

NEW JERSEY COURT OF ERRORS AND
APPEALS

HARRY DIAMENT,
Appellant,
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.

BRIEF OF APPELLANT

This case was in this court before, 99 Atl. Rep. 915.
The suggestions there made have been adopted in
order to bring the matter properly for hearing.

I.

FACTS.

Charles G. Diament, a former sheriff of Cumber-
land County, died at Cedarville, N. J., January 31,
1914 (13).

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

1. A paper writing alleged to be the will of deced-
ent, dated Nov. 12, 1902 (1), 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 (32). By paragraphs 8 and 9 of said will (6, 7) 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 (9), 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 (60). The Prerogative Court approved the same.

II.

Mr. Diamant 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 (50, 71). This codicil was prepared by John S. Ware, secretary and treasurer of the Cumberland Trust Company, according to written instructions of the decedent (20, 34, 47). It followed exactly the instructions given in decedent's letter of August 19, 1913 (64). This letter is C2, p. 27. 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. Diamant for execution (34). Leslie M. Ogden was one of the subscribing witnesses (29). After due execution, the codicil was returned to the trust company (20). Charles S. Ware was also a subscribing witness to the codicil (60). Its execution is admitted (46, 70). Who took the codicil to the trust company is not known; it was taken by some one (30). About two weeks later (21), 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" (30). Ware delivered it to him *in the barn* (30), where this conversation between the decedent and Ware took place (30). "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 (33), *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" (33). 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 (36) 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 (36). On November 14th (38) 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 (38). 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" (38). 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" (38). 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 (21), 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 50 *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 (51) 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 Diamant 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 (51-52), "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 Diament 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 Diament 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. Diament, 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. The learned Vice-Ordinary (52) only considered the testimony of decedent's two sons as to whether they rebutted the presumption of destruction, but it was offered for a more important pur-

pose—to show that the sheriff did not know of the ~~distinction~~^{destruction}—there could be no legal revocation if he did not know of it.

“Revocation is an act of the mind made known by some one of the other of these outward signs of revocation pointed out by the statute.”

Dan vs. Brown, 4 Cowen (N. Y.) 483.

Now, the statute above quoted is obviously intended to prevent fraud. Its provisions require positive 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 (31), 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. Diament 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. 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 testator, 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 Diamant 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 restless.

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 Diament 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. Diamant 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 Diamant 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.

V.

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*" (51, 52). The case is totally barren of any and all evidence of search and failure to find. *Underwood 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 (51), holds and finds as a fact that the codicil in question was destroyed *animo revocandi*, and (52) 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.

VI.

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 conformably 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 2, 3), 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 (9). On page 12, 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" (53), 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 (56), justifies his conclusions by the fact that the testator 'phoned to John S. Ware, who always drew his wills, to 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 (21). 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 (21), "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 (26, 27); Exhibit C2 (27). 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 rival institution. The third codicil destroyed this trusteeship entirely. Therefore, Mr. Diamant 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, involves *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?

One reason why we think the doctrine does not apply is that it is a fundamental principle that republication or revival does not republish or revive any legacy or devise that has been adeemed or satisfied.

40 Cyc. 1216, and cases cited.

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.

VII.

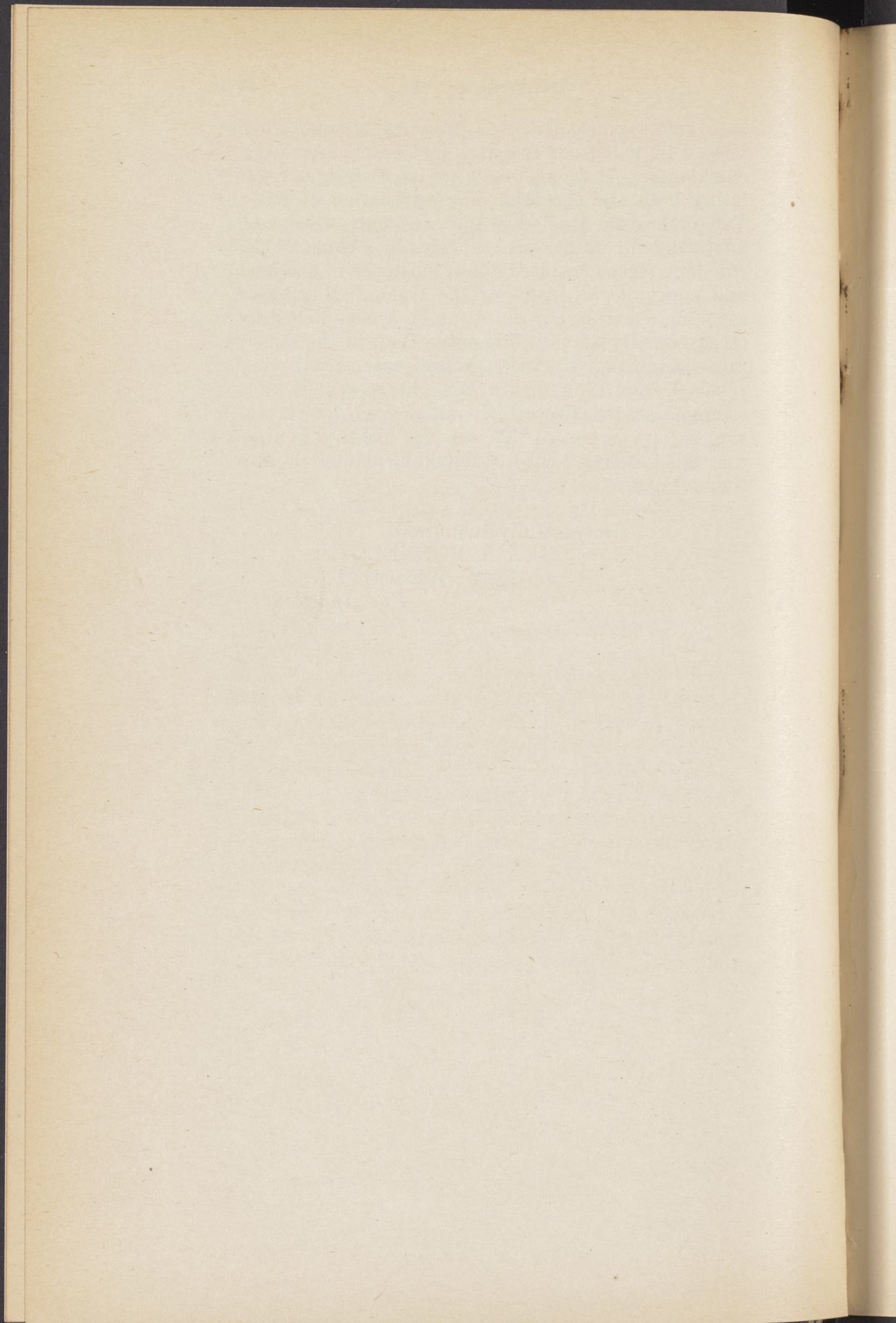
What ought to be the rule adopted in New Jersey?

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 Appellant.



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CAVEAT.

*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. Dia- 10
ment, until examination and decree thereon by the
Orphans' Court of said County of Cumberland.

Dated Bridgeton, N. J.

February 13th, 1914.

HARRY G. DIAMENT.

[ENDORSED]

20

Filed Feb. 13, 1914.

FRANK F. WALLACE,
Surrogate.

In the name of God Amen, I, Charles G. Diament
of Cedarville, Cumberland Co., New Jersey, being
of sound mind, memory and understanding, for 30
which blessing I thank God, do make and publish this
my last will and testament in manner and form fol-
lowing, to wit:

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.

10 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.

20 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 November 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.

30 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.

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.

10

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 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 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.

20

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 Charles D. Cook and Almedia Cook to them their heirs and assigns forever.

30

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.

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.

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.

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 father Theophilus E. Diament deceased. 10

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. 20

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 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. 30

6th. I give and devise to my 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 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
10 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.

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
20 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.

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
30 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.

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 the timber therefrom, Lot No 3 contains 9 96-100 10 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.

9th. I give and devise to the Cumberland Trust Company of Bridgeton New Jersey, the several properties I purchased of J. Ogden Burt assignee 20 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,

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 30 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.

10 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.

20 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.

30 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.

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]

Signed, published and declared by the said Charles G. Diament to be his last will and testament 10
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

This is a codicil, to be added to the last will and 20
testament of me, Charles G. Diament of Cedarville New Jersey which will bears date on the Twelfth day 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.

Second: I hereby revoke so much of item 5th in said will as gives to my said son Harry Diament to 30
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 re-

corded 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
10 virtue of the above deed and the other undivided one half by the will of my father Theophilus E. Diament deceased.

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
20 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
30 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.

Fourth: Whereas the stock of the Standard Life Insurance Company of America is about being ex-

changed 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.

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. 10

CHARLES G. DIAMENT [SEAL]

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. 20

SARAH B. VANNAMAN

BENJ T. POWELL

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: 30

It is my will that my shares of stock in the Cumberland 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.

- 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
20 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.

CHARLES G. DIAMENT [SEAL]

- 30 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
CHAS S WARE

PETITION OF MARY L. D. COOK.

CUMBERLAND COUNTY ORPHANS' COURT.

In the matter of the pro- } PETITION FOR PRO-
bate of the alleged will } BATE.
of Charles G. Diament. } PETITION. 10

*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
Company of Bridgeton, a corporation of the state of
New Jersey, respectfully shows that Charles G. Dia- 20
ment, late of the village of Cedarville, in the town-
ship 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 herein.

Your petitioners further show that the said 30
Charles G. Diament left him surviving as his next of
kin and heirs-at-law:

Henry Grant Diament, a son, age 46 yrs., resi-
dence Cedarville, New Jersey.

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

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:

- 10 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.
 20 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.

30 February 13, 1914.

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

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 10 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.

J. G. MITCHELL, 20
M. C. C. of N. J.

[ENDORSED]

Filed Feb. 27, 1914.

FRANK F. WALLACE,
Surrogate.

30

TESTIMONY.

CUMBERLAND COUNTY ORPHANS' COURT.

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

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

20

TESTIMONY.

Before HON. ROYAL P. TULLER, Judge.

30

APPEARANCES:

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.

JOHN S. WARE, SWORN.

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. 10

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.

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? 20

A. Yes.

Q. Was that request made personally or in writing?

A. In writing.

(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 30 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.

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
10 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 wit-
nesses. John S. Ware, Charles S. Ware."

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

A. Yes.

Q. Was any one else present?

A. Charles S. Ware was present.

20 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.

Q. Then what occurred?

A. Then I wrote my name as a witness and
30 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?

A. Yes.

Q. In whose handwriting does that appear?

A. In Mr. Diament's.

Q. Is it signed by him?

A. Yes.

Cross-examination.

10

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?

A. Only with a sore toe. No other.

Q. Have gangrene?

A. Not that I know of. He complained of a sore 20
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?

A. Before I went.

Q. Was Mrs. Ewan there?

A. In the house? 30

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?

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.

10 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.)

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

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.

30 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?

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.

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?

20

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?

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

30

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.

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
10 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.
20

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?

Q. Yes.

A. Charles S. Ware.
30

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?

A. Yes.

CHARLES S. WARE, SWORN.

Direct examination.

10

By Mr. Ware:

Q. Where do you reside?

A. Swedesboro, New Jersey.

Q. What is your business?

A. Secretary and treasurer of the Swedesboro Trust Company.

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

A. Cedarville, New Jersey.

20

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?

A. Yes, I did.

Q. Going backward and forward by trolley each day?

A. Yes, sir.

30

Q. When did your employment with the trust company cease?

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

(Witness is shown the same paper writing pur-

porting 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?

10 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?

A. I did.

20 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.

Q. Did you see John S. Ware sign?

A. I did.

30 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.

JOHN S. WARE, recalled.

Further cross-examination.

By Mr. Wescott:

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

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?

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

Q. You prepared it? 20

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. Diament's signature on it?

A. Yes.

Q. And sealed? 30

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.

10 Mr. Wescott: I understand that is the practice. 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
20 her in every possible way. I suppose it would be a 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.

30 Mr. Wescott: I want to introduce in evidence these two communications which were produced by 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.” 10

(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.” 20

(Letter marked Exhibit C2.)

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.

30

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.

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.

10 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.

20 (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.

30

Appearances: (Same as at first hearing.)

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? 10

A. I did, yes, sir.

Q. Do you remember sometime 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? 20

A. Mr. Diament and Mr. Charles Ware.

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? 30

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.

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.

10

CAVEATORS REST.

 PROPONENTS' TESTIMONY IN REBUTTAL.

CHARLES S. WARE, recalled.

Direct examination.

By Mr. Ware:

20

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
30 company after it was executed?

(Objected to. Question allowed.)

A. I did.

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

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.)

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

Q. Who took it to him?

10

A. I did.

Q. Did you deliver it to him?

A. I did.

Q. Personally?

A. I did.

Q. Where?

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. 20

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 said to destroy it. 30

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.

10 EVA M. EWAN, SWORN.

Direct examination.

By Mr. Loder:

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

A. Yes.

Q. In Cedarville?

20 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?

30 A. I remember seeing him come there.

Q. When was it?

A. I think it was early in the fall.

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.

Q. Then what happened?

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

Q. Sheriff Diament did?

A. Yes.

10

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?

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

Q. Sheriff Diament?

A. Yes.

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

20

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.

30

JOHN S. WARE, recalled.

Further cross-examination.

By Mr. Wescott:

Q. After having my attention called to the record, your testimony, Mr. Ware, does not seem to contain
10 what I understood you to state. You were asked about the execution of the third codicil to Mr. Diamant'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?

A. The codicil revoked the bequests before made
20 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
30 bequests to Mrs. Ewan?

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

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:

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? 10

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.

HARRY DIAMENT, SWORN.

20

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? 30

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.

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?

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

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?

20 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.

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.

30 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?

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 his wheat and things that he had there.

10

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.

20

No cross-examination.

EDWARD L. DIAMENT, SWORN.

Direct examination.

By Mr. Wescott:

30

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.

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 it would be satisfactory to everybody.

10 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 "You don't look very well." He came and met me
20 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
30 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?

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.

Q. Did he express any regrets about his past relations with you or anybody else? 10

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.

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

A. No, sir, I didn't go to his home at all. 20

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? 30

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.

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. Diament. 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

(Counsel argue legal questions.)

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

[ENDORSED]

10

Filed March 27, 1914.

FRANK F. WALLACE,
Surrogate.

DECREE FOR PROBATE.

CUMBERLAND COUNTY ORPHANS' COURT.

20

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

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
10 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.

And John W. Wescott and Rex. A. Donnelly, proctors 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 forepart of the
20 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 aforesaid, 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 evi-
30 dence 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, 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 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; 10

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. 20

ROYAL P. TULLER,
Judge.

[ENDORSED]

Filed March 24, 1914.

FRANK F. WALLACE, 30
Surrogate.

STIPULATION.

NEW JERSEY PREROGATIVE COURT.

10	In the matter of the estate of Charles G. Diament, deceased.	}	ON APPEAL FROM CUMBERLAND O R- PHANS' COURT. STIPULATION.
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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:

- 20 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. Diament, deceased, and that all persons concerned therein were duly in court either by service of such citations or by acknowledgment of service thereof.
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.
- 30 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.

STIPULATION.

20

NEW JERSEY PREROGATIVE COURT.

HARRY DIAMENT, *et al.*,
Appellants,

vs.

THE CUMBERLAND TRUST
COMPANY OF BRIDGETON,
et als.,

Respondents.

In the Matter of the
Estate of Charles
G. Diament, de-
ceased.

ON APPEAL FROM
CUMBERLAND OR- 30
PHANS' COURT.
STIPULATION.

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 *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
10 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.

20

JAS. S. WARE,
For Executors.

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

30

FRANK F. WALLACE,
Guardian Ad Litem for Helen
Diament, Mary Diament,
Charles G. Cook and Al-
meda L. Cook.
Respondent Per Se.

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. 10

Q. Are you also assistant treasurer of the state?

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 decedent had deposited with the Cumberland Trust Company a will and two codicils, the second codicil was drawn, as I recollect, by you? 20

A. Yes.

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

A. Yes.

Q. Which was afterwards taken away from your possession?

The Vice-Chancellor: Are you right that he drew or superintended the execution of the third codicil? 30

A. Yes.

Q. In August or September of nineteen hundred and thirteen?

A. Yes.

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.

The Vice-Chancellor: They were there with the
10 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.

20 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. Diament, about—shortly before his death —

(Objection by Mr. Donnelly. Overruled.)

30 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.

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.

10

Cross-examination.

By Mr. Donnelly:

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. 20

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.

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. 30

CONCLUSIONS.

NEW JERSEY PREROGATIVE COURT.

10 In the Matter of the Estate of CHARLES G. DIAMENT, Deceased. } ON APPEAL FROM CUMBERLAND ORPHANS' 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, respondent.

20

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, deceased, and the others as codicils thereto. The will 30 bears date November 12, 1902, the first codicil February 1st, 1911, the second codicil December 19, 1912.

A third codicil was executed by testator in the latter part of August or the forepart 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.

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.

10

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.

20

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.*

10 *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.

20 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.*

30 (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 revoca-

tion 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 items of that will a life estate in certain real and personal property is given to Mrs. Eva M. Ewan, who was
10 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
20 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
30 destruction of a codicil, so far as the specific provisions of the will to which the codicil relates are concerned, cannot be logically distinguish in principle from the destruction of a subsequent will which expressly or by necessary implication wholly revokes 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 nullifying the amendment, even though no force be given to 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 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 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 safekeeping. Subsequently testator withdrew 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
 10 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.

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.

30

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; 10

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. 20

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.

E. R. WALKER,
Ordinary. 30

Endorsed: "Filed Mar. 23, 1915.

David S. Crater, Register."

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.
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20 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;

30 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 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.

Respectfully advised, E. R. WALKER, 10
Ordinary.
 E. B. LEAMING,
Vice Ordinary.
 Endorsed: "Filed Apr. 8, 1915.
 Thomas F. Martin, Register."

DESIGNATION.

20

*To Hon. Francis B. Davis, President Judge of the
 Court of Common Pleas of Gloucester County:*

I hereby request you to preside during my absence and hold a session of the Court of Common Pleas, Orphans' Court and Court of Quarter Sessions in and for the county of Cumberland on Monday, April 30th, 1917.

30

Dated April 27th, 1917.

LEROY W. LODER,
*President Judge Court of
 Common Pleas Cumber-
 land County.*

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

I, L. H. Hogate, clerk of the county of Cumberland, also clerk of the Circuit Court and Court of Common Pleas, in and for the said county, the same being courts of record, do hereby certify the foregoing to be a true copy of the designation therein
 10 recited, as taken from and compared with the original designation now on file in my office.

In Witness Whereof, I have hereunto set
 (Seal) my hand and affixed the seal of said county
 and courts this 9th day of May, A. D. 1917.

L. H. HOGATE,
County Clerk.

20

AMENDED DECREE FOR PROBATE.

CUMBERLAND COUNTY ORPHANS' COURT.

In the Matter of the Pro-
 bate of the Last Will and
 Testament of Charles G.
 Diamant, Deceased. } AMENDED DECREE
 FOR PROBATE.

30

This matter being opened to the Court by James S. Ware, proctor for proponents and for Eva M. Ewan, legatee, and it appearing that all parties in interest have had due and legal notice of the application:

It is on this 30th day of April, 1917, on motion of

James S. Ware, proctor for proponents and for Eva M. Ewan, legatee, ordered that the decree for probate made by this Court on the twenty-fourth day of March, 1914, be amended so that the same shall read as follows:

This matter being opened to the Court by James S. Ware, proctor for proponents and for Eva M. Ewan, legatee, and it appearing that all parties in interest have been duly cited and the Court having taken testimony and heard the allegations of the parties herein 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 duly executed by the said Charles G. Diament as and for his last will and testament, and as and for codicils thereto; that the said Charles G. Diament was in all respects competent to execute the same and was not under any restraint or undue influence.

It is ordered, adjudged and decreed that the said instrument and said codicils thereto be and the same hereby are established as the last will and testament and codicils thereto of the said Charles G. Diament, deceased and that the same be and hereby are admitted to probate.

And it is further ordered that letters testamentary be issued upon the aforesaid will to Mary L. Dia-

ment Cook and the Cumberland Trust Company of
Bridgeton, the executors therein named.

FRANCIS B. DAVIS,
Judge.

[ENDORSED]

Filed Apr. 30, 1917.

10

FRANK F. WALLACE,
Surrogate.

APPEAL.

CUMBERLAND COUNTY ORPHANS' COURT.

20	In the Matter of the Estate of Charles G. Diament, Deceased.	}	APPEAL.
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Harry Diament, son of Charles G. Diament, de-
ceased, hereby appeals to the New Jersey Prerog-
ative Court from the decree entered herein on the
thirtieth day of April, A. D. nineteen hundred and
seventeen, and from each and every part and para-
30 graph thereof.

Dated, April 30th, 1917.

REX A. DONNELLY,
Proctor for and
JOHN W. WESCOTT,
Of Counsel with Harry
Diament, Appellant.

[ENDORSED]

Filed April 30, 1917.

FRANK F. WALLACE,
Surrogate.

Personally served April 30, 1917, on 10

JAS. S. WARE,
*Proctor for Proponents &
May Eva Ewan.*

FRANK F. WALLACE,
*Guardian ad litem for Helen
Diament, Mary Diament,
Charles Cook & Almeda
L. Cook.*

On May 1st, 1917, on 20

J. O. BURT,
*Proctor for Admx. of Ed-
ward L. Diament, Decd.,*

On April 30, 1917, on
LEROY W. LODER,
*Of Counsel for all Respon-
dents.*

30

CERTIFICATION.CUMBERLAND COUNTY SURROGATE'S
OFFICE.

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

- 10 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 caveat, will, codicils, petition for probate with oath of executor and executrix, order and commission to examine witness, testimony, deposition with certificate, decree for probate, amended decree for probate, appeal and affidavit of service, in the matter of the estate of Charles G. Diament, deceased, and that the same are true
20 transcripts thereof.

Given under my hand and seal of office
(Seal) this tenth day of May, nineteen hundred
and seventeen.

FRANK F. WALLACE,
*Surrogate and Judge of
the Surrogate's Court.*

30

[ENDORSED]

Filed May 18th, 1917.

THOMAS F. MARTIN,
Register.

PETITION OF APPEAL.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate
of CHARLES G. DIAMENT, } PETITION OF APPEAL.
Deceased. } 10

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

The petition of Harry Diament, the appellant, respectfully shows, that your petitioner finds himself aggrieved by a decree, being an amended decree for probate, made by the Cumberland County Orphans' Court and entered therein on the thirtieth day of April, A. D. nineteen hundred and seventeen, upon application of the Cumberland Trust Company of Bridgeton, N. J., Mary L. D. Cook and Eva M. Ewan, for the probate of a certain writing purporting to be the last will and testament of Charles G. Diament, deceased, and two other writings (1) date the first day of February, nineteen hundred and eleven (2) dated the nineteenth day of December, nineteen hundred and twelve, purporting to be codicils to said last will and testament of said decedent, in that, said decree established said first writing as the last will and testament of said decedent and the two latter writings as codicils to said last will and testament of said decedent and admitted the same to probate as such.

And your petitioner appeals 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 said Orphans' Court 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
 10 by said decedent and dated the latter part of August or the forepart of September, A. D. nineteen hundred and thirteen.

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

20

REX A. DONNELLY,
Proctor of Appellant.

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

JOHN W. WESCOTT,
Of Counsel with Appellant.

[ENDORSED]

30

Filed May 17, 1917.

THOMAS F. MARTIN,
Register.

Service of a copy acknowledged May
 19th, 1917 by,

LEROY W. LODER,
Of Counsel for all Respondents.

ANSWER OF FRANK F. WALLACE.

NEW JERSEY PREROGATIVE COURT.

<p>In the Matter of the Estate of CHARLES G. DIAMENT, Deceased.</p>	}	<p>ON APPEAL FROM CUMBERLAND COUNTY ORPHANS' COURT. ANSWER.</p>	10
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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, appellant.

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.

FRANK F. WALLACE,
*Guardian ad litem for Helen
Diament, Mary Diament,
Charles G. Cook and
Almeda L. Cook,*
Per Se

20

30

Legally served on proctors of appellant, June 1,
1917.

[ENDORSED]

Filed June 8, 1917,
THOMAS F. MARTIN,
Register.

10

ANSWER.

NEW JERSEY PREROGATIVE COURT.

20 In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
CUMBERLAND COUN-
TY ORPHANS'
COURT.
ANSWER.

Answer of Mary L. D. Cook and the Cumberland
Trust Company of Bridgeton, executors, and Eva M.
Ewan, legatee, three of the respondents to the peti-
tion of appeal of Harry Diament, appellant:

30 These respondents admit that an order or decree
of the date, tenure and effect in said petition of ap-
peal 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 the said order or decree may be affirmed by this

Court, with costs to be adjudged to these respondents.

JAS. S. WARE,
*Proctor for Respondents,
Mary L. D. Cook and the
Cumberland Trust Com-
pany of Bridgeton and
Eva M. Ewan.*

Legally served on proctors of appellant, June 1, 10
1917.

[ENDORSED]

Filed June 8, 1917.

THOMAS F. MARTIN,
Register.

20

STIPULATION.

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate
of CHARLES G. DIAMENT,
Deceased.

ON APPEAL FROM
CUMBERLAND OR 30
PHANS' COURT.
STIPULATION.

It is hereby stipulated and agreed by and between
John W. Wescott and Rex A. Donnelly, proctors for

appellant, and James S. Ware, proctor of respondents, and LeRoy W. Loder, of counsel for all respondents, in the above matter, as follows:

1. As the testimony of Benjamin T. Powell and the deposition of Sarah J. Vannaman shows as a matter of fact and it being admitted that the instrument, dated Nov. 12, 1909, alleged to be the last will and testament of Charles G. Diament, deceased, and the alleged codicil thereto dated Feb. 1, 1911, were both duly executed by said decedent in full compliance with the law of this state in every respect, said testimony and deposition, with the order and commission to take said deposition, need not be included as part of the state of the case in this cause on appeal to this Court.

2. That the codicil to said alleged will of said decedent, dated the last part of August or the first part of September, A. D. 1913, and referred to in the petition of appeal, 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.

3. That the following shall be considered as the state of the case in this court, viz., All testimony taken in the cause, save only what is already excepted herein, stipulation of April 20, 1914, petition for probate, notice of appeal, petition of appeal, answer of respondents, with the dates of filing and service marked thereon and this stipulation. None of the aforesaid records need be certified. No other part of the record in this cause need be considered as part of the state of the case on the appeal to this Court.

Dated May 26, 1917.

JOHN W. WESCOTT,
 REX A. DONNELLY,
Proctors of Appellant.
 JAMES S. WARE,
Proctor of Respondents.
 LEROY W. LODER,
Of Counsel for all Respondents.

10

[ENDORSED]

Filed June 8, 1917.

THOMAS F. MARTIN,
Register.

DECREE.

20

NEW JERSEY PREROGATIVE COURT.

In the Matter of the Estate of CHARLES G. DIAMENT, Deceased.	}	ON APPEAL FROM CUMBERLAND O R- PHANS' COURT.
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An appeal having been taken in the above-stated cause from an order of the Cumberland County Orphans' Court, bearing date the thirtieth day of April, 1917, admitting to probate the last will and testament and two codicils thereto, of Charles G. Dia-

ment, 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 submitted by the proctors for the appellant and for the respondents, and the evidence and proofs having been read and considered, and it appearing to the Court that the decree of the Cumberland County Orphans' Court, admitting said will
 10 and codicils to probate, should be sustained;

It is on this 27th day of June, A. D. 1917, 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 be remitted to the said Cumberland County Orphans' Court and that letters testamentary be issued to the Cumberland Trust Company of Bridgeton and to Mary L. Diament Cook, the executors named in
 20 said will and codicils.

It is further ordered that the costs of both parties be taxed by the clerk of the court, the same to be paid out of the estate of said decedent.

E. R. WALKER,
Ordinary.

Respectfully advised,
 E. B. LEAMING,
Vice-Ordinary.

30

[ENDORSED]

Filed June 28, 1917.

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 O R-
PHANS' COURT.
NOTICE OF APPEAL.

10

The appellant, Harry Diament, hereby appeals from so much of the final decree made in this court in the above cause on June 27th, 1917, and filed on June 28th, 1917, 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 July 17, 1917.

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REX A. DONNELLY,
Proctor for and
JOHN W. WESCOTT,
Of Counsel with Appellant.

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

JOHN W. WESCOTT,
Of Counsel with Appellant.

30

[ENDORSED]

Filed July 18, 1917.

THOMAS F. MARTIN,
Register.

Personally served on Frank F. Wallace guardian *ad litem*, James S. Ware, proctor for certain respondents, and on LeRoy W. Loder, of counsel for all respondents, July 19th, 1917.

PETITION OF APPEAL.

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Filed Aug. 3, 1917.

THOMAS F. MARTIN,
Clerk.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20	In the Matter of the Estate of CHARLES G. DIAMENT, Deceased.	}	ON APPEAL FROM THE PREROGATIVE COURT. PETITION OF APPEAL.
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*To the Honorable the Court of Errors and Appeals
in the Last Resort in all Causes:*

30 The petition of Harry Diament, the appellant in the above cause, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Prerogative Court of New Jersey by his Honor Edwin Robert Walker, Ordinary of the state of New Jersey, bearing date June 27th, 1917, and filed on June 28th, 1917, wherein your said petitioner was appellant 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 April 30, 1917, 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 10 February 1st, 1911, (2) dated December 19th, 1912, purporting to be codicils to said last will and testament 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 petitioner humbly appeals 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 forepart of September, 1913. 20

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

REX A. DONNELLY,
Proctor of Appellant.
JOHN W. WESCOTT,
Of Counsel with Appellant.

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

JOHN W. WESCOTT,
Of Counsel with Appellant.

Personally served on counsel for all respondents.
Aug. 4, 1917.

10

ANSWER.

Filed Sept. 1, 1917.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

20	HARRY DIAMENT, <i>Appellant,</i> and THE CUMBERLAND TRUST COMPANY OF BRIDGETON, <i>et als.,</i> <i>Respondents.</i>	} ON APPEAL FROM DECREE OF THE PRE- ROGATIVE COURT. ANSWER.
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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 appellant.

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 twenty-seventh day of June 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 appellant in his 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

JAMES S. WARE,
Proctor for the Respondents, The Cumberland Trust Company of Bridgeton, and Mary L. D. Cook and Mary Eva Ewan. 20

FRANK F. WALLACE,
Guardian ad litem for Helen Diament, Mary Diament, Charles G. Cook and Almeda L. Cook.

LEROY W. LODER, 30
Of Counsel with all Respondents.

Served upon Rex A. Donnelly, proctor of appellant.
 Aug. 22, 1917.

STIPULATION.

Filed Sept. 11, 1917.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

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In the Matter of the Estate of CHARLES G. DIAMENT, Deceased.	}	ON APPEAL FROM PREROGATIVE COURT. STIPULATION.
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It is stipulated and agreed between Rex A. Donnelly and John W. Wescott, proctors for appellant, and James S. Ware, proctor for the Cumberland Trust Company, Mary L. D. Cook and Mary Eva Ewan, respondent, Frank F. Wallace, guardian *ad litem* for Helen Diament, Mary Diament, Charles Cook and Almeda L. Cook, respondents, and LeRoy W. Loder, of counsel with all respondents, in the above matter or cause, that to the state of the case as stipulated and agreed upon in the Prerogative Court under stipulation filed in that court, dated May 26, 1917, there shall be added and printed as the state of the case in this court, the following, viz.,

Notice of appeal, petition of appeal, answer of respondents, with dates of filing and service marked thereon and this stipulation with dates of filing and service marked thereon being the records of this court. None of the aforesaid records need be certified and no other part of the record need be printed

as the state of the case in this cause, on appeal to this court from the Prerogative Court.

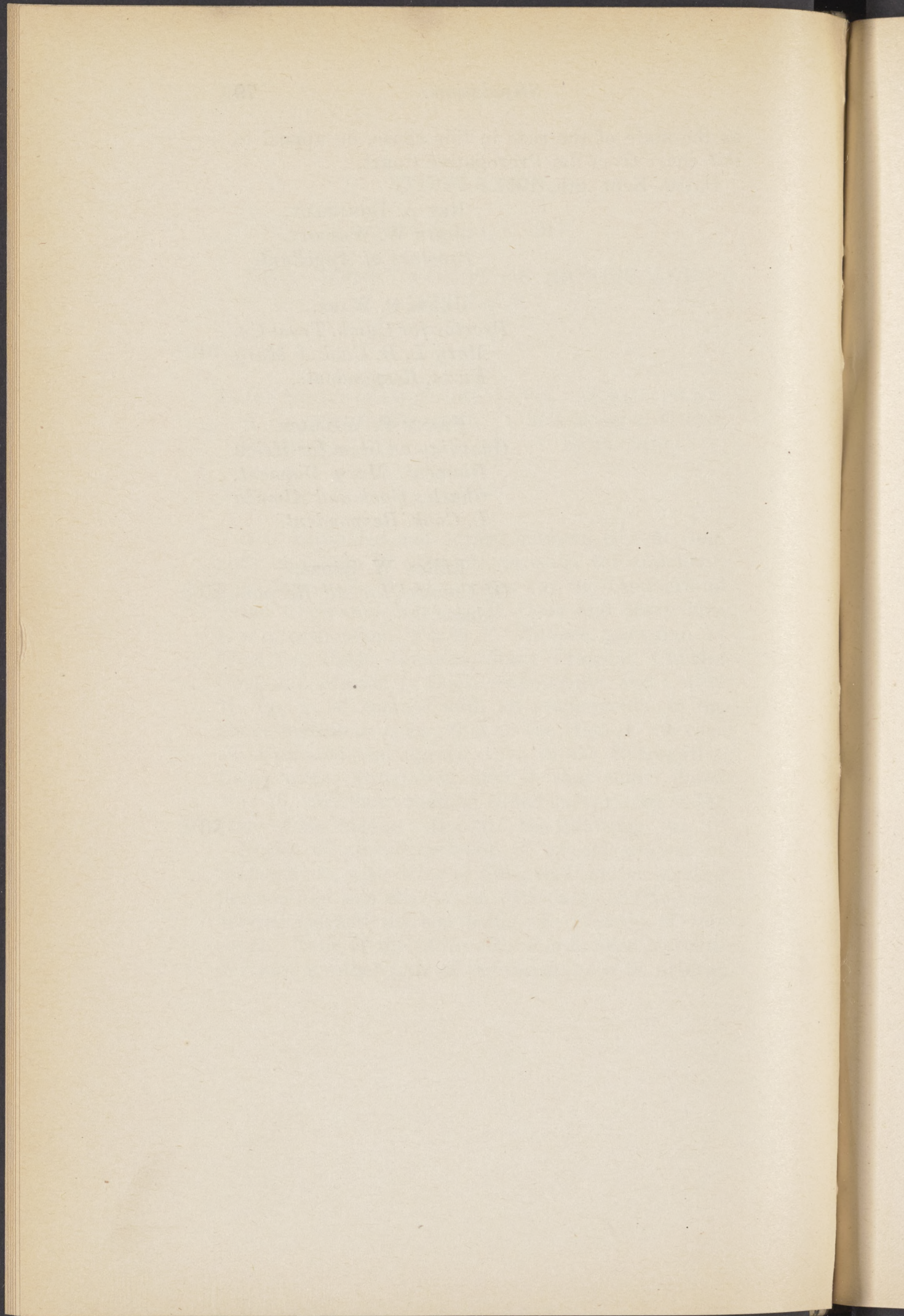
Dated, Sept. 8th, 1917.

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

JAMES S. WARE,
Proctor for Cumb. Trust Co.
Mary L. D. Cook & Mary
Ewan, *Respondents.*

FRANK F. WALLACE,
Guardian ad litem for Helen
Diament, Mary Diament,
Charles Cook and Almeda
L. Cook, Respondent.

LEROY W. LODER,
Of Counsel for All Respon- 20
dents.



New Jersey Court of Errors and Appeals

HARRY DIAMENT,

Appellant,

vs.

THE CUMBERLAND TRUST
COMPANY OF BRIDGETON,
ET AL.,

Respondents.

In the matter of the Es-
tate of Charles G. Diamant,
Deceased.

On Appeal from Preroga-
tive Court.

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 Appellant's brief.
2. The decedent executed a third codicil to his will in the latter part of August, 1913 (20 & 70).
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 revocandi* (30-33).

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 (34).

The letter giving the instructions for the drawing of the codicil is set forth on page 27, 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 50 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, (49). The third codicil was prepared by Mr. John S. Ware and deposited with the Trust Company in August 1913 (30).

About two weeks after it was executed (31) the third codicil was returned to Mr. Diament by Charles S. Ware at Mr. Diament's request.

Charles S. Ware testifies (31) "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 (31) "I rather think he put it in his pocket."

Mrs. Ewan testifies (32 & 33) that she saw Charles S. Ware talking to Mr. Diament and saw Mr. Ware hand Mr. Diament a paper. She also testifies (33) that after Mr. Ware left, Mr. Diament came into the house and threw a paper in the kitchen stove.

Appellant contends (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. Holcombe*, 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*.

The appellant bases his appeal solely on the ground that the Orphans' Court should not have admitted the will and the codicils to probate without first establishing and admitting to probate the third codicil (75).

The third codicil had been destroyed *animo revocandi* and hence could not have been probated as a lost codicil.

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 I Vict., Chap. 26.

Goodright ex dem. Glazier vs. Glazier (1770),

4 *Burr* 2512.

Harwood vs. Goodright, 1 *Cowp.* 87.

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

1 *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 1 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 case 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 Jersey, 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 (49); 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 codicils in August, 1913, (30); 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 (21); he had received some money for an item mentioned in his will and wished to arrange for the proceeds of the same (21). He understood that this could be done by means of another codicil (49).

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 part of the will.

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 appellant's contention that the destruction of the third codicil did not revive those bequests be sustained, then no reason could possibly be assigned for its destruction.

So, in *Stewart's Estate*, 149 Pa. III, 24 Atl. 174, although it was held only that the Orphans' Court had committed no error in refusing to grant an issue to determine whether or not a codicil to a will had been destroyed

by the testator, or by another, it seems to be implied that the will was properly admitted to probate, and that upon the presumption that the codicil was destroyed by the testator himself, a provision of the will with which the codicil was inconsistent was revived by such destruction, and was a valid part of the will as probated.

Respectfully submitted,

LEROY W. LODER,
JAMES S. WARE,
For Respondents.

BOND

BOARD