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NEW JERSEY

Court of Errors and Appeals

IN THE MATTER OF THE PROBATE OF THE LAST WILL AND TESTAMENT OF FREDERICK F. COLEMAN, DECEASED. } On Appeal from Prerogative Court.

Brief for Proponents-Respondents.

The appeal in this case brings up for review the decree of the Ordinary in the Prerogative Court, admitting to probate the last will and testament of Dr. Frederick F. Coleman, late of Asbury Park, New Jersey.

The grounds of appeal are not concisely stated in the petition of appeal and are not stated in appellant's brief in the same manner as in the petition. We believe, however, that the grounds of appeal alleged in the petition may be fairly summarized as follows: first, that appellant was induced by fraud and misrepresentation to refrain from attendance on the first day of the hearing, and that when she appeared on the second day the Ordinary denied her the right to recall for cross-examination the witnesses who had been examined on the first day, thus preventing her from having her day in court; and, second, that proponents failed to discharge

the burden of proof cast upon them by reason of the fact that a jury under an inquisition had found the decedent to have been *non compos mentis.*

THE PROCEEDINGS BELOW.

The arrangement of the State of the Case is disorderly and misleading. We, therefore, desire at the outset to note the order in which the events below transpired.

A petition for probate of the will was filed in the Prerogative office on December 8, 1916. Upon presentation of the petition the proponents advised the Ordinary that the decedent had been found *non compos mentis,* under an inquisition, but that they were prepared to rebut the presumption raised by such finding by showing the decedent's testamentary capacity at the time the will was executed. The Ordinary, on December 11, 1916, ordered that proof be made in solemn form, and set January 9, 1917, as the time of hearing. Citations returnable January 9, 1917, were duly served upon all persons concerned, including appellant. The chronological order of events thereafter was as follows:

January 9, 1917.

The return day of the citation. Mr. James D. Carton and Mr. John V. B. Wicoff appeared for the proponents (respondents here). Mr. C. Russell Rogers appeared for Lavinia E. Dodge. Mrs. Dodge relied upon the fifth clause of the prior will of decedent, printed as *Exhibit P-2* on pages 267 and 268 of the State of the Case. This clause had been cancelled, and because there was no proof offered that such cancellation had been unlawfully or fraudulently made, the Ordinary ruled that Mrs. Dodge had no interest in the proceeding. (S. C., pp. 50–52.) Thereafter the testimony on behalf of proponents, printed on pages 53 to 96, inclusive, was taken. Mr. Rogers, notwithstanding

the ruling of the Court that Mrs. Dodge had no interest in the proceeding, was present during the taking of all such testimony. Adjournment was then taken until January 16, 1917.

January 16, 1917.

A further adjournment was taken until January 23, 1917.

January 23, 1917.

On this date Mr. Rogers appeared, pursuant to the notice of motion printed at S. C., p. 23, and moved on behalf of the appellant, Ella McGlathery, for leave to appear as a contestant. In support of this motion, the affidavit printed at S. C., pp. 24–27, was read. Proponents did not object to her appearance, provided she was placed on reasonable terms, but, in answer to the allegation that she had been kept away from the hearing on January 9th by fraud, read the affidavits of Robert A. Messler and James S. Messler, printed at S. C., pp. 27 A, etc. The Ordinary ruled that Mrs. McGlathery had absented herself without sufficient excuse, but would be permitted to appear without leave to recall the witnesses already examined for cross-examination. The testimony printed in S. C., pp. 98–114, was then taken on behalf of proponents, and also the testimony on behalf of contestant printed in S. C., pp. 114–123. An adjournment was then taken until January 30, 1917.

January 30, 1917.

The testimony on behalf of contestant, printed in S. C., at pp. 124–159, was taken. An adjournment was taken until January 31, 1917.

January 31, 1917.

The testimony on behalf of contestant, printed in S. C., at pp. 159–197, was taken. The testimony printed

in S. C., at pp. 197–199, was taken on behalf of proponents in rebuttal.

February 7, 1917.

The testimony of Dr. Givens on behalf of contestant was taken *de bene esse* at Stamford, Connecticut, S. C., pp. 200–251.

February 13, 1917.

The testimony of Dr. Robertson on behalf of contestant was taken *de bene esse* at New York, S. C., pp. 253–264.

March 10, 1917.

The testimony of Viola Garrabrant on behalf of proponents was taken *de bene esse* at Ocean Grove. This testimony was the last taken, although it is printed first in the State of the Case, at pp. 28–49.

April 3, 1917.

On this date appellant, pursuant to notice of motion printed in S. C., at pp. 14–15, applied for leave, among other things, to recall for cross-examination the witnesses not previously cross-examined. In support of the motion, the affidavit printed in S. C., at pp. 16–22, was read. The letter printed at pp. 22 A, etc., was annexed to the affidavit and read. The Ordinary denied the motion. With the foregoing summary of the order of events in the case in mind, we pass to the consideration of the grounds of appeal.

APPELLANT'S ALLEGATION OF FRAUD IS NOT PROVEN.

Appellant alleges as the first ground of appeal that she was induced to refrain from attendance on the return day of the citation by fraud.

Such an allegation will not be taken for granted, but must be proved. The alleged proof is contained in appellant's affidavit of January 17, 1917 (S. C., pp. 24–27). In that affidavit she alleged that she did not appear on the return day of the citation because "she was not at that time cognizant of the facts and circumstances surrounding her brother's mental condition at the time said will was drawn;" that she had been advised that her brother was suffering from paresis in October, 1915; that he had been taken to New York and examined by a noted alienist who was an expert in mental diseases, and on his recommendation sent to Stamford, Connecticut, and that a receiver had been appointed for his property; and that "on Sunday, January 14th, 1917, your deponent first learned of the true condition of affairs, as heretofore stated in this affidavit."

The absolute falsehood of these allegations is proved beyond question by the fact that in April, 1916, nine months before the making of the affidavit, she had received a letter from her sister Rolinda advising her that her brother had "brain trouble," that he had been taken "to a specialist in New York" and on his advice sent to a sanitarium in Connecticut and that a "guardian" had been appointed "to take charge of his affairs." Not only had she received the letter, but she undoubtedly had it in her possession when she made her affidavit on January 17, 1917, for on April 3, 1917, it was presented to the Ordinary annexed to the affidavit of her solicitor. This letter was not printed by appellant as a part of the State of the Case. When objection was made appellant agreed that respondents might have it printed and inserted in the case. It appears on pages 22A, etc. It proves conclusively that appellant knew in April, 1916, what she swore she did not know until January 14, 1917.

Appellant further alleged in her affidavit that she had been induced by fraud of Robert A. Messler to remain

away from the hearing on the return day of the citation. What motive Mr. Robert A. Messler, a most estimable citizen of Trenton and a man without any interest whatever under the will, could have had in inducing her to remain away is not disclosed. Every allegation of fraud which appellant makes against him is completely denied by his answering affidavit, printed at pages 27A, etc. His affidavit shows that appellant came to him, whom she had known for forty years, voluntarily, expressed to him no surprise at the provision made for her in her brother's will, and on the contrary said that she "had always understood that the doctor had left her only $100 because she and her brother had fallen out a number of years ago."

Mr. Robert A. Messler's affidavit is largely corroborated by the affidavit of Mr. James S. Messler, who overheard the interview between him and appellant.

Both of these answering affidavits, like the letter above mentioned, were omitted from the State of the Case prepared by appellant, although appellant, as in the case of the letter, consented after objection that respondents should supply them.

It is submitted that the evidence shows that instead of having been a victim of fraud, appellant by the use of a false affidavit sought to perpetrate a fraud on the Court below, and that the Ordinary was fully warranted in finding, as he did, that appellant "had absented herself on the return day of the citation without any sufficient excuse." (S. C., p. 10.)

Under these circumstances the Ordinary gave her every consideration to which she was entitled by admitting her as a contestant with the right of full participation in the proceedings from that point on, but without the right to recall witnesses who had left the stand.

The will was proved in solemn form and the citation was duly served upon appellant. She had the unquestioned right to attend, cross-examine witnesses and

offer evidence, but having refrained from attendance on the first day of the hearing was estopped from any further contest as to what took place on that day.

Chancellor Magie in *In re Hodnett*, 65 *Equity* 329, 340, said:

> "Upon this construction of the act, it follows, in my judgment, that any person noticed to attend the probate must be admitted to cross-examine the testamentary witnesses and produce evidence on the matter of the will, and a contest against the will could be maintained by him. It also follows that any person who has been noticed to attend and has refrained from attending, or who has attended and made no contest, would be thereafter estopped by the order admitting the will to probate from any further contest, at least on matters then apparent or discoverable."

All requests relating to matters incidental to the conduct of the hearing are addressed to the discretion of the trial court. Authorities are many and are collected in 4 *C. J.* 825, *sec.* 2800. A party in interest in a probate proceeding is usually permitted to intervene at any time and to participate in the proceeding from the date of his intervention. In *Bioren* v. *Nesler*, 76 *N. J. Eq.* 576–577, one of the parties in interest appeared on the day of the adjourned hearing, and in *Kayhart* v. *Whitehead*, 77 *N. J. Eq.* 12, 15, an appearance was entered for one of the parties in interest at the time of final argument. In this case proponents did not oppose the admission of appellant as a party to the proceeding, but only denied her allegation of fraud, upon which she based her application to recall for cross-examination the witnesses who had left the stand before she intervened. Since she failed to establish her allegation of fraud, she failed to establish any right to recall these witnesses, and the Ordinary's ruling left her exactly where her own default placed her, namely, with

the right to participate in the proceedings from the time of her intervention, but without the right to recall the witnesses who had left the stand for cross-examination.

But even if it be conceded, for the sake of argument, that there was error in the action of the Ordinary, the error was not harmful to appellant. Mr. Rhome, the principal witness examined on the first day, was again called by proponents as a witness on January 31, 1917, and might on that day have been called by appellant. The other witnesses were subject to subpœna. The Ordinary, during the first day of the hearing as is usual in uncontested cases, frequently cross-examined the witnesses. He cross-examined Mr. Rhome at length.

Finally, even if the evidence of the witnesses whom appellant did not cross-examine be entirely disregarded, the will must be sustained on the other evidence in the case. The testimony of the subscribing witness, Mrs. Garrabrant, and of Arietta Coleman, Kays R. Morgan and Mary Thurston, all of whom appellant did cross-examine, clearly establishes the execution of the will in accordance with the statutory requirements and the testamentary capacity of the testator at the time of its execution. Their testimony was not shaken on cross-examination.

It is submitted that there is no merit whatever in appellant's first ground of appeal.

The Evidence of Testamentary Capacity at the Time of the Execution of the Will is Clear and Convincing, and Overcomes the Presumption Arising From the Lunacy Inquisition.

1. *The Law.*

The will was executed on October 16, 1915. The decedent died November 27, 1916. On November 3, 1916, about three weeks before his death and more than a year after the execution of the will, a jury, under a

lunacy inquisition, found the decedent *non compos mentis,* and that he had been without lucid intervals for seventeen months prior thereto, thereby running the period of incapacity back to June 3, 1915, some four and one-half months prior to the execution of the will.

It is to be noted that the fact that the decedent had been adjudged *non compos mentis* under an inquisition is only *prima facie* proof of testamentary incapacity. It can be rebutted.

In *Whitenack* v. *Stryker and Voorhees, 2 Eq.* 8, a will was probated notwithstanding two prior inquisitions by which the testator was found of unsound mind. The Court said, at page 28:

> "These inquisitions are not pretended to be conclusive on the case, but it is claimed for them, that they are entitled to all that respect which is due to the opinion, thus expressed, of so large a number of the most respectable citizens of the County of Somerset. This is perfectly correct. They are entitled to all the respect which any men acting on the subject before them could possibly have. Some of the jurors I know, and I respect no men among us more. Their business and mine is very different. They have decided, from the general character of the testator, that he was incompetent to manage his business; it is my duty to decide whether, at the time he executed two instruments of writing, he was of sound mind."

In the case of *Brady* v. *McBride, 39 Eq.* 495, the will was dated February 24, 1876. In October, 1878, an inquisition under a commission of lunacy found the testatrix of unsound mind, and that she had been so for three years next preceding and upwards. Testatrix died in 1883. Chancellor Runyon said (p. 500):

> "The application in lunacy was not made until November, 1878, * * * nearly three years after the will was made. The finding of the jury

> that the lunacy had existed for three years is not conclusive. Any presumption which it raises is rebutted by the proof that the testatrix had testamentary capacity at the time of the making of the will."

In *Sbarbero* v. *Miller, 72 Eq.* at 264, Vice Chancellor Garrison said, speaking of the finding of an inquisition of lunacy:

> "I do not see that it is entitled to any more than *prima facie* effect in the face of a fully tried issue in this court."

The rule of law thus laid down was recognized and followed by the Ordinary. He cites and quotes both *Brady* v. *McBride, supra,* and *Sbarbero* v. *Miller, supra.* (S. C., p. 11.)

2. The Facts.

With regard to the facts in this case, the Ordinary said in his memorandum (S. C., p. 13):

> "I shall not discuss them. To my mind it is sufficient to say that they clearly show that the testator was of sound and disposing mind, memory and understanding when he executed his will, that he comprehended the property he was about to dispose of, the natural objects of his bounty, the meaning of the business in which he was engaged, the relation of each of these factors to the others, and the distribution that was made by the will. His mental capacity was at least equal to that. See *Clifton* v. *Clifton,* 47 *N. J. Eq. 227.*"

His finding was amply justified. The testimony shows that the will was drawn and attested by J. Otto Rhome, Esquire, a member in good standing of the bar of this State. He had known Dr. Coleman for twenty years, and he and his firm had represented him for that time (S. C., p. 53). In the summer of 1915, Dr. Coleman went to see Mr. Rhome "a great many

times" with regard to the collection of $500, which was due him from the estate of a deceased cousin (S. C., pp. 56–57). In the middle of June, 1915, Dr. Coleman brought to Mr. Rhome's office a memorandum in relation to the collection of money owing to him on a bond and mortgage of Mrs. Ritter. He instructed Mr. Rhome not to foreclose because the mortgage was a second mortgage on a moving-picture house, but asked that every effort to collect the amount due be made. He saw Mr. Rhome "a great many times about it" (S. C., pp. 57–58). In the fall he called on Mr. Rhome with regard to dispossession of a tenant (S. C., p. 59). On October 20, 1915, four days after the will was executed, Mr. Rhome instituted a suit for Dr. Coleman against defendants by the name of French and Pratt, and during the first part of the October, 1915, Dr. Coleman brought to Mr. Rhome his accounts and duplicate deposit slips for the preceding year, and showed by them that the defendant, Pratt, was not entitled to certain credits which he claimed (S. C., pp. 54–56). The foregoing testimony of Mr. Rhome is largely corroborated by that of Viola Garrabrant, the other subscribing witness, who was a stenographer in Mr. Rhome's office at the time the will was executed (S. C., p. 31).

There is much other evidence in the case clearly showing capacity at times prior and subsequent to the execution of the will. The day after making the will he told Miss Thurston of its execution and of its provisions (S. C., p. 107). On November 3, 1915, nearly three weeks after the execution of the will, he turned over to Mr. VanCleef, his successor as chairman of the Board of Trustees of the Elks Lodge, the accounts which he had kept in his own handwriting relating to the building fund of the Lodge. He had handled some $40,000, received in very small sums. His books were audited and found correct in every detail. Mr. VanCleef saw no indication of incapacity (S. C., pp. 76–77).

On November 19, 1915, a month after the date of the will, Mr. Calvert called on Dr. Coleman and asked

him about an account. The doctor got out the account and conversed about it, and Mr. Calvert paid him (S. C., 80–81, *Exhibit P-3*). On October 29, 1915, after the execution of the will, Mr. Thompson called on him at his drug store and presented a bill, which the doctor paid (*Exhibit P-4*). The doctor talked with him about Mr. Thompson's father being in the Legislature and about pending legislation relating to automobiles (S. C., p. 83). Near election time, he examined Harry J. Bodine for life insurance (S. C., p. 85). There is in evidence a series of bank deposit slips prepared by the doctor during the period from September, 1915, to November 20, 1915, and during this period the teller in the bank noticed no change in the doctor's condition, except a slight impediment in his speech (S. C., p. 87, *Exhibit P-5.*)

On January 6, 1916, the doctor was admitted to the sanitarium at Stamford, Connecticut. Dr. Givens having in mind the Connecticut statute (S. C., p. 234), admitted him on his own application as a voluntary patient (S. C., p. 233 and p. 235), that is as one, in the language of the statute, "whose mental condition is not such as to render it legal to render an order of commitment." While at the sanitarium he attended to business matters, talked intelligently regarding medical, lodge and Masonic matters and correctly diagnosed and prescribed for other patients in the sanitarium. He insisted that he had only one life insurance policy, when those in charge of his affairs thought that he had two, and he was right (S. C., pp. 239–240, 242).

As to the testimony offered by the caveatrix, it should be especially noted that the same witnesses who testified to the hallucinations and other acts on which appellant relies freely admitted that at other times the doctor was fully capable. Giving, therefore, the greatest possible weight to their evidence, the most that can be said is that the testator, while at times incompetent, was at other times fully competent.

> "In this situation it becomes manifest that the greatest attention must be directed to the proofs of his condition at the very times when instructions were given for the preparation of the will and the instrument was executed."
>
> *Claffey* v. *Ledwitch*, 56 *Eq.* 333, 347.

The proofs of the testator's condition at the very times when instructions were given and the will executed are clear and convincing. He told Mr. Rhome "that he had no use for his sister (appellant), had not seen her in 25 or 30 years, and that she did not even have the decency to come to his wife's funeral—Mrs. Coleman's funeral. Did not want to have anything to do with her or to see her." (S. C., p. 62.) He, however, directed Mr. Rhome to include in the will a bequest to her of $100, because "he supposed he would have to." (S. C., p. 62.) He told Mr. Rhome that he wanted to give his property to his two sisters, Rolinda and Arietta, and Mrs. Wahl, share and share alike, and speaking of Mrs. Wahl said that "he was engaged to be married to Mrs. Wahl and that she always had been a great help. As a matter of fact, she had always been a great deal more help to him than any of his people, and he wanted to see that she was properly taken care of." (S. C., pp. 61–62.) After giving these instructions the will was dictated by Mr. Rhome in his presence. It is in every respect reasonable and bears on its very face evidence of capacity. Its eighth clause is especially designed to discourage any attempt to prevent its probate. As a whole it shows the same controlling purpose which is shown by the former will of 1911 (S. C., p. 267), namely, the desire to provide for his sisters, Rolinda and Arietta, and Mrs. Wahl. The appellant was not the residuary legatee in the 1911 will, nor was she displaced by Mrs. Wahl in the 1915 will. Under the 1911 will the only certain provision made for her was the bequest of one hundred dollars—the same sum given her under the

1915 will. The other provision for her is remote. In no event would she take anything until after the death of her sisters Arietta and Rolinda, and then only in case Mrs. Wahl, who was preferred to her, remarried.

The next day the doctor returned to Mr. Rhome's office and executed the will. On the very same day that it was executed Mr. Rhome discussed with him the matter of the French suit, and took him to Judge Taylor's office to see some receipts (S. C., p. 65). Mrs. Garrabrant, the other subscribing witness to the will, corroborates Mr. Rhome's statement that the doctor said that he had not seen Mrs. McGlathery, the appellant, for many years; that she did not care enough for him to come to his wife's funeral, and that he wanted to "remember her in the will so she would not be able to break it" (S. C., p. 34). He asked Mr. Rhome about the charge for drawing the will and "was jollying" Mrs. Garrabrant (at that time Miss Bills) about her engagement, announcement of which had appeared in the newspapers (S. C., p. 41). Neither Mr. Rhome, Mrs. Garrabrant, nor Mr. Morgan, who was in the office, saw any evidence of incapacity.

It is submitted that the evidence shows conclusively that Dr. Coleman was in full possession of his mental faculties at various times, both before and after the execution of the will, and that the unshaken and undisputed testimony of Mr. Rhome, Mrs. Garrabrant and Mr. Morgan, all disinterested witnesses, as to his condition at the precise time when he actually executed the will, clearly justifies the Ordinary in his finding and overcomes the presumption arising from the finding of the lunacy inquisition by affirmatively proving beyond any question the testamentary capacity of the decedent.

The testimony as a whole warranted the Ordinary in disposing of the matter without discussing the facts in detail. (S. C., p. 13.) He said "to my mind it is sufficient to say that they clearly show that the testator was of sound and disposing mind, memory and under-

standing when he executed his will, etc." (S. C., p. 13.)

We submit that there is no merit in the appeal and that the decree below should be affirmed.

Respectfully submitted,

WICOFF & LANNING,

DURAND, IVINS AND CARTON,

For Proponents-Respondents.

New Jersey Court of Errors and Appeals

In the Matter of The Application for Probate of the Last Will and Testament of Frederick L. Coleman, deceased.	On Appeal from New Jersey Prerogative Court.

BRIEF IN FAVOR OF CAVEATRIX-APPELLANT

Statement of the Case

This appeal is from a decree made by the Honorable Edwin Robert Walker, as Ordinary, and entered in the New Jersey Prerogative Court, admitting the will, dated, October 16th, 1915, of Dr. Frederick L. Coleman, to probate.

The decedent was fifty-two years old, and had for a long time been an active medical practitioner at Asbury Park. That he was a widower, without children. That he left him surviving three sisters, two unmarried, who were the proponents

herein, and Mrs. Ella McGlathery, the caveatrix, married and having children. That for several years deceased had been friendly with a Mrs. Annie E. Wahl, who is mentioned in the 1915 will, and takes the place of the caveatrix, Mrs. Ella McGlathery, who had been made residuary legatee, under a will of 1911.

That in the early spring of 1915, the doctor had a stroke of apoplexy, and that from that time on he lost thirty or forty pounds in weight, that his physical appearance indicated he was a sick man.

That on November 3d, 1916, an inquisition was held at Freehold, and the jury found the deceased to have been suffering from paresis, without lucid periods for 18 months prior thereto, which would have brought the beginning of the paresis to the summer of 1915. Will drawn October 16, 1915.

That in January, 1916, the proponents petitioned the Court of Chancery for a receiver, alleging acts of incompetency, and a receiver was appointed.

That on January 25th, 1916, two physicians certified the deceased to be insane, and on January 27, 1916 the Probate Court, at Stamford, Conn., committed the deceased to Dr. Given's sanitarium for the insane, where the doctor died from paresis.

That proponent's case was not finished when the contestant appeared, and asked leave to enter, which was granted by the Court below, on condition that the Appellant-Caveatrix might enter but would not be allowed to cross-examine the witnesses called up to that time. This refusal on the part of the Court to allow appellant-caveatrix to cross-examine was objected to. That appel-

lant's appearance was consented to by the proponents, provided the Court imposed reasonable terms.

That subsequently the will of 1915 was admitted to probate, and it is from this decree that this appeal is taken.

Grounds of Appeal

1. That inasmuch as the deceased had been declared incompetent by a lunacy commission and as the will in question was drawn and executed during this period of incompetency the proponents did not assume the burden of proof as required by law.

2. Because there was absolutely no evidence upon which the Court below could have predicated its judgment.

3. That in refusing to permit the caveatrix to cross-examine proponents' witnesses, the Court below violated a fundamental right of the contestants. That this denial of the right to cross-examine touched the merits of the question.

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1. Because the Ordinary erred in refusing to allow the contestants the right to cross-examine the proponents' witness, and in so doing infringed a substantial, fundamental right of the appellant.

At the outset the appellant urges the learned justices considering this case to a careful perusal of the printed record, for the questions involved are purely legal ones, but can only be answered by reference to a due consideration of all the testimony.

Taking up the points relied on by the appellant-caveatrix in the inverse order the Appellant insists that the decree below should be reversed.

The taking of testimony in this case opens on page 50, with the testimony of J. Otto Rhome, the scrivener, who drew the 1915 will, and follows on

with the testimony of Dr. Cotton, pages 70 to 74; Martin L. Ferris, 74 to 76; Charles B. Van Cleef, 76 to 78; Harry Borden, 78 to 79 inclusive; Samuel H. Calvert, 79 to 82; Charles Thompson, 82 to 84; Harry Bodine, 84 to 85; Herbert Stewart, 85 to 86; Charles Schenck, 86 to 89; Anna Wahl, 89 to 96.

Thus eleven witnesses were called by the proponents to probate this will in solemn form, when the contestant appeared on the second day's hearing and alleged fraud by appropriate notice and affidavit (see pp. 23 to 27, inclusive). Counter affidavits were read by the proponents, when the Ordinary below stated that he saw no reason why the appellant should not be admitted to be heard. The proponent's then withdrew their objection provided the appellant-caveatrix was put upon reasonable terms (p. 97, par. 28). That the Ordinary admitted the caveatrix as a party (see p. 97):

> "That the testimony already taken shall stand without any right on the part of Ella McGlathery, (the appellant-caveatrix) to recall the witnesses for cross-examination. From this point on she may participate without limitation or restraint."

That the appellant-caveatrix called the Court's attention to the fact that some of the witnesses were still in the court room and offered to pay their witness fees, which was denied.

Counsel for Mrs. McGlathery do not consent to the terms and claim the right to cross-examine the witnesses already examined (p. 97, pars. 36-40).

The question presented is a clean cut one, and resolves itself into two sub-divisions.

(*a*) Did the learned Ordinary below abuse his discretion?

(*b*) Did the learned Justice by his refusal of the right to cross-examine violate a fundamental right of the caveatrix below, which directly affects the merits of the question and the rights and interests of the contesting party?

Now, to begin with, once the Ordinary decided to admit the caveatrix as a party to the proceeding he must have been convinced of the allegations of fraud in the caveatrix's moving papers (pp. 23 to 28) or he would never have admitted her, but aside from this fact, or the fact of any counter affidavits having been put in by the proponents, *the indisputable fact stands out that the proponents consented to the caveatrix being made a party, provided she was put on reasonable terms* (p. 97, par. 28). Now in admitting the appellant-caveatrix she was either entitled to be in or out of Court, she was entitled to try her case in full, not in part—she was entitled to have her day in Court, not a part of it—she was entitled to the fundamental and elemental right of every litigant to cross-examine the witnesses of the adverse side. If the Court in the imposition of "reasonable terms," had imposed costs of the day to be fixed or taxed—had required the caveatrix-appellant to have subpoenaed the eleven witnesses called on the first days hearing at her expense, or some such terms this would have been reasonable.

This order and action of the Court was an absolute abuse of discretion and as such is reviewable (*State v. Bassett*, 33 N. J. L., 26).

An appeal lies from a decree of a chancellor awarding costs where it appears there has been an arbitrary and clearly erroneous exercise of that judicial discretion, by which he is in such matters alone controlled (*Weiss v. Louisville, &c.*, 7 South (Miss.) 390).

The Court of Appeals will not interfere in matters of discretion in the Circuit Court, unless that discretion is exercised with manifest injustice (*Saunders v. Outten,* 24 Ky (1 J. J. Marsh) 488).

In the case at bar if the Court was exercising its discretion it positively worked manifest injustice to the caveatrix as she had no opportunity to break down the direct testimony of all the proponents witnesses, who all uniformly testified they saw no change in the deceased, when as a matter of fact the doctor was a man weighing 240 pounds and had fallen away some 30 or 40 pounds in weight and talked thick. The crux in the case was,

> "What was the mental condition of the deceased on the day he executed his will?"

This clean cut question, which needed plenty of light and the searching scrutiny of cross-examination, particularly of the scrivener who drew the will and whose testimony was so flattering as to cause the Ordinary to ask:

> "Why didn't you tell that a while ago, when you were asked that over and over again?" (p. 66, p. 20),

and who admitted on further questioning by the Ordinary that in December, 1915, he had heard talk around about the doctor being mentally unbalanced (p. 68, p. 40), and again of the testimony

of Anna E. Wahl, who was enamoured of the doctor, and who is one of the beneficiaries of the 1915 will, despite the fact that the witnesses O'Brien and Daley testified without contradiction (pp. 164 to 194), to having set up all night as a watch for Dr. Coleman in his home in the fall of 1915, and that Mrs. Wahl was present. If the appellant-caveatrix had been cross-examined she would have been forced to admit this, and the probative force of her testimony could have been nullified and her whole testimony would have fallen. Likewise, the testimony of Mr. Rhome would have fallen.

Next we come to the testimony of Dr. Cotton and his whole opinion is based on the testimony of Mr. Rhome (p. 72, par. 40; p. 73, pars. 1-10). This witness having been a medical expert, it was of vital importance that the doctor be examined, that the appellant have an opportunity to interrogate the expert as to whether the fact that the doctor in the spring of 1915,

> "Mumbled words, was thinner, worked more slowly and did not seem to have the control of himself he had before, got prescriptions mixed, fell asleep in chair while talking. I nudged him and said, Guess I will go. He said, 'better stay awhile,' and fell asleep again.
>
> "September, 1915, seemed worse physically, when talking would wander off, carried revolver. My impression was that there was something the matter with him mentally" (see testimony of Stewart Farrell pp. 115 to 123).

That in early June, 1915:

"That the man over there has new treatments. He lets a man down over there about 12 o'clock every night, and some nights a woman and some nights a child. That Dr. Coleman said he was a sick man, took out a vial of morphine tablets and a hypodermic syringe and said that these were his best friends. That Dr. Coleman said, one night he came home with a knife up his sleeve with the full intention to kill her (his wife). She chased him from room to room and finally got him to his lovely bath tub and then he gave the knife up. He cried like a baby. Denied conversations *in toto* that he had with witness, complained of being sick in the head, that witness, who was a trained nurse, thought that the doctor had gone clean mad" (see testimony of Martha A. Ruth, pp. 125 to 131).

"That the doctor in September, 1915, talked of his hand being palsied from signing $2,000,000 worth of checks and when asked wasn't he afraid, he said, 'All I had to do was press a button and I had a regiment of artillery at my command.' His tongue and talk was thick, that the doctor had seen 500 patients that morning and it was about 10 a. m., when the conversation took place" (see testimony of Dr. Joseph Stackhouse, pp. 134 to 142).

Dr. Stackhouse is corroborated in this by the testimony of James S. Stephens and they both state that Mrs. Wahl was with Dr. Coleman when he made these amazing statements. Mrs. Wahl

never rebutted this testimony. Manifestly if the appellant had been allowed to cross-examine Mrs. Wahl her testimony would have been broken down and her undue influence might have been shown.

"October, 1915, mixed prescriptions.

"October, 1915, said he was called up to go to Lakewood, took his gun and took trolley at 12 o'clock and got back to his house at 3 o'clock that morning (there is no trolley from Asbury Park to Lakewood), that he conversed in a mumble" (see testimony of Peter S. Weir, pp. 150 to 157).

"August, 1915, deceased thought his car was out of order when it was all right, legs were thick" (see testimony of George Garrier, pp. 159 to 163).

"September, 1915, the doctor claimed he had bought a load of puppy dogs with short tails, that a man with a black dog was always following him. Doctor had failed in appearance, cheeks sunk in much thinner, walked lame, talked thick—could hardly understand him.

"Late October, 1915. Went to deceased's home, he was raving, when he talked he seemed to wander off. I thought he talked funny, a sane person would never talk like that, that way. He seemed to me that he was out of his mind. He was not right. Somebody asked Mrs Wahl if the doctor had a gun. She said, He has, but I have taken out the bullets and put in blank cartridges" (see testimony of Augustus H. O'Brien, pp. 164 to 174).

> "October, 1915. Deceased confused names of witness' employees, said, 'I have to get away from him (referring to a man with a black beard), that fellow out there is looking for me' " (see testimony of Geo. J. Daley, pp. 175 to 191).

From the foregoing brief resumé of evidence it can readily be seen that had Dr. Cotton, Otto Rhome, Mrs. Wahl, and the other witnesses, been cross-examined on this evidence their testimony would have been entirely changed or shattered beyond recognition.

That to deny the appellant-caveatrix this right of cross-examination entirely not only encroached upon a fundamental right of hers, but strikes at the very kernel of the case and was an abuse of discretion, if it was discretionary at all.

The Court in *Rowley v. Van Benthuysen*, 16 Wend., 370, said in part:

> "The line of separation is not very strongly marked between questions which are purely of discretionary character and those which depend upon some established principle of equity jurisprudence. And the practice and principles of the Court are so intimately connected that it may sometimes be difficult to determine whether a particular order should be regarded as disposing of the right of the party or merely regudating the course of proceeding in the cause."

American Digest, vol. 2, p. 1191, pars. 559-641. On par. 559 (La.):

> "When the law leaves anything to the discretion of a Judge, a sound and legal

> discretion is understood, not an arbitrary one. In the exercise of this discretion, he is as liable to err as in any other parts of his duty, and his errors are equally fatal to the suitor. From the exercise of this discretion an appeal will lie."

Where an order of Court is within the limits of its discretion, it is final and no appeal lies, and where the order on its face appears to be partly within and partly without and beyond its scope of authority, it may be appealed from and reversed.

Negrave Bell v. Jones, 10 Md., 322.

But it is the appellant-caveatrix's insistment that this was not a discretionary matter, but that if the Court of Errors and Appeals should feel that it is, then it is one of the border line cases referred to in the preceding citation, and should be resolved in favor of the appellant, as the estate being litigated is worth about $75,000, and the rights of a sister are being jeopardized in favor of a total stranger—Mrs. Wahl.

This question denying to the appellant the right of cross-examination did not give her her full day in Court, and involved the merits of the controversy, as a reference to the previous resumé of the testimony in the case clearly shows, and hence is appealable and reversible.

McMahon v. Davidson, 12 Minn., 357.

A question affecting a substantial right is appealable, if erroneously decided.

Sheldon v. Williams, 52 Barb., 183.

An appeal from the General Term lies from a decision of a judge at circuit refusing an application for a postponement of the trial of a cause made upon the ground of absence of a material witness. It effects a substantial right and is not in the absolute discretion of a judge.

> Howard v. Freeman, 3 Abb. Prac. (N. S.), 292.

The law in this State seems to be well-settled in the case of *The State v. Wood,* 23 N. J. L., p. 560. Chief Justice Green on page 564 (bottom of page 564) of that case, says:

> "Discretion on the other hand, implies that in the absence of positive law, or fixed rule, the Judge is to decide by his view of expediency or of the demands of equity and justice."

Further, on page 565, the Court clearly indicates that an appeal does not lie where a matter is discretionary but will lie where a rule of law has been violated, for the Court goes on to quote the case of *Rogers v. Hosack's Executors,* 18 Wend., 329. The Court of Errors of New York held that an appeal would not lie from an order of the Chancellor refusing to remove an executor, and to appoint a receiver instead. Justice Cowan in that case said:

> "I understand the line of authorities to stand almost without exception, that to warrant a reversal upon appeal from chancery some definite rule of law or equity must appear to have been violated."

> Rowley v. Van Benthuysen, 16 Wend., 369.
>
> Garr v. Hill, 1 Halst., Ch. Rp., 639.

It is almost too elemental to require the citation of authorities to demonstrate that "cross-examination is a right and not a privilege." The scope and extent of cross-examination may be discretionary but never the initial right to cross-examine itself.

No man can be condemned in our law without hearing the witnesses against himself and having an opportunity to cross-examine them.

Perrine v. Van Note, 4 N. J. L., 147.
Parker's Digest, vol. 7, pp. 13. 575.

Cross examination on matters either directly or indirectly in issue, or directly relevant to the issue is a matter of right, and its exclusion is error.

Prout v. Bernards Co., 32 N. J. L. J., 336.
Parker's Digest, vol. 8, p. 2306.

Points 1 and 2 made by the appellant are inseparably interwoven with point 3 in this case and the resumé of testimony heretofore referred to may be considered in conjunction therewith.

In view of the findings of the Sheriff's jury, the burden of proof shifted in this case clearly to the proponents herein, to establish their case by a fair preponderance of the evidence.

The appellant therefore respectfully and confidentially submits that the decree admitting the 1915 will of Dr. Coleman to probate be reversed and set aside.

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Proctors and Of Counsel
with Appellant.