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Petitioner's:

New Jersey Court of Errors and Appeals

Petition On Appeal

(*Filed, Nov. 20, 1917*)

In the Matter
of
The Application for the probate
of the last will and testament
of Michael Allen, deceased.

To the Honorable, the Court of Errors and Appeals, in the last resort in all causes:

The petition of Joseph M. Allen, the appellant in the above stated cause, respectfully shows as follows:

1. Your petitioner finds himself aggrieved by a final decree made in the Prerogative Court of New Jersey by his Honor, Edwin Robert Walker, Ordinary thereof, bearing date the 23d day of October, 1917, in which an application was made by the appellant to have probated the last will and testament of Michael Allen, deceased, in which proceeding appellant appeared as petitioner, and Elizabeth Calver, Jennie Calver, Hannah A. Foster, James S. Pedrick, Mary Harbison, Hannah England and Ruth Justice, some of the persons

named in said petition, by their respective proctors, appeared as respondents.

2. Your petitioner is aggrieved by said final decree in that the said final decree ordered, adjudged and decreed that the cancellation of the will of Michael Allen, deceased, was effective to revoke the same, and that he died intestate, and that the probate of said canceled will be denied, and the petition of the petitioner therein be dismissed.

3. Your petitioner humbly appeals from that part of said decree of the Ordinary which decrees and orders as aforesaid, upon the ground that the cancellation of said will by Michael Allen was by virtue of a mistake, and was not effective to revoke the same, and that the said Michael Allen did not die intestate, and that the petition of the petitioner, to have the said will probated, should have been granted.

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 premises as to this Honorable Court shall seem meet.

S. HUNTLEY BECKETT,
Proctor of Appellant.

Lewis Starr,
Of Counsel with Appellant.

Answers to petition of appeal in usual form filed.

Petition

NEW JERSEY PREROGATIVE COURT

(*Filed Mch. 15, 1917*)

In the Matter
of
The Application for the probate of the last will and testament of Michael Allen, deceased.

To the Honorable Edwin Robert Walker, Ordinary of the State of New Jersey:

The petition of Joseph M. Allen, of the Borough of Woodstown, County of Salem and State of New Jersey, respectfully shows, charges and avers:

1. That Michael Allen, late of Woodstown, in the County of Salem and State of New Jersey, died in the Borough of Woodstown on the 14th day of January, 1917, leaving a last will and testament duly made and executed, as your petitioner is informed and believes.

2. By the residuary clause of said will, the said Michael Allen gave all his estate to his brother, Charles E. Allen, and to his sister, Josephine Allen, share and share alike, with a provision that if the said Charles E. Allen or the said Josephine Allen should die without lawful issue, then all of the estate should go to the survivor.

3. Charles E. Allen, the brother of said Michael Allen predeceased him, and left him surviving his

three children, Elizabeth Allen, Margaret Allen and your petitioner.

4. The said Michael Allen, by said will, appointed Charles E. Allen, the father of your petitioner, Executor of said will.

5. Upon the assumption that the said Michael Allen died intestate, the Surrogate of Salem County, on January 23, 1917, appointed Joseph Beck Tyler Administrator of his Estate.

6. The said Michael Allen left him surviving Josephine Allen, a sister of the whole blood, who resides at Woodstown, New Jersey, and Elizabeth Allen, Margaret Allen and your petitioner, children of Charles E. Allen, a brother of the whole blood, who also reside at Woodstown aforesaid.

7. The said Michael Allen left him surviving the following brothers and sisters of the half blood, and descendants of sisters of the half blood, as follows, to wit: Hannah A. Foster, who resides at West Chester, in the State of Pennsylvania, Ruth R. Justice, who resides at Pedricktown, in the County of Salem, New Jersey, sisters of the half blood; and James S. Pedrick, who resides at Williamstown, in the County of Gloucester, New Jersey, brother of the half blood; and Elizabeth Calver and Jennie C. Calver, who reside at Chester, Pennsylvania, who are children of Jane Calver, a sister of the half blood; and Mary Harbison and Hannah R. England, who reside near Auburn, in the County of Salem aforesaid, who are children of Martha Cheeseman, a sister of the half blood; and Maria Turner, Benjamin Turner and Sam-

uel Turner, who reside at Pennsgrove, in the County of Salem aforesaid, who are children of Martha Turner, who was a child of Martha Cheeseman, a sister of the half blood.

8. All of the above named persons are of full age, except Samuel Turner, who, your petitioner is advised, is a minor of the age of seventeen years.

9. Attached hereto is a copy of the last will and testament of Michael Allen, deceased.

10. No caveat has been filed against the probate of said will in the office of the Surrogate of the County of Salem, as appears by the certificate of the Surrogate, attached hereto.

Therefore, your petitioner prays that a day may be fixed when the said will may be proved by proof presented to this Court, and letters of administration, with the will annexed, be granted to such person as may be entitled to the same according to law, and that an order may be made prescribing the notice to be given to all pesons concerned in the taking of said proof.

JOSEPH M. ALLEN,
Petitioner.
By S. Huntley Beckett,
Proctor.

Lewis Starr,
of Counsel.

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

Joseph M. Allen, being conscientiously scrupulous of taking an oath, and being duly affirmed, says:

I am the petitioner named in the foregoing petition. I have read the same, and know the contents thereof. The said petition is true to the best of my knowledge and belief.

JOSEPH M. ALLEN.

Affirmed and subscribed before me this
Seventh day of March, 1917.
E. S. Fogg,
Master in Chancery.

Will

I, Michael Allen of Pilesgrove township, Salem County, New Jersey, being of sound and disposing mind and memory, do make and publish this writing as my last will and testament in manner following:

First: I direct all my just debts and expenses paid as soon as can be after my decease.

Second: After the payment of my debts and expenses out of my estate, I give the residue of my estate, real, personal and mixed of every kind to my brother Charles E. Allen, and to my sister Josephine Allen share and share alike. If either my said brother Charles or my said sister Josephine, shall die without lawful issue then I give all of my said estate to the survivor.

Lastly: I hereby appoint my brother Charles E. Allen executor of this will.

In witness thereof I have hereto set my hand and seal the Eleventh day of March, A. D. Eighteen hundred & eighty-four.

MICHAEL ALLEN (Seal)

Signed, published & declared by the
said Michael Allen, to be his last
will in the presence of us who were
present at the same time and sub-
scribed our names as witnesses
in the presence of the testator.
Jos. K. Riley.
Frank Wright.

July 29, 1916.

SALEM COUNTY SURROGATE'S OFFICE

I, Loren P. Plummer, Surrogate of the County of Salem, in the State of New Jersey, do hereby certify that no caveat has been filed in said office [illegible] the proving of the last will and testament of Michael Allen, deceased.

WITNESS, my hand and seal of office this fifth day of March, nineteen hundred seventeen.

LOREN P. PLUMMER,
Surrogate of Salem County.

(Seal)

Order

NEW JERSEY PREROGATIVE COURT.

(*Filed Mar. 16 1917*)

In the Matter
of
The application for the probate
of the last will and testament
of Michael Allen, deceased.

Joseph M. Allen having presented and filed in this Court a petition setting forth:

1. That Michael Allen, late of Woodstown, in the County of Salem and State of New Jersey, died in the Borough of Woodstown on the 14th day of January, 1917, leaving a last will and testament duly made and executed.

2. That by the residuary clause of said will, the said Michael Allen gave all his estate to his brother, Charles E. Allen, and to his sister, Josephine Allen, share and share alike, with a provision that if the said Charles E. Allen or the said Josephine Allen should die without lawful issue, then all of the estate should go to the survivor.

3. That Charles E. Allen, the brother of said Michael Allen predeceased him, and left him surviving three children, Elizabeth Allen, Margaret Allen and said petitioner.

4. That the said Michael Allen, by said will, appointed Charles E. Allen, the father of said petitioner, Executor of said will.

5. That upon the assumption that the said Michael Allen died intestate, the Surrogate of Salem County, on January 23, 1917, appointed Joseph Beck Tyler Administrator of his Estate.

6. That the said Michael Allen left him surviving Josephine Allen, a sister of the whole blood, who resides at Woodstown, New Jersey, and Elizabeth Allen, Margaret Allen and said petitioner, children of Charles E. Allen, a brother of the whole blood, who also reside at Woodstown aforesaid.

7. That the said Michael Allen left him surviving the following brothers and sisters of the half blood, and descendants of sisters of the half blood, as follows, to wit: Hannah A. Foster, who resides at West Chester, in the State of Pennsylvania, Ruth R. Justice, who resides at Pedricktown, in the County of Salem, New Jersey, sisters of the half blood; and James S. Pedrick, who resides at Williamstown, in the County of Gloucester, New Jersey, a brother of the half blood; and Elizabeth Calver and Jennie C. Calver, who reside at Chester, Pennsylvania, who are children of Jane Calver, a sister of the half blood; and Mary Harbison and Hannah R. England, who reside near Auburn, in the County of Salem aforesaid, who are children of Martha Cheeseman, a sister of the half blood; and Maria Turner, Benjamin Turner and Samuel Turner, who reside at Pennsgrove, in the County of Salem aforesaid, who are children of Martha Turner, who was a child of Martha Cheeseman, a sister of the half blood.

Order

8. That all of the above named persons are of full age, except Samuel Turner, who is a minor of the age of seventeen years.

9. That no caveat has been filed against the probate of said will, in the office of the Surrogate of the County of Salem, as appears by the certificate of the Surrogate, attached to said petition.

And it further appearing that said petition prays that a day may be fixed when the said will may be proved, by proof presented to this Court, and letters of administration, with the will annexed, be granted to such person as may be entitled to the same, according to law, and that an order may be made prescribing the notice to be given to all persons concerned in the taking thereof;

It is, on this 15th day of March, 1917, on motion of S. Huntley Beckett, proctor of the petitioner, ordered that on the 16th day of May, 1917, at the hour of ten o'clock in the forenoon, at the Chancery Chambers in the City of Camden, the said petitioner may present said will, and prove the same in solemn form by witnesses and proofs, as he may be advised, and that he give notice to the said next of kin and heirs of the said Michael Allen, deceased, and all persons concerned, that, at the time and place so fixed, he will proceed to prove said will in manner and form aforesaid, which notice shall be in writing and served personally upon each of said persons interested or concerned at least ten days before the day fixed for making said proof.

Respectfully advised,

E. R. WALKER,

Ordinary.

E. B. LEAMING,
Vice Ordinary.

(*Endorsed*)

"Filed Mar. 16, 1917,
Thomas F. Martin,
Register."

Testimony

NEW JERSEY PREROGATIVE COURT

In the Matter of The application for the probate of the last will and testament of Michael Allen, deceased.	On Petition, &c. Final hearing.

Before his Honor, E. B. Leaming, Vice-Ordinary, at the Chancery Chambers, Camden, New Jersey, on Wednesday, May 16th, 1917.

Appearances:

Hon. Lewis Starr, and S. Huntley Beckett, Esq., for petitioner.

Hon. A. H. Swackhamer, for James S. Pedrick.

Hon. David O. Watkins, for Elizabeth Calver, Jennie C. Calver, and Hannah A. Foster.

James Mercer Davis, Esq., for Hannah R. England, and Mary Harbison.

John F. Harned, Esq., for Ruth B. Justice.

JOSEPH BECK TYLER, a witness produced on behalf of the petitioner, alleging himself conscientiously scrupulous of taking an oath, being duly affirmed according to law, on his solemn affirmation saith—

Mr. Davis: We object to the jurisdiction of the court in this matter, and for this reason: We understand that the paper writing purporting to be the last will and testament of the decedent in this case bears unmistakable evidences of having been cancelled during the lifetime and by the testator, and that this proceeding, which on its face is for the purpose of probating a will, as a matter of fact is a proceeding to establish a will which has been revoked by the testator in his lifetime. We think that the Prerogative Court has no jurisdiction to determine that matter but that it first must be determined in equity and then the probate may be proceeded with in the Prerogative Court.

The Vice Ordinary: I shall not undertake at this time to finally or conclusively pass upon the question of jurisdiction without giving it careful consideration, more consideration than I can possibly give it at this moment. On the one hand, it seems to be folly to proceed with a day or two days' testimony if it is ultimately to be determined that there is a want of jurisdiction. On the other hand, we have present a large number of witnesses who have obviously come here to meet this very

question of fact, and to send them away and have them return again, possibly, after a decision in favor of the jurisdiction, would be equally disastrous. On the face of the petition there is no suggestion that this will has been mutilated. I understand, however, that the parties on both sides are fully aware of the condition of the will and have come prepared, I assume, to meet the questions of fact, in case they are entertained as questions of fact, notwithstanding the objection to the jurisdiction. I think, on the whole, unless counsel are by reason of the silence of the petition on the question of mutilation unprepared to meet that issue with testimony today, that we should proceed with the tesmony subject to a future determination of the question of jurisdicion after full argument. Are counsel in any way embarrassed on the questions of fact by reason of want of knowledge that they were today to meet the question of mutilation of the will?

Mr. Davis: I cannot say that I am, if your Honor please.

The Vice Ordinary: Evidently it is well-known to counsel that that was the issue to be presented. I do not want to embarrass counsel by compelling them to meet an element of fact with which they are not familiar. I will overrule the motion to dismiss the proceeding for want of jurisdiction. The motion would have to be overruled at this time, at any rate, because so

for it has not appeared that the will is mutilated. But, assuming that to be the case at this time, I will overrule the motion and hear the proofs and at the conclusion of the case will give more mature consideration to the question of jurisdiction.

Mr. Davis: Is it necessary to take an exception?

The Vice Ordinary: No, it will not be necessary for you to take exceptions. I will at this time extend to counsel for the defendants the benefit of all objections which they have made or may be able to make, so that if any defect appears in the proceedings which is injurious to them they may have the same benefit of such objections as though formal exceptions appeared on the record. I think, in view of the almost novel nature of the case, the testimony offered should all be received, giving the adversaries the benefit of all objections they could make to it, in order that if the case is reviewed, as it probably will be, the court of errors will have the benefit of the testimony and pass upon its relevancy and sufficiency. At this time I will tentatively overrule this motion under the assumption that the facts are, as stated in the motion, that the will has been mutilated. I do not know that it need be worth while even for me to suggest what my present notions are, but, as presently advised, my understanding is that the Probate Court, the Ordinary's Court, has inherited the jurisdic-

tion of the English Ecclesiastical Court, that the jurisdiction of the Ordinary is co-extensive with the jurisdiction exercised by the Ordinary and the Metropolitan in England before the revolution It is also my present understanding that the English Ecclesiastical Courts had exclusive jurisdiction in all questions of this kind, and that there is considerable doubt of any jurisdiction of the Court of Chancery to either review the proceedings of the Ecclesiastical Courts or, in this State, the proceedings of the Ordinary sitting in the court of Probate for any purpose, even for fraud practised upon the parties or upon the court. I know there has been a tendency upon the part of the Court of Chancery to intervene in matters of re-establishment of lost wills and some other matters, but I think it will be found that the general and accepted doctrine established by the English courts and by most of the American Courts is that the jurisdiction of the English Ecclesiastical Court was supreme in all matters of probate so far as personal property was concerned, and that that court entertained jurisdiction in all matters relating to the probate of wills and could relieve against its decrees, its own decrees, upon equitable grounds, and could afford remedies in almost every, if not every, conceivable circumstance that could arise. There will be found in the opinions of various courts and in the statement of text writers upon

the subject this general doctrine laid down in so many words; that the Court of Chancery can relieve against judgments or proceedings in law courts and law tribunals in the case of fraud, accident and mistake without exception, in all cases of every nature save one and the one exception is matters of probate. That exception is referred to by some courts and some writers as illogical but historic and is recognized for its antiquity, and the only exception so far as the authorites seem to disclose was an exception made by Lord Mansfield, which has been commented upon to an almost unlimited extent since then, in which he found a limitation to the Ecclesiastical jurisdiction and relieved a probate already granted in an Ecclesiastical Court on its being established that some of the parties were fraudulently prevented from contesting the probate. He assumed, as I recall that case, that the Ecclesiastical Court was unable to relieve under those circumstances but has since been criticized repeatedly for that assumption. I do not know whether or not counsel have had occasion to consider what is known as the Roderick case. That was a case not similar to this, it did not arise in this manner at all, but it shows the extent to which equity jurisdiction is limited in matters in which it ordinarily exists. Roderick was a rich San Francisco man who left a large estate and his will was probated. It was afterwards ascertained that the will was

forged, that subscribing witnesses were procured fraudulently to prove the will. A bill was filed in the Court of Chancery to set aside that probate through fraud. The case went to the Federal Supreme Court on Appeal and the opinion there was written by Justice Bradley. It is unnecessary to say that that was an exhaustive review of the matter of jurisdiction of probate courts, enlightening to an extreme degree, and he held that the Court of Chancery had no power to set aside that probate notwithstanding it was the probate of a forged will. I only make these suggestions now tentatively to show counsel how very difficult the question is which you have presented on the subject of jurisdiction, and especially how difficult it is in my own mind without a very thorough argument and a careful consideration of the arguments made and a thorough refreshment of my memory. My present impression, however, is that the English Ecclesiastical Court in exactly the present situation would have jurisdiction, but I only give it to counsel as a present impression and in no way to bind the future determination of that question. So I think, as I said a moment ago, that the proper and best plan is, in view of the great number of witnesses present, to go ahead and hear their testimony and give to both sides the benefit of the most liberal objections that can be urged in their behalf at all stages of the proceedings. Proceed with your proof.

By Mr. Starr: Q. Mr. Tyler, are you a member of the Bar? A. I am.

Q. Do you practise in Camden? A. I do.

Q. Are you the administrator of the estate of Michael Allen? A. I am.

Q. When were you appointed? A. January 23d, 1917.

Q. When did Mr. Allen die? A. January 14th, 1917.

Q. Did you know him in his lifetime? A. I did.

Q. Where did he live? A. Woodstown, Salem County, New Jersey.

Q. Have you qualified as administrator? A. I have.

Q. Have you taken charge of his affairs since his death? A. I have.

Q. What did his estate consist of? A. It consisted of principally mortgage investments, first mortgage securities on real estate, a very few stocks and bonds and very little real estate.

Q. And what is the total amount of the personal property?

Mr. Davis: I object to that as incompetent, irrelevant and immaterial on the issue framed in this case.

The Vice Ordinary: Objection is overruled.

Mr. Starr: Do you object to the fact that we have not the inventory here?

Mr. Davis: I think the proof is incompetent even if we had the inventory.

The Vice Ordinary: I did not understand him to object because the inventory was the best proof. You are willing to accept Mr. Tyler's testimony?

Mr. Davis: Yes; I do not object for that reason. I object on the general ground that the testimony is incompetent and irrelevant.

A. The amount of the inventory, as made by the appraisers, of personal property at its face value is $303,078.43. That does not include the accrued interest on the securities. The real estate consisted of a farm, which was sold at public sale for $10,025, and his residence in Woodstown, New Jersey, which has not been sold but is assessed for $4,000.

Q. So far as you have been able to ascertain did Mr. Allen have any other real estate except the farm and residence in Woodstown? A. He had not.

Q. And the $303,078.43 included mortgages and stocks and bonds? A. Yes.

Q. All of the personal property? A. Yes, and the farm stock and implements and what household furniture he had, that was all the personal property.

By the Vice Ordinary: Q. How was the farm sold? A. The farm was sold at public sale by the heirs.

CROSS-EXAMINATION by Mr. Watkins:

Q. When you say the farm was sold at public sale by the heirs you mean by the brothers and sisters? A. By the sister and the children of a brother of the whole blood.

Q. Mr. Tyler, where were you appointed administrator? In what county were you appointed? A. By the Surrogate of Salem County.

Q. And how did you come to be appointed administrator?

Mr. Starr: I object to that as immaterial.

Mr. Watkins: Mr. Tyler is not one of the family, not a relative.

The Vice Ordinary: I do not see how it can possibly be material.

Mr. Watkins: It may be material in this way: that the persons who are now seeking the probate of this will by their act requested an administrator to be appointed, with the knowledge that the will as it is now was then in existence, just as it is today, they had knowledge of this very paper then.

The Vice Ordinary: Well, if you think it may be material I will let it be introduced.

A. I was appointed at the request of all of the next of kin, both the whole and half blood, by a renunciation signed by all.

Q. All of the whole and half blood, renounced? A. Yes.

Q. Have you a copy of the renunciation with your papers, Mr. Tyler? A. No. There was only one copy made, there never was anything but the original and that was filed by the Surrogate. I don't think I have a copy, I don't think a copy was ever made.

Mr. Starr: I will admit, if you want me to, that the petitioner in this matter signed the renunciation.

Mr. Watkins: Then it is admitted that the petitioner here signed a renunciation and a request for the appointment of Mr.

Tyler, and the renunciation itself is offered in evidence.

The Vice Ordinary: Let that stand as a stipulation.

By Mr. Starr: Q. Mr. Tyler, when you secured the renunciations from the petitioner in this matter, and also the other persons interested in the estate, did you say anything to them with regard to the effect it would have in case it should be established that a will was in existence?

Mr. Davis: Now, that is objected to.

The Vice Ordinary: Let it be answered.

A. I did.

Q. What did you tell them? A. I told Mr. Allen, the petitioner here, that I thought the proper thing to do was to have an administrator appointed to conserve this estate; it was a very large estate, interest was falling due, mortgages were being paid off from time to time, the farm stock had to be taken care of, and that I did not think that the appointment of an administrator would in any way affect their rights, if any existed, under this will.

By Mr. Watkins: Q. The will was then known to be as it is now? A. Yes.

Q. And was in this petitioner's custody? A. No; it was in the residence of Mr. Allen.

Q. Michael Allen? A. Michael Allen.

Q. Do you know in what part of his residence it was kept? A. Yes, I think it was kept in his safe.

Q. In his private safe? A. Yes.

Q. Of his house? A. Yes.

Q. And do you knew whether or not, of your own knowledge, in making examination of his

papers and so on, that that safe was there he kept all his private papers? A. The safe was a small iron fire-proof safe and was a joint safe of Michael Allen and his sister, Josephine Allen, they kept both their papers in this one safe.

Q. Kept their securities there? A. Yes. And the only way I know this will was in the safe is that I saw Josephine take the will from the safe, that is all.

Q. With this knowledge of this paper as it now is, Mr. Tyler, in the possession of the petitioner—

Mr. Starr: I object to that question, because it has not been shown that it was in the possession of the petitioner.

The Vice Ordinary: Finish the question.

Q. With the knowledge at the time, Mr. Tyler, of this will being in existence, or this paper writing being in existence, and in the safe, or wherever it may have been, did the petitioner make the application for administration or for your appointment as administrator? A. Yes, but he made the express statement that he did not want—

Q. Just a moment, Mr. Tyler—and, of course, with that petition he filed his affidavit that Michael Allen dies intestate? A. No, I think not, I don't think the renunciation contained any affidavit of that fact, probably—

Q. Not the renunciation, the petition for administration? A. Yes, I think my petition, in making the application for administration, contained an affidavit to that fact.

Q. That Michael Allen died intestate? A. I think so. That is my recollection of the petition.

Q. There wouldn't have been administration granted if that affidavit had not been filed, would there? A. I don't think so.

Mr. Starr: Are you to produce the renunciation and also the petition for probate?

Mr. Davis? A. No, that is yours.

Mr. Starr: You offered it in evidence. I want to know, if your Honor please, whether what they offered in evidence was the renunciation or the petition for administration. Now, which is it?

The Vice Ordinary: So far nothing has been stipulated about except the renunciation.

Mr. Starr: Well, now, the offer was made by Governor Watkins of the record, the renunciation was offered in evidence.

The Vice Ordinary: Yes.

Mr. Starr: Now, I have no objection to that renunciation being produced, but I think they ought to say whether that is to be produced or whether the petition for administration is to be produced.

The Vice Ordinary: There has been no stipulation about the petition for administration.

Mr. Watkins: Do you want us to produce it?

Mr. Starr: I think it ought to go in with the renunciation.

Mr. Watkins: Well, I have not offered the petition. Of course, I think we both understand that the administration would

not have been granted unless such an affidavit had been made.

By Mr. Watkins: Q. Mr. Tyler, did you secure the signers to this renunciation of the half-blood? A. I did.

Q. Was Joseph Allen with you at the time? A. For some of them he was. I asked him to go with me because I was not acquainted with them, did no even know where they lived.

Q. Did he state anything to them about their share of the estate?

Mr. Starr: I object to that as immaterial.

The Vice Ordinary: I will overrule the objection.

A. I think either he or myself said to all of them, or most o them, that the estate consisted of about three hundred thousand dollars.

Q. Did you go with Mr. Allen when the renunciation of Mr. Pedrick, over at Williamstown, was secured? A. I did.

Q. Did Joseph tell him at that time, in asking his renunciation, that he would receive enough money from the estate to purchase or build a house?

Mr. Starr: Objected to as immateial.

The Vice Ordinary: Objection overruled.

A. My recollection is that Mr. Pedrick had just built a new barn, or that his son or son-in-law had built it for him, it had been destoryed by fire, it was about just completed, and either Mr. Allen—I think Mr. Allen said then that his share of the estate would enable him to pay for many barns and to buy a good deal of property around there.

WILLIAM Z. FLITCRAFT, a witness produced in behalf of the petitioner, alleging himself conscientiously scrupulous of taking an oath, being duly affirmed according to law, on his solemn affirmation saith—

By Mr. Starr: Q. Where do you live, Mr. Flitcraft? A. Woodstown, New Jersey.

Q. How long have you lived there? A. Fifty years or more.

Q. What is your occupation? A. An officer of the First National Bank of Woodstown and Salem County Trust Company of Woodstown.

Q. And how long have you been identified with those institutions? A. 49 years with one of them and not so long with the other.

Q. Did you know Joseph K. Riley in his lifetime? A. I did.

Q. Where did he live? A. At Woodstown.

Q. What was his occupation? A. Formerly a merchant; the latter part of his life he was retired but did conveyancing.

Q. And when did he die, about? A. I don't remember the date of his death.

Q. Approximately how many years ago? A. Well, it was in the latter part of the last century.

Q. Did you know Frank Wright? A. I did.

Q. Is he living or dead? A. He is dead.

Q. And about when did he die? A. I think he died in 1898.

Q. And what was his occupation? A. He was in the shoe business at Woodstown.

Q. And where did he live? A. At Woodstown.

Q. How long did you know him before his death? A. A number of years.

Q. Did you have any business dealings with Mr. Riley during his lifetime? A. I did.

Q. What was the general character of those business dealings? A. In his relations with the bank principally.

Q. Were you acquainted with his handwriting? A. I was.

Q. How did you become acquainted with his handwriting? A. Seeing it frequently through bank transactions.

Q. What do you mean by "through bank transactions?" A. The signing of checks.

Q. Checks that went through your bank? A. Yes.

Q. And did he deal at the bank? A. Yes.

Q. And by that means you became acquainted with his handwriting? A. I did.

Q. Did you know the handwriting of Frank Wright? A. I did.

Q. And how did you become acquainted with that?

The Vice Ordinary: Are these subscribing witnesses both dead?

Mr. Starr: Yes.

A. In the same way.

Q. And did he deal at the bank? A. Yes.

Q. Did you see him write? A. Yes.

Q. And did you see his name signed to checks that passed through the bank? A. Yes.

The Vice Ordinary: Is this attestation clause complete?

Mr. Starr: I think it is.

Mr. Watkins: I think it is not.

The Vice Ordinary: In order to constitute itself *prima facie* proof of due execu-

tion does not the attestation clause need to contain the statement that the witnesses signed in the presence of each other?

Mr. Starr: I think not. I compared that language with the language of the statute and I think it is identical with the language of the statute. This attestation clause is identical with the language of the act. It is not as full as used now, but I compared it with the statute and I find it is in exact accord with the language as set forth in the act.

The Vice Ordinary: The act does not set forth a form of attestation clause.

Mr. Starr: It prescribes a method by which it shall be executed.

The Vice Ordinary: But supposing it does and the court of appeals says that it is necessary for the two subscribing witnesses to sign in the presence of each other? Supposing that the court of appeals says that the language of the statute means that, that the language of the statute constitutes that requirement, then isn't it necessary for an attestation clause, to give the probative force of *prima facie* proof, to contain that statement?

Mr. Starr: My understanding of the law is this: That the statute prescribes a method by which the will shall be executed. Now, if the attestation clause contains language which is in accord with the statute to show that that method was used in the execution of it it is *prima facie* evidence of the facts stated, and this language, as I said before,

is copied from the statute and it is the form that was used at that time, and it seems to me that it is sufficient.

The Vice Ordinary: But the court of errors says that the language used by the statute means that the subscribing witnesses shall sign in the presence of each other.

Mr. Starr: Undoubtedly.

The Vice Ordinary: Now, then, if an attestation clause is to be used as *prima facie* proof of the fact must it not state the fact?

Mr. Starr: I do not think it has to go any further than to state the facts set forth in the statute, if the language prescribed by the statute is used.

The Vice Ordinary: Has not that question ever been before the court?

Mr. Starr: I cannot find that particular question.

Mr. Davies: I think it has been, if your Honor please. I do not have the case at hand but I am quite confident it has been.

The Vice Ordinary: Assume what you say, Judge Starr, to be correct, that it does follow the language of the statute: The question is whether it makes *prima facie* proof of facts sufficient to sustain it as proof.

Mr. Swackhamer: This attestation clause does not say that the witnesses signed it in the presence of each other.

The Vice Ordinary: That is the point I am making to Judge Starr. There is no

use going ahead with all this testimony if it is perfectly clear that the attestation clause is defective.

Mr. Starr: But it says "present at the same time."

The Vice Ordinary: Yes, they were present at the time that he declared it to be his last will and testament, but were they both present at the time they did the signing?

Mr. Davis: There is a very recent case, if you Honor please, decided about six years ago, which reviews the statute with regard to the execution of wills and states the order in which they must be signed.

The Vice Ordinary: There is no doubt they must be present at the same time, but must the attestation clause show that fact in order to make *prima facie* proofs?

Mr. Starr: Now, here is the language of the statute: "***shall be signed by the testator, which signatures shall be made by the testator, or the making thereof acknowledged by him, and such writing declared to be his last will, in presence of two witnesses present at the same time, who shall subscribe their names thereto, as witnesses, in the presence of the testator." Now, that is the preceise language used in this attestation clause, and the inference is that where it says it was "signed, published and declared in the presence of us, who were present at the same time," that it was not only signed and declared in the presence of these witnesses who were pres-

ent at the same time but that they subscribed their names as witnesses in the presence of the testator. Now, the attestation clause, as I said before, followed the language of the statute, and it seems to me under those circumstances it is *prima facie* proof of all the facts which the statute requires. Now, it is true that in the form which is used now "both being present at the same time" is included, but it seems to me that is surplusage, it it not required by the statute. I cannot find any authority which holds that an attestation like this, which follows the language of the act, is not *prima facie* evidence of the facts stated.

The Vice Ordinary: It would seem that it ought to be if it follows the language of the statute, it does not seem possible that the courts can make more requirements than the statute makes, but the courts, nevertheless, have said that the subscribing witnesses shall sign in the presence of each other, and if the attestation clause is to be *prima facie* proof of that fact it would seem that the attestation clause ought to disclose that fact. However, I will not finally pass upon the question at this time unless counsel have some cases directly in point.

Mr. Watkins: Just at this time is it ripe for objection?

The Vice Ordinary: Yes, I think it is. He is trying to prove this will by the signatures of subscribing witnesses.

Mr. Swackhamer: We want to make the objection, then, that it is not executed or that the attestation clause does not show that it was executed in compliance with the statute.

The Vice Ordinary: I will sustain your objection if you will show me any authorities in point, holding that this language is not *prima facie* proof of due execution. My own impression would have been that it is not, but it follows the statute so closely that it seems difficult to hold that it is not.

Mr. Swackhamer: Well, I am not prepared with the authorities on the subject. It seems to me that it does not.

The Vice Ordinary: If you can find any authority directly in point that is conclusive we can save ourselves lots of trouble, and if you will bring them in this noon we will consider them at that time.

Mr. Watkins: The objection is noted, though, at this time?

The Vice Ordinary: You may have the benefit of your objection.

By Mr. Starr: Q. I show you a paper which contains the apparent signature of Joseph K. Riley and Frank Wright and ask you whether or not those signatures are in their handwriting. Take the first signature: Is that in the handwriting of Mr. Riley? A. It is.

Q. Is that his signature? A. Undoubtedly.

Q. And of Mr. Wright? A. Undoubtedly.

Q. That is his handwriting, is it? A. Yes, sir.

The Vice Ordinary: You had better have the instrument marked for identification.

Mr. Starr: Yes.

Said paper marked Exhibit P-1a for identification, and signature of Michael Allen torn from same marked Exhibit P-1b. for identification.

Mr. Starr: Mr. Davis, is there any question as to the authenticity of these signatures?

Mr. Davis: I am not going to raise any question.

Mr. Starr: If your Honor please, we have other witnesses to prove the authenticity of the signatures of the subscribing witnesses but the gentlemen assure me that they are not going to make any contest of that situation.

The Vice Ordinary: And it is stipulated that both these witnesses are dead, is it not?

Mr. Starr: He has testified to that.

Q. Are both of these witnesses dead? Are Mr. Riley and Mr. Wright both dead? A. Yes.

No Cross-Examination.

HORACE F. NIXON, a witness produced in behalf of the petitioner, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Mr. Nixon, what is your profession? A. Lawyer.

Q. How long have you been practising? A. Since 1896, twenty-one years.

Q. And your office is located where? A. 317 Market Street, Camden.

Q. D'd you know Michael Allen in his lifetime?
A. I did.

Q. How long did you know him before he died?
A. About eighteen years.

Q. And in a general way did you transact business for him? A. I did.

Q. And what was the nature of the business you transacted for him? A. I had invested for him at the time of his death over $123,000 in mortgages.

Q. And how long had you been taking care of his investments in that way? A. About eighteen years.

Q. Did you have any conversation with him with relation to the rights of brothers and sisters of the half blood and of the whole blood in his estate in case of intestacy?

Mr. Davis: I object to that.

The Vice Ordinary: I will overule the objection. This goes, of course, to the very root of the case, testimony offered with a view of showing an inadvertent cancellation or mutilation of this will. I will give defendants the benefit of any objection that they will be entitled to avail themselves of.

Mr. Davis: Of course, my objection, your Honor, is that at the present time there is nothing to show that it has any relevancy to the matter here.

The Vice Ordinary: Of course, he has to climb a ladder by beginning at the first rung. I can see what is coming.

Q. Answer the question, Mr. Nixon.

(Question repeated)

A. I did.

Q. Do you remember about when that conversation occurred? A. It was on the 25th day of September, 1915.

Q. And where did it occur? A. In his residence at Woodstown.

Q. And who were present? A. His sister, Miss Josephine Allen, and himself and myself.

Q. Who lived in that house at that time, Mr. Nixon? A. Michael Allen and his sister, Josephine.

Q. Was Micheal Allen married or a bachelor? A. He was a bachelor.

Q. And was Josephine married or was she single? A. Single.

Q. Now, won't you state the conversation which occurred upon that occasion as near as you can recall it?

Mr. Davis: That is objected to.

The Vice Ordinary: Objection overruled.

Mr. Watkins: I might call your Honor's attention to the fact that this date upon the will showing cancellation is in 1916, or a year later than this conversation, and my understanding of all the authorities is that if any attempt is made to establish a will of this kind that all conversations relative to it are confined to the time of the destruction of the will.

The Vice Ordinary: I will overrule the objection upon my understanding at this time that this proof when completed will be for the purpose of showing that the will was canceled through inadvertence and mistake and without intention upon the

part of the testator to revoke it. That, I apprehend, is the purpose of the proof?

Mr. Starr: That is the object of the proof.

The Vice Ordinary: I will overrule the objection.

Q. (Repeated) Now, won't you state the conversation which occurred upon that occasion as near as you can recall it? A. I had called with reference to some mortgages investments, and Mr. Allen asked me while I was there what was the law of half blood. I told him that I was under the impression that half blood had no interest when there were living relatives of the whole blood, but that I would look up the matter and let him know.

By the Vice Ordinary: Q. By that you meant that at the decease of a person his half bloods would not take his property? A. Would not take his property.

Q. If he had full bloods? A. Full blood living.

Q. Brothers and sisters of the half blood you referred to? A. I referred to all relatives of the half blood or their descendants.

By Mr. Starr: Q. How did the conversation arise? Do you remember? A. Miss Allen said, as near as I can recall it, "Michael doesn't want the half blood to have any interest in his property." She personally felt differently.

Mr. Davis: I move that be stricken out.

The Vice Ordinary: You may state what he said.

Q. That was stated by her in the presence of yourself and Michael? A. Yes, that was said in the presence of the three of us.

By Mr. Watkins: Q. By him? A. She said—that was her words, and he did not reply, he did not deny it. Then he asked me to look up—or, rather, he asked me what was the interest of the half blood as against those of the whole blood, and I told him that I was of the opinion that the half blood had no interest when there were relatives of the whole blood but that I would look it up and let him hear from me.

By Mr. Starr: Q. Now, is that in substance the whole of the conversation which occurred upon that occasion? A. Well, the consultation, according to my diary, was a pretty long one, and we must have—I can't remember the exact facts. I have an entry here in my diary which I made at the time.

Q. That was the date? A. That was the date, yes.

Q. And what date did you say it was? A. September 25th, 1915. Shall I read that entry?

Mr. Davis: No.

Q. Now, I show you a paper which is dated September 29th, 1915, partly printed and partly written, with some writing at the bottom, and ask you whether that was a form used by you in your office with relation to the notification of the payment of interest? A. It was.

Q. At that time? A. It was.

Q. In whose handwriting are the words at the bottom of the sheet? A. In my handwriting.

Q. Do you know what was done with that piece of paper? A. That was mailed to Michael Allen on September 29th, 1915, with some interest, probably several checks for interest.

Q. And who wrote the words at the bottom of that piece of paper? A. I did.

The Vice Ordinary: Will you read it, Judge Starr?

Mr. Starr: I offer it in evidence.

Said paper marked exhibit P-2.

Mr. Starr: The bottom is, "Have looked up your questions and will either write you or see you some time this week."

The Vice Ordinary: I thought this was the answer?

Mr. Starr: Oh, no. "H. F. N."

Mr. Watkins: Do you offer that, Judge?

Mr. Starr: Yes.

Mr. Watkins: Where is there any evidence that that was brought to Michael Allen's notice?

Mr. Starr: I will prove it later.

Q. Now, when next after the 22d of September were you in Woodstown, if you can recall? A. The 25th, you mean?

Q. The 25th of September. A. September 25th was on Saturday. The next time I was there was the following Friday, October 1st.

Q. Now, in the meantime what had you done with reference to looking up the question of law as to the devolution of property as between half blood and whole blood, in accordance with your conversation with Mr. Allen?

Mr. Davis: That is objected to as not being material or competent, whatever he d d in looking it up.

The Vice Ordinary: I will overrule the objection. I do not think his researches will add much excepting, perhaps, to give

a corroborative detail of his own narrative. You may answer it.

A. I asked Mr. James B. Nixon, who at that time was my assistant, to look up the law as to half blood.

Mr. Davis: I move that to be stricken out.

The Vice Ordinary: Overruled.

Q. Now, I show you a paper in lead pencil, the first word at the top being "Descent." In whose handwriting is that? A. That is in the handwriting of Mr. James B. Nixon.

Q. And was Mr. Nixon in the months of September and October, 1915, your assistant in your office? A. He was.

By the Vice Ordinary: Q. And an attorney-at-law? A. An attorney-at-law.

By Mr. Starr: Q. Now, what do you know with reference to this paper, the first word being "Descent,"—how that came to be prepared and what became of it? A. It was prepared by Mr. James B. Nixon, to whom I referred matters of opinions as to law, and handed to me and taken by me to Woodstown on Friday, the first day of October, and given by me to Michael Allen.

Q. And is the paper now in the same condition as it was when you gave it to Michael Allen? A. It is.

Mr. Starr: I offer that in evidence.

Mr. Davis: Of course, it is objected to.

The Vice Ordinary: Objection overruled.

Mr. Davis: As irrelevant and incompetent.

Said paper marked Exhibit P-3.

The Vice Ordinary: Read it, please.

Mr. Starr: "Descent. Comp. Stat., Vol. 2, p. 1918, Sec. 2. When any person shall die seized of lands, etc., in fee, etc., without devising same in due form of law, leaving a brother or sister, or leaving a brother or brothers and a sister or sisters of the whole blood, the inheritance shall descend to such bro. or sister or to such bro. or brothers and sister or sisters, as the case may be, as tenants in common, in equal parts; and in case any such bro. or sister who would have inherited by this law, if living, shall die before the said person so seized, and leave a lawful child or children, such child or children, surviving the person so seized, shall inherit, if a child solely, and if children, as tenants in common in equal parts, such share as would have descended to his, her or their father or mother, if such father or mother had survived the person so seized. Same law applies in case of death of child of such bro. or sister." Now, that is practically a re-statement of section 2 of the descent act with some abbreviations.

The Vice Ordinary: Is there another section which provides for the half blood? Is that all the statute provides?

Mr. Davis: I think the statute is silent. That is my recollection of it. The statute of descent is silent as to any interest of the half blood against the whole blood. There is no provision in the descent act as to the devolution of title to half bloods where the whole blood is in existence.

The Vice Ordinary: Well, did not the will that was destroyed provide exactly as that statute provides?

Mr. Davis: Yes,—the law is different with reference to personal property.

The Vice Ordinary: Yes, I understand that the rule is different there.

Mr. Davis: Yes, the rule is different, we concede that for the purpose of this case.

By Mr. Starr: Q. Did you ever see this paper which is marked Exhibit P-3 during Michael's lifetime after you handed it to him? A. I did not.

Q. Do you remember whether or not there was any conversation between you and Michael upon this subject when you handed the paper to him? A. I told him at that time—

Mr. Davis: I object to the conversation, if your Honor please.

The Vice Ordinary: Objection overruled.

A. (Resuming) I told him at that time that the law was that the half blood would have no interest in his estate as against the whole blood or their descendants. I gave him a copy of the law, handed him that paper.

Q. In either of these conversations, when you first talked with him and also when you handed him the paper, did Michael express himself to you with relation to the half bloods? A. Yes.

Mr. Davis: That is objected to.

The Vice Ordinary: Overruled.

Q. What did he say? A. He said that he did not want the half blood to have any interest in his estate.

CROSS-EXAMINATION by Mr. Davis:

Q. Mr. Nixon, you took with you this copy of the statute of descent and gave that to Mr. Allen? A. I did. This paper, you mean, just referred to by Judge Starr?

Q. Yes. Now, you told him that this law, this statute, excluded the half blood, did you not? A. I told him that the law was that the half blood would have no interest in his estate as against whole blood or their descendants.

Q. Yes. Now, you did not distinguish between personalty and realty? A. I did not.

Q. And he did not distinguish to you in his question as to realty and personalty? A. No, he did not.

Q. Now, the paper which you presented to Mr. Allen deals only with lands, does it not? A. It does.

Q. And used only the word "lands" in describing the estate? A. It does,—lands, tenements and hereditaments, I think.

Q. No, look at this paper; that don't say anything about tenements and hereditaments, does it? A. It says "lands, &c."

Q. Yes, hasn't got anything on it about tenements and hereditaments? A. No.

Q. Now, this was the last conversation that you had with him about it? A. I can't say that it was. I saw him at intervals—I can give you the dates,—of about two months.

Q. But you have no recollection of any further conversations that he had with you about this question? A. I have no definite recollection of—

Q. You have no indefinite recollection, have you, of any conversations that you had with Michael Allen with reference to this matter? A. Well,—

Q. Now, won't you answer yes or no? A. I will have to answer yes, because the matter was talked over later.

Q. Well, now, when? A. At the time that I drew Miss Josephine Allen's will.

Q. Now, did he question you any further about it? A. Well, a statement was made by Miss Allen in his presence.

Q. No, never mind, I don't ask you that, Mr. Nixon, I am asking you did he question you any- A. No, I can't say that he did. I can explain it he did.

Q. You didn't draw any will for Michael Allen? A. I did not. I didn't know whether he had one or not.

Q. Well, now, do you remember having a conversation with Miss Josephine Allen directly after the funeral of Michael Allen with respect to any conversation with Michael Allen concerning the descent of his property? A. I was in Florida—

Q. Answer yes or no, will you? A. I do.

Q. Now, at that time weren't you asked the question by Miss Allen whether or not you had any conversation and had given Michael Allen improper advice with respect to it? A. I was not asked that question.

Q. Well, were you not asked a similar question meaning the same thing? A. The whole situation was gone over, I was shown Mr. Allen's will, I was shown this paper again which I had not seen since.

Q. Now, at that time didn't you tell Miss Allen that you had no recollection of having any conver-

sation with Michael Allen and had no recollection of the paper? A. When I was in Florida—

Q. Won't you answer the question, please? A. No, I can't say that I did. I can explain it if you will let me.

Q. Well, do you deny that you said so? A. Yes, I deny that I said so.

Q. Do you remember Miss Calver being there? A. I do.

Q. You deny that you said that you had no recollection of either giving Mr. Allen this advice, or tion of either giving Mr. Allen this advice, or any any recollection of this paper, or any conversation with respect to the descent of his property? A. My recollection was—

Q. Won't you answer the question, please? a specific question. I ask for an answer yes or no. A. Well, I deny it, then. If you will let me explain I will tell you the whole thing.

Q. And didn't you at that time say to Miss Allen that the statement of the law as contained in this paper was correct because it referred only to lands,—real estate? A. I did.

Mr. Davis: This paper that I referred to in my question was P-3, if your Honor please.

The Vice Ordinary: Yes.

Q. Now, Mr. Nixon, are you sure that you took this paper, P-3, to Michael Allen? A. I am.

Q. Or did you mail it to him? A. I took it personally, according to my—I have my record here in my diary, on the first day of October, 1915.

Q. No, I am not referring to your diary, I am now referring to your recollection. Isn't it your recollection that instead of taking this paper, P-3,

to Michael Allen that you mailed it to him? A. Until this morning in court I was uncertain whether I had mailed it to him or whether I had taken it to him.

Q. Now, you know Mrs. Hannah England, do you not? A. Yes.

Q. Did she not call at your office after the death of Michael Allen and ask you concerning this paper, P-3? A. She did.

Q. Did you not tell her at that time that you mailed the paper to him? A. I did not. I told—

Q. That you mailed it to him without comment? A. I told her that I probably mailed it to him with a receipt for interest. Until this paper was shown to me this morning I was uncertain whether I had taken it personally or whether I had mailed it.

Q. I am asking you not whether you are certain or uncertain, I am asking you if you did not tell Hannah England that you mailed this paper to him, and that you mailed it without any comment and had no conversation with Michael Allen with reference to it—A. No, I did not tell her that.

Q. —after it was written? A. I did not tell her that.

Q. You deny telling her—using those words? A. Yes.

Q. Do you deny expressing that thought to her? A. My recollection was that I told her that I wasn't sure whether I took it to him personally or mailed it. I have had the impression this morning, which I wasn't able to testify to until I found the entry in my diary and saw that paper,—

Q. That is all right. A. —which I didn't find until this morning, and didn't see that paper until this morning,—that calls my attention now to the fact.

By the Vice Ordinary: Q. This is a diary, Mr. Nixon, I apprehend, that you kept regularly of all your daily transactions? A. I have kept a diary since I was eight years old, every day.

By Mr. Davis: Q. Now, Mr. Nixon, isn't it a fact that on the day that you had the conversation with Michael Allen with respect to the disposition of his estate that you at that time told him that you did not know what the law of descent was or of distribution of his personal estate but would advise him about it? A. No, I did not. I told him as I understood the law the half blood had no interest as against the whole blood or their descendants but I would look it up and let him know.

Q. Now, have you ever been threatened with suit in this matter? A. No.

Q. Haven't some of the persons who have been interested in this estate threatened to sue you? A. They have not.

Q. Haven't they intimated that suit was to be brought against you by reason of—A. No.

Q. Well, why were you present in Woodstown immediately after or shortly after the death of Michael Allen? A. I received a telegram from Joseph Allen, which counsel has, stating that Michael died under the impression received from me and from a paper that his half blood had no interest.

Q. And you went down in response to it? A. The day I came home from Florida, which was on the 8th day of February, I went at once to Woodstown to find out what this meant.

Q. You had no recollection of it at that time? A. I didn't recall the facts, and part of them until I got my diary and looked at it this morning.

Q. Now, does your diary under the date in September that you spoke of contain the statement of facts that you made to Michael Allen? A. I will read it to you. My entry of September 25th is as follows: "A clear, warmer day."

Q. No, never mind the weather, we are not talking about that. What did you say to Michael Allen? A. It is very short: "Went down to Woodstown in the car this afternoon and had a long consultation with Michael and Josephine Allen. Then I went on to Salem," &c.

Q. Now, that's all that you diary shows about it? A. That is all my diary shows about that.

Q. Now, then, the diary, then, don't refresh your recollection as to what you said to Michael Allen? A. No.

Q. And when Mrs. England asked you in your office about it you didn't know anything about it—couldn't recall what happened? A. I certainly could recall that I had had this conversation, it was most distinct in my mind, always has been, that Michael had asked me about the law of half blood; there were certain details that I had forgotten.

Q. Did you tell Mrs. England that you did not remember the conversation and that all you did was to send down to him a copy of the law? A. I did not. Part of that is true, but not all of it.

By Mr. Starr: Q. Mr. Nixon, is this the telegram (exhibiting paper to witness) that you received from Joseph Allen while you were in Woodstown? A. While I was in Florida, you mean.

Q. I mean in Florida. A. It is.

Q. And is that the telegram that induced you to go to Woodstown when you reached home? A. I sent a reply at once to that telegram.

Q. I show you a telegram which is dated the 25th day of January, 1917, and ask you whether or not—

Mr. Davis: I object to that. I do not see that that is relevant.

The Vice Ordinary: I think it is relevant, in explanation of what you brought out on cross-examination.

Q. That is the telegram that you sent? A. This is my telegram of January 25th in reply to this telegram of January 23d.

Mr. Starr: I offer these two telegrams in evidence.

Mr. Davis: Objected to, on the ground that all references made to the telegrams was volunteer information by the witness and not elicited by any questions from consel.

The Vice Ordinary: I think they were responsive to the questions. I will admit the telegrams. Read them, Judge Starr.

Mr. Starr: "Woodstown, N. J. Horace F. Dixon, Hotel Halcyon, Miami, Florida. Michael died without will under the impression received from talk and paper sent by you that Josephine and Charles heirs along according to law received the estate, you knowing there were half sisters. Reply immediately about this distribution of personal and real estate. Some lawyers say halves share equally. Joseph M. Allen. 1917, January 23d, A. M. 8.46."

"Miami, Florida, January 25th, 1917. Joseph Allen, Woodstown, N. J. Telegram

just received, addressed Dixon instead of Nixon. As I understand facts, half blood have no interest as against those of the whole blood. Am wiring my office to send you careful opinion. Think you had best telephone exact facts to my office or call up on receipt of this. Horace F. Nixon."

Said telegrams marked exhibits P-4 and P-5, respectively.

By Mr. Starr: Q. Now, when you said a moment ago that you were uncertain as to the dates when you visited Woodstown and had your recollection refreshed by a paper, did you refer to exhibit P-2? A. I referred to that and to the fact that I had gone carefully over my diary and marked in the back the dates that I had been to Woodstown during the year 1915, and I overlooked until I came in to court this morning that I hadn't made a note that I had been there on October 1st, 1915, for some reason I overlooked that.

Q. Now, it was developed on cross-examination that you drew a will for Miss Josephine. Do you remember when that was? A. That was in September, 1916.

Q. September, 1916? A. Yes.

Q. Well, now, did you have a conversation with Miss Josephine in the presence of Michael upon that occasion with relation to what the law was as to half bloods? A. Michael was present part of the time, he left the room and went upstairs.

Q. While he was there was there anything said about what the law was regarding half bloods? A. Miss Josephine wished to have the half blood have an interest in her estate.

Mr. Davis: Now, that is not an answer to the question.

Mr. Watkins: I move it be stricken out.

The Vice Ordinary: You will have to confine your answer to anything that was said in the presence of Michael.

Q. Between the three of you, when Michael was there, was there anything said about this question of the half blood participating in the estate?

Mr. Watkins: It is further objectionable because while it may not appear in the case at this time it undoubtedly will appear that the will of Michael Allen was destroyed in July, 1916, and they are now attempting to show a conversation in September, two months after the occurrence of it.

The Vice Ordinary: I will hear the testimony.

A. I cannot recall the exact conversation except that it was talked over by me in the presence of both of them, the question of half blood, and Michael said he did not wish the half blood to have any interest in his estate, he always said that, and Miss Josephine always said—

Mr. Davis: I move that be stricken out.

A. (Continuing)—she wished the half blood to have an interest in her estate.

The Vice Ordinary: It may stand if it was said in his presence.

Mr. Davis: The part that I object to, if your Honor please, is, he says that he always said that,—

A. (Resuming): At any time that the matter ie up.

Mr. Davis: —without fixing any time.

The Vice Ordinary: I think I will let it stand in that form.

Q. With reference to Mr. James B. Nixon, when did he cease employment in your office? A. At the time that he was struck by an automobile, which caused concussion of the brain, on November 23d, 1915.

Q. And what has been the condition of his health since that time? A. He has never resumed the active practice of law.

By the Vice Ordinary:

Q. Is he able to testify at this time? A. He has complained some of his memory not being what it should be.

By Mr. Swackhammer:

Q. Mr. Nixon, this conversation that you had with Mr. Allen regarding the disposition of his estate or where it would go without a will, what date did you say that was? A. On September 25th, the first conversation was September 25th 1915, the second one on October 1st, 1915.

Q. He asked you where his estate would go in case he died without a will,—is that what he said? A. No; he asked me what was the law of half blood.

Q. Law of half blood? A. Yes, what interest the half blood would have in his estate.

Q. He did not discriminate between personal property and real estate? A. He did not.

Q. You answered the question that the kindred of the half blood would not inherit, would not take property? A. I told him as I understood the law the half blood had no interest as against the whole blood or their descendants.

Q. Well, you had in mind real estate, did you not? You are a lawyer of twenty years experience

and you would distinguish, wouldn't you? A. I did not personally look it up until after Mr. Allen's death as to whether there was any difference between real estate and personalty.

Q. When you did look it up—oh, after Mr. Allen's death? A. After Mr. Allen's death.

Q. Never looked it up before? A. I did not look it up before.

Q. Well, you delivered this paper to him? A. I did.

Q. That says "real estate?" A. That says lands, &c."

Q. You must have understood, then, that his question referred to real estate, didn't you? A. No.

Q. Well, then, why did you give him this paper that refers solely to real estate? A. At the time I gave him that paper I thought that included everything, real estate and personal property.

Q. Then do you mean to say when you handed Mr. Allen that paper that you understood that that applied to personal property and real estate? A. I understood that that was all the law there was on the question of half blood.

Q. Well, you have read the statute of distribution haven't you? A. Yes, I have probably a great many years ago.

Q. Frequently in your business as a lawyer you would have occasion to refer to it, wouldn't you? A. No, I haven't read an opinion in at least ten years, and I never examine statutes or get up a brief. I always depend upon someone else.

Q Well be that so, you knew that there was a statute of distribution? A. I did.

Q. And if you were not familiar with it and were asked a question you would naturally look it up, wouldn't you? A. I haven't done so for twenty years.

Q. You are a careful lawyer, Mr. Nixon,—an exceedingly careful lawyer, aren't you? A. The part of the law that I attend to I try to be very careful.

Q. You enjoy a reputation of being a very careful lawyer, don't you? A. I can't tell you about that. You can tell probably better than I can myself. I don't attempt to do any brief work or look up opinions.

Q. Then as a matter of fact, you simply scribbled off the statute of descent? A. I didn't scribble it off.

Q. Well, had it done? A. I asked Mr. James B. Nixon to look up the law of half blood and I handed that to Mr. Allen as the law.

Q. Without any comment? A. No, I told him that the law was that the half blood would have no interest as against those of the whole blood or their descendants.

Q. Where did you get that information from? A. I got the information from Mr. James B. Nixon.

Q. Well, you didn't get it from this paper, did you? You didn't get it from this paper that you handed to Mr. Allen? A. I personally did not look up the law. I asked Mr. Nixon to look it up, and that was the paper he gave me and the paper I handed to Mr. Allen.

Q. Did you have any knowledge independent of what Mr. Nixon looked up and handed you on this

paper? A. My understanding of the law is as stated in this telegram,———

Q. No, no, no. A. ———that the half blood have no interest as against those of the whole blood,—until I looked it up after Mr. Allen's death.

Q. Well, you don't mean to say that you wrongly advised Mr. Allen as to the law, do you? A. The statement which I gave to Mr. Allen as to the law was not broad enough to cover personal property.

Q. It refers to real estate? A. That act of descent refers to real estate. As I told Miss Allen when I saw that paper for the first time since it had been given to him, when I read it carefully, I says "This refers to real estate, and so far as this writing is concerned it is perfectly true."

Q. And when you got it from Mr. James B. Nixon you saw that it referred to real estate, didn't you? A. Well, if I had examined it carefully I would have seen that.

Q. Well, you did examine it carefully, didn't you, before you took it over to Mr. Allen to be his guide? A. I can't say how carefully I examined it, I took it there as the law and handed it to him with the statement—

Q. Well did you see in the paper at the time the word "lands"? A. I don't recall that I did.

Q. Does your recollection enable you to say whether at that time in giving this paper to Mr. Allen you had in your mind that it pertained to real estate? A. I had in my mind that that opinion was—that that law was a complete answer to his question as to what interest the half blood

would have as against those of the whole blood.

Q. This paper that you gave him pertained to real estate? A. It did.

Q. It says nothing about personal property? A. It says "lands, &c."

Q. As you understood it it referred to lands? A. As I understand it now.

Q. So that you were answering him a question which you understood he asked you? A. Yes.

Q. Weren't you? A. I was, but his question, understand, was—he meant all his property.

Q. That is all.

JAMES B. NIXON, a witness produced in behalf of the petitioner, being duly sworn according to law, on his oath says———

By Mr. Starr: Q. Mr. Nixon, where do you live? A. Collingswood.

Q. And what is your profession? A. Lawyer.

Q. In the month of September, 1915, in whose office were you working? A. Horace F. Nixon's.

Q. I show you a paper, which is marked P 3, and ask you whether or not that paper is in your handwriting? A. I think it is.

Q. Have you any recollection— A. Looks like it.

Q. Have you any recollection now—

Mr. Watkins: Doesn't he know whether it is or not.

A. It looks very much like my handwriting. I think it is. But it was never made for anything except our own personal memorandum.

Q. Have you any recollection of how the paper came to be prepared? A. No.

Q. No recollection at all? A. None whatever.

Q. When did you leave Mr. Nixon's office? A. Being under oath I can't answer, I only know from hearsay, my memory has gone completely after the 23d of November and for two or three weeks before that.

Q. You had an accident on the 23d of November? A. So I am told; I believe so.

No Cross-Examination.

JOSEPHINE ALLEN. a witness produced in behalf of the petitioner, being duly sworn according to law, on her oath says—

By Mr. Starr:

Q. Miss Josephine, where do you live? A. Woodstown.

Q. And what relation were you to Michael Allen? A. A brother.

Q. How long did you and Michael live together? A. Sixty-two years.

Q. Was he married? A. No.

Q. Were you married? A. No.

By the Vice Ordinary:

Q. Did you say yes or no? A. No.

By Mr. Starr: Q. And how old was Michael when he died? A. Sixty-two years, not quite sixty-two years.

Q. And were you older or younger than he? A. I was sixty-four last April, the 12th of April.

Q. And how long have you and he lived in the neighborhood of Woodstown? A. All our lives excepting one year, 1869, we lived in Camden.

Q. How long had Mr. Nixon had anything to do with the negotiation of mortgages for your brother before his death? A. I suppose—may have been about eighteen years.

Q. And did he transact any business with you during that time? A. Yes.

Q. What sort of business did he conduct for you? A. Investing money.

Q. Investing money on mortgages? A. On bonds and mortgages.

Q. And did Mr. Nixon come to Woodstown to see your brother and see you about business affairs? A. Yes.

Q. Do you remember Mr. Nixon coming there sometime in the month of September, 1915? A. Yes.

Q. Was there any conversation between Michael and himself, or you and Mr. Nixon in Michael's presence, with relation to the law of half bloods? A. Yes.

Q. Now, won't you state in your own way about what occurred in Michael's presence? A. He asked Mr. Nixon—

Mr. Watkins: What time was this, Judge?

Mr. Starr: September, 1915.

Mr. Watkins: Of course the objection is made as before.

The Vice Ordinary: Objection overruled.

Q. Go ahead, Miss Allen. A. He asked Mr. Nixon if he died without a will if the half bloods would come in, Mr. Nixon said he did not know but he would go home and look the matter up.

Q. Is that about what occurred? A. Yes.

Q. Do you know what happened to induce Michael to make that inquiry of Mr. Nixon?

Mr. Davis: That is objected to.

The Vice Ordinary: I somewhat doubt the competency of that, Judge. What does it call for?

Q. Well, had you and Michael had any conversation— A. Yes.

Q. ———about that matter which induced him to say something to Mr. Nixon about it? A. Yes.

Q. Now, what was the conversation between you and Michael on that question?

Mr. Davis: Objected to.

The Vice Ordinary: Objection overruled.

Q. Answer, Miss Josephine.

(Question repeated) A. At that time?

Q. Either at that time or just before that time, which induced Michael to make the inquiry of Mr. Nixon? A. Before 1915?

Q. Yes, about that time. A. Oh, I had a will just like Michael's and I destroyed it and I wrote another will, wrote another will leaving my estate to Michael and provided for my half brother and sister, and I destroyed that, and I suppose that is what led him to ask that question. I hadn't any will at that time.

Q. Well, had you had any conversation with Michael in which you told him that you had destroyed the will? A. I did.

Q. And did you tell him why you destroyed it? A. Yes.

Q. What did you say to him? A. I told him that—

Mr. Swackhamer: That is objected to.

The Vice Ordinary: I think it is competent.

Q. Go ahead. A. I told him that I had destroyed both of my wills, and I thought if I died—he was the executor of both of them—that he wouldn't know what had become of the wills.

Q. Was there anything said about half bloods at that time between you and Michael?

Mr. Swackhamer: I object to that as leading and suggestive.

The Vice Ordinary: Objection overruled.

A. Not at that time.

Q. Well, at any time prior to the date Mr. Nixon came down there and Michael made this inquiry had you and Michael talked over the question of the half blood? A. Yes.

Q. And what had been said between you and him? A. Why, we didn't want them to come in and take a share of our estate.

Mr. Davis: I move that be stricken out if your Honor please. It does not fix the time or place.

The Vice Ordinary: Fix the time, if you can.

Q. Well, when was that with reference to the time Mr. Nixon came down and Michael made this inquiry of him? A. Why, I had destroyed my will I think about a month before that.

Q. And did this conversation with Michael occur about the time you destroyed your will?

Mr. Davis: I object to it as leading.

The Vice Ordinary: I think it is objectionable.

By the Vice Ordinary: Q. Can you tell when it occurred with reference to the time Mr. Nixon came? A. Well, he was down there September the 29th, 1915.

Q. The 25th, according to his testimony. A. Well, it might have been the 25th.

Q. That is when he first came. A. Well, he was right.

Mr. Watkins: It is further objectionable because her answer is as to what would become of our estate.

The Vice Ordinary: Well, the question is overruled.

By the Vice Ordinary: Q. You said he was there on the 29th, or 25th you now think it is, and the question is how long before that was it that you had this conversation with your brother which you have just spoken of? A. I think it was sometime—I am not positive—the last of July or August, I was without a will for two months.

By Mr. Starr:

Q. Of the same year? A. Yes.

Q. And Michael knew that you were without a will? A. Yes, after I told him.

Q. Well, now, I show you a paper which is marked Exhibit P-2: Do you remember that paper? A. Yes.

Q. Do you know where it came from? A. Yes.

Q. Where did it come from? A. Mr. Nixon.

Q. Who was it sent to? A. Why, it must have been sent to me, because it was—our business checks sometimes came together, some to Michael and some to me, but according to this it must have been sent to me.

Q. The mortgage referred to is one of your mortgages? A. Yes.

Q. Well, now, it came to Woodstown from Mr. Nixon? A. Yes.

Q. And when did you first see it? A. I saw it when it came and it has been put away and I found it yesterday.

Q. Found the paper yesterday? A. Yesterday morning.

Mr. Watkins: Did she say that when she received it she put it away and found it yesterday morning?

Mr. Starr: Yes.

Mr. Watkins: That was admitted upon the assumption that it had been delivered to Michael Allen. There is no testimony at this time showing that Michael ever saw it.

Q Well, did Michael see this paper? A. He always saw my business affairs and his own.

Mr. Watkins: That is objected to because it is not a direct answer to the question. The question is, did he see this paper?

The Vice Ordinary: I will let the answer stand if it is the answer she desires to stand.

Q. Now. I show you Exhibit P-3; in lead pencil: Where did you first see that paper?

Mr. Watkins: Just a moment. I must object to the admission of that first paper. It

was let in first because Judge Starr said that he would show that it had been delivered to Michael Allen. Now, that has not been shown; it has not been shown to have either been in Michael Allen's possession or that Michael Allen ever saw it.

The Vice Ordinary: Mr. Nixon testified that he handed this paper to Michael Allen.

Mr. Watkins: This paper?

The Vice Ordinary: Yes, the one he is now showing to the witness..

Mr. Watkins: I am referring to P-2;

Mr. Starr: Mr. Nixon testified that that was mailed to Michael Allen.

Mr. Davis: No; he testified that he took it to Michael Allen.

Mr. Watkins: But Miss Allen says that she received it. There is no testimony at this time that Michael ever saw it.

Mr. Starr: If you are talking about P-2: Mr. Nixon testified that that had been mailed to Michael Allen.

Mr.Watkins: And the objection was made that —it was not objected to but the suggestion was made that you must show that Michael Allen had seen the paper or had it in his possession, and Miss Allen, who you are attempting to show that by, has not shown that Michael Allen ever did see it or ever had it in his possession. That is what I am objecting to. I ask that the paper not be admitted until it is proven to have either been shown Michael Allen or been in Michael Allen's personal possession.

The Vice Ordinary: Let it stand as an Exhibit. She says that he received all mail that came to her. Now, answer the question with reference to Exhibit P-3; I think it is, that has just been asked.

By Mr. Starr:

Q. (Repeated) Now, I show you Exhibit P-3; in lead pencil: Where did you first see that paper? A. In my home.

Q. Do you know how it came there? A. I can't remember.

Q. Do you know whether Mr. Nixon brought it there or mailed it there?

Mr. Davis: She says she can't remember, and I think she has answered the question.

The Vice Ordinary: I think he may refresh her memory to that extent.

Q. Well, can you remember now whether Mr. Nixon brought it there or it was mailed there? A. No.

Q. In whose possession was it when you first saw it? A. Michael was looking over it and I looked it over with him. We always looked over our business affairs together.

Q. Do you know where Michael got it from? Can you recall now where he got it from? A. I don't remember. I can't remember.

Q. What did Michal say about the paper? A. He said———

Mr. Davis: That is objected to as being incompetent.

The Vice Ordinary: Objection overruled.

A. (Resuming) He says "Mr. Nixon says the halfs can't come in."

Q. And when he said that did he have the paper? A. He had and was reading it.

Q. Now, where was that paper put? A. In a drawer of mine.

Q. And when was it put there? Do you remember? A. After I received it. We didn't put it in the safe because we thought it would be handier to refer to if we wanted to.

Q. And where was this drawer? A. In the sideboard where I kept some of my papers.

Q. In the house occupied by you and Michael? A. Yes.

Q. And how long did that paper remain there? A. From the time he received it until it was called for.

Q. Do you know whether that paper was shown to other people before Michael died? A. It was shown to Lizzie Allen and Elizabeth and Jennie Calver.

Q. Do you remember about what time it was shown to these persons? A. I think it was the last of October, they were visiting at our house.

Q. Of what year? A. 1915.

Q. And after Michael's death where did you find this paper? A. It was in the drawer where I had put it.

Q. Did you know anything about Michael having a will? A. I did.

Q. What do you know about the execution of the will, if anything? A. It was executed at Mr. Riley's office.

Q. Mr. who's office? A. Mr. Riley's.

Q. Mr. Riley's office? A. Yes, in 1884.

Q. Were you present when the will was executed? A. I don't remember.

Q. Did you have a will drawn at the same time? A. Just like it.

Q. And drawn by whom? A. Mr. Riley.

Q. Did you over-hear any conversation between Mr. Riley and your brother Michael with reference to the making of the will? A. Yes.

Mr. Watkins: That is all objected to. It happened in 1884, and they cannot establish the will in that way. A will must be established by the witnesses, and if they are dead by proof, but Miss Allen cannot go back to conversation in 1884 and attempt to establish the will, the making of the will.

The Vice Ordinary: What do you seek to establish by this, Judge Starr?

Mr. Starr: To show a declaration on the part of Michael that the purpose of making the will was to prevent half bloods from participating in the estate. I concede, if your Honor please, it is rather remote.

The Vice-Ordinary: I think so. The will on its face shows that, surely.

Mr. Starr: Well, I make the offer anyhow.

Q. Now, after the will was executed where did Michael keep it? A. In the safe.

Q. In the house where you live? A. Yes.

Q. What was kept in that safe? A. Bonds and mortgages and other business papers.

Q. What say? A. And other business papers.

Q. Were your papers kept there too? A. Yes.

Q. As well as Michael's? A. Yes.

Q. Did you see the will in that safe? A. Yes.

Q. After it was executed? A. Yes.

Q. In what was it kept? A. In a yellow envelope.

Q. Is this the envelope in which it was kept (exhibiting to witness)? A. Yes.

Mr. Starr: I offer that in evidence.

Said envelope marked Exhibit P-6.

Mr. Watkins: Is there any writing on the envelope, Judge?

Mr. Starr: Yes.

Q. I show you a paper which is marked P-1, and ask you if that is the will which was kept in the envelope? A. It was.

Q. The envelope being marked P-6. Now, after the lead pencil paper, P-3, was received, did you and Michael have any conversation about the opinion which Mr. Nixon had given? A. We did.

Q. What was said by Michael to you or you to Michael with reference to that opinion and the effect of it? A. Michael said that "Mr. Nixon says the halfs can't come in and if I kept that will—if I keep that will and we should die it would look as if I wasn't a very good business man."

Q. Now, about when did that conversation occur? A. In June.

Q. Of what year? A. 1916.

Q. In June, 1916? A. Yes.

Q. Had you and Michael talked over the situation—talked over that opinion between September or October, 1915, and June, 1916? A. Yes.

Q. Did you talk about it frequently or otherwise? A. Yes.

Q. And what would Michael say with reference to the opinion and his desire as to his half bloods to participate in the estate?

Mr. Davis: I object to that, if your Honor please. I think the question is, what did he say.

The Vice Ordinary: I think, under the circumstances, I would not refresh the witness' memory too far.

Mr. Starr: Well, I have no desire to do that, if your Honor please. Cross the question out.

Q. What did Michael say about Mr. Nixon's opinion? A. Well, he said that "Mr. Nixon says they cannot come in."

Q. Do you recall whether or not Michael read this lead pencil memorandum more than once between those dates? A. Yes.

Q. Did you see him read it? A. Yes.

Q. Now, I notice the will, which is marked for identification, has the signature torn off. How did that happen? A. He was sick, he was taken sick on the 9th of July, and he had asked me several times to get the will for him, but that day he told me to go down and bring the will up, and he sat up in bed and asked me for a lead pencil, and after he tore that off, why, he marked it with a lead pencil.

Q. Now, what do you mean, Miss Allen—he tore something off? A. He tore his name off.

Q. Tore the signature off? A. Yes.

Q. Was that done in your presence? A. It was.

Q. And where was he when he did it? A. Sitting up in bed.

Q. Before that time where had the will been kept? A. In the safe.

Q. And I notice the part containing the signature has some writing on the back. In whose handwriting is that? A. Michael's.

Q. Was that written in your presence? A. Yes.

Q. And what is the date? A. July 29th, or—yes, July 29th.

Q. What year? A. 1916.

Q. And was that the date that Michael wrote on the back of this piece of paper? A. Yes.

Q. And was that the date that the signature was torn off? A. Yes, the same time, he did it afterwards.

Q. Now, after that was done what became of the will? A. I took it down and put it back in the safe.

Q. And the torn signature too? A. Yes, in with it.

Q. And can you state whether or not it was put in the yellow envelope? A. It was.

Q. And where did it remain until after his death? A. In the safe.

Q. The signature and the body of the will kept together? A. It was.

Q. I call your attention to the words "Michael Allen" opposite a seal: In whose handwriting is that? A. Michael Allen's.

Q. You were acquainted with his handwriting, were you? A. Yes.

By the Vice Ordinary: Q. The whole will appears to be in his handwriting. Is it? A. No, it is Mr. Riley's.

Q. Are you sure that isn't Mr. Allen's handwriting—the body of that will? A. Yes.

Q. Are you? A. Yes.

Q. It looks like it to me, it looks like the same writing as the signature.

Mr. Starr: If your Honor will look at the endorsement on the envelope—I think that is Mr. Ripley's handwriting.

A. What—on the envelope?

By Mr. Starr: Q. Yes. A. I don't think so.

The Vice Ordinary: She says the will is in the handwriting of Mr. Riley. If I were an expert I would say the whole will is in the handwriting of Mr. Allen or else the signature is in the handwriting of Mr. Riley, but I am not an expert.

Q. Now, Miss Allen, after the signature was torn off from this will did you have any conversation with Michael with relation to sending some money to some of your relatives of the half blood? A. I did.

Q. When was that? A. August. I asked him if I couldn't send Lill Calver and Jen a present, as I was waiting for Mr. Nixon to come home to write my will, and I was afraid that I might die in the meantime and they wouldn't get any of my property, and I hadn't any will at that time.

By the Vice Ordinary: Q. This was in August of 1916? A. Yes.

By Mr. Starr: Q. Who was Miss Calver? A. She is a daughter by my half sister.

Q. Well, now, what did he say about that?

Mr. Davis: Now, I object to it. This is after the destruction of the will.

The Vice Ordinary: What probative force has it?

Mr. Starr: It has this force: It shows that an impression existed in Michael's mind even after the will was destroyed that his relatives of the half blood would not participate in his estate, and that he and Josephine were making presents to the half blood in order that they would get some property.

The Vice Ordinary: Well, are you undertaking to prove any conversation or statement made by Allen?

Mr. Starr: Yes, conversations between Michael and Josephine.

The Vice Ordinary: Well, she may testify to those conversations. I thought you were asking for conversations between Josephine and these relatives.

Mr. Starr: No.

By Mr. Starr: Q. This conversation was between you and Michael, was it not? A. Yes.

Q. Now, what did he tell you to do? A. Well, I sent Hannah Foster a check for five hundred, and when I received the acknowledgment he was lying on the lounge, he was sick at that time, and he smiled, he says "She wrote such a nice letter when I get better why I will do the same, send her the same amount."

Q. Now, Hannah Foster was what relation to you? A. Half sister.

Q. Now, do you remember when that conversation was? A. It was September the 2d, 1916.

Q. Now, did you also send some money to James Pedrick? A. I did.

Q. Who was James Pedrick? A. He is a half brother.

Q. How much did you send him? A. $500.

Mr. Davis: I move that testimony be stricken out, if your Honor please. It certainly has no probative force in this case.

The Vice Ordinary: Not unless Mr. Allen participated in the matter.

Q. How did you come to send him the money? Did Michael have anything to do with that? A. He was willing to send them all money.

Q. What did he say?

Mr. Davis: I move it be stricken out.

The Vice Ordinary: I will deny the motion.

A. He said he would do the same after he got better.

Q. Now, was any money sent to Ruth Justice? A. There was.

Q. How much? A. Five hundred.

Q. And when was that sent? A. October 2d, 1916.

Q. And what had Michael to do with that money being sent to Miss Justice? A. Just the same as the others—he gave me permission to do it.

Q. This was your money, was it? A. It was my money, but I never gave any money away without getting his permission.

Mr. Swackhamer: That is objected to and asked to be stricken out.

The Vice Ordinary: Let it stand.

Q. Now, Mr. Nixon drew a will for you, did he not? A. He did.

Q. On what date—do you remember? A. September 29th, 1916.

Q. And was there any conversation between Mr. Nixon and Michael in your presence with relation to the law of the half bloods? A. Not at that time, I don't remember.

Mr. Davis: She testified to that before.

Q. Do you remember what happened upon one occasion when a colored man named Smith was up there at your house in Woodstown? A. I do.

Q. Do you remember when it was? A. It was sometime in December.

Q. In what year? A. 1915.

Q. Who was Smith? A. He lived on Michael's farm at Sharptown, worked there for thirds.

Q. Was there anything said upon this subject? A. There was.

Q. Between you and Michael or Smith at that time? A. There was.

Q. Now, what was said, please?

Mr. Davis: Objected to for the same reasons.

The Vice Chancellor: Overruled.

A. We were talking about Frank Allen dying and leaving his wife—his third wife all the property and not leaving any to his two children by the second wife, and I says "We found out that the halfs can't get any of our property." Michael says "Don't say anything about that," then he looked up at 'Lish and told him "I am glad of that."

Q. 'Lish was the colored man? A. Yes, Elisha Smith.

Q. How many brothers and sisters of the whole blood did Michael have? A. One brother and one sister?

Q. You are the sister? A. I am.

Q. And what was the name of the brother of the whole blood? A. Charles E. Allen.

Q. And is he dead? A. He is.

Q. When did he die? A. I think 1910.

Q. And he left how many children? A. Three.

Q. And their names? A. Elizabeth, Joseph and Margaret.

Q. Now, how many sisters or brothers of the half blood did Michael have? A. He had three sisters and one brother on one side and one sister on the other side.

Q. Now, what brothers and sisters of the half blood and their descendants are now living? A. Elizabeth Calver and Jennie, that is Martha Jane Calver's daughters.

Q. Now, Jane Calver was a half sister? A. She was.

Q. She is dead, is she? A. Yes.

Q. And left how many chiidren? A. Two daughters.

Q. Elizabeth and Jennie? A. Yes.

Q. Now, Hannah Foster was a sister of the half blood? A. Yes.

Q. Is she still living? A. Yes.

Q. And Ruth Justice? A. Yes.

Q. Of the half blood? A. Yes.

Q. And she is still living? A. Yes.

Q. And James Pedrick is a brother of the half blood? A. Yes.

Q. And he is still living, is he? A. Yes.

Q. Now, there was Martha Cheeseman? A. Yes.

Q. Was she a half sister? A. She was.

Q. And she is dead? A. Yes.

Q. And what are the names of her descendants? A. Hannah England, Mary Harbison, and her grandchildren is Maria Turner, Benjamin Turner and Samuel Turner.

Q. Martha Turner, their mother, is dead? A. Their mother is dead.

Q. Do you know whether or not before Michael's death he was in the habit of visiting his rela-

tives of the half blood? A. No, he never visited them, some of them he has never visited.

Q. Which are the ones he never visited to your knowledge? A. Hannar Foster, Jane Calver and James Pedrick.

Q. What about Ruth Justice? A. He had been there, she didn't live very far and he went there occasionally.

Q. She lived where? A. Pedricktown, that is in New Jersey.

Q. Now, what about Mary Harbison ? A. I don't think he ever visited there.

Q. Hannah England? A. He was in the house once.

Q. And the Turner children—did he visit them? A. He never was there excepting to her funeral.

By the Vice Ordinary: Q. Did any of them visit him? A. Yes.

By Mr. Starr: Q. Now, about Hannah Foster: How often would she come to Woodstown? A. I don't think she has been there for—she was there when mother died, and she was there the next spring, I think that was 1885, I don't think she has been there since 1885.

Q. And Ruth Justice? A. She would come quite often.

Q. What do you mean by quite often? A. Well, every three or four months, sometimes not quite so often.

Q. And James: How often would he visit Woodstown? A. He has not been to see us—I don't know how many years it has been, it has been a long time.

Q. Now, Jane Calver? A. She used to come when she was living.

Q. When did she die? Do you remember? A. No.

Q. Now, since her death, her two children, Elizabeth and Jennie? A. They come—well, Lill comes once a year.

Q. Who do you mean by Lill? A. Elizabeth.

Q. She comes about once a year? A. Yes.

Q. What about Jennie? A. She didn't come very often.

Q. Now, the children of Martha Cheeseman, Mary Harbison and Hannah England? A. They come occasionally.

Q. How often? A. I don't know, maybe every two or three months.

Q. They live at Auburn? A. Yes, sir.

Q. That is in Salem County? A. It is.

Q. Now, the Turner children: Have they ever visited Michael? A. Yes, they were quite friendly.

Q. Do you remember an occasion in the fall of 1915, after the lead pencil memorandum came from Mr. Nixon, Exhibit P-3, when either one or both of the Misses Calver were present at Woodstown? A. Yes.

Q. Was this paper there at that time? A. It was.

Q. And what happened? A. Michael showed it to them and he said something about—to Jen to see if she could look the matter up over in Pennsylvania.

Q. That was to Jennie Calver? A. Yes.

Q. Who was there at the time? A. Her sister, Elizabeth.

Q. Do you remember another occasion when two of the children of your brother Charles were

there? A. I don't remember any only Lizzie, Elizabeth, she was there and he showed the paper to her.

Q. And what did he say? A. He told her that "Mr. Nixon says the halfs can't come in."

Q. Do you remember about when that was? A. The same time—not long after we received the paper.

By the Vice Ordinary: Q. He said that to which two? A. Elizabeth Allen.

Q. And who else? A. Jennie Calver.

Q. Was it at the time or different times? A. No, different times.

By Mr. Starr: Q. Do you remember whether Charles Allen's widow was there upon one occasion? A. I don't remember.

Q. What had been the business relations between you and Michael at the time of his death? A. We would always—he assisted me with my business affairs and I assisted him.

Q. Had you always been friendly? A. Always.

Q. Who kept house for him? A. I did.

Q. For how long? A. Well, I kept house myself after mother died twenty-three years.

Q. And Michael lived there with you? A. Yes.

Q. Was the household composed of anybody but you and Michael? A. No.

Q. Was Michael ill any time during that period? A. Yes, he was ill about thirteen years before he died, and then he was taken sick on the 9th of July and died on January 14th.

Q. Who took care of him while he was ill? A. I did.

CROSS-EXAMINATION by Mr. Watkins:

Q. Miss Allen, in the conversation of September or October of 1915 with Miss Jennie Calver, you say that Mr. Allen had a conversation with her in which he showed her this paper from Nixon?

A. Yes.

Q. Now, what did he say to her? A. He told her that "Mr. Nixon says the halfs can't come in," and he was a little undecided and he asked her if she wouldn't look the matter up over in Pennsylvania.

Q. She is one of the half-blood people? A. Yes.

Q. Why did he say that to one of the half-bloods if he didn't want them to have any share of his estate?

Mr. Starr: I object, if your Honor please.

Q. If you know.

The Vice Ordinary: I think it is proper cross-examination. It may elicit some of the circumstances.

Mr. Starr: The objection is, if your Honor please, that this witness is not supposed to know what was in the mind of Michael.

The Vice Ordinary: No, but if circumstances arose at that time that indicated the reason for the conversation—it was not, apparently, a very natural one—I think it should be shown.

Q. Please answer that, Miss Allen. What did you say?

Q. (Repeated) Why did he say that to one of the half-bloods if he didn't want them to have

any share of his estate—if you know? A. I don't know.

Q. Had he been discussing how this property was to go with Miss Calver? A. He had not.

Q. What else was said about the half blood inheriting any part of the estate? A. To her?

Q. Yes. A. I don't know anything that was said; I didn't hear anything.

Q. Is that all you heard? A. It is.

Q. Well, where were they talking,—in a room in the house? A. Then were in the front room.

Q. Did you leave the room? A. I don't remember.

Q. That was all that you heard? A. That is all I heard.

Q. What did he say when he showed this paper to her? A. Just as I told you.

Q. What induced him to show the paper to her? A. Why, he thought that they were our friends and we would talk over the matter with them.

Q. With the half bloods? A. Yes.

Q. They were very friendly with yourself and Mr. Allen? A. Yes.

Q. You both thought a great deal of them? A. Yes.

Q. Mr. Allen, of course, thought a great deal of them? A. Yes.

Q. They both would visit Mr. Allen's house and stay there for a week or more at a time, would they not? A. Not both of them; Elizabeth did but Jen did not.

Q. Well, Elizabeth would? A. Yes.

Q. And then Miss Jennie would visit at other times? A. I think she has visited us twice in twenty-three years.

Q. They lived where? Where was their home? A. Booth's Corner, Delaware County, Pennsylvania.

Q. And where did Miss Foster live? A. They live at West Chester.

Q. Did you hear Mr. Allen say to Miss Calver at this time that you are speaking of that if he thought the half bloods would come in for an equal share with full bloods he would—"I believe I would let the law settle it"? A. I did not.

Q. Do you know whether he said that or not? A. I have heard so since.

Q. Well, would you say this morning that he did not say so? A. I can't tell, because I didn't hear him say it.

Q. Now, then, what else did he say about this memorandum of Mr. Nixon? What did he want Miss Calver to do with it or about it? A. See if it was the law over in Pennsylvania.

Q. He asked her to find out if that was the law in Pennsylvania? A. Yes.

Q. And what did she tell him? A. I think she told him that she would see when she went home.

Q. Didn't she also tell him that he should consult some lawyer in New Jersey? A. I think she did.

Q. Well, now, can you recall to your memory—can you think of some other part of the conversation? A. I cannot.

Q. Who went out of the room first? A. I can't remember.

Q. That is all absolutely that you do remember of it? A. That is all I do remember.

Q. Now, this will was made in 1884,—are you sure that Mr. Riley wrote that will? A. I am.

Q. Why, what makes you so sure about it? A. Because he—it was in March after father died, and Bennie and Martha Cheeseman and—that is our half sister on our father's side, and Mr. Riley was out there, and Michael was going to take him to Woodstown, and he came in, he says, "Josephine, Mr. Riley wants to see you," so I went out, he says to me "If you don't make a will the halfs will come in equal."

Q. Yes, yes, but did you see Mr. Riley write the will? A. I didn't see him write this one.

Q. I mean the will of 1884? A. I did not.

Q. Well, now, looking at the very beginning of it,—you are throughly familiar, of course, with Michael's signature? A. I am.

Q. You have said that. Now, isn't that Michael's writing,—"I, Michael Allen"? A. No, sir.

Q. Isn't it? A. No.

Q. Doesn't that look nearer like the signature of Michael Allen than it does the writing of Joseph K. Riley? A. No, sir.

Q. Now, after that will was made in 1884 when did he first have any doubts as expressed to you about the will not being the way he wanted it? A. In 1915.

Q. So that evidently, as far as you know, he was satisfied with that will and wanted that will from 1884 to 1915? A. He did.

Q. Never discussed it before that? A. No.

Q. Never said anything about it at all? A. No.

Q. And you say that at the time that will was made Mr. Allen said that if he didn't have that will the half blood would inherit? A. He did not.

Q. Didn't you say that he said that? A. I did not.

Q. What did you say about the expression made about the time that he made that will? A. He said that in September.

Q. I don't mean 1915, I mean at the time the will was made? A. Well, I said—I didn't say what he said, Mr. Riley told us if we didn't make a will the halfs would come in, he didn't say anything.

Q. That was in Mr. Allen's presence? A. It was.

Q. And was that before the will was signed by him? A. It was.

Q. And it was at that time that he concluded to have a will and Mr. Riley, as you say, drew it? A. It was.

Q. Now, then, the will, without any discussion upon the part of Mr. Allen, continued down until about September of 1915? A. It continued until July the 29th, 1916.

Q. No, but before any discussion was had of changing the will? A. Yes,—he didn't say anything about changing his will.

Q. But about his will,—the first that was said about his will after the making of it was in September of 1915, was it? A. He was not talking about his will but he just wanted to ask Mr. Nixon if the halfs could come in.

Q. And that was in September, 1915? A. It was.

Q. So that, I say that, as far as you know, he was satisfied with his will from the making of it in 1884 down until September, 1915? A. I don't

think he was talking about his own will, it was about my affairs he asked that question.

Q. I am not speaking about your affairs? A. Yes, he was satisfied, he was satisfied with it until July 29th, 1916, when he tore his name off.

Q. Then he was satisfied with it in September of 1915? A. He was, he was not looking after his own interest.

Q. Well, then, why did he want any advice about changing it? A. On my account, I had destroyed two wills.

Q. But you were going to get your share of the estate under this will? A. I didn't think anything about my share.

Q. No, but if he did, if he was thinking of you, you were going to get your share under the will, why should he want to change it?

The Vice Ordinary: It was her disposition of her estate, you won't understand her as she means to be understood.

Mr. Watkins: Well, I don't mean to misunderstand her.

The Vice Ordinary: She said the anxiety was about her property, and what disposition she was to make of her property, that suggested the inquiry of Mr. Nixon, if I understand her correctly.

The Witness: Yes.

By the Vice Ordinary: Q. That was not what disposition he should make of his property that suggested that inquiry first: Is that what you meant to say? A. Yes.

By Mr. Watkins: Q. Then Mr. Allen had no intention or idea of changing the will until after

your will had been discussed? A. I suppose not; he never said anything about changing his will.

Q. Never said anything about it? A. No.

Q. So that all this conversation and really the investigation upon the part of Nixon had reference to a will which you were to make? A. Yes; I hadn't any will at that time.

Q. Yes. Well, I say, it had reference to your will? A. Yes. I had just destroyed two.

Q. No, Miss Allen,—it had reference to the will that you were about to make? A. It was.

Q. Now, was there any differences which arose between—Charles Allen, the person named as executor, is dead,— is that right? A. Yes.

Q. When did he die? A. I think it was August —I don't know whether it was August or September, 1910.

Q. And his son, Joseph, is the petitioner here in these proceedings? A. He is.

Q. Now, was there any differences that arose between Michael and Joseph? A. There was not, not anything serious.

Q. Well, was there anything serious or otherwise? A. A little so, yes, for a while.

Q. When was that? A. I don't know, I guess it was—it must have been in 1914, I guess, I don't know when it was.

Q. Do you remember? You think it was 1914? A. Yes.

Q. What did that arise over? A. Why, Michael had a farm and Mr. Crispin lived on it, and he heard that Joseph was to take his tenant—

By the Vice Ordinary: Q. Do what? A. Joseph was to take Michael's tenant and put him on his farm and he didn't like it.

By Mr. Watkins: Q. He spoke of it? A. Yes.

Q. He spoke of it more than once? A. I know he was alright on that, because Joseph was taken sick after that—

Q. Yes. A. And Michael went up in his bedroom and stayed with him, so I know he didn't have any feeling towards him.

Q. But he did at one time have a feeling? A. At one time.

Q. Did you hear him refer to it? A. Sometimes.

Q. Sometimes? Now, how many times would you hear him refer to it? A. I can't remember.

Q. Eh? A. I don't remember.

Q. And you think it occurred in 1914 and sometimes after that? A. Yes.

Q. He would refer to the treatment of Joseph? A. Yes, because he sold the farm when he wanted the farm to be given to Joseph, afterwards he tried to buy it back.

Q. Who sold the farm? A. Michael did.

Q. And why did he sell it? A. Why, he had heart disease for seven years before he died and he couldn't manage it, and he thought if Joseph didn't take an interest he might as well sell it.

Q. And he did sell it? A. He did sell it.

Q. He wanted Joseph to take an interest in it, didn't he? A. He did.

Q. Hadn't your brother Michael acted as administrator and executor of estates a number of times? A. Yes.

Q. In his lifetime? A. Yes.

Q. And for how long a time did he continue that business? Down to the time of his death? All his life? A. No. 1885, he had three estates that

fall, mother's and Thomas McHollister and Michael Myers, and he hasn't—

Q. Wasn't he guardian—A. —and he hasn't done any of it since.

Q. None at all since? A. Yes.

Q. Wasn't he guardian for some person? A. Yes, I had forgotten that.

Q. When was that? A. I don't know.

Q. That was since? A. Must have been since.

Q. When he had his will finished what did he do with it? Did you see where he put it? A. I don't know what he did with it, because we hadn't a safe then, we kept our papers separate at that time.

Q. How long was it in this safe,—or when did you get this safe that you speak of? A. I think it was about 1900.

Q. Then ever since 1900 it has been among his papers in his safe? A. It has.

Q. And it was there when you got it in July, 1916? A. It was.

Q. What did he say to you just on that specific occasion? How did you come to take him the will? A. He told me to go down and get the will and bring it up, he didn't say anything.

Q. Didn't say anything? A. No.

Q. What was all the conversation? A. That is all the conversation we had, we didn't have any conversation at that time only he told me to go down and bring it up.

Q. Now, that was all that he said? A. Yes. He did tell me to hand him a pencil off the stand.

Q. And with the pencil he made that date on the back? A. He did.

Q. And what did he do with the will? A. I think he handed it back to me and didn't say anything.

Q. But what did he do with it while it was in his possession? A. I don't understand you.

Q. What did he do to it while he had it in his hand? A. He tore his name off.

Q. And then handed it back to you? A. Yes.

Q. Without a word? A. Without a word.

Q. Didn't even tell you what to do with it? A. No.

Q. And what did you do with it? A. I took it down and put it in the safe.

Q. He didn't tell you to do that? A. No.

Q. And you kept it in the safe until, of course, it has been produced in Court? A. Yes.

Q. Now, in that safe—that was where he kept all of his papers? A. Yes.

Q. Now, July 29th is when he destroyed the will, you have just testified. How long was it before that time that he mentioned the will to you? A. In June.

Q. In June? A. Yes.

Q. What part of June? A. I don't remember.

Q. And who was there? A. Not any one.

Q. Just the two of you? A. Yes.

Q. Was he in bed then? A. He was on the lounge.

Q. Was it in the early part of June? A. I can't remember.

Q. But you are sure it was in June? A. It was in June.

Q. And then there wasn't anything said after that conversation in June until he directed you to bring in the will on the 29th of July? A. No.

Q. Absolutely nothing? A. No.

Q. And you have told us all the conversation, then, that took place on July 29th? A. Yes; he didn't say anything, only what I told you, July 29th.

Q. All these people of the half-blood—was he on good terms with all of them? A. Yes.

Q. Good, natural feeling between them as far as you know? A. As far as I know.

Q. This money that you spoke of as having been sent to Miss Foster, the $500, and to the others, was that your money? A. It was my money.

Q. It was your money? A. I asked him if I could do it.

Q. Yes; but it was your money? A. It was my money.

Q. Miss Allen, you are possessed of quite an estate of your own, are you not? A. I am.

Q. Is your estate as large as Michael's?

Mr. Watkins: I am not asking that any further than to show that she had plenty of money to send these people if she so desired.

A. That is something I don't tell any one, no one knows that.

Q. But it is plenty large to take care of you? A. No one knows that but myself, how much I am worth.

Q. Well, we won't ask it in figures, but you have a comfortable estate, sufficient to take care of you and maintain you—I mean of your own? A. It don't take much to keep me.

Q. Well, but whatever it is it is enough, is it, Miss Allen?

The Vice Ordinary: What he wants to show, Miss Allen, is not with reference to how much property you have, but that you could afford to send $500 to them if you wished to.

A. Yes.

By Mr. Swackhamer: Q. Miss Allen, Michael Allen was on friendly terms with Mr. Pedrick, was he not? A. He was.

Q. Did Mr. Pedrick ever visit him at his house? A. No.

Q. Are you sure? A. Yes.

Q. James is now quite an old man, isn't he? A. He is.

Q. Past seventy, considerably past seventy years of age? A. I think so.

Q. And he has been in rather poor health for the last two or three years? A. I don't know.

Q. Well, you know Mrs. Pedrick? A. Yes.

Q. The wife of James? A. Yes.

Q. She visited at your house, or Michael's house, did she not? A. No, she called there, she has never visited us, I don't think she has visited since mother died, neither has he, but she called there to thank me for the $500 that I gave them.

Q. Beg pardon? A. She has not visited us since mother died, neither has Jim Pedrick.

Q. When did your mother die? A. 1895.

Q. Well, now, Mrs. Pedrick has called at your house? A. She called there or stopped there to thank me for the money that I sent her husband.

Q. When was that? A. I think it was sometime in October, I am not positive.

Q. Did her daughter come with her? A. She did.

Q. Mrs. Mossbrooks? A. Yes, sir.

Q. Now, at that time did Michael and Mrs. Pedrick talk about Charles Allen's family? A. I don't think so, because he was very sick at that time, he was lying on the longue.

Q. Well, he was up and around the house, wasn't he? A. Not very much at that time.

Q. Didn't he go out of the house? A. He would go out for a short walk but he was very weak.

Q. Now, don't you recall a conversation between Mrs. Pedrick and Michael in which Michael said the Charles Allen family had not been to see him since he was sick, which took place sometime in—A. No, I don't recall.

Q. June? A. I don't recall anything of the kind. I wouldn't have been true, because Joseph was there several times and several of the family.

Q. Didn't you say to Mrs. Pedrick that it hurt Michael that these children did not come and see him? A. I don't remember it.

Q. Will you say that you did not say so? A. I don't remember saying it.

Q. Did you hear Michael tell Mrs. Pedrick that there was an ill-feeling or an estrangement between Michael and Charle's family because of the conduct of Joseph Allen taking away the tenant? A. No.

Q. The tenant that had formerly lived on Michael's farm? A. I don't remember it.

Q. Well, that is a fact, is it not? A. It was, yes.

Q. There was an estrangement there? A. Had been but it was all fixed over.

Q. How do you know it was all fixed over? A. I know from the way Michael talked.

Q. When did James call at the house last before the death of Michael? A. He was there when mother's clothes were divided in 1895, and then he wasn't there until the day of the funeral.

Q. The children of the half blood, as well as Michael and yourself, agreed that Michael should settle up your mother's estate? A. Yes.

Q. That was agreed upon—A. Yes.

Q.—by all of you? A. Yes.

Q. By James and all the rest of the heirs? A. I suppose so.

Q. Your brother Michael was selected because of the fact that he had had experience in these matters? A. He had been handling mother's estate.

Q. And he had been handling other people's estates, had he not? A. Yes.

Q. He was a smart man,—smart business man, wasn't he? A. Yes.

Q. Did he employ lawyers to look after his business? A. Not often.

Q. Well, in settling these estates did he not employ a lawyer to assist him? A. No.

Q. To advise him on the law? A. No.

Q. Well, you don't know that he did not employ lawyers to assist him in settling these estates? A. I know he did not, because I assisted him and I was not a lawyer.

Q. Well do you know about settling estates? Have you ever settled any? A. No.

Q. But your relations with Michael—A. Yes.

Q. —gave you a good deal of information about how to settle an estate, did it not? A. Yes.

By Mr. Davis: Q. Miss Allen, your brother knew the particulars about your business? A. He did.

Q. And the amount of your estate? A. He did.

By Mr. Starr: Q. Miss Allen, there is just one more question. How many times before you took the will to Michael on the 29th of July, 1916, had he asked you to bring the will to him? A. Several times.

Q. And when were those occasions? How long before the 29th of July did he ask you to bring the will to him? A. I think it was sometime in June.

Q. And what do you mean by several times? A. Well, I mean that I had care of the safe and always took charge of all the papers and kept the insurance and all the papers all together, and when there was anything wanted out of the safe I would go get it, and he would ask me to get it, but sometimes I wouldn't get it for him because it was at the bottom of the safe and it was too much trouble to hunt it.

By Mr. Watkins: Q. In June of 1916 you refused to get the will for him,—bring it to him? A. He didn't ask me then, we were talking about it.

Q. When was he taken sick? A. The 9th of July.

Q. 9th of July? A. Yes.

Q. Well, why would he ask you to bring him the will prior to that time? A. Why, he wasn't very

well, and, as I say, I had charge of the safe and he wasn't in the habit of going in the safe to hunt anything, I knew where everything was.

Q. And you refused several times to get it for him? A. Yes, because it was so much trouble.

At this point a recess was taken until 2 o'clock p. m.

Hearing of the cause resumed after recess, in the presence of the respective counsel heretofore noted.

ELIZABETH C. ALLEN, a witness produced in behalf of the petitioner, alleging herself conscientiously scrupulous of taking an oath, being duly affirmed according to law, upon her solemn affirmation saith—

By Mr. Starr: Q. Miss Allen, where do you live? A. Woodstown, New Jersey.

Q. And what relation were you to Michael Allen? A. Niece.

Q. How long have you known him? A. Ever since I can remember.

Q. Have you always lived in Woodstown? A. Well, around about.

Q. Your father was named what? A. Charles E. Allen.

Q. And how long has he been dead? A. 1910, September, 1910.

Q. And was Charles of the full blood or half blood? A. Full.

Q. I show you Exhibit P-3 and ask you whether you ever saw that paper before? A. Yes, I have.

Q. When was the first time you saw it? A. In the early fall of 1915, about around the first of October.

Q. And where were you when you saw it? A. At uncle Michael's.

Q. And who was there? A. My mother and aunt Josephine and he.

Q. That is, Michael, Miss Josephine, your mother and yourself? A. Yes, sir.

Q. What did Michael say about the paper? A. Why, aunt Josephine brought it to me, he told her to bring it to me, and he says that "Horace Nixon says that halfs don't come in."

Q. And was the paper there at the time? A. Yes.

Q. Did you read the paper? A. Yes.

Q. Was there anything else said that you can remember? A. Not in regard to this.

Q. Was that the only time that you ever saw the paper in his presence? A. Yes, in his presence.

Q. Did he ever say anything to you about whether or not he had any desire that his half relatives, relatives of the half blood, should participate in his estate?

Mr. Davis: That is objected to.

A. No.

No cross-examination.

MARGARET ALLEN, a witness produced in behalf of the petitioner, alleging herself conscientiously scrupulous of taking an oath, being duly affirmed according to law, upon her solemn affirmation saith:

By Mr. Starr: Q. Mrs. Allen, where do you live? A. Woodstown.

Q. And what relation by blood or marriage were you to Michael Allen? A. I was Charles Allen's wife.

Q. And Charles Allen was a brother of Michael? A. A whole brother.

Q. And when did Charles Allen die? A. When did what?

Q. When did Charles die? A. In September, 1910.

Q. I suppose you knew Michael in his lifetime? A. Oh, yes, very well.

Q. I show you Exhibit P-3 and ask you if you ever saw that paper before? A. Yes, I have seen that paper.

Q. Do you remember when it was and under what circumstances? A. It was at the time my daughter was there.

Q. At whose house? A. Michael's.

Q. And who was there? A. Josephine and Michael and my daughter and myself.

Q. Now, won't you just state to his Honor, to the Court, what happened upon that occasion what Michael said or what anybody else said in the presence of Michael?

Mr. Davis: That is objected to.

The Vice Ordinary: Objection overruled.

Q. Go ahead. A. He says "Horace Nixon says halfs don't come in."

Q. Was that paper there at the time? A. Yes.

Q. Did you read the paper? A. No. He told my daughter to read it. I didn't have my glasses with me.

Q. And did your daughter read it? A. Yes, she took it and looked at it, yes.

Q. And when was that? A. In the fall.

Q. Of what year? A. 1915, sometime.

Q. That is the only time that you were there with your daughter when the paper was exhibited? A. That is the only time I remember.

CROSS-EXAMINATION by Mr. Watkins:

Q. What time in the fall was this? A. 1915.

Q. What month? A. After he had received this paper.

Q. Yes, but what month? A. I think it was about in October, the same time she was there. I didn't set the date down and I couldn't tell the exact date.

Q. We are asking you to the best of your recollection? A. Yes.

Q. Now, to the best of your recollection, then, was it in October, 1915? A. Right after he had received this paper.

Q. That isn't hardly an answer to my question. To the best of your recollection was it in October of 1915 that you had this conversation or heard this conversation? A. Yes.

Q. Now, who was present there at that time? A. My daughter.

Q. Who else? A. Michael Allen and Josephine Allen and myself.

Q. Now, were the Calver girls, do you know, in Woodstown at that time? A. Oh, no.

Q. Had they been there before? Had you seen them there before? A. I don't know that I ever seen them there at all. They came to my house one day, but it was after that, I think.

Q. It was after you had this conversation that you saw them, you say, or was the conversation with Michael Allen after you had seen them at your house? A. The conversation was before, when my daughter was there is when this conversation was.

Q. You remember the Calver girls being at your house? A. Yes, but I don't know the date exactly.

Q. Was this conversation after that time or before they came? A. Before.

Q. How long before? A. I couldn't tell at all, I can't tell you.

Q. You couldn't say whether it was a month or two months or three months? A. I can't tell exactly, no. I just know this to be the fact, but the dates I don't know exactly.

Q. That is as close as you can give it? A. It is.

Q. You are quite sure, however, that this conversation took place in October of 1915? A. Why, it must, because he didn't receive the paper—

Q. I am not asking you that. Are you quite sure that that is so,—that it was in October, 1915? A. Yes.

JOSEPH ALLEN, the petitioner, being duly sworn according to law, on his oath says:

By Mr. Starr: Q. Joseph, you are the petitioner in this case, are you? A. Yes, sir.

Q. And what relation were you to Michael Allen? A. He was my uncle.

Q. In 1916, in July, were there any differences between you and Michael Allen?

Mr. Davis: One minute. If your Honor please, I cannot find that it has been determined in this state whether what you might call a complainant, as in this case, is debarred by the statute from testifying. I make the objection. As I understand, he is the petitioner in this cause, Mr. Tyler is the personal representative of the deceased.

The Vice Ordinary: My view on that is that the statute does not relate to suits of this nature.

Mr. Starr: That has been expressly held in the Court of Errors in the Vezey will case.

The Vice Ordinary: Answer the question. Objection overruled.

(Question repeated.)

A. Not as I know of.

Q. What has become of the homestead property in Woodstown—the real estate left by Michael Allen? A. Why, my Aunt Josephine has bought it at private sale.

Q. For what price? A. $5,000.

Q. And the other real estate was sold at public auction, was it not? A. Sold at public sale in February.

CROSS-EXAMINATION by Mr. Watkins:

Q. Who bought the farm? A. The firm of Harris & Waddington, cattle dealers.

Q. Did they buy it for themselves? A. Bought it for themselves.

Q. Mr. Allen, did you go with Mr. Tyler in securing the renunciations? A. I think I went to England's, Harbison's, Turner's,—I guess Mrs. Harbison was down at the Turner farm, and I went over to Pedrick's at Williamstown; I was at Joephine Allen's when she signed and when my other two sisters signed, I think, and I signed there.

Q. Did you tell any of these people at the time that you secured the signatures to the renunciation that they would get a share in this property? A. Why, I think, if I remember right, I told Mrs. Pedrick this: I says "If this thing goes right for you"—she was speaking about her house and about having a fire, and I think I told her "If this thing goes right for you you will be able to buy several houses," or "build several houses," I forget which.

Q. You said "if it goes right" for them? A. Yes, I told them that.

Q. What did you mean by going right for them? A. I didn't know whether—of course, I didn't know whether the will could be proved or not.

Q. Well, what did you mean by saying if it went right by her? A. Why, if they got the money they would be able to buy houses, if they didn't of course they couldn't.

Q. Did you explain at that time that you were getting her renunciation to attack the administration? A. I didn't know how to go about it. Of

course, I know that Michael meant it for us, and I wanted to get it any way, whether—

Q. You knew about his will at that time? A. Yes.

Q. By Mr. Starr: Q. What did Mr. Tyler tell you about your renouncing,—what effect it would have? A. Why, I began to ask Mr. Tyler right away, I says "Now we signed this, it will be all off for us." He says "Oh, no, it won't make any difference." And I myself, I knew of the horses and cows over at the farm—the tenants would move the 25th of March and the cows and horses would have to be cared for, and Tyler would take care of the estate until the thing was settled, that is the way I understood signing.

ELISHA SMITH, a witness produced in behalf of the petitioner, being duly sworn according to law, on his oath says—

By Mr. Starr: Q. Elisha, where do you live? A. Lower Alloways, Salem County, New Jersey.

Q. What is your business? A. Farming.

Q. Did you know Michael Allen in his lifetime? A. I did, sir.

Q. Did you ever work for him? A. I did.

Q. When? A. I worked for him from 1905 to 1910. I lived on one of his farms, farmed it for one-third, and I knew him eight or ten years before that, worked for him by the day.

Q. Did you have any business dealings with him in the month of December, 1915? A. I did, sir.

Q. What were those dealings? A. Settling up for my wheat. I moved away the 25th of March, 1915, came back the 7th of December, sold the wheat and came and settled up.

Q. Now, you say it was the 7th of December? A. Yes, the 7th of December.

Q. Where were you that day, the 7th of December, 1915? A. Why, I arrived there in the morning, went over to the farm and got the team and taken the wheat away, came back and settled up that night. I arrived there on the 6th, went and sold the wheat and then came back and stayed all night at Mr. Allen's, then went over on the 7th and taken the wheat away and came back and settled up.

Q. Do you remember a conversation with Josephine, that is, Miss Josephine, in Michael's presence? A. I do.

Q About half bloods, or anything of that kind?

Mr. Watkins: That is objected to. That is decidedly leading, if your Honor please.

The Vice Ordinary: I do not think it is leading.

Mr. Watkins: "About half bloods," he said.

The Vice Ordinary: I think he is entitled to know the general subject. There is nothing suggestive about that. I will overrule the objection.

Q. Won't you tell the Court to the best of your recollection what happened at that conversation? A. Well, I was up there settling for the wheat, and I says "Your cousin is dead." That is, Franklin Allen. And I says "I wonder if his children, son and daughter of his first wife, gets

any of his estate." He says "Yes, I think they do by his will." Miss Josephine says "Why, we have just learned that if we make a will, why, our half brothers and sisters don't get anything," He says "Never mind telling Elisha that. We tell him too much anyhow. But" he says "I am glad we found out." That is what he told me.

Q. Had you talked with Michael before that time with reference to his relatives of the half blood? A. I did.

Q. What did he say about them? A. Well, my half brother came to see me and he came over as usual and my brother came out and he says "Who is that man?" I says "That is my half brother." "Oh," he says, "he is after some of your money, now he knows you are farming." "Well," I says, "how about your half brothers and sisters? You see, you have got several of them. They will have a good time on your money when you are gone." He says "I don't intend my half brothers and sisters to have any of my money." He says "My sister and my brother Charles will get it, if my brother Charles outlives me, and if he don't his heirs will get my money."

Q. Do you remember when that conversation was? A. Yes, that was during the winter of 1907, I couldn't just say the date but I know when it was.

Q. And where were you working at that time? A. Why, I was farming his farm, he was helping me cut stalks for the cattle up in the barn.

CROSS-EXAMINATION by Mr. Watkins:

Q. When was this talk that you had with Mr.

Allen when he said that he did not intend the half blood to get anything, that his brother and sister will get it? When was that? Now, fix that. A. That was in 1907.

Q. 1907? A. Yes, I couldn't just say the date of the day.

Q. Did he say he had a will? A. No, he didn't say anything about a will.

Q. And he said in December, of 1915, when you and Miss Josephine were talking to him, that "if we make a will our half bloods don't get anything?" A. Said "We just learned it." She said, "We just learned it."

Q. That was just what he said, now, was it? A. He didn't say so. Miss Josephine said "If we make a will."

Q. But it was in his presence? A. In his presence, and he says "I am glad we found out."

Mr. Starr: We rest.

JENNIE C. CALVER, one of the respondents, being duly sworn according to law, on her oath says:

By Mr. Watkins: Q. Miss Calver, where do you live? A. Landsdowne, Pennsylvania.

Q. How long have you lived there? A. For less than a month.

Q. Formerly where did you live? A. Chester.

Q. In the City of Chester, Pennsylvania? A. Yes.

Q. How long did you live there? A. About eighteen months.

Q. Were you a relative of Michael Allen's? A. I was.

Q. What relation? A. Niece.

Q. Is your mother a—A. Half sister.

Q. Half sister to Mr. Allen? A. Yes.

Q. How long have you known Michael Allen, Miss Calver? A. Well, practically all my life.

Q. Did you ever live in the same locality? A. No.

Q. Did you visit him? A. I never went to stay long at a time, I used to—when I was visiting at Pedricktown or had an opportunity I always went there to see them, that is, I would go when I would be visiting at Pedricktown, we would drive over, possibly be over for a few hours, and I think on two or three occasions I was there over night, but only that.

Q. Who would you visit in Pedricktown? A. My aunt, Mrs. Justice.

Q. That is, of the half blood of Michael Allen? A. A full sister of my mother's.

Q. Your sister's name is what? A. Elizabeth Calver.

Q. And you are the only children of that branch of the family? A. Only living children.

Q. Now, Miss Calver, were you there at Michael Allen's in Woodstown, in September or October of 1915? A. I was.

Q. What occasioned your being there? A. We simply went for a little friendly visit, possibly over the week's end, I don't remember just how long we stayed, I think over—I can't say positively but I think from possibly Saturday until Tuesday.

Q. Was your sister there with you? A. She was.

Q. Had she been staying there longer than that time? A. Not on that occasion, no, we went together.

Q. Did you have a conversation with your uncle Michael concerning his will or his estate? A. I did.

Q. At that time? A. Yes.

Q. Who was present at the conversation? A. My aunt, my sister, uncle and myself.

Q. You mean your aunt Josephine? A. Yes, my aunt Josephine.

Q. And where did this conversation take place? A. Well, in the afternoon, shortly after we arrived in Woodstown, we were in the sitting-room at their home there in Woodstown, and I don't know in just what way it came up but my aunt was speaking about her will, and they were speaking of their money, and my uncle spoke of having gotten or received a paper from Mr. Nixon, and whether my aunt went and got the paper or whether he went and got the paper I don't remember but the paper was handed to me, he gave it to me to read, and I read it, and he said "Jen.' what do you make out of that?"—and it was in regard to the half bloods he had been speaking of, and I said "I don't think he has answered your question."

Q. Did he tell you what his question was? A. He had said that he had asked Mr. Nixon whether the half bloods would come in for an equal share, and I read the paper and I said "I don't think he has answered your question."

Q. What else took place? A. Well, there was very little more said at that time, after supper we were talking on the subject.

Q. Did you have another conversation after supper? A. After supper, when we were doing up the supper work.

Q. Where did that take place? A. Out in the kitchen, when they were talking, doing up the supper work at the time.

Q. Who was present then? A. My aunt, my sister, uncle and myself, although my aunt was bobbing back and forth in putting away the supper things.

Q. Now, state that conversation? A. Well, my uncle spoke about his will, they were speaking about an old will that they had, and I remember my aunt said "Well, you know that will is no good because the witnesses are dead." And I said "Well, I think if you could prove their signatures that that will would stand." Of course, I knew nothing of the contents of the will. And then he said, my uncle said, "If I thought that the half bloods would come in for an equal share I believe I would let the law settle it."

Q. And that was said in the presence of your sister? A. In the presence of my sister, yes.

Q. And Miss Josephine Allen? A. Well, she was—as I say, she was going back and forth in the room, whether she was there just at that particular minute I couldn't just say.

Q. Now, did he ask you to do anything further relative to that paper which he showed to you from Nixon? A. Well, not exactly in regard to the paper which he showed from Nixon, but when he spoke of the half bloods coming in for an equal

share he did say to me then "I wonder if you could find out for me," and I answered him this way, I said "Well, hardly, because all the lawyers and the men that I know that would be likely to be able to give me the information are Pennsylvania men who would know nothing about the Jersey law. The only way I could find out is by going to a Jersey lawyer professionally,"—which I never did.

Q. Was anything further said about it? A. Not to my knowledge.

Q. Now, from that time until his death did he speak to you again about the matter,—about his will or about his estate? A. No, I think not.

Q. Was that your last visit to him? A. No, I was there last July but he was not very well and I only was in the room possibly fifteen minutes, if that long.

Q. July of 1916? A. Yes.

Q. When did he die? A. January, the 14th.

Q. Of this year? A. Yes.

Q. Now, did he say anything about his will, where he was going to keep it or who was going to have charge of it? A. Well, he said—spoke of his old will and he said—when they were speaking about the will and the signatures on the will, he said at that time, he says "I tell Josephine to have that will handy so if at any time I want it in a hurry to tear it up I can have it." I think then he was thinking of having had heart trouble.

Mr. Starr: Never mind that.

Q. Now, did you have any conversation afterwards with Miss Josephine about where the will was, or did she tell you? A. Well, I don't remember that I had. I knew it was in the safe but I don't remember that I had.

Q. Do you know whether or not your uncle had asked Miss Josephine for the will? A. At this time?

Q. No, afterwards. Did any one tell you of that? A. You mean the time of the destroying of the will?

Q. Well, at any time after that did Miss Josephine tell you whether her brother had asked for his will or not? A. Yes.

Q. When was that? A. This year when we were there, after my uncle's death.

Q. What did she say about it?

Mr. Starr: I object to that. I don't think there is any foundation laid for that. We are not bound by any of it anyhow.

Mr. Watkins: I think I laid the foundation in the examination of Miss Allen in asking her if she had any conversation after September of 1915 with Michael about the will up to June, 1916.

The Vice Ordinary: Yes, but did you ask Miss Allen touching this conversation with this witness?

Mr. Watkins: No.

The Vice Ordinary: Then it is not competent until and unless you do.

Q. Did you ever hear your uncle discuss or say anything about his relations with Joseph prior to 1916? A. Yes.

Q. What did he say about them? A. Well, he spoke of his having hired his man and displeased him in that way.

Q. Was he on good terms with Joseph or was he otherwise?

Mr. Starr: Well, I object.

A. Well, I think he was not well pleased.

Mr. Starr: I object to that unless the witness shows some knowledge of it.

The Vice Ordinary: We had better confine ourselves to what he said. Your question was general, whether he was on good terms.

Q. You heard him speak of Joseph's treatment? A. I did.

Q. Did he do it more than once? A. Did he do what more than once?

Q. Speak of him more than once in connection with this farm transaction. A. Well, I think he did but I couldn't be positive. I remember his speaking of it, whether it was more than once I can't say.

Q. Now, did you see Mr. Nixon at the house after the death of Mr. Allen? A. I did.

Q. How long after? A. On the 8th of February.

Q. 1917? A. Yes.

Q. Do you know how he came to be there, of your own knowledge? A. By what he said.

Q. Who was there at the time? A. Mr. Beckett, Mr. Nixon, my sister, aunt Josephine.

Q. Was he asked by Miss Josephine whether he had any conversation with Mr. Allen regarding his will? A. He was.

Q. What did he say? What was his answer? A. He said "Strange to say, Miss Allen, I remember having talked with Michael on the subject."

CROSS-EXAMINATION by Mr. Starr:

Q. Miss Calver, when was the last time you were at Woodstown visiting Michael before he died? A. July, I don't remember the date, it was early in July.

Q. Of 1916? A. Yes.

Q. Was he confined to his bed at that time? A. He was.

Q. Upstairs did you see him? A. Yes, for about fifteen minutes.

Q. When before that were you there? A. The fall of 1915.

Q. That was the time when you had exhibited to you this piece of paper in lead pencil? A. Yes.

Q. When before that were you at the house at Woodstown? A. That I don't remember.

Q. Can't you give us some idea? A. Well, I don't know as I can, because, as I said, when I used to be visiting at Pedricktown we would go over when we had an opportunity, go over to possibly have dinner or spend the afternoon.

Q. Did you ever go to Woodstown specially to visit them? A. That is the only way I ever do go to Woodstown, when I went to visit them.

Q. As I understand you to say, you were visiting your aunt at Pedricktown and went over for that purpose? A. Yes, but I went over to Woodstown to visit them.

Q. But you never visited Woodstown directly from Philadelphia,—it was always while you were visiting your relatives in Pedricktown? A. Oh, no, I beg your pardon, I did go—at this time when I went in the fall I went from Philadelphia down, and I had gone other times.

Q. Were you there at any other time in 1915 except the fall? A. No.

Q. How about 1914? A. I don't remember that I was there.

Q. How about 1913? A. Well, I say, I couldn't tell you because I don't really know.

Q. When was it you had the conversation with Michael about Joseph and his tenant? A. 1915, in the fall.

Q. In the fall of 1915? A. Yes.

Q. Who was present upon that occasion? A. I couldn't say because I don't just remember the exact time, it was during that visit.

Q. And how long were you there in the fall of 1915? A. Well, I don't know whether we were there over the week end, we stayed until Tuesday, whether we went Saturday or not I couldn't say, but we were there for just a few days.

Q. This slip of paper that was shown you,—do you know where it came from? A. He told me he had gotten it from—that it had come from Nixon, is all I know.

Q. I know, but who handed it to you to read? A. Either my uncle or my aunt, I don't remember which.

Q. Do you know where it was gotten from to hand to you to read,—where in the house? A. I don't.

Q. How did it happen that the paper was handed to you to read? A. Well, my aunt and uncle were talking of their money and the way—my aunt was speaking of having destroyed her will, and then they were speaking about the law, and he got this paper and gave it to me to read and said to me "Jen., what do you think of it?"

Q. Well, now then, after Miss Allen, Miss Josephine, said that she destroyed her will and they were talking about the disposition of their property, then this paper was produced? A. Yes.

Q. And you read it? A. Yes.

Q. Did Michael ask you to read it? A. Yes.

Q. He told you that Mr. Nixon had given it to him? A. I don't know that he said he gave it to him, he gave me to understand that it had come from Mr. Nixon, whether it was mailed or had been handed to him he didn't say, so far as I remember.

Q. Now, on what day of the week did that conversation occur? A. Well, if we went on Saturday; it was on Saturday afternoon, soon after we got there. I don't remember whether it was Saturday; I think it was Saturday that we went down.

Q. Do you remember what else was talked about that afternoon besides the will and the property? A. Well, there was other conversation but it doesn't bear on that subject.

Q. Well, can you remember what else was said about anything? A. Yes, in a way I can, but it doesn't bear on this.

Q. How did it happen that Miss Josephine volunteered the information that she destroyed her will? How did that come about? Do you remember? A. Well, simply that they were talking in a friendly way about their financial affairs is all,—the only reason I can give you.

Q. And was there any excuse for her volunteering the statement to you that she had destroyed her will? What led up to it? A. Well, I don't know that I know.

Q. And Michael said at that time that Nixon had advised him that the half bloods didn't come in? A. He showed me this paper.

Q. I know, but didn't he tell you—independently of the paper, didn't he say to you, or say to the persons that were there present, that Mr. Nixon had told him that half bloods didn't come in at all? A. I don't remember that he did.

Q. What did he say about Nixon? A. He said "Here is a paper that"—either "that I got from Nixon" or "Nixon sent me." He said "Read it." I read it and he said "What do you make out of it?" I said "I don't think he has answered your question."

Q. Didn't you say on your direct-examination that Michael said that Mr. Nixon had told him that half bloods didn't come in? A. Well, I say —I don't know that he said it at that time when he handed me this paper.

Q. Did you have any conversation with Michael about this subject at any other time than when this paper was exhibited? A. After supper we were talking on the subject of the law.

Q. Well, do you remember whether when that paper was exhibited to you, shown to you, and you read it, whether Michael said that Mr. Nixon had told him that the half bloods didn't come in? A. Well, that had been discussed, that subject, whether he said it or my aunt did in the afternoon before this was handed—that subject had been discussed, whether uncle Michael said it or whether my aunt said it, that I couldn't be sure of,—and then he gave me this paper.

Q. You understood from what was said that Mr. Nixon had given it as his opinion that the half

bloods didn't come in? A. He had this paper, he gave me that to read.

Q. Irrespective of the paper, from the conversation there you understood that Mr. Nixon had advised Michael that the half bloods did not participate? A. I understood that my uncle had asked and this paper had been sent him, and he gave me the paper to read.

Q. Well, now, why did he give you the paper to read? A. He wanted to know what I had made out if it.

Q. Well, now, what did he tell you before that? A. He said "This was what came from Nixon, read it, see what you make of it."

Q. What did he say before that? Didn't he tell you that Nixon had told him that the half bloods didn't come in? A. Well, I am not sure he did. He gave me this paper to read.

Q. Well, was there something said about Nixon's opinion before the paper was handed to you? A. He wanted my opinion on that paper.

Q. Won't you please answer my question?

(Question repeated.)

By the Vice Ordinary: Q. You said that you told him that you didn't think the paper answered his question. Now, what question did he refer to or did you refer to? A. Well, in regard to the half bloods coming in for a full share, for an equal share in his personal property. That was the subject that we had all been talking about—we had been talking about.

By Mr Starr: Q. Well, now, according to the best of your recollection, what was the first thing said by anybody upon this subject? A. Well, that is a little hard to answer.

Q. Well, now, in the evening, did Michael tell you upon that occasion that Nixon had told him that the half bloods didn't come in? A. In the evening he was speaking of his money.

Q. Well, you are not answering my question. Please answer my question. (Repeated) Well, now, in the evening, did Michael tell you upon that occasion that Nixon had told him that the half bloods didn't come in? A. No, that wasn't the conversation.

Q. Well, how did the conversation start? A. They were speaking of the old will.

Q. I am speaking about the evening. A. Well, this was in the evening. The conversation started with talking about his old will, and my aunt said "The old"—she says "You know what that old will is. It is no good; the witnesses are dead." And I said—of course, I didn't know the contents of the will, I knew nothing about it except there was a will,—

Q. Well, now—A. I said "If you can prove—I am quite sure if you could prove the signatures the will will stand."

Q. Was that in the afternoon or in the evening? A. That was in the evening.

Q. Well, now, what else happened? A. Then was the time my uncle said "If I believed the half bloods would come in for an equal share I believe I would let the law settle it."

Q. Now, who was present when that was said? A. My sister and my uncle, and my aunt was in and out of the room; whether she was there just that minute I couldn't say positive.

By the Vice Ordinary: Q. That was also in the evening, was it? A. That was in the evening

after supper, while we were doing up the supper work.

By Mr. Starr: Q. Now, was there anything said about Nixon's opinion upon that occasion—that is, in the evening? A. Not that I remember.

Q. Was there anything said about this paper at that time? A. No; we had discussed this in the afternoon.

Q. Well, now, did Michael at that time, in the evening, say "If the halfs do come in of course there is no use of me making a will"? A. I will repeat what he said; "I believe if I"—

Q. You haven't answered my question yet. Did he say at that time, "And if the halfs do come in of course there is no use of making a will"? Did he say that? A. He didn't say that, no, that wasn't the words he said.

Q. Did you write down what he said? A. I remember what he said practically.

Q. Did you write down what he said? A. No.

Q. And that was in the fall of 1915? A. Yes.

By the Vice Ordinary: Q. Was it in the evening he spoke of having the will in the safe, handy, where, he could destroy it if he wanted to? A. Yes, when he said about—if the half bloods came in equally he would let the law settle it, he said that right afterward.

Q. Didn't you give that as a part of the afternoon conversation in your direct testimony? A. How is that? Which as a part of the afternoon conversation,—about the destroying of the will?

Q. No, that he believed he would let the law settle it. A. If I did it was a mistake, because it was after supper while we were doing up the supper work.

Q. When did he ask you to confer with the attorneys? A. At this time where he spoke—that if he thought the half bloods would come in for an equal share he would let the law settle it, he turned to me and said "I wonder could you find out for me?" I said "Hardly. All the lawyers and the men I know are Pennsylvania men, and the Pennsylvania law and the Jersey law are so different the only way I could find out is going to see a lawyer, a New Jersey lawyer professionally."

Q. Was it the afternoon or evening conversation in which it was spoken about the will being no good because the witnesses were dead? A. Evening conversation, after supper.

Q. The only thing that occurred in the afternoon conversation related to Mr. Nixon's opinion, was it? A. And the reading of this paper.

Q. And what? A. And reading of this paper.

By Mr. Starr: Q. Miss Calver, after Michael died didn't you tell Miss Josephine that what Michael had said to you in 1915, in the fall, was that "If the halfs do come in of course there is no use of me making a will"? A. I surely did not. "If the halfs do come in"?

Q. Yes. A. No, what I have said exactly, if they come in for an equal share that he would let the law settle it.

ELIZABETH CALVER, a witness produced in behalf of the defendants, being duly sworn according to law, on her oath says—

By Mr. Watkins: Q. Miss Calver, you are a sister of Miss Jennie Calver? A. Yes.

Q. And reside with her? A. Yes.

Q. In Pennsylvania? A. Yes.

Q. You knew Michael Allen in his lifetime? A. Yes.

Q. How long did you know him? A. Well, I knew him all of my lifetime.

Q. Frequently visited him? A. About once a year I used to go for a week or possibly longer.

Q. How long did you stay on these visits? A. A week and sometimes longer.

Q. And they would occur at least once a year? A. Generally every fall or sometime in the summer.

Q. Now, in September or October of 1915 were you at his house in Woodstown? A. Yes, in October, I think it was.

Q. And who else was there at the time? A. My sister.

Q. How long did you stay there on that visit? A. Well, I really don't remember just how long I did stay. I hadn't thought about it until I got here this afternoon, and I really don't know how long we were there.

Q. Were you there in 1914 too? A. No, I think not; no, my mother died that year, I wasn't there.

Q. Well, this time in 1915, was that the only time in that year that you were at the home in Woodstown? A. Yes, I think so.

Q. Did your sister go there with you? A. Yes.

Q. Now, did Mr. Allen have a conversation with you and your sister and Miss Josephine Allen in September or October of 1915? A. Yes.

Q. Can you place it more definitely than that as to the time, whether it was September or October? A. Well, it was October, I am sure, because it was

after this paper had been received from Mr. Nixon's office.

Q. And where were you when the conversation took place? A. We were in the sitting-room in the afternoon, the day we went down there.

Q. The very day that you went there? A. Yes.

Q. Who was present at the time? A. My sister, my aunt Josephine and uncle Michael.

Q. Now, what was the conversation? How did it originate and what was the conversation? A. Well, talking about aunt Josephine having destroyed her will, and about distribution of wealth, and then this paper was brought up that came from Mr. Nixon's office, and uncle Michael or aunt Josephine, I don't remember which one, gave it to my sister to read and she read it over.

Q. What was said, if anything, by Michael Allen or in his presence? A. Well, I don't know what he said. I know my sister said "Well, I don't think he has altogether answered your question."

Q. Did he say anything about having asked any one a question? A. No, only the distribution of real estate and personal property both, and after reading this over I suppose my sister realized that it did not include personal property too.

Mr. Starr: I move that be stricken out.

The Vice Ordinary: Yes, I don't think she should testify and I don't think the testimony should stand touching her suppositions.

Mr. Watkins: I didn't want that.

The Vice Ordinary: I think she must confine herself to what he said.

Q. What did he say when he or Miss Allen handed the paper to your sister? A. I don't know

that anything was said, only just told her to read it, "See what you think of it."

Q. What did she reply? A. "Well, I don't think he has answered your question," my sister replied when she gave it to him.

Q. Now, was there anything further said in the afternoon—at the time? A. No, I don't think so.

Q. Did the question or subject come up again? A. In the evening, yes, we were talking about—

Q. Where were you? A. In the kitchen.

Q. What doing? A. Why, finishing up the supper things.

Q. Who was there at that time? A. My sister and uncle Michael, and aunt Josephine was bobbing in and out.

Q. What was she doing? A. Well, she was putting away the victuals and things like that, doing things around the house, I don't know exactly what now, she was putting the victuals away from supper.

Q. What were you and your sister doing? A. I don't know whether we were doing anything then except just talking with uncle Michael.

Q. What, if anything, did Mr. Allen say at that time? A. Well, he said that if he thought that the half bloods would come in equal that he believed he would let the law settle his estate.

Q. What was said prior to that which led up to that remark by him? A. Why, about the distribution of—to the half bloods and whole bloods.

Q. Who started the conversation again that evening? A. I really couldn't say.

Q. Did Miss Allen enter into the conversation at any time in the evening? A. Well, she mentioned the old will, said that that—"You know

what the old will is," she said, "that isn't any account."

Q. What old will? A. Why, referring to this will that we have here today,—said the signatures —that is, the witnesses were dead.

Q. What else, now, was said, if anything, by either Miss Allen or Mr. Allen,—that is, in Mr. Allen's presence? A. I don't know as I can think of anything else particular.

Q. Did you spend the night there? A. Oh, yes, we were there several days, I don't remember just how long, but we were there several days afterwards, I don't really remember how long.

Q. Did any talk on that line come up again before you left? A. I don't remember whether it did or not.

Q. How long after that visit was it that you went there again? A. In July of 1916, when he was in bed.

Q. Did you have a talk with him then? A. Only for a few minutes; he was quite ill then. Well, he did say that he intended to—well, he told his sister to have the old will handy so that he could tear it up any time he wanted to suddenly.

Q. Who told you that? A. He did.

Q. When did he tell you that? A. That same evening.

Q. July? A. No, the same evening that we were talking about the will.

Q. In October? A. In October.

Q. 1915? A. 1915, yes.

Q. Now, after July, prior to his death, did you go again to Woodstown? A. Yes, we were for three weeks after his death.

Q. After his death? A. After his death.

Q. And talked with your aunt Josephine then? A. Yes. We went down the 30th of January and we were there until the 20th of February.

Q. How did you come to sign a renunciation to the administration of your uncle's estate?

Mr. Starr: Well, I object to that. It is immaterial.

The Vice Ordinary: What is the materiality of the question?

Mr. Watkins: I will withdraw the question.

CROSS-EXAMINATION by Mr. Starr:

Q. Prior to Michael's death you were there in July, 1916, just for a few minutes? A. Just a short time. I suppose probably I was in the house an hour. I was only in his room for a few minutes.

Q. And the next time before that was October, 1915? A. Yes.

Q. When before that were you there? A. Why, possibly 1913. I couldn't say positively but I think very likely 1913.

Q. And how many times in 1913 were you there? A. Well, I couldn't tell you really. I suppose once, because I usually went about once a year.

Q. Well, now, in the afternoon of the day you arrived there,—A. Yes.

Q. What was the first thing that was said by anybody that brought up the conversation about the distribution of wealth to which you referred? A. I really couldn't tell you, we were all talking together.

Q. How did the conversation arise? A. I don't know that either, but just simply it came up and I couldn't tell you how it started at all.

Q. How was it this paper was handed to your sister to read? A. I suppose they had this paper—I don't know whether they had had it long or not, I don't just remember the date we were down there,—and handed it to my sister to read it.

Q. Now, what had happened just before that? What had been said by Michael? A. I couldn't tell you.

Q. Your sister said, however, that didn't answer the question? A. No.

Q. Now, what was the question that Michael wanted answered by Mr. Nixon? A. Well, before that we had been talking of distribution of wealth and in connection with the half bloods and the whole bloods.

Q. And had Mr. Nixon told Michael that the half bloods didn't come in? A. Not that I know of.

Q. Wasn't that the statement which Michael made at that t me? A. No.

Q. That Nixon had told him? A. No, he didn't say that Nixon had told him.

Q. Well, how did this paper happen to be produced? A. I don't know. He said that was the paper that came from Nixon's office and it was handed to my sister and myself to read.

Q. Well, had he talked about Nixon before that paper was handed out? A. I don't know Mr. Nixon was often spoken of because he did business for him.

Q. On this occasion had he talked about Nixon? A. I don't know whether he had or not, I don't remember that.

Q. Did Michael say that he had asked Mr. Nixon for an opinion? A. No.

Q. As to how the property would be divided? A. No, he didn't say anything of the kind.

Q. Well, what question had your sister reference to when she said that Mr. Nixon hadn't answered it? A. Well, this paper was—only dealt with real estate.

Q. Well, what was the question? A. Why, the question was whether the half bloods and the whole bloods all came in equal.

Q. Yes. A. And this paper didn't answer that, only on the real estate.

Q. Well, now, then, Michael had said that he had asked Mr. Nixon—A. No.

Q. —the question? A. No, he hadn't.

Q. Well, how did it arise, then? A. I don't know, I just can't tell you how it came about. He didn't say that he had asked Mr. Nixon, just "That is the paper came from Nixon's office."

Q. Then all that you can remember is that the paper was produced? A. Yes.

Q. And your sister said that the question wasn't answered? A. Yes.

Q. Is that all that you can remember of the conversation? A. Yes, that is all.

Q. All that you can remember? A. Yes; they were speaking of the distribution in general, but she thought this didn't take in the real estate and personal property.

Q. And that is all you can remember of the conversation in the afternoon? A. Yes.

Q. Well, now, in the evening was Michael sitting in the kitchen or was he standing up? A. I think he was standing but I am not sure.

Q. How long had you been in there before the conversation arose about the question of having the will handy so that it could be destroyed quickly? A. I don't know how long it had been. We had been talking around,—I couldn't tell you.

Q. And did you all stand up there? A. We were standing around the kitchen talking after supper.

Q. What was the first thing that was said in the evening? A. Well, I don't remember that, I don't remember what was said first.

Q. And what did Michael say about the half bloods? A. Why, he said that he believed if the half bloods came in equal that he would let the law settle this estate.

Q. Yes. Well, now, what conversation had immediately preceded that? A. Well, destroying of his will, I suppose,—well, I am not sure of that but they were talking of the destroying of this will and I don't know whether that came then or not, but he told his sister to have this old will handy in case he wanted to destroy it suddenly.

Q. Well, now, what induced that conversation—what started that, in the evening? A. Well, I don't know. We were just on this same subject all evening and I don't remember just what led up to each one.

Q. Can't you remember what was said about it? Something must have been said that induced Michael to make the statement that he wanted his sister to keep his will handy so it would be destroyed easily. Now, what had happened immediately before that to induce that remark? What had been said by anybody? A. I couldn't tell you just immediately.

Q. Do you know whether that preceded the statement about the half bloods coming in equally? A. No, I don't remember which came first.

Q. And during all of this time Michael and you and your sister were in the kitchen standing up? A. Yes, I think we were standing up, we were there in the kitchen, I think we were all standing up.

Q. And Miss Josephine was in and out? A. Yes.

Q. Attending to her duties? A. Yes.

BENJAMIN C. ENGLAND, a witness produced in behalf of the respondents, being duly sworn according to law, on his oath says—

By Mr. Davis: Q. Now, Benjamin, you are the son of Hannah England? A. Yes, sir.

Q. What relation was she to Michael Allen? A. A niece.

Q. Your mother's mother was a half sister of Michael Allen, was she not? A. Yes, sir.

Q: Now, did you know Michael Allen in his lifetime? A. I knew him all my life.

Q. You knew him all your lifetime? A. Yes.

Q. You are how old? A. I am—will be 28.

Q. You live down near Auburn? A. Yes, sir.

Q. Did you at any time live on the farm of Michael Allen? A. Yes, sir.

Q. And what year was that? A. 1915.

Q. Well, did you go there in March, 1915, and stay there until March, 1916? A. I would have —yes, sir.

Q. Now, during any of that time did you have a conversation with Michael Allen with respect to Joseph Allen? A. Yes, sir.

Q. Now, can you fix the time any nearer than during the year? A. The talk of Joseph Allen you are speaking of?

Q. No, the talk that Michael held about Joseph Allen. A. That is what I mean.

Q. Yes. A. Why, the first talk about Joseph Allen was in the fall of 1914, when I signed the lease for the farm.

Q. Yes. Now, where was that? A. That was in Woodstown there at his home.

Q. Now, what was said? A. Why, he said that the farm on the Sharptown road, the homestead, was to be Joseph's, but Joseph stole his tenant off and made him mad and he sold it, and he said that Joseph wouldn't get any more than the rest.

Q. That was in the fall of 1914? A. Yes, sir.

Q. Now, was that all of the conversation which referred to Joseph Allen? A. Yes, sir.

Q. Now, did you have another conversation about the farm? A. About the farm where I live.

Q. Yes, where you did live? A. Yes, sir.

Q. And can you tell me when that was? A. It was in the summer sometime, I couldn't say what month.

Q. And where? A. Where was I at then?

Q. Yes. A. Standing in the wagon yard.

Q. Well, in whose wagon yard? A. On the place where I lived.

Q. Was Michael Allen there? A. Yes, sir.

Q. Now, what did he say at that time? A. He said that the place would—that he expected Ben-

jamin Turner to get it after he was through with it.

Q. Now, Benjamin Turner is the son of your mother's sister, is he not? A. Yes, sir.

Q. And Benny Turner's mother was Michael Allen's niece? A. Yes, sir.

Q. Now, anything else? A. And I told him the only way he would get it he would have to leave it in his will.

Q. Go ahead. Anything further? A. And he seemed to think that the law—

Mr. Starr: No, I object.

Q. No, what did he say? What did he say? A. What did Michael say?

Q. Yes. A. About his will?

Q. Yes, go ahead, tell the conversation; not what he seemed to think, but what did he say? A. I don't just understand what you mean.

Q. Now, you just tell what your uncle said as near as you can tell us and what you said to him? A. I told him that he would have to have it in his will if he expected Benjamin Turner to get the place when he was through with it.

Q. What did your uncle say? A. He just laughed; he didn't say whether he had a will or whether he hadn't.

Q. Is that the only conversation you had with your uncle about his will or disposition of his property? A. Only the same thing over again about Joseph, he was often talking about that.

Q. Now, when was the last time that you recall that he spoke about Joseph? A. You mean a special time, that is a date—I couldn't tell you.

Q. Well, as near as you can tell us. A. I couldn't give you any date.

Q. Well, was it after you left the farm or before? A. The last time I was talking about it?

Q. Yes. A. Before I left the farm. I never saw him but once after I left the farm.

Q. Now, how long before you left the farm? A. I couldn't exactly tell you that.

Q. You left the farm in March of 1916? A. I left the farm on December 29th.

Q. Did he sell the farm while you were a tenant? A. No?

Q. You went on the farm in March of 1915, and stayed there until the following December, is that correct? A. Yes, sir.

CROSS-EXAMINATION by Mr. Starr:

Q. Now, Mr. England, you left the farm in December, 1915? A. I left the farm, yes, sir.

Q. You were there from March, 1915? A. Yes, sir.

Q. That season, 1915? A. Yes.

Q. And all of this conversation that you had was prior to December, 1915? A. 1915.

HANNAH R. ENGLAND, one of the respondents, being duly sworn, according to law, on her oath says:

By Mr. Davis: Q. Mrs. England, you are the wife of William England? A. Yes.

Q. And your mother was the half sister of Michael Allen? A. Yes.

Q. Was she not? A. Yes.

Q. Now, did you know Michael Allen all of your lifetime? A Yes..

Q. And all of your life time have you lived in and around Auburn, near there? A. No, I have lived at Pennsgrove the forepart of my life until I was thirteen and a half.

Q. Now, during the whole of your life have you been visiting Michael Allen frequently? A. I have.

Q. During your mother's lifetime? A. Yes.

Q. And you have been married how long? A. How long have I been married?

Q. Yes. A. Thirty years.

Q. And during that time you lived near Auburn, did you not? A. Yes, sir.

Q. Now, Auburn, is how far from Woodstown? A. About ten miles from where we live.

Q. And during all of this period of your married life have you been in the habit of visiting Michael Allen? A. Yes.

Q. How frequently during the year? A. Just—every time that I could.

Q. Well, tell his Honor about how many times you think that would be? A. Well, I couldn't say exactly, some years it would be oftener than other years. I always went whenever I could; sometimes I wasn't well and had other things to see to and couldn't go, but whenever I could I always went to see him and always enjoyed going.

Q. Did your uncle welcome you? A. Always.

Q. Seem to be fond of you? A. Always seemed to be, yes.

Q. Now, Mrs. England, you never talked to your uncle about his will, did you? A. No, never in my life.

Q. Nor he to you? A. No.

Q. Were you in Mr. Nixon's office at any time after the death of Michael Allen? A. Yes.

Q. Did you have a conversation with him with respect to this paper marked P-3? A. Yes.

Q. Now, did he tell you at that time that he mailed the paper to your uncle? A. Yes.

CROSS-EXAMINATION by Mr. Starr:

Q. What else did he say upon that occasion? A. Who—Mr. Nixon?

Q. Yes, Mr. Nixon. A. He said that he didn't know that uncle Michael had a will until after his death. He also said that—with regard to this paper, that he just merely sent them a clause of the law with regard to the whole bloods.

Q. And did he tell you at that time that he couldn't remember whether it had been mailed or whether he had taken it down personally? A. No, he told us he mailed it.

Q. Did Michael ever visit you? A. He was there once.

Q. When? A. That is, I mean since we was married.

Q. How long have you been married? A. Thirty years.

Q. And when did he visit you? A. I don't just know when it was. It was in the spring. I don't know what part.

Q. There has been a good many springs in the last thirty years. A. The year I don't know.

Q. You don't know whether it has been five, ten or fifteen or twenty years? A. Oh, it has been less than twenty, but I don't just exactly remember the year.

Q. Well, now, in the year 1915, how many times did you visit Michael's house? A. I don't know. I was there several times. That is all I do know.

WILLIAM ENGLAND, a witness produced in behalf of the respondents, being duly sworn according to law, on his oath, says:

By Mr. Davis: Q. Mr. England, you are a farmer and live in Auburn, do you not? A. Yes, sir.

Q. You are the husband of the witness that just left the stand? A. Yes, sir.

Q. Did you go in company with your wife to the office of Mr. Nixon? A. I did.

Q. Since the death of Michael Allen? A. Yes.

Q. Did you at that time or did your wife in your presence have a conversation with Mr. Nixon with respect to P-3, which is the paper that has been talked about here this morning? A. Well, I couldn't say. I didn't have it in my hands; I saw it in Aunt Josephine's hands.

Q. Well, now, did you have a conversation or did your wife have a conversation with Mr. Nixon in his office at that time about a paper that was sent? A. Yes, sir.

Q. By Mr. Nixon or his office to Michael Allen? A. Yes, sir.

Q. At that time did he say in your presence that he mailed the paper to Michael Allen? A. Yes, sir; that is the way I understood it.

No cross-examination.

LILLIAN MOSSBROOK, a witness produced in behalf of the respondents, being duly sworn according to law, on her oath says:

By Mr. Swackhamer: Q. Where do you live, Mrs. Mossbrook? A. I beg pardon?

Q. Where do you live? A. 1508 Bellefield Avenue, Atlantic City.

Q. Are you a daughter of James Pedrick? A. Yes, sir.

Q. Did you know Michael Allen in his lifetime? A. Never visited him but once.

Q. Did you know him? A. That is all, just the once.

Q. You visited him once? A. Yes.

Q. When was that? A. The 8th day of October, 1916.

Q. Who was with you when you visited him? A. My mother.

Q. What was the condition of Michael's health at that time? A. He was ailing.

Q. How long were you there? How long were you visiting him? A. Probably two hours.

Q. Did you talk with Michael Allen? A. Yes, sir.

Q. About his health and so on? A. Yes, sir.

Q. Was there anything said by Michael Allen while you were there in conversation with him regarding his relations with Joseph Allen or Charles Allen's family? A. Why, he spoke something about their not coming to see him.

Q. What did he say about their not coming to see him? A. I don't just recall only him saying of him being sick and they hadn't been to see him on some holiday.

Mr. Starr: I move that last be stricken out.

Q. Oh, well, he said they hadn't been to see him? A. That is what he said.

Q. Did he say anything about a tenant that Joseph had taken away from him? A. I don't recall whether he or Aunt Josephine did but it was mentioned, the trouble was through that.

Q. You sat there about two hours, you say? A. Probably that; probably longer and probably less.

Q. Was he and Miss Allen friendly— A. Yes.

Q. —towards you? A. Yes.

CROSS-EXAMINATION by Mr. Starr:

Q. You came there after Miss Allen had sent $500? A. Yes.

Q. To your father? A. Yes.

Q. You came there, you and your mother, to thank her for that money? A. On our way home from visiting our other uncle, yes, sir.

JULIA PEDRICK, a witness produced in behalf of the respondents, being duly sworn according to law, on her oath says:

By Mr. Swackhammer: Q. Mrs. Pedrick, where do you live? A. Williamstown, N. J.

Q. James S. Pedrick is your husband, is he not? A. Yes, sir.

Q. How old is James? A. He was 77 last March.

Q. 77? A. Yes, sir.

Q. What is the condition of his health? A. What say?

Q. (Repeated.) What is the condition of his health? A. Well, I don't know. He has kind of sinking spells and heart trouble, I think.

Q. He doesn't go away from home at all? A. No, sir, never goes away.

Q. Did you go with your daughter to Woodstown? A. Yes, sir.

Q. And call on or visit Michael Allen, last fall? A. Yes, sir.

Q. When was it? A. The 8th of October.

Q. 8th of October? A. Yes.

Q. You saw both Michael and his sister? A. Yes, sir.

The Vice Ordinary: October, what year, Judge?

Q. What year was it? A. Last October, 1916.

By the Vice Ordinary? Q. 1916? A. Yes.

By Mr. Swackhamer? Q. Last October? A. Yes.

Q. What was the condition of Michael's health at that time? A. Well, he was feeling real poorly, he said.

Q. Eh? A. He was feeling real poorly.

Q. Was he lying down on a couch? A. Yes, sir.

Q. Did he take part in a conversation that went on between him and Miss Allen? A. He talked to me the same as he did to my daughter.

Q. Eh? A. He talked to me just the same as he did to my daughter, we was all there.

Q. Now, during the conversation that afternoon was anything said by Michael relative to his relations with Charles Allen's family? A. Only what he said about Joseph, his family hadn't been to see him, he said, he felt hurt about it.

Q. The family hadn't been to see him? A. And he felt hurt by it.

Q. How long had he been sick, that is, how long had he been confined to his house? Do you know? A. I couldn't say.

Q. Well, did he go out any while you were there? That is, was he able to go out doors? A. Yes, sir; he went out and came in again.

Q. Did you hear any conversation regarding a tenant that Joseph hired that had been working for Michael? A. Yes, sir.

Q. What was said? A. He said he took his man off of his place and put him on his'n, that was all.

Q. How long were you there? A. I guess about a couple of hours.

No cross-examination.

JOSEPH ALLEN, re-called:

Q. Joseph, something has been said about your getting a tenant away from one of Michael's farms. Won't you explain to the Court what happened with reference to that?

Mr. Davis: I object to it, if your Honor please.

The Vice Ordinary: I think it may be competent to show that there has been an undue significance attributed to this incident. I think Joseph is entitled to explain.

Mr. Swackhamer: It might be that Michael had an exaggerated notion of it.

The Vice Ordinary: We will have to ascertain that. He could, of course, get angry over a very small thing, but I think the size of the thing might be important.

Q. Explain that, please, about the tenant. A. Michael's farm joined my father's farm and I bought my father's farm at his death, and my father's farm was a much larger farm than uncle Michael's and I kept a good bit more stock, and he had a very good tenant on there for two or three years, I most forget which, and the man was going to move any way, and I met Uncle Michael along the road one day and told him that the tenant was going to move any way and I might as well have him as any one, and he says to me, "If you can do any better by him than I can, go ahead." And from that I thought it was all right, and I know he got quite cross at me and he went ahead and sold the farm, that was the homestead, but that was years ago.

Q. When was it that you got the tenant from him? A. I should say it was either three or four years ago. The tenant lived on my farm three years, the tenant that came from his farm, a man named Crispin; that tenant moved off of my place this year, so it has been three years. And Michael was quite cross and he put the farm up for sale and sold it. I guess he was sorry afterwards; I have heard so a good many times but I haven't heard him say so.

Mr. Davis: I move that that be stricken out.

The Vice Ordinary: Yes, don't say what you don't know.

Q. What were the relations between you and Michael after that? A. For a month or so I didn't go down there, I think, but saw him along the street and we wouldn't talk about the farm, because he didn't start it and I didn't start it, but my wife and I went down after a little while and he was very friendly but not as friendly as he had been, but he gradually came back and he got so he—I had him out automobile riding but I am not certain—I don't know whether—that is since then, and the following January I was taken with appendicitis, and he was a man never went around to see people so much but I hadn't been down in bed more than an hour before he was right up in the room and stayed there until I was taken to the hospital, and every day he inquired about my health, and from that time on I believe I had been as friendly with him as a man could be, because he wasn't a man that went out, associated with people all the time, but I went to cow sales with him and always very friendly with him.

Q. Now, in his illness in 1916 did you visit him? A. I visited— I don't believe there was ever two weeks went by I didn't visit him, because I knew he was a man that would feel that way if I didn't visit him, and every time I went there I always said, "I don't know whether you would rather have me come or not, whether it would be a bother having so many people around when you are sick." But he always said, "I am glad you come." I went down a couple of times, several times, with my mother, a couple of times I asked him to go out automobile riding but he said he was too sick.

Q. How about your sister? A. They tried to keep in touch always, every two or three days, sometimes Lizzie would go and sometimes my younger sister, Margaret, would, every day or so we knew just how Uucle Michael was, and I don't believe there was ever two weeks we wasn't at the house, I think my aunt will corroborate that.

Q. And what year did you have appendicitis? A. Well, it was in January before the tenant moved on the farm. You see, I bargained to take his tenant along about September or October, corn-husking time, October; and he goes ahead and sells the farm, and by January I had appendicitis, so two or three months' time everything was fixed up as good as ever, as far as I know, he treated me all right.

CROSS-EXAMINATION by Mr. Watkins:

Q. Did you ever make a charge against Michael for taking him on these automobile rides that you speak of? A. He never paid me a cent towards taking him automobile riding. I don't think I have ever taken him more than two or three times. I was always glad to take him when he would go but he wouldn't go with any one very much, didn't go away from home a lot.

Q. Didn't go out and visit anybody? A. He didn't go visit very much.

JOSEPHINE ALLEN, re-called:

By Mr. Starr: Q. Miss Josephine, upon the occasion of the visit of the two Calver young ladies

at Woodstown in 1915 did Michael say to you in their presence that he wanted you to keep the will handy so that it could be gotten quickly in case he wanted to destroy it, or anything of that kind?

Mr. Davis: That wasn't the question. The young ladies testified that Michael had told them that he had told his sister prior to that time.

The Vice Ordinary: Well, I wouldn't like to decide between you on that. My recollection is that they said that he said to her that she should keep it.

Mr. Davis: No, my understanding was that he told the young ladies that he had told his sister to have the will—

The Vice Ordinary: Well, put it both ways, Judge, and then you will be sure to cover it. I can't remember it and it will take sometime to refer to the testimony.

Mr. Starr: Well, I don't remember about that. My recollection is the same as your Honor's.

(Question repeated).

The Vice Ordinary: I apprehend I have it accurately in my notes. I have it this way, "Michael said, 'I have told Josephine to have the old will handy so if any time I want it to tear it up I could have it handy.'" That is from my notes of the testimony of the two Misses Calver.

Mr. Starr: Well, then, I withdraw the question.

Q. Did Michael say to either of the young ladies upon that occasion in your presence that if he thought the half bloods would come in equally he would let the law take its course?

Mr. Watkins: That is objected to because that question was asked Miss Allen upon her direct testimony and she said she did not remember.

The Vice Ordinary: I think she had better testify again since she has heard their testimony. It may have refreshed her memory.

(Question repeated.)

A. I didn't hear him.

By the Vice Ordinary: Q. Did you say no? A. No, I didn't hear him.

By Mr. Starr: Q. Was there any conversation of that kind in your presence? A. What—about the will?

Q. No, about Michael saying that if he thought that the half bloods would come in equally— A. No, I didn't hear it.

Q. —he would let the law take its course? A. I didn't hear it.

By the Vice Ordinary: Q. You remember well, do you, this circumstance of the conversation had between you and Michael and your two nieces? A. Well, I do when he was showing them the slip of paper, but I don't remember anything else.

Q. Yes. A. Of course, I was busy, and I suppose when he was talking about that I was clearing the table and taking the victuals downstairs.

Q. Do you remember what Miss Jennie said when the paper was handed to her and she read it? A. No.

Q. Do you remember that it was handed to her to read? A. Yes. I think I went and got it and brought it in the room.

Q. Do you remember anything said by you about your brother's will being no good because the

witnesses were dead? A. No, I don't remember it.

Q. Well, can you say whether you did make any statement of that kind or not? A. No, I don't remember anything at all about that part of it.

Q. Do you remember what the conversation was about the half bloods inheriting with the whole bloods? A. At that time?

Q. Yes. A. No.

Q. Do you remember hearing your brother say to Miss Jennie and her sister that he had told you to have the old will handy where he could get it in case he wanted at any time to tear it up? A. I think he never said that to me, I never remember him saying anything about tearing up his will.

Q. No, but did you hear him say anything like that to them? A. No.

Q. He did tell you, however, didn't he, at one time to get the will for him? A. Yes.

Q. Or on several occasions to get the will for him? A. Yes.

Q. When you didn't get it? A. I didn't get it. He wanted it for the purpose of looking over it.

Q. What? A. Looking over it, that is what he wanted it for. I don't think he wanted it to destroy it but he wanted to look over it.

Q. You have no recollection of his ever telling you to have it handy where he could get it quickly? A. No; I never remember it.

CROSS-EXAMINATION by Mr. Watkins:

Q. You say that you don't think he wanted to destroy it when he told you to get it. Didn't you say this morning, in your testimony, Miss Allen,

that he told you several times to get it in order that he could destroy it? A. I did not.

Q. Didn't he know the contents of his will? A. He did.

Q. Why would he want to get it to look over it? A. I don't know.

By Mr. Swackhamer: Q. You don't know, then, what he wanted it for? A. No, I don't know.

Both sides rest.

Exhibit P-2

B 10 P 109 9-29-15

6 months' interest on Griffiths
Mortgage 1038 N. 19th St., Camden
Due Sept. 27, 1915 $36.00
Expense of Collection, etc.,
Check herewith 36.00

HORACE F. NIXON,
Per B

Tax Receipt for 1914 Produced.

Have looked up your questions and will either write you or see you some time this week.

H. F. N.

Exhibit P-3

Descent

Comp. Stat. Vol. 2 p 1918 Sc. 2

When any person shall die seized of lands, etc., in fee, etc., without devising same in due form of law, leaving a brother or sister, or leaving a brother or brothers and a sister or sisters of the whole blood, the inheritance shall descend to such bro. or sister or to such bro. or brothers, sister or sisters, as the case may be, as tenants in common, in equal parts; and in case such bro. or sister, who would have inherited by this law, if living, shall die before the said person so seized and leave a lawful child or children, such child or children surviving the person so seized, shall inherit, if a child solely, and if children, as tenants in common in equal parts, such share as would have descended to his, her or their father or mother, if such father or mother had survived the person so seized. Same law applies in case of death of child of such bro. or sister.

Exhibits P-1A and P-1B are printed as exhibits attached to the petition for probate.

Exibits P-4 and P-5 are printed in the record.

Conclusions

(*Filed, Sept. 21, 1917*)

NEW JERSEY PREROGATIVE COURT

In the matter of The Application for the Probate of the last will and testament of Michael Allen, deceased.	On Petition.

S. Huntley Beckett, Esq., and Hon. Lewis Starr, for Petitioner.

Hon. David O. Watkins, for Elizabeth Calver, Jennie C. Calver, and Hannah A. Foster, respondents.

Hon. A. H. Swachkammer, for James S. Pedrick, respondent.

LEAMING, VICE ORDINARY:

This is an application made to the Ordinary for the probate of a certain paper writing as the last will and testament of Michael Allen, deceased. Deceased is herein referred to as "testator" for convenience of reference. All persons in interest have been duly cited to appear and have been fully heard.

The paper writing which has been produced for probate was executed by testator as his last will and testament March 11th, 1884, and was by him revoked July 29th, 1916, by tearing his signature from the instrument.

Conclusions

There is no dispute touching the act of revocation. The testimony is conclusive to the effect that testator tore his signature from the will with the definite purpose to render it wholly inoperative as a will. His mental capacity to revoke the will and his intention to do so are fully established. Nor did testator at the time or near the time disclose to any one his reasons for revoking the will.

The contention of proponent is that the revocation was ineffective for the reason that testator misunderstood the law controlling the distribution of personal property of an intestate and that he would not have revoked the will but for such misunderstanding.

Testator left him surviving a sister of the whole blood and children of a deceased brother of the whole blood. Under the will, if it be probated, these relatives of the whole blood will take testator's entire estate, real and personal, testators' sister taking one half and the descendants of testator's deceased brother taking one half. Testator also left him surviving brothers and sisters of the half blood and descendants of deceased sisters of the half blood.

The misunderstanding of the law by testator which is now claimed to have existed and to have wholly occasioned his act of revocation of the will was his erroneous belief at the time that his entire estate would pass to his relatives of the whole blood in case of his intestacy in precisely the same manner contemplated by his will, to the total exclusion of his relatives of the half blood.

In support of that claim testimony has been introduced to the effect that about ten months be-

fore the act of revocation of the will testator was advised by an attorney at law that in case of his intestacy one half of his property would go to his living sister of the whole blood and the other half to the descendants of his deceased brother of the whole blood.

It seems impossible to doubt that advice to that effect was given at the time stated either to testator or to testator's sister and brought to the attention of testator. In giving this advice the attorney obviously overlooked the fact that he was defining the law of descent of real estate and that the law controlling the distribution of personal property was not the same either with respect to the rights of living brothers or sisters of the half blood as against those of the whole blood or with respect to the rights of descendants of deceased brothers or sisters of either the whole or half blood. Indeed as to the latter respect a recent decision of our Court of Errors and Appeals was necessary to settle the law. See *in re White's Estate*, 101 Atl. Rep., 241.

There is also some testimony to the effect that as late as approximately one month prior to the cancellation of the will testator made a statement indicating his belief that the intestacy laws would bestow his property the same as it was bestowed by his will. It is the contention of proponent that the entire evidence justifies the conclusion that that was testator's belief at the time he revoked the will and that that belief on his part was the sole cause of the revocation, and that in such circumstances the act of revocation must be regarded as a mistake and ineffective because lacking *animus revocandi*.

Conclusions

Our statute provides not only the method of making a will, but also the methods of revoking it after it has been made. The provisions touching revocation are:

"That all written revocations of wills shall be executed in the same manner as wills are hereby required to be executed, and when so made shall be sufficient to revoke any last will, or any part thereof." 4 Comp. Stat., p. 5870, sec. 25. "That no devise or bequest in writing, of any lands, tenements, hereditaments or other estates whatsoever in this state, or of any estate *pur auter vie,* or any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself or in his presence, and by his direction and consent; but all devises and bequests of any lands, tenements, hereditaments, or other estates whatsoever in this state, or of any estate *pur auter vie,* shall remain and continue in force until the same be burnt, canceled, torn or obliterated by the testator or by his directions in manner aforesaid, or unless the same be revoked or altered by some other will or codicil in writing, or other writing of the devisor signed by the presence of three or more subscribing witnesses declaring such revocation or alteration" 4 comp. Stat., p. 5861, sec. 2.

The statute is silent touching mistake, accident or intent. It cannot be doubted, however, that,

"burning, canceling, tearing or obliterating" by testator by mistake or accident without intent to do so would be ineffective as a statutory revocation. *Smock vs. Smock,* 11 N. J. Eq., 156, 163. But when a testator of sound mind has revoked his will by tearing his signature from it with a defined intent to destroy its operation as a will so that there can not be said to have been any accident or mistake touching the act of revocation or intent to revoke, the claim that the revocation was a mistake and ineffective because of testator's inaccurate understanding of the intestacy laws of his state enters a wholly different field of investigation (see *in re Gluckman's will,* (N. J.), 101 Atl. Rep., 295, as to the circumscribed field of mistakes in the execution of wills). The former is a mutilation without intent to revoke, the latter a mutilation by the statutory method with intent to revoke. The misapprehension in the latter case is not even as to the primary consequence of the act of revocation, for the primary consequence of that act is intestacy and intestacy is necessarily intended by the act of revocation in the absence of a substituted will. The misapprehension or mistake which is thus made the foundation of proponent's case is not that testator did not intend to revoke his will and die intestate, but is that testator misunderstood the law of intestacy at the time he revoked the will, and believed at that time that the intestate laws would transmit his entire estate in the same manner as the will which he revoked. But as such misapprehension may be said to be relevant to disclose the ultimate consequences which testator desired to flow from his act of revocation, it appropriately directs the present in-

quiry to an ascertainment of how far and by what means a Court may properly inquire into and ascertain such ultimate intent or purpose of testator in a case of this nature.

It will be observed that the present case does not fall within the doctrine of dependent relative revocation. The tendency of modern cases is clearly to narrow that doctrine, but it does not appear to have been ever extended to any cases except those in which a substituted will has failed because of defects of execution or by accident. Nor does the present case fall within that class of cases where a revocation is on its face expressly grounded upon the assumption of certain facts which were not true, such as are not infrequently found in codicils to wills. See *Hayes vs. Hayes*, 21 N. J. Eq., 265. Nor within the class of cases in which the act of revocation has been accompanied with a definite declaration of its purpose, as in *Perrott vs. Perrot*, 14 East., 423. In the present case nothing occurred at or near the time the will was revoked to indicate what thoughts testator had in mind at that time. He merely sent his sister for his will, tore his signature from it and returned it to her without comment. His death did not occur until six months later. Whether at the time he revoked the will he intended to make a new will or die intestate he gave no intimation by words or conduct; nor did he at that time indicate what his understanding may then have been touching the laws of intestacy or his wishes as to the disposition of his property.

Even though it be assumed that testator's revocation of his will, in the erroneous belief and because of his erroneous belief that the law of in-

testacy was the same as the provisions of the revoked will, would be operative to nullify the revocation, I am unable to reach the conclusion that a Court should undertake the ascertainment of testator's belief and intent in those respects solely by means of testimony of statements made to and by testator which are not so closely related at the physical act of revocation as to time or circumstance as to clearly form a part of the *res gestae*. The grave danger of error in such an investigation is apparent; it not only encounters the dangers arising from possible inaccuracies of testimony, but is necessarily based upon the dangerous assumption that statements made by testator from time to time touching his proposed bestowal of bounty at his death accurately portray his real purposes, and the further dangerous assumption that his purposes have remained unchanged. Testator's belief as to the law and his attitude toward his various relatives and his intentions and wishes touching the possible objects of his bounty a month or more before the act of revocation may be theoretically assumed to have continued the same in the absence of evidence of change in one or all of the respects named; but human inpulses are not immutable, and in the practical affairs of life testator's information touching the law and his attitude toward his relatives and his conception of duty to them may well have changed during that period without the knowledge of any one. While such declarations of testator may be said to be admissible in evidence, (*State vs. Ready*, 78 N. J. Law, 599) if not too remote in time their probative force is necessarily weakened to an extreme degree.

Conclusions

The testimony in this case is illustrative of the views already expressed. There can be no doubt that some ten months before the act of revocation testator was inaccurately advised touching the law of intestacy. If the testimony of the testator's sister accurately reproduces testator's statements and testator accurately disclosed to her his purpose testator still remained misinformed touching the law of intestacy a month or more before the act of revocation and then desired his half blood relatives excluded from his bounty at his death. But testimony of witnesses of the half blood touching conversations with testator after the date on which he had been inaccurately advised touching the law of intestacy included suggestions that the advice which had been given by the attorney to testator related only to real estate and did not include personal property, and also included statements made by testator indicating that he desired his estate to be shared by his relatives of the half blood.

My conclusion is that the evidence is inadequate to justify a determination that the act of revocation was ineffective. Probate of the cancelled will is accordingly denied.

Submitted: August 10, 1917.
Determined: September 21, 1917.

Final Decree

(Filed, Oct. 24, 1917)

NEW JERSEY PREROGATIVE COURT

In the Matter of The Application for the probate of the last will and testament of Michael Allen, deceased.	On Petition.

This matter being opened to the Court by S. Huntley Beckett and Lewis Starr, Proctors for petitioner, Joseph M. Allen; David O. Watkins, Proctor for respondents, Elizabeth Calver, Jennie Calver and Hannah A. Foster; Austin H. Swackhamer, Proctor for respondent, James S. Pedrick; and James Mercer Davis, Proctor for respondents, Mary Harbison and Hannah R. England; and John F. Harned, Proctor for respondent, Ruth Justice, and it appearing that citations have been duly issued and served upon all the parties interested in said estate and the petition having been read and the proofs offered in open Court and the arguments of the respective Proctors having been heard and considered and the Court being of the opinion that the act of cancellation by the said Michael Allen, of his will, dated March 11, 1884, was effective to revoke the same and that he died intestate, and that the petitioner is not entitled to the relief sought and prayed for by him in his said petition.

It is on this 23d day of October, 1917, ordered, adjudged and decreed that the cancellation of the

said will by the said Michael Allen was effective to revoke the same, and that he died intestate and that probate of said cancelled will will be denied, and the petition of said petitioner be dismissed.

And it is further ordered that the taxed costs of the respective parties hereto, as well as the expense of securing the attendance of witnesses and having the testimony written up, be paid out of the Estate of Michael Allen, deceased, by Joseph Beck Tyler, Administrator.

And it is further ordered that the said Administrator, as part of the expense of said litigation, pay the following allowances to the counsel hereafter named for their services therein, to wit:

Lewis Starr and S. Huntley Beckett, Proctor and Counsel for petitioner	$1,000.
David O. Watkins, Proctor for respondents, Elizabeth Calver, Jennie Calver and Hannah A. Foster	$1,000.
Austin H. Swackhammer, Proctor for James S. Pedrick	$1,000.
James Mercer Davis, Proctor for Mary Harbison and Hannah R. England	$1,000.
John F. Harned, Proctor for Ruth Justice,	$1,000.

E. R. WALKER,
Ordinary.

Respectfully advised,
E. B. Leaming,
V. O.

(*Endorsed*)
"Filed, Oct. 24, 1917
Thomas F. Martin,
Register."

Notice of Appeal

(Filed, Nov. 20, 1917)

NEW JERSEY PREROGATIVE COURT

In the Matter of The Application for the probate of the last will and testament of Michael Allen, deceased.	Notice of Appeal.

The petitioner in this matter, Joseph M. Allen, hereby appeals from so much of the final decree entered therein, by which it is ordered, adjudged and decreed that the cancellation of the will by the said Michael Allen was effective to revoke the same, and that the said Michael Allen died intestate, and that the probate of the said cancelled will be denied, and the petition of the petitioner dismissed; to the Court of Errors in the last resort in all causes.

Dated, November 7, 1917.

S. HUNTLEY BECKETT.
Proctor of Petitioner.

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

LEWIS STARR,
Of Counsel with Petitioner.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Application for the Probate of the Last Will and Testament of Michael Allen, Deceased.	On Appeal from Prerogative Court.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

This appeal brings up for review a decree of the Prerogative Court, dismissing an application for the probate of the will of Michael Allen, and refusing to admit the same to probate. The appellant, a nephew of the testator, and one of the persons who, as a child of Charles E. Allen, the brother of the testator, would take under the will, if proven, filed a petition for the probate of said will. All of the persons who would participate in the distribution of the estate if probate be denied were cited to appear in the Prerogative Court.

The case was heard by Vice Ordinary Leaming upon notice to all concerned, and probate of the will was denied. (C., p. 151.)

GROUNDS OF APPEAL.

The grounds of appeal are:

1. That the proof showed that the will of said testator was executed according to law.

2. That the proof showed also that the cancellation of said will by Michael Allen was because of a mistake, and was not effective to revoke the same.

3. That the testator did not die intestate.

4. That the will should have been probated as prayed for by the petition.

BRIEF OF FACTS.

First.

Michael Allen died January 4, 1917.

He was unmarried, and for years lived with a maiden sister, Josephine, at Woodstown, Salem County, New Jersey.

Michael was sixty years old when he died, and Josephine was about two years older.

During his life, Michael was engaged in the business of farming and selling live stock.

He accumulated quite a fortune, and when he died the inventory of his personal estate amounted to $303,078.43. In addition, he owned real estate worth about $14,000. (C., p. 19, l. 10.)

Upon the assumption that the testator died without a will, Joseph Beck Tyler, of Camden, was appointed administrator.

The relatives of Michael Allen consisted of brothers and sisters of the whole and half blood, and their descendants.

Miss Josephine, with whom Michael lived practically all of his life, was a sister of the whole blood. Charles E. Allen, the father of Joseph Allen, the appellant, was a brother of the whole blood. Charles died in 1910, leaving a widow and three children, the names of the latter being Elizabeth, Joseph and Margaret. (C., p. 71, l. 31.)

Michael also left him surviving Hannah Foster, a half sister; Ruth Justice, a half sister; James S. Pedrick, a half brother; Elizabeth Calver and Jennie C. Calver, children of Jane Calver, a sister of the half blood; Mary Harbison and Hannah R. England, Maria Turner, Benjamin Turner and Samuel Turner, descendants of Martha Cheeseman, a sister of the half blood.

There was no particular degree of intimacy between Michael and any of his kindred of the half blood. On the other hand, he had always lived with Miss Josephine, his sister of the whole blood, and was intimate with his brother Charles, while he lived, and with his family after his decease.

There can be no doubt, in this case, that while the testator occasionally came in contact with his relatives of the half blood, nothing appeared to show a desire on his part that they should become the objects of his bounty to the extent of $225,000, or three-quarters of his fortune, either by the execution of a will, or the revocation of one, which disposed of his property to his whole blood relatives.

Furthermore, Miss Josephine had kept house for Michael for years before his death, and they had assisted each other in the conduct of their respective business

affairs, and she had cared for him every time when he was ill. (C., p. 75, l. 20.)

The will presented for probte was dated and executed March 11, 1884, and contained the following provision:

> "Second. After the payment of all my debts and "expenses out of my estate, I give the remainder of "my estate, real, personal and mixed, of every kind, "to my brother, Charles E. Allen, and my sister, "Josephine Allen, share and share alike. If either my "said brother, Charles, or my said sister, Josephine, "shall die without lawful issue, then I give all my "said estate to the survivor."

He made his brother, Charles, executor of the will. (C., p. 6, l. 18.)

The subscribing witnesses to the will were Joseph K. Riley and Frank Wright. At the time of the hearing, both witnesses were deceased, and the due execution of the will, by proof of the handwriting of the subscribing witnesses, was furnished by the testimony of William Z. Flitcraft. (C., p. 25, *et seq.*)

The will offered for probate, dated in 1884, was drawn by one of the subscribing witnesses, who was a conveyancer living at Woodstown, and apparently was executed because of the suggestion of Riley to Michael that unless he did make a will, the half bloods would participate in the distribution of his estate. (C., p. 80, l. 12.)

At the same time, Miss Josephine made a will in favor of Michael and her whole brother, Charles, both of these wills being prepared by Mr. Riley. (C., p. 64, l. 1.)

The will made in 1884 remained undisturbed until 1916, when Michael removed his signature from the same under the circumstances which will be discussed hereafter. During this period, many times Michael declared that it was

his desire that half bloods should not participate in the distribution of his estate. This is shown by the uncontradicted testimony of Miss Josephine, also testimony of Mr. Nixon (C., p. 58, l. 28), and the testimony of Elisha Smith (C., p. 100, l. 12, *et seq.*)

Horace F. Nixon, a lawyer having offices in Camden, invested a large sum of money for Michael during his life. The total amount of mortgages held by Michael, which Nixon had placed, amounted at the time of the former's death to over $123,000.

In September, 1915, Mr. Nixon was calling at the house of Michael, at Woodstown, and saw the latter and Miss Josephine. Michael asked Nixon, while he was there, about the law of half blood. Nixon told Michael that he was under the impression that relatives of the half blood would have no interest when there were living kindred of the whole blood, but that he would look it up, and let him know. (C., p. 35, l. 10; C., p. 57, l. 1.)

Miss Josephine, in the presence of Michael, told Nixon, "He does not want the half blood to have any interest in his property," although she felt differently. This remark was induced by the fact that Miss Josephine had a will similar to Michael's, which she had destroyed, and she made another will leaving her estate to Michael, and also provided something for her half brother and sisters. This latter will was also destroyed. (C., p. 57, l. 29.) This, of course, would leave the distribution of Miss Josephine's property, and she was then possessed of quite a considerable estate, under the intestate laws, which situation probably caused Michael to make the inquiry of Nixon as to what the "law of the half blood" was, as he termed it.

On September 29, 1915, Nixon sent to Woodstown, to either Michael or Miss Josephine, a memorandum of

interest, upon the bottom of which appeared the following notation:

"Have looked up your questions, and will either write you or see you sometime this week. H. F. N." (Exhibit P2, C., p. 141.)

This slip was produced by Miss Josephine at the trial. (C., p. 60, l. 14.)

In accordance with the request made of Mr. Nixon by Michael, the former directed his assistant, James B. Nixon, to examine the law, as a result of which the latter prepared a lead pencil memorandum, which was taken by Nixon to Woodstown on October 1, 1915, and given by the latter to Michael. (C., p. 38, l. 21.) This extract is Exhibit P3, and is a copy, with a few abbreviations, of Section 2 of the Descent Act of New Jersey. (Exhibit P3, C., p. 142.)

In addition to handing the memorandum to Michael, Nixon told him that relatives of the half blood would have no interest in his estate as against those of the whole blood or their descendants. (C., p. 40, l. 26.)

At the two conversations held with Nixon, Michael told the former that he did not want any of the half blood to have any interest in his estate. (C., p. 40, l. 39.)

The last conversation with Nixon, about this statute, prior to the destruction of the will, was October 1, 1915.

Miss Josephine was present at all of the conversations between Mr. Nixon and Michael in relation to this matter, and her testimony corroborates Mr. Nixon as to what was said and done at each interview.

The opinion given by Mr. Nixon was the subject matter of discussion between Michael and Miss Josephine after October 1, 1915, until the time the will was destroyed. (C., p. 65, l. 30.)

In the fall of 1915, Exhibit P3 was shown to the widow and children of Charles Allen and two nieces of the half blood. (C., p. 63, l. 20.)

The paper was found, after Michael's death, in a drawer where he or Miss Josephine had placed it. (C., p. 63, l. 28.)

The will, the signature of which was subsequently torn off, was deposited by Michael in a safe, where the securities belonging to him and Miss Josephine were kept. (C., p. 64, l. 32.)

The envelope, in which the will was kept, was produced at the trial. (P6, C., p. 65, l. 8.)

In June, 1916, Michael and Miss Josephine had a conversation in respect to Nixon's opinion. Michael said to Miss Josephine, "Mr. Nixon says the halves can't come in, "and if I keep that will, and we should die, it would look "as if I wasn't a very good business man." (C., p. 65, l. 23.)

Michael and Miss Josephine had talked, with respect to Mr. Nixon's opinion, frequently between October, 1915, and June, 1916 (C., p. 65, l. 32), at which conversations Michael stated that he understood from Nixon's opinion that the half bloods did not participate. (C., p. 66, l. 15.)

While Michael was ill, he had asked Miss Josephine several times to get the will for him. He was taken sick July 9, 1916. On July 29, 1916, he again requested his sister to bring the will to him, and he sat up in bed, asked for a lead pencil, tore off his signature, and wrote the date (July 29, 1916) on the piece of paper which contained the signature, and gave the will back to Miss Josephine to put in the safe. (C., p. 66, l. 21.) No conversation occurred on this day between Miss Josephine and Michael

with relation to the purpose of the latter in removing his signature. (C., p. 84, l. 26.)

After the signature was removed from the will, and as the result of a conversation between Miss Josephine and Michael, the former, with the consent of the latter, voluntarily sent sums of $500 to each of several of her brothers and sisters of the half blood. Miss Josephine asked Michael if she should send these sums to two of the kindred of the half blood, as she was then waiting for Mr. Nixon to come home to write her will, and she was afraid she might die in the meantime, and they would not get any of her property, as she had no will at that time. (C., p. 68, l. 18.) After Miss Josephine had sent to Mrs. Foster, a half sister, a cheque for $500, and received an acknowledgment, Michael, in a conversation with Miss Josephine, said, "She wrote such a nice letter; when I get "better, why I will do the same, and send her the same "amount." This conversation occurred September 2, 1916. (C., p. 69, l. 21.) Miss Josephine also sent $500 to James Pedrick, another half brother, and Michael said he was willing to send them all money, and when he got better he would do the same. (C., p. 70, l. 1.) The same situation occurred with reference to Ruth Justice, payment being made on October 2, 1916. (C., p. 70, l. 15.)

Unquestionably, these payments of money were made by Miss Josephine with the consent and approval of Michael, who then understood, in the absence of a will giving a portion of his estate to his kindred of the half blood, that they would not participate in the distribution thereof.

Miss Josephine also testified to a talk between Michael and Elisha Smith, who was one of Michael's tenants, in

the year 1915. It was a conversation with reference to the death of a man named Allen, and Miss Josephine said to Smith, in the presence of Michael, "We found out that the halves can't get any of our property," and Michael replied, "Don't say anything about that," and also told Smith, "I am glad of that." (C., p. 71, l. 18.)

It also appeared that Michael had a conversation with Miss Calver, in which the latter was told by the former that Nixon "says the halves can't come in." (C., p. 76, l. 12.)

In September, 1916, *two months after the will was destroyed,* Mr. Nixon went to Woodstown for the purpose of drawing a will for Miss Josephine, and there was a general discussion between Michael, Josephine and Nixon upon the question of the kindred of the half blood participating in their estates. According to the testimony of Mr. Nixon, "Michael said he did not wish the half blood to have any interest in his estate." C., p. 49, l. 26.) The conversation arose over the desire of Miss Josephine to remember her half blood relatives.

Elizabeth Allen, a niece of the whole blood of Michael, and sister of the petitioner, testified that around the first of October, 1915, while visiting her uncle, the latter told Miss Josephine to bring Exhibit P3, in order that the witness might read it, and said, "Horace Nixon says the halves don't come in. (C., p. 92, l. 18.) Margaret Allen, mother of Elizabeth Allen, was present at the same time and corroborates this fact. (C., p. 94, l. 1.)

Elisha Smith also testified that as early as 1907 Michael stated to him, "I don't intend my half brothers "and sisters to have any of my money. My sister and "my brother Charles will get it if my brother Charles

"outlives me, and if he don't his heirs will get my "money." C., p. 100, l. 24.)

It is perfectly manifest, from a careful consideration of the facts presented on the part of the petitioner in support of the application to probate the will, that the consideration which induced Michael to cancel his will was the opinion given by Mr. Nixon, the same being understood by Michael as applying to his estate generally, and not limited to real property.

Primarily there is nothing in the testimony to show that Michael had any particular regard or affection for his brothers and sisters of the half blood. On the contrary, there is every indication that Miss Josephine, who had lived with and cared for him for years, and his brother of the whole blood and his children, were to be the objects to his bounty. All the evidence in the case that we believe is entitled to credence demonstrates conclusively that there was no adequate reason why Michael should have changed his mind as to the manner in which his property was to be disposed of after his death, after adhering, for over thirty years, to the purpose of giving the same to his nearest relatives.

The will, the probate of which was rejected, was made in 1884 for the express purpose, as disclosed by statements made by the scrivener at that time, to prevent his brothers and sisters of the half blood from participating in the estate.

There was no apparent reason why the expressions and thoughts of a lifetime in this regard should be so suddenly reversed. All the testimony shows that whenever this question was the subject matter of consideration with Michael, he expressed his desire that his half bloods

should not receive any of his estate. There is no testimony to show that he ever had a change of heart in this respect.

The request made of Mr. Nixon to advise him in this regard was not with the then present idea of changing his will. Miss Josephine, who had a will made in 1884, disposing of her property to Michael and Charles, if living, and to his children if deceased, had destroyed that will, and of course Michael was anxious to know whether or not, in case of her intestacy, he would receive the same share of her estate as he would under the will, and if the half bloods would participate. His anxiety was about Josephine's property and what disposition she was to make of the same, and this situation suggested the inquiry of Mr. Nixon. (C., p. 81, l. 26.)

The good faith of Nixon, in his belief of the accuracy of his opinion, is shown by the telegrams which passed between him and the petitioner after Michael's death, referred to by the respondents, and introduced in evidence by the petitioner. (C., p. 45, l. 19; C., p. 47, l. 26.)

There is no fact in the case to account for the destruction of the will, under the circumstances, except the understanding which Michael obtained from Nixon, that his property would be distributed, in case of intestacy, in the same manner as provided by the will which had been in existence for over thirty years.

The fact that this opinion was given is not disputed, and the effect which such opinion had upon the mind of Michael is manifest from the declarations made by him to the various witnesses. The authenticity of the written memorandum was established beyond doubt.

In no way can the destruction of the will be explained, under the circumstances, except upon the theory that

Michael relied entirely upon Mr. Nixon's version of the law. The opinion was given him in October, 1915. As late as June, 1916, it was the subject matter of conversation between Michael and Miss Josephine, and Michael then disclosed the effect which the opinion had upon his mind, and expressly stated that he would be considered a poor business man to leave a will for the disposition of his property when the law would divide it the same way.

Apparently this is the last statement that Michael made with respect to his wishes or the suggestion that the will be destroyed, although, until July 29, 1916, when the will was actually canceled, upon several occasions Michael requested Miss Josephine to bring the will to him. In other words, while he was declaring his thought, as to half blood relatives, he had asked Miss Josephine to get the will, in the same manner as he did on July 29, 1916.

Nothing appears in the case to show that there was anything, except Nixon's opinion, which actuated the destruction of the will, even *after the will was destroyed.* In August he assisted Josephine in distributing some money to some of the half blood relations, in order that they might have something, in case Miss Josephine should die before Mr. Nixon could make a will for her, leaving them a legacy, and Michael expressed to Mr. Nixon, at the interview in September, 1916, the thought that it was not his wish to have his kindred of the half blood participate in the estate.

There was some evidence in the case that in October, 1915, Michael stated to two of his half nieces that if he thought the half bloods would come in, he believed he would let the law settle his estate. It will be observed

that, even if the recollection of the two nieces of the half blood, who testified to this fact, is accurate, it occurred nine months before the will was actually destroyed and prior to the time when Michael expressed the purpose not to have any of the half bloods get his property. It will also be noted, in this connection, that there is grave doubt as to whether or not Michael did make any statement of this kind, because it is absolutely at variance with every bit of evidence showing his wishes in this respect. Furthermore, the statement, as made, is predicated upon a result which is directly the reverse of Nixon's opinion.

Summarizing, therefore, we have absolute proof of the fact that in 1884 Michael made a will for the express purpose of disinheriting his brothers and sisters of the half blood and their descendants, and to protect those nearest in blood kinship. We have repeated declarations made by him that it was his wish that his property be distributed in accordance with the terms of that will. We have the unquestioned evidence that Michael was advised by Mr. Nixon that to accomplish his purpose in having the property go to his relatives of the whole blood, it was not necessary to have a will. We have his declaration, less than two months before the will was actually destroyed, showing the reason why he thought there was no necessity of having a will. We have the fact that his brother Charles was then dead, and there would be an administrator appointed, and, under these circumstances, even if the will was retained, he could not designate a person to settle the estate, the appointment by the law of such person being necessary. We have the testimony showing that after the will was destroyed he

still harbored the purpose to disinherit the half blood relations, and we also have the additional fact that after the will was destroyed he advised with Miss Josephine relative to gifts of money to kindred of the half blood, and consented to the same, stating that he would do likewise, which undoubtedly was based upon the understanding that such relatives would, in no event, receive any property after his decease.

We most respectfully insist, therefore, that it was established in the case that the destruction of the will was induced exclusively and entirely by reason of Mr. Nixon's opinion, and if such opinion had not been given, the will would never have been destroyed. There is no rational, satisfactory or reasonable theory upon which the revocation may be supported, except the existence of the Nixon opinion. A man with the estate of $300,000 would not have acted as Michael did without some fixed and definite purpose or object in view.

Second.

We contend that the revocation of the will, induced by an assumption of a fact which turns out to be false, is inoperative because the *animus revocandi* is lacking.

40 Cyc., 1179, and cases there cited.

The most important authority upon this point, which we have been able to discover after very exhaustive examination, is *Strong's Appeal, 63 Atl., 1089*, in which the syllabus is as follows:

> "After testator's death her will, which was type-
> "written, was found in an envelope, each page be-

"ing torn in two lengthwise, and she had written at "the top of the first page 'Superseded by the written "one,' and in the same envelope was an unsigned "draft of a will in her handwriting disposing of the "same property dealt with by the torn will, and the "effect of both dispositions was to prevent certain "property passing to strangers to her blood. Held "that, as the tearing of the will was evidently done "with an intent to revoke it under a mistake of law "as to the effect of the written draft, there was no "legal revocation."

Judge Baldwin, of the Court of Appeals of Connecticut, who wrote the opinion, uses this language:

"No act of tearing or cancellation destroys a will "unless it be done with the intention of revoking it. "An intent to revoke may be either absolute and "final, or dependent on the existence, or a belief in "the existence of circumstances. The words 'Sup- "erseded by written one' sufficiently indicate that "when Miss Strong wrote them she assumed that "the draft in her handwriting then had full testa- "mentary force and effect, and so, as it covered the "same ground in a different manner, had destroyed "her previous dispositions by will. These were "treated as destroyed simply because they had been "replaced by something else. Here she was acting "under a mistake, and one apparent from the words "used to effect the cancellation. This mistake was "plainly the sole cause for the revocation which she "intended to declare. Unless she exercised the "power of disposition given her by Mr. Harris, the "fund which was subject to it would go to strangers "to her blood. The main object, both of the will "and of the draft will, was to exercise it. The case, "therefore, is within the reason of the rule that a "writing purporting to revoke a will on account of

"the existence of a certain fact does not revoke it if "there be no such fact. *Dunham vs. Averill, 45 "Conn., 61, 80; 29 Am. Rep., 642."*

A will is not revoked by an act of burning, tearing, cancelling, obliterating or destroying which is accidental or which is done under a mistake of law or fact.

40 Cyc., 1187, and cases.
In re Olmstead, 54 Pac., 745.
Beardsley vs. Lacey, 67 L. J. P. D., 35.

Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction, and, therefore, if the will intended to be substituted is inoperative from defect of the attestation of any other cause, the revocation falls also, and the original will remain in force.

1 Jarm. Wills, 6th Ed. C. 7, p. 7.

Where the testator revokes his early will through some false or mistaken assumption of fact, which is discernable from the face of the papers, the revocation does not take effect * * * This rule regards the testator's intent and the impulse which moved him to dispose as he did, and Courts treat the revocation accordingly as a sort of contingent or conditional one, which condition or contingency has failed, the intent being deficient as in other cases of fundamental mistakes.

Schouler, Sec. 410.

Even error on the testator's part may be shown to have caused the revocation, where he expressly founds his revocation on the assumption of a fact derived from the information he has received from others, which is shown to be false, though where the fact was peculiarly within his own knowledge error would be unlikely. In short, whether revocation or alteration be by a new will, a codicil, or by some oral act of cancelling or destroying, mental capacity and freedom from constraint are requisite as in making a will.

Schouler, Sec. 427 A, and cases cited.

Where a testator by a codicil revokes a devise or bequest in his will or in a previous codicil, expressly grounding such revocation on the assumption of a fact which turns out to be false, the revocation does not take effect, being it is considered conditional and contingent upon a contingency which fails.

1 Jarm. Wills, 357.
1 Pow. Dev., 523.
2 Rob. Wills, 210.
1 Wm. Ex., 208.
Campbell vs. French, 3 Ves., 321.
Doe vs. Evans, 10 Adol. & E., 228.
Smock vs. Smock, 11 N. J. Eq., 156.
Mundy vs. Mundy, 15 N. J. Eq., 290.
Frothingham Will, 75 Eq., 205.
Frothingham Will, 76 Eq.

As a corollary to the principle of law supported by the above authorities, we contend that where the act of destruction is so closely connected with the purpose of the

decedent to provide for the distribution of his property in another way, to wit, by the application of the testate laws, as to fairly raise the inference that the testator intended the revocation of the will to depend upon the carrying out of what he understood to be the effect of the testate laws, which he intended should be substituted as a means of devolution of property, that the same legal effect would be given to the transaction as if the testator had intended to provide a substituted method of distribution by the execution of a new will. Therefore, if, for any reason, the testator had been misadvised, and was acting under a mistake of fact, and if the method which he sought to substitute, for any reason, became inoperative to carry out his wishes and purposes, the revocation falls, and the will remains in force.

This is in accord with the principle of the foregoing authorities, the only difference being that the authorities refer to a situation where the testator intended, by a will, to provide a substituted method. We can conceive of no rational reason why the same rule should not be applied to a case where the testator destroyed his will, with the idea that his property, under the testate laws, would be distributed in a certain way. The act of revocation applies to the purpose of the testator to provide a method for the distribution of his property after his death; in one case by a new will, and in the other case by the operation of the testate laws. In both instances, the effect of the purpose is the same. Without doubt, Michael would, under no circumstances, have revoked his will, unless he was laboring under a mistake as to the effect of such revocation.

The mistake in a situation of this kind is a mistake of fact, and not of law, as defined in *27 Cyc., 809.*

Of course, if the misapprehension here displayed was as to the interpertation of the law, as a matter of law, the case might fall within the principle stated in *Gluckman's Will, 101 Atl. Rep., 295,* but we insist that the mistake here was one of fact as to what the law of intestacy was.

THIRD.

The attestation clause of the 1884 will is sufficient to warrant the probate thereof.

At the trial below, the argument was made that the attestation clause of the 1884 will did not comply with the statute, in that the same did not state that the witnesses subscribed their names as witnesses in the presence of each other.

The attestation clause is as follows:

> "Signed, published and declared by the said "Michael Allen, to be his last will in the presence of "us who were present at the same time and sub- "scribed our names as witnesses in the presence of "the testator.
>
> JOS K. RILEY,
> FRANK WRIGHT."

It will be observed that the scrivener who prepared the will used the precise language of the statute. We contend, therefore, that if the Courts of our State should interpret this statute by holding that the same, by inference, requires the signatures of the witnesses to be subscribed in the presence of each other, as well as in the presence of the testator, that such inference arises here to show that such method of execution had been followed, where the attesta-

tion clause is a literal reproduction of the statute. If there is a necessity for the two witnesses to subscribe their names in the presence of each other, inferred by the statute, it seems to us that the fact of compliance is conclusively established by the use of the same language as contained in the statute.

Vice Ordinary Read, in *Clark's Will, 52 Atl., 222,* held that under the provisions of the law relative to wills, it is not requisite, to the valid execution of a will, that the witnesses should sign in the presence of each other. The will in that particular case, however, was refused probate because it was not shown that the will was published in the presence of both witnesses, being present at the same time.

This Court, when the case came to be reviewed, affirmed the conclusion reached by the Vice Ordinary, and, speaking through Judge Adams, commented on the situation as follows:

> "It will be observed that the concluding clause does "not contain the averment that the witnesses sub- "scribed their names in the presence of each other. "The weight of the evidence is that they did not do "so. The learned Vice Ordinary, in dealing with the "matter, correctly said that the statute concerning "wills does not in express words require that the wit- "nesses should sign in the presence of each other. "Whether such requirement, though not distinctly "expressed in the Act, results by natural and neces- "sary implication from the statutory language, is a "question that need not now be decided, and as to "which we express no opinion."

So far as we have been able to ascertain, this is the latest judicial expression in New Jersey upon this point, but we insist that regardless of how the matter may be

eventually decided, the incorporation, in the attestation clause, of the exact language of the statute is sufficient to show that the will was executed as required thereby.

FOURTH.

The learned Vice Chancellor, in his opinion, refers to *In re Gluckman, 101 Atl., 295,* of which the sixth syllabus is as follows:

> "Misunderstanding of the legal effect of the pro-
> "visions of a will, whether resulting from erroneous
> "legal advice or otherwise, will not, in the absence of
> "fraud or undue influence, defeat probate."

It seems to us that the situation there under consideration is entirely different from the one presented in the case at bar. A material difference exists between a mistake as to the legal effect of a will predicated upon the language employed therein, as well as the legal interpretation which may be put thereon, and a well grounded misapprehension of fact as to the effect of a situation which will result from the destruction of a will. The mistake in the case at bar was as to the fact of how Allen's property would be distributed in case of intestacy, and the effect thereon of the testator's act in destroying his will. There is no doubt as to the method of distribution prescribed by the intestate laws. The mistake occurred by reason of the statement by Nixon of the fact that if Michael died intestate his kindred of the half blood would not participate. There was no question of erroneous interpretation of the language of the statute. It was a statement of what fact was. It will at once be perceived that such situation is entirely different from that which that Court dealt with in the Gluckman case.

FIFTH.

The testimony of Elizabeth and Jennie Calver is relied upon by the respondents to show that Michael had concluded to revoke his will, in order that kindred of the half blood might participate in the distribution of the estate.

In the first place, Michael's declarations, sworn to by these two young ladies, were made in October, 1915, shortly after Mr. Nixon had rendered the opinion. In fact, the written memorandum of the opinion was exhibited by Michael and read by the witnesses, who were nieces of the half blood.

It is an uncontradicted fact in the case, that Michael made declarations, on later dates, inconsistent to the testimony of these young ladies, in which he reaffirmed his oft-repeated statements that none of his relatives of the half blood would get any of his estate.

Furthermore, it is incredible that Michael should have made the statements to these two witnesses based upon any bona fide and honest intention to reverse his life-long attitude relative to the particular class of relatives referred to. It will also appear that the testimony was indefinite and uncertain as to whether the declarations were made in the afternoon or evening of the day they visited their uncle. In one place the witnesses testified that the conversation with relation to the destruction of the will, and allowing the law settling the matter, occurred in the afternoon, and, in another place, it was said it occurred in the evening. In any event it can have no particular significance, because the conversation occurred at a time when the will was admittedly in existence, and Michael's declaration of what he understood the law to be was then in exact accord with the manner in which he had disposed of his property by the will.

SIXTH.

It will probably be argued also that the testimony of Elisha Smith is inconsistent with our contention as to Michael's wishes with relation to the relatives of the half blood.

Smith gives this recollection of the conversation between Michael, Miss Josephine and himself:

> "Miss Josephine says, 'Why, we have just learned "that if we make a will, why our half brothers and "sisters don't get anything.' He says, 'Never mind "telling Elisha that. We tell him too much, any-"how,' but he says, 'I am glad we found out.' That "is what he told me." (C., p. 100, l. 1.)

Miss Josephine's recollection as to this incident is as follows: (C., p. 7, l. 1.)

> "I says, 'We found out that the halves can't get "any of our property.' Michael says, 'Don't say "anything about that.' Then he looked up at 'Lish "and told him 'I am glad of that.' "

It will be observed that Smith uses substantially the same language as Miss Josephine, except that he interpolates the suggestion that if a will be made the half bloods would not get anything. That is the only difference between the testimony of the two witnesses. It is perfectly manifest that Smith's recollection in this particular is inaccurate, because there is no point to the statement that if a will be made the half brothers and sisters would not participate. The reason is manifest. The testimony of Miss Josephine in this respect, on the other hand, is consistent with the other evidence in the case and the Nixon opinion. The tremendous importance of Smith's testimony is to show that Michael then

said that he was glad he had found out that the half brothers and sisters would not receive any portion of his estate. This conversation occurred in December, 1915, about two months after Nixon had given the written opinion and after the visit of the two half nieces, Calver, in October, 1915. The testimony of Smith is important to corroborate Miss Josephine that Michael expressed pleasure with the information that he half blood kindred would not, in case of intestacy, receive any portion of his property.

SEVENTH.

At the trial the point was raised that testimony as to the declarations of Michael was incomplete.

Upon the question of the admissibility of testimony showing declarations made by the testator in this matter see the following authorities:

Wood vs. Wilcox, 65 Eq., 397.
In re White, 25 Eq., 501.
Smock vs. Smock, 11 Eq., 156.
State vs. Ready, 78 L., 599.
Ib. Ib., 28 L. R. A. N. S., 240.
Schouler, Sec. 403.
See also cases in *3 N. J. Dig., 5019, Sec. 151.*

Upon the question of the admissibility of the testimony of Josephine Allen and the other next of kin, see *Veasy's Case, 80 N. J. L., 466.*

We respectfully insist that the decree appealed from be reversed and the will admitted to probate.

S. HUNTLEY BECKETT,
Solicitor of Appellant.
LEWIS STARR,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

In the Matter of the Application for the Probate of the Last Will and Testament of Michael Allen, deceased.

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANT.

In the brief of respondents, James S. Pedrick and Hannah A. Foster, reliance is placed upon that portion of the opinion of the Vice Ordinary which states that the case does not fall within the doctrine of dependent relative revocation. (C., p. 148, l. 10.)

Since the original brief of the appellant was printed, we have found an English authority which appears to us to support our view that the case at bar should be decided upon the doctrine of dependent relative revocation. This doctrine has been given full force and effect in New Jersey and is based upon the idea that a man either makes or revokes a will because of his belief of the existence of a situation which is not true. In the matter of revocation, the principle is predicated upon the theory that the testator does not really revoke because his determination to act was based upon a false premise.

The case of *Stamford vs. White*, *84 L. T. R.*, *269*, is an English authority, the facts of which are almost identical with the case under consideration. There a testator in 1882 executed a will in which, inter alia, he appointed certain funds comprised in his mar-

riage settlement, made in 1855. Subsequently he caused the will of 1882 to be cancelled under the erroneous impression, (as informed by his Solicitor) that the appointments contained in the will of 1882 were useless, and that the settlement of 1855 would of itself effect the purpose he had in his mind when the will of 1882 was executed, and it was held that this was a case of dependent relative revocation, and that the will was a document to be admitted to probate.

The Court said: "If the Testator believed that the children of the first marriage would take the property comprised in the settlement of 1855 by the provisions of the settlement itself, and that therefore the will of 1882 was useless, a revocation made under this erroneous impression would not be absolute. I think that this was the case here, and as a result I am of the opinion that all the documents prayed for in the statement of claim ought to be admitted to probate. I have no doubt that what was done in 1895, and what is relied upon by the defendants as a revocation of the will of 1882, was done under an erroneous belief as to the effect of the settlement of 1855."

The testimony in the case at bar shows beyond question that Michael had always intended his property to be distributed among his relatives of the whole blood and his declarations unquestionably demonstrated a firm conviction in his mind that his relatives of the half blood should not participate therein. While nothing was said by Michael at the exact time his signature was removed from the will, yet his attitude both before and after established the fact that he had not changed his mind from that determination adhered to throughout his whole life "that the halfs should not share in his estate."

If the will is not sustained, an anomalous situation will arise, notwithstanding this firm conviction that his relatives of the half blood would not share. They will participate and receive three-fourths of his entire estate amounting to over $225,000 and. his full blood sister, Miss Josephine, who was unquestionably the main object of his bounty, would receive only one-quarter.

This result is so foreign to what Michael intended, as disclosed by what he said after the will was destroyed and what he did in the approval of gifts of money by Miss Josephine to rela-

tives of the half blood, under the belief that they would not participate, demonstrates beyond question that the act of revocation was induced exclusively by the statement made to him by Mr. Nixon.

It is maanifest, therefore, that these facts, which are established beyond question, bring this case within the doctrine of dependent relative revocation as exemplified by the English authority above referred to.

S. HUNTLEY BECKETT,
LEWIS STARR,
Solicitors of Appellant.

N. J. Court of Errors and Appeals

In the Matter of the Application for the Probate of the Last Will and Testament of Michael Allen, Deceased.	On Appeal from Prerogative Court.

BRIEF ON BEHALF OF RESPONDENTS.

This is an appeal from the decree of the Ordinary denying probate of a paper writing, which was once the will of Michael Allen, deceased, but which was cancelled by him several months before his death with a deliberation, which left no doubt of his intention to revoke it. The theory advanced in support of the appeal is that the will was revoked by mistake, but the appellant's case as disclosed by the record shows that his claim is based rather upon the idea that deceased, at the time he destroyed his will, was ignorant of the law governing the distribution of intestate's estate, and because of such lack of legal knowledge he cancelled the will, whereas if he had been informed on the law he would not have destroyed it.

GROUNDS OF APPEAL.

There are four grounds of appeal stated, only two of which are discussed separately in the brief of counsel for the appellant: viz.

1. That the proof showed that the will of said testator was executed according to law.

2. That the proof showed also that the cancellation of said will by Michael Allen was because of a mistake and was not effective to revoke the same.

The Vice Ordinary, who heard the case, did not pass upon the question of the sufficiency of the attestation clause to prove the execution of the will in the absence of the subscribing witnesses, both of whom were dead, because he reached the conclusion that Michael Allen died intestate and therefore whether the will which he had revoked was legally executed or not was of no importance.

It is contended on behalf of the appellant that because the language of the statute is written into the attestation clause that it must be held that the law governing the Execution of Wills has been complied with, and cites the case in re Clark's Will, 52 Atl. 222, as the latest deliverance on the subject in this Court. It is true this Court was careful to avoid expressing an opinion on the question as to whether or not it is necessary that the attestation clause show that the witnesses signed in the presence of each other, but I think the opinion has long been entertained by the Bench and Bar that it is necessary, if the clause is relied upon to furnish prima facie proof of the execution of the will. It was evidently the view entertained by the Vice Ordinary at the hearing (C. p. 27 & 28). The conclusion is irresistible, if we assume that it is the law that the two subscribing witnesses must sign in the presence of each other, and about that there seems to be no doubt. The weight of authority is in favor of the fuller attestation clause, and in the absence of a final pronouncement by this Court, it is the contention of respond-

ents that the attestation clause in question is insufficient.

FACTS.

Michael Allen made his will in 1884, and in it devised his estate to his brother, Charles Allen, who predeceased him, leaving children, and to his sister, Josephine Allen, who lived with him at the time the will was executed and until his death. She says they were advised by the scrivener, who drew this will, that if they did not want their half brothers and sisters to share in their estate they should make a will, and that at the time Michael's will was executed she also executed a similar will, leaving her estate to her whole blood kindred, (C. p.1. 10). The will in question was in Michael's possession and was in his control from the time of its execution until it was cancelled, although Josephine had access to the safe in which it was kept, and kept her own papers there, but Michael was the owner of the home and Josephine lived with him, (C. p. 19, 1. 16). He was a man of affairs, possessed of large means and served in the capacity of guardian, executor and administrator in the settlement of estates in Salem County, and some twenty years before his death he had been appointed administrator of his mother's estate at the request of all the children, half brothers and sisters as well as the whole blood, and settled the estate. (C. p. 89, 20. 24).

Michael, Josephine and Charles lived in the village of Woodstown, while the half brothers and sisters lived at a distance from the ancestral home, some of them were domiciled in Pennsylvania, others in Gloucester County, the nearest living at Pedricktown, Salem County. Thev all married and reared families.

There is nothing in the evidence to show that the usual affectionate regard did not prevail among all the members of this family, notwithstanding they had different fathers. The mother of all the children and the surviving parent

died twenty years before Michael. The affection which the chidren bore to each other is evidenced by the fact that Josephine, who was wealthy, made presents of $500.00 each to her half sisters and brothers, who were less fortunate, in the fall of 1916, and Michael evinced an intention to do the same when he recovered from his illness.

It is assumed by counsel for appellant that Michael had little in common with these half blood kindred, based upon the fact that the will, which was made by Michael when he was a young man, excluded them, and the several declarations alleged to have been subsequently made that he did not want them to share in his estate. The proofs show, however, the Mrs. Ruth Justice, his half sister, visited Michael at his home on frequent occasions and that he visited her, (c. p. 73, 9. 12. 23, 33). Jennie and Elizabeth Calver visited him for weeks at a time. (C. p. 116, 1. 32). The testimony shows that these nieces were on very intimate terms with the family, and that Michael talked over his business affairs in the most confidential manner. Even showing them, Exhibit P 3, the paper containing copy of the descent act, which figures largely in the case.

It appears too that Joseph, the appellant was non persona grata with Michael in 1914, and that the feeling prevailed to some extent toward the whole of Charles Allen's family. The feeling arose over Joseph hiring a farm tenant while he was in the employ of Michael, the result of which was to induce Michael to sell his homestead farm, which the young man says he repented of afterward, (C. p. 9, 30), and the estrangement continued until 1916, when he complained to Julia Pedrick, his half brother's wife, that Joseph's family had not visited him during his illness, and at that time referred to Joseph taking away his tenant, (C. p. 133, 33. 40; 134, 1. 20).

He told Benjamin England, a son of a deceased half sister who lived on one of his farms in 1914, that Joseph

was to have inherited the Sharptown farm, but he "stole" his tenant and for that reason would get no more than the rest. (C. p. 125, 16. 22).

It is also worthy of comment, in view of the great stress laid upon the friendly relations between Michael and Josephine, that Michael was a rich man, for one living in the country side, having an estate worth over three hundred thousand dollars. And Josephine was also wealthy and further advanced in years than Michael, and had no different or other claims upon her bounty than he had. As before stated, they made wills in favor of each other in 1884, and Josephine had revoked her will and executed another recognizing the half blood relatives, which she also revoked before Michael cancelled his. And she was without any will until September 1916, only a few months before Michael's death. (C. p. 82, 10. 12).

SECOND.

The circumstances surrounding the cancellation of the testament in question are fully set forth in the Brief of Appellant. According to the evidence of Josephine Allen, who was the only person present, Michael had been ill in bed since July 9, 1916, and on the 29th called Josephine to bring him his will, and when it was produced, deliberately tore his signature from it, marked the date on the reverse side of the slip containing his signature and handed it back to her without a word of comment; and without any instructions from him she took the cancelled will and returned it to its previous place in the safe. In Appellant's brief he says that Michael gave the will back to Josephine "to put in his safe," but this is doubtless an error. On page 80 of printed case he says, "Q. What did he do with it when he had it in his hands? A. He tore his name off. Q. And then handed it back to you? A. Yes. Q. Without a word? A. Without a

word Q. Didn't even tell you what to do with it? A. No." So far as appears the will was never afterward mentioned by Michael. Apparently the testator wished to avoid any question of mistake or misunderstanding by supplying in writing the date of the cancellation.

Michael Allen died on January 14, 1917, and on January 23, Joseph B. Tyler, an attorney at law, was appointed administrator of his estate by the Surrogate of the County of Salem upon the recommendation of appellant and the other next of kin of deceased, who renounced in favor of Tyler, and the appellant took an active part in obtaining the signatures to the renunciations. And on the same day the letters were granted, appellant commenced preparations looking to the establishment of the cancelled will. (C. p. 47, 26. 36). His petition was filed in the Prerogative Court on March 15, 1917, and the cause heard by Vice Ordinary Leaming, whose conclusions are found on page 143 to 150 of printed case.

As the cancellation was a deliberate act and unaccompanied by any declaration of the testator, who was in full possession of all his faculties, the alleged mistake is sought to be proved by witnesses who testify to conversations with him both prior and subsequent to the cancellation.

The alleged mistake is that Michael relied upon erroneous advice regarding the distribution of intestates estate under our New Jersey statute. According to the testimony, it appears that Horace F. Nixon, an attorney at law, whose professional relations with Michael consisted in investing large sums of money secured by mortgages on real estate, called at the Allen home on business of this character on or about September 25, 1915, and while there, was asked by Michael what was the law of half bloods, and he replied that he was under the impression that they had no interest when there were living relatives of the whole blood, but that he would look it up and let him know. The inquiry was made on behalf of

Josephine, who was contemplating the making of a will. (C. p. 82, 4, 11). On September 29, he wrote at the bottom of a memorandum, referring to Josephine's business, " have looked up your questions and will either write you or see you some time this week." (C. p. 37, 10. 15). And in October he delivered to Michael or Josephine (it is not clear which) Exhibit P 3 (C. p. 39, 1. 27), which is a copy of our descent act. This paper was taken possession of by Josephine and was in her custody until after Michael's death. (C. p. 63, 1. 30). It is claimed that this paper, Exhibit P 3, and what Mr. Nixon said to him, was relied upon by Michael and induced him to cancel his will, notwithstanding the will he then had was a valid legal instrument, which precluded the half blood kindred from any interest in his estate. There is also testimony that on several occasions Michael remarked that he did not want the half bloods to come in. At bottom of page 38 of record Nixon says, "Miss Allen said, as near as I can recall it 'Michael doesn't want the half blood to have any interest in his property.' " And in the same connection he says, "Michael did not deny it." Apparently the purpose is to draw the inference that because Michael did not deny it he acquiesced in what Josephine said.

It is also claimed that after the will was destroyed in September 1916, on another visit of Nixon to the Allens, Michael said he did not want the half bloods to have any interest in his estate, and the witness further says, "Michael always said that," as if to imply that whenever he saw him he repeated his desire that his half brothers and sisters should not benefit by his estate. If this proves anything it proves too much.

Counsel for appellant points out the fact that Michael had asked his sister, during his illness, on more than one occasion to bring his will, before she brought it to him on July 29, and the inference he seeks to draw is

that Michael was minded to destroy his will soon after the conversations about the half blood, but it must not be overlooked that Michael told Jennie Calver that he had told Josephine to have the will handy in case anything should happen to him; and this was in connection with his conversation with Miss Calver, in which he said that if he thought the half blood relations would share in his estate he would let the law settle it. (C. p. 104, 20. 30). (C. p. 105, 25. 34).

The fact that Michael had made a will which disposed of his estate to these full blood relatives, and therefore had no possible motive to destroy it, if he was still of the same mind regarding his half blood kindred, is sought to be explained on two grounds, *first* that the Executor named in the will had died; but why destroy the will when a codicil could be added; *second* that his business pride prompted him to destroy the will, in view of Nixon's opinion, rather than have his neighbors say that he was a poor business man to resort to the execution of a will when the law disposed of his property in the same way as the will would dispose of it. And a cenversation with Josephine in which he is alleged to have said if he kept the will and should die, it would look as if he wasn't a very good business man, (C. p. 65, 1. 23) is seized upon by appellant as a reason for destroying his will; but Michael knew from a reliable source when he made the will that it was necessary to make it, if he wanted his whole blood relatives to get his property. So that if the law had changed since he made it there could be no reflection on his business judgment. Such a reason might be assigned as a pretext for cancelling his will, in order that there might be an equal division of his estate among his next of kin, but it can hardly be said that a man of fair intelligence would take such a step with no better reason or excuse for his act.

Furthermore, it will be noted that Michael was not entirely satisfied with Nixon's opinion. He asked Jennie

Calver what she thought of it, and when she told him that she did not think Nixon had answered his question, he suggested that she might ask some lawyer for an opinion. If he wasn't satisfied with Mr. Nixon's opinion then, is it unreasonable to suppose that he might not himself have consulted other attorneys and himself made certain about the devolution of his estate in case he destroyed the will?

It is asserted with much confidence by counsel of appellant that Michael's expressed intention to make presents of money to his half blood kindred as his sister had done is evidential of Michael's belief that they would receive nothing under the intestate laws upon his death without a will. This assumes that this weathy bachelor would not make presents to his relatives unless he was going to leave them nothing at his death, but there appears no reason why he might not have intended to do both. At any rate, the giving of presents cannot be regarded as an evidence of any other attitude than the most friendly relations between Michael and these half blood kindred.

In the sixth subdivision of appellant's brief, page 22, the testimony of the colored man Smith, a witness for appellant, is adverted to. His testimony will be found at top of page 100. The purpose of calling him, evidently, was to corroborate Josephine's testimony, where she says, "I says 'We have found out that the halves cannot get any of our property.' Michael says, 'Don't say anything about that.' Then he looked up at Lish and told him 'I am glad of that.' " (C. p. 71, l. 21). Smith says Miss Josephine said, "Why we have just learned that if we make a will, why, our half brothers and sisters do not get anything." This testimony is referred to by appellant as of great importance in that it corroborates Josephine, but it will be observed that it does nothing of the kind. On the contrary it contradicts her on the most vital point: viz. whether or not the will was necessary to defeat the half blood relatives and according to the witness,

Josephine said a will was necessary. Counsel seeks to harmonize the testimony of the two witnesses by rejecting part of Smith's, but that is not corroboration. On page 100 of case, Smith further testifies, "He (referring to Allen) says I don't intend my half brothers and sisters to have any of my money. My sisters and my brother, Charles, will get it if my brother, Charles, outlives me, and if he don't his heirs will get my money." This conversation occurred in 1907 while the will was still in force. Allen then knew that if he had a will his half blood relatives would not share the estate, and he made essentially the same statement to Smith in December 1915, months after he had received the Nixon letter.

The testimony of Elizabeth and Jennie Calver is also subjected to criticism in the brief of appellant's counsel. That part of the testimony in which Michael is said to have remarked that if he thought the half bloods would come in, he would let the law settle it, is denounced as incredible. because it is at variance with what Michael afterward said about the half blood kindred coming in for a share of his estate, but there can be no denial that Michael showed the paper, Exhibit P 3, to these young ladies and talked freely with them about his estate, and so did Josephine. (C. p. 104, 17. 40). (C. p. 105, 110). Why should this rich uncle talk to them about the disposition of his property at all, if his only purpose was to defeat any expectation they might have of sharing it at his death? If he intended to cut them off and leave all his estate to Josephine and the heirs of Charles, such conversations would have been indulged in with that branch of the family only.

Why should he ask Jennie Calver to consult a lawyer of her acquaintance to test the correctness of Nixon's view of the law? The conversation between Michael and these young ladies, which was overheard by Josephine and admitted by her, was of a confidential nature and

showed a disposition on the part of Michael to talk frankly with these two favorite nieces about his private affairs, and in the light of what subsequently happened regarding the will, the testimony is not incredible, but is entirely consistent and in the highest degree reliable.

The Vice Ordinary, who had the several witnesses before him and had an opportunity to judge of their truthfulness, seems to have regarded the testimony of these two witnesses quite as reliable as any other witness. (C. p. 150, 10. 25).

ARGUMENT.

It is the contention of the respondent, that as the will was revoked by the testator in one of the methods pointed out by this statute without comment or any act or word which would indicate that he was acting through mistake or misapprehension that these declarations of the testator touching his purpose to leave his estate to his whole blood relatives, made months before the act of revocation, are inadmissible. This question was before the Court in the case of Harris vs. Vandervere, 21 Eq. 568. Justice Van Syckle, who wrote the opinion, says, "It is proper to say that it is not intended to intimate any opinion as to the admissibility of the testator's declarations before and after the execution of the will; they have been used in the argument on both sides without objection, each party claiming a benefit from them." In the case of State vs. Ready 78 L. 599, all the cases on the subject are collected and distinguished, and Wigram's more's text in his Law of Evidence is adopted as the law of this Court: viz. "that where the issue is whether a will was executed, or whether a will was made to have a certain tenor or provision, the pre-existing testamentary design of the alleged testator is always relevant, and to evidence the existence of that design, his antecedent statements are admissable when not too remote to be material."

The issue in that case was whether a will was executed. Ready was indicted for forging the will of one Russell and was on trial for that crime, and declarations of Russell, made some three months prior to his death, as to what disposition he intended to make of his estate by last will and testament, were excluded by the Supreme Court as heresay. This Court held that they were improperly excluded, unless it had been made to appear that they were so remote as to be immaterial upon the issue whether the paper writing was, in fact, Russell's will. The issue here is not whether Michael Allen made a will, but whether he cancelled his will animus revocandi, and his declarations are introduced for the purpose of showing that he had taken legal advice to ascertain the law on the distribution of intestate's estate, that he had been inaccurately advised and because of such advice had destroyed his will. It is easy to understand how the declarations of the testator offered in the Ready case, where defendant's liberty was at stake, were admissable to show that the testator had the alleged beneficiary in mind as an object of his bounty some time before executing his will; but the admission of declarations of Michael Allen that he did not intend his half blood kindred to share in his estate, made at a time when he had evidenced that intention by a will duly executed and still effective for that purpose, to prove that he subsequently cancelled his will by mistake is, it is needless to say, a very different proposition and is not sanctioned by any of the decided cases. The learned Vice Ordinary in dealing with this question points out the difficulty of ascertaining, with any degree of accuracy, the testator's belief or intent by means of such testimony, unless so closely connected with the act of revocation as to form a part of the res gestae. And the case at bar forms a good illustration of the danger of admitting such declarations so remote in point of time from the act of revocation.

The paper, Exhibit P 3, was delivered with Mr.

Nixon's opinion on the law, to Michael on October 1, 1915, nearly a year prior to the cancellation of the will. And the last conversation he had with anyone in reference to the opinion was in June 1916, more than a month before he revoked it. What may be remote in point of time in one case may not be remote in another. Assuming that he remained uninformed as to the law a month or even a week before he cancelled the will, who will say that he did not satisfy himself as to where his estate would go before he cancelled it. The argument of appellant leaves out of view the fact that there were other sources of obtaining legal information besides Mr. Nixon. There was at least two experienced lawyers in Woodstown within a block of the Allen home, and he could have accurately informed himself on the law at any time prior to cancelling the will, and there is no evidence that he did not do so. It will also be noted that six months elapsed between the date of the cancellation of the will and Michael's death, during which he had ample time for reflection and further consultation on the law, and it is past belief that this man, who had over a quarter million dollars to leave by will or to be distributed under the intestate laws, would have died uninformed on the law. As was said by the Chancellor in Smock vs. Smock 11 Eq. 164, the complainant must overcome the presumption which exists against the validity of the instrument. And this will having been cancelled by the testator himself in the most deliberate manner, without comment and under circumstances which left no doubt that he understood fully the nature of his act, it is incumbent upon the petitioner to overcome that presumption and satisfy the Court that the cancellation was the result of mistake and not done animus revocandi. It is insisted that these declarations of Michael Allen—if not inadmissable, are so remote that they can have no probative force.

The case principally relied upon by Counsel to sus-

tain appellant's contention is Strong's Appeal, a decision by the Court of Appeals of Connecticut, reported in 63 Atl. 1089, referred to on page 15 of appellant's brief. The syllabus and part of Judge Baldwin's opinion are quoted in the brief. The cancellation of the will was effected by tearing each page in two lengthwise and writing at the top of the first page "superceded by a written one," and the written will was a draft in manuscript in the hand writing of testatrix unsigned, and disposing of the same property as did the torn will, and the effect of both dispositions was to prevent certain property from passing to strangers. The Court held that the tearing of the will was done with an intent to revoke under a mistake of law as to the effect of the written draft and there was no revocation. The mistake was in the belief of the testatrix that the written draft was effective to destroy her previous will, and the mistake was apparent from what she had written on the top of the first page of the destroyed will. Without admitting that this decision is in accord with recent decisions in our Courts, we can find no fault with the rule stated by the judge that "a writing purporting to revoke a will on account of the existence of a certain fact does not revoke it if there be no such fact," by which rule he says this case is governed. From a reading of the opinion in Security Company vs. Snow, 39 Atl. 153, referred to in Strong's Appeal, it appears that the law governing the revocation of wills in Connecticut has been changed by statute, whereby the strictness of the original act has been relaxed. The Strong case, so far from being in point with the case at bar, is lacking in all the essential characteristics. In the first place, in that case the mistake was apparent upon the face of the destroyed will, a fact which is given prominence in the opinion of the Court. Whereas, in the Allen case the misapprehension is sought to be established by proof of statements made by testator long prior to the act of revocation. Again, while the mis-

take in the Strong case is called a mistake of law, it is in effect a mistake of fact as stated by the Court in another part of its opinion. It is not a mistake resulting from erroneous legal advice, which is alleged to be the case in the Allen case.

The other authorities cited by Counsel under this head are principally text writers with whose general propositions of law no question is raised. The case cited. Smock vs. Smock 11 N. J. Eq. 156, was an attempt to establish a will which had been cancelled by cutting out the seal and part of testator's name, and the will was found in this condition after testator's death in a desk in his bed-room where he had always kept his valuable papers. Declarations of the testator made a fortnight before his death, consistent with the existence of the will, were introduced, but the Court held they were not sufficient to overcome the effect of the deliberate act of revocation.

In Mundy vs. Mundy 15 N. J. Eq. 290, the testator called for his will, expressing an intention to destroy it. His wife told him she had burned it fifteen years previously, which was untrue, and the Court held that although it was no doubt the intention of the testator to cancel his will, he had not pursued the course provided by statute to effectuate his purpose. This Court in reversing the decree of the Prerogative Court in Frothingham Will, 76 Eq. 335, holding that the evidence showed that at the time the testator made erasures of certain clauses in his will he intended to revoke those clauses, remarked, "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 the very act that constitutes such revocation To extend the scope of such an inquiry to subsequent periods, however closely related in point of time with the revocatory act, is but to add new danger to a rule that is already from its inherent nature too much exposed to fraud."

The learned Vice Ordinary in his conclusions points out the kind of mistakes which would render the cancellation of a will ineffective to revoke it and cites the case of Smock vs. Smock, supra, and also the recent decision of this Court In re Gluckman's Will, 101 Atl. Rep. 295, as illustrating the circumscribed field of mistakes in the execution of wills. And counsel for appellant, on page 21 of their brief, seek to differentiate the Gluckman case from the case at bar. By their argument they in effect admit that if the mistake relied upon in the Allen case were a mistake of law it would be controlled by the Gluckman decision. They quote the sixth syllabus of the case, and then attempt to show that the mistake, which is alleged to have influenced the action in the Allen case, was a mistake of fact and not of law as in the Gluckman case, but according to the opinion of the learned judge in the latter case, it would make no difference whether it was a mistake of fact or of law. The opinion says:

> "The view of the learned trial judge below "seems in reality to have been based upon two "uncontrolling elements: viz. (1) What they "thought was a variance between the will as exe- "cuted and the instructions from which it was "prepared; and (2) What, if it existed amounted "to a pure mistake upon the part of the testator, "(whether self induced or resulting from erron- "eous legal advice of his lawyer) as to the prac- "tical effect of the provision of the will which "he knew it contained and thoroughly under- "stood. As to the first of these, it is quite im- "material whether the will did or did not cor- "rectly embody the instructions, if in point of "fact the testator, when he executed it was made "acquainted with and understood its contents "and cites In re Livingstone's Will, 37 Atl. 770. "As to the second: Assuming that the lawyers

"assurance that the 'such-sum-or-sums-as-may-
"be-necessary' clause would permit the executor
"to pay over the entire income after the debts
"were satisfied was intended and understood as
"legal advice upon the construction of this clause
"and that it was legally unsound (which under
"the circumstances we think it was not), that
"also, in the absence of fraud or of undue in-
"fluence is insufficient to defeat probate of the
"will. It is no new thing for provisions in wills
"to turn out under established rulings of the
"Court, to have a very different meaning from
"that which the testators themselves under the
"honest but mistaken advice of counsel thought
"they had when the wills were executed, but this
"has never been ground for refusing probate."

Another case much in point and in which the principles laid down in the Gluckman case are approved is In re Carter's Will, 19 Gratton's Reports Va. 758-786. In that case the testatrix lived in the South and had made a will devising property to persons living in the North. During the Civil War she was advised that under the Sequestration Act, any property left by will to people living in the North would be confiscated. Acting upon this advice, testatrix revoked these bequests in the following language: "In consequence of the state of the country, I revoke these bequests, &c." It appeared that under the Sequestration Act only the income was confiscated, not the principal. The Court held that the revocation was valid, notwithstanding she may have been misinformed or under a misapprehension.

In the case of Couch vs. Eastman 27 W. Va. 805, the Court says, "The mistake which will avail to set aside a will is a mistake as to what it contains or as to the paper itself, not a mistake of law or fact in the mind of the testator as to the effect of what he actually and intentionolly did."

"A misapprehension as to the legal capacity of devisee to take is a mistake of law and not of fact."

30 Miss. 276.

Hayes Executor's vs. Hayes 21 N. J. Eq. 265.

In Re White's Will, 25 N. J. Eq. 501.

Boylan vs. Meeker 28 N. J. Law 297.

45 Conn. 61.

The English cases are to the same effect:

The Attorney General vs. Lloyd et als. reported in Atkyn's Reports pg. 551, decided in 1747 by Lord Hardwick, is in point with the Gluckman case.

The mistake of lawyer is testator's mistake.

7 Probate Division pg. 68. (1882)

Law Reports Division pg. 1. (1893)

The conclusions of the learned Vice-Ordinary clearly states the law of this case, and his closing remarks that the evidence is inadequate to justify a determination that the act of revocation was ineffective is borne out by the evidence, and it is respectfully submitted that the appeal should be dismissed.

AUSTIN H. SWACKHAMER,

Counsel for Respondent, James S. Pedrick.

DAVID O. WATKINS

Counsel for Respondent, Hannah A. Foster.

NEW JERSEY COURT OF ERRORS AND APPEALS

In the matter of the Application for the Probate of the Last Will and Testament of Michael Allen, deceased.	On Appeal from Prerogative Court.

RESPONDENTS' BRIEF

The question in this case is whether or not the last will of Michael Allen was destroyed by him in his lifetime *animus revocandi* or whether Michael Allen destroyed his will under such a mistaken idea that the Courts can say the act lacked the *animus*. There is no question about the facts that Michael Allen, on July 29, 1916, sent his sister for his will and when the will was produced, without any comment or statement tore from the will his signature and endorsed on the back thereof the date, and that the will was found in the safe of Michael Allen in this condition at the time of his death. There is no question about any accident. Michael Allen intended to tear from the will his name.

The only question is, Was it done under a mistake, such as the law may relieve by probating the will? This is not the case where the will itself contains its reasons of its revocation. At the time of the de-

struction of the will and for a long time before nothing had been said by the testator as to any reason he had in mind for destroying his will. As a matter of fact, nothing in the testimony shows that the testator ever expressed any reason why he desired to destroy his will. It is alleged, however, that he had sought information with respect to the "law of the half-blood." There is no testimony, as I remember it, as tending to show that he connected in any wise this advice with his own personal estate. The testimony of Miss Josephine Allen is to the effect that he sought the information because of her affairs and not because of his own. The burden of the proponents is to show that this advice so operated on the deceased and was operating on his mind at the time of the revocation to such an extent that had he known the truth of the situation he would not have torn his name from the will and the further burden to show the Court that even if the facts be admitted, that it is sufficient ground for holding that the will was not revoked with *animus*.

I submit that the testimony in the present case falls short of these requirements. There is no testimony in the case at all near the time of the revocation of the will, which would justify the Court in deciding that the deceased ever had any information as to the correctness or incorrectness of the advice given by Nixon, and so far as the records show, there is no testimony that the deceased was in any wise concerned as to the way in which his property would go after his death.

It seems to me that the proponents must show, not merely that misinformation had been given to the deceased, but must show in addition that the misinformation had created a state of mind on the part of the testator, so that the Court may say that at the time he

revoked his will, he revoked it not with *animus revocandi.* The testimony in this case falls entirely short. In fact, as I recall it, there is no testimony to show what the state of the mind of the deceased was with respect to the misinformation that had been given him. All of the testimony which bore upon the question after the receipt of the information was to the effect that if he knew that the law would permit the halfblood to share equally with the whole-blood, he would allow the law to settle his estate. As I recall it, this is the only testimony given, except that of the colored man, who said that on the seventh of December, the deceased said that if he had a will the halfblood couldn't share in his estate.

Now, as Lord Hardwicke said in *Atty. General vs. Lloyd,* it is one thing to say that a man had been advised, in other words, that he had received information and yet a wholly different thing to say that he believed the information and that he acted on that belief. In the present case there is testimony that he received improper advice, but I do not think that it can be fairly said that there is any testimony to show that he ever believed the advice or that he acted upon the advice, and if the proponents have failed in this particular, it is my contention that the Court lacks the information upon which to declare the paper the last will of Michael Allen.

In *Attorney General vs. Lloyd,* decided 1747, cited in 3 Atl. Rep. 551, 26 Eng. Rep., full reprint Chancery Book 6, page 1117; 1 Vez. 32. One James Millington by will dated February, 1734, gives lands and his personal estate to be laid out in charitable uses, and by a codicil dated July 12, 1736, recites his will and that he had devised lands to such uses "but that there had been an act of Parliament," "The Mort-

main Act," and being in doubt whether the devise made by him to such charitable uses would be good or not, and being still desirous so far as in him lies to confirm the said will, nevertheless, if by the act of Parliament or by any construction of law thereupon the estate is not well devised and cannot go to those uses, then and in such case, I give those lands to Millington Buckley and his heirs.

A second codicil dated March 17, 1736, reciting as aforesaid, "that being advised the devise of his lands would be void and it being my intention the charity should be continued, and being advised my personal estate can be given, I do, therefore, by this codicil, give my personal estate to the charitable uses before mentioned, and I do hereby give my real estate to the defendant." Mortmain Act was passed in 1736. The testator died the eighth of February, 1737.

The Master of the Rolls on December 10, 1744, decreed the will and codicils to be proved, and that the trust to be performed. Millington Buckley appeals to the Lord Chancellor. The attorney general appears for the charity.

The Master of the Rolls, Lord Hardwicke said: "It is a very nice thing to say that because the reason a man gives for his devise is false, therefore, his devise shall fail, and how far that will extend I cannot say. But here he has put the devise upon the fact himself, for the words of the second codicil are, 'That being advised the devise of his lands would be void, etc., that he was so advised was a fact in his own knowledge, and he has grounded his devise upon this advice, and not upon the realty of the law, though that should come out in the event one way or another, upon what he makes his determination which he might do to quiet the doubtful question.' 'I will not have this litigated after my

death, but I will settle it myself upon some certain foundation.' "

The matter was referred to the Judges of the Court of King's Bench for their opinion and they certified that they were of opinion that the real estate was well devised by the codicil dated March 17, 1736. (*Atty. Gen. vs. Lloyd*, 3 Atl. Rep. 551, 26 Eng. Rep. full reprint 6, page 1117, 1 Vez. Sr. 32.)

It seems to me that the present case is even stronger than the case above cited.

Miss Calver testified that the deceased some time after the receipt of the paper from Nixon and while discussing it said that if he thought that the law would permit the halfblood to have an equal share in his estate, he believed that he would let the law settle it. That is almost exactly the equivalent to the explanation given by Lord Hardwicke in explaining the above case, namely, "I will not have this litigated after my death, but will settle it myself upon some certain foundation." If there was any doubt in his mind about the matter and he revoked his will, it seems to me to be conclusive that he did not act upon the mistaken conception of the fact.

The proponents have cited a number of cases as though they dealt with the case which is now at hand. Practically all of the authorities, however, distinguish between the proposition as laid down by the proponents and the present case, which, it seems to me, is governed by *Attorney General vs. Lloyd*, 1 *Powell on Devises*, page 525, 1 *Redfield on Wills*, 2nd Ed. 358, 359; *Skipworth vs. Cabell's Executors*, 19 Grattan (60 Va.) 728.

In 1 *Powell on Devises*, page 525, it is said: "But care must be taken to distinguish between cases like the foregoing, where the testator acts under a false impression, originating from a deceit practiced upon

him, and those where although the reason which he gives for his subsequent devise is false, yet no deceit is practiced upon him; for although in cases of the first sort, the devise will be void if the fact be otherwise than as the testator understands, yet the law will be different in instances of the latter kind."

1 *Redfield on Wills,* 2nd Ed. pages 358, 359, states the law to be: "And it has been held that where the testator revokes a legacy upon the ground or assigning as a reason that the legatee is dead, and which proves unfounded, the revocation shall not take effect, the revocation being regarded, in such cases, as merely conditional. But if the legacy or the revocation be made dependent merely upon the information received by the testator, on his belief, or opinion, it seems that the act will be held valid, notwithstanding the testator might have been misinformed or under a misapprehension."

In *Skipworth vs. Cabell's Executors,* 19 Grattan (60 Va.) 758, the testator made a codicil to a will as follows: "In consequence of the state of the country, I now revoke my bequest to Dr. C. and his children and also to Mrs. T. and her daughter C. and also to Miss L., all of them residents of Philadelphia." Evidence was offered to prove that testatrix had been advised that there was danger that the legacies would be confiscated by the confederate government and that this was the reason of the revocation. The Court held (1) If the advice was erroneous, it would not void the revocation; (2) Parol evidence is not admissible to show the views or opinions of the testatrix in order to show that she acted under a mistake. The mistake which induces the revocation must appear on the face of the will. I do not know whether or not the later clause would be

considered the law at the present time, but I am quite sure that the Court must find as a fact that the mistaken information of the testator must have induced the revocation. In other words, it appears to me to be essential to the proponents' case that he show the condition of the testator's mind at the time of the revocation and to show that the mistaken information that he had induced the revocation.

There are no New Jersey decisions upon the question here involved.

Smock vs. Smock, 11 Eq. 156, refers to the proposition claimed by the proponents, but no such question was in the case. It was not necessary to its decision. The matter was not decided, but was purely dictum.

They also cite *Re Frothingham Will,* 71 Atl. 695, which was reversed in the Court of Errors. That case, however, does not decide the present case. The matter which was there under consideration was whether or not alterations made in his will operated to make a revocation and not whether he had acted upon improper advice. I think it is quite clear that that case is in no wise an authority in assisting the Court in this case. The proposition there determined seems to me is that if the testator makes one disposition in his will and subsequently by interlineations or alterations in his will, he seeks to give the same property to other persons but fails in that respect, whether or not the original devise is cancelled or revoked. The Courts held, as in other jurisdictions, that if a revocation was conditioned upon the second devise taking effect that inasmuch as the second devise did not take effect the first holds.

There is no question but what the points decided in the Frothingham case is correct, but it does not decide the questions involved in this case, and is, therefore, not an authority.

Likewise in Strong's Appeal, cited from the Connecticut Reports, the case turns upon the conditional relevant revocation which all of the textwriters should have taken the pains to distinguish from the present case as does *Atty. General vs. Lloyd,* and *Skipworth vs. Cabell's Executors.*

With respect to the attestation clause, I think it may be fairly said that it is the common understanding of the bar and is the universal practice of the Orphans' Courts of this State that the witnesses must sign in the presence of the testator and in the presence of each other and that the failure to do so is fatal to the proof of a will.

The Court of Errors and Appeals in the case of *Clark vs. Clark,* 52 Atl. Reporter, page 225, did not pass upon whether or not it was necessary for the witnesses to sign in the presence of each other. They affirmed the Vice-Chancellor to the effect that the language did not so require it, but as to whether or not the necessary implication of the language required it was not passed upon by the Court of Errors and Appeals, and is, therefore, a matter which has never been determined in this State. I submit that the necessary implication of the language does require the witnesses to sign in the presence of each other. It does not follow, however, it seems to me, although the necessary implication of the language of the statute requires the witnesses to sign in the presence of each other, that same language imports that they actually did sign in the presence of each other. The language imports just what it says. It doesn't say that they signed in the presence of each other and proof that witnesses signed their names to such an attestation clause has no probative force that they did that which the attestation clause does not aver, namely, that they signed in the presence of each other.

The Court of Errors and Appeals in the case of *State vs. Ready,* 78 Law, 599, the opinion being written by Chief Justice Gummere, laid down the law with reference to declarations by the testator as follows: "That the rule is thus stated by Professor Wigmore in his very able treatise on the Law of Evidence, Section 1735, namely, that where the issue is whether a will was executed or whether a will was made to have a certain tenor or provision, the pre-existing testamentary design of the alleged testator is always relevant, and to evidence the existence of that design his antecedent statements are admissible when not too remote to be material."

So I suppose it must be considered the settled law of this State that declarations of the testator may be received when not too remote to be material. But are the declarations of the testator in the present case close enough either in point of time or closely enough related in point of fact to be considered as material to the present inquiry whether or not he revoked his will under a mistaken idea? The evidence shows that about the first of October, 1915, the opinion was given by Mr. Nixon as to the state of the law. There must be some doubt as to whether or not any earlier statements were made by Nixon, because his diary which he used to refresh his recollection was silent as to anything said by him to the testator and he himself shortly after the death of Michael Allen had forgotten the transaction. He told Mr. and Mrs. England that he mailed the paper "P4" to Michael Allen, and therefore did not have the conversation that he testified to on the witness stand. He further testified that he had forgotten that he had visited Allen on the 25th of September, 1915. So that just what was said and when it was said may well be a matter of doubt.

As I recall the testimony, Nixon did not testify to any statements made by Allen on the receipt of "P4" but only testified to questions asked by Allen of Nixon. So that what may have been the belief or state of mind of Allen on the receipt of the paper and the conversation, no one knows.

Shortly after, however, in October, 1915, to wit, not more than a month after the receipt of "P4" Allen told Miss Calver that if he thought the half-blood would share equally in his estate, he believed he would let the law settle. There is practically no other conversation, and certainly none touching the destruction of his will from that time until the day of its destruction, unless perchance Miss Allen testified to something of the kind, and with the exception of the testimony of the colored man as to what took place the 7th of December.

The will was not revoked until July 29, 1916, which was ten months after the receipt of the paper and eight months after the conversation with the colored man. So that it seems to me that these conclusions are entirely too remote in time as to be considered a part of the transaction of the tearing of his will. Much less are they relevant as a part of the *Res Gestae* of the destruction of his will. Not one single syllable, as I recall the testimony, was testified to of any declaration by the testator as to his purpose in destroying his will or the reasons why he was to destroy his will. In other words, all the testimony that was offered on the part of the proponents was devoid of any material relation to the act of destruction. I am not forgetting that Miss Allen testified to the fact that he would not be considered a good business man by leaving a will, or something to that effect. (I do not recall just when that was spoken, *i. e.,* whether before or after the receiving of the ad-

vice of Nixon) but I think that is not necessarily connected with the revocation of his will. So that it seems to me that that whole of the testimony as to declarations by the testator is unconnected either in time or material with the act of tearing his name from his will.

It is a general rule of law that in the exercise of a testamentary disposition, either in the making of the will or the revoking of a will, the Courts will seek to carry out the intentions of the testator. If it was the intention of the testator in the present case to revoke the will, the Courts of course desire to carry his intention into effect, and a strong presumption arises that the will was revoked *animo revocandi*, when done by the testator as proved in this case. Now, there must have been some reason in the testator's mind for revoking this will. He never talked about it. He never disclosed to any one why he was revoking it. What was in his mind as a cause for revoking this will was a secret in the mind of the testator alone, so far as the proof shows. He may have been thinking of a thousand things which he never disclosed to anyone. Certainly the Court will hesitate a long time before they will make a distribution of Michael Allen's estate without knowing what Michael Allen intended and desired to be done with his estate after his death, and so far as the testimony in this case shows, there is no way of knowing what was in his mind. From the time of receiving "P4" to the date of revocation, about ten months elapsed and not a word was spoken by the testator as to indicate the state of his mind concerning the revocation of his will. It seems to me that it would be a most elusive kind of a guess to attempt to say what made Michael Allen destroy his will. But he did destroy it, and he had a perfect

right to do so, and he had a perfect right to die intestate, if he so desired. It seems to me that it is impossible for the Court to say that they knew what was in his mind, and therefore establish a paper which he had deliberately revoked and concerning which he had expressed a wish many times before to revoke under the circumstances.

I wish to call the attention of the Court to the case of *Smock vs. Smock, supra,* on the question of the relevancy of the declarations of the testator. There the Court said (page 166) "There are other facts relied upon to overcome the presumption of the testator's having cancelled the will. They are mainly the declarations of the testator recognizing the existence of the will, and his speaking of the devises and bequests contained in it. These declarations were made more than a year prior to the testator's death; and this fact destroys all influence that can be deduced from them to overcome the presumption. The fact, that up to within a year of his death, the testator freely spoke of the will—his ceasing to do so during the last year of his life strengthens the presumption that he cancelled it. While it was in existence he did not hesitate to speak of it. He ceased to speak of it because it had ceased to exist."

The same test of relevancy is applicable to the present case.

Respectfully submitted,

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