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# Record No. **1374**

## **PETITION FOR WRIT OF PROHIBITION**

**CLARENCE W. COWPER**

vs.

**WILLIAM H. SARGEANT, JUDGE, ETC.**

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“The briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with Act of Assembly, approved March 1, 1903; and the clerks of this court are directed not to receive or file a brief not conforming in all respects to the aforementioned requirements.”

The foregoing is printed in small pica type for the information of counsel.

H. STEWART JONES, Clerk.

*160 Va 562*

IN THE  
**Supreme Court of Appeals of Virginia**

AT RICHMOND.

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CLARENCE W. COWPER

vs.

WILLIAM H. SARGEANT, JUDGE, ETC.

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PETITION FOR A WRIT OF PROHIBITION.

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*To the Honorable William H. Sargeant, Judge of the Corporation Court of the City of Norfolk:*

Please take notice that the undersigned will, on Tuesday, the 7th day of March, 1933, at 10 o'clock A. M., or as soon thereafter as he may be heard, present the petition and exhibits made a part thereof hereto annexed to the Supreme Court of Appeals of Virginia, at Richmond, and apply to said court for the writ of prohibition therein prayed for.

Very respectfully,

CLARENCE W. COWPER.

By JAMES E. HEATH,  
His Attorney.

Service of the above notice, and of the petition of Clarence W. Cowper and exhibits therein referred to, is hereby accepted.

WILLIAM H. SARGEANT,  
Judge of the Corporation Court of the  
City of Norfolk.

February 10, 1933.

Received and filed February 11, 1933.

H. S. J.

IN THE  
SUPREME COURT OF APPEALS OF VIRGINIA.  
AT RICHMOND.

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CLARENCE W. COWPER

against

WILLIAM H. SARGEANT, JUDGE OF THE CORPORATION COURT OF THE CITY OF NORFOLK.

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*To the Honorable, the Judges of the Supreme Court of Appeals of Virginia:*

Your petitioner, Clarence W. Cowper, respectfully shows unto the Court as follows:

1. That Laura Virginia Dewell, late of the City of Norfolk, departed this life on the 25th day of July, 1929, leaving a last will and testament, which was duly probated in the Corporation Court of the City of Norfolk on the 29th day of July, 1929. A certified copy of the order of probate, marked Exhibit "B", is filed herewith and prayed to be read as a part of this petition. Your petitioner was named as residuary devisee and legatee, and also as executor, in said will. Inasmuch, however, as, at the time said will was offered for probate, your petitioner was not a resident of this State, and the Trust Company of Norfolk, which was named as executor in the event your petitioner should predecease the testatrix, had ceased to exist, Annie Cowper was appointed by said Court Administratrix, c. t. a., of the estate of the said testatrix, and duly qualified as such.

2. That on the 3rd Monday in July, 1931, James P. Cowper filed, or attempted to file, a bill in equity in said Corporation Court, the object of which was to impeach the said last will and testament of the said Laura Virginia Dewell, to have the same decreed to be not her last will and testament, and to have the probate thereof set aside. A copy of this bill is filed

herewith, marked Exhibit "C", and prayed to be read as a part of this petition.

3. That, upon the filing of said bill, the defendants named therein, including your petitioner, appeared specially, for the sole purpose of moving, and thereupon did move, the Court to dismiss said bill, on the ground that the said Court was without jurisdiction in the premises.

4. That, upon the argument of this motion, the Court took the same under advisement, and subsequently, to-wit, on the 30th day of January, 1933, overruled the said motion and entered an order in which it held that the said Court *did* have jurisdiction of said bill and stated its determination to proceed in said cause. A copy of this order is filed herewith, marked Exhibit "D", and prayed to be read as a part hereof.

5. That it was and is the insistence of the said James P. Cowper (in which the Court agreed) that the said Court had jurisdiction of the said cause by virtue of the last sentence of Section 5259 of the Code of 1919, which is here quoted in full, the sentence in question, upon which the Court relied in taking jurisdiction, being in italics:

Section 5259. MOTION FOR PROBATE MAY BE *EX PARTE*; WHEN AND BY WHOM SUIT MAY BE BROUGHT IN SUCH CASE, TO IMPEACH OR ESTABLISH WILL. Any court having jurisdiction of the probate of wills under section fifty-two hundred and forty-seven may, however, without summoning any party, proceed to probate and admit the will to record, or reject the same. After a sentence or order under this section or under section fifty-two hundred and forty-nine, a person interested, who was not a party to the proceeding, may proceed by bill in equity to impeach or establish the will, on which bill a trial by jury shall be ordered to ascertain whether any, and if any, how much of what was so offered, for probate, be the will of the decedent. The court may also, if it deem proper, require all testamentary papers of the same decedent to be produced, and direct the jury to ascertain whether any, or if there be more than one, which of the papers produced, or how much of what was so produced, be the will of the decedent. If the sentence or order be made by the court in the exercise either of its original jurisdiction or an appeal from the clerk, such bill shall be filed within two years from the date of such order made by the court. If no appeal be taken from a sentence or order made by the clerk under section fifty-two hundred and

forty-nine, the bill shall be filed within two years from the date of such order or sentence by the clerk. If no such bill be filed within that time, the sentence or order shall be forever binding. *No bill shall be filed under this section except in the court in which, or in the clerk's office of which, the will was admitted to probate.* (Code 1887, Section 2544.)

6. That, notwithstanding the italicized portion of this statute, your petitioner alleges that the act of February 12, 1894 (Acts 1893-1894, p. 244), which established the Court of Law and Chancery of the city of Norfolk, and at the same time curtailed the jurisdiction of the Corporation Court of said city, which act now appears as Chapter 247 of the Code of 1919, has wholly deprived the latter Court of all equity jurisdiction, and that it was not the purpose of the Revisors of the Code of 1919, or the Legislature which enacted the same, by the insertion of the last sentence in section 5259, to restore to that Court any jurisdiction which had thus been taken away from it.

7. That the Corporation Court of the City of Norfolk had, and has, no jurisdiction of the said cause, and that it should be restrained by this Court from taking further jurisdiction thereof, or proceeding therein in any way.

Wherefore, your petitioner, being without any other adequate remedy, prays that a writ of prohibition may be awarded, directed to William H. Sergeant, Judge of the Corporation Court of the City of Norfolk, in due form of law, to prohibit him, the said William H. Sergeant, Judge of said Court, from taking jurisdiction of the matter aforesaid, or from further proceeding therein.

And he will ever pray, etc.

CLARENCE W. COWPER, Petitioner.

JAMES E. HEATH,  
Counsel for Petitioner.

District of Columbia,  
City of Washington, to-wit:

This day Clarence W. Cowper, the above-named petitioner, personally appeared before me, W. R. Burgess, a Notary Public in and for the City of Washington, in the District of

Columbia, and made oath that the matter and things stated in the foregoing petition are true. My commission expires on the 18th day of May, 1933.

Given under my hand this 31st day of January, 1933.

(Seal) W. R. BURGESS,  
Notary Public.

VIRGINIA:

In the Corporation Court of the City of Norfolk, on the 29th day of July, 1929.

The last will and testament of Laura Virginia Dewell, deceased, late of the City of Norfolk, who departed this life on the 25th day of July, 1929, was this day produced in Court and offered for probate.

And thereupon came C. Fred Bonney and W. L. Prieur, two of the subscribing witnesses to the said will, who, having first been duly sworn, testified that the said testatrix signed, sealed, published and declared the same to be her last will and testament in their presence, and in the presence of Chas. B. Carroll, the other subscribing witness to the said will, and that they, at the request of the said testatrix, and in her presence, and in the presence of each other, all four being present at the same time, subscribed their names as witnesses to the said will.

Whereupon it is considered by the Court that the said will has been duly and fully proved, and the same is ordered to be recorded as the true last will and testament of Laura Virginia Dewell, deceased, in due form.

And it appearing to the Court that Dr. Clarence Wills Cowper, one of the Executors named in the said will is not a resident of the State of Virginia, and that The Trust Company of Norfolk, one of the Executors named in the said will, has been merged with the Norfolk National Bank of Commerce and Trusts, and on motion of Annie Cowper, the Court doth appoint her as the administratrix, with the will annexed, of the estate of Laura Virginia Dewell, deceased.

And thereupon the said Annie Cowper, qualified as such Administratrix, with the will annexed, by taking the several oaths prescribed by law, and by entering into and acknowl-

edging a bond in the penalty of Four Thousand Dollars with Clarence W. Cowper, as surety, who justified his sufficiency on oath conditioned according to law.

A certificate is granted the said Annie Cowper for obtaining letters of probate and administration with the will annexed, on the estate of Laura Virginia Dewell, deceased, in due form.

And it is ordered that the said bond be recorded.

Teste:

W. L. PRIEUR, JR., Clerk.

By A. G. GRAHAM, D. C.

A Copy—Teste:

W. L. PRIEUR, JR., Clerk.

By L. B. ROBERTS, D. C.

Virginia:

In the Corporation Court of the City of Norfolk. Filed 2nd July Rules 1931.

James P. Cowper, Complainant,

vs.

Clarence Wills Cowper, Anna Cowper, as Admr., c. t. a. of the estate of Laura Virginia Dewell, deceased, Anna Cowper, Annie Fripp, and Marion Kelsie Harper, formerly Marion Kelsie Jolly, Defendants.

In Chancery—Bill.

To the Honorable William H. Sargeant, Judge of the said Court:

Your Complainant, James P. Cowper, respectfully represents:

(1) That on the 25th day of July, 1929, Laura Virginia Dewell, departed this life, leaving surviving her the complainant, who is her brother and also the defendants, Anna Cowper and Clarence Wills Cowper and Annie Fripp, who are her sole heirs-at-law.

(2) That at the time the said Laura Virginia Dewell, departed this life she owned and possessed a valuable estate, consisting of real and personal property amounting to the sum of about Twenty Thousand (\$20,000.00) dollars.

(3) The complainant further states that on the 29th day of July, 1929, there was admitted to probate in the Clerk's Office of the Corporation Court of the City of Norfolk, Virginia, a paper writing purporting to bear date on the 31st day of May, 1924, and which purports to be the last will and testament of Laura Virginia Dewell, deceased, and Clarence Wills Cowper was appointed executors and in case of his death the Trust Company of Norfolk, but inasmuch as Clarence Wills Cowper is not a resident of the State of Virginia, and the Trust Company of Norfolk is merged with the Norfolk National Bank of Commerce and Trusts, Anna Cowper qualified as administratrix with the will annexed and gave bond in the penalty of four thousand (\$4,000.00) dollars, with Clarence Wills Cowper as surety, all of which will more fully and at large appear from said paper writing itself, together with the order of probate thereof, and the order appointing Anna Cowper, administratrix of the said estate, copies of which are herewith filed, and made a part of this bill.

(4) That the said paper writing purports to contain devises and bequest to the said Anna Cowper, Clarence Wills Cowper, Annie Fripp, Marion Kelsie Harper, formerly Marion Kelsie Jolly and Richard Cowper, deceased, as by reference to the writing will more fully and at large appear.

(5) That the bulk of the estate is given by the said writing to the said Clarence Wills Cowper, and Anna Cowper, and nothing is given to your complainant.

(6) Your complainant further says that at the time of said paper writing was made, purporting to be the last will and testament of Laura Virginia Dewell, deceased, the alleged testator, she, the said Laura Virginia Dewell, was afflicted with bodily and mental infirmity, and with weakness of mind and impaired memory to such an extent that the said alleged testator was not of sound and disposing mind, was incapable of understanding the extent and variety of her property, and was incapable of holding in \* \* \* mind the objects of her affection so as to make her devises and bequests conform to her true intent and desire.

(7) That the said Clarence Wills Cowper has for a long time tried to get control and possession of the estate of Laura Virginia Dewell, and during her life-time did get control and

possession of a large part thereof; that by his importunities and entreaties he brought the said Laura Virginia Dewell entirely under his influence and control and that the said influence and control continued to the time of the making of the said paper writing and continued thereafter until the date of the death of the said Laura Virginia Dewell; that it was due to the influence of the said Clarence Wills Cowper that the said Laura Virginia Dewell, deceased, made the said paper writing purporting to be a last will and testament in which she left none of her property to your complainant and so your complainant says that the said paper writing purporting to be the last will and testament of the said Laura Virginia Dewell, deceased, was procured, obtained, and made through and by the *unlawfull* and undue influence of the said Clarence Wills Cowper, upon the mind of the said Laura Virginia Dewell, at the time of its execution.

(8) Your complainant therefore further says that the said paper writing purporting to bear date of the 31st day of July, 1924, and admitted to probate on the 29th day of July, 1929, by the Clerk of the Corporation Court of the City of Norfolk, Virginia, and purporting to be the last will and testament of the said Laura Virginia Dewell, deceased, is not the last will and testament of the said Laura Virginia Dewell, deceased, nor is any part thereof the last will and testament of the said Laura Virginia Dewell, deceased.

Your complainant therefore prays that the said Clarence Wills Cowper, Anna Cowper, as Admr. c. t. a. of the estate of Laura Virginia Dewell, deceased, Anna Cowper, Annie Fripp and Marion Kelsie Harper, formerly Marion Kelsie Jolly, be made party defendants to this bill and be required to answer same, but not on oath, the oath being hereby waived; that proper process issue; that an issue *devisavit vel non* be made up and tried by a jury at the bar of this Court to ascertain whether said paper writing admitted to probate as aforesaid is or is not the true last will and testament of the said Laura Virginia Dewell, deceased, that the said probate be set aside; that the said paper writing be declared and decreed not to be the last will and testament of the said Laura Virginia Dewell, deceased, and that all such other further and general relief may be afforded your complainant as the nature of the case may demand or to equity shall seem meet, and your complainant will ever pray, etc.

JAMES P. COWPER.

By LLOYD E. WARREN, Counsel.

LLOYD E. WARREN, p. q.

In the Name of God, Amen:

Laura Virginia Dewell,

I, Laura Virginia Dewell, of the city of Norfolk, State of Virginia, (widow of John N. Dewell) being of sound mind and memory, and in full possession of all my mental faculties; do hereby make, publish and declare this to be my last will and testament, hereby revoking all other wills heretofore made by me.

First: I desire that my funeral expenses be promptly paid, and all other debts that I might owe at the time of my death.

Second: I hereby direct my executor hereinafter mentioned, to have erected at my grave a tombstone, not to exceed in cost, one thousand (\$1,000.00) dollars.

Third: I give and bequeathe unto my sister Anna Cowper and my brother Richard Cowper, all the household and kitchen furniture that I may own at the time of my death.

Fourth: I give and bequeathe unto my sister Anna Cowper, the sum of two thousand (\$2,000.00) dollars, in cash in fee simple.

Fifth: I give and bequeathe unto my brother Richard Cowper, the sum of two thousand (\$2,000.00) dollars in cash in fee simple.

Sixth: I give and bequeathe unto my niece Annie Fripp (Widow) of Gene Fripp of Portsmouth, Va., the sum of one hundred (—100.00) dollars, in cash in fee simple.

Seventh: I give and bequeathe to my grand-niece, Marion Kelsie Jolly, the sum of two hundred and fifty dollars (\$250.00) in cash in fee simple.

Eighth: All the rest and residue of my personal estate, I direct my executor hereinafter mentioned to invest in some good and sound investment, as his good judgment might direct.

Ninth: I hereby give my executor hereinafter mentioned, full power to sell any of my real estate, or make such purchase of other real estate, with whatever money he may have in hand belonging to the estate, or to exchange any real estate I may die possessed of for other real estate, also to collect the rents issued and profits, from my estate both real and personal.

Tenth: I hereby authorize my executor hereinafter men-

tioned to pay over semi-annually, in equal parts, the rents, issues and profits from my estate, after all levies, taxes, assessments and expenses of said estate have been paid; to my sister Anna Cowper and my brother Richard Cowper, equally.

Tenth, continued. Laura Virginia Dewell.

These payments to be kept up as long as they shall live, and at the death of either of the above mentioned, Anna Cowper or Richard Cowper, the said rents, issues and profits to go to the survivor during his or her life time.

Eleventh: After the deaths of Anna Cowper and Richard Cowper, the rest and residue of my estate of every kind and description, I devise and bequeathe unto my nephew, Dr. Clarence Wills Cowper (whom I raised) my entire estate of whatever kind and wherever located, both real and personal in fee simple.

Twelfth: I hereby nominate and appoint Dr. Clarence Wills Cowper, executor of this my last will and testament, with full power and authority to execute the same according to its true and intended meaning. I request that no bond be required or any appraisement made. Should the above named Dr. Clarence Wills Cowper die before the testatrix, I *herby* authorize and appoint the Trust Company of Norfolk.

In Witness Whereof, I hereunto subscribe my name and affix my seal to this my last will and testament, which is written on two sheets of legal cap paper, with my name written on each sheet, at the top *threof*, this 31st day of July 1924.

(Seal)

LAURA VIRGINIA DEWELL.

The above signature of the Testatrix, Laura Virginia Dewell, was made and the foregoing will was acknowledged, by the said Laura Virginia Dewell in the presence of us, three competent witnesses present at the same time do hereby subscribe the said will in the presence of the said testatrix and of each other, at the request of the said testatrix on this 31st day of July, 1924.

Witness: C. FRED BONNEY,

Witness: W. L. PRIEUR,

Witness: CHAS. B. CARROLL,

Virginia:

In the Corporation Court of the City of Norfolk, on the 29th day of July, 1929.

The last will and testament of Laura Virginia Dewell, de-

ceased, late of the city of Norfolk, who departed this life on the 25th day of July, 1929, was this day produced in Court and offered for probate. And thereupon came C. Fred Bonney and W. L. Prieur, two of the subscribing witnesses to the said will, who, having first been duly sworn, testified that the said testatrix signed, sealed, published and declared the same to be her last will and testament in their presence, and in the presence of Chas. B. Carroll, the other subscribing witness to the said will, and that they, at the request of the said testatrix, and in her presence, and in the presence of each other, all four being present at the same time, subscribed their names as witnesses to the said will. Whereupon, it is considered by the Court that the said will has been duly and fully proved, and the same is ordered to be recorded as the true last will and testament of Laura Virginia Dewell, deceased, in due form.

And it appearing to the Court that Dr. Clarence Wills Cowper, one of the Executors named in the said will is not a resident of the state of Virginia, and that The Trust Company of Norfolk, one of the Executors named in the said will, has been merged with the Norfolk National Bank of Commerce and Trusts, and on motion of Annie Cowper, the Court doth appoint her as the administratrix, with the will annexed, of the estate of Laura Virginia Dewell, deceased.

And thereupon, the said Annie Cowper, qualified as such Administratrix, with the will annexed, by taking the several oaths prescribed by law, and by entering into and acknowledging a bond in the penalty of four thousand dollars with Clarence W. Cowper as surety, who justified his sufficiency on oath conditioned according to law.

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And it is ordered that the said bond be recorded.

Teste:

W. L. PRIEUR, JR., Clerk.

By A. G. GRAHAM, D. C.

A Copy—Teste:

W. L. PRIEUR, JR., Clerk.

By JNO. S. RILEY, JR.,  
Deputy Clerk.

Virginia:

In the Corporation Court of the City of Norfolk, on the 30th day of January, 1933.

James P. Cowper

vs.

Clarence Wills Cowper, et als.

ORDER.

This cause came on this day to be heard upon the complainants bill and the motion to dismiss of the defendant, and was argued by counsel;

On consideration whereof, the Court being of the opinion that the motion of the defendant to dismiss the bill of the complainant filed in this cause on the ground that this court has no jurisdiction to entertain such a bill, is not well taken, the court doth hereby overrule and dismiss the same; and doth further decide that it has jurisdiction of said bill.

A Copy—Teste:

W. L. PRIEUR, JR., Clerk.

By JNO. S. RILEY, JR.,  
Deputy Clerk.

A Copy—Teste:

H. STEWART JONES, C. C.

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