the foreign state or country (65 L. R. A. 187; 14 L. R. A., new series, 980; L. R. A. 1916 A, 666, and cases cited)."

The Vermont Court then continues:

> "But this is as far as we can go. Her right to inherit any part of this estate depends

> upon our law. The statute giving a child a share in its parents' estate when left out of a Will has no counterpart in our statutes."

This is again a paraphrase of the rule above laid down by Vice-Ordinary Fielder, simply stating same in the converse; *i. e.,* if the policy of the two jurisdictions is not the same, the child cannot take. If it is the same, it can. The only jurisdictions that can be found to the contrary are Alabama and Florida, the same being doubtless influenced by the peculiar statutes in those jurisdictions. In regard to this, the United States Supreme Court, in *Hood* vs. *McGehee,* 237 U. S. 611, says: "The statute of Alabama excludes children adopted by parents in another state." The Alabama courts, therefore, are in exact accord with the general rule, since it is the peculiar public policy evinced by the statute in each state which determines the difference in the result. Similarly, in the case of *Smith* vs. *Derr,* 34 Pa. 126, the Court reaches a similar conclusion to that reached in the Alabama case. But, as stated in the New Jersey case of *Dayton* vs. *Adkisson,* 17 Atl., page ~~950:~~ 964; 45 NJE 603:

> "An equivalent of this statute of Merton was enacted in Pa. and while in force produced the decision in Smith *vs.* Derr, 34 Pa. St. 126, the hardship of which probably led to the passage of the law of 1857 above quoted."

In other words, Pennsylvania has now changed her public policy so that she is now in line with practically every other state in the United States, including New Jersey.

It therefore appears that not only the courts of this state, but the courts of the United States generally as well as the text book writers, support the rule that an adoption in a foreign state whose policy in regard to adoptions is the same as New

Jersey, will be honored in New Jersey and the adopted child permitted to take personalty here.

III.

The lone case of Frey vs. Nielson does not controvert this doctrine.

The rule which we have set forth above is firmly entrenched throughout the United States. It is therefore settled that an adopted child takes personalty everywhere in the absence of fraud or a direct contravention of public policy. Nor is *Frey* vs. *Nielson,* 99 N. J. Eq., 135 to the contrary. It decides a different point.

The question ruled on is, as there stated by the Court,—"Can a child adopted in New York *inherit land* in New Jersey?" The right to inherit lands is a different one from the right to take personalty, is based upon a different statute, and therefore may be subject to a different public policy. It was this alleged difference in public policy which caused the decision in *Frey* vs. *Nielson.* In that case, Vice-Chancellor Church relied almost entirely upon the old English case of *Birtwhistle* vs. *Vardill,* 2 Cl. and F. 570, 7 Cl. and F. 895.

This latter case (1) is based entirely upon the difference in public policy between the two jurisdictions concerned and (2) *this very case has been later expressly determined by the English Courts not to deny the right to take personalty, but to hold that personalty will pass according to the status of the taker,* as determined by the foreign jurisdiction. This is exactly the state of the law as above set forth in the United States.

Since Vice-Chancellor Church in *Frey* vs. *Nielson* places such entire reliance on the case of

Birtwhistle vs. *Vardill,* let us consider this case more at length. In the first place, the question was not one of adoption, but of the legitimation of a bastard by subsequent marriage of his parents. The birth and marriage occurred in Scotland and the right of such child to take land of the father lying in England was in question. It was held in the House of Lords by Lord Chief Justice Tyndal, 7 Cl. and F. 895, on page 928, that the heir was not entitled to take. This was put solely on the ground that the old English statute of Merton (not a statute at all in fact) was deemed to settle the public policy of England as being opposed to the public policy of Scotland, which permitted a bastard to be legitimized so as to take land. The Lord Chief Justice there says, page 931:

> "The contest above adverted to (on the original adoption of the statute of Merton) was a contest between the ancient law and custom of England on one hand and the canon law on the other hand, as to which should prevail as to the hereditary succession to land in England; *the canon and civil law being acknowledged and prevailing in England in all other respects with the single exception of the descent of land.*"

Again Lord Brougham, in his opinion on page 955, says that the judges: "Admit that a person may be *legitimate for all other purposes* and yet not be capable of taking land by descent." In the course of the argument against the alleged heir, it is said, page 904: "There is no necessity for mixing with this question (as to the heirship to realty) any discussion as to the right to personalty, * * *." Plaintiff demands, "That this house should adopt a rule of foreign law * * * *a foreign law may be adopted by another country* * * * *if the foreign law shall not be inconsistent*

with the law of the adopting country. It is submitted that neither of these conditions can be said to be fulfilled here * * * *lands and personalty requiring to be differently dealt with."*

In the argument of the Attorney General for the alleged heir, on page 902, it is said:

> "Suppose there had been a mortgage in fee simple to the father. The judges here say that he, though legitimate, was not heir; he would not therefore be real encumbrancer; but he would be entitled as next of kin to the benefit of the mortgage."

In the opinion in the lower Court, 2 Cl. and F. 570, Lord Brougham says, page ~~594:~~ 584:

> *"This (the rule as adopted by the Court) makes a man legitimate when he sues for distribution of personalty, bastard when he sues for succession to real estate."*

and on page 596, the same judge says:

> "Should the heir happen to be next of kin to his uncle who had a mortgage upon the estate, he must be denied his succession to the land of the mortgage in the quality of bastard, and be allowed to come in as an encumbrancer upon the self-same estate in capacity of legitimate son to the same mortgagor."

It therefore clearly appears that *in Birtwhistle* vs. *Vardill, it was admitted by all concerned that while as to realty the alleged heir could not take, as to personalty he could.* This result was reached because the policy of England as to personalty was not in contravention of the policy of the foreign jurisdiction; while the policy of England as to realty, due to the statute of Merton, was in contravention of the policy of Scotland.

This conclusion has been definitely affirmed in England in the later case of *Re Goodman's*

Trusts, L. R. 17 Chancery Division 266, in which, after carefully considering the case of *Birtwhistle* vs. *Vardill,* or *Doe* vs. *Vardill,* as it is known there, James, L. J., says:

> "I content myself with the case of Doe *vs.* Vardill, 7 Cl. & F. 895, in that judgment * * * there are two distinct propositions clearly and distinctly enunciated. The first was that plaintiff was for all purposes legitimate. The second was that, such legitimacy would not necessarily and would not in fact include heirship to *English land*" * * *. (After discussing the reason for the rule as to the land, the Court continues) "Heirship is an incident of land, depending on local law * * *. Kinship is an incident of the person, and universal * * * and, as the law applies universally to persons of all countries, races and religions whatsoever, the proper law to be applied in determining kindred is the universal law, * * * adopted by the comity of States."

The English Court, therefore, holds in this case that *children born bastard, but legitimized* by subsequent marriage of their parents in Holland, *can take personalty in England,* there being nothing inconsistent in the English law as to personalty, though there is in the English law as to realty, due to the statute of Merton.

It is, therefore, clear that *Birtwhistle* vs. *Vardill* does not decide that either an adopted child or legitimated bastard child cannot take personalty in England. On the other hand, the English law is settled to the contrary. Since *Frey* vs. *Nielson* itself concerns not personalty, but land, and itself relies on *Birtwhistle* vs. *Vardill,* very evidently *Frey* vs. *Nielson does not affect the right to take personalty.* If Vice-Chancellor Church, in *Frey* vs. *Nielson,* had been considering personalty, and had continued to follow *Birt-*

whistle vs. *Vardill, he must have held that the child adopted in New York could take personalty here.*

This is exactly in accord with all the authorities in this state and elsewhere above mentioned, and exactly the rule for which respondent here contends.

Nor do the cases of *Olmstead* vs. *Olmstead,* 216 U. S. 386; *Fall* vs. *Eastin,* 215 U. S. 1; *Hood* vs. *McGehee,* 237 U. S. 611, help appellant, as cited under his Point I, that "the courts of the State of New Jersey are not bound to give effect to adoption proceedings in another state". These cases merely go to the point, that the "full faith and credit" clause will not require courts of one state to let a child adopted elsewhere inherit land. In the first place, while it is elementary that where jurisdiction exists, the "full faith and credit" clause binds as to status, though not necessarily as to the effect given to status, we may admit, for the sake of argument, that the "full faith and credit" clause has no bearing whatever upon the entire matter. It is the question of comity which clearly controls here. The above cases have nothing to do with comity. They could have nothing to do with it, because comity is not a Federal question, over which alone they have jurisdiction.

In the second place, these cases concern the right to take lands under the Descent Act, not the right to take personal property under the Distribution Act; entirely different statutes, as to which an entirely different rule has been laid down by the very authorities, *Frey* vs. *Nielson,* and *Birtwhistle* vs. *Vardill,* upon which appellant relies.

Finally, the case of *Hood* vs. *McGehee* is in fact an authority for respondent, not for appellant. The criterion, as laid down in all cases cited by respondent, as laid down by Vice-Ordinary Fielder, in the case at bar, is whether or not the

laws of the two states are substantially the same, so that the child can take in the state where the property is. But in *Hood* vs. *McGehee,* as quoted by appellant, the Court says:

> "The Alabama statute of descents, as construed by the Supreme Court of the state, excludes children adopted by proceedings in other states. There is no ground upon which we can go behind these decisions."

Thus, the courts had already decided the very question which is to be decided here, and had found that the policy of Alabama differed from that of the other state. Had the policy been the same, the result would, of course, have been different. That is exactly the rule laid down by our Prerogative Court in this case.

IV.

Grave doubt exists as to the decision in Frey vs. Nielson, even as to land.

As seen by the series of cases, cited and quoted from, under Point Two, not only the Orphans' Courts of this State, the Prerogative Court, and the Court of Chancery of this State, but the courts of the United States and the text writers practically universally hold that a child adopted or legitimized in a foreign jurisdiction, whose policy as to such adoption or legitimation is the same as the local policy, can take *either realty or personalty* in the local jurisdiction. *Frey* vs. *Nielson* does not affect this rule as to personalty, but does stand practically alone in opposition to this universal rule, as to realty.

With the utmost of deference, it is respectfully submitted that this decision is based upon a misconception of the authority upon which it relies,

as Vice Ordinary Fielder clearly intimates in the case at bar, where he says:

"But Vice Chancellor Church reached the opposite conclusion as to real property in Frey *v.* Nielson, 99 N. J. Equity 135, wherein he held that a child adopted under the New York law could not inherit from her adoptive father land in this state.

"Reference to cases upon which the learned Vice Chancellor relied in arriving at his conclusion may be helpful in determining the instant case. Hood *vs.* McGehee, 237 U. S. 611, involved the right of children adopted in Louisiana to inherit from the adoptive father land in Alabama, the claim on behalf of the children being that by virtue of Art. IV, Sec. 1 of the Federal Constitution and the Act of Congress pursuant thereto, the Louisiana record was entitled to full faith and credit in Alabama, but the United States Supreme Court held that the Alabama statute of descent, as construed by the Supreme Court of that state, excludes children adopted by proceedings in other states, citing Brown *v.* Finley, 157 Ala. 424 (also cited by the Vice Chancellor) in which a Georgia adoption was considered and that the full faith and credit clause of the Constitution could not apply because Alabama has the right by statute and decision of its highest court to determine the devolution of Alabama land by descent. This is also the purport of the decision of the United States Supreme Court in Olmstead *v.* Olmstead, 216 U. S. 386 (also cited by the Vice Chancellor). Alabama is one of the few states which holds that a foreign adoption gives the adopted child no right to inherit from the adoptive parents land in another state and it is interesting to note that in a case involving the same adoption as in Brown *v.* Finley, *supra,* and upon the same state of facts, except that the land in question was in Tennessee, the Tennessee Supreme Court held that the children adopted in Georgia had, under the law of comity, the right to inherit

Tennessee land because Tennessee had adoption laws similar to Georgia (Finley *v.* Brown, 122 Tenn. 316).

"Birtwhistle *v.* Vardill, 2 Clark & Fin., 571, the leading English case on the subject, is also cited by the learned Vice Chancellor. This decision has been criticized by other English decisions and by decisions in this country, including Dayton *v.* Adkisson, *supra.* The English case involved the right of a child born in Scotland of parents domiciled there, who were unmarried at the time of his birth, which child was made legitimate by the law of Scotland through the subsequent marriage of his parents, to take lands of his father situate in England. The court held that the law of inheritance in England had been fixed by the so-called Statute of Merton (20 Hen. III. c. 9) under which none were legitimate heirs except those born in lawful wedlock, but the court did not deny the status of the child as a legitimate child under the law of Scotland, or that being legitimate in Scotland he was also legitimate in England.

"The Birtwhistle case does not apply to personal property and we have no statute in this state similar to the Statute of Merton, but we have our adoption statute and statutes legitimating children born out of wedlock, whose parents afterward marry (P. L. 1915, p. 333) and children born of a ceremonial marriage afterwards annulled or declared void (P. L. 1924, p. 318) and giving such children the right of inheritance from their parents, which statutes are contrary to the Statute of Merton."

As seen above, *Frey* v. *Nielson* is based upon the case of *Birtwhistle* v. *Vardill, supra.* But *Birtwhistle* v. *Vardill* is decided, because of the peculiar policy as to heirship to English land deemed to be evinced by the so-called ancient statute of Merton, preventing the legitimation of a bastard by a subsequent marriage so as to take land, and land only.

In the first place, many courts in this country have refused to permit the ancient statute of Merton, adopted far back in 1235, A. D., to control the public policy of the states of the United States of America in this day and generation. If this ancient statute does not control present day America in an age seven centuries later, with a public policy greatly altered, of course, *Birtwhistle* v. *Vardill* is no authority upon which to rely.

In the second place, let us assume that the statute of Merton has been carried down seven centuries later, and transported across the Atlantic Ocean. Upon this assumption, it may have originally been the public policy of New Jersey that a bastard could not be legitimized by the subsequent marriage of his parents so as to take land. *But this alleged public policy has now been expressly reversed.*

In 1915 New Jersey passed "An act to provide for the legitimation of a bastard child, P. L. 1915, Chapter 173, page 333." This act expressly provides that such child upon the subsequent marriage of his natural parents "shall be entitled to all the rights and privileges such child would have enjoyed had he been born *after* any such marriage. The intention of this act being that the status of any such child after said marriage of his parents shall be the same *as if the child were born within wedlock*". See also act legitimizing children born of a ceremonial marriage, afterwards declared void, P. L. 1924, page 318.

The public policy, exemplified by these statutes, is elsewhere repeated. But in themselves, they absolutely wipe out and reverse the alleged public policy based upon the ancient statute of Merton.

No such statutes, as ours in New Jersey, existed in England when *Birtwhistle* v. *Vardill* was

decided. Had such statutes then existed, the public policy of England as to heirship would have been in accordance with the public policy of Scotland as to heirship; and *the alleged heir would have been held entitled to have inherited land.*

According to the very principles enunciated by the Court in *Birtwhistle* v. *Vardill,* it is clear therefore that our courts must hold that a bastard child, legitimated by the subsequent marriage of his parents elsewhere, or a child adopted in New York, must inherit land in New Jersey, since the public policy of New York and New Jersey as to adoptions is identical.

The cases of *Hood* v. *McGehee,* 237 U. S. 611 and *Olmstead* v. *Olmstead,* 216 U. S. 386, upon which the Court in *Frey* v. *Nielson* also relies, are in no way contrary to this. They are pertinent only on the argument that New Jersey is not bound by the full faith and credit clause of the Federal Constitution to permit the heir to inherit. This rule is not questioned. The question is not whether New Jersey is bound by the Federal Constitution to recognize an heir; but whether the principles of comity, *i. e.,* interstate courtesy, will induce our courts to recognize a lawful status created elsewhere. This question was in no way involved in the case of *Hood* v. *McGehee* and *Olmstead* v. *Olmstead.* Such question could not have been involved. It is not a federal question. In fact, the only reason why the United States Supreme Court held in such cases that the federal constitution would not bind was because in the one case "The Alabama statute of descents as construed by the Supreme Court of that state excludes children adopted by parents in other states;" and in the Olmstead case a fraudulent use of the foreign jurisdiction and

an attempt to divest divested rights was attempted.

As to the remaining cases cited by the Court in *Frey* vs. *Nielson* from New Jersey, admittedly they are not on the point. They in no way involve the recognition by New Jersey courts of a status created elsewhere. They only involve the question of the effect of our own adoption statute in New Jersey, on adoptions in New Jersey.

Consequently, *in view of the express decision of the question by the Court of Chancery in Dayton* vs. *Adkisson,* 45 N. J. Eq. 603; *Tuttle* vs. *Woolworth,* 74 N. J. Eq. 310; *Estate of Peddie,* 20 N. J. L. J. 279, *and of this very case by Vice Ordinary Fielder, and in view of the practically universal decision by all the courts of this country and by the English courts themselves* (*Birtwhistle* vs. *Vardill into the bargain*), *it would seem that the lone decision of Frey* vs. *Nielson was based upon a misconception.*

Of course, this is, strictly speaking, immaterial on the present issue. Even if *Frey* vs. *Nielson* were correctly decided, as to the right to take land, the very basis of the decision of *Frey* vs. *Nielson,* as is seen in Point III, *supra,* is the clear right of the adopted child to take personalty.

V.

It is respectfully submitted that the decree of the Court below be affirmed.

Respectfully submitted,

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Evelyn Finkenzeller Bill.

Richard Hartshorne,
Of Counsel.