

New Jersey Court of Errors and Appeals

HARRY DIAMENT, *et al.*,
Appellants,

vs.

THE CUMBERLAND TRUST
COMPANY OF BRIDGETON,
et al.,

Respondents.

IN THE MATTER OF
THE ESTATE OF
CHARLES G. DIA-
MENT, DECEASED.
ON APPEAL FROM
PREROGATIVE COURT.

SUPPLEMENTAL ARGUMENT FOR APPELLANTS.

I.

On the subject of the destruction of the will the learned Vice-Ordinary said: "When a will is proved to have been executed, *and it cannot be found at the testator's death*, if the *will* remained in his custody, or after its execution he had ready access to it, *the fact that it cannot be found after his death raises a presumption that he had destroyed it animo revocandi*" (107). The case is totally barren of any and all evidence of search and failure to find. *Under-*

wood on Wills, Vol. 1, p. 371, says: "The actual destruction of the will should be shown, but, if it cannot be shown, it is incumbent upon the party alleging the loss to show that a careful, diligent and bona fide search for the instrument has been made and that the search was unsuccessful." Now, the learned Vice-Ordinary (106), holds and finds as a fact that the codicil in question was destroyed *animo revocandi*, and (107) that it was lost. It could not be both destroyed and lost. It is important to know whether it was lost or destroyed. If it was lost, it should have been probated because its contents were known and proved. Consequently, the decree must be reversed. If it was destroyed, another question arises, the question of revival.

II.

We submit further observations upon this phase of the controversy.

From the English Statute of Frauds, 1676, to *Randall vs. Beatty*, 1879, a period of 203 years, there is a dearth of judicial declaration on the subject of revival. *In re Lawrence*, 3 Hal. 215, probate was refused in New York State, allowed in New Jersey and then vacated. The question of revival was not settled. Then came the cases of *Randall vs. Beatty*, 31 N. J. Eq. (4 Stew.) 643, and *Moore's Case*, 72 N. J. Eq. (2 Buch.) 371, which seem to be the only ones dealing with the subject. See *in re Will of Da Cunha*, 35 N. J. L. J. 304, &c. The rule established, as we understand it, is that the destruction of a subsequent will revives a former one, provided there is proof that such was the testator's intention. Intention makes a will, if that intention is expressed conform-

ably with statutory requirements. Intention is the sole question.

In respect to testator's intention, the following circumstances, not apparently considered below, come to have commanding force.

First, the will (pages 1 & 2), gives to the testator's daughter, Hettie, a large portion of his estate. Page 9 makes her residuary legatee and devisee. She is made executrix of the will (10). On page 13, in his second codicil, he refers to the death of his daughter, Hettie, and appoints other executors, but makes no disposition of or reference to the estate bequeathed and devised to her. Did the testator intend, assuming the last codicil to have been destroyed, to revive his deceased daughter's interest? The contestants are vitally interested in the disposition of Hettie's share in the estate.

In the Moore case, *supra*, "there was a provision in the earlier will for the wife of the testator, and she was dead at the time the later will was destroyed" (108), says the Vice-Ordinary. Is not this a circumstance to show conclusively that Mr. Diamant did not mean to revive his will and the first two codicils? What becomes of Hettie's residuary interest? It remains undisposed of. Sheriff Diamant was extremely punctilious and careful. Is it not clear that he did not express his intention in respect to Hettie's estate? If the death of a wife in the Moore case justified the exclusion of the second will, the death of the testator's daughter, Hettie, certainly indicated that he did not intend to revive the will and the first two codicils by the destruction of the last one.

Second, the learned Vice-Ordinary (111), justifies his conclusions by the fact that the testator 'phoned to John S. Ware, who always drew his wills, to

4 *Supplemental Argument for Appellants*

make some disposition of cash just come into his hands. This was a week before his death and some weeks after the alleged destruction of the codicil in question (50). This cash would clearly become a part of the estate and go according to the terms of his will. What did the testator intend to do with this money? The circumstance means, not that he wished to revive his will and its first two codicils, but that he wished and intended to do something else. It does not mean revival. It does mean revocation. "At common law any alteration of the estate by the testator, or of his interest therein, or any modification of it which converted it into a different estate from the one the testator had at the time of his will, was a revocation thereof, whether such a result was intended or not." 40 Cyc. 1207. The testator (50), "had received some money for a certain matter that was mentioned in his will and he wished to arrange for the disposition of the proceeds of this matter that had been mentioned in his will," etc. This means that his estate had been altered. How far or in what respects it had been changed is unknown. This meant revocation. It is a plain publication of a purpose not embraced in his will and codicils. Therefore, it is an act of revocation. Had his will and the first two codicils embodied his intention, he would not have wished Mr. Ware to prepare another will or codicil. Therefore, his will and the first two codicils did not declare his intention. His wish, expressed a week before he died, is the clearest possible proof that he had not revived his will and codicils by destroying the third. The learned Vice-Ordinary misconceived the proof and fell into error. The testator died with contemplated changes in his will. Consequently, the will probated is not his last will, if his intentions are considered. A man's last will is his honest intention.

Twice before the testator had procured Mr. Ware to make changes in his will. In both instances the testator gave specific instructions by letter. Exhibit C1, 56, 46, 47; Exhibit C2 (56). This last proposed change was so important that he requested Mr. Ware to come personally.

Third, the Vice-Ordinary regarded as evidence to revive the withdrawal of the last codicil from the bank and leaving the will and the first two codicils there. But the testator had trouble at his home, that is, with his housekeeper. He was an old man and alone with her. It may well be that he feared she might learn of her disinheritance with its inevitable consequences. It may well be that he preferred to be sure of his ground and that, therefore, he concluded to keep the disinheriting codicil in his own possession. He may have hidden it in the barn or some other place. On her ignorance of that codicil depended his peace and comfort for a time at least. What proves this is the fact that he said nothing to anyone about it. Such a construction is quite as rational as any other.

Fourth, he sent for his sons, had a reconciliation with them and declared that he had made a new will, which he hoped would be satisfactory. Either he had literally made a new will, or he had in mind the last codicil, which completely excluded his housekeeper and, as a consequence, included his sons. From these facts, two arguments may be drawn, first, that he had not destroyed and did not destroy the last codicil; second, that his own sons were provided for. But the latter could not be true, if the last codicil was not to prevail, or unless a new will had been made. It is evidence, not of a purpose to revive, but the contrary.

Fifth, there was another reason for taking the

last codicil from the bank. The will creates a trust estate to Mrs. Ewan in four dwelling houses, in stock of the Cumberland National Bank and in the Robert Shull mortgage. The Cumberland Trust Company is executor and trustee. It is a valuable asset, provided Mrs. Ewan, a young woman, lives long. The bank stock could be voted by a rival institution. The third codicil destroyed this trusteeship entirely. Therefore, Mr. Diament preferred to control it himself.

Mr. Ware, president of the Trust Company, hiding behind the excuse that he was too busy, failed to make any further change in the disposition of the testator's estate. On the death of the testator, the trustee neglected its plain duty to make search for the last codicil. The trustee at once championed the cause of Mrs. Ewan. It was unpardonable hostility to the codicil.

Sixth, can any Judge in this court find the slightest ground upon which to base a firm belief? Can anyone say what the real intention of the testator was? Is not the case surrounded by uncertainty? If so, there is no rational process by which a purpose to revive the will and the first two codicils can be established. The circumstances strongly support the inference that such revival was not intended. Hence the rule in Moore's case applies.

It is a dangerous practice to revive a revoked will in this way. It puts in the power of unscrupulous people the temptation to destroy one will and thereby make another. The safe rule is to require, for republication or revival, the same formality and care as are required to pass titles by will in the first instance.

Seventh, every case in New Jersey and elsewhere, so far as we have been able to discover, in-

volves *two wills*, not *one will* and codicils. In this case there is but *one will*, to wit, the original will and three codicils. Hence, the question is, does the rule of revival apply in the case of one will and its codicils? The destruction or loss of a codicil is not the destruction or loss of a will as such. Furthermore, the last codicil revoked a devise in the original will. That is to say, it, by proper legal formality, changed the course of a title to realty. Can the title to that same realty be effected, without legal formality, by the loss or destruction of a codicil to a will? In New Jersey there are two ways to transmit title to real estate; namely, by deed or by will. The Legislature has prescribed strict and indispensable requirements to control the devolution of title in either case. But here, in the case at bar, title is devolved regardless of legal formalities by the mere uncertainty of circumstances, by a mere guess. In other words, every case involving revival embraces two wills. The destruction of one has, in some cases, been held to revive the other; while here one part of a will, either lost or destroyed, is held to revive other parts of the will. To correctly apply the reasoning of the learned Vice-Ordinary, the will and the first two codicils must be regarded as one instrument, and the last codicil as another, which cannot be true.

III.

What ought to be the rule adopted in New Jersey?

At common law wills, whether of personalty or realty, once revoked, could be revived or republished either by an informal instrument or by parol evidence showing intention to revive or republish, 40 Cyc. 1212. But, under the English Statute of Frauds,

wills of lands could be revived or republished only by re-execution, *ib.* The statute did not affect wills of personalty, which could be revived by parol as before. But a statute in Victoria made re-execution or republication apply to all wills alike.

The reason, therefore, for revival arose before these two enactments. It necessarily disappeared by force of these two enactments. The English statute is followed in many of our States. It is the safe rule because titles to property should, when passed by wills, not rest in doubt or uncertain circumstances. In New Jersey, we have statutes regulating both the execution and revocation of wills. Yet, if the rule applied in the case under review be adopted, both statutes are repealed by a common law rule long since legislated out of existence in England and many of the States of the Union. Making or revoking a will in our State can be accomplished by strict compliance with law only. Yet, in the uncertain circumstances of the present case, a will once revoked, according to law, may be recreated by a common law practice utterly out of accord with reason, safety or sense. To say the least, it is time that this important subject should be planted on safe foundations.

Respectfully submitted,
REX A. DONNELLY,
JOHN W. WESCOTT,
For Appellants.

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BRIEF OF RESPONDENTS

I.

FACTS

1. The history of the case and the facts, in so far as they relate to the due execution of the will and two codicils admitted to probate, are set forth on pages 1 and 2 of Appellants' brief.

2. The decedent executed a third codicil to his will in the latter part of August, 1913 (49 & 58).

3. This third codicil was afterwards delivered to the decedent by an employe of The Cumberland Trust Company at decedent's request and respondents' insist was destroyed by decedent *animo revocani* (60-62).

4. This third codicil was not produced at the hearing, but its contents were proved.

This codicil revoked the bequests made in the will and second codicil to Mrs. Ewan (63).

The letter giving the instructions for the drawing of the codicil is set forth on page 56, Ex C2.

II.

POINTS

As we view it, there are two matters presented by this appeal.

1. Was the third codicil destroyed by Mr. Diament *animo revocandi*?

2. Did such destruction of the third codicil leave the will and the first and second codicils unimpaired?

III

The learned Vice Ordinary decided both of the above matters in the affirmative. His conclusions are found on pages 105, etc.

IV.

Respondents insist that the third codicil was destroyed by Mr. Diament *animo revocandi*.

The will and two codicils had been deposited by Mr. Diament with The Cumberland Trust Company on or about the date of the second codicil, which was the nineteenth day of December, 1912, (104). The third codicil was pre-

pared by Mr. John S. Ware and deposited with the Trust Company in August 1913 (60).

About two weeks after it was executed (60) the third codicil was returned to Mr. Diament by Charles S. Ware at Mr. Diament's request.

Charles S. Ware testifies (61) "Why, I said Sheriff, I have the paper here that you wished me to return to you" and I said "here it is". Something was said about this being his codicil that he had once made and that he requested to be returned to him and as I remember, he asked me what was the best way to annul it, and I said "to destroy it". Mr. Ware also testifies (61) "I rather think he put it in his pocket".

Mrs. Ewan testifies (62) that she saw Charles S. Ware talking to Mr. Diament and saw Mr. Ware hand Mr. Diament a paper. She also testifies (62) that after Mr. Ware left, Mr. Diament came into the house and threw a paper in the kitchen stove.

Appellants contend (Brief page 7) that there is no proof that the paper Mr. Ware handed to Mr. Diament is the paper that Mr. Diament threw in the stove. Also that there is no proof that there was a fire in the stove.

Where a will is traced to the possession of the person who made it, and after his death it is not found, the law presumes that the testator destroyed the will *animo revocandi*.

Holcombe vs. Holcombe (Errors & Appeals)
39 N. J. E. 592.

In Re Willets Estate (Reed, V. O.), 46 Atl.
519
Collyer vs. Collyer 110 N. Y. 481, 18 N. E.
110.
Williams vs. Miles, 68 Nebr. 463, 62 L. R.
A. 383.

In *Holcombe vs Holcolmb*, *supra*, it was proved that the will came into the possession of the testator in June 1882, and that all further trace of it was lost. One witness testified that at the time testator took possession of the will he said he intended to destroy it. There was no further proof of destruction. The Court applied the above rule and held that the testator had destroyed the will *animo revocandi*.

No facts are proved to rebut the presumption that the third codicil was destroyed *animo revocandi*.

V.

The destruction of the third codicil left the will and the first and second codicils unimpaired.

1. The revocation by the third codicil, of the bequests to Mrs. Ewan was testamentary, and the revocation of the third codicil revived the bequests.

Such is the rule laid down by Chancellor Runyon sitting as Ordinary in *Randall vs. Beatty* 31 N. J. E. 643.

This was the rule adhered to by the common law courts of England from the time of the enactment of the statute of frauds (Stat. 29 Car. II, Chap. 3) to the act 1 Vict., Chap. 26.

Goodright ex dem. Glazier vs. Glazier
(1770), 4 Burr 2512.

Harwood vs. Goodright I Cowp. 87.

Bates vs. Holman, 3 Hen & M. 503, 525, 542.

I Jarman, Wills, 123.

4 *Kent, Com.* 531.

1 *Redfield, Wills* 374, 375.

Our statute contains a substantial re-enactment of the sections of the English Statute (29 Car. II) relating to the revocation of wills.

In some states the rule is laid down that where a person, having a will, afterwards makes another will containing a clause expressly revoking all former wills, and afterwards destroys the second will, and dies leaving the former will uncanceled, the revoking clause operates instantaneously to effect a revocation, and that consequently, the destruction of the second will does not revive the former one.

In states which have enacted a statute similar to the English statute of I Vict; Chap. 26, as in New York, the reason for this rule is plain.

We submit however, that in states having a statute similar to our own, the rule cannot be justified.

The case of *James vs. Marvin* (1821) 3 Conn. 577 is the foundation of this doctrine in this country, and is based on a misconception of the law.

This misconception is ably pointed out by Dubois J., in *Bates vs. Hacking* (R. I.) 68 Atl. 622, 14, L. R. A. (N.

S.) 937 and the rule laid down in *Randall vs. Beatty* 31 N. J. E. 643 is followed.

This is also the rule in Illinois.

Stetson vs. Stetson 200 Ill. 601, 61 L. R. A. 258.

In both of the above cases *Randall vs. Beatty supra*, is cited with approval.

2. The ecclesiastical courts laid down the rule that it is a question of intention to be collected from all the circumstances of the case whether there is a revival of the earlier will.

This is the rule sanctioned in *Moore's Case* 72 N. J. E. 371.

The same rule is followed in the following cases in other jurisdictions.

Blackett vs. Ziegler (Iowa) 37 L. R. A. (N. S.) 291.

Williams vs. Miles 68 Nebr. 463, 62 L. R. A. 383.

In re Gould (Vt.) 47 Atl. 1082.

Colvin vs. Warford 20 Md. 567.

In the last two cases it is held that the cancellation of a revoking will is prima facie evidence of an intention to revive, but this presumption may be rebutted by evidence of the attending circumstances and probable motives.

3. Whether the common law rule or the rule of the ecclesiastical courts be declared to be the law of New Jer.

sey, respondents insist that the bequests to Mrs. Ewan were revived.

If inquiry be made into the intention of the testator, we find.

The will and two codicils deposited with The Cumberland Trust Company (one of the executors) by Mr. Diament about December 19th, 1912 (104); a third codicil prepared by an officer of the Trust Company executed by Mr. Diament and deposited with the will and the first and second codicil in August, 1913, (60); the third codicil withdrawn by Mr. Diament in September, 1913, and destroyed by him. The will and the first and second codicils remained continuously with the Trust Company until his death; just before he died Mr. Diament spoke to Mr. Ware about making a change in his will (50); he had received some money for an item mentioned in his will and wished to arrange for the proceeds of the same (50). He understood that this could be done by means of another codicil (103).

4. It is submitted that in making inquiry into the intention of the decedent, the fact that the destroyed instrument was a codicil rather than a complete will should be considered.

A codicil is an addition or qualification, to a will and is a part of the will 40 cyc. 994.

The effect of the third codicil was only to revoke the bequests to Mrs. Ewan and give the same to the heirs of Mr. Diament. If appellants' contention that the destruc-

tion of the third codicil did not revive those bequests be sustained, then no reason could possibly be assigned for its destruction.

Respectfully submitted,

LEROY W. LODER,

JAMES S. WARE,

For Respondents.

**NEW JERSEY
COURT OF ERRORS AND APPEALS.**

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BRIEF OF APPELLANTS.

I.

FACTS.

Charles G. Diament, a former sheriff of Cumberland County, died at Cedarville, N. J., January 31, 1914 (14, 65).

Proponents offered for probate in the Orphans' Court the following papers, viz:

1. A paper writing alleged to be the will of decedent, dated Nov. 12, 1902 (2), by the terms of which

he devises his estate to his two daughters, Hettie Diament and Mary L. D. Cook, his two sons, Harry and Edward L. Diament (the appellants), his grandchildren, Helen and Mary Diament, children of his son Edward, Charles and Almedia Cook, children of his daughter Mary, and to Eva M. Ewan, who was his housekeeper (61). By paragraphs 8 and 9 of said will (7, 8) he gives his housekeeper a life estate in the house and lot where he resides, in the household goods, in all the stock, goods and chattels at the barn, and also in two wood lots. He also creates a trust estate of four dwelling houses in Bridgeton, Cumberland National Bank stock and the Robert P. Shull mortgage, the income from which is payable to Mrs. Ewan during her life and on her death the properties go to his heirs at law.

2. A paper writing dated February 1, 1911, alleged to be a codicil to said will (10), in which decedent revokes the principal part of the devise to his son Harry in said will, and gives it to Phillip and Anna Sheppard for their lives and on their death to his heirs at law. This practically disinherited his son Harry.

3. A paper writing alleged to be a second codicil (12) to said will, dated Dec. 19th, 1912, in which decedent provides that on the death of Mrs. Ewan his bank stock should go to the First Presbyterian Church of Cedarville, N. J., instead of to his heirs as provided in his will, and also appoints the Cumberland Trust Company of Bridgeton and his daughter Mary L. D. Cook executors in place of Hettie Diament, named as executrix in the will, she being deceased. The Orphans' Court admitted the above writing to probate as a will and two codicils to same of decedent (87). The Prerogative Court approved the same.

II.

Mr. Diament executed a third codicil to his will. The Orphans' Court refused to probate that codicil. Vice-Ordinary Leaming sustained the action of the Orphans' Court. The appeal is from the decree founded upon the opinion of the Vice-Ordinary (94, 116). This codicil was prepared by John S. Ware, secretary and treasurer of the Cumberland Trust Company, according to written instructions of the decedent (46, 49, 56). It followed exactly the instructions given in decedent's letter of August 19, 1913 (64). This letter is C1, p. 56. The letter was intended by the decedent to be a codicil to his will, but not being in form, Mr. Ware drew a proper codicil which was sent to Mr. Diament for execution (64). Leslie M. Ogden was one of the subscribing witnesses (58). After due execution, the codicil was returned to the trust company (54). Charles S. Ware was also a subscribing witness to the codicil (60). Its execution is admitted (100). Who took the codicil to the trust company is not known; it was taken by some one (60). About two weeks later (60), decedent requested its return to him. Charles S. Ware went to the decedent's residence with the codicil. Ware said, "As I was walking down the drive, I saw the Sheriff standing in the barn door and he spoke to me, beckoning for me to come and I went to the door" (60, 61). Ware delivered it to him *in the barn* (60), where this conversation between the decedent and Ware took place (61). "I said, 'Sheriff, I have the paper here that you wished me to return to you; here it is.' He asked me, as I remember, what was the easiest way to annul it and I said, to destroy it. I rather think he put it in his pocket."

Mrs. Ewan saw the Sheriff talking to Charles Ware (62), *out in the house yard* and saw Mr. Ware hand the decedent a paper. Shortly thereafter the decedent came into the house, walked over to the stove, took a paper out of his pocket and threw it into the stove, *but did not say a word*. She did not know what the paper was. Her precise answer was, "No; do not know what it contained at all" (62). This is the entire testimony relative to the destruction of the codicil. *No effort was made by any one at any time or place, either before or after decedent's death, to find the codicil*. There is not a word of testimony, directly or indirectly, on this aspect of the case.

Decedent had two sons, Harry and Edward. There had been some difference between the decedent and his sons. The decedent 'phoned for his son Harry (63) some three months after the alleged destruction of the codicil and shortly before his death, to come to see him. The decedent was then very ill and practically on his death bed. On that occasion he entrusted his son Harry with important duties, expressed regret that differences had ever arisen between them and, unsolicited, told him that he had made a new will and had made everything all right (65, 66). On November 14th (67) he talked with his other son, Edward, a physician, and told him that he had made another will and hoped that everything was all right. On this occasion the son talked to his father about his physical condition and told him that it was hopeless (67, 68). To the question, "Was anything said about you going to his home?" he replied, "He came and met me at the car; told me he did not want me to go down to the house, he said they were having trouble down there" (68). The witness said that he did not know who was at the house; that he did not go there. He declared his father said "he

did not want me to go to the house and I didn't go there" (69). This latter evidence is quite important.

These two interviews were sought by the decedent. They were conscience interviews and interviews of love. Mr. Diamant knew that he was about to die. In the disposition of his property, he had practically disinherited his son Harry and had not treated his son Edward as a father naturally would and should. The meetings were really meetings of reconciliation on the verge of death. The reconciliation was emphasized by the decedent's imposing upon his son Harry important responsibilities in relation to the decedent's estate. It passes belief that these interviews were a mockery. It passes belief that Mr. Diamant did not tell his sons the truth when he declared that he had made another will and arranged things, as he hoped, satisfactorily. There was no motive for this aged and dying father to deceive his sons, especially in view of the fact that he himself brought the interviews about. What lends great force to these interviews is the circumstance that the old gentleman did not take his son Edward to his house, for the reason that there was trouble there. Mrs. Ewan was his housekeeper and had been for many years. The presumption is that Mrs. Ewan had been paid for her services and the fact is that she has nowhere made claim for compensation. The trouble at the house was between the decedent and his housekeeper. The will of the decedent and the first two codicils made bountiful provision for Mrs. Ewan and, in that proportion, took from these two sons and other blood relatives of the decedent what would naturally have been their share in decedent's estate. The codicil in question revoked every provision for Mrs. Ewan. This circumstance explained why Sheriff Diamant

said to his two sons that he had made a new will that he hoped would be satisfactory. It furthermore explains the strange language of Mrs. Ewan when she said, "No, don't know what it contained at all." She had said that she saw the Sheriff throw a paper into the stove. Presumably, it might have been any paper. At any rate, the paper had not been in her hand, according to her testimony. Why, then, should she have said, "Don't know what it contained at all"? Is it not certain that what the paper contained was dominant in her mind? The contents of the paper was the last thing that would have occurred to a perfectly honest mind.

The will and the first two codicils John S. Ware thinks were left at the trust company from the day of the date of the second codicil, where they remained until after decedent's death. About two weeks before his death (50), he 'phoned John S. Ware and said that he had received some money for a certain matter mentioned in his will and that he wished to arrange for some specific disposition thereof. The record is otherwise silent on this subject.

III.

The conclusions of the learned Vice-Ordinary are found on pages 105 *et seq.* The second section of an Act concerning wills, Com. St. Vol. IV. 5861, provides that "no devise or bequest in writing, etc., shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests, etc., shall remain and continue

in force until the same be burned, cancelled, torn or obliterated by the testator, etc.”

The learned Vice-Ordinary (106) said the conclusion of the Orphans' Court to the effect that testator destroyed the third codicil *animo revocandi* is clearly supported by the evidence. The first mistake lies in the declaration by the learned Vice-Ordinary that Mrs. Ewan saw Mr. Ware hand a paper to the testator and that testator came to the house and burned a paper in the kitchen stove. There is no proof that a paper was burned in the kitchen stove. There is no proof that there was a fire in the stove. There is no proof that the paper handed by Ware to Diament was the paper put in the stove. The weather was warm. It was in September. The probabilities are that there was no fire in the stove. The next mistake made by the learned Vice-Ordinary is in his statement (107), “The well recognized rule in cases of this nature is that when a will is proved to have been executed and it cannot be found at testator's death, if the will remained in his custody or after its execution he had ready access to it, the fact that it cannot be found after his death raises the assumption that he had destroyed it *animo revocandi*.” While the rule is properly stated, the facts do not warrant an application of the rule. There is no proof that search was made and that the codicil could not be found. On the contrary, there is no proof at all on the subject. A presumption is not a fact. Presumption arises from facts. There are no facts in the case which give rise to the legal presumption necessary for the application of the rule quoted. The learned Vice-Ordinary simply inferred the destruction of the codicil. Equally powerful inferences to the contrary may be drawn. If Mrs. Ewan had been paid for her services, which is a legal presumption, there was no

reason why the testator should have left so much of his estate to her. On the other hand, there is every legitimate reason why he should have left his estate to his own blood. There was such trouble between the Sheriff and Mrs. Ewan that he did not invite his sons to his house. For some grave reason Sheriff Diamant concluded to revoke his bequests to Mrs. Ewan and give his estate to his heirs. There is no proof that anything occurred to change his purpose in this regard. On the other hand he sent for his two sons, after he had executed the third codicil and told them, almost in the presence of his Maker, that he had made a new will and that he hoped it would be satisfactory. Furthermore, he had a reconciliation with his two sons and immediately imposed upon his son Harry important duties in relation to his estate. These things could not have happened if Sheriff Diamant had destroyed this new codicil. Therefore, the inference against the theory of destruction is well nigh conclusive. Besides, his interview with young Ware, when the codicil was delivered to him, was in the barn. This clearly indicates a purpose on the part of the testator to conceal from Mrs. Ewan what he was doing. Under such circumstances, he would not have thrown the codicil in the stove and burned it in her presence. Besides, the codicil handed by Mr. Ware to the decedent was not handed to him in the house yard, as Mrs. Ewan avers. She, therefore, did not see the transaction which occurred in the barn. It may well be that Mr. Diamant, in view of the trouble in his home with Mrs. Ewan, for reasons not disclosed, wished to control the custody of the third codicil himself, for the reason that it revoked all bequests to his housekeeper.

Now, the statute above quoted is obviously intended to prevent fraud. Its provisions require posi-

tive proof of the destruction of the will by the testator. The destruction of a will cannot be inferred from shadowy circumstances which support the inference that the will was *not* destroyed. If the destruction of a will, in the interests of a stranger to the testator's blood, as in this case, can be proven by the shadowy circumstances disclosed in the proof, no man's will is safe and the purposes of the statute are circumvented in the easiest possible manner.

The testimony of Charles S. Ware (61), if taken as literally true, only shows the inquiry as to how to annul. The answer was to destroy. Clearly the decedent knew this as well as the uninformed young man who told him. Mr. Diamant did not express any intention to destroy, nor did he do any act indicative of a purpose to destroy. Mr. Ware simply says, he thinks he put the codicil in his pocket. This testimony is unnatural and improbable. Taken at its strongest, it simply expresses a thought, not a purpose. About two weeks before the testator's death, he wished to make a specific disposition of a matter mentioned in his will by another codicil (50, 103). He had already made three codicils. If he had destroyed the last codicil, it is altogether probable that he would have so informed the elder Mr. Ware. The learned Vice-Ordinary simply assumed that the testator accepted young Mr. Ware's suggestion to destroy. If, now, the fullest force be given to Mrs. Ewan's testimony, it means that a paper was thrown into a stove. Not a word was said by either Mrs. Ewan or Sheriff Diamant about the act. How much time elapsed between the interview with young Mr. Ware and the act of throwing a paper in the stove does not appear. The case of *Baylan ads. Meeker*, IV Dutcher, 285, holds "No proof of declaration of revocation made by the tes-

tator, though proved by a cloud of witnesses to have been made times without number, will avail. The statutory evidence must be had or the intended revocation fails. If proof by any number of witnesses that the testator said, after the execution of the will 'I hereby revoke and declare it null and void' will not avail to destroy the will, why should proof by the same number that he said, 'I never executed any will' have that effect? Is not the liability to perjury the same in both cases?" In other words, the case holds, "The will can only be revoked in the manner provided by statute and cannot be changed, annulled or in any manner affected by verbal declarations of the testator made after its execution." *Randall vs. Beatty*, 31 N. J. Eq. 645; *Gorden Will*, 50 N. J. Eq. 397, affirmed by this Court, 52 N. J. Eq. 317; *Monday vs. Monday*, 15 N. J. Eq. 290; 40 *Cyc.*, 1187, 1189.

In re Frothingham's Will, 76 N. J. Eq. 331, which was a revocation, by pencil marks, of certain parts of a will, this Court declared, "What we wish to emphasize is that in revocations of this nature there is but one point of time as to which the intent of the testator is to have controlling effect and that is the time of the doing of the very act that constitutes such revocation. To extend the scope of such inquiry to subsequent periods, however closely related in point of time with the revocatory act, is but to add a new danger to a rule that is already from its inherent nature too much exposed to fraud."

The conversation with young Mr. Ware was before the alleged act of revocation. It did not take place at the time. Sometime thereafter Mrs. Ewan says she saw the decedent put a paper in the stove. If this amounts to revocation, in the face of the statute and the decisions quoted, no man's will is safe in the State of New Jersey.

It should be repeated that there is no necessary connection between the delivery by young Mr. Ware of the codicil to Sheriff Diament in his barn and his subsequent deposit of a paper in the stove. It would not be safe to declare that this paper was the solemn codicil in question. It would not be sound reasoning to say that the decedent two months afterwards, invited his sons to see him and then told them that he had made the codicil in question, when as a matter of fact he was unnecessarily committing falsehood on the threshold of dissolution. It would not be wise to accept the unnatural testimony of young Mr. Ware and the unnatural testimony of Mrs. Ewan, or to justify the inference of the destruction of the codicil in the absence of any evidence whatever that search was subsequently made for it. Mr. Diament may have concealed this very will in the barn. He may have placed it in his own private safe in his home. At any rate, it is perfectly certain that he meant to revoke his bequests to his housekeeper, with whom he was having trouble; that he did revoke it; that it was perfectly natural for him to revoke it and that he told his two sons that he had revoked it.

If repetition may be excused, permit a restatement of the argument.

The learned Vice-Ordinary justified his conclusion on these grounds: (1) the best way to annul it is to destroy it; (2) the testator burned a paper in the kitchen stove; (3) the codicil was not found. As to number one, the answer is: (a) Sheriff Diament knew that destruction of the codicil would annul without such information from a mere boy; (b) the Sheriff did not then and there declare his purpose to destroy; (d) a mere question is not the announcement of a purpose. Hence, this circumstance is not proof of destruction or even purpose to destroy.

As to number two, the answer is: (a) no proof that the paper, thrown into the stove, was burned; (b) no proof that the paper, thrown into the stove, was the codicil; (c) no connection between the paper thrown into the stove and the paper given the Sheriff in the barn. Hence, the assumption that it was the same paper and that it was burned is gratuitous, not conclusive, as the statute requires.

As to number three, the answer is: (a) that no search for the codicil was ever made. Hence, there is no foundation whatsoever for points one and two to rest upon. Until proof of search and failure to find, there can be no presumption of destruction.

Against the learned Vice-Ordinary's justification for his conclusion are the following facts and inferences: (1) the conversation between the Sheriff and young Mr. Ware is unnatural and scarcely believable; (2) young Ware delivered the codicil to the Sheriff *in the barn*; (3) Mrs. Ewan could not and did not see this; (4) what she saw, if anything, was a paper delivered by Ware to the Sheriff in the house yard; (5) it could not have been the paper delivered in the barn; (6) it is difficult to believe that the Sheriff would have walked into the kitchen, thrown a paper in the stove and not said a word about it; (7) it is equally hard to believe that Mrs. Ewan remained silent; (8) the whole series of facts is artificial and extremely improbable; (9) two months after these improbable incidents, the Sheriff sent for his sons, told them he had made another will and that he hoped it would be satisfactory; (10) this meeting was one of love and reconciliation; (11) at this meeting the Sheriff imposed upon his son important duties in relation to his estate; (12) he would not have deliberately deceived his sons without motive or purpose; (13) if he told them the truth, he

did not destroy the codicil; (14) the codicil revoked all bequests to Mrs. Ewan, a stranger, and gave the property thus revoked to these very sons and others of the decedent's blood.

In answer, in part, to this analysis, it may be said that the Sheriff sent for the codicil and left the will and other codicils in the bank. Why did he do this? The question cannot be answered except speculatively. The codicil revoked completely all bequests to the housekeeper. The testator had trouble in his home of such character that he could not ask his son to go there, but met his son at the car. The old man depended, in his last days, on this housekeeper. It may very well be that he wished to be sure that she should not know of her disinheritance and that he wished to keep the codicil himself. Therefore, this circumstance, even in connection with the others, does not prove destruction of the codicil.

To resort to the familiar metaphor of the scales, let it be supposed that all the circumstances of the case, pro and con, with their respective possible inferences, are put in opposite scales. Will they balance, or will one out-weigh the other?

Those who assert the destruction of the codicil must prove it. The burden is on them. They have not borne the burden, especially in view of the statutory requirements as to proof. The proof must be positive, clear, unequivocal and convincing. Otherwise the temptation to perjury becomes resistless.

IV.

The doctrine of revival ought to be put upon clear and unmistakable grounds. The codicil in question was duly executed and expressed the intent of the

testator. The codicil revoked all bequests to Mrs. Ewan and thus far revoked all former wills and codicils. If its destruction be granted, for the purpose of argument, did that destruction revive the will and codicils probated?

The cases of *Randall vs. Beatty*, 4 Sew. 643, and *Moore's Case*, 2 Buch. 371, do not clearly define the doctrine of revivorship in this State. A will is a question of intention. A duly executed will is a conveyance. Our statute regulates the formalities of conveyance. Those formalities are inexorable, determinative and final. They are means by which intent is expressed. They prevent fraud and put titles upon a firm foundation.

When Sheriff Diamant executed the third codicil to his will he expressed his intention. This intention was to revoke bequests to Mrs. Ewan and give such bequests to his own blood kin. "The right of heirs-at-law will not be taken away except upon clear proof of a testamentary disposition of the decedent's property," *Moore's Case (supra)* 375, *Cyc.* Vol. 40 p. 1412.

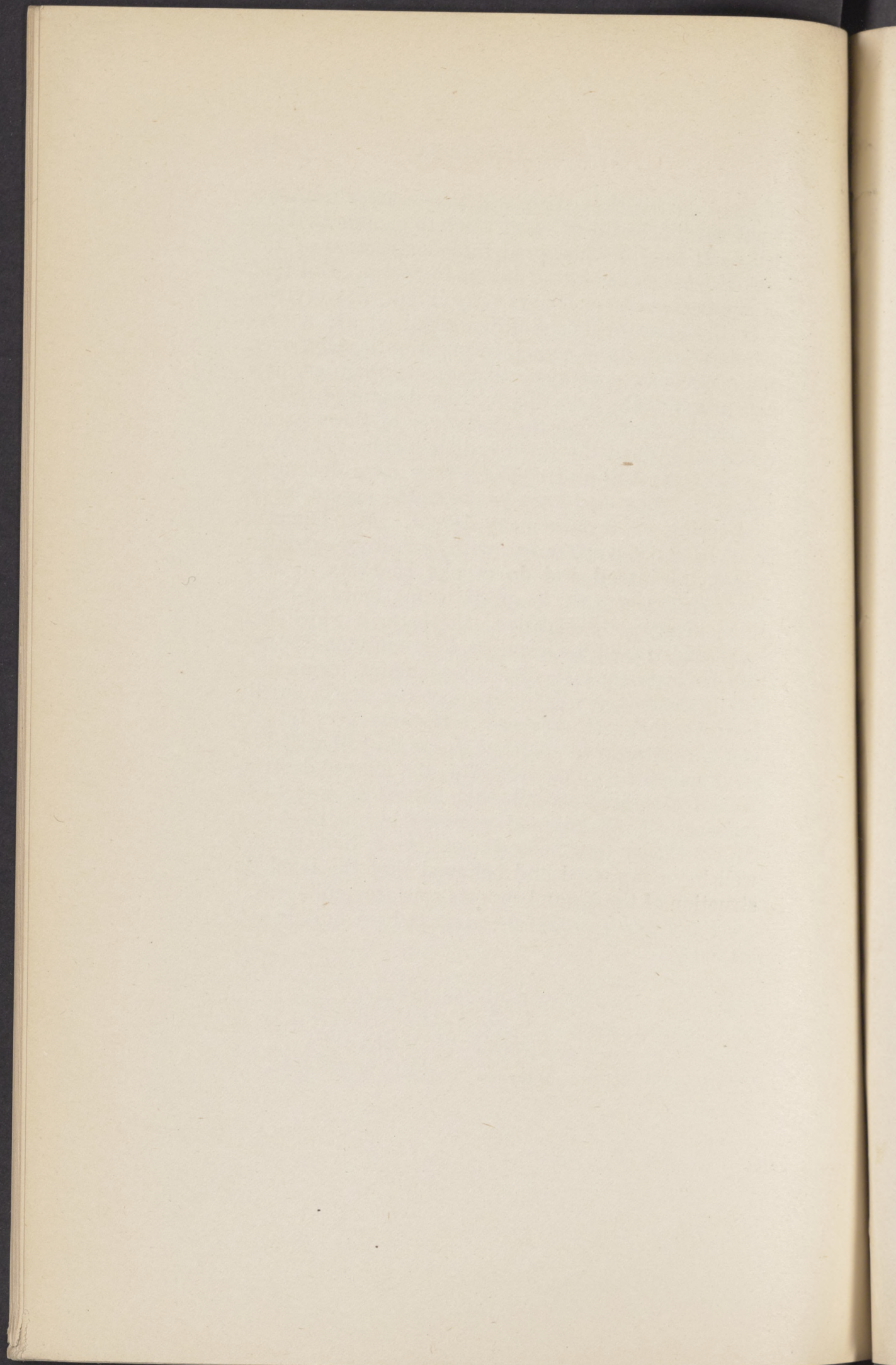
The doctrine of common law revivorship is illogical, unjust, and even barbarous. It is admitted that the execution of the last codicil revoked necessarily the bequests to Mrs. Ewan and gave decedent's property to his heirs-at-law. That was his intention. That is to say, the execution of the codicil *legally destroyed those provisions in former wills and codicils which gave Mrs. Ewan decedent's property*. Suppose the testator, when he executed the third codicil, which was legal destruction, at the same time completely erased in his will all bequests to Mrs. Ewan. That would have been *physical* destruction. What is the difference between legal and physical destruction? Destruction is destruction.

If legal destruction expressed the testator's intent, what act did he do or word utter to change that intent? It may be answered that destruction of the codicil was expression of intent to revive. But that is a *non-sequetur*. It was only intent, not revival.

If the statutory formalities required are a prerequisite and if the codicil in question legally, even for a moment, destroyed all those formalities, how can prerequisite formalities, thus destroyed, be recreated by destroying the destroyer of those prerequisites? When the third codicil legally destroyed parts of the will and codicils, they were destroyed forever. They could not be recreated except by an expression of testamentary intent. Mr. Diament said, in strict conformity with statutory requirements, "I intend and do revoke bequests to Mrs. Ewan and give such bequests to my heirs-at-law." If he afterwards destroyed the codicil, which had legally destroyed the bequests, how can such destruction be testamentary disposition under terms of a legally destroyed will? Who can say that a legally destroyed bequest expresses a testamentary intent? The uncontradicted evidence shows that Sheriff Diament believed, two months after the alleged destruction of the third codicil, that his estate was to be satisfactorily distributed amongst his heirs-at-law. On the theory that he destroyed the codicil, he may well have supposed and believed that the legal destruction of the Ewan bequests was accomplished.

At any rate, our statute ought to be definitely construed.

Respectfully submitted,
REX A. DONNELLY,
JOHN W. WESCOTT,
For Appellants.



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CAVEATS.

*To Frank F. Wallace, Surrogate of the County of
Cumberland:*

I, Edward L. Diament, one of the children and next of kin of Charles G. Diament, late of the Township of Lawrence, who died on the thirty-first day of January, 1914, do hereby caveat and protest against admitting to probate any paper purporting to be the last will and testament of the said Charles G. Diament, until examination and decree thereon by the Orphans' Court of said County of Cumberland. **10**

Dated Bridgeton, N. J.
February 13th, 1914.

EDWARD L. DIAMENT. **20**

[ENDORSED]

Filed Feb. 13, 1914.
FRANK F. WALLACE,
Surrogate.

30

*To Frank F. Wallace, Surrogate of the County of
Cumberland:*

I, Harry G. Diament, one of the children and next of kin of Charles G. Diament, late of the Township

of Lawrence, who died on the thirty-first day of January, 1914, do hereby caveat and protest against admitting to probate any paper purporting to be the last will and testament of the said Charles G. Diament, until examination and decree thereon by the Orphans' Court of said County of Cumberland.

Dated Bridgeton, N. J.

February 13th, 1914.

HARRY G. DIAMENT.

10

[ENDORSED]

Filed Feb. 13, 1914.

FRANK F. WALLACE,
Surrogate.

20

In the name of God Amen, I, Charles G. Diament of Cedarville, Cumberland Co., New Jersey, being of sound mind, memory and understanding, for which blessing I thank God, do make and publish this my last will and testament in manner and form following, to wit:

30

1st. It is my will and I do order all my just debts and funeral expenses be fully paid and satisfied as soon as conveniently can be after my decease.

2nd. I give and devise to my daughter Hettie G. Diament my home farm that I became possessed of under the last will of my father Theophilus E. Diament deceased, for and during the term of her natural life and at her death the same to go to my grand

son Charles D. Cook, to him, his heirs and assigns forever.

I also give and devise to my said daughter Hettie G. Diament for and during her natural life the land described as lot No. 7 containing 32 1-4 acres more or less, in a deed from John E. Diament and wife to said Charles G. Diament dated March 8, 1892, and recorded in the Clerks office of Cumberland County, in deed book No. 212 page 509 &c. I became seized of and undivided one half interest by the above deed and the other half by the last will of my father Theophilus E. Diament deceased, and at her death the same to go to my said grand son Charles D. Cook, to him, his heirs and assigns forever. 10

I also give and devise to my said daughter Hettie G. Diament for and during the term of her natural life the lot of land containing 7 90-100 acres more or less, described as lot No. 2 in a deed from Richard G. Laning executor of Samuel Laning deceased, to Charles G. Diament dated Nov. 24, 1899, and not yet recorded, and at her death the same to go to my said grand son, Charles D. Cook, to him, his heirs and assigns forever. 20

I also give and devise to my said daughter Hettie G. Diament for and during the term of her natural life the Long Island farm consisting of three lots that I purchased of Jacob Kienzle and wife by deed dated October 14, 1892, and recorded in said Clerks office in deed book No. 215 page 375 &c., and at her death the same to go to my said grand son, Charles D. Cook, to him, his heirs and assigns forever. 30

I also give and devise to my said daughter Hettie G. Diament for and during the term of her natural life the undivided one half of all that certain lot of cedar swamp that I became possessed of under the deed from John E. Diament and wife dated March

8, 1892 and recorded in said clerks office in deed book No. 212 page 509 &c and is lot No. 5 in said deed and at her death the same to go to my said grand son, Charles D. Cook to him, his heirs and assigns forever.

3rd. I give and devise to my daughter Mary L. Diament Cook so much of the Hepner farms described as follows, being lots Nos. 1 and 3 in farm
10 No. 1 lot No. 1 containing 89 56-100 acres more or less, No. 3 containing 13 75-100 acres more or less and lots Nos. 1, 2, 3 and 4 in farm No. 2, lot No. 1 containing 75 15-100 acres more or less, lot No. 2 containing 6 acres more or less, No. 3 containing more or less and lot No. 4 containing 18 3-4 acres more or less, for description of these lots see deed given to me by James Boyd Potter, Master, dated April 21, 1905 and recorded in said Clerks office in deed book No. 277 page 448 &c, for and during the
20 term of her natural life, and at her death the same to go to her child Almedia Cook, to her, her heirs and assigns forever.

I also give and devise to my said daughter Mary L. Diament Cook for and during the term of her natural life the lot of land containing 5 76-100 acres more or less, which I purchased of Mary L. Bateman by deed dated December 9, 1895 and recorded in the said Clerks office in deed book No. 237 page 49 &c and at her death the same to go to her said children
30 Charles D. Cook and Almedia Cook to them their heirs and assigns forever.

4th. I give and devise to my son Edward L. Diament the mortgage and bond of one thousand dollars that I hold against him together with all the interest due thereon.

I also give and devise to my said son Edward L. Diament, to him, his heirs and assigns forever, the piece of wood land containing 21 40-100 acres more or less that I purchased of Ephraim Bateman executor of Rhoda Ogden deceased, by deed dated December 28, 1878 and recorded in said clerks office in deed book No. 157 page 52 &c.

I also give and devise to my said son Edward L. Diament, to him, his heirs and assigns forever the three lots of land I purchased of Edward O. Davis, trustee by deed dated April 14, 1904, and recorded in said clerks office in deed book No. 272 page 253 &c, lot No. 1 being bush land containing 27 3-4 acres more or less, No. 2 being bush land containing 21 97-100 acres more or less and lot No. 3 being the undivided one half part of a lot of Cedar swamp, containing 5 1-2 acres more or less. 10

I also give and devise to my said son Edward L. Diament, to him, his heirs and assigns forever, a lot of Cedar swamp containing 1 84-100 acres more or less, the undivided one half of which I purchased of John E. Diament and wife by deed dated March 8, 1892 and recorded in said clerks office in deed book No. 212 page 509 &c and the other undivided half I received under the will of my father Theophilus E. Diament dec'd. 20

5th. I give and devise to my son Harry Diament, to him, his heirs and assigns forever, the farm known as the Loper farm, and is the premises I purchased of William B. Robinson administrator with the will annexed of Uriah Loper deceased by deed dated October 17, 1885 and recorded in said clerks office in deed book No. 179 page 97 &c. containing 168 acres more or less, excepting out however a small lot I sold to David C. Husted. 30

I also give and devise to my said son Harry Diament, to him, his heirs and assigns forever, a certain tract of wood land described as lot No. 2 in a deed made to me by John E. Diament and wife dated March 8 1892 and recorded in said clerks office in deed book No. 212 page 509 &c and contains 21 81-100 acres more or less. I became possessed of an undivided one half interest by virtue of the above deed and the other undivided one half by the will of my
10 father Theophilus E. Diament deceased.

I also give and devise to my said son Harry Diament, to him, his heirs and assigns forever, a tract of land containing 19 06-100 acres more or less and is lot No. 1 in a deed from Richard G. Laning executor of Samuel Laning deceased, to said Charles G. Diament dated November 24, 1899 and not yet recorded.

I also give and devise to my said son Harry Diament, to him his heirs and assigns forever, the undivided one half of all that certain lot of Cedar
20 swamp that I became possessed of under the last will of my father Theophilus E. Diament deceased, containing eleven acres more or less, and the said Theophilus E. Diament became possessed of the whole by deed from John Elmer dated July 1st 1854 and recorded in said clerks office in deed book B. V. page 343 &c.

6th. I give and devise to my two grand children
30 Helen Diament and Mary L. Diament, children of my said son Edward L. Diament, to them, their heirs and assigns forever, the Nixon farm, being the premises that I purchased of Allen R. Shinn, sheriff, in two lots, by deed dated June 15, 1895 and recorded in said clerks office in deed book No. 230 page 602 &c lot No. 1 containing 153 95-100 acres more or less,

excepting out 30 acres more or less sold out before I purchased, No. 2 containing 44 acres more or less.

I also give and devise to my said two grand children, Helen Diament and Mary L. Diament children of my said son Edward L. Diament to them, their heirs and assigns forever, the lot of marsh described as lot No. 2 in the Hepner farm, farm No. 1 that I purchased of James Boyd Potter by deed dated April 21 1905 and recorded in said clerks office in deed book No. 277 page 448 &c and contains 29 28-100 acres more or less excepting out of the same 12 acres more or less sold before I purchased the same. 10

7th. I give and devise to the Cumberland Trust Company of Bridgeton New Jersey, eighty shares of the Standard Life Insurance Company of America, in trust, to receive the income derived therefrom and after paying all necessary expenses to pay the same to the First Presbyterian Church of Cedarville New Jersey, commonly called the Brick Church so long as the said Church shall exist, and in case the same shall ever cease to exist, the principal shall go to my heirs at law. 20

8th. I give and devise to Mrs. Eva M. Ewan for and during the term of her natural life the house and lot where I now reside and which I became possessed of in part by a deed from John E. Diament and wife dated March 8th 1892 and recorded in said clerks office in deed book No. 212 page 509 &c and is lot No. 1 in said deed, and the other part by the last will of my father Theophilus E. Diament, deceased, and at her death the same to go to my heirs at law, to them, their heirs and assigns forever. 30

I also give and devise to said Mrs. Eva M. Ewan for and during the term of her natural life, all the

house hold goods in said house and all the stock goods and chattels at the barn and at her death the same to go to my heirs at law.

I also give and devise to said Mrs. Eva M. Ewan for and during the term of her natural life the two lots of wood land described as lots Nos. 3 & 4 in a deed from John E. Diament and wife to me dated March 8, 1892 and recorded in said clerks office in deed book No. 212 page 509 &c with the right to cut
10 the timber therefrom, Lot No 3 contains 9 96-100 acres more or less. lot No. 4 contains 5 80-100 acres more or less, and I became possessed of the same in part by the last above deed and in part by the last will of my father Theophilus E. Diament deceased and at her death the same to go to my heirs at law, to them, their heirs and assigns forever.

20 9th. I give and devise to the Cumberland Trust Company of Bridgeton New Jersey, the several properties I purchased of J. Ogden Burt assignee of Constant Albertson, being described in four lots in said deed, dated June 16, 1896 and recorded in said clerks office in deed book No. 236 page 76 &c.

I also give and devise to said Cumberland Trust Company all my shares of stock of the Cumberland National Bank of Bridgeton, New Jersey,

30 I also give and devise to said Cumberland Trust Company the bond and mortgage given by Robert P. Shull and wife to Theophilus E. Diament and recorded in said clerks office in book of mortgages No. 44 page 136 &c and assigned to me by Wm. A. Logue executor of Theophilus E. Diament deceased. All the above bequest under this item 9th to said Cumberland Trust Company are made in trust, for the following purpose, after paying all necessary expenses to pay the balance of the income derived

therefrom to Mrs. Eva M. Ewan for and during the term of her natural life, and at her death the said property so held in trust real and personal to go to my heirs at law, to them, their heirs and assigns forever.

10th. All the bequests herein made for the use and benefit of said Mrs. Eva M. Ewan in items 8th and 9th are upon the condition that she shall live with me during the rest of my life, and if she shall not so live with me, all the estate herein devised for her benefit shall go to my heirs at law, to them, their heirs and assigns forever. 10

11th. I do order my executrix hereinafter named to pay to the Cumberland Trust Company of Bridgeton New Jersey the sum of two hundred dollars, in trust and out of the income therefrom to use so much as may be necessary to keep the grave lot in which my father Theophilus E. Diament is buried at the Old Stone Church, and the lot where I shall be burried in proper condition, the balance to be theirs for the services rendered, and in case they shall refuse to accept the trust or at any time fail to look after the said lots, then the said sum of two hundred dollars shall be divided among my heirs at law. 20

12th. All the balance of my estate, real personal and mixed, I give, devise and bequeath unto my four children Hettie G. Diament, Mary L. Diament Cook, Edward L. Diament and Harry Diament, share and share alike, to them, their heirs and assigns forever. 30

13th. It is my will and I do order that if any one shall contest this my last will, that they shall do so at their own expense, no fees being being allowed therefor by the court out of my estate.

14th. I hereby appoint my said daughter Hettie G. Diament executrix of this my last will and testament.

In witness whereof I do hereto set my hand and seal this Twelfth day of November A. D. nineteen hundred and nine.

CHARLES G. DIAMENT [SEAL]

10 Signed, published and declared by the said Charles G. Diament to be his last will and testament in the presence of us who were present at the same time and subscribed our names as witnesses hereto in the presence of the testator and in the presence of each other at the request of the testator.

SARAH B. VANNAMAN

BENJ T. POWELL

20

This is a codicil, to be added to the last will and testament of me, Charles G. Diament of Cedarville New Jersey which will bears date on the Twelfth day of November A. D. nineteen hundred and nine.

First: I do hereby ratify and confirm my said will in all respects save so far as any part thereof shall be revoked or altered by this present codicil.

30 Second: I hereby revoke so much of item 5th in said will as gives to my said son Harry Diament to him his heirs and assigns forever the following three tracts or lots of land.

1st being the farm known as the Loper farm, and is the premises I purchased of William B. Robinson administrator with the will annexed of Uriah Loper

deceased, by deed dated October 17, 1885 and recorded in said clerks office in deed book No. 179 page 97 &c, containing 168 acres more or less excepting out however a small lot I sold to David C. Husted.

2nd being a certain tract of wood land described as lot No. 2 in a deed made to me by John E. Diament and wife dated March 8th 1892 and recorded in said clerks office in deed book No. 212 page 509 &c and contains 21 81-100 acres more or less. I became possessed of an undivided one half interest by virtue of the above deed and the other undivided one half by the will of my father Theophilus E. Diament deceased. **10**

3rd being a tract of land containing 19 06-100 acres more or less and is lot No. 1 in a deed from Richard G. Laning executor of Samuel Laning deceased, to said Charles G. Diament dated November 24th, 1899

Third. I hereby give the above three tracts, or lots of land and premises to Philip H. Sheppard and Anna Laura Sheppard his wife for and during the term of their natural life and upon the death of one of them the survivor to have the same for and during the term of his or her natural life and upon the death of the survivor the same to go to my said son Harry Diament, to him, his heirs and assigns forever. The said Philip H. Sheppard and Anna Laura Sheppard his wife or the survivor are to have the right and privilege of cutting what firewood they need for their own use, and any timber needed for repairs to the buildings, and they are to keep the land in good condition and the buildings in good repair and pay all taxes against the same. **20**
30

Fourth: Whereas the stock of the Standard Life

Insurance Company of America is about being exchanged for the stock of the Standard Securities Company of New Jersey, being of the same par value, therefore Item 7th in said will shall be so altered as that after the change has been made, the stock of the Standard Securities Company of New Jersey shall take the place of the stock of the Standard Life Insurance Company of America.

- 10 In witness whereof, to this present writing, which I hereby declare to be a codicil to my last will and testament, and which I direct to be added thereto, and to be taken as a part thereof, I have set my hand and seal this 1st day of February nineteen hundred and eleven.

CHARLES G. DIAMENT [SEAL]

- 20 Signed, published and declared by the said Charles G. Diament as and for a codicil to his last will and testament, and to be taken as a part thereof in the presence of us who were present at the same time and subscribed our names as witnesses in the presence of Charles G. Diament and in the presence of each other at the request of said Charles G. Diament.

SARAH B. VANNAMAN
BENJ T. POWELL

30

I, Charles G. Diament, of Cedarville, Cumberland County, New Jersey, do make, publish and declare this Codicil to my last will and testament, said will being dated November twelfth, nineteen hundred and nine, in manner following, to wit:

It is my will that my shares of stock in the Cum-

berland National Bank mentioned in the will to which this is a codicil shall remain in the hands of The Cumberland Trust Company of Bridgeton, Trustee, and that such dividends as shall be paid thereon during the life of Mrs. Eva M. Ewan shall be paid to her; and that from and after her death said dividends, after deduction of expenses, shall be paid to the Trustees of the First Presbyterian Church of Cedarville, New Jersey, commonly known as the Brick Church, so long as it shall maintain its organization; and when the said church shall cease to be an organization, the said shares of stock shall go to my heirs at law. 10

It is my will that the proceeds from the Life Insurance Policy on my life in which Mrs. Eva M. Ewan is made beneficiary shall be placed and remain at interest, the income derived therefrom to be used to pay the taxes on my house and to keep the same in repair, any surplus of said income to be paid to said Mrs. Eva M. Ewan. 20

My daughter, Hettie G. Diament, named as Executor in my said will, having died since, I name, constitute and appoint my daughter, Mary L. Diament Cook and The Cumberland Trust Company of Bridgeton and the survivor of them Executors under this will and The Cumberland Trust Company of Bridgeton Trustee of all Trusts created thereby.

In testimony whereof I have hereunto set my hand and seal this this nineteenth day of December Nineteen hundred and twelve. 30

CHARLES G. DIAMENT [SEAL]

Signed, sealed, published and declared by the above named Charles G. Diament as and for a Codicil to his last will and testament in the presence of us who at his request, in his presence and in the pres-

ence of each other, both being present at the same time, have hereunto subscribed our names as witnesses.

JOHN S WARE
CHAS S WARE

10

PETITION.

CUMBERLAND COUNTY ORPHANS' COURT.

20

In the matter of the pro- } PETITION FOR
bate of the alleged will } PROBATE.
of Charles G. Diament. } PETITION.

*To Frank F. Wallace, Surrogate of the County of
Cumberland:*

The petition of Mary L. D. Cook, of the Township of Greenwich, in the County of Cumberland and State of New Jersey, and THE CUMBERLAND TRUST
30 COMPANY OF BRIDGETON, a corporation of the State of New Jersey, respectfully shows that Charles G. Diament, late of the village of Cedarville, in the township of Lawrence, County of Cumberland and State of New Jersey, departed this life on the thirty-first day of January, nineteen hundred and fourteen, more than ten days ago, having first duly made and

executed a paper writing purporting to be his last will and testament, with two codicils thereto, and that your petitioners are the executors named therein.

Your petitioners further show that the said Charles G. Diament left him surviving as his next of kin and heirs-at-law:

Henry Grant Diament, a son, age 46 yrs., residence Cedarville, New Jersey.

Edward Lummis Diament, a son, age 42 yrs., residence Bridgeton, New Jersey. **10**

Mary L. D. Cook, a daughter, age 39 yrs., residence Greenwich, N. J.

Your petitioners having been informed that a caveat or caveats have been filed objecting to probate of said will and codicils, for the purpose of properly bringing all parties into court give the names of beneficiaries mentioned in said will and codicils not next of kin, to wit:

20

Helen Diament, age 13 yrs., residence Bridgeton, N. J.

Mary Diament, age 10 yrs., residence Bridgeton, N. J.

Charles G. Cook, age 12 yrs., residence Greenwich, N. J.

Almeta L. Cook, age 6 yrs., residence Greenwich, N. J.

Mrs. Eva M. Ewan, residence Cedarville, N. J.

Philip D. Sheppard, residence Cedarville, N. J. **30**

Anna Laura Sheppard, wife of Philip D. Sheppard, residence Cedarville, N. J.

Your petitioners therefore pray that the said writing be admitted to probate as and for the last will and testament, and the said codicils be admitted as

and for codicils to the last will and testament of the said Charles G. Diament, deceased, and that letters testamentary thereon be granted to your petitioners.

Dated Bridgeton, New Jersey,
February 13, 1914.

MARY L. D. COOK.
THE CUMBERLAND TRUST CO.
OF BRIDGETON
JOHN S. WARE, *Treas.*

10

STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } *ss.:*

Mary L. D. Cook, being duly sworn upon her oath according to law, deposes and says that she is one of the petitioners in the foregoing petition named; and John S. Ware being duly sworn on his oath says, he is Treasurer of The Cumberland Trust Company of Bridgeton, one of the petitioners in the foregoing petition named; and both further depose and say that the matters and things contained in said petition are true to the best of their respective knowledge and belief.

MARY L. D. COOK,
JOHN S. WARE.

Subscribed and sworn to this 13th day of February, 1914, at Bridgeton, N. J., before me

30

J. G. MITCHELL,
M. C. C. of N. J.

[ENDORSED]

Filed Feb. 27, 1914.

FRANK F. WALLACE,
Surrogate.

TESTIMONY.

CUMBERLAND COUNTY ORPHANS' COURT.

In the matter of the pro-
bate of the alleged will } ON CAVEAT. 10
of Charles G. Diament.

Bridgeton, N. J., March 12th, 1914, 10 A. M.

TESTIMONY. 20

Before HON. ROYAL P. TULLER, Judge.

APPEARANCES: 30

For Executors, Cumberland Trust Company and
Mary L. Cook, JAMES S. WARE, Esq.
For Legatee, Eva M. Ewan, LEROY W. LODER, Esq.
For Caveators, REX A. DONNELLY, Esq., HON. JOHN
W. WESCOTT.

BENJAMIN T. POWELL, SWORN.

Direct examination.

By Mr. Ware:

Q. Where do you reside, Mr. Powell?

A. Cedarville.

10

Q. What is your profession?

A. Attorney-at-law.

Q. You are in practice of your profession at Cedarville?

A. I am.

Q. Where did you reside on the twelfth day of November, 1909?

A. Cedarville.

Q. Were you acquainted in his lifetime with Charles G. Diament?

A. I was.

20

Q. Where did Mr. Diament reside?

A. Cedarville.

Q. What was his business?

A. Well, at the time the will was executed, it wasn't any business. He was living retired. Naturally he was a farmer.

Q. He owned a number of farms?

A. Yes.

Q. What official position in this county had he formerly held?

30

A. Sheriff.

Q. Were you called upon by any one to make a will for Mr. Diament?

A. I was.

Q. By whom?

A. Mr. Diament.

Q. Where did you see him?

A. Well, he spoke to me first up near the post office and then he came to my house to see me.

Q. Was a will prepared by you?

A. Yes, sir.

Q. Where was that prepared?

A. At my home.

Q. Who gave you the directions?

A. Mr. Diament.

(Witness is shown paper writing bearing date the **10** twelfth day of November, 1909, and is asked in whose handwriting is that instrument.)

A. That is in my handwriting.

Q. Whose signature is appended thereto?

A. Charles G. Diament.

Q. What does that purport to be?

A. His last will and testament.

Q. Prepared by you?

A. Yes, sir.

20

Q. Where was it executed?

A. At my home.

Q. In Cedarville?

A. Yes.

Q. In your presence?

A. Yes.

Q. Are you one of the witnesses?

A. I am.

Q. Just look at the attestation clause. Does your name appear there as one of the witnesses?

30

A. It does.

Q. Who is the other witness?

A. Sarah B. Vannaman.

Q. Who is Sarah B. Vannaman?

A. She is my wife's mother; lives with me.

Q. An old lady?

A. Seventy-four.

Q. Does she live with you still?

A. Yes.

Q. What was done by Mr. Diament at the execution of that will? That is, what was said by him?

A. He declared that to be his last will and testament in our presence, and asked us to witness it.

Q. Did he sign it?

A. He did.

10 Q. In your presence?

A. He did.

Q. Before or after you signed?

A. Before.

Q. When did you sign, immediately after he did?

A. Immediately afterwards.

Q. Mrs. Vannaman sign before or after you?

A. The paper shows that she signed ahead; I don't remember that.

Q. Did you see her sign?

20 A. I did.

Q. Just read the attestation clause that appears at the bottom of the will.

A. "Signed, published and declared by the said Charles G. Diament to be his last will and testament, in the presence of us, who were present at the same time and subscribed our names as witnesses hereto in the presence of the testator and in the presence of each other at the request of the testator."

30 Q. Is that a correct and true statement of what occurred at the execution of the will?

A. It is.

Q. Is Sarah B. Vannaman, the other witness, in court?

A. No, she is at home.

Q. Was she subpoenaed?

A. She was.

- Q. Why isn't she here?
A. She is not able to come.
Q. On account of physical conditions?
A. Yes, sir.
Q. Now, is there another instrument attached to that will concerning which you have just testified?
A. A codicil.
Q. Who prepared that?
A. I did.
Q. What is the date? 10
A. First day of February, 1911.
Q. Who gave the directions for the preparation of that codicil, Mr. Powell?
A. Mr. Diament.
Q. The codicil was prepared where?
A. At my home.
Q. Executed there?
A. Yes, sir.
Q. On the date of the codicil?
A. Yes, sir. 20
Q. Who are the witnesses?
A. The same, Sarah B. Vannaman and myself.
Q. Did Mr. Diament publish that as a codicil to his last will?
A. He did.
Q. In the presence of you and Mrs. Vannaman?
A. Yes.
Q. Who signed first?
A. Well, the name Sarah B. Vannaman appears first. 30
Q. No; I mean of the three.
A. Mr. Diament.
Q. Mr. Diament, Sarah Vannaman and yourself?
A. Mr. Diament signed it. I asked him if he declared that to be a codicil to his last will and testament and wished us to sign it, and he said he did.

Q. Did Mrs. Vannaman see him sign it?

A. She did.

Q. Did you see him sign it?

A. I did.

Q. Did you each, referring to the witnesses, see the other sign?

A. We did.

Q. Read the attestation clause.

10 A. "Signed, published and declared by the said Charles G. Diament as and for a codicil to his last will and testament and to be taken as a part thereof, in the presence of us, who were present at the same time and subscribed our names as witnesses, in the presence of the said Charles G. Diament and in the presence of each other, at the request of the said Charles G. Diament."

Q. Mr. Powell, are you interested in the estate of Charles G. Diament?

A. Not a particle.

20 Q. Any way related to him?

A. Not a particle.

Q. Were you employed by Mr. Diament to draw these codicils?

A. I was, on this one codicil.

Q. And the will?

A. And the will.

Q. Paid for it?

A. Yes, sir.

30 Cross-examination.

By Mr. Wescott:

Q. What was Mr. Diament's physical condition at the time that he made this will?

A. All right.

Q. Did you know that he had a mental trouble?

A. Not to my knowledge.

Q. Didn't hear of it?

A. No, sir.

Q. Did he come to you to get you to draw this will?

A. Yes, sir.

Q. How did he come? How far did you live from him?

A. Oh, I suppose about seven or eight minutes walk.

10

Q. How did he come, walk?

A. Yes, sir.

Q. Anybody come with him?

A. No, sir.

Q. Did you go to his house?

A. I don't think so; I don't remember that I did.

Q. Never went there?

A. Oh, I have been there, but not in the preparation of the will.

Q. How many interviews did you have with him before the will was reduced to writing? 20

A. As I remember it, he first spoke to me up street, said that he wanted me to do some writing for him, and set the time when he would come down and see me, and he came down and we talked the matter over and he brought his deeds for his properties down and I prepared the will.

Q. What did he say to you on that occasion?

A. When he came down it was read to him.

Q. What was read to him?

A. The will.

30

Q. The first time he came to you what did he say to you?

A. Why, he told me what he wanted.

Q. Well, what did he say to you?

A. Told me what he wanted and I took down a

memorandum. I can't repeat all the words that he said.

Q. Did you make any notes of what he told you?

A. I did.

Q. Where are those notes?

A. I can't tell you that; they weren't saved.

Q. Did he have more than one interview with you?

A. Yes, sir, he was down that —

Q. How many about the preparation of this will?

10 A. The first will that I prepared, when I read it to him he wanted to make some changes, and we changed the will, it was re-written, and he came back and I read it to him.

Q. Do you remember in what particulars he wanted it changed?

A. I couldn't tell you now, no, sir.

Q. Was anybody living with him at the time?

A. I suppose he had the housekeeper.

Q. Why do you suppose that?

20 A. I can't say that he had, any more than that is the report, that he had a lady there as housekeeper.

Q. You never were in his home?

A. I have been in his home, yes.

Q. Was anybody there when you went to his home?

A. Yes.

Q. Who?

A. Mrs. Ewan.

30 Q. Anybody else?

A. I don't remember any one else in the house when I have been there, unless it was the boy. The boy might have been there.

Q. Whose boy?

A. Mrs. Ewan's.

Q. Before this will was finally executed how many interviews did you have with the sheriff about it?

A. I don't recall but the one up street before he came to the house, and then he was down there I think twice.

Q. There was an interview up the street; that was number one?

A. Number one, yes, sir.

Q. Then you had an interview with him at his house?

A. At my house.

Q. That is number two. Did you have any other 10 interviews with him?

A. He was down there the second time.

Q. Then you had three interviews?

A. Yes; he was down at the house two different times.

Q. And three interviews were all you had with him —

A. I don't recall any other.

Q. — about this will?

A. I don't recall any other. 20

Q. These two interviews at your house, anybody with him, ever?

A. Come with him?

Q. Yes.

A. No, sir.

Q. I noticed there is a clause in that will which states, "It is my will and I do order that if any one shall contest this, my last will, that they shall do so at their own expense, no fees being allowed therefor by the court out of my estate." Did he tell you to put that in the will? 30

A. He did.

Q. Tell you why he wanted it in the will?

A. I don't recall that he did.

Q. Did you ask him?

A. I don't recall it.

Q. Had no curiosity about it?

A. No, sir.

Q. Did you notice in this will that he provided very generously for a Mrs. Ewan?

A. Why, sure. I wrote the will.

Q. Did you know who she was?

A. I did.

Q. Who was she?

A. By hearsay; that is all.

10 Q. Was she the lady you saw at his house when you were there?

A. Yes, sir.

Q. Did he tell you why he provided so generously for her, to the exclusion of his own blood?

A. No, sir.

Q. Did you ask him?

A. No, sir.

Q. Had no curiosity about it?

20 A. It wasn't any of my affairs. I made the will just as he asked me to do it.

Q. Now, the will was prepared in your office, was it?

A. Yes, sir.

Q. And how long had it been prepared before Mr. Diament came to sign it?

A. Well, I wouldn't say whether he came down the next night after the first night he was down there, or whether it was the night afterwards. It was within a day or two.

30 Q. Nobody came with him?

A. No, sir.

Q. What time of the day did he come?

A. Came in the evening.

Q. What time in the evening?

A. I should say around seven o'clock, half past six.

Q. Dark?

A. Well, in November at that time it would be after dark, yes. It was after supper.

Q. Have you an office?

A. Only at my home.

Q. You have an office at your home?

A. I have my office in my home.

Q. Room separated from the rest of the building?

A. No, sir.

Q. How is your office connected with the rest of **10**
the building?

A. It is all one house. We were in the sitting room.

Q. This will was executed in the sitting room —

A. In the sitting room, yes, sir.

Q. — and not in your office? What part of the sitting room was it executed?

A. Well, the table is in the middle of the room. It was signed on the table.

Q. You keep pen and ink there or did you go get **20**
pen and ink?

A. I had a pocket pen.

Q. Was there anybody in the room when the sheriff came there?

A. When he came?

Q. Yes.

A. Not when he came in there wasn't.

Q. Well, when he came in what did he do, take a seat somewhere?

A. Took a seat, sure. **30**

Q. Then what did you do?

A. I read the will to him as I had prepared it, see if it was as he wanted it.

Q. He sat down and you read the will to him?

A. He did, yes, sir.

Q. And what did he say?

- A. Well, he said it was what he wanted.
- Q. Then what did he do?
- A. Signed the will.
- Q. Then what did you do?
- A. Before he signed the will I called ——
- Q. No. What did you do when he signed the will?
- A. I looked at him.
- Q. Looked at him sign the will?
- A. Yes.
- 10** Q. Then what did you do?
- A. I signed my name afterwards.
- Q. Immediately afterwards?
- A. I suppose so. Just as immediately as you would expect.
- Q. Then what happened? What did you do then?
- A. Well, I don't know as I understand.
- Q. First he came to your house and sat down in a chair?
- A. Yes, and I read ——
- 20** Q. And you read the will to him. Then he signed it and you signed it?
- A. Before he signed, I called ——
- Q. No, no, no.
- A. Yes, but I want to tell the facts.
- Q. Pardon me. I want to get the facts in my own way. He came to your house and sat down in a chair, and you read the will to him, then he signed it, then you signed it?
- A. No, before he signed—you asked me that.
- 30** Q. Pardon me one second. You have already said he signed it and you signed it.
- A. So I did.
- Q. What was the next thing that happened?
- A. Well, there was something happened before that. Don't want that?
- Q. Pardon me. I will attend to that.

Mr. Ware: You have a right to state it.

A. I don't know why I can't tell the facts.

The Court: You can explain it after he is through.

Q. What was the next thing happened after you signed?

A. Well, I suppose when he got ready he went home.

10

Q. Not what you suppose. I want the fact.

A. Afterwards he went home.

Q. Then he went home?

A. Yes.

Q. What became of the will?

A. I kept it.

Q. Why did you keep it?

A. Because he asked me to.

Q. How long did you keep it?

A. I couldn't tell you. Kept it until he asked me to bring it to him. 20

Q. That was about how long?

A. I wouldn't venture to say whether it was six weeks or three months.

Q. How did he ask you to bring it to him or take it to him?

A. How did he ask me?

Q. Yes; by 'phone or personally?

A. Personally.

Q. Came to you and asked you to bring it to him? 30

A. Yes, saw me up street and asked me to bring the paper up to him, and I did.

Q. Did you give it to him?

A. I did.

Q. Ever see it afterwards?

A. Never until it was brought here this morning. Well, when he brought it to have that codicil added.

Q. We will come to that pretty soon. The witness, Mrs. Vannaman, how is she related to you?

A. Mother-in-law.

Q. An old lady, you say?

A. Seventy-four.

Q. See well?

A. Is she well?

Q. Can she see well?

A. See well?

10 Q. Yes.

A. Why, I think so.

Q. Hear well?

A. I think so.

Q. Where was Mrs. Vannaman when the sheriff came?

A. She was somewheres in the house.

Q. Did you know the sheriff was coming?

A. I did.

Q. Did he tell you?

20 A. Yes, sir.

Q. Where did he see you to tell you he was coming?

A. He had been down at my house the night before, either one or two nights before, whenever he had come down the first time. I don't remember whether the time for him to come back was set one or two days.

Q. Did you get Mrs. Vannaman to witness the will before the sheriff got there or after he got there?

30 A. Did I get her to witness it?

Q. Yes.

A. When he was there.

Q. Did you speak to her about it before the sheriff came or after he came?

A. Why, I had told her that I was going to ask her to witness the will when he came.

- Q. Where was she then?
A. In the house.
Q. What part of the house?
A. Couldn't tell you.
Q. Have you talked to her about it, Mrs. Vannaman? Have you talked to her about this will?
A. Why, certainly. It would be natural for it to be talked about. Pretty much everybody else has.
Q. When did you talk to her about it?
A. Well, a good many times. **10**
Q. When was the last time?
A. I kept no account of it nor no memorandum or anything about them.
Q. Have you talked to her about the due execution of this will?
A. I don't know; what do you mean?
Q. Have you talked to her about the execution of the will?
A. I asked her to witness it.
Q. No; since, have you talked to her about the execution of this will? **20**
A. I don't know whether I have or not.
Q. Has she talked to you about it?
A. The affair has been talked over at home. What has been said I can't tell you.
Q. Well, haven't you talked over it with her, the question of the way this will was executed?
A. I don't recall. Nothing peculiar in the way it was executed.
Q. You happened to know that there was a caveat filed in this case? **30**
A. Yes. I have heard that.
Q. You have heard a great deal about it, haven't you?
A. I have heard the talk around the town.
Q. You heard there was a grave question whether this was Mr. Diamant's will, didn't you?

A. I have heard some say so and I have some say not. Whether it was his will.

Q. Have you talked that over with your mother-in-law?

A. Whether it was his will, you mean?

Q. Have you talked it over with your mother-in-law?

A. We have talked over home just the same as anybody would naturally talk.

10 Q. And have you recalled, since you heard of the controversy over this will, just how it was executed?

A. Just how?

Q. Yes.

A. I haven't thought anything about it. Hadn't any idea that I would be asked any such questions.

Q. Was Mrs. Vannaman in the room when the sheriff came?

A. Not when he came in the house. If she was in the room when he was coming, she went out.

20 Q. What?

A. If she had been or any of the rest of them in the room when he came to the door, she would have went out of the room and left it.

Q. She was not there when the sheriff came?

A. She wasn't in the room when he came in.

Q. What did the sheriff say before he signed this will? Give us his words.

A. Can't do it.

Q. Did he say anything?

30 A. I suppose he did. I don't remember his words.

Q. You don't remember whether he did or not?

A. No, sir.

Q. Did he say anything after he signed the will?

A. I can't tell you what he said. Be natural to talk.

Q. You don't know whether he said anything or not after he signed the will?

A. No, when it comes to knowledge, I do not. I haven't any doubt but he said something. I am not going to say from my knowledge what he said.

Q. Did Mrs. Vannaman say anything?

A. I have no knowledge that she did.

Q. Don't know whether she did or not?

A. Have no knowledge that she said anything at all.

Q. Did you say anything?

A. I asked him if he declared that to be his last will and testament and wished us to witness it. 10

Q. What else did you say?

A. I couldn't tell you.

Q. Where was Mrs. Vannaman when you put that question?

A. In the room.

Q. Whereabouts in the room?

A. Alongside of the table.

Q. On which side of the table?

A. I couldn't tell you. 20

Q. On which side of the table was the sheriff?

A. Well, I might tell you what I thought, but I am not going to say what side of the table.

Q. Which side of the table were you on?

A. I won't say.

Q. Were you in front of him, back of him or side of him?

A. I was in front of him.

Q. Where was Mrs. Vannaman?

A. She was there with me. 30

Q. In front of him, standing at your side?

A. I should naturally suppose so.

Q. But you don't know?

A. No, I am not going to say.

Q. When did you next see this will?

A. I can't recall.

Q. How happened you to see it?

A. Well, I suppose when he wanted the codicil added to the will, I would see it.

Q. Did you prepare the codicil for him?

A. I did.

Q. Is the whole thing in your handwriting?

A. It is.

Q. Where were you when you prepared this codicil?

10 A. At home.

Q. Where was it signed?

A. At my home.

Q. Do you remember when it was?

A. Only as the date on the paper gives it.

Q. Executed in the same room that the will was executed in?

A. Yes, sir.

Q. Same formality?

A. Yes, sir.

20 Q. Is Mrs. Vannaman able to travel?

A. Not at the present time she is not.

Q. Does she wear glasses?

A. Yes.

Q. Can she see without glasses to read or write?

A. I don't think so.

Q. Where did you sit when you signed the will?

A. I don't know whether I sat down or stood up.

Q. Where was Mrs. Vannaman, sitting or standing when she signed it?

30 A. I am not going to say.

Q. Don't know?

A. I suppose she sat down, but I don't remember the particulars.

Q. Who sent for her?

A. For Mrs. Vannaman?

Q. Yes.

A. When I was ready for her I asked her to come in the room.

Q. Where did you find her?

A. I couldn't tell you what room of the house she was in.

Q. Was she waiting for you?

A. She was expecting for me to call her when I was ready for her.

Q. Where she was you don't know?

A. I don't know whether she was in the dining room, sitting room or parlor or upstairs. **10**

Q. When was it you got ready, what part of the transaction?

A. When was it I got ready?

Q. Yes.

A. Do you mean the date?

Q. What part of the transaction.

A. I don't know; I don't know how to answer.

Q. You have already said that the sheriff came and sat down and signed the will and you signed the will. Now, in what part of that transaction was it that Mrs. Vannaman appeared? **20**

A. Why, before Mr. Diament signed it.

Q. She was there before he sat down?

A. Before he sat down? I don't know. I expect he sat down. I don't suppose he was standing up all the time I was reading the will to him.

Q. She was standing up all the time you read the will to him?

A. You asked if he had sat down before she came in. I would suppose he did while I read the will to him. **30**

Q. He didn't read the will himself?

A. No, sir.

Q. You simply read it to him?

A. I read it to him.

Q. He said it was what he wanted?

A. Yes, sir.

Q. Where was Mrs. Vannaman then?

A. She was in the other part of the house somewhere.

Q. Well, had he signed when you sent for her?

A. Certainly not.

Q. You sent for her before he signed?

A. Why, sure. This clause says so, and in matter
10 of fact I did.

Q. Is that what you are depending on, the clause?

A. No, I am depending on facts.

Q. Are you depending on your memory of what actually happened?

A. I am depending on what I know about it.

Q. Are you depending on your memory as to what actually happened?

A. On my memory?

Q. Yes.

20 A. Why, I remember it well enough, yes.

Q. Now, remembering, as you say, that fact, can't you remember at what part of the transaction you sent for her?

A. I sent for her after he said it was what he wanted and was ready to execute it.

Q. How did you send for her?

A. I went and asked her to come in.

Q. Where did you go?

A. I don't know.

30 Q. She was expecting you, of course?

A. She was.

Q. You remember very distinctly when she signed, I suppose?

A. Certainly I do.

Q. When was it?

A. When she signed? Right away after Mr. Diamant had signed.

- Q. Then what did she do?
A. After he wished us to witness it, she signed.
Q. No. What did she do after she signed?
A. Why, I told her that was all and she went out.
Q. Right after she signed?
A. Yes, sir, that is, after the will was executed.
Q. No, no, no.
A. After the will was executed.
Q. Pardon me.
A. Well, I am going to tell it. **10**
Q. I want to get the facts and not the repetition of what appears in that paper. Right after she signed she went out, you have stated. Is that true or not?
A. When we was through with her.
Q. Is that true or not?
A. I won't say.
Q. See if you can recollect how long she stayed there after she signed.
A. I don't know whether it was one minute or ten. **20**
Q. How long did you stay after you signed?
A. After he signed?
Q. Yes.
A. I stayed there until he went away.
Q. How long was that?
A. I don't know.
Q. Did he tell you to keep the will?
A. He did.
Q. Did he tell you why he wanted you to keep the will? **30**
A. I don't know.
Q. When was the last codicil made?
A. I should have to depend on the date to tell you.
Q. Look at it.
A. Do you mean the codicil that I made or the last codicil? You asked for the last one.

Q. Didn't you make that?

A. No, sir.

Q. What was the last codicil you made?

A. The codicil that I made was dated February first, 1911.

Q. That is not very long ago, is it? Can you tell what time in the day that was made?

A. They were both made after supper.

10 Q. Now, give us the details, if you please, concerning the execution of that codicil. Being a short time ago, your memory will be full and accurate about it.

A. I will say simply that he came there after supper and made the contents known to him and it was what he wanted and it was executed.

Q. Is that all you can state?

A. That is all I have got to say about it, yes, sir.

Q. Is that all you remember about it?

A. I don't—that is all I can tell as far as words or things that was said.

20 Q. That is all you can remember about it now?

A. Yes; I can't remember anything that was said.

Q. Who came in first?

A. Wasn't but one came in.

Q. Who was that?

A. Mr. Diament.

Q. He was the only one came in?

A. Certainly.

Q. When did he come in?

A. After supper.

30 Q. What time after supper?

A. I don't know.

Q. What did he do when he came in?

A. I suppose he sat down.

Q. Don't you know?

A. No; I don't remember particularly seeing the man sit down or anything about it. I haven't any

doubt but what I asked him to sit down and he sat down. I am not going to say whether he did or did not.

Q. Couldn't remember whether he did or not?

A. No, I am not going to say.

Q. What room?

A. In the same room.

Q. Was there a table there?

A. Same table.

Q. In the center of the room?

10

A. Yes, sir, I suppose so, near what we call the center. I haven't measured it.

Q. Where did the sheriff sit?

A. Where did the sheriff sit?

Q. Yes.

A. I am not going to say.

Q. Don't remember?

A. No; I won't say what chair he sat in.

Q. Can you say at what table he sat?

A. Well, there is only one table there for him to sign on. 20

Q. So you reason that he sat at the table?

A. I suppose very natural.

Q. But you don't remember?

A. I am not going to say.

Q. Let's see what your recollection is about other circumstances. What did you do after the sheriff came in?

A. Well, I read the codicil to him.

Q. Remember that, do you?

30

A. Yes. As a matter of fact I did, yes.

Q. You remember it?

A. Yes, I say I remember that.

Q. What did the sheriff do when you read the codicil, or say?

A. He was satisfied with it.

Q. What did he say?

A. I can't give you his words.

Q. Why do you say he was satisfied?

A. For the simple reason that he was.

Q. You can't remember anything that he said?

A. Nothing more than I will say he said it was what he wanted.

Q. You do remember that he said "that is what I want"?

10 A. I won't say whether it was, "That is what I want," or "wanted" or "as I want it," or what he said.

Q. He said something that meant he was satisfied?

A. Yes, I read it to him and he was satisfied.

Q. Was he sitting or standing when you read it to him?

A. I suppose he was sitting.

Q. When you read it to him and he said that, what was the next thing that happened?

20 A. Well, when he was satisfied it was all right, what he wanted, I asked my mother-in-law to come in to be a witness to it.

Q. What did you say to her?

A. I couldn't tell you whether I said, "Come in," or "We are ready."

Q. What did she do?

A. She came in.

Q. Then what did she do?

A. She was there while Mr. Diament signed it.

30 Q. What did she do?

A. I suppose she looked at us.

Q. You are not sure?

A. No, I am not going to say whether she had her eyes shut or open.

Q. What was the next thing she did?

A. I don't know.

- Q. Don't know what she did?
A. No, I don't know all of her different actions.
Q. You were there?
A. Yes, sir.
Q. Saw what she did?
A. Yes.
Q. And can't tell what she did?
A. No, I can't tell you just her motions and things she went through.
Q. Did the Sheriff say anything after she came in? 10
A. I couldn't tell you. Yes, I will take that back. He declared that to be a codicil to his last will in our presence. He said that.
Q. Sure he said that?
A. Yes.
Q. What is the language he used?
A. That is the language I used.
Q. That is the language he used?
A. That is the language I used in asking him.
Q. What did he say? 20
A. He said he did.
Q. Where was Mrs. Vannaman while that was going on?
A. She was there in the room.
Q. What was she doing?
A. I suppose she was listening and looking at what was being said and going on.
Q. But you don't know.
A. Yes, I know she was. She couldn't help it.
Q. How do you know she was? 30
A. I don't fix the particular things.
Q. After the Sheriff said that what did she do?
A. She signed for a witness.
Q. Sitting or standing?
A. I suppose sitting. She might have stood, but I suppose she sat.

Q. Old lady, was she?

A. Yes.

Q. What did she do after you suppose she signed it?

A. After it was executed I told her that we was through and she went out.

Q. That is all she had to do with it?

A. That is all she had to do with it.

Q. Then what happened?

10 A. Well, when Mr. Diament got ready, he went home.

Q. Leave the codicil with you or take it with him?

A. I won't say whether it was left with me until after the codicil was fixed or whether it wasn't.

Q. Can't remember that?

A. No, sir, I don't remember.

Q. You say you prepared this will in your office?

A. At my home.

Q. In your office?

20 A. Well, you can call it the office if you wish. It is all together.

Q. Use a fountain pen?

A. Fountain pen?

Q. Yes.

A. Yes, sir.

Q. For the whole business?

A. I think so. I generally use a fountain pen. I don't think I used anything else for that.

Q. Did Mr. Diament use the same pen?

30 A. I won't be positive, but to the best of my knowledge I should say yes.

Q. Well, do you know whether you had another pen and ink well on that table?

A. No other pen in that room to my knowledge.

Q. Then he used the same pen?

A. He would naturally have to.

Q. Mrs. Vannaman use the same pen?

A. She did.

Q. And you used the same pen?

A. I did.

Q. The same is true with reference to the codicil, is it?

A. Yes, sir.

Q. Did you draw another will for the sheriff before this?

A. No, sir.

10

Q. Did you draw one afterwards?

A. No, sir.

Q. Did you hear of one that was drawn afterwards?

A. I don't know whether I ever heard it or not.

Q. Can't tell whether you heard it or not?

A. There has been so much said. I heard that he had left a will. I never knew whether it was the one I wrote for him or not, until after he was dead.

Q. Did you refill the fountain pen——

20

A. Couldn't tell you.

Q. ——at any time?

A. I couldn't tell you.

Q. How do you account for the fact that the ink used in making the signature of Charles G. Diament to both the will and the codicil is apparently a different ink?

A. I couldn't tell you. I don't know whether he carried a fountain pen himself or not or anything about it.

30

Q. Can't remember?

A. But as a matter of fact, I don't see any difference between the ink of Charles G. Diament and Sarah B. Vannaman a particle on the codicil.

Q. If you saw Sheriff Diament sign this paper on that occasion, as you say you did——

A. I did.

Q. —why is it you are not sure about what sort of a pen he used or whether he used the same pen?

A. Nothing queer about that at all. I can have my own opinion, but when it comes to be positive, I am not going to be positive of what was done four or five years ago.

Q. You ought to be in a matter of this sort.

A. Maybe I am not up to the rest, then. Maybe
10 I ought to.

Q. Oh, I guess you are. You are a little ahead of the rest. It is quite obvious that there is different ink used there, isn't it?

A. It don't look to me so in the codicil.

Q. Doesn't it?

A. No, not in the codicil it don't look to me so. I don't know what an expert would say. I am not an expert on the matter at all.

Q. Just look again at the signature on the codicil.

20 A. I don't see any difference.

Mr. Ware: Of course, if he is not an expert he cannot testify as to any difference in the ink.

Mr. Wescott: If one is white and one is black it does not take an expert to show it.

The Court: It speaks for itself.

30 Q. It is quite obvious there is a difference there, isn't it?

A. I don't think so.

Q. If you do not, then it isn't obvious. Will your mother-in-law be able to come here some other time?

A. I don't think so.

Q. Is she bedridden?

A. No, sir, not in bed.

Mr. Ware: I have no other questions. If there is any statement or explanation you care to make yourself——

A. Well, there is nothing——

Mr. Wescott: I object to that mode of examination.

10

The Court: Yes, it will have to be in questions and answers.

Mr. Ware: I am not asking questions. I am stating to the witness that he may make any explanation, just as the Court stated to the witness when he was being cross-examined.

The Court: Voluntary statements, not in answer 20
to questions, are not regular.

A. I don't know just——

Mr. Wescott: Wait.

JOHN S. WARE, SWORN.

30

Direct examination.

By Mr. Ware:

Q. Where do you reside, Mr. Ware?

A. Bridgeton.

Q. What is your business or position?

A. Secretary and Treasurer of the Cumberland Trust Company.

Q. The Cumberland Trust Company of Bridgeton is a corporation of the State of New Jersey?

A. Yes, sir.

Q. And where is its head place of business?

A. Bridgeton, New Jersey.

10 Q. Were you acquainted in his lifetime with Charles G. Diament?

A. Yes, sir.

Q. Were you ever called upon by Mr. Diament to prepare a codicil to his will?

A. Yes.

Q. Was that request made personally or in writing?

A. In writing.

20 (Witness is shown a paper writing bearing date the nineteenth day of December, 1912, and is asked what is that paper.)

A. The codicil to the last will and testament of Charles G. Diament.

Q. Was that executed by Mr. Diament?

A. It was.

Q. In whose presence?

A. In the presence of John S. Ware and Charles S. Ware.

30 Q. In whose handwriting is that paper prepared?

A. In mine.

Q. When was it executed?

A. Nineteenth day of December, 1912.

Q. Where?

A. In Cedarville; at his home.

Q. Just read the attestation clause.

A. "Signed, sealed, published and declared by the above-named Charles G. Diament as and for a codicil to his last will and testament in the presence of us, who, at his request, in his presence and in the presence of each other, both being present at the same time, have hereunto subscribed our names as witnesses. John S. Ware, Charles S. Ware."

Q. Did you see Mr. Diament sign his name to that codicil?

A. Yes.

10

Q. Was any one else present?

A. Charles S. Ware was present.

Q. Of the three who signed first?

A. Charles G. Diament.

Q. Was anything said by Mr. Diament after that?

A. After his signature?

Q. Yes.

A. He declared it to be a codicil to his last will and testament and requested that Charles S. Ware and myself should witness the same.

20

Q. Then what occurred?

A. Then I wrote my name as a witness and Charles S. Ware afterwards wrote his name as a witness.

Q. Did you see Charles S. Ware write his name?

A. Yes.

Q. And did he see you?

A. Yes.

Q. Have you in hand the paper or writing sent to you by Mr. Diament as instructions for the preparation of that codicil?

30

A. Yes.

Q. In whose handwriting does that appear?

A. In Mr. Diament's.

Q. Is it signed by him?

A. Yes.

Cross-examination.

By Mr. Wescott:

Q. Mr. Ware, let me see that paper. I suppose you went to see the sheriff, did you, at his home?

A. At the time of the signing of the codicil, yes.

Q. At that time was he in pretty bad physical condition?

10 A. Only with a sore toe. No other.

Q. Have gangrene?

A. Not that I know of. He complained of a sore toe.

Q. He sent you this note, I suppose?

A. Yes.

Q. That was the occasion of you going to see him?

A. Yes.

Q. And did you prepare this codicil before you went or after you went?

20 A. Before I went.

Q. Was Mrs. Ewan there?

A. In the house?

Q. Yes.

A. Yes.

Q. Was she present when the codicil was executed?

A. No.

Q. Do you happen to know whether she knew anything about it?

30 A. I don't know.

Q. Was there another codicil besides this?

A. Prepared?

Q. Prepared.

A. Yes.

Q. Now, who prepared that, Mr. Ware?

A. I did.

Q. At Mr. Diament's request?

A. Yes.

Q. Did you get a letter from him concerning that, too?

A. Yes.

Q. Where is that letter?

(Letter handed Mr. Wescott.)

Q. Did this come to you through the mail or don't you recollect about it? 10

A. I think it came by messenger.

Q. And when you got the note dated August nineteenth, 1913, then you prepared still another codicil, as I understand?

A. I did.

Q. And was that codicil duly executed?

A. Yes.

Q. And witnessed by you and whom?

A. Not by me. 20

Q. Who witnessed it?

A. Charles S. Ware was one of the witnesses and I don't remember the other.

Q. Charles S. Ware, that is your son?

A. Yes.

Q. Did you have that last codicil in your possession any time?

A. Yes.

Q. How did you happen to part with the possession of it? 30

A. At Mr. Diament's request.

Q. Was his request orally made or in writing?

A. Orally. Well, his request came by messenger orally.

Q. Who was the messenger?

A. Charles S. Ware.

Q. And can you remember about when that was?

A. No. It was shortly after the codicil was executed.

Q. And you gave it to your son Charles?

A. Yes.

Q. And you never saw the codicil afterwards?

A. No.

10 Q. Mr. Ware, have you any recollection as to whether Mr. Diament, after this last codicil was prepared by you and executed and came into your possession, sent for you again for the purpose of making another codicil, another will?

A. After the last one spoken of?

Q. Yes.

A. No.

Q. Well, do you remember of him sending for you about two or three weeks before his death?

A. Yes.

Q. What was that for?

20 A. He said that—over the telephone said that he had received some money for a certain matter that was mentioned in his will and he wished to arrange for the disposition of the proceeds of this matter that had been mentioned in his will and he said there was no hurry for my coming down. I said should I come down that day. He said, “No, there is no hurry. If you will come down any day next week it will be time enough.” And I was very busy and on Saturday, I think it was Saturday, I don’t remember, at any rate, it was the day he died, I started for Cedarville and before I got to the car I learned he had died.

30 Q. Now, will you be good enough to tell us what it was that he wanted to see you about?

A. I don’t know any further than I said. He mentioned that a certain item that was mentioned in his

will had been disposed of and turned into money and he wished to dispose of the money specifically.

Q. You don't recollect whether that money was in your bank, do you?

A. I don't know anything about it. May I make an explanation of something?

Q. Yes, certainly.

A. I am not sure but that the request for the return of the codicil was also corroborated by telephone. Mr. Diament had several telephone conversations with me and I think that that was corroborated by telephone. 10

Q. Did the sheriff keep an account with your trust company?

A. He did not.

Q. Never had one there?

A. No.

Q. Will you please tell us who the messenger was that wanted this last codicil?

A. Charles S. Ware. The last one? 20

Q. Yes.

A. Charles S. Ware.

Q. That was your son?

A. Yes, an employe of the Cumberland Trust Company.

By Mr. Ware:

Q. At that time Charles S. Ware resided in Cedarville, did he not? 30

A. Yes.

CHARLES S. WARE, SWORN.

Direct examination.

By Mr. Ware:

Q. Where do you reside?

A. Swedesboro, New Jersey.

Q. What is your business?

10 A. Secretary and Treasurer of the Swedesboro Trust Company.

Q. In December, 1912, where did you reside?

A. Cedarville, New Jersey.

Q. And where were you employed at that time?

A. Cumberland Trust Company, Bridgeton.

Q. What was the nature of your employment with the Trust Company?

A. I was a clerk.

Q. And you lived in Cedarville?

20 A. Yes, I did.

Q. Going backward and forward by trolley each day?

A. Yes, sir.

Q. When did your employment with the Trust Company cease?

A. Some time during December of 1913. I don't remember the exact date. About Christmas.

30 (Witness is shown the same paper writing purporting to be a codicil to the will of Charles G. Diament, dated the nineteenth day of December, 1912, and is asked):

Q. Does your name appear as one of the witnesses to that codicil?

A. It does.

Q. Do you recall being present at the execution of that codicil?

A. I do.

Q. Where was it executed?

A. At the home of Charles G. Diament, Cedarville.

Q. Who else was present besides you and Mr. Diament?

A. John S. Ware.

Q. Did you see Mr. Diament sign his name to that paper?

10

A. I did.

Q. Did you hear any declaration made by him concerning it?

A. I did, that it was a codicil to his last will and testament and that he wished John S. Ware and myself to witness his signature to it.

Q. Of the three, who signed first?

A. Charles G. Diament.

Q. Then who signed?

A. John S. Ware, and then myself.

20

Q. Did you see John S. Ware sign?

A. I did.

Q. And did he see you sign it?

A. He did.

Q. And was Mr. Diament present when you two witnesses signed?

A. He was.

No cross-examination.

30

JOHN S. WARE, recalled.

Further cross-examination.

By Mr. Wescott:

10 Q. Mr. Ware, can you recollect in substance what was contained in the last codicil which you and your son saw Mr. Diamant execute?

A. Only by referring to this memorandum.

Q. Now, this last codicil, the substance of which is in this letter, did you see that codicil executed?

A. Did I see it executed?

Q. Yes.

A. No.

Q. Do you know who did?

20 A. Charles S. Ware and some other person, I don't know who.

Q. You prepared it?

A. I prepared it.

Q. Did you see it after it was prepared?

A. I beg pardon.

Q. Did you see it after it was prepared?

A. After it was executed?

Q. After it was executed, I mean.

A. Yes.

Q. And it had Mr. Diamant's signature on it?

30 A. Yes.

Q. And sealed?

A. Yes.

Q. And a proper attestation clause?

A. Yes.

Q. And two witnesses?

A. Yes.

Mr. Ware: That is our formal proof of the will excepting that we have done what we could towards getting the testimony of Mrs. Vannaman, the other witness to the original will and codicil.

The Court: I think the testimony of the witness ought to be had, Mr. Ware, unless the other side expressly waives it.

Mr. Wescott: I understand that is the practice. 10
It amounts to what in common law is called a solemn establishment of the will and requires the production of all the witnesses. I would say that we are advised by hearsay that this will in the first place was not properly executed, and having been so advised, we deem it to be necessary to take the evidence of this old lady. We depreciate her condition and the necessity that we are under to take her testimony, but we will join with Mr. Ware in protecting her in every possible way. I suppose it would be a 20
proper arrangement for Mr. Ware and Mr. Donnelly to go down there under a stipulation and examine her. If we stipulate that, it ought to be satisfactory to the Court.

The Court: Any arrangement is satisfactory to the Court that is satisfactory to counsel.

Mr. Wescott: I want to introduce in evidence these two communications which were produced by 30
Mr. Ware, and I want to read them in the record. The first one does not seem to be dated, but it reads this way; "This is the things that I wish to be changed in the first place the Cumberland Bank stock I want the Brick Presbyterian Church of Cedarville to have the use of the dividends as long

as it shall remain a Church after Mrs. Eva M. Ewan live time. The rest of the Will to remain as it is Except that I wish the Cumberland Trust Company with my Daughter Mary L. D. Cook to be my Executors of my Will and the Trust Company to have full charge of all of the Trust Funds as long as it is needed, and if Mr. David H. Johnson is living to be my undertaker. The will to be read one day after My Funeral at the Home in Cedarville. Chas. G. Diament. The Life Insurance policy that is in Mrs. Eva M. Ewan Favor to remain at Interest to Pay the Taxes and keep the house in Repair.”

(Letter marked Exhibit C1.)

Mr. Wescott: The second note is in writing, in ink, and reads: “Cedarville, N. J., Aug. 19th, 1913, This Codicil to will made on this date that all that was willed to Mrs. Eva M. Ewan is hereby revoked and the Bank Shares is left to Brick Presbyterian Church and the rest to my Estate. Charles G. Diament.”

(Letter marked Exhibit C2.)

30 Recess taken until Friday, March 20th, 1914, at 10 A. M.

Bridgeton, N. J., Friday, March 20th, 1914. Trial of the cause resumed at 10 A. M.

Appearances:

For Executors: James S. Ware, Esq.,

For Legatee, Eva M. Ewan: Leroy W. Loder, Esq.,

For Caveators: Rex Donnelly, Ethan Wescott and Mr. Weaver.

10

Mr. Ware: If your Honor please, we took some depositions at Cedarville on the afternoon of last Thursday. If the Court desires that those depositions be read here, we can do that today.

The Court: I think it is not necessary. Counsel can look them over and leave them with the Surrogate.

20

Mr. Ware: Mr. Donnelly, will you waive the reading of those depositions in court?

Mr. Donnelly: Certainly.

Mr. Ware: I think that completes our testimony so far as the proof of the will and the codicils is concerned, and I want to make a formal offer of the will and the two codicils in evidence.

30

(Will marked Exhibit E1; codicils marked Exhibits E2 and E3.)

Recess taken until Tuesday, March 24th, 1914, 10 A. M.

Bridgeton, N. J., Tuesday, March 24th, 1914. Trial of the cause resumed at 10 A. M.

Appearances: (Same as at first hearing.)

10 LESLIE M. OGDEN, SWORN.

Direct examination.

By Mr. Wescott:

Q. Mr. Ogden, where do you live, please?

A. Cedarville, New Jersey.

Q. Did you know the late Sheriff Diament?

A. I did, yes, sir.

20 Q. Do you remember some time in August of last year witnessing a codicil to his will?

A. Yes, sir.

Q. Do you remember when it was?

A. It was either the last week in August or the first week in September.

Q. Where did it occur?

A. In the post office at Cedarville.

Q. Who was present?

A. Mr. Diament and Mr. Charles Ware.

30 Q. See Diament sign the codicil?

A. I did, yes, sir.

Q. Sign it in your presence?

A. Yes, sir.

Q. In the presence of Mr. Ware?

A. Yes, sir.

Q. Whose name you just mentioned?

A. Yes, sir.

Q. Had it an attestation clause to it?

A. Yes, it had the usual words at the bottom. I don't know whether I could give the wording. I have witnessed a number of wills. It was the usual clause.

Q. Did he declare it to be his codicil to his will?

A. He did, yes, sir.

Q. Signed it and sealed it in your presence?

A. Yes, sir.

10

Q. Did you read the codicil? Do you know what it contained?

A. No, sir, I don't know anything about the contents of it.

No cross-examination.

CAVEATORS REST.

20

PROPONENTS' TESTIMONY IN REBUTTAL.

CHARLES S. WARE, recalled.

Direct examination.

30

By Mr. Ware:

Q. Mr. Ware, you testified about two weeks ago or a little less than two weeks ago here, did you not?

A. I did.

Q. You were the other witness to the execution of the codicil concerning which Mr. Ogden just testified?

A. I was.

Q. My recollection is that you testified that that codicil was delivered into the hands of the Trust Company after it was executed?

(Objected to. Question allowed.)

10

A. I did.

Q. Was that codicil ever returned to Mr. Diament?

A. It was.

Q. About how long afterward?

A. A very short time, probably within a couple of weeks' time.

Q. Why was it taken to him?

(Objected to. Question allowed.)

20

A. Because he requested that the codicil be returned to him.

Q. Who took it to him?

A. I did.

Q. Did you deliver it to him?

A. I did.

Q. Personally?

A. I did.

Q. Where?

30

A. In the barn at his residence in Cedarville.

Q. Why in the barn?

A. My usual custom—I had gone to Sheriff Diament's several times—in going to the Sheriff's was in entering a lane on the side, two large gates there, entering that drive and going on back there, and as I was walking down the drive I saw the Sheriff

standing in the barn door and he spoke to me, beckoned for me to come, and I went to the barn.

Q. Just state the conversation that occurred then as near as you can recollect it.

A. Why, I said, "Sheriff, I have the paper here that you wished me to return to you," and I said, "Here it is." Something was said about this being his codicil that he had once made and that he requested to be returned to him, and as I remember, he asked me what was the best way to annul it, and I 10 said to destroy it.

Q. Do you remember any other conversation?

A. No, I don't recollect of any.

Q. What did he do with the paper after you gave it to him?

A. Just from my memory, I rather think he put it in his pocket.

No cross-examination.

20

EVA M. EWAN, SWORN.

Direct examination.

By Mr. Loder:

Q. Mrs. Ewan, you were the housekeeper for Sheriff Diament? 30

A. Yes.

Q. In Cedarville?

A. Yes.

Q. Were you keeping house for him at the time of his death?

A. Yes.

Q. You heard Mr. Charles Ware testify just a moment ago?

A. Yes.

Q. Do you remember the time that Mr. Ware came to Mr. Diament's residence in Cedarville as he testified?

A. I remember seeing him come there.

Q. When was it?

A. I think it was early in the fall.

10 Q. Of what year?

A. Last fall.

Q. Last fall?

A. Yes.

Q. Did you see him talking to Mr. Diament?

A. Yes, I saw him out in the house yard talking to Mr. Diament. I saw him hand him a paper.

Q. Saw who hand a paper?

A. Saw Mr. Ware hand Mr. Diament a paper and then they talked some.

20 Q. Then what happened?

A. Well, after Mr. Ware left he came in the house.

Q. Sheriff Diament did?

A. Yes.

Q. Did you observe him do anything?

A. No, I didn't speak to him; I was busy with my housework.

Q. Did you see any paper?

A. Yes.

Q. Who had it?

30 A. He did, and threw it in the stove.

Q. Sheriff Diament?

A. Yes.

Q. Did he say anything when he threw it in?

A. Not a word. Come in the kitchen, walked over to the stove, took a paper out of his pocket and threw it in the stove.

Q. Did you know what the paper was?

A. No; don't know what it contained at all.

No cross-examination.

Mr. Ware: My recollection is that I offered in evidence the will and two codicils which we have proven and also the evidence which was taken in Cedarville before Mr. Myrose as Supreme Court Examiner. We rest.

10

JOHN S. WARE, recalled.

Further cross-examination.

By Mr. Wescott:

Q. After having my attention called to the record, 20
your testimony, Mr. Ware, does not seem to contain
what I understood you to state. You were asked
about the execution of the third codicil to Mr. Dia-
ment's will, asked several questions about it. You
remember that, don't you?

A. Yes.

Q. Now, I understand that you drew that codicil
yourself?

A. I did.

Q. What were the contents of the codicil?

30

A. The codicil revoked the bequests before made
to Mrs. Eva M. Ewan.

Q. The last witness on the stand?

A. Yes.

Q. And that was drawn by you at the directions
of the Sheriff?

A. Yes.

Q. The testator?

A. Yes.

Q. That is what I wanted to get clear. Did the codicil contain anything else than the revocation of bequests to Mrs. Ewan?

A. I don't remember that it did. It followed exactly the instructions as given by Mr. Diament in his letter to me. The letter is in evidence.

10 Q. The codicil was drawn according to the instructions in that letter?

A. Yes.

Q. And that is the letter of August nineteenth, which is in evidence?

A. Yes.

By Mr. Ware:

20 Q. You had no personal interview with Mr. Diament before the drawing of that codicil?

A. No.

Q. You drew it in accordance with the written instructions he sent you by mail?

A. Yes, the written instructions were in the form of a codicil. Mr. Diament had undertaken to draw a codicil and wanted it attached to his will, and the codicil not being in form, I drew a codicil which was properly drawn and sent it down for him to execute.

30

HARRY DIAMENT, SWORN.

Direct examination.

By Mr. Wescott:

Q. Where do you live, Mr. Diament?

A. Cedarville.

Q. In this county?

A. Yes, sir.

Q. And how are you related to the testator of the will in question?

A. I am his son.

Q. When did your father die?

A. Thirtieth of January, I think it was; the last day or the thirtieth.

Q. Well, it was the latter part of January?

A. Yes.

10

Q. Last January?

A. Yes.

Q. Did your father send for you shortly before he died?

A. Seventeenth day of December; telephoned down to me.

Q. Did you go and see him?

A. I went up that morning.

Q. Did you find him confined in his bed?

A. No, he was up and about; he wasn't very well. 20

Q. What, if anything, did he say to you about his will?

A. He told me he made a new will and made everything all right. Wanted me to go around to Furman's and get the lease belonging to the farm. He wanted me to look after that farm for him.

Q. Said he had made a new will and everything was all right? Did he say why he had made a new will?

A. He didn't say. Just called me in there. I started out and he called me back again and wanted me to sit down. 30

Q. Did he say anything about his satisfaction over having made this new will or anything of that sort?

A. Didn't say anything about that.

Q. Did he say anything to you about his past relations with you?

A. Told me he was sorry we ever had any words. That was all he ever said.

Q. You had had some words with your father?

A. I had some words. We never had many words. He always stopped there and always came in there; borrowed my things. We had a few words once after I had had a sale.

Q. He expressed regrets that he ever had any words with you?

10 A. Yes.

Q. Was that before he announced to you that he made a new will?

A. Yes; he sat down there. I started out and he called me back, and I went around to Furman's and asked for the paper and couldn't find it, so he sent me up to the constable's to draw up papers so I could look after the farm. The constable served them on him and I went down there with him. I was up there two or three days after that. He wanted to see about
20 his wheat and things that he had there.

Q. Did your father draw this paper?

A. Yes, sir, and signed it and give it to the constable.

Q. Where is that paper?

A. I don't know; I think he gave it to Mr. Wood. I didn't go in the house.

Q. It was a paper authorizing you to look after his affairs?

A. Yes.

30

No cross-examination.

EDWARD L. DIAMENT, SWORN.

Direct examination.

By Mr. Wescott:

Q. Are you also a son of the late Sheriff Diament?

A. Yes, sir.

Q. Did you see your father shortly before he died?

A. Yes, sir.

10

Q. About when was it, if you recollect?

A. Well, I was down there a few days before he died and then I was down there all afternoon the fourteenth day of November.

Q. Down a few days before he died? Did he send for you?

A. Yes, sir.

Q. What did he say to you about his having made a new will?

A. Told me he had made a new will and he hoped 20
it would be satisfactory to everybody.

Q. When was it he said that?

A. Fourteenth day of November.

Q. Do you recollect any conversation you had with him further than that?

A. Well, we was talking there all the afternoon.

Q. What did you talk about principally?

A. Well, first thing, as soon as I saw him I asked him if he was feeling pretty well, I hadn't seen him for a few days, and he said no, he wasn't, and I said 30
"You don't look very well." He came and met me at the trolley car. Didn't go to the house at all.

Q. Are you a physician?

A. Yes, sir.

Q. What condition was your father in then when you saw him in November?

A. I thought he looked pretty poor. I never saw him look so bad.

Q. Did he say anything about his fear of dying or expecting to die or anything of that sort?

A. He asked me what I thought about him and I told him he didn't look to me as if he was going to get any better and the probability was he would get worse.

Q. What was your judgment at the time?

10 A. I thought he wouldn't live very long if he didn't get better.

Q. What, if anything, did he say as to his reason for having made a new will?

A. I don't know as I can recall about that, but he said he had—I don't just remember about that now.

Q. Did he say anything—

A. He sat there. If you didn't keep talking to him he would go to sleep, anyway. Sat there on the bench.

20 Q. Did he express any regrets about his past relations with you or anybody else?

A. Well, we never had much trouble. I always got along with him pretty well. He said he was sorry we ever had any difficulties, but he said he hoped he had made everything all right.

Q. Where was he when you had this conversation with him?

A. Sitting right out front of Lou Baker's there, right out by the hall at Cedarville, on a bench.

30 Q. It wasn't in your father's home?

A. No, sir, I didn't go to his home at all.

Q. Was anything said about you going to his home?

A. He came and met me at the car. Told me he didn't want to go down to the house, he said they were having trouble down there.

Q. Who was at the house, do you happen to know?

A. I don't know who was at the house. I didn't go there.

Q. Said they were having trouble there; is that correct?

A. That is what he said. Said he didn't want me to go to the house and I didn't go there.

No cross-examination.

10

Mr. Wescott: If your Honor please, we have concluded to follow this plan: To resist the probate of this will under the proof as it now stands. We think that the will is unsusceptible of probation as the proof now stands and the thought is to draw your Honor's mind on the case, and if your Honor agrees with us, of course, that ends the controversy. If the Court does not agree with us, then we will go into the other phase of the case, which is the use of undue and improper influence by Mrs. Ewan over the mind of Mr. Diamant. I am so confident of the rectitude of our legal position that I would like to have the opportunity to review that question, and I am going to suggest to your Honor that you permit us, if you disagree with our view, to review this question, saving us the right subsequently to adduce the proof on the subject of undue influence, which would relate to the making of the original will and the codicils and the disappearance of the last codicil.

20

30

(Counsel argue legal questions.)

The Court: As the proof now stands, I feel that this will ought to be probated. The question, how-

ever, is raised as to the power of the Court to order the probate of the will under the proof, and counsel asks that he may have the opportunity of testing the validity of the probate on appeal to the Prerogative Court before entering into the further question of undue influence. I think that the application on the part of counsel is not unreasonable, in view of all the circumstances in this case, and I will permit that procedure and not require counsel, unless they so
10 see fit, to proceed with the taking of testimony upon that part of the case today. I must, however, under the proof as it now stands, direct the probate of this will.

Mr. Wescott: Reserving to us the question of undue influence.

The Court: Yes, reserving to you the right to enter into the further question at a later time.

20

[ENDORSED]

Filed March 27, 1914.

FRANK F. WALLACE,
Surrogate.

30

**ORDER FOR COMMISSION TO EXAMINE
WITNESS.**

CUMBERLAND COUNTY ORPHANS' COURT.

In the matter of the pro-
bate of the last will and
testament of Charles G.
Diamant, deceased.

ORDER FOR COMMISS-
SION TO EXAMINE
WITNESS. 10

This matter being opened to the Court by James S. Ware, Proctor for proponents, and it appearing that Sarah Vannaman is a material witness in this cause, 20
being one of the witnesses to the original will and also to the first codicil thereto, and that the said Sarah Vannaman resides in the village of Cedarville, in this county, but on account of her physical condition is unable to attend court as a witness;

It is, on this twelfth day of March, A. D. nineteen hundred and fourteen, both sides consenting thereto, ordered that a commission, issued out of and under the seal of this Court, directed to Claude W. Myrose, a Supreme Court Examiner of the State of New Jersey, authorizing him to examine de bene esse the 30
said witness above named on oath or affirmation, in the presence of Proctor for proponents and Proctors for caveators, taking said examination in shorthand, which afterwards is to be reduced to writing by the said Claude W. Myrose, Examiner as aforesaid, and

72 *Commission for Examination of Witness*

returned into this court on or before the twentieth day of March, 1914.

ROYAL P. TULLER,
Judge.

[ENDORSED]

Filed March 20, 1914.

10

FRANK F. WALLACE,
Surrogate.

**COMMISSION FOR EXAMINATION OF
WITNESS.**

CUMBERLAND COUNTY ORPHANS' COURT.

20

In the matter of the pro-
bate of the last will and
testament of Charles G.
Diamant, deceased.

} COMMISSION FOR EX-
AMINATION OF WIT-
NESS.

NEW JERSEY, ss.:

30

The State of New Jersey to Claude W.
[SEAL] Myrose, Supreme Court Examiner of the
State of New Jersey,

GREETING:

Know Ye; that we, in confidence of your prudence
and fidelity, have appointed you, and by these pres-

ents do give unto you full power and authority diligently to examine Sarah Vannaman, of the village of Cedarville, in the County of Cumberland, New Jersey, in the presence of James S. Ware, Proctor for the proponents, and of Rex A. Donnelly, Proctor for the caveators, on her oath or affirmation first taken before you, touching her knowledge of the examination of a certain writing purporting to the last will and testament of Charles G. Diament, deceased, and of a codicil thereto, causing same to be taken in shorthand, signature of the witness being waived by all parties, which examination is afterwards to be typed, and when so taken and typed you are to send same to the Orphans' Court of the County of Cumberland on or before the twentieth day of March, 1914. 10

Witness, Royal P. Tuller, Judge of our said Cumberland County Orphans' Court, this twelfth day of March, in the year of our Lord one thousand nine hundred and fourteen. 20

ROYAL P. TULLER,
Judge.

[ENDORSED]

Filed March 20, 1914.

FRANK F. WALLACE,
Surrogate. 30

DEPOSITIONS.

CUMBERLAND COUNTY ORPHANS' COURT.

| | | | |
|----|-------------------------------------------------------------------------|---|----------------------------|
| 10 | In the matter of the probate of the alleged will of Charles G. Diament. | } | ON CAVEAT. DEPOSITIONS. |
|----|-------------------------------------------------------------------------|---|----------------------------|

Depositions taken before Claude W. Myrose, a Supreme Court Examiner of the State of New Jersey, at the home of Benjamin T. Powell, Esq., Cedarville, Cumberland County, New Jersey, on Thursday, 20 the twelfth day of March, 1914, at three o'clock in the afternoon, by agreement of counsel.

Present: James S. Ware, Esq., representing the Executors. Leroy W. Loder, Esq., representing Mrs. Eva M. Ewan, legatee. Rex Donnelly, Esq., representing the Caveators.

30

It is agreed that the testimony shall be taken stenographically, reduced to typewriting, and that the signature of the witness shall be waived thereto.

SARAH B. VANNAMAN, a witness produced on the part of the executors, being first duly sworn according to law, testified as follows:

Direct examination.

By Mr. Ware:

Q. Where do you reside Mrs. Vannaman?

A. Right here in Cedarville.

10

Q. What is your age?

A. Seventy-four.

Q. You live with Mr. Powell?

A. I do.

Q. He is your son-in-law?

A. Yes, sir.

Q. Were you acquainted in his lifetime with Charles G. Diament?

A. Well, a little.

Q. You knew him when you saw him?

20

A. I knew him when I saw him.

Q. Were you ever called upon by him to be a witness to any will or codicil to a will?

A. To his will I was.

Q. Can you say who drew the will?

A. Mr. Powell.

Q. Where was Mr. Diament when he executed this will?

A. Right here in this room.

30

(Witness is shown the paper writing produced in court, purporting to be the last will of Charles G. Diament, deceased, bearing date the twelfth day of November, 1909, and is asked):

Q. Will you look at that and at the signature of

Mr. Diament and at the attestation clause and say whether or not that is the will which you were called upon to witness?

A. Yes, sir.

Q. Can you read this writing well?

A. Well, no, I can't very well.

Q. Can you read it well enough to read this clause out loud?

A. No, I don't think I can.

10 Q. That is your signature, is it?

A. Yes, sir.

Q. Is that the signature of Mr. Powell?

A. Yes, sir.

Q. Did you see Mr. Diament sign this?

A. I did.

Q. Can you say whether or not it was on the day that this was dated?

A. Well, I don't know that, couldn't say.

20 Q. Now, this attestation clause reads, "Signed, published and declared by the said Charles G. Diament to be his last will and testament in the presence of us, who were present at the same time and subscribed our names as witnesses hereto in the presence of the testator and in the presence of each other, at the request of the testator." Will you say whether or not that is a correct statement of what occurred at the time that this was signed?

A. I think so.

30 Q. Were you in the room when Mr. Diament signed his name?

A. Yes, sir.

Q. Can you say whether or not he signed before you and Mr. Powell signed?

A. Yes.

Q. He did?

A. He did.

Q. After he signed the paper he signed, was there any declaration made by him or any question asked which he answered?

A. I don't know.

Q. What was said relative to this being a will, if anything?

A. I don't know what he said.

Q. Do you know whether or not Mr. Powell asked him if this was his last will?

10

(Objected to as leading.)

A. Yes, sir.

Q. You heard that?

A. Yes, sir.

Q. What did Mr. Diament say to that?

A. Why, I don't remember what he said.

Q. Did he say it was not?

A. No, he didn't say it wasn't, I am sure as to that.

20

Q. Did you hear Mr. Powell ask him if he wanted you and Mr. Powell to be witnesses?

(Objected to as leading.)

Q. You remember that, do you?

A. I remember that.

Q. What did he say to that?

A. I think he said, "I do."

Q. After he signed which signed first of you and Mr. Powell?

30

A. That I don't know.

Q. Your signature appears on the paper ahead of Mr. Powell's. You don't remember?

A. I don't remember which signed first.

Q. Did you see Mr. Powell sign?

A. I did.

Q. Did Mr. Powell see you sign?

A. Yes, sir.

Q. Now, Mrs. Vannaman, afterwards were you called upon to witness a codicil to this same will?

A. No, sir.

Q. I will show you the codicil I speak of and will ask you if that is your signature there.

A. Yes, sir, that is my signature.

10 Q. That is not the same that you were just shown before, the will. That is the one to the will.

A. Yes.

Q. Now, this is the codicil. Do you have any recollection of being a witness to this codicil? This is an addition to the will.

A. Why, I don't remember that I was.

Q. You don't remember that you were?

A. No.

Q. I will show you the codicil and your signature.

20 You see your signature there?

A. Yes, sir.

Q. That is your signature?

A. Yes, sir.

Q. Are you acquainted with Mr. Powell's signature?

A. Yes, sir.

Q. That is his signature?

A. It is.

30 Q. Are you sufficiently acquainted with Mr. Diament's signature to identify it?

(Objected to.)

A. No, I don't think so.

Q. You are not sufficiently familiar with Mr. Diament's handwriting to identify his signature?

A. No.

Q. Now, this which you have signed says, "Signed, published and declared by the said Charles G. Diament as and for a codicil to his last will and testament and to be taken as a part thereof, in the presence of us, who were present at the same time and subscribed our names as witnesses in the presence of the said Charles G. Diament and in the presence of each other, at the request of the said Charles G. Diament." Your signature appears 10
signed to that. Do you now have any recollection?

A. Well, I don't know.

Q. Have you any doubt that you signed that?

A. No, I haven't a bit of doubt that I signed it.

Q. But you simply don't recall the circumstances?

A. No, I don't recall the circumstances, but that is my signature, I know.

Q. And you know that to be Mr. Powell's signature?

A. Yes, sir. 20

Q. Now, try to think whether or not you were—this is on the first day of February, 1911. The original will was the twelfth day of November, 1909. This is about a year and three months after the original will was drawn. Now, just try and think and see whether or not you can recall the execution of that.

A. Well, I remember Mr. Diament being here twice.

Q. Do you remember signing something for him twice? 30

A. Yes. Yes, I remember signing something for him twice.

Q. Do you remember whether the second paper you signed was or was not a part of his will or an addition to his will?

A. No, I don't remember.

Q. But you do identify that as your signature?

A. I do.

Q. Have you any reason to doubt the statement made in this clause as being correct?

Mr. Donnelly: That is objected to for the reason that there is no testimony that that clause was ever read to the witness; no testimony from this witness.

10 (Question repeated.)

Q. You have signed it?

A. Yes.

Q. Have you any reason to doubt that the statement you signed your name to is correct?

A. No.

Q. Is or is not your memory pretty good?

A. Yes, my memory is pretty good, I think.

Q. What is your age?

20 A. Seventy-four.

Q. You do not recall the circumstances surrounding the execution of this codicil?

Mr. Donnelly: That is objected to. The witness has already answered it three times.

A. Well, as I said before, I knew of him being here twice and I signed the paper, but I don't know any more.

30 Q. You don't recall the circumstances of this the second time?

A. No.

Cross-examination.

By Mr. Donnelly:

Q. Mrs. Vannaman, you say that the Sheriff was here twice?

A. Yes.

Q. That is, you have seen him here twice?

A. Yes.

A. Of course, he may have been here more times than that that you don't know of?

A. Oh, yes.

Q. What was the first time he was here, do you remember that?

A. No.

Q. Do you remember what time of the year it was? 10

A. I do not.

Q. Don't remember whether it was the summer, fall or winter?

A. No.

Q. Do you know what day of the week it was?

A. No, I couldn't say.

Q. Do you know what time of the day it was? Now, referring to the first time, Mrs. Vannaman, not the second time.

A. No.

20

Q. You cannot recall what time of day it was? Was it in the day time, morning, afternoon, evening or when?

A. I couldn't say.

Q. You say you were called in to witness this paper, this first paper, which you remember about?

A. Yes.

Q. You don't recall what time of day that was?

A. I do not.

Q. Who called you in, do you remember?

30

A. Mr. Powell.

Q. Do you remember where you were when he called you?

A. No, I don't know what room I was in; but I was here in the house somewhere, I suppose, of course.

Q. Had Mr. Powell said anything to you about Mr. Diament coming down?

A. That I don't remember, whether he did or not. I suppose he did, though.

Q. You suppose so, but you have no recollection about it?

A. No.

Q. Where did you sign your name to this will? Where were you when you signed it?

10 A. Right there on that table.

Q. When you came here in this room who was in here?

A. Mr. Powell and Mr. Diament.

Q. Anybody else?

A. No.

Q. What was said when you came in the room?

A. I said, whatever time it was, evening or morning or afternoon, I said, "Good afternoon, Mr. Diament," or "Good morning," whatever it was, I don't
20 remember.

Q. Then what was said, do you remember that?

A. No, I don't remember what was said next.

Q. Do you remember whether Mr. Diament was sitting or standing or where he was?

A. On that side of the table.

Q. Where was Mr. Powell?

A. He stood right there where the gentleman sits.

Q. When you first got in the room what was the first thing they asked you to do? Do you remember
30 that?

A. No, I don't know that I do.

Q. Do you remember what Mr. Powell did after you got in the room?

A. After I came in the room?

Q. Yes, after you came in the room.

A. No, I don't know that, either.

Q. Do you remember what Mr. Diament did after you came in the room?

A. No.

Q. Do you remember how long you were in the room, Mrs. Vannaman?

A. Just long enough to sign my name, witness the will.

Q. Then where did you go, right out?

A. I went out of the room.

Q. Had Mr. Powell signed before you had, or 10
don't you remember?

A. I don't remember which signed first.

Q. Do you remember whether the Sheriff had signed or not?

A. He signed first.

Q. He had signed first? What did he say when he signed it, anything?

A. I don't remember him saying anything.

Q. After he signed it did Mr. Powell say anything? 20

A. Yes, sir, I think so.

Q. What do you think he said?

A. Well, I don't know, either, whether he signed first or I.

Q. Mr. Powell?

A. Yes; but Mr. Diament signed his name first.

Q. Mr. Diament signed his name before you did?

A. Yes.

Q. Now, the last part of this, which reads, 30
"Signed, published and declared by the said Charles
G. Diament to be his last will and testament in the
presence of us, who were present at the same time
and subscribed our names as witnesses hereto in the
presence of the testator and in the presence of each
other, at the request of the testator," that is right
before your signature; was that read over to you be-
fore you signed this?

A. I don't think so; I don't remember that it was.

Q. How long do you suppose you were in the room altogether, Mrs. Vannaman?

A. Why, I don't suppose I was in the room five minutes.

Q. When this will was signed was it on this table here?

A. Yes, sir.

Q. Then where were you, standing or sitting?

10 A. I was sitting down.

Q. How far away from the table, Mrs. Vannaman?

A. Right here in this chair.

Q. Was your eyesight good at that time?

A. Yes, it was as good as it is now.

Q. Could you see the Sheriff sign his name?

A. Yes, sir.

Q. Then you were only three or four feet away from the table when he signed?

A. Just about where I am now.

20 Q. That would make about three or four feet, wouldn't it?

A. I am.

Q. Probably a foot more than that. Now, Mrs. Vannaman, in answer to Mr. Ware's questions in regard to this codicil, you say you have no recollection of signing that, but you believe it to be your signature?

A. Yes, sir.

Q. This writing here?

30 A. Yes, sir.

Q. Are you sure that you signed two different papers for the Sheriff?

A. Yes, sir.

Q. Or that the Sheriff was down here twice?

A. Yes, sir.

Q. How many times was the Sheriff down here, do you know that?

A. Twice.

Q. Wasn't he down here twice before the will was executed?

A. I don't know anything about that.

Q. But you do remember him being down here twice?

A. Yes.

Q. Well, how long has it been since he was down here the second time?

A. I don't know.

10

Q. You don't know that? You have no recollection of signing this codicil at all, you say, although you say that is your signature?

A. Well, I suppose I signed it the last time he was here.

Q. But you have no recollection of it at all?

A. No.

Q. Nor of any of the circumstances?

A. No, I don't know that I do.

20

By Mr. Ware:

Q. You do know that he was here twice, Mrs. Vannaman?

A. Yes, sir.

Q. And that you signed for him twice?

A. Yes, sir.

By Mr. Donnelly:

30

Q. Do you know, Mrs. Vannaman, what kind of paper you signed for him twice?

A. No, I do not.

Q. You don't know whether one was the will and the other the codicil or not?

A. I know one was the will.

Q. But you don't know whether the second paper was the codicil or whether it was some other legal paper?

A. No, for I don't know anything about it only I know I signed it, I know that is my signature.

Mr. Ware: Pointing to the signature to the witness clause of the codicil.

10

I certify that the foregoing is a true and full transcript of the deposition of Mrs. Sarah B. Vannaman taken before me on the twelfth of March, 1914.

CLAUDE W. MYROSE,
Supreme Court Examiner.

20

[ENDORSED]

Filed March 20, 1914.

FRANK F. WALLACE,
Surrogate.

30

DECREE FOR PROBATE.

CUMBERLAND COUNTY ORPHANS' COURT.

In the matter of the probate of the last will and testament of Charles G. Diament, deceased. } DECREE FOR PROBATE. 10

This matter being opened to the Court by James S. Ware, Proctor for proponents, and LeRoy W. Loder, Proctor for Eva M. Ewan, and it appearing that all parties in interest have been duly cited, and the Court having taken testimony, and having heard the allegations of the parties herein upon the question of the due execution of the will and codicils thereto, and being satisfied upon the proof that the instrument in writing offered by proponents for probate as and for the last will and testament of Charles G. Diament, deceased, and the codicil thereto bearing date the first day of February, nineteen hundred and eleven, offered by proponents as a codicil to said last will and testament of Charles G. Diament, deceased, and the codicil thereto bearing date the nineteenth day of December, nineteen hundred and twelve, offered by proponents as a codicil to said last will and testament of Charles G. Diament, deceased, were each and all of them executed by said Charles G. Diament as and for his last will and testament, and as and for codicils thereto. 20 30

And John W. Wescott and Rex. A. Donnelly, Proc-

tors for the caveators, having moved that probate be denied the will and codicils above mentioned for the reason that a third codicil, bearing date the latter part of the month of August, or the fore part of the month of September, nineteen hundred and thirteen, was duly executed by the said Charles G. Diament, by which said codicil the interests of said Eva M. Ewan in the estate of the deceased are revoked, and for the further reason that the codicil last afore-

10 said, according to the evidence taken, was not destroyed, or if destroyed, did not revive the will and codicils aforesaid; and the Court being of the opinion that the legal question arising upon proof was of importance and should be decided before the evidence of undue influence in the creation of said last will and codicils should be taken;

It is thereupon, on this twenty-fourth day of March, nineteen hundred and fourteen, on motion of Proctors for proponents and for Mrs. Eva M. Ewan,

20 ordered, adjudged and decreed that the said last will and testament, and the codicils thereto, bearing dates respectively the first day of February, 1911, and the 19th day of December, 1912, be and the same are hereby established and admitted to probate as the last will and testament, and as codicils thereto, of the said Charles G. Diament, deceased.

It is further ordered that probate of said will and codicils and proceedings thereunder, excepting as far as the preservation of the estate transmitted by

30 said will and codicils is concerned, be stayed until further order of this Court, and that caveators be permitted to have the legal question, arising upon the proof as it now stands, settled by the Prerogative Court;

And it is further ordered that the right of the caveators to produce other proof in the contest of

said will and codicils on the ground of undue influence is reserved, and if the legal question arising upon the proof as it now stands is decided adversely to the caveators, then the caveators will be permitted to offer their proof in the line of undue influence against the validity of said will and codicils.

ROYAL P. TULLER,
Judge.

10

[ENDORSED]

Filed March 24, 1914.

FRANK F. WALLACE.
Surrogate.

20

APPEAL.

CUMBERLAND COUNTY ORPHANS' COURT.

In the matter of the estate
of Charles G. Diament,
deceased. }

APPEAL.

30

Harry Diament and Edward L. Diament, sons of Charles G. Diament, deceased, hereby appeal to the New Jersey Prerogative Court from the decree entered herein on the twenty-fourth day of March,

nineteen hundred and fourteen and from each and every part thereof.

Dated April 11th, 1914.

REX A. DONNELLY,
Proctor for and
JOHN W. WESCOTT.
Counsel with Harry Diament
and Edward L. Diament.

10

—————
[ENDORSED]

Filed April 11, 1914.

FRANK F. WALLACE,
Surrogate.

20

—————
CERTIFICATION.

**CUMBERLAND COUNTY SURROGATE'S
COURT.**

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

30 I, FRANK F. WALLACE, Surrogate and Judge of the Surrogate's Court of the said County of Cumberland, in said State, do hereby certify that I have compared the annexed copy of the Caveats, Will, Codicils, Petition for Probate with Oath of Executor and Executrix, Order and Commission to Examine Witness, Testimony, Deposition with Certificate, Decree for Probate and Appeal, in the Matter of the

Probate of the alleged last Will and Testament of Charles G. Diament, Deceased, as taken from and compared with the originals now remaining in my office, and have found the same to be a true and correct transcript thereof.

In Witness Whereof I have hereunto set my hand and affixed my official seal this twenty-first of April, A. D., nineteen hundred and fourteen.

[SEAL]

FRANK F. WALLACE,
Surrogate and Judge of the 10
Surrogate's Court of the
County of Cumberland,
New Jersey.

[ENDORSED]

Filed April 24, 1914.

DAVID S. CRATER, 20
Register.

30

STIPULATION.

NEW JERSEY PREROGATIVE COURT.

| | | | |
|----|--------------------------------------------------------------------|---|-------------------------------------------------------------------|
| 10 | In the matter of the estate of Charles G. Diamant, deceased. | } | ON APPEAL FROM CUMBERLAND OR- PHANS' COURT. STIPULATION. |
|----|--------------------------------------------------------------------|---|-------------------------------------------------------------------|

20 It is stipulated and agreed by and between John W. Wescott and Rex A. Donnelly, Proctors for Appellants and James S. Ware and LeRoy Loder, Proctors for Respondents, in above stated matter as follows:

1. That citations were duly issued directed to all the persons named as devisees and legatees in the alleged will and codicils of Charles G. Diamant, deceased, and that all persons concerned therein were duly in court either by service of such citations or by acknowledgment of service thereof.
- 30 2. That all legatees and devisees in said will and codicils mentioned, who were minors were duly in court by guardian ad litem duly appointed.
3. That all adjournments in said cause were duly made and entered by proper orders.

4. That the above mentioned citations, petitions and orders for the appointment of said guardian ad litem and the said orders for adjournments need not be printed as part of the State of the Case on appeal from the decree of the Cumberland Orphans' Court.

Dated April 20, 1914.

REX A. DONNELLY,
JOHN W. WESCOTT,
Proctors of Appellants.
LEROY LODER,
JAS. S. WARE,
Proctors of Respondents.

10

[ENDORSED]

Filed April 24, 1914.

DAVID S. CRATER,
Register.

20

30

PETITION OF APPEAL.

NEW JERSEY PREROGATIVE COURT.

10 In the matter of the estate
of Charles G. Diament,
deceased. } PETITION OF APPEAL.

*To the Ordinary of the State of New Jersey and
Judge of the Prerogative Court:*

20 The petition of Harry Diament and Edward L.
Diament, the appellants, respectfully shows, that
your petitioners find themselves aggrieved by a de-
cree made by the Orphans' Court of the County of
Cumberland, and entered therein on the twenty-
fourth day of March, nineteen hundred and fourteen,
upon application of The Cumberland Trust Company
of Bridgeton, N. J., and Mary L. D. Cook for probate
of a certain writing purporting to be the last will
and testament of Charles G. Diament, deceased, and
two other writings (1) dated the first day of Feb-
ruary, nineteen hundred and eleven (2) dated the
30 nineteenth day of December, nineteen hundred and
twelve, purporting to be codicils to said last will and
testament of said deceased, in that said decree es-
tablished said first writing as the last will and testa-
ment of the said deceased and the two latter writings
as codicils to the said last will and testament of said
deceased and admitted the same to probate as such.

And your petitioners appeal from that part of the

decree aforesaid, and the several items thereof that are herein specified, upon the ground that said decree is erroneous for that the Orphans' Court of the County of Cumberland, aforesaid, by its decree aforesaid, should have refused to admit said writings to probate without first establishing and admitting to probate as a codicil to said last will and testament of said decedent, and the two codicils thereto attached, a third codicil executed according to law by said decedent and dated the latter part of August or the fore part of September, nineteen hundred and thirteen. 10

Your petitioners, therefore pray that the said decree of the Orphans' Court of the County of Cumberland aforesaid, may be in the particulars aforesaid reversed, set aside and for nothing holden, and that your petitioners may have such further and other relief in the premises as may be just.

REX A. DONNELLY,
Proctor of Appellants. 20

I conceive there is just cause of appeal in the above stated matter.

JOHN W. WESCOTT,
of Counsel with Appellant.

[ENDORSED]

Filed April 21, 1914. 30

DAVID S. CRATER,
Register.

Served upon Proctors of Respondents and Guardian ad litem April 22, 1914.

ANSWER OF MARY L. D. COOK AND CUMBERLAND TRUST CO.

NEW JERSEY PREROGATIVE COURT.

10

In the matter of the estate
of Charles G. Diament,
deceased.

ON APPEAL FROM
CUMBERLAND
COUNTY ORPHANS'
COURT.

20

Answer of Mary L. D. Cook and the Cumberland Trust Company of Bridgeton, two of the respondents to the petition of appeal of Harry Diament and Edward L. Diament, appellants:

These respondents admit that an Order or Decree of the date, tenure and effect in said petition of appeal set forth was made by the Orphans' Court of the County of Cumberland, and these respondents are advised, believe and submit that said Order or Decree is just and equitable, and therefore pray that

30 the said Order or Decree may be affirmed by this Court, with costs to be adjudged to these respondents.

JAMES S. WARE,
*Proctor for Respondents Mary
L. D. Cook and The Cumberland
Trust Company of
Bridgeton.*

[ENDORSED]

Filed May 4, 1914.

DAVID S. CRATER,
Register.

ANSWER OF MARY EVA EWAN.

10

NEW JERSEY PREROGATIVE COURT.

In the matter of the estate
of Charles G. Diament,
deceased.

ON APPEAL FROM
CUMBERLAND
COUNTY ORPHANS'
COURT.

20

Answer of Mary Eva Ewan, one of the respondents to the petition or appeal of Harry Diament and Edward L. Diament, the appellants:

30

This respondent admits that an Order or Decree of the date, tenure and effect in said petition of appeal set forth was made by the Orphans' Court of the County of Cumberland, and this respondent is advised, believes and submits that said Order or Decree is just and equitable, and therefore prays that

the said Order or Decree may be affirmed by this Court, with costs to be adjudged to this respondent.

LEROY W. LODER,
*Proctor for Respondent Mary
Eva Ewan.*

[ENDORSED]

10

Filed May 7, 1914.

DAVID S. CRATER,
Register.

ANSWER OF FRANK F. WALLACE.

20

NEW JERSEY PREROGATIVE COURT.

In the matter of the estate
of Charles G. Diament,
deceased.

ON APPEAL FROM
CUMBERLAND
COUNTY ORPHANS'
COURT.

30

Answer of Frank F. Wallace, guardian ad litem
for Helen Diament, Mary Diament, Charles G. Cook

and Almeda L. Cook, infants under the age of fourteen years, to the petition of appeal of Harry Diament and Edward L. Diament, appellants:

This respondent admits on behalf of his said wards, and of each of them, that an Order or Decree of the date, tenure and effect in said petition of appeal set forth, was made by the Orphans' Court of the County of Cumberland, and this respondent is advised, believes and submits that said Order or Decree is just and equitable, and therefore prays that the said Order or Decree may be affirmed by this Court, with such costs as may be adjudged to this respondent. 10

FRANK F. WALLACE,
*Guardian ad litem for Helen
Diament, Mary Diament,
Charles G. Cook and Al-
meda L. Cook.*

Per Se

20

[ENDORSED]

Filed May 11, 1914.

DAVID S. CRATER,
Register.

30

STIPULATION.

NEW JERSEY PREROGATIVE COURT.

| | | | |
|----|-------------------------------------------------------------------------------------------------------------------------------------------------|---|--------------------------------------------------------------------------------------------------------------------------------------------------|
| 10 | HARRY DIAMENT, et al., <i>Appellants,</i> vs. THE CUMBERLAND TRUST COMPANY OF BRIDGETON, et als., <i>Respondents.</i> | } | In the Matter of the Estate of Charles G. Diament, de- ceased. ON APPEAL FROM CUMBERLAND OR- PHANS' COURT. STIPULATION. |
|----|-------------------------------------------------------------------------------------------------------------------------------------------------|---|--------------------------------------------------------------------------------------------------------------------------------------------------|

20

It is hereby stipulated and agreed by and between John W. Wescott and Rex A. Donnelly, proctors for appellants, and James S. Ware and LeRoy W. Loder, proctors for respondents, and Frank F. Wallace, guardian *ad litem* for Helen Diament, Mary Diament, Charles G. Cook and Almeda Cook, respondent

30 *per se*, in the above matter as follows:

1. That the codicil to the alleged will of the said decedent dated the last part of August or the first part of September, A. D. 1913, and referred to in the argument in this court as the third codicil, was as a matter of fact duly executed by said decedent in full

compliance with the law of this state in every respect.

Dated Dec. 11th, 1914.

JOHN W. WESCOTT,
REX A. DONNELLY,
Proctors of Appellants.

JAS. S. WARE,
For Executors.

LEROY W. LODER,
For Mary E. Ewan, 10
Proctors for Respondents.

FRANK F. WALLACE,
*Guardian Ad Litem for Helen
Diament, Mary Diament,
Charles G. Cook and Almeda
L. Cook.*

Respondent Per Se.

20

JOHN S. WARE, SWORN.

Examination by Mr. Ware.

Q. Where do you reside?

A. Bridgeton.

Q. Are you an officer of the Cumberland Trust Company?

A. Secretary and treasurer.

Q. Are you also assistant treasurer of the State? 30

A. Deputy treasurer, yes, sir.

Q. You were a witness when this cause was heard in the Cumberland County Orphans' Court, Mr. Ware?

A. Yes.

Q. You recall that it was there testified that de-

cedent had deposited with the Cumberland Trust Company a will and two codicils, the second codicil was drawn, as I recollect, by you?

A. Yes.

Q. And that there was a third codicil drawn by you?

A. Yes.

Q. Which was afterwards taken away from your possession?

10

The Vice-Chancellor: Are you right that he drew or superintended the execution of the third codicil?

A. Yes.

Q. In August or September of nineteen hundred and thirteen?

A. Yes.

20 Q. Is it within your knowledge what became of the original will and two codicils, first and second codicils, at the time the third codicil was taken from your possession?

A. They remained continuously with Cumberland Trust Company until Mr. Diament's death.

Q. Was it then taken away from the possession of the Cumberland Trust Company?

A. No.

30 The Vice-Chancellor: They were there with the Cumberland Trust Company by reason of the Trust Company having been made custodian by the testator?

A. Yes.

The Vice-Chancellor: And the same is true of the third codicil?

A. Yes.

Q. After the taking away of the third codicil, and before the death, of course, of the decedent, was there any conversation had by or with the decedent having reference to this will and codicils in your possession?

A. Mr. Diamant, about—shortly before his death —

(Objection by Mr. Donnelly. Overruled.) 10

A. Shortly before his death he called me over the telephone telling me that one of the items mentioned in his will had been turned into cash and he wished to make a specific disposition of that cash.

The Vice-Chancellor: I recall that now, and you were delayed in going to him to make the change and he died while you were on your way there, or you heard of his death while on your way there. 20

Q. Did he say in what manner he wanted to make the change, whether by a new will or some other manner?

A. He asked me to come down and arrange to have the specific bequest made and he understood that it could be done by means of a codicil.

Cross-examination.

By Mr. Donnelly: 30

Q. Mr. Ware, can you give the specific day or somewhere near the specific day when the will and the first and second codicils were left at your trust company?

A. I cannot give the specific date, I think it was the very day of the drawing of the second codicil.

Q. You think it was the very day of the drawing of the second codicil that he brought the will and codicils to the trust company?

A. I cannot testify certain to that.

Q. That is your recollection?

A. That is my thought; yes.

10 Q. Mr. Ware, did he leave these papers with you personally or with you as an officer of the trust company?

A. He gave them to me in the office of the trust company as an officer of the trust company.

CONCLUSIONS.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
CUMBERLAND OR- 10
PHANS' COURT.
CONCLUSIONS.

REX A. DONNELLY, and JOHN W. WESCOTT, Proctors
for Appellants.

JAMES S. WARE, Proctor for certain Respondents.

LEROY W. LODER, Proctor for Eva M. Ewan, Re- 20
spondent.

LEAMING, Vice Ordinary:

This is an appeal from a decree of the Orphans'
Court of Cumberland County admitting to probate
three certain instruments in writing; the first as the
last will and testament of Charles G. Diament, de- 30
ceased, and the others as codicils thereto. The will
bears date November 12, 1902, the first codicil Feb-
ruary 1st, 1911, the second codicil December 19, 1912.

A third codicil was executed by testator in the lat-
ter part of August or the fore part of September,
1913, and its provisions and proper execution have

been adequately established by the evidence taken before the Orphans' Court, but the instrument has not been found and was refused probate as a lost will.

10 The present appeal is based on the contentions: first, that the third codicil should have been admitted to probate as a lost codicil, and, second, that assuming the evidence adequate to support the finding of the Orphans' Court that it was destroyed by testator *animo revocandi*, its execution and subsequent destruction were operative to revoke the former will and two codicils.

20 The conclusion of the Orphans' Court to the effect that testator destroyed the third codicil *animo revocandi* is clearly supported by the evidence. After its execution it was left with John S. Ware, as an officer of the Cumberland Trust Company, for safe keeping by that institution; thereafter testator desired its return to him and one Charles S. Ware, at testator's request, procured it from the Trust Company and delivered it to testator; testator then asked Charles S. Ware "the best way to annul it," and Mr. Ware replied "to destroy it." No justification can be found for doubting the truth of the testimony of Charles S. Ware, touching these matters. It thus appears that this third codicil was recalled by testator from its custodian and as a part of that transaction testator was informed, in response to his inquiry, that its destruction was an adequate means of cancellation. The testimony of Mrs. Ewan touching its destruction is subject to question by reason of her vital interest in the controversy; her testimony is to the effect that she saw Mr. Ware hand a paper to testator and that testator then came to the house and burned a paper in the kitchen stove. That testimony cannot, however, be wholly disregarded.

30

The well recognized rule in cases of this nature is that when a will is proved to have been executed, and it cannot be found at testator's death, if the will remained in his custody, or after its execution he had ready access to it, the fact that it cannot be found after his death raises a presumption that he had destroyed it, *animo revocandi*. 30 *Am. & Eng. Enc. of Law* (2nd Ed.) 635; *Jarman on Wills*, No. 133; see also *In Re Cunnion*, 201 N. Y. 123. This rule has been expressly adopted by this Court. *In re Willett's Estate* (Reed, Vice Ordinary), 46 *At. Rep.* 519. This presumption may be rebutted, but there is in this case no circumstance sufficient to rebut it; the testimony of testator's two sons touching conversations with their father is clearly insufficient for that purpose and the testimony already referred to substantially supports the presumption.

The remaining question is whether the destruction of the third codicil by testator with intention to revoke its provisions is operative to deny probate to the will and two codicils already referred to.

At common law the revocation of a subsequent will which revoked, either expressly or impliedly, an earlier will, left the earlier will unimpaired. The reason for the rule appears to have been that the revoking will was itself revocable and did not become final or absolute until the death of the testator. In the English ecclesiastical courts, however, the intent of the testator in this respect was a subject of inquiry. In this court Chancellor Runyon, sitting as Ordinary, in the case of *Randall vs. Beatty*, 31 *N. J. Eq.* (4 *Stew.*) 643, defined the rule in this State as follows: "The true rule on the subject is, that where one will is revoked by another, the revocation is testamentary, and the revocation of the latter will revives the former." In that case, however, the

learned Ordinary also found evidence of an intention on the part of the testatrix that the earlier will should remain her will. That evidence was found in the circumstance that testatrix destroyed the later will and retained the earlier one until her decease. In a later case in this court, *Moore's Case*, 72 N. J. Eq. (2 Buch.) 371, Chancellor Magie, sitting as Ordinary, made inquiry into the circumstances of the case to ascertain the intention of testator in revoking the later will, and discovered satisfactory evidence of an intent that the earlier will should not stand as the will of the deceased. In that case the evidence disclosed that the earlier will had not been retained by testator in a manner indicating a purpose to preserve it, but testator "had practically thrown the paper (the earlier will) away," and it had also been partially burned and rendered in part incapable of being read; furthermore, there was a provision in the earlier will for the wife of testator, and she was dead at the time the later will was destroyed. These several circumstances were held to adequately disclose that when the later will was revoked testator did not intend that the earlier instrument should be his will. As already suggested, the common law regarded the revocation of an earlier will by a later one as a testamentary act and deduced therefrom the rule that it was a necessary conclusion of law that when the later will was revoked the former will would stand, and no proofs were admitted to overthrow that conclusion. But where the testator has destroyed, or has undertaken to physically destroy the former will, as in the Moore case, the situation presented is obviously outside the field of operation of the common law rule; in that aspect the Moore case cannot be properly regarded as a repudiation of the common law rule as stated in

Randall vs. Beatty, supra; but in considering the circumstance of the wife's death prior to the revocation of the later will as a circumstance tending to disclose intent, the Moore case appears to have made the ecclesiastical rule the basis of the decision to that extent.

In the present case the will of testator, dated November 12, 1909, makes detailed disposition of his entire estate. By the eighth, ninth and tenth it of that will a life estate in certain real and personal property is given to Mrs. Eva M. Ewan, who was housekeeper for testator, on condition that she remained with him until his decease; at her decease the property was given to testator's heirs at law. The will also contains a residuary clause in favor of the heirs at law of testator. Neither the first nor second codicil were designed to wholly revoke the will; the provisions of each are modifications of specific portions of the will and are designed to stand with the will as specific modifications thereof. The third codicil, which was destroyed, was of like nature; it revoked the provisions of the will which were in favor of the housekeeper, but in no way revoked or superseded the will except as to the specific items referred to in the codicil. The situation thus presented prior to the destruction of the third codicil was that of an existing will making detailed disposition of all of testator's estate with three successive codicils each making specific modifications of the will and each designed to confirm the will as modified by the codicils. It may be that the effect of the destruction of a codicil, so far as the specific provisions of the will to which the codicil relates are concerned, cannot be logically distinguished in principle from the destruction of a subsequent will which expressly or by necessary implication wholly re-

- vokes a former will; but when a codicil is regarded as a mere modifying instrument intended only to modify or change specific provisions of a will and designed to stand with the will as a mere amendment to or modification of its provisions, it is difficult to conceive the destruction of the codicil and retention of the will by the testator as other than the adoption of a convenient method of withdrawing or nulifying the amendment, even though no force be given to
- 10 the underlying principle of the common law rule that a provision for revocation, express or implied, is purely testamentary in its inherent nature. In executing such a codicil the intention of testator is that the will and codicil shall be read together; in destroying such a codicil and retaining the will the intention most apparent would seem to be that the will should be read without the codicil. The will here in question has never been revoked, except in so far as the destroyed codicil may be held to have
- 20 revoked the specific provisions of the will to which that codicil was directed. The will must accordingly be admitted to probate, while the destroyed codicil cannot be admitted to probate because it was destroyed by testator *animo revocandi*; it follows that if it be held that the destroyed codicil was effective in revoking the provisions of the will to which it referred, notwithstanding its revocation by testator, the same effect will be given to the destroyed codicil as though it had not been revoked; such result would attribute no intelligent purpose to the
- 30 act of destruction.

But should inquiry be made into the intent of testator the evidence in this case adequately establishes that intent. The will and the three successive codicils were deposited with a trust company by testator for safe keeping. Subsequently testator with-

drew from the depository the last codicil and destroyed it and permitted the will and two preceding codicils to remain with the depository until his death. That circumstance appears to be uniformly treated as satisfactory evidence of an intention upon the part of testator to revive a former will which has been preserved by him in that manner. The evidence also disclosed that shortly before the death of testator he requested the officer of the trust company, already referred to, who had drawn the second and third codicils, to draw another codicil to make specific disposition of some cash which had come to the hands of testator by reason of a security referred to in the original will having been turned into cash. This proposed codicil was not executed by reason of the death of testator on the very day it was to be drawn. 10

I will advise a decree affirming the decree of the Orphans' Court.

Submitted: January 13, 1915. 20

Determined: January 27, 1915.

DECREE.

NEW JERSEY PREROGATIVE COURT.

10 In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
CUMBERLAND OR-
PHANS' COURT.

DECREE.

An appeal having been taken in the above-stated cause from an order of the Cumberland Orphans' Court, bearing date the twenty-fourth day of March, 1914, admitting to probate the last will and testament, and two codicils thereto, of Charles G. Diament, deceased, and said appeal coming on to be heard before Honorable Edmund B. Leaming, Vice Ordinary of the New Jersey Prerogative Court, at Chancery Chambers in the City of Camden, and having been duly argued by the Proctors for the appellants and for the respondents; and the evidence and proofs having been read; the Court having duly considered said evidence, proofs and arguments, and it appearing to the Court that the decree of the Cumberland Orphans' Court, admitting said will and codicils to probate, should be sustained;

It is, on this 22d day of February, A. D. 1915, ordered, adjudged and decreed that the decree of said Orphans' Court, appealed from by the petition of appeal in the above matter, be, and the same is hereby sustained and affirmed.

And It Is Further Ordered, that the record be remitted to the said Cumberland Orphans' Court, and that letters testamentary be issued to The Cumberland Trust Company of Bridgeton, the executor named in said will and codicils.

It Is Further Ordered, that a counsel fee of one hundred fifty dollars be allowed to Proctors for the respondents, same to be paid out of the estate of said decedent.

Respectfully advised,

E. B. LEAMING,

Vice Ordinary.

Endorsed: "Filed Mar. 23, 1915.

David S. Crater, Register."

E. R. WALKER, 10
Ordinary.

DECREE.

NEW JERSEY PREROGATIVE COURT. 20

In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
CUMBERLAND OR-
PHANS' COURT.

DECREE.

30

An appeal having been taken in the above-stated cause from an order of the Cumberland Orphans' Court, bearing date the twenty-fourth day of March,

1914, admitting to probate the last will and testament, and two codicils thereto, of Charles G. Diamant, deceased, and said appeal coming on to be heard before Honorable Edmund B. Leaming, Vice Ordinary of the New Jersey Prerogative Court, at Chancery Chambers in the City of Camden, and having been duly argued by the Proctors for the appellants and for the respondents, and the evidence and proofs having been read; the Court having duly
 10 considered said evidence, proofs and arguments, and it appearing to the Court that the decree of the Cumberland Orphans' Court, admitting said will and codicils to probate, should be sustained;

It is, on this seventh day of April, A. D. 1915, as of the twenty-seventh day of January, A. D. 1915, ordered, adjudged and decreed that the decree of said Orphans' Court, appealed from by the petition of appeal in the above matter, be, and the same is hereby sustained and affirmed, and that the record
 20 be remitted to the said Cumberland Orphans' Court.

It Is Further Ordered, that a counsel fee of one hundred and fifty dollars be allowed to Proctors for appellants, and a like sum to Proctors for Respondents, together with costs of both parties to be taxed by the Clerk of this Court, same to be paid out of the estate of said decedent. This decree is in substitution of and is to supersede a similar decree already filed by reason of inadvertent errors in the former decree.

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Respectfully advised,

E. B. LEAMING,

*Vice Ordinary.*E. R. WALKER,
Ordinary.

Endorsed: "Filed Apr. 8, 1915.

Thomas F. Martin, Register."

NOTICE OF APPEAL.

PREROGATIVE COURT OF NEW JERSEY.

In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
CUMBERLAND OR-
PHANS' COURT.

NOTICE OF APPEAL.

10

The appellants hereby appeal from so much of the final decree made in this court in the above cause on April 7th, 1915, and filed on April 8th, 1915, as sustains and affirms the decree of the Cumberland Orphans' Court, to the Court of Errors and Appeals in the last resort in all causes.

Dated April 27th, 1915.

20

REX A. DONNELLY,
Proctor for and

JOHN W. WESCOTT,
Of Counsel with Appellants.

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

JOHN W. WESCOTT,
Of Counsel with Appellants.

Filed Apr. 28, 1915.

30

THOMAS F. MARTIN,
Register.

Personally served on Frank F. Wallace, guardian *ad litem*, Resp., April 29, 1915, on James S. Ware and LeRoy W. Loder, Proctors for the other respondents April 30, 1915.

PETITION OF APPEAL.

Filed May 6, 1915.

THOMAS F. MARTIN,
*Clerk.*NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.ON APPEAL FROM
THE PREROGATIVE
COURT.

PETITION OF APPEAL.

20

*To the Honorable the Court of Errors and Appeals
in the Last Resort in all Causes:*

The petition of Harry Diament and Edward L. Diament, the appellants in the above cause, respectfully shows, that your petitioners find themselves aggrieved by a final decree made in the Prerogative Court of New Jersey by his Honor Edwin Robert

30 Walker, Ordinary of the State of New Jersey, bearing date April 7th, 1915, and filed April 8th, 1915, wherein your said petitioners were appellants and the Cumberland Trust Company of Bridgeton, New Jersey, Mary L. D. Cook, Mary Eva Ewan and Frank F. Wallace, guardian *ad litem* for Helen Diament, Mary Diament, Charles G. Cook and Almeda

L. Cook, were respondents, in this respect; that the said decree sustains and affirms a decree of the Cumberland Orphans' Court entered in the last aforesaid court on March 24, 1914, admitting to probate a certain paper writing purporting to be the last will and testament of Charles G. Diament, deceased, and two other writings (1) dated February 1st, 1911, (2) dated December 19th, 1912, purporting to be codicils to said last will and established said first writing as the last will and testament of the said decedent and the two latter writings as codicils thereto. And your petitioners humbly appeal from that part of the decree of the Ordinary which decrees as aforesaid, upon the ground that the same is erroneous, because the Ordinary should have reversed the said decree of the Orphans' Court admitting said writings to probate without first establishing and admitting to probate as a codicil to said last will and testament of said decedent and the two codicils thereto attached, a third codicil executed according to law by said decedent and dated the latter part of August or the fore part of September, 1913. 10 20

Your petitioners therefore pray that the said decree of the said Ordinary may be in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

REX A. DONNELLY,
Proctor of Appellants. 30

JOHN W. WESCOTT,
Of Counsel with Appellants.

Personally served on proctors of respondents and Frank F. Wallace, guardian *ad litem*, respondent, May 7, 1915.

ANSWER.

Filed May 14, 1915.

THOMAS F. MARTIN,
Clerk.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

HARRY DIAMENT and ED-
WARD L. DIAMENT,
Appellants,

and

THE CUMBERLAND TRUST
COMPANY OF BRIDGETON,
et als.,

20

Respondents.

ON APPEAL FROM DE-
CREE OF THE PRE-
ROGATIVE COURT.

ANSWER.

30 The answer of The Cumberland Trust Company of Bridgeton, Mary L. D. Cook, Mary Eva Ewan and Frank F. Wallace, guardian *ad litem* for Helen Diament, Mary Diament, Charles G. Cook and Almeda L. Cook, to the petition of appeal of the above-named appellants.

These respondents, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto nevertheless, say and admit, that a decree was, on the seventh day of April last past, made and entered in the New Jersey Prerogative Court, in the cause

mentioned in the said petition as is therein stated; but as to the substance and form thereof these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the said decree is not erroneous for the reason stated by the said appellants in their petition of appeal, or for any other reasons, but that the same is agreeable to law and the evidence produced in the case, and they pray that the same be affirmed, with costs to be adjudged these respondents. 10

JAS. S. WARE,
*Proctor for the Respondents, The
 Cumberland Trust Company of
 Bridgeton and Mary L. D. Cook.*

LEROY W. LODER,
*Proctor for Respondent, Mary
 Eva Ewan.*

FRANK F. WALLACE,
*Guardian ad litem for Helen Dia- 20
 ment, Mary Diament, Charles
 G. Cook and Almeda L. Cook.*

LEROY W. LODER,
Of Counsel with Respondents.

Service acknowledged,
 May 11th, 1915.

REX A. DONNELLY,
Proctor of Appellants.

STIPULATION.

Filed May 18, 1915.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

10

In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
PREROGATIVE COURT.
STIPULATION.

- 20 It is stipulated and agreed by and between Rex A. Donnelly and John W. Wescott, proctors for appellants, and James S. Ware, proctor for the Cumberland Trust Company of Bridgeton, N. J., and Mary L. D. Cook, respondents, LeRoy W. Loder, proctor for Mary Eva Ewan, respondent, and Frank F. Wallace, guardian *ad litem* for Mary Diament, Helen Diament, Charles G. Cook and Almeda L. Cook, respondent, in the above matter or cause, that to the State of the Case as printed and filed in the Prerogative Court, there shall be added and printed as the State of Case in this court the following, viz:

(1) Stipulation dated Dec. 11, 1914, testimony of John S. Ware, conclusions of the Court, decree dated Feb. 22, 1915, and filed March 23, 1915, decree dated April 7, 1915, and filed April 8, 1915, records of the Prerogative Court.

(2) Notice of appeal, petition of appeal, answer of respondents, with dates of filing and service marked thereon and this stipulation with the date of filing thereon, records of this court. None of aforesaid records need be certified.

(3) That no other part of the record need be printed as the State of Case in this cause, on appeal from the Prerogative Court to this Court.

Dated, May 14, 1915.

10

REX A. DONNELLY,
Proctor for and

JOHN W. WESCOTT,
Of Counsel with Appellants.

JAS. S. WARE,
*Proctor for Respondents, The
Cumberland Trust Company of
Bridgeton and Mary L. D. Cook.*

LEROY W. LODER,
*Proctor for Respondent, Mary
Eva Ewan.* 20

FRANK F. WALLACE,
*Guardian ad litem for Mary Dia-
ment, Helen Diament, Charles
G. Cook and Almeda L. Cook,
Respondents.*

LEROY W. LODER,
Of Counsel with Respondents.

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