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**Decree Granting Probate.**

(Filed, April 9, 1915.)

**New Jersey Prerogative Court.**

IN THE MATTER

*of*

The application for the probate of a certain paper writing purporting to be the last Will and Testament of JOHN TUTTY, late of the County of Morris, deceased.

10

APPLICATION having been made to the Surrogate on the twenty-ninth day of May, A. D. 1914, by William J. Tutty for probate of a certain paper writing purporting to be the last will and testament of John Tutty late of the County of Morris, State of New Jersey, dec'd. and a caveat having been filed against the probate thereof by Mary A. Monahan a daughter of the said deceased and the Surrogate having issued citations to all persons concerned to appear in the Orphans Court of said County on the nineteenth day of June, A. D. 1914, and the said citations having been returned duly acknowledged by all persons to whom said citations were directed, and the matter having come on to be heard by the said Orphans Court; Elmer King Esq. proctor for the proponents and Charles A. Rathbun, Esq. and Lyman M. Smith, Esq. appearing as Proctors and Counsel for the caveator.

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30

And the Court having taken testimony and heard the allegations of the parties herein, and being satisfied that the instrument in writing bearing date the eighth day of May, A. D. 1914

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*Decree Granting Probate.*

offered by the proponent for probate as and for the last Will and Testament of John Tutty deceased was duly executed by the said John Tutty as and for his last Will and Testament; that the said John Tutty at the time of executing the said instrument was in all respects competent to execute the same and was not under restraint or

10 under undue influence.

It is thereupon on the ninth day of April, 1915 ordered, adjudged and decreed that the said instrument be and the same hereby is established as the last Will and Testament of said John Tutty deceased, and that the same be and hereby is admitted to probate and that letters testamentary be issued upon the aforesaid will to William J. Tutty, the executor therein named.

20

JOSHUA R. SALMON,  
Judge, &c.

30

40

IN THE NAME OF GOD, AMEN, I, JOHN TUTTY of the Township of Rockaway in the County of Morris and State of New Jersey, being of sound and disposing mind and memory do hereby revoke and annul all former Wills and Testaments heretofore made and published by me, and do make and publish this my last Will and Testament in manner following, that is to say:—

FIRST:—I do order and direct that all my just debts and funeral expenses be paid and satisfied as soon as conveniently can be after my decease. 10

SECOND:—I give, bequeath and devise all of those two certain tracts, lots or parcels of land and premises which were conveyed to me by two certain parties and by two certain deeds as follows, to wit, The first thereof is situate in the Township of Rockaway in the County of Morris and State of New Jersey, and is the same land and premises which were conveyed to me by Edward Dunn by deed dated August 15th, 1865, and recorded in the Morris County Record of Deeds in Book Q-6 on pages 419 &c, The second thereof is situate in the City of Newark in the County of Essex and State of New Jersey, and is the same land and premises which were conveyed to me by Benjamin J. Crane, Executor of the Estate of Agnes Matches, deceased, by deed dated April 6th 1892, and recorded in the Register's Office of the County of Essex New Jersey on April 9th, 1892, in Book V, 26 of Deeds on pages 51 &c, unto my beloved son, William J. Tutty, to him, his heirs and assigns forever. 20 30

THIRD: I give and bequeath unto my beloved daughter, Mary Ann Monohan, the sum of one hundred dollars to be paid to her within one year after my decease.

FOURTH: I give and bequeath unto my beloved daughter, Margaret Cahill, the sum of one hundred dollars to be paid to her within one year after my decease. 40

FIFTH:—I give bequeath and devise all of that certain tract or lot of land and premises which was conveyed to me by Jabez L. Allen and wife by deed dated July 12th, 1869, and recorded in the Morris County Record of Deeds in Book Q-7, on pages 150 &c, unto three of my grand children, namely, William T. Tutty, John E. Tutty and Anthony S. Tutty, and who are children of my son William J. Tutty, to be equally divided between them share and share alike, to them their heirs and assigns  
10 forever.

SIXTH:—I give bequeath and devise all of the rest, residue and remainder of my property and estate real, personal and mixed of every kind, name, nature and description whatsoever and wheresoever situate and being whereof I may die seized and possessed unto my beloved son, William J. Tutty, to him, his heirs and assigns forever.

SEVENTH:—I do hereby nominate, constitute and  
20 appoint my said beloved son William J. Tutty, Executor of this my last Will and Testament,

IN WITNESS WHEREOF I have hereunto set my hand and seal this eighth day of May, A, D, Nineteen Hundred and Fourteen (1914).

his  
JOHN X TUTTY (SEAL)  
mark

SIGNED, SEALED, PUBLISHED and DECLARED by the  
30 above named John Tutty to be his last Will and Testament, in the presence of us, who were present at the same time, and subscribed our names as witnesses in the presence of the Testator and at his request and in the presence of each other.

JOHN F. STICKLE, Rockaway, N. J.  
EDWIN BLANCHARD Allen Mine,  
DANIEL KEARNS, Allen Mine,

**Petition of Appeal.**

(Filed, May 25, 1915.)

**NEW JERSEY PREROGATIVE COURT.**

IN THE MATTER

*of*

The application for the probate of a certain paper writing purporting to be the last Will and Testament of JOHN TUTTY, late of the County of Morris, deceased.

10

The petition of appeal of Mary A. Monahan respectfully shows:—

1. She filed a caveat against the probate of the alleged will of John Tutty, deceased, with the Surogate of Morris County; 20

2. The Orphans' Court of Morris County heard and determined the evidence submitted by your petitioner and the proponents;

3. On the ninth day of April, Nineteen Hundred and Fifteen, the Orphans' Court of Morris County adjudged and determined that the said alleged will of John Tutty, deceased, was his last Will and Testament and admitted the same to probate and thereupon signed the decree and order admitting said alleged will to probate, which said decree or order was filed on the ninth day of April, Nineteen Hundred and Fifteen with the Surrogate of Morris County. 30

4. Your petitioner finds herself aggrieved by the said decree and order so made by the said Orphans' Court and your petitioner hereby appeals from the whole and every part of said decree and order upon the ground that the same was illegal, improper and erroneous. 40

*Petition of Appeal.*

5. Your petitioner therefore prays that said order and decree may in every respect as aforesaid be versed, 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.

10

MARY A. MONAHAN,  
 LYMAN M. SMITH,  
 CHARLES A. RATHBUN,  
 Proctors for Petitioner and Caveator.  
 CHARLES A. RATHBUN,  
 Of Counsel with Petitioner and  
 Caveator.

STATE OF NEW YORK, }  
 COUNTY OF BRONX, } SS:  
 CITY OF NEW YORK. }

20

MARY A. MONAHAN, the petitioner above named, being duly sworn according to law, on her oath deposes and says:—that she has read the foregoing petition and that the matters and things therein set forth are true to the best of her knowledge and belief.

MARY A. MONAHAN.

(Seal)

30 Subscribed and sworn to before }  
 me, the subscriber, a Notary }  
 Public in and for said State, }  
 this 6th day of May, A. D. }  
 Nineteen Hundred and Fifteen. }

John L. O'Hara,  
 Notary Public,  
 Bronx County.

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**Answer to Petition of Appeal.**

Filed, September 12, 1915.

**NEW JERSEY PREROGATIVE COURT.**


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IN THE	}	
of		On Appeal.
The application for the probate of a certain paper writing purport- ing to be the last Will and Tes- tament of JOHN TUTTY, late of the County of Morris, Deceased.		Answer to     10 Petition of Appeal.

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The answer of William Tutty, Executor of the Last Will and Testament of John Tutty, late of the County of Morris, to the petition of appeal of Mary A. Monahan.

This respondent not acknowledging all or any of the matters which in said petition of appeal are contained to be true for answer thereto says and admits that a decree was made and entered in the Orphans' Court in the County of Morris on the date and of the purport mentioned in said petition, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced.     20

And he is advised that the same is legal, just and equitable and prays that the same may be affirmed, with costs to be adjudged to this respondent.     30

KING & VOGT,  
Proctors for Wm. Tutty,  
Respondent.

**Opinion.****IN THE PREROGATIVE COURT.**


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 IN THE MATTER

of

 The Probate of the Will of JOHN  
 TUTTY.
 

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} On Appeal.

10

MR. CHARLES A. RATHBUN for Appellant.

MR. ELMER KING for Respondent.

STEVENS, V. O.

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This is an appeal from the decree of the Morris Orphans' Court admitting the Will of John Tutty to probate. The appeal is based upon the ground that its provisions were the product of the undue influence exerted by Tutty's son, William, to whom testator gave nearly all his property.

30

Testator was eighty-four years old at the time of his death on May 18, 1914. The Will was executed ten days previously. He left three children, the son, William, and two daughters. He came to this country from Ireland when a young man and worked in the mines of Morris County. By his industry, he had accumulated an estate of about seven or eight thousand dollars. It consisted of a house in Newark worth three or four thousand dollars, a house at Mount Hope, worth three thousand, two lots in the same place of small value and a little money. He had rented the house at Mt. Hope to his son, William, who kept a saloon there. His two daughters lived in New York. He had been twice married. The three children were those of his first wife. When his second wife died he went to board with his daughter, Mrs. Monahan, and lived with her from

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*Opinion.*

1910 to 1913. He left, according to the evidence of Mrs. William Tutty, because his daughter wanted him to pay \$20 a month for his board and he would not go to William's house because William wanted \$15. His niece, Mrs. Flanagan, who lived at Dover, was willing to take him for \$12, and so he went there in May, 1913. She had four rooms and a husband, who was a common laborer and six children. There he remained until May 3, 1914, when he was taken to William's house under the circumstances I will presently refer to. For a considerable period before his death, he was deaf, had Bright's disease and was afflicted with asthma so badly that he slept at night in a chair. It is proved beyond question that while at the Flanagan house he grew weaker in mind and body and toward the end, labored under occasional delusions. He would hit the flour barrel with his cane, saying "Git up, Dan, git up" and would strike the walls of the room, under the delusion that he was sounding the walls of a mine. He could do little or nothing for himself and required constant attention day and night. Both his doctor and his relatives wanted him to go to some institution where he could be properly cared for. His means were ample; but his penuriousness and prejudices prevented him. Up to the time William took him away from the Flanagans he had made two wills, one, while he was living in New York, giving the Mount Hope property to William and the Newark property to his two daughters; the other while with Mrs. Flanagan, giving almost everything to her. This latter will is called in the evidence the Davenport will.

On May 3, between seven and eight o'clock in the evening, William, who lived only three or four miles away, came to the Flanagan house

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*Opinion.*

with his horse and wagon and asked his father to take a drive. He had heard that the Flanagan Will had been made. While they were driving, something was said which induced the old man to quit the Flanagans and go to William's house to live. William's account of the conversation, and of course he alone knows what occurred, is

10 meager and unsatisfactory. He says, "I mentioned the Davenport Will and he said he didn't know of any Davenport Will being drawn. \* \* \* I told him there was one drawn; he said he *expected* to have another drawn by Mr. Stickle." On being asked to tell the whole conversation William replied, "That is about as much as I know about it." He says further that when he

20 started he intended to take him back to the Flanagans. His explanation of why he did not is, "he didn't want to come back. He wouldn't stand for it." Now this is certainly remarkable. The old man was, according to all the evidence, strange as it may seem, perfectly satisfied with his surroundings. He did indeed receive more care from Mrs. Flanagan and from her husband than one would have thought possible under the circumstances. So well satisfied was he that he

30 had made a will in their favor, and in all the testimony not a single complaint is to be found about their treatment of him. William on the other hand had heretofore refused to take him unless he was willing to pay \$15 a month. But the situation was suddenly changed. William, if we may credit his evidence, without making any bargain with him, merely because the old man "would not stand for it" \* \* \* i. e. would not stand for going back to the Flanagans, took him, without conditions, to his own home. He says

40 that when he got there he sat up with him all

*Opinion.*

night, but that not a word was said about the will. Early next morning, however, we find him going to Rockaway and bringing back Mr. Stickle. Mr. Stickle says that he found him in the kitchen; that they went into an adjoining room and that the testator told him that he wanted him to draw a will; that he had made a will or two before and they didn't suit him; that he wanted him to make a power of attorney besides. From the instructions then received, he prepared a will, executed on May 8, four days afterward. Both Mr. Stickle and the subscribing witnesses testify that his mental condition was good when he signed it. He died, as I have said, ten days afterwards. 10

The question is was this will the product of undue influence. 20

In *Dale v. Dale*, 11 Stew., 274, it was held by the Court of Errors that where a mother mentally enfeebled by disease and in a position where one of her two sons could exercise an improper influence over her, made a will leaving nearly all her property to him, the burden was upon him to show that such instrument was executed without the exercise of undue influence.

In *Lynch v. Clements*, 9 C. E. Gr., <sup>431</sup>135, Vice-Chancellor Dodd quotes the following passage with approval "In regard to undue influence the cases are almost infinite in number and variety. Where the party to be benefited by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance and one requiring the fullest explanation. So where a will is unreasonable in its provisions and inconsistent with the duties of the testator with reference to his property and family, this will of itself impose upon those claim- 30 40

*Opinion.*

ing under the instrument the necessity of giving some reasonable explanation of the unnatural character of the will. While undue influence embraces fraud, fraud by no means embraces every species of undue influence, since it is quite supposable that one may really exercise a degree of influence over the testator in producing the testam-  
 10 mentary act, which upon every just ground is fairly entitled to be considered extreme and unreasonable either in character or degree without its being fraudulent."

Now in the case in hand the disposition was inconsistent with the duty of the testator owed his family. His daughters had as much claim to share in his bounty as his son. While he had never quarrelled with *them*, he had quarrelled with William about the rent. They were in the habit  
 20 of going to see him at the Flanagans. William himself admitted that he knew of no reason why he should have been preferred.

In considering the question of undue influence the mental power of the testator must be taken into account. Tutty's mind had become diseased and enfeebled. As mind and body weaken, strength to resist the importunity or suggestion of one who occupies the dominate position declines. Four years before his death while in good  
 30 health, Tutty had made a perfectly fair will, apportioning his property among his children. Less than six months before his death, while living with the Flanagans, he had made a will in their favor the provisions of which were altogether indefensible. He could only have done so, because mentally dominated by his surroundings. Within a few hours after he had been released from these surroundings, we find him making  
 40 another will almost equally inequitable. He

*Opinion.*

makes William the recipient of practically all his property, without getting from him, if we may believe William's story, a promise even to care for him until death.

That more passed between father and son than the son is willing to admit can hardly be doubted. William told Monahan, testator's son-in-law, the day before the funeral, so Monahan testifies, that he had the will made to suit himself. He told Cahil, the other son-in-law, that, this time, he had the will made out his way. He made a similar statement in the hearing of Margaret Cahil and Mary Spears and to Mary Monahan he said, he might as well have it as the Flanagans. Is these witnesses, all of them of apparent respectability, are interested they are not more so than William.

His conduct in reference to the other wills merits remark. As soon as the will in his favor was executed, he obtained from his father authority to get the others. Upon getting them he at once burned them. On receiving the will from Mr. Smith, he very disingenuously told him, that if his father wanted another will drawn he would bring him down. "If I do bring him down (so Mr. Smith testifies) I want you to look after my interests, for I think I am entitled to the bulk of the estate. William denies these various conversations, but coming, as they do, from so many witnesses, it is difficult to believe that they did not take place.

We have then on the one hand a man eighty-four years old whose mind and body have all but failed and on the other a son in a position completely to dominate him. No sooner does this feeble old man come under William's influence than he makes a will in his favor, although

William admits that he knows of no reason why he should have preferred him. According to the cases before referred to, it is for William to give some reasonable explanation why the inequitable disposition was made and this he has failed to do. The decree should, therefore, be reversed.

ENDORSED:

"Filed Aug. 22, 1916,

"Thomas F. Martin,

10 "Register."

**Decree.**

(Filed Sept. 20, 1916.)

**IN THE PREROGATIVE COURT.**

	IN THE MATTER	
	OF	On
20	THE PROBATE OF THE WILL OF	Appeal
	JOHN TUTTY.	

30 This matter coming on to be heard in the presence of Elmer King, Proctor and of counsel for William Tutty, Executor, appellee, and of Charles A. Rathbun and Lyman M. Smith, Proctors and counsel for the appellants, and the court having taken the testimony, and heard the argument of counsel thereon and being satisfied that the instrument in writing, dated March 8th, 1914, heretofore admitted to probate by the Orphan's Court of the County of Morris, as the last will and testament of John Tutty, late of the County of Morris, deceased, is not his last will and testament and the same was procured by the undue influence of William Tutty the chief beneficiary.

40 It is thereupon, on this nineteenth day of September, Nineteen Hundred and Sixteen, on motion of Charles A. Rathbun of counsel with the

appellants, ORDERED, ADJUDGED and DECREED that the said instrument heretofore admitted to probate as the last will and testament of John Tutty, deceased, be and the same is hereby set aside, and that the order made by the Orphan's Court of the County of Morris admitting the same to probate is likewise set aside and to be for nothing holden.

And it is further ORDERED that the question of a counsel fee to Charles A. Rathbun and Lyman M. Smith, counsel for the appellants, and to Elmer King counsel of appellee and Executor and that said counsel fees are reserved. 10

Respectfully advised,

E. R. WALKER,  
Ordinary.

FREDERIC W. STEVENS,  
V. O.

**Notice of Appeal.**  
(Filed October, 1916.) 20

**IN THE PREROGATIVE COURT.**

IN THE MATTER

of

The Application for probate of a certain paper writing, purporting to be the last Will and Testament of JOHN TUTTY, late of the County of Morris, deceased.

On Appeal. 30

The proponents hereby appeal from the final decree made in this Court in the above-entitled cause, which was as follows:

"This matter coming on to be heard in the presence of Elmer King, proctor and of counsel for William Tutty, executor, appellee, and 40

*Notice of Appeal.*

10 of Charles A. Rathbun and Lyman M. Smith, proctors and counsel for appellants, and the Court having taken the testimony, and heard the argument of counsel thereon and being satisfied that the instrument in writing, dated March 8th, 1914, heretofore admitted to probate by the Orphans' Court of the County of Morris, as the last Will and Testament of John Tutty, late of the County of Morris, deceased, is not his last will and testament and the same was procured by the undue influence of William Tutty, the chief beneficiary.

20 "It is thereupon, on this Nineteenth day of September, Nineteen Hundred and Sixteen, on motion of Charles A. Rathbun, of counsel, with the appellants, ORDERED, ADJUDGED and DECREED that the said instrument heretofore admitted to probate as the last Will and Testament of John Tutty, deceased, be and the same is hereby set aside, and that the order made by the Orphans' Court of the County of Morris, admitting the same to probate is likewise set aside and to be for nothing holden.

"And it is further ORDERED that the question of a counsel fee to Charles A. Rathbun and Lyman M. Smith, counsel for the appellants, and to Elmer King, counsel of appellee and executor, and that said counsel fees is reserved."

30 to the Court of Errors and Appeals in the last resort in all causes.

KING & VOGT,

Proctors of Proponents and Appellants.

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

ELMER KING,

Of Counsel with Proponents.

**Petition of Appeal.**

(Filed Nov. 3, 1916.)

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


---

 IN THE MATTER
*of*

The Application for probate of a certain paper writing, purporting to be the last Will and Testament of JOHN TUTTY, late of the County of Morris, deceased.

---

On Appeal. 10

TO THE COURT OF ERRORS AND APPEALS in the last resort in all causes in the State of New Jersey.

1. The petition of William Tutty, respectfully shows that he is one of the next of kin and heir at law of said John Tutty, late of the County of Morris and State of New Jersey, deceased, and executor mentioned in the paper writing purporting to be the last Will and Testament of John Tutty, deceased. 20

2. Your petitioner further shows that on the Ninth day of April, One Thousand Nine Hundred and Fifteen, the said paper writing was by the Orphans' Court of the County of Morris, adjudged and decreed to be the last Will and Testament of the said John Tutty, deceased, and said Court by its decree of the same date, admitted the same to probate. 30

3. Your petitioner further shows that Mary A. Monahan, one of the next of kin and heir at law of said John Tutty appealed to the New Jersey Prerogative Court from the decree of the Morris Orphans' Court, and that, after hearing in the said Court, the Ordinary of this State, by his decree dated the Nineteenth day of September, One 40

*Petition of Appeal.*

Thousand Nine Hundred and Sixteen, set aside the said instrument theretofore admitted to probate as the last Will and Testament of John Tutty, deceased, and did also set aside the decree of the Orphans' Court of the County of Morris, admitting the same to probate.

10 Your petitioner, therefore, appeals from the decree of the Prerogative Court, so far as the same sets aside the decree of the Morris Orphans' Court, admitting the paper writing to probate as the last Will and Testament of John Tutty, deceased, and states the ground of his appeal, as follows:

A. That at the time of the making and executing of said paper writing, purporting to be his last will and testament, said John Tutty was of sound and disposing mind.

20 B. That at the time of the making of said will, the said John Tutty was not unduly influenced by the said William Tutty to make said paper writing, purporting to be the last Will and Testament of him said John Tutty, deceased.

C. That the said paper writing, admitted to probate by the decree of the Orphans' Court of the County of Morris, which decree was set aside by the Prerogative Court of the State of New Jersey, is the true last will and testament of said  
30 John Tutty, deceased.

D. That your petitioner and appellant may be restored in all things to what he has lost by reason of the erroneous decree of the Prerogative Court of the State of New Jersey, and that this Honorable Court will grant such other and further relief in the premises as justice and equity require, and your petitioner, will ever pray.

Dated October 26th, 1916.

40

KING & VOGT,  
Proctors for and of Counsel  
with William Tutty, Appellant.

I conceive there is a good cause for appeal in the above-entitled matter.

ELMER KING,  
Of Counsel for Appellant.

**Answer.**

(Filed Nov. 3, 1916.)

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

---

IN THE MATTER

*of*

The Application for probate of a certain paper writing, purporting to be the last Will and Testament of JOHN TUTTY, late of the County of Morris, deceased.

---

On Appeal.

10

The answer of Mary Monahan, respondent to the petition of appeal of William Tutty, appellant.

20

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless says and admits, that a decree was, on the nineteenth day of September, Nineteen Hundred and Sixteen, made and entered in the Prerogative Court, in the cause for that purpose mentioned in said petition as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said decree of the Prerogative Court is agreeable to equity and the circumstances of said case, and she prays that the same may be affirmed, with costs to be adjudged to this respondent.

30

CHARLES A. RATHBUN,  
Proctor for and of Counsel with  
Mary Monahan, Respondent.

40

**Application for Probate of Will.**

TO THE SURROGATE OF THE COUNTY OF MORRIS:

The petition of William J. Tutty respectfully shows that John Tutty, late of the Township of Rockaway, in said County, departed this life at Mount Hope, New Jersey, on the 18th day of May, A. D. 1914, having previously made and executed a last Will and Testament, bearing date the 8th day of May, A. D. 1914.

That in and by said last Will and Testament he did appoint your petitioner the executor thereof.

Your petitioner therefore humbly prays that said Will may be admitted to probate, and that Letters Testamentary thereon may be granted and issued to him.

And would further show that said deceased left him surviving next of kin and heirs at law whose names, residences and Post Office addresses, and the manner or degree they severally stand related to deceased, so far as the same are known to your petitioner, are as follows, viz.:

Name.	Relationship.	Post Office Address.
William J. Tutty,	Son,	Wharton, R. F. D.
Mary A. Monahan, wife of	Daughter,	Briggs Ave., New York City,
John Monahan,		No. 2894.
Margaret Cahill, wife of	"	Stanhope St., Brooklyn, N. Y.,
Peter Cahill,		No. 404.

30

**OTHER LEGATEES,**

Children of said William J. Tutty.

William T. Tutty,	Grandson,	Wharton, N. J., R. F. D.
John E. Tutty,	"	" " "
Anthony S. Tutty,	"	" " "

Dated, May 29, 1914.

WILLIAM J. TUTTY.

40

STATE OF NEW JERSEY, }  
Morris County, } ss.:

WILLIAM J. TUTTY, the petitioner above named, being duly sworn, on his oath says that the statements made in the foregoing application for Probate of Will are true to the best of his knowledge and belief.

WILLIAM J. TUTTY.

Sworn before me at Rockaway, }  
May 29, 1914. }

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John T. Stickle,  
M. C. C. of N. J.

(Filed May 29, 1914.)

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**Testimony.****MORRIS ORPHANS' COURT.**


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10 In the Matter of the application  
for probate of a certain paper  
writing purporting to be the  
Last Will & Testament of JOHN  
TUTTY, late of the County of  
Morris, Deceased. } On Caveat.

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Transcript of shorthand notes of testimony,  
taken in the above matter before Hon. Joshua R.  
Salmon, Judge of said Court, on Friday, June  
19th, 1914, by R. C. Matthews, stenographer.

## A P P E A R A N C E S :

- 20 ELMER KING, Esq., Proctor for and of Counsel  
with Proponents.  
MESSRS. CHARLES A. RATHBUN and LYMAN M.  
SMITH, proctors for and of Counsel with Cav-  
eators.

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JOHN F. STICKLE, a witness produced on behalf  
of the Proponents, being duly sworn, testified as  
follows:

## 30 DIRECT EXAMINATION BY MR. KING:

Q. Mr. Stickle, you are a practitioner in the  
Courts? A. Yes, sir.

Q. A Counselor-at-law? A. Yes, sir.

Q. With your office at Rockaway? A. Yes, sir.

Q. And how long have you been practicing in  
the Courts of New Jersey? A. Oh, since sometime  
in sixty-four, I think.

40 Q. Mr. Stickle, I show you a paper writing pur-  
porting to be the last will and testament of John

*John F. Stickle—Direct.*

Tutty, late of the Township of Rockaway, in the County of Morris and State of New Jersey, dated the eighth day of May, 1914, and ask you who drew that will? A. I did.

Q. For whom did you receive the information which was placed in the paper? A. From Mr. John Tutty.

Q. And where did you receive that information? **10**  
A. Oh, at his—where he resided, near the Allen Mine.

Q. How did you happen to go to his house? A. He sent for me to come up and see him, and I went up there to see him and when I got there I found him and he was sitting in the kitchen or dining room—somewheres with some of the family. There was a lady or two there I noticed. And he shook hands with me and said he was glad to see me and so on and said he wanted to see me on a little business, and he took me in the adjoining room. He and I went in and sat down there, and he told me he wanted to make a will and wanted to make a power of attorney besides—another paper besides a will; and he told me how he wanted the will made and I made a memorandum of it and told him that I'd draw it and come up in three or four days for him to sign it, and I came home— **20**

Q. (Interrupting) Just a moment. How far in Rockaway from the place you found him—Richard's Mine I think you said? A. In the neighborhood of four miles, I judge. **30**

Q. How long had you known Tutty prior to this time? A. Oh, I don't know. Twenty years or more.

Q. Then you came home. Then what did you do? A. I prepared the will and the other paper and on the 8th I went up there. **40**

Q. When you went up on the 8th, where did

*John F. Stickle—Direct.*

you find him? A. Well, he was out of doors just when I went there. He came in in a few moments and he and I went in the private room, at least we—I went there. Mr. Tutty was out doors and I sat down in this room and in a few minutes he came in and sat down with me and I read the paper to him—the will—and he said that was all  
 10 right. He wanted to sign it. Then I said to—  
 went out and said to somebody around there to go and get a couple of persons that would write to be witnesses to the will, and in a short time after that Mr. Blanchard and Mr. Kearney came in.

Q. Kearney? A. Kernan I think it was.

MR. KING: Kearns—Daniel Kearns.

A. (Continuing) And when they came in I said to them, I says, “Do you write your names?”  
 20 and they said “Yes.”

Q. This was in the presence of the testator? A. Yes. He was sitting right besides me. Then I said to Mr. Tutty, “You want to make your last will and testament, do you?” He said “Yes.” I said “You want us three men to sign as witnesses?” That’s myself and the other two, Mr. Blanchard and Mr. Kearns, and he said “Yes,” so the other two gentlemen came up by the table—Mr. Tutty and I were sitting by the table—they came  
 30 up to the table and Mr. Tutty took hold of the top of the pen and made his mark and said that was his last will and testament.

Q. Who wrote his name on the will? A. I did. And then these two men were standing by the side of the table and I signed my name as a witness in their presence and in the presence of Mr. Tutty, and Mr. Blanchard, he signed his name in the presence of all of us, and so did Mr. Kearns. And then after it was signed, I said to Mr. Tutty, I  
 40 says: “You sign, publish and declare this to be

*John F. Stickle—Direct.*

your last will and testament in the presence of us, do you?" He said "Yes," and then the other men, the other two men returned, and he told me he wanted to take it home and keep it till such time as it was needed; and I did. And in a short time after that he died.

Q. Then what did you do with the paper? A. Well, when he died, on the day of the funeral Mr. William Tutty came down and wanted me to bring the will up to the house and read it to the family—that is, to his sisters and their husbands and so on that were there attending the funeral, and this was after the funeral—in the afternoon. I took it up and read it to them and then took it home. Then Mr. Tutty and I brought it down to the Surrogate's office here in about nine or ten days after Mr. Tutty died—nine days I guess it was. 10 20

Q. And you found a caveat had been filed against its admission to probate? A. Yes, I think so.

Q. Now, do you know whether Mr. Tutty knew these two men who came in as witnesses—Mr. Kearns and Mr. Blanchard? A. Yes.

Q. Were they neighbors of his? A. Yes. He knew them.

Q. Was it upon your suggestion witnesses were sent for, because as a lawyer you knew it required witnesses, or did he tell you whom to get? A. I don't remember. I said to him we want some witnesses, a couple of witnesses I said, and I don't remember whether he suggested anybody or not. I am not quite sure about that. But, at any rate, I said to Mr. Tutty, I think William Tutty or someone that was there—asked them to see if they could find a couple of men that would be witnesses to the will. 30

Q. And on the day— A. (Interrupting) And 40

*John F. Stickle—Direct.*

when themen came in, Mr. Tutty, John Tutty knew them.

Q. Tutty then came with you to the Surrogate's Office—William? A. Yes.

Q. He is the Executor named in the will? A. Yes.

10 Q. Do you remember whether the testator was living at William Tutty's home at this time? A. I think he was.

Q. And that was the Executor under the will and the chief beneficiary? A. Yes.

Q. Now when he, the testator, gave you these instructions, was there anybody in the room with you? A. Not that I know of. I didn't see anybody.

20 Q. Was anybody there in the room when the will was executed—anybody but you, the testator and these two witnesses? A. No, sir.

Q. What have you to say as to his mental capacity at that time—the execution of the will? A. Well, he seemed to me to be all right mentally. Bodily he was rather feeble, but mentally he seemed to understand everything.

Q. He seemed to understand. Did he understand? A. Yes, he did.

30 Q. How did his condition—his mental condition—at that time compare with the years previous, restricting it to say the two or three years previous? A. Just about the same.

Q. Did you notice any decline or impairment in his mental capacity? A. No. He seemed to understand—he understood just as well then as he had for the last several years.

40 Q. Now, this paper that you have mentioned as being signed—by Tutty by his mark and by three subscribing witnesses—is that the paper writing before you? A. Yes, sir.

*John F. Stickle—Cross.*

Q. And when is it dated? A. The eighth day of May.

At this point the paper is offered for identification by Mr. King, and marked P-1 for identification.

## CROSS EXAMINATION BY MR. RATHBUN:

10

Q. Mr. Stickle, who came for you when—before the will was drawn? A. Why, William Tutty.

Q. William Tutty, the son of the testator? A. Yes, sir.

Q. You were at your home in Rockaway—in the Borough of Rockaway—at the time? A. Yes, sir.

Q. And where did he take you? A. He took me to his house where his father was.

Q. And that's in the Township of Rockaway? A. Yes. 20

Q. At a place called Allen Mine, did you say? A. Yes.

Q. And how far is that from your home? A. I think about four miles.

Q. Did he come for you with a horse and wagon? A. Yes, sir.

Q. Anyone else in the wagon? A. No, sir.

Q. What did he tell you when he came there? 30

Objected to by Mr. King. Objection overruled and exception granted.

A. He said his father wanted to see me and wanted me to come up to his house.

Q. Yes. What else? A. That's all.

Q. Did he tell you what his father wanted to see you about? A. No. He just told me his father wanted to see me, and I went up.

Q. Had he been to see you before that day? A. This— 40

*John F. Stickle—Cross.*

Q. (Interrupting) William Tutty? A. No.

Q. Had the testator, John Tutty, been to see you before that? A. Oh, I had done business for him off and on for a number of years.

Q. Well, when was the last you did business for him? A. Well, I don't remember just exactly, but I think—six or eight months before that I think. I  
10 am not sure about the time. He was at my place.

Q. What was the character of the business you did for him six or eight months before?

Objected to by Mr. King.

Objection sustained.

WITNESS: That's as near as I can tell. Six or eight months I should say it was.

Q. Did William Tutty bring with him any papers?

20 WITNESS: When?

MR. RATHBUN: When he came to see you and get you to take you to his father.

A. No. Not that I know of.

Q. He didn't show you any papers his father sent down? A. No.

Q. On the way to Allen Mine, before you saw his father, did William Tutty discuss with you the errand you were on? A. No. He talked to me  
30 about his father—he had been living at one place and another. His father originally lived up at the Allen Mine at this house where—

Q. (Interrupting) I'm not interested in that. I want to know what he talked to you about. A. I don't remember. We talked about things generally—things we saw as we went along.

Q. Did he tell you about the condition of his father? A. Yes.

Q. What did he say as to his condition?

40

Objected to by Mr. King.

*John F. Stickle—Cross.*

Objection sustained, and exception granted.

Q. Now you finally arrived at the place where John Tutty was, and that happened to be where William Tutty lived?

MR. KING: I object. I move to strike that out. I object to the word "happened" being incorporated in the question. 10

Motion to strike out granted.

Q. And that was the home of William Tutty?  
A. Yes, as I understood it.

Q. And whom did you find there? A. Well, when we arrived there Mr. Tutty drove the horse up to the hitching post and I got out of the wagon and walked in. He drove the horse right near the house. I got out of the wagon and walked in the house and William Tutty stayed out and tied the horse and I walked in. 20

Q. Did he tell you to go on in? A. I don't know whether he did or not. I don't recollect that he did. But we were right close up to the door and the door was open and so on, so I walked right in and Mr. Tutty—John Tutty—was sitting right near the door, and I think that I had seen him sitting there when I got out of the wagon, but I won't be positive about that, but I saw him very soon after I got out and I walked in the door and shook hands with him and we passed the compliments of the day and so on. 30

Q. Don't tell us that—tell us the language—just what you said, not what you did. A. I said "How do you do?" to him and he said "How do you do?" and that he was glad to see me and wanted to see me.

Q. What else did he say? A. I am telling you as fast as I can. He was sitting on a chair and he got up and started to go through a door into 40

*John F. Stickle—Cross.*

the next room and he said "Come in here," and I followed him in and we went in the adjoining room.

Q. Now first, had he called you by name? A. Yes.

Q. Why didn't you say so after asking you for what he said? A. He said "How do you do, Mr. Stickle?"

10 Q. Do you think he recognized you? A. I know he did.

Q. Was anyone else in the room at the time? A. In the room we went in? No, sir.

Q. In the room where you found him. Was anyone else in the room? A. Yes.

Q. Who? A. A couple of ladies.

Q. Do you know their names? A. I think one was William Tutty's wife and I don't know the name of the other one, and I think there was a little girl or two around.

20 Q. Did you speak to the women? A. I think I did.

Q. You spoke to her and she spoke to you? A. I think so.

Q. Did she call you by name? A. I don't remember whether she did or not.

Q. Did the other lady call you by name? A. No. I didn't know her.

30 Q. Which one did you speak to first, Mrs. Tutty or John Tutty? A. I spoke to John Tutty.

Q. And then you turned and spoke to her? A. Yes. After I spoke to Mr. Tutty—this lady, Mrs. William Tutty, was standing pretty well towards the other part of the room—and after Mr. Tutty and I had spoken to each other and shook hands, then she looked up and said "Good morning," or something like that, to me, and I said "Good morning," and that was about all.

40

*John F. Stickle—Cross.*

Q. Yes. Now, did you speak to him about having been sent for?

WITNESS: Speak to Mr. Tutty?

MR. RATHBUN: Yes.

A. I don't know that I did.

Q. You didn't say to him "Did you send for me?" A. I don't remember of saying that at all. 10  
After we passed the time of day why he, as I said, got up and started to go into the other room and said to me "Come in here," and so I followed him in.

Q. You knew what he wanted you for, didn't you? A. No.

Q. You didn't know what he wanted you for? A. No. Not till he told me.

Q. And you didn't learn until you had been taken by him into the other room? A. Yes. 20

Q. Well, when you got into the other room, what did he tell you? A. He said he wanted to make his will and he wanted to make a paper giving William power to transact his business.

Q. Now, did he have any paper from which he read to you what he wanted to do? A. No.

Q. Did he give you any paper? A. No.

Q. He just told you? A. Yes.

Q. Without any prompting? A. Yes.

Q. And what did you do? A. I made a little memorandum of what he told me. 30

Q. Now you say a little memorandum. What did you make it on? A. On a piece of paper I had.

Q. You had it in your pocket or he furnished it? A. No, I think I had it in my pocket.

Q. And how long were you in there together? A. Oh, I can't tell exactly. Probably pretty well on to an hour, I should say.

Q. And it took you a whole hour to receive in- 40

*John F. Stickle—Cross.*

structions which you say you were able to jot down on a little piece of paper? A. Well, I don't know that it took me a whole hour for that, nor I don't know that I was there a whole hour. I was in there some time—pretty nearly an hour I should say.

10 Q. You say a little piece of paper. Have you that here? A. No.

Q. Where is it? A. I threw it away when I got through with it.

Q. How large was it? A. I don't know.

Q. About how large, Mr. Stickle? A. I think it was a half sheet of paper.

Q. Had you gone up there with the paper in your pocket to draw the Will? A. No.

20 Q. You say a half sheet of paper. Was it legal cap paper? A. I don't remember whether it was a legal cap or typewriter paper.

Q. Did you put it in your pocket just before you went there? A. I think so.

Q. You put it in your pocket for the purpose of jotting down what he might want. Is that so? A. If I put it in then, I did. I may have had it in my pocket before. I most always do have some blank paper in my pocket because often I want to make little memoranda and frequently have it there. I don't remember just about it.

30 Q. Did any one interrupt you at all during the hour, or whatever time you may have been in that room? A. No.

Q. Were you talking all of the time you were in that room about the will and power of attorney? A. Oh, no. Not all the while.

40 Q. What else were you talking about? A. Well, I was inquiring about his condition. He was telling me about his ailment and so on, and he seemed to be kind of anxious to tell me about it

*John F. Stickle—Cross.*

and I was anxious that he should do so, and we talked that over quite a little time.

Q. He was in a very feeble condition at the time, was he?

WITNESS: What?

Q. (Repeated) He was in a very feeble condition at the time? A. Well, his ailment incapacitated him considerably from walking around and getting around. 10

Q. And it was a generally feeble condition, wasn't it? A. Well, you might call it so in one sense of the word.

Q. Well, wasn't it? A. Well, so far as his mind was concerned—

Q. (Interrupting) I am talking about his physical condition at the present time. A. Yes.

Q. Wasn't he in a feeble condition? A. Yes.

Q. How old a man was he? Do you know? A. 20  
No, not exactly.

Q. About how old? A. Well, that would only be a guess. I think he was in the neighborhood of seventy—somewhere along there; perhaps a little more. I don't remember.

Q. Then you took the instructions from him? A. Yes.

Q. And after that what did you do? A. I went home and between that time and the eighth I drew up the will and drew the Power of Attorney. , 30

Q. Yes. Had you received any other instructions in the meantime? A. No.

Q. Had William been there to your house in the meantime, between the time you were at his home receiving these instructions and the time when you went again to have the will signed? A. Yes.

Q. When did he come there? A. After we came away from the house up there, while we were coming in the wagon—Mr. Tutty brought me home again— 40

*John F. Stickle—Cross.*

Q. (Interrupting) That is, William Tutty brought you home? A. Yes. While we were coming down I said to him "your father wanted me to make out some papers for him and I would like to have the deeds and I forgot to ask him for them up there" I said "to-day, and I wish that you would get the deeds and bring them down to me,"  
 10 and he said all right, he would, so he did between that time and the day—the eighth—he brought the deeds down and then I prepared the will and —

Q. (Interrupting) Do you know how many deeds there was? A. No.

Q. Was it the next day that William Tutty came down? A. I don't remember.

Q. Do you know how many days before you went back again? A. Well, it was during the  
 20 same week. I think I was up there the early part of the week, maybe Monday, and it was all done in one week anyhow.

Q. And within ten days after this will was drawn he died? A. I don't remember that.

Q. Didn't he? A. I don't remember when he died. It was soon after, but I forget just how long.

Q. On what day did you draw the will, in reference to the time you went to have it executed? A.  
 30 I don't remember that.

Q. Was it the same day?

WITNESS: That I did what?

MR. RATHBUN: Was it the same day?

WITNESS: That I drew the will?

MR. RATHBUN: Yes, was the day on which the will was executed the same as on which you drew it?

40 A. Well, as I—Mr. Tutty, William Tutty,

*John F. Stickle—Cross.*

brought me those deeds and after he brought the deeds I started in then top repara the will and I think I got the will ready for execution that morning that we went up or the day before—one of the two. I know I was drawing it the day before, and whether I got it completed or not I am not quite sure.

Q. I notice the will is typewritten? A. Yes. 10

Q. You did that? A. It was done in my office.

Q. Do you know what time of day it was that you went there the first time? A. No.

Q. Was it in the morning or was it in the afternoon? A. I am under the impression that it was in the forenoon.

Q. Forenoon? A. I think so. I won't be positive about it.

Q. What time of day was it when you went and had the will executed? A. I think it was in the neighborhood of ten o'clock when I left Rockaway. I got up there somewhere in the neighborhood of eleven. I know I got back home about noontime. 20

Q. Did he say whether he had made any former will on either one of these occasions? A. Yes, I think he did. I think he said the first day that I was up there that he had made a will, but he wanted to make another one; it didn't suit him and so on.

Q. Did he tell you when he had made the other one—how long before? A. I don't think he did. 30

Q. Did he show you that other will? A. No.

Q. Did you see it? A. No, I don't think I did.

Q. William didn't show it to you? A. I know that Mr. Tutty, John Tutty, said that he had made a will or two before and that they didn't suit him and that he wanted to make a new will, and so on, and then I think that he said he wanted to get them up, take the wills up that he made 40

*John F. Stickle—Cross.*

before. I think he said Mr. Smith had one and I think he said Mr. Davenport had one if I remember right, and so I think, if I am right about my recollection, that William Tutty, his son, one day came into my office after this will had been made and said to me that he had been to Dover and got the will from Mr. Smith and Mr. Davenport, and

10 I don't know whether he had them in his pocket or in his hand or not, but I didn't look at them or didn't take them.

Q. He didn't leave them with you? A. No. Oh, no.

Q. You had prepared an order on Mr. Smith, Mr. Lyman Smith, for the will in his possession, had you not? A. Mr. Tutty, the old man, told me he wanted to get them up and I said to him that he would have to send somebody for them and that

20 he would have to send a paper—an order—requesting that it be given up, and he told me to fix a paper, and I did make a little note to Mr. Smith and Mr. Davenport and to deliver them up to Mr. William Tutty, I think.

Q. Was that William Tutty or John Tutty that asked you to prepare the order? A. The old man said he wanted to get them up.

Q. Was that the same time the will was signed or you received instructions to draw the will? A.

30 He told me when I got the instructions to make the will that he had made a will or two before, but that was all I think that was said about it. When I took the will up to him to sign and so on, when I read it to him and read about that he revoked all former wills and so on, he said that he ought to get them up, hadn't he, and I said that probably would be well enough and I said to get them up he would have to send a little writing to these

40 men that have the wills to deliver them up, and he told me to fix it.

*John F. Stickle—Cross.*

Q. Did he direct you to use the expressions "beloved daughter" in reference to his daughters?

WITNESS: On my memorandum?

MR. RATHBUN: What's that?

WITNESS: On my memorandum?

MR. RATHBUN: I say, did he direct you to use the expression "beloved daughter" in reference to his daughters? 10

A. He said to his daughters. I don't know whether he said to his beloved or not, that is in the instructions, but I used it in drawing the will. He seemed to think nicely of that and so on.

Q. Now when the witnesses, Edwin Blanchard and Daniel Kearns, arrived, did they come with anyone?

WITNESS: Did they come with anyone? 20

MR. RATHBUN: Yes.

A. I don't know. The first I saw of them they came in the door.

Q. You were still in this private room, as you call it? A. Yes.

Q. What room was that? A. I guess it was the parlor.

Q. Anyone else in that room besides you and the old man? A. No. 30

Q. Did William Tutty come in with the men? A. I didn't see him.

Q. Had you cautioned William Tutty about keeping out of the room?

WITNESS: About what?

MR. RATHBUN: Keeping out of the room.

A. No.

Q. Hadn't told him it would be advisable for him to stay out? A. No. 40

*John F. Stickle—Cross.*

Q. Sure of that? A. Yes.

Q. Did you write the name "John Tutty?" A. Yes.

Q. Opposite the seal? A. Yes.

Q. Did you write that before the witnesses arrived?

WITNESS: Before what?

10 MR. RATHBUN: Before the witnesses arrived.

A. I think not, but I ain't quite sure.

Q. Yes. A. I asked Mr. Tutty about—I read the will to him and says "You write your name?" and he said no, he didn't write and so—

Q. (Interrupting) Do you know whether he had ever written his name? A. I don't know.

Q. In any of his business deals with you, you had never seen him write it? A. I don't remember that I had.

Q. So that the use of a mark was not due to the then present condition? A. No, I think not. I don't think that he ever wrote his name, to my recollection, but I am not sure.

Q. When did you make the mark—or when did he make the mark? A. After these men came in, these two men, Mr. Blanchard and Kearns, I says to him, "Now, Mr. Tutty, do you want us three to witness your will?" and he said "Yes," and then I says to the two witnesses "Come up here by the table where you can see" and so they came up by the table and when they got up by the table, then I says "Mr. Tutty, you make your mark," and he did in their presence and so on, and they signed as witnesses and I signed as a witness.

Q. Then you signed your name and they signed theirs? A. Yes.

WITNESS: I was going to say.

*John F. Stickle—Cross.*

MR. RATHBUN: I am not asking any questions, Mr. Stickle, now.

Q. Now you say after the death of John Tutty you went up there with the will and read it? A. Yes.

Q. Do you remember having a conversation with James Monahan with reference to it? A. I don't know as I do. That is one of the sons-in-law, isn't it? 10

MR. RATHBUN: Yes.

A. (Continuing) He was there and we didn't have any particular conversation that I remember of.

Q. Didn't he make some remark about the old gentleman making a will, and did not you, in reply, say "Well, he didn't know what he was doing," and— A. (Interrupting) No, sir. 20

Q. (Continuing) and didn't James Monahan then say to you "Do you mean to say he didn't know what he was doing when he made the will?" and you said "Well, he didn't care what he was doing?" A. No, sir. No such conversation as that at all; not a particle.

Q. Now, you just describe to us his physical condition the day you first went there? A. Well, he seemed to be—it seemed to be a hard matter for him to walk around, and he didn't seem very strong. 30

Q. Well, how did he manifest that? A. Well, I noticed when he got up to walk from the room—from one room to the other, that he walked kind of careful and that he didn't take very long steps, and so on.

Q. Did he use any cane? A. I don't think he did. I don't remember that he did.

Q. Did he walk along the side—take hold of 40

*John F. Stickle—Cross.*

chairs or the side of the room or anything like that? A. I didn't notice him doing that.

Q. Was he tottering? A. No, not tottering.

Q. Well, can't you describe it a little more definitely? A. I don't think I can.

Q. You say that he appeared feeble. What did he do, or what didn't he do that lead you to think  
 10 he was feeble? A. Well, as I said, he got up kind of leisurely off the chair and walked very slow like and took short steps and so on. That's about all I can say.

Q. Did he wear glasses? A. I don't remember.

Q. What did he appear to be doing when you went into the room? A. If I remember right, he was not doing anything.

Q. Sleeping? Eyes closed?

WITNESS: What?

20

MR. RATHBUN: Were his eyes closed.

A. I don't think so.

Q. Did you see him before you got into the house? A. Yes, I saw him through the door or window. I forget just which.

Q. He was sitting near either the door or the window? A. Yes.

Q. Was he looking out of the window? A. No, he didn't seem to be looking out of the window.  
 30 He seemed to be sitting kind of sidewise to the door or window.

Q. Can you tell whether he was engaged in conversation with the others when you went in? A. No, I don't know.

Q. Was the door open—before you went in—as you came up to the house? A. I think it was. I think he was sitting in a small like room and I guess there was a stove in there and a fire. I guess it was warm.

40

*John F. Stickle—Cross.*

Q. Now, in giving you instructions, did he appear to have any hesitation? A. No. No, he seemed to know what he wanted to do, all about it, right straight along.

Q. Read it right off to you; told you right off without any effort on his part? A. No. No effort. He simply said "I want to give this one so and so" and when he said that, I make a memorandum of it, and when I got the memorandum he saw I was through, and I said "What else?" and he told me another point. 10

Q. Well, did he explain to you the motive in making any of the bequests or devises that he made, at the time he was giving you these instructions? A. Well, he said that he hadn't very much and that he expected to stay with William while he lived and he said that his condition was such that he required a great deal of waiting on. It seemed to be necessary, as I gathered from what he said, to have somebody near by him to wait on him day and night. 20

Q. Did he tell you what his ailment was? A. Well, there was something seemed to be the matter with his water—kidneys and bowels &c.

Q. Did he tell you how long he had been there at William's? A. I don't think he did.

Q. Had William told you how long he had been there? A. I don't remember, but I got the impression that he hadn't been there a great while from what somebody said. I don't remember who it was whether it was him or William or who. 30

Q. Did he explain to you why he wanted to leave \$100 to each of his daughters? A. No.

Q. You made no inquiry of why he made so much smaller amounts or bequests to them? A. No.

Q. And the others? A. No. I think from his conversation and talk— 40

*John F. Stickle—Re-direct.*

MR. RATHBUN: Not what you think. If you can tell us what he said, I would be glad to have it.

10 A. (Continuing) Well, he said that his condition was such that he was a good deal of trouble to anybody that he lived with and he expected to stay with William as long as he lived and he felt that what he had would not be any more than to compensate him if he lived any length of time, and he said that he wanted to remember his daughters; they had been kind to him and so on, and said he hadn't much to give them.

Q. What's that? A. He said he wanted to remember his daughters; they had been kind to him; that he hadn't much to give and he did give them \$100 apiece.

20 Q. Did he compare the contents of this will with what he'd given in former wills? A. No, he didn't tell me anything about it.

Q. Didn't tell you about the former wills? A. He didn't tell me anything about the contents of the former wills at all.

Q. Did he recognize these witnesses as they came in? A. Yes.

30 Q. Call them by name? A. I don't remember whether he called them by name or not, but he seemed to recognize them.

Q. Had you met them before? A. I had seen one of them, Mr. Blanchard, before.

Q. How old are you, Mr. Stickle?

WITNESS: Sir?

MR. RATHBUN: How old are you?

A. I am seventy-two.

RE-DIRECT EXAMINATION BY MR. KING:

40 Q. Mr. Stickle, you said with reference to writ-

*John F. Stickle—Re-direct.*

ing the name John Tutty on the will, you were not sure whether you wrote this before—the name John Tutty—before the witnesses came in or afterwards. Will you look at the will and give me your best recollection of it? Not the mark—not his mark, but the words “John Tutty.” A. My recollection about it is that when the witnesses came in that I asked him whether he wrote his name—asked Mr. Tutty—and he said one, he made his mark. That would be my recollection about it, and I wrote his name then, “John Tutty” and he made his mark and the witnesses signed. 10

BY THE COURT:

Q. Did he read the paper, Mr. Stickle? A. No, sir; I read it?

Q. Read it to him? A. Yes, sir.

WITNESS: There's one that I was going to say 20

MR. RATHBUN: Objects to the witness making a statement excepting in answer to questions.

MR. KING asks that the witness be allowed to make a statement, and he is directed to do so.

WITNESS: Mr. Tutty lived in Rockaway for, I think in the neighborhood of fifteen or twenty years before he died, except two or ~~three~~ years before he died that he lived near by me, and I used to see him very frequently—every two or three days, and was very well acquainted with him, and he lived at this place where William Tutty lives. That was his old home, when his first wife was living. She died there. After a time he came to Rockaway and married a lady in Rockaway. Then he lived in Rockaway with that lady near by me until she died, and she died three or four years 30 40

*Edwin Blanchard—Direct.*

ago I think. Then after she died he went away from Rockaway and lived around in different places.

BY MR. RATHBUN:

Q. That last lady who died—you drew her will, didn't you? A. Yes.

10 Q. And it very much offended John Tutty, didn't it—the provisions of that will?

Objected to by Mr. King.

Objection sustained. Exception granted.

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EDWIN BLANCHARD, a witness produced on behalf of the Proponents, testified as follows:

DIRECT EXAMINATION BY MR. KING:

20 Q. Mr. Blanchard, how old are you? A. Well, I am sixty-seven—sixty-eight last April.

Q. Where do you live? A. I live up near Allen Mine.

Q. Did you know John Tutty? A. Yes, sir.

Q. For how many years? A. Oh, for quite a number of years.

Q. As many as— A. Oh, I knew him for—I couldn't tell exactly. Twenty-five or thirty years—thirty years I suppose.

30 Q. Do you remember going up to his house and signing a paper? A. Yes, sir.

Q. Who came for you? A. William Tutty.

Q. How far do you live from John Tutty? A. Oh, not very far. About an eighth of a mile, I suppose.

Q. Did you go over to Mr. John Tutty's? A. Yes, sir.

40 Q. Who showed you into the house? A. Nobody.

*Edwin Blanchard—Direct.*

Q. Where did you find John Tutty?

WITNESS: Old Mr. Tutty, you mean?

MR. KING: Yes.

A. Sitting in the room with Mr. Stickle.

Q. Did Mr. William Tutty go in with you? A.  
No, sir.

Q. Did Mr. William Tutty go back with you? 10  
A. No, sir. I came home alone.

Q. When you first went in the room, what did you do? A. Spoke to Mr. Tutty.

Q. What did he do? A. Spoke back. Then I spoke to Mr. Stickle.

Q. You knew Mr. Stickle? A. Yes, sir.

Q. Then what happened? A. Mr. Stickle asked him then if he wanted us men to sign this paper, and he said yes.

Q. Had the other man come in with you? A. 20  
Yes.

Q. Who was that? A. Mr. Kearns.

Q. Did you know him? A. Yes.

Q. How long? A. Fifteen or sixteen years.

Q. So that at the time Mr. Stickle made this statement, who was in the room? A. Mr. Kearns and me, Mr. Stickle and Mr. Tutty.

Q. Now what did Mr. Stickle say?

WITNESS: With regard to the will?

MR. KING: Yes. 30

A. He asked him—he said he had sent for these men to act as witnesses, and asked him if he wanted to sign it. Mr. Stickle said “Yes.”

MR. KING: Mr. Tutty said “Yes.”

WITNESS: Yes.

Q. Was the will read over in your presence? A.  
No, sir. I don't know anything in the will.

Q. Did Mr. Stickle have the paper in his hand? 40

*Edwin Blanchard—Direct.*

A. The paper lay in front of Mr. Stickle on the table.

Q. Then what did next happen? A. Then I think Mr. Stickle asked Mr. Tutty if he could write.

Q. What did Mr. Tutty say? A. I think he said "No."

10 Q. What did Mr. Stickle do then? A. I think he said he would have to make his mark.

Q. Then what did Mr. Stickle do? A. Mr. Stickle steadied his pen.

Q. I show you the words "John Tutty." Do you know who wrote them? A. Mr. Stickle, I guess, wrote that.

Q. Is it your recollection that Mr. Stickle wrote "John Tutty" there? A. Yes, sir.

20 Q. Now after he wrote "John Tutty," who made the mark? A. Mr. Tutty and Mr. Stickle together.

Q. Did Mr. Tutty's hand touch the pen? A. Yes, sir.

Q. At the time the mark was made? A. Yes, sir.

Q. Now, up to that time, had either you or the other witnesses signed the paper? A. No, sir.

Q. After Tutty had made his mark, then what happened? A. Then I think Mr. Stickle signed his name.

30 Q. Where were you and Mr. Kearns and Mr. Stickle when Mr. Tutty made his mark? A. Sitting right up beside the table—right close to the table.

Q. So that each could see the other? A. Yes, sir.

Q. Then you say Mr. Stickle wrote his name? A. Yes, sir.

40 Q. Where was Mr. John Tutty and you and Mr. Kearns when Mr. Stickle wrote his name? A. Right beside Mr. Stickle.

*Edwin Blanchard—Direct.*

Q. Then who next signed? A. I did.

Q. Where were these three men when you signed? A. All there.

Q. After you signed, who signed his name? A. Why, Mr. Kearns signed after I did.

Q. Where were you other three men when he signed? A. There.

Q. After that was done, what happened to the paper? A. Mr. Stickle asked Mr. Tutty if this was his last will &c., and he said "Yes." 10

Q. And then what became of the paper? A. I don't know. I came out.

Q. What was the condition of Mr. Tutty's mind on the day this will was signed—the paper purporting to be the will? A. Well, the man was weak physically.

MR. KING: Yes.

20

A. (Continuing) but his—but he seemed to talk all right.

Q. What was his—you had known him for years before that? A. Yes.

Q. How did his mental condition compare with that—with what it had been for the years previous? A. Well, he certainly was weaker.

Q. His mind? A. His mind seemed to be strong enough.

Q. How did his mind compare with previously? A. About the same. 30

Q. But physically he was weaker, was he not? A. Yes, sir.

Q. Did you notice whether he got up or not? A. I saw him get up after Mr. Stickle went out and I saw him walk out of the parlor into the kitchen. He was quite weak.

40

*Edwin Blanchard—Cross.*

CROSS EXAMINATION BY MR. RATHBUN:

Q. Just tell us all the conversation you had that day with John Tutty? A. I didn't have any conversation with John Tutty. I spoke to him—said "How do you do, Mr. Tutty?" He said "How do you do?" That was when I first went in, and also to Mr. Stickle.

10 Q. While you were in there, about all that was said by John Tutty was "How do you do" and in response to Mr. Stickle's question he said "Yes, sir" and whether he wanted you to act as witness he said "Yes sir?" That was about all the conversation? A. Yes, sir.

Q. And there was not very much said by him from which you could judge as to his mental capacity, was there? A. On that occasion.

20 Q. There was not very much said by which you could judge anything about his mental capacity? A. Well, there was not much said between any of us, only what Mr. Stickle said to him.

Q. I mean as to what he said. From anything he said—he said very little from which you could judge of his mental capacity. Isn't that right? If you asked him anything, he'd answer you "Yes" wouldn't he? He'd say "Yes, sir?" A. Yes.

30 Q. Outside of that he didn't pay much attention to things did he? Didn't seem to take much interest in things, did he? A. He sat there looking around. He seemed quite bright.

Q. How long had you known him? A. Its a good many years since I first seen him.

Q. How long? A. Twenty-five or thirty years.

Q. And yet all he said to you was "How do you do" and when you went away he said "Good bye?" A. I merely knew him. I didn't say we were personal friends. He used to keep the place.

40 Q. The neighborhood is not a very large one

*Edwin Blanchard—Cross.*

where you live, is it? A. Well, quite a neighborhood. Sure it is no city.

Q. Seriously, its a comparatively small village—country, a county place? A. Yes.

Q. Had you known him very well and he knew you very well, hasn't he? A. Yes.

Q. And yet on that occasion practically nothing was said between you? A. Nothing except what I said. I said "How do you do, Mr. Tutty," and he said "How do you do." 10

Q. When he had his hand on the pen, was anyone holding his arm? A. No, sir.

Q. You didn't hold his arm? A. No, sir.

Q. Mr. Stickle didn't hold his arm? A. No, sir.

Q. Did Mr. Stickle hold the pen while he just had hold of the end of the pen? A. Yes, sir.

Q. He impressed you as being very weak, you say? A. Yes, his condition seemed quite weak— feeble. 20

Q. How did he indicate that? A. Well, by his looks.

Q. You could see he had failed a good deal from what he used to be? A. Yes, sir.

Q. Was he an older man than you? A. Yes, I think he was.

Q. Did you give your age? A. Sixty-seven.

Q. He impressed you from the little that he did there that—from his movements, as being very weak, did he? A. Yes, sir. He seemed to be weak and wasn't the man he used to be by a good ways. 30

Q. Do you know how long he had been at William Tutty's?

WITNESS: This last time?

MR. RATHBUN: Yes.

A. No, sir, I couldn't say.

*Edwin Blanchard—Re-Direct.*

*Daniel Kearns—Direct.*

RE-DIRECT EXAMINATION BY MR. KING:

Q. One thing I forgot. This is your signature on the will, isn't it? A. Yes, sir.

Q. That is the signature of Mr. Stickle, your signature and Mr. Kearns'? A. Yes, sir.

10 MR. KING: I am showing witness Exhibit P-1 for identification.

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DANIEL KEARNS, a witness produced on behalf of the Proponents, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KING:

20 Q. Mr. Kearns, where do you live? A. Near Allen Mine.

Q. How old are you? A. Nearly fifty-eight.

Q. Did you know John Tutty in his lifetime? A. Yes, sir.

Q. Did you witness a paper for him? A. Yes; sir.

Q. How did you come to go over to Tutty's house? A. They came and asked me.

Q. Who? A. Mrs. Tutty.

Q. Mrs. William Tutty? A. Yes.

30 Q. And when you got there, whom did you find at Tutty's house? A. Mr. Stickle and Mr. Blanchard.

Q. When you got in the house did you speak with Mr. Tutty? A. Not then, no. Not just then.

Q. When you went in the room? A. Not just then.

Q. Did he speak to you? A. No, sir. I went over to him after a little while and asked him how he felt, and he said "A little better to-day."

40 Q. Was that before the will was executed or afterward? A. After.

*Daniel Kearns—Direct.*

Q. When you went in, what did Mr. Stickle say about the will, if anything? A. Well, he said "Mr. Tutty, you say this is your last will and testament?" and he said "Yes," and Mr. Tutty touched the pen while Mr. Stickle made the cross on it. and Mr. Stickle signed it, Mr. Blanchard signed it and I signed it.

Q. Did each of you sign it in the presence of each other? A. Yes, sir. 10

Q. All present at the same time? A. Yes, sir.

Q. After the will was signed, what was done? A. Mr. Stickle said "You declare this to be your last will and testament?" and he said "Yes."

Q. I show you now paper marked P-1 for identification and ask you if that is your signature on the bottom of the second sheet? A. Yes, sir.

Q. Were the names John Tutty, his mark, John F. Stickle and Edwin Blanchard all made by the respective parties at the same time and in the presence of each other? A. Yes, sir. 20

Q. Was there anything said about what you were to do when you got there? A. I was to witness a will.

Q. Who said that? A. Mrs. Tutty told me Mr. Tutty wanted me for a witness to the will.

Q. Was that before you went down? A. Yes.

BY MR. RATHBUN: 30

Q. Mrs. Tutty? A. Yes, sir.

BY MR. KING:

Q. Who asked you to sign a will? A. Well, Mr. Tutty wanted me to come there at once.

Q. When you got in where Mr. Stickle and Mr. Tutty were did either Mr. Stickle or Mr. Tutty say anything to you about witnessing a will, after you got in the house? A. I forget exactly. He told us we were there to do it. 40

*Daniel Kearns—Cross.*

Q. To do what? A. To witness the will.

Q. Was that said in Mr. Tutty's presence? A. Yes, sir.

## CROSS EXAMINATION BY MR. RATHBUN:

10 Q. Mr. Stickle said he wanted you for a witness, did he? A. No, he said "We are all three here now" and went on with it.

Q. After Mrs. Tutty came for you, where did she go? A. Came home, I suppose.

Q. Did she walk home with you? A. Not along with me, no.

Q. Did she go ahead of you or follow you? A. I don't remember. Afterwards, I think.

Q. And you say when you came into the room, Mr. Tutty didn't speak to you nor you to him? A. Not right away. A little after; not right away.

20 Q. What did you say to him? A. Asked him how did he feel to-day.

Q. What did he say? A. He said "A little better to-day."

Q. What else did you say? A. He says "I know your features but I can't call you by name." I said "My name is Daniel Kearns." He said "I known you all right."

30 Q. How long had you known him? A. Forty-five years or more.

Q. You had worked together? A. I had worked for him—with him.

Q. When had you seen him last before that? A. It might have been a year.

Q. And you two had lived in this neighborhood for a good many years together? A. Yes, sir.

Q. Now, do you remember when he was taken to William Tutty's house? A. Not exactly, I heard about it at the time or shortly after.

*John F. Stickle—Direct.*

JOHN F. STICKLE, a witness produced on behalf of the Proponents, here resumed the stand.

FURTHER CROSS EXAMINATION BY MR. RATHBUN:

Q. Mr. Stickle, is it your usual custom to have three witnesses to a will?

Objected to by Mr. King.

10

Objection sustained and exception granted.

Q. How is it you had three witnesses to this will? A. Well, I said that we need two witnesses and I told William Tutty, I think it was, that he'd have to get somebody to be witnesses. Well, pretty soon these two men came in. Well, then I thought under all the circumstances that it would be just as well for me to sign as a witness too, so I did.

Q. What were the circumstances which were to require three witnesses to this will?

20

Objected to by Mr. King, and question withdrawn by Mr. Rathbun.

Q. To what circumstances do you refer in your answer? A. Well, in the first place the old gentleman didn't write and had to make his mark I found out, and I thought maybe that it would be just as well for me to see him make his mark and to be a witness as to rely altogether upon the other two.

30

Q. And isn't it your custom to witness wills unless you are one of the beneficiaries under the will?

Objected to by Mr. King.

Q. Wills that you have drawn yourself?

MR. KING: That is objected to still.

Question allowed.

40

*John F. Stickle—Direct.*

A. Yes, sir.

Q. Why did you send for more than one witness? A. I don't know in particular. I didn't care particularly about being a witness. You asked me about my custom—

10 MR. KING: (Interrupting) No, I object to that.

Q. And yet you were the first one to sign as a witness? A. Yes.

Q. Now, when did you change your mind? A. I changed my mind just when Mr. Tutty made his mark. If Mr. Tutty had written his name, I don't believe I would have signed as a witness.

Q. Who was in the house when you went there with the will?

WITNESS: When I went there with the will?

20 MR. RATHBUN: Yes. Who was in the house?

A. I don't know.

Q. That you saw? A. When I went there with the will Mr. Tutty was out doors, in the back yard, and there was a lady in the kitchen and I don't know but two. I think one was Mr. William Tutty's wife was in the kitchen, and I am not sure whether there was another woman there or not. I

30 am not positive.

Q. If there was— A. (Interrupting) She says, "Walk in and take a seat, Mr. Tutty's out and will be in soon." She showed me in the parlor, as I called it, where we were before. There was a window right behind me and I turned toward it and saw Mr. Tutty, the old gentleman, in the garden, and he was coming towards the house.

Q. Did you suggest that these women might act as witnesses? A. No.

40 Q. Why not?

*John F. Stickle—Direct.*

Objected to by Mr. King.

Objection overruled and exception granted.

A. Well, in the first place, I am not sure that there was more than one woman there, and that was William Tutty's wife. Of course I wouldn't ask her to be a witness. But I have made it a rule—

10

MR. KING: (Interrupting) I object to that. Objection sustained.

Q. Mr. Stickle, was not the thought in your mind that the mental condition of this man and his physical condition too made it questionable whether he was competent to make a will? A. No, sir. I didn't have any doubt but what he was competent. If I had, I don't think I would have drawn the will for him. I make it a point—

20

Q. (Interrupting) Never mind. Had William Tutty suggested to you that there might be a contest over this will? A. No, sir.

MR. KING: I object.

THE COURT: Well, the question is answered now.

MR. KING: I close my case and offer the will for probate.

At this point the caveators announced their desire to continue the case.

30

MR. KING: If they do not go on with the case, I make application for the appointment of Mr. William Tutty as Administrator ad litem.

It was ordered by the Court, and the bond fixed at \$1000.

At this point the case was adjourned to July 10th, 1914, at ten o'clock in the forenoon.

R. C. MATTHEWS,  
Stenographer.

40

## MORRIS ORPHANS' COURT.

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 IN THE MATTER

*of*

10 The Application for Probate of a  
 Certain Paper in Writing Pur-  
 porting to be the Last Will and  
 Testament of JOHN TUTTY, late  
 of the County of Morris, De-  
 ceased.

On Caveat.  
 Book Two.

20 Transcript of shorthand notes of testimony taken  
 in the above matter, before Hon. Joshua R. Sal-  
 mon, Judge of said Court, at the Court House in  
 Morristown, New Jersey, on Friday, the twenty-  
 fifth day of September, in the year one thousand  
 nine hundred and fourteen, by R. C. Matthews,  
 stenographer.

## A P P E A R A N C E S :

CARL V. VOGT, ESQ., of the firm of King & Vogt,  
 Proctor for and of Counsel with Proponent.

MESSRS. CHARLES A. RATHBUN and LYMAN M.  
 SMITH, Proctors for and of Counsel with Cave-  
 ators.

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*Mary Flanagan—Direct.*

MARY FLANAGAN, a witness produced on behalf of the Caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live? A. Well, West End Heights, Dover.

Q. And how long have you been living there? A. **10**  
Three months.

Q. Prior to that where did you live? A. Wharton; Pine Street, Wharton.

Q. How long had you lived in Wharton, about? A. Two years.

Q. Did you know John Tutty? A. Yes, sir.

Q. How long had you known him? A. I've known him several years.

Q. Did he live at your house at any time? A. **20**  
Yes, sir.

Q. When? A. Well, he came to my house in May, two years ago—or one year ago.

Q. May, 1913? A. Yes, sir.

Q. And how long did he live at your house? A. He was there almost one year, lacking a few days.

Q. What was he doing at your house? A. Well, he was not doing anything in particular.

Q. Living there? A. Living there.

Q. Did anyone come there with him? A. No, **30**  
sir.

Q. Did anyone stay there with him? I mean any of his relatives. A. No, sir.

Q. What was his condition, his physical condition, while there? A. He went around very well until Thanksgiving day he was taken with a cold.

Q. Thanksgiving, 1913, you mean? A. (Witness nods head.)

Q. And from that time on, what was his condition? A. Well, the doctor attended him. He was **40**  
sick.

*Mary Flanagan—Direct.*

Q. Well, how did he appear physically for the rest of the time he was in your house? A. Well, I couldn't say. He appeared like a man that had a doctor when he wanted him.

Q. Well, was he a weak or a strong man? A. Well, he wasn't so very strong.

Q. Was he an old man? A. Yes, sir.

10 Q. About how old? Do you know? A. He always said he was about 84.

THE COURT: About 84?

WITNESS: Yes.

Q. How was he mentally? A. Well, he went around very well through the house.

Q. Did you notice anything peculiar about him after Thanksgiving? A. Once in a while, coming on to the last, he did act kind of—

20 Q. (Interrupting.) Now, what did he do or say which led you to think he was peculiar?

MR. VOGT: I think the question should be answered. Let her finish her answer.

A. (Continued.) Queer at times.

THE COURT: Tell us what he did or said that led you to believe that he was queer or acted queer.

30 A. Well, at the time I didn't really notice him. I just passed it off, thinking it was his old age that had him to notice or say different queer things.

Q. What were some of the queer things he said?

A. Oh, he asked how long I'd lived there and how long my mother was dead and all such as that.

Q. Well, what else? Anything you recall? (Witness fails to answer promptly.) Well, can

40 you answer, Mrs. Flanagan?

*Mary Flanagan—Direct.*

WITNESS: Well, what will I answer, please?

MR. RATHBUN: I asked if you could recall anything else that he said which was peculiar or queer.

A. Well, he kept wondering if he was going to get better and how he would like to go out around, and such as that. 10

Q. What impressed you about those things as being queer? Anything? Won't you kindly answer me?

WITNESS: Well, I don't understand what you mean.

MR. RATHBUN: What did he do or say which was queer?

A. He'd look around under the table and wonder who was there, asking what they were coming around there after him for. He wished to remain there. 20

Q. Was anybody attempting to take him away from there at that time? A. No, sir.

Q. And yet he'd say, why couldn't he stay there? A. He had an idea, I suppose, he wanted to stay there.

Q. There was no attempt to take him away that you know of? He kept saying to you, what did they want to take him away for, and why couldn't he stay there? Is that right? A. Well, he had thought he might be better if he went to the hospital or some place like that, and he got that on his mind. Talking about it and wishing to know if he couldn't stay with me. 30

Q. And you have a piano in your house? A. Yes, sir.

Q. Did he say anything about that piano? A. Well, he would go to the piano and try to move it and ask to get behind it to see if the men were 40

*Mary Flanagan—Direct.*

working all right. He'd imagine he was in the mine.

MR. VOGT: I move to strike out the latter part of that answer.

Motion granted.

Q. What did he say the men were doing, if anything? A. Working in the mine.

10

Q. Did that occur more than once? A. Yes, sir.

Q. And at the time were there any men behind the piano? A. No, sir.

Q. Was anyone behind the piano? A. No, sir.

Q. Did you have a spittoon or cuspidor in the room? A. Yes, sir.

Q. Did he say or do anything about that? A. Yes, sir, he would often throw it on the wall.

20

Q. How often did you see him do that? A. About three times.

Q. Did he object to its being in the room? A. No, sir.

Q. Did he give any reason for throwing it? A. Well, he didn't want it there, he said.

Q. Well, after throwing it, what would he do for a cuspidor? A. I'd soon bring it back to him.

30

Q. Why would you take it back to him? A. To have him use it.

Q. On your own volition or at his request? A. My own.

Q. Now, did he—did you hear him say anything else which indicated he was imagining things? A. Yes.

Q. What did you hear him say? A. He would often look out of the window and imagine he seen horses and wagons and men.

40

Q. When horses, wagons and men were not there? A. Nothing at all.

*Mary Flanagan—Direct.*

Q. What would he say about them? A. He'd want us to go and look and see them. He would ask if I knew who they were.

Q. How did he say that? What words did he use? A. "Come here, come here, quick, and tell me who they are."

Q. And when he said those things, did you respond and go there? A. No, sir. 10

Q. Then how would you know there were no horses and wagons and men there? A. I would see nothing there but the tow path and I would say, "Uncle John, there's nothing there."

Q. Nothing but the tow path along by the window in the room where he sat? Then what would he say, if anything? A. He'd only laugh and sit down and maybe doze off to sleep. He slept a great deal of his time.

Q. Do you recall anything else he may have imagined he saw? A. He'd see funerals that went by; in the looking glass he'd see little pigs and cows. 20

Q. How did you know that? A. Because he'd tell me to step there and see them.

Q. How frequently did you hear him say things like that? A. Well, coming on evening, for a couple of weeks before he was taken away.

Q. How many times did you hear him say that? A. Well, say five or six times. 30

Q. How many times did you hear him talk about the funeral processions going by? A. The same amount.

Q. And, as a matter of fact, were there any funeral processions going by when he spoke of them? A. No, sir.

Q. He had asthma, did he not?

WITNESS: Sir?

MR. RATHBUN: He had asthma, did he not? 40

*Mary Flanagan—Direct.*

A. Yes, sir.

Q. Do you remember any occasion in the Spring of this year when he had a specially bad attack of it, while at your house? A. Well, coming on Spring we thought he was getting better. The doctor only came about once a week.

Q. Well, in the Winter, the latter part of the  
 10 Winter, do you— A. (Interrupting.) Late in the Winter he had a severe cold and had grippe.

Q. Do you remember any occasion when Mr. Rourke was there, the father and his nephew, and William Tutty was there? A. He came to see him.

Q. Well, do you remember any particular conduct? Do you remember Ash Wednesday of this year? The night of Ash Wednesday? A. Yes, sir.

Q. And did you notice anything about his con-  
 20 duct that night? A. He had a very weak spell that night.

Q. And did he say anything queer at that time? A. Yes, sir.

Q. What? A. Well, there was water running down the walls—not to sit down we'd get so wet.

Q. He said water was running down the walls? A. Yes, sir.

Q. How did he express himself then? What words did he use? A. Well, he wanted us to look  
 30 and see the water running down the wall.

BY THE COURT:

Q. How did you know he wanted that? How did you know he wanted you to look at the water? A. He'd say, "Oh, Mary, look at the water. We'll all be wet."

BY MR. RATHBUN:

Q. Was any water running down the walls at the time? A. No, sir.

Q. Was there water on the floors at the time?  
 40 A. No, sir.

*Mary Flanagan—Direct.*

Q. Did he ever talk to you about his son, William? A. Yes, sir.

Q. What did he say to you about him? Tell us what you recall? A. His son William called there to see him quite often.

MR. RATHBUN: Go ahead. Go ahead and tell us.

10

A. (Continued.) Especially when it would come near his rent time he'd say that he stopped away then at that time.

Q. What would John tell you or say in regard to—about William, or about his property, or about his relations with William? Tell us anything you recall. Did you hear John Tutty—did John Tutty say anything to you, for instance, about William Tutty—how he was going to leave his property? A. Yes, sir.

20

Q. Well, what did he say? A. He wasn't satisfied, at the time, to leave his property with him.

Q. Did he say why? A. He very often said to me he wasn't deserving of it.

Q. Did he explain why he wasn't deserving? A. Yes, sir.

Q. What did he say? A. Because he wanted to remain there.

THE COURT: That is, who wanted to remain where?

30

Q. Who wanted to remain? A. John Tutty wished to remain at their home, and when he wished to remain there, he said Will Tutty wasn't deserving of it.

Q. Wasn't Will Tutty trying to induce his father to go away? A. No, sir.

Q. Then what made John Tutty make that remark? A. This is a year ago when he left their place and came with me.

40

*Mary Flanagan—Direct.*

Q. When John Tutty left where Will Tutty was and came to you? A. Yes.

Q. Well, was he dissatisfied about having Will Tutty remain at the saloon? A. No, sir.

Q. Did he say anything about why he left Will Tutty and why he didn't stay with Will Tutty? A. Because they didn't want him to stay there.

10 Q. What did he say about it? A. He said he thought he ought to have a life right in the place but he couldn't stay, so he came to me.

Q. Did he say how much he was going to leave Will Tutty by his will? A. He—in his will he left him the place.

MR. VOGT: I ask to have that struck out.  
Motion granted.

Q. Did he say to you how much he was going  
20 to leave Will Tutty by his will?

Objected to by Mr. Vogt as leading.  
Objection overruled.

A. Yes, sir.

Q. Now, what did he say? A. Well, first he said he wasn't deserving of \$5 being left him. After another day or two Will came there and talked to him and he decided to leave him the old homestead.

30 Q. The homestead is the property in Wharton? A. No, sir.

Q. Where? A. Allen Mine.

Q. Now, you say that he decided to leave the homestead to Will Tutty. What did he say to you which led you to think he decided to do that?

A. Because Will came there and said the least he might do was to leave him that much.

Q. Did you hear him tell Will anything? A. Yes, sir.

40 Q. What did he tell Will? What were the

*Mary Flanagan—Direct.*

words he used, if you can recall them? A. Well, he told that he always said he'd leave that place in the name of a Tutty, and for him to be satisfied and contented and he would leave it with him.

Q. Yes. You don't remember the exact language he used? A. No, sir.

Q. Did he make any will while he was at your house? A. Yes, sir. 10

Q. Were you present when the will was made? A. Yes, sir.

Q. And who else was there? A. Well, Mr. Davenport.

Q. Yes. Who else? A. His wife.

Q. Anyone else? A. John Tutty and myself.

Q. And do you remember when that was made?

A. I think it was around December.

THE COURT: 1913? This last December? 20

WITNESS: November, just after Thanksgiving.

Q. Mr. Davenport, the lawyer? A. Yes, sir.

Q. And who got Mr. Davenport there? A. Father Carew.

Q. Father Carew. He lives there at Wharton, does he? A. No, sir.

Q. Where does he live? A. Well, it's Wharton; St. Mary's parish.

Q. He was looking after John Tutty? A. Yes. 30

Q. Was this conversation you heard John Tutty have with William Tutty, in which he told William Tutty he was going to leave him something—was that before or after the making of this will, in November? A. It was after.

Q. After? A. After.

Q. How did he come to tell Will Tutty he was going to leave him the homestead and that he ought to be satisfied with that? A. Because Will Tutty came there and asked him about it. 40

*Mary Flanagan—Direct.*

Q. And what did Will Tutty say to him? A. That he ought to leave him that and—

Q. Did Will Tutty say anything about the rest of the property? A. No, sir.

Q. How many wills were drawn for John Tutty while he was at your house? A. One.

Q. Did you see it signed? A. Yes, sir.

10 Q. Had another one been drafted or prepared which was not signed? A. The same one was a little contradicted a few days after.

Q. A few days after the will that was signed at your house, he drafted another will? A. He had it fixed out a little different.

Q. Who fixed that? A. Mr. Davenport.

Q. Mr. Davenport came the second time, then? A. Yes, sir.

20 Q. And what change was made? Do you remember? Do you know? A. Yes, sir.

Q. What was changed? A. There was a change made to leave him the old homestead and his sisters—

MR. VOGT: Just a minute. His sisters what?

WITNESS: A change made on the will.

Q. What was to be done with the sisters? A. To leave them an equal share; that is, both alike.

30 THE COURT: In what?

Q. In what property were they to share—the sisters? A. He didn't mention any property.

Q. Well, had the homestead not been left to Will Tutty in the first will that Mr. Davenport drafted, if you know?

MR. VOGT: I object to that. The wills are the best evidence.

40 MR. RATHBUN: I ask then that proponent

*Mary Flanagan—Direct.*

produce the wills that were drawn at the house of Mrs. Flanagan.

The Court orders them produced if they are in existence.

MR. RATHBUN: I will withdraw my last question.

Q. Was this conversation that you have stated as taking place between John Tutty and Will Tutty, in which Will Tutty—or rather, in which John Tutty told Will Tutty that he ought to be satisfied with the homestead—did that take place between the drawing of the first will by Mr. Davenport in your house and the drawing of the second will? A. Between times.

10

Q. Did you hear any of the conversation between Father Carew and John Tutty in reference to the disposition of his property? A. Yes, sir.

Q. Where did the conversation take place that you heard? A. In my house.

20

Q. What did you hear between the two in regard to disposing of the property?

MR. RATHBUN: I withdraw that question.

Q. When did you hear that talk? A. It was on a Monday morning; I couldn't exactly give the date.

Q. I mean what month? A. The beginning of December.

30

Q. Now, what did you hear said? A. Well, it seems Will Tutty found out his father had made the will—

MR. VOGT: I object.

THE COURT: What did John say, if he spoke first? Who spoke first, Mrs. Flanagan, Mr. Tutty or the priest when they joined there? Do you remember?

40

*Mary Flanagan—Direct.*

A. He spoke. He told Mr. Tutty his business there.

Q. What did he say, what his business was? A. He told him his son had been talking to him and wished him to go there and talk to him about the property.

10 Q. Yes. Then what was said? Go on. Just tell us as near as you can. A. He said he had found out that he had left—made a will and left a little to me, I suppose it was, “that woman”.

MR. VOGT: I ask to have that stricken out. Motion granted.

A. (Continued.) I heard Will say to him, “I don’t know what Mrs. Flanagan has to do with it”.

20 Q. I am asking you now, Mrs. Flanagan, just what conversation you heard between Father Carew and John Tutty the time he came there to your room, as you say, about the first of December, 1913; not what Will Tutty said or anything else. We will get to that later. Go ahead. Just tell us all you heard said. A. Father Carew questioned John Tutty if he was satisfied with what he had said about the will, and he answered him it was all right.

30 Q. What did Father Carew say about the will to John Tutty at that time? A. He was there to see that he had made up his mind that everything was all right.

Q. Where was Will Tutty? A. Will, the son, was there with him.

Q. What did the son say? A. He didn’t seem to be satisfied because he was leaving me anything.

40 Q. How did he express himself? What did he say about it? A. He couldn’t see how Mrs. Flanagan was entitled to anything.

*Mary Flanagan—Direct.*

THE COURT: What did he say which you heard that indicated that he couldn't see that you were entitled to anything? Did he say, "Father, why did you do this? Why did you leave this to Mrs. Flanagan?" What did he say? What did William say to his father concerning anything in the will with reference to you? What he said to his father and the father said in reply to his son? 10

WITNESS: He couldn't see why he was leaving Mrs. Flanagan anything.

THE COURT: He said words that indicated that thought?

WITNESS: That's it. Yes.

MR. RATHBUN: We want the talk in the present tense, as the conversation was taking place. Will Tutty would say, "Why are you doing this?" What the Court desires is not to use the words, "He thought", so and so. Use the language of the people that were there with you. Now, if you can do that, just tell us what Will Tutty said and what his father said. 20

A. "I don't see why you have left her anything."

Q. Then what did John Tutty say? A. John Tutty said, "I understand what I am doing and you be satisfied". 30

Q. And what else was said by Will, if anything?

A. I couldn't say.

Q. And after that, Mr. Davenport came again, as I understand it? A. Yes, sir.

Q. And fixed up the paper again? Is that right? A. Yes, sir.

Q. Did John Tutty tell you—say anything about Will Tutty owing him rent? A. Yes, sir.

Q. Repeat it, will you? A. Yes, sir.

Q. What did he say? A. Oh, he seemed to talk 40

*Mary Flanagan—Direct.*

about it—Mr. Tutty seemed to talk about it continually.

Q. In what—how did he talk about it? What was the manner of his conversation? Was he satisfied or dissatisfied with Will Tutty, in respect to the rent? A. Dissatisfied.

Objected to by Mr. Vogt.

10

Q. What did he say which expressed dissatisfaction? A. He expected Will Tutty to be there with the rent on the first day of the month, and he'd let it run by and he'd say he's waiting—Will Tutty would be waiting to see if the breath would leave him.

20

Q. Did you ever hear him say anything to Will Tutty when Will came and brought the rent? A. Well, I didn't hear him say much to him. If he'd come anywheres near around the first of the month.

Q. What did he ever say to Will in regard to the rent, that you heard? A. He often said to him, "Will, you know I am waiting for it."

Q. Go ahead. Anything else? Now, Mrs. Flanagan, when did they take him from your house? A. The third of May.

Q. The third of May, 1914?

30

THE COURT: Who is that?

Q. Who took him? A. Will Tutty.

Q. Anyone else? A. No, sir.

Q. And how did Will Tutty take him? A. He had a rig. He come in and said he was going to take his father for a little drive.

Q. Did he say how far he was going to take him? A. Just around the road a little.

Q. Did you know at the time that he was going to take him to his own home? A. No, sir.

40

*Mary Flanagan—Cross.*

Q. When did you learn that he had taken him to his own home? A. Next day.

Q. What did John Tutty say when Will Tutty came for him, if anything? A. John Tutty said, "Wait until I get my hat and coat on and I will go with you."

Q. What time of day was it? A. Seven o'clock Sunday evening; between seven and eight. 10

Q. Did John Tutty—or Will, take the old man's clothes with him at that time? A. No, sir.

Q. What did John Tutty say to you as he left? A. He bid me "Good-bye."

Q. What did he say else? Anything? A. No, sir.

Q. Well, then, why didn't you know that he wasn't coming back? A. Because Will Tutty came Monday evening and told me; ordered his clothes.

Q. When John Tutty bid you good-bye, you didn't think that was farewell? A. No. Oh, no. 20

Q. What did Will Tutty say when he came after the clothes? A. He would keep him for a time and he wished to have his belongings.

Q. Anything else he said? A. I don't remember.

Q. Did he tell you why he had taken his father to his house? A. No, sir.

Q. Did you ask him? A. No, sir.

Q. Did you see John Tutty after that before his death? A. No, sir. 30

## CROSS EXAMINATION BY MR. VOGT:

Q. When did you go to live in Wharton? A. On the 6th of November.

Q. What year? A. 1912.

Q. 1912? On Pine Street? A. Yes, sir.

Q. What number? A. No number.

Q. Who lived in that house besides yourself? A. Mr. Swayze lived there at the time of my moving there. 40

*Mary Flanagan—Cross.*

- Q. Who else? A. Tom Smith.
- Q. Who else? A. That's all.
- Q. Your husband lived there? A. Yes, sir.
- Q. Any children? A. Yes, sir.
- Q. How many? A. Six.
- Q. How old was the oldest one? A. Nineteen.
- Q. And did Mr. Smith and Mr. Swayze continue  
**10** to live there after you moved in? A. No, sir.
- Q. So that they didn't live in the house while you lived there at all? A. The Smiths lived there.
- Q. The Smiths lived there. And how long did they live there? A. They moved out this Spring.
- Q. It was a double house? A. Yes, sir.
- Q. You occupying one side and the Smith family the other side? A. Yes, sir.
- Q. Now, in your family then, at the time you moved, there was yourself, your husband and six  
**20** children? A. Yes, sir.
- Q. That's all? And you rented the house? A. Yes, sir.
- Q. How many rooms were there in the house?  
 A. Four.
- Q. How many downstairs and how many upstairs? A. Two down and two up, and a large garret.
- Q. What were the rooms downstairs used for?  
 A. One was the kitchen and the other was the  
**30** front room.
- Q. And how many bedrooms did you have? A. Two.
- Q. Two bedrooms. When did John Tutty first go to live with you? A. About between the 12th and 15th of May, 1913.
- Q. And was he a relative of yours? A. Yes, sir.
- Q. How was he related? A. He was my uncle.
- Q. Was your mother his sister? A. No, sir.
- 40** Q. How was the relationship, Mrs. Flanagan?  
 A. My father and him were brothers.

*Mary Flanagan—Cross.*

Q. Your father and Mr. Tutty were brothers?  
What room in the house did Mr. Tutty occupy?

A. The back bedroom.

Q. Upstairs? A. Yes, sir.

Q. Did anyone else room with him? A. No, sir,  
not after he became sick—not after Thanksgiving.

Q. No, I mean at the time he first came to live  
with you? A. There was two beds in it, but I **10**  
took one out.

Q. So that all the time he occupied your house,  
he occupied this bedroom by himself? A. Yes,  
sir.

Q. What kind of health was he in when he first  
came to live with you? A. Passable health for  
an old man.

Q. He was a pretty old man, wasn't he? A. He  
claimed to be, in years.

Q. He claimed to be what? A. About 84. **20**

Q. You don't know, yourself, how old a man he  
was? A. No, sir.

Q. Was he older or younger than your father?  
A. Older.

Q. Is your father still alive? A. No, sir.

Q. When did he die? A. He died in the year  
eighty-eight, June 26th.

Q. And how old was he when he died? A. 46.

Q. And about how much older was Mr. Tutty  
than your father? A. I couldn't say. **30**

Q. You don't recall that? A. He claimed to be  
about between 10 and 11.

Q. Is your mother still alive? A. No, sir.

Q. When did she die? A. She died four years  
last July.

Q. Did Mr. Tutty pay board to you? A. Yes,  
sir.

Q. How much? A. \$12 a month.

Q. And when he came to live with you, was it  
understood how long he was going to stay? Was **40**

*Mary Flanagan—Cross.*

anything said about how long he was going to stay with you? A. No, sir.

Q. He left you when? A. The 3rd of May.

Q. Of this year? A. Of this year.

Q. And he left with whom? A. His son, William Tutty.

10 Q. And you say you didn't know that Mr. Tutty was leaving you for good? A. No, sir.

Q. He had gone riding or driving with his son, William Tutty, before this? A. No, sir.

Q. Did he go outside the house and walk around the streets or yard? A. Yes, sir.

Q. Frequently? A. Well, while the weather permitted.

Q. He was able to get around by himself? A. Not very well. We would generally lead him around.

20 Q. Did he walk down the street that you lived on? Did he go down to the town or anything like that? A. Not since before Thanksgiving.

Q. But he did before that? A. Yes.

Q. Thanksgiving time he had a spell considerably for the worse? A. He got a cold.

Q. And that cold confined him to the house? A. Yes, sir.

30 Q. Did he go out of the house at all after Thanksgiving day of last year? A. Once in a while.

Q. Did he go by himself? A. We'd lead him down a little in the yard.

Q. Did he go downtown any? A. No, sir.

Q. Not even accompanied by a member of your family? A. No, sir.

Q. Could he go up and downstairs by himself? A. Until the last month or two; he didn't go up or downstairs.

40 Q. That is, until April or May of this year? A. March or April.

*Mary Flanagan—Cross.*

Q. Could he go up or downstairs with help? A. He didn't seem to want to.

Q. Well, did he stay upstairs or down? A. Downstairs.

Q. In the front room? A. Yes, sir.

Q. Did he sleep down there? A. Yes, sir.

Q. Did you move the bed in the front room? A. No, sir; he wouldn't accept the bed. He slept on a chair. 10

Q. For how long a period of time did he sleep on the chair downstairs? A. I should judge two months.

Q. During all that time he hadn't been on the second floor of your house at all? A. Well, he might have been occasionally.

Q. Would he go up by himself? A. Yes, sir.

Q. Which room downstairs did you eat in, the front room or the back room? 20

WITNESS: Eat in?

MR. VOGT: Yes.

A. The kitchen.

Q. And Mr. Tutty took his meals with you? A. Yes, sir.

Q. And would sit at the dining room table? A. Yes, sir.

Q. Walk to the table by himself and away from the table by himself? A. With a little help. 30

Q. Well, could he do it without any help? A. Yes, sir.

Q. Yes. He knew his way around the house? A. Yes, sir.

Q. Now, what did you do on the 3rd of May when you found it was getting late and Mr. Tutty hadn't returned?

THE COURT: May 3rd?

WITNESS: May 3rd. 40

Q. Now, when it got late in the evening, what did you do? A. Decided he had taken him home.

*Mary Flanagan—Cross.*

Q. What led you to that decision? A. Because I decided that they had tried to get him to a hospital or something, that would lead me to think he had taken him home.

Q. Who had been trying to get him to a hospital? A. His son.

Q. Anyone else? A. I couldn't say.

10 Q. Did the son ever say to you he didn't think the old gentleman was getting proper treatment in your house? A. No, sir.

Q. Or that he thought he would be better treated home or in the hospital? A. No, sir.

Q. Had he ever said anything about taking him home? A. No, sir.

Q. Why did you think he had taken him home? A. Well, he took him away and didn't bring him back and I decided he had brought him to his home.

20 Q. Had Mr. Tutty ever said anything about going home? A. No, sir.

Q. John Tutty lived where before he came to live with you? A. I couldn't say.

Q. You don't recall that? What had been his occupation during his active life? A. Miner.

Q. He was a miner? Always had been a miner? Never had done anything else? A. So far as I know.

30 Q. He owned this property at Mount Hope that his son William is now living in? A. Yes, sir.

Q. When had he last lived there? A. He came to my house from there.

Q. Why did you say just now, in answer to my question one or two back, that you didn't know when he had last lived there? A. He had only been there a short while.

Q. How long had he been at the Mount Hope house before he came to live with you? A. I

40 couldn't say.

*Mary Flanagan—Cross.*

Q. How did he come to live with you? You say he had only been there a short while. How did you know that? A. He said he would like to come and stay with me.

Q. No, how did you know that Mr. Tutty had only been at Mount Hope for a short time? A. Mr. Tutty told me he left New York and came to his son's and they refused—or his son refused letting him stay there and he come to see if he could stay with me. 10

Q. When did he tell you that? A. Around the 8th or 9th of May, 1912—1913.

Q. While he was still living at the Mount Hope house? A. Yes, sir.

Q. Do you know how long he had lived in New York? A. Between three and four years, I understood him to say.

Q. Do you know whether he had lived in Newark before that? A. No, sir, I don't. 20

Q. So that it was three or four years that he had not been in the Mount Hope house when he came back there? A. Oh, he had visited frequently, but not lived there.

Q. Visited his son William? A. Yes, sir.

Q. Had he ever boarded with you before? A. No, sir.

Q. Did you see very much of him, or had you seen very much of him before he came to live with you? A. Yes, sir. 20

Q. In New York? A. No, sir.

Q. Well, he visited you? A. I never lived in New York.

Q. Well, he visited you? A. Yes, sir.

Q. At Dover and at Wharton? A. At Mount Hope and Wharton.

Q. And frequently? A. When he would have time.

Q. Had anything been said between you and him 40

*Mary Flanagan—Cross.*

about his coming to live with you at some time?

A. No, sir.

Q. So that around the 8th or 9th of May was the first time he had ever mentioned the subject to you? A. Yes, sir.

Q. And he said that the reason was because his son William would not let him live up in the  
10 Mount Hope house? A. Yes, sir.

Q. He knew perfectly well what he was doing, and could converse in a rational manner—knew what was going on? A. Well, at times.

Q. When did you first notice that he didn't know what was going on? A. Around Ash Wednesday evening. I am most sure that was the time.

Q. Ash Wednesday evening of which year? A. Of this year.

20 Q. Before that he was in possession of his senses and knew what was going on? A. Yes, sir.

Q. He always knew you and the members of your family? A. Yes, sir.

Q. Mentally was he bright up to that time? A. At times.

Q. But not all the time?

WITNESS: When do you mean?

30 MR. VOGT: I mean up to Ash Wednesday.

A. Yes, sir.

Q. He was bright all the time up to Ash Wednesday? A. Yes, sir.

Q. What day was Ash Wednesday? What date? A. I couldn't say.

Q. What makes you think it was Ash Wednesday? A. Well, we held it as a holiday.

Q. What month was it in this year? A. I am not sure it was November.

40 Q. In November? That was November of last year—1913? A. Yes, sir.

*Mary Flanagan—Cross.*

Q. And you held it as a holiday? What is your religion, Mrs. Flanagan? A. Catholic.

Q. And Catholics observe Ash Wednesday as a holiday or fast day? A. Yes, sir.

Q. But you don't remember what day of the month of November it was? A. I could not say now.

Q. I mean what day of the month it was. Well, 10  
was it the early part of the month or the latter part of the month, or the middle part of the month? A. The latter part.

Q. Now, what change did you notice in Mr. Tutty's mental condition on Ash Wednesday? A. He noticed water running down the wall and peeking under the table to know who was there and what they wanted.

Q. And those occurrences happened on Ash Wednesday? A. Well, that evening and other evenings 20  
afterward.

Q. Before Ash Wednesday you hadn't noticed that Mr. Tutty saw these different things that you have related, such as the water? A. I didn't notice that, no, sir.

Q. And had he, before that time, called your attention to funerals going by? A. No, sir.

Q. Nor to wagons or people on the street? A. Around that time.

Q. You say there is a canal near your property. 30  
Front or back? A. The back.

Q. And when Mr. Tutty would look out the window and call your attention to funerals going by, for instance, would he look out the front window or the back window? A. The back window.

Q. Does your house face the street? A. The front faces Pine Street.

Q. So that when he looked out the window he would be looking toward the street, and not towards the canal? A. Yes, towards the tow path. 40

*Mary Flanagan—Cross.*

Q. Does the canal run parallel with Pine Street?

A. No, sir.

Q. It runs at an angle? And which side of the house, as you face the street, is the canal? A. The kitchen.

Q. I mean, is it the right-hand side or the left-hand side? A. Neither; right by in front of  
10 you.

Q. In front of you? A. The kitchen door.

Q. Yes, but the kitchen is in the rear of your house, is it not? A. The kitchen's on one end and the front room on the other end.

Q. So that the canal is behind the kitchen? A. Yes, sir.

Q. And Pine Street before the front room? So that when Mr. Tutty would look out the front room window— A. (Interrupting.) The kitchen  
20 window.

Q. He'd look out the kitchen window when he made the remark about the funeral, not the front room? A. The kitchen window.

Q. Where would he be? A. Standing there by the window.

Q. And what would he be doing in the kitchen? A. Walking around for a little exercise.

Q. Walking around the lower part of the house then for exercise? A. Yes, sir.

30 Q. Frequently? A. Yes, sir.

Q. And by himself? A. Yes, sir.

Q. Well, he was in the kitchen for the purpose of going there to eat? A. He went through whenever he felt like it.

Q. Do they use the canal up there now? A. I couldn't say.

Q. Did they last year? A. Yes, sir.

Q. And around Ash Wednesday was the canal in use? A. No, sir.

40 Q. It had closed down before that? A. They close it before then.

*Mary Flanagan—Cross.*

Q. Do you recall when they closed the canal last year? A. I couldn't say when the last boats ran.

Q. But you are quite sure that no boats were running at the time he made these remarks? A. No, sir.

Q. Had he ever said anything to you before calling your attention to the water coming down the wall, or calling your attention to the funerals on the canal path that led you to think his mind had changed for any reason? A. No, sir. 10

Q. He had never done anything of any kind or acted in any peculiar manner which made you think his mentality had changed? A. Not enough to draw my attention, no, sir.

Q. So that this was in the nature of a surprise to you when he made such statements? A. Yes, sir. 20

Q. How often did he call—or how many times did he call your attention to funerals going by on the tow path? A. About three or four times.

Q. When was the second time? A. An evening or two later.

Q. When was the third time? A. Just a few days later.

Q. Well, how many days would there be in between? A. Well, maybe a week.

Q. And during that week would he appear perfectly normal? A. Yes, sir. 30

Q. He knew you all? A. Yes, sir.

Q. And knew about his own affairs? A. Yes, sir.

Q. At any time that any of these remarks you say he made were made by him, was anyone present beside yourself? A. Just the children.

Q. And what children? What were their names? A. Margaret, Nora.

Q. How old is Margaret? A. Fourteen. 40

Q. How old is Nora? A. Ten.

*Mary Flanagan—Cross.*

Q. They were the only ones present? A. Yes, sir.

Q. Were you with Mr. Tutty all the time? A. Well, yes; every day.

Q. Well, I mean were you with him for the purpose of watching him to see that he didn't injure himself? A. Yes, sir.

10 Q. After or before you noticed these peculiar remarks? A. When I was not there, my husband was there. We never left him alone.

Q. Was that after or before these peculiar remarks which he made? A. It was after.

Q. And how long afterwards did you first commence to keep close supervision over him? A. Well, in fact from the time he first had the doctor in Thanksgiving and attended to him, we commenced to do that.

20 Q. But you didn't at that time— A. (Interrupting.) Well, he went to bed then and slept during the night.

Q. Around Thanksgiving time Mr. Tutty was doctoring and using medicine which the doctor had given him for his cold? A. Yes, sir.

Q. And up to that time and for a considerable time after that you hadn't noticed any peculiarities in his actions or his speech, had you? A. No, sir.

30 Q. That didn't come until around Ash Wednesday? A. Yes, sir.

Q. So that you and Mr. Flanagan hadn't exercised any unusual supervision over his actions prior to Ash Wednesday? A. No, sir.

Q. Well, now, how long after Ash Wednesday was it that you first commenced to keep a closer watch on him? A. Well, I couldn't say exactly.

Q. And did you keep just as close a watch on him on his good days as on his bad days? A. No, 40 sir.

*Mary Flanagan—Cross.*

Q. How could you tell that he had a good day or a bad day? A. Well, if I didn't see him going to bed and laying down contented, I would watch him.

Q. And would he converse with you or your husband or children about himself or yourselves or his affairs? A. Yes, sir.

Q. And in an intelligent manner? A. Yes, sir, **10**

Q. He knew what he was talking about? A. Yes, sir.

Q. Did he read the newspapers? A. No, sir.

Q. Did you have a newspaper at the house? A. Yes, sir.

Q. Did he ask anything about what the news was, or anything like that? A. Once in a while he'd talk about the paper to Mr. Flanagan.

Q. Did anybody call on him? A. Yes, sir.

Q. Who? A. Mr. Rourke. **20**

Q. Anybody else, Mrs. Flanagan? A. His daughters came to see him.

Q. Did they come very often? A. No, sir.

Q. Who else called on him? A. I couldn't say at the present time.

Q. Did the priest call on him? A. Yes, sir.

Q. Very often? A. No, sir.

Q. Do you recall anybody else? Did the neighbors come in? A. He wasn't much acquainted there, but they would inquire about him. **30**

Q. Did any of his old friends come in? A. Yes, sir.

Q. Frequently? A. No, sir.

Q. Now, when these various people came to see Mr. Tutty, would he talk with them? A. Yes, sir.

Q. How long would they stay? A. Oh, just a short while.

Q. And would you be present when he would hold these conversations? A. Yes, sir. **40**

*Mary Flanagan—Cross.*

Q. And would he talk in an intelligent manner?

A. Yes, sir.

Q. Recognize all of them? A. Yes, sir.

Q. Knew what he was talking about? A. Yes, sir.

Q. Knew what they were talking about? A. Yes.

10 Q. How many times did he call your attention to the water coming down the wall? A. Oh, three or four—three times.

Q. Was that in day time or night? A. Just in the evening.

Q. What time in the evening? Do you recall?

A. After the light would be lit; say seven o'clock or eight o'clock.

Q. Would that be in the front room or in the kitchen? A. Wherever he was; wherever he would be.

20 Q. What did he say to you the first time he called your attention to the water? A. When he told me to look to see the water running down the wall I told him there wasn't any; to sit down and be contented, so he done so.

Q. He said nothing more about the water? A. No, sir.

Q. Who was present at that time besides yourself? A. I couldn't say as there was anybody

30 but the children.

Q. What kind of night was it outside? A. A bright night.

Q. You are sure about that? A. Yes, sir.

Q. Do you remember what day it was? A. I couldn't say.

Q. Or in what month? A. No, sir.

Q. Did you ask him what he meant by saying the water was coming down the wall? A. No, sir. I didn't pay any attention to him.

40 Q. And yet this was the first time that he had made such a remark? A. Yes, sir.

*Mary Flanagan—Cross.*

Q. Why didn't you find out what he meant by it? A. Well, I had spoke to the doctor about such things and he said it was likely the morphine pills that was going to his head a little.

Q. Why had you spoken to the doctor about it if it hadn't occurred before? A. Well, he had said it to me several times.

Q. Mr. Tutty? A. Yes, sir. 10

Q. When had he first called your attention to the water? A. As near as I can judge, around Ash Wednesday.

THE COURT: What year? This year or last year?

WITNESS: Last year.

Q. The reason you recall it was around Ash Wednesday was that Ash Wednesday you celebrated as a holiday? A. Yes, sir. There was two or three came in to see him and they noticed him, and that's the reason that I remember it so well. 20

Q. What other church day did you celebrate as a holiday last year? A. We celebrated Thanksgiving.

Q. Was that a church day? A. If you wanted to make it one.

Q. Well, was it? A. Yes, sir.

Q. What other church day did you celebrate? A. I couldn't say. 30

Q. Did you celebrate Easter? A. Yes, sir.

Q. Why do you think it was Ash Wednesday instead of Easter that this— A. (Interrupting.) Well, Easter comes shortly after.

Q. What I am getting at is this, Mrs. Flanagan: Why do you recall that this particular occurrence took place on Ash Wednesday instead of Easter? A. That was a week day and Easter a Sunday.

Q. You recall that it was on a week day? A. Yes, sir. 40

*Mary Flanagan—Cross.*

Q. Why do you say Ash Wednesday? Might it not have been Thanksgiving? A. No, sir.

Q. Why not? A. Because Thanksgiving was the first day the doctor had come to see him.

Q. That was the first day? A. Yes, sir.

10 Q. Now what day was it, as you recall, that he first called your attention to wagons and horses and people out in the street when, as a matter of fact, you say, there were none there? A. I forget; it seems to me it was around the last—around in March.

Q. Around in March of this year? A. Yes, sir.

Q. What makes you think it was in March? A. Because the days were getting very bright—long evenings.

20 Q. Who was present when he first called your attention to these people out in the street? A. I couldn't say as there was anyone.

Q. And what did you say to Mr. Tutty at that time? A. I would try to pacify him by saying there was nothing like that out there.

Q. Was he in the front of the house or the back of the house— A. (Interrupting.) He would be in the kitchen looking out of the kitchen window.

Q. And you called his attention to the fact that there was no street out of that window? A. Yes, sir.

30 Q. What would he say to you? A. Just smile.

Q. Had the doctor said that was due to the morphine he had taken? A. Yes, sir. Well, no, I couldn't say that he did.

Q. You don't recollect about that? A. No, sir.

Q. Did you give Mr. Tutty his medicine? A. Yes, sir.

Q. And was he taking morphine? A. I couldn't say what the tablets were made up of.

40 Q. Did you notice whether these peculiar remarks made by him always came after you had given him a dose of medicine? A. No, sir.

*Mary Flanagan—Cross.*

Q. You didn't notice about that? The remarks were more in the evening than any other time? A. Yes, sir.

Q. And early in the evening? A. Yes, sir.

Q. What time in the evening would he go to sleep? A. Well, the evening was when he would stay awake. He would sleep during the day.

Q. Do you know what kind of medicine the doctor prescribed for Mr. Tutty? A. He didn't prescribe any. He would bring it there and leave it with him. 10

Q. Did he take any whiskey? A. Yes, sir.

Q. Where would he get that from? A. Why, he would get it from the saloon, I suppose.

Q. Go out and get it himself? A. No, sir.

Q. Who would bring it to him? A. Well, his son brought it to him.

Q. How did you know that? A. Wasn't I there? 20

Q. I don't know. Were you? A. Yes, sir.

Q. When? A. When he would come with it.

Q. What day do you remember that William Tutty brought whiskey to his father? A. Well, it seems to me he brought him some for Christmas.

Q. Yes? A. More for Easter.

Q. Easter of what year? A. This year.

Q. Yes. What else? Do you recall any other time? A. No, sir.

Q. And the rest of his whiskey you think he got from the saloon? A. Yes, sir. 30

Q. Did he drink very much whiskey? A. No, sir.

Q. Who would pour it out for him? A. I would make a hot drink of it.

Q. Did he always drink it hot? A. Yes, sir.

Q. Do you know whether the doctor had told him to take hot whiskey? A. Yes, sir.

Q. Had he or not? A. The doctor told him he could take it as he wished it. 40

*Mary Flanagan—Cross.*

Q. Did he take very much? A. No, sir.

Q. He never took it except when you made it hot for him? A. No, sir.

Q. Would he have more than a glassful a day? A. Yes, sir.

Q. How many glasses a day? A. Well, probably two wine glasses if he'd want it; three if he'd ask  
10 for it.

Q. Would he have it every day? A. Mostly every day, yes, sir.

Q. What was Mr. Tutty's physical condition, Mrs. Flanagan? A. The grippe.

Q. That was his affliction, but I mean in what condition was he bodily? Healthy? A. Yes, sir.

Q. He had strength in all his limbs? A. No, sir.

Q. What part was weak? A. Around the hips.

Q. So that it interfered with his walking? A.  
20 Yes, sir.

Q. Was that true when he came to your house originally? A. No, sir.

Q. When did that become true? A. After he was taken with the cold—with the grippe.

Q. It seemed to settle in his hips? A. Yes, sir.

Q. So that it made him feeble? A. Yes, sir.

Q. But still able to walk? A. Yes, sir.

Q. Did it affect him anywhere else besides the  
30 hips? A. Well, the disease seemed to go down to his legs.

Q. But he was not paralyzed or anything like that? A. No, sir.

Q. Did he ever talk to you about his life several years ago when he was younger than he was when he lived with you?

WITNESS: His life?

MR. VOGT: Yes.

40 A. Yes, sir.

*Mary Flanagan—Cross.*

Q. About incidents that had occurred in his life when he was younger? A. Yes, sir.

Q. As a matter of fact, he was more ready to talk about his younger life than about the present life, was he not? A. He seemed to talk it all over, from one thing to another.

Q. Did the doctor ever tell you that he might be apt to talk about his younger life? A. No, sir. **10**

Q. He never told you that because of his age, he was apt to think of things that had occurred years ago? A. No, sir.

Q. So that, so far as you are concerned, you noticed no difference in his talk which you attributed to old age? A. No, sir.

Q. Did Mr. Tutty ever say anything to you about going to the hospital? A. No, sir.

Q. Did he tell you that his family or his son wanted him to go to the hospital? A. Yes, sir. **20**

Q. When did he first tell you that? A. I couldn't say.

Q. Well, was it this year or last year? A. This year.

Q. And before or after you noticed these peculiarities? A. After.

Q. Did he seem to be conscious of the fact that he was getting worse? A. He often said he didn't expect to get any better.

Q. And did he ever ask you if you knew how he was getting along? A. Yes, sir. **30**

Q. And what would you tell him? A. I told him I would think he was getting better.

Q. Did he ever ask you what the doctor said about him? A. No, sir.

Q. Did he ever ask the doctor how he was getting along? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. What did the doctor tell him? A. The doctor would tell him he was doing as good as could be expected. **40**

*Mary Flanagan—Cross.*

Q. Did he ever ask the doctor if he was going to get better? A. Yes, sir.

Q. Did he ask the doctor if he thought he would do better if taken to the hospital? A. No, sir.

Q. Did he ever tell you who suggested to him that he go to the hospital? A. No, sir.

10 Q. Did he ever tell you what put the idea of the hospital in his head? A. Yes, sir.

Q. What? What did he tell you? A. He said that his children wished him to go to the hospital.

Q. When did he tell you that? A. I think it was around last March or April.

Q. After you had noticed these peculiarities? A. Yes, sir.

Q. Did he say whether he was going to the hospital or not? A. Yes, sir.

20 Q. What did he say? A. He said he wouldn't go unless I said he had to leave my house.

Q. Did he say whether he had told his children whether he would go to the hospital or not? A. I don't remember.

Q. You don't recollect? A. No, sir.

Q. But he told you he wouldn't go? A. He wouldn't go unless I said he had to go. I told him they was probably coming to try and encourage him to go. He said, "Mary, I won't go if a dozen comes for me unless you say I must go."

30 Q. Do you recollect what month that was when you had that conversation? A. It seems to me around last March.

Q. This year? A. This year, yes, sir.

Q. After that conversation, was the subject of the hospital ever talked about between you again? A. No, sir.

Q. When was it that he looked under the table and asked who was there? A. Why, it seems to me that was in March month, along there.

40 Q. Do you recollect whether that was before or

*Mary Flanagan—Cross.*

after he talked about the hospital? A. That was after.

Q. Did you ever suggest to him that he might be better off in the hospital? A. No, sir.

Q. Did you think that he might be better off in the hospital? A. I never said it to him.

Q. Did you think that he might be? A. No, sir. 10

Q. You didn't think that he was in a condition where he needed hospital treatment? A. No, sir.

Q. You thought he was getting along all right in your house? A. Yes, sir.

Q. And, as a matter of fact, he was? A. Yes, sir.

Q. So that the various peculiarities which you have related didn't seem to you to be very serious? A. No, sir.

Q. And you thought that they were due to the medicine he was taking? A. Yes, sir. 20

Q. Did the doctor ever tell you that he was giving Mr. Tutty strong medicine? A. Yes, sir.

Q. Medicine that might be apt to upset his mind a little? A. Yes, sir.

Q. When did the doctor tell you that? A. When he began to sleep so much during the day.

Q. And did the doctor tell you that his day sleeping was due to the medicine? A. No, sir; due to his disease. 30

Q. How often did the doctor call, Mrs. Flanagan? A. He called every day for several months.

Q. Right up to the time that Mr. Tutty left you? A. No, sir. He might have come for once or twice a week the last month.

At this point a recess was taken until 1:45 P. M.

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AFTER RECESS.

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*Mary Flanagan—Cross.*

MARY FLANAGAN, resumes the stand.

FURTHER CROSS EXAMINATION BY MR. VOGT:

Q. Was the reason why the doctor's visits became less frequent because of the fact that Mr. Tutty was improving in health? A. No, sir.

10 Q. What was the reason? A. I couldn't say, unless that it was he left more medicine.

Q. So that it wasn't—

WITNESS (Interrupting): The same kind.

Q. (Continued) —wasn't as necessary for him to come so often because he left more quantities of medicine when he did come? A. Yes, sir.

Q. And you think that these more infrequent visits were made during the last month that Mr. Tutty was with you? A. That he came—yes.

20 Q. Yes. Now you say that Mr. Tutty asked you how long your mother had been dead. Did he ask you that more than once? A. No, sir.

Q. And you also said that he asked you how long you had lived in the Wharton house? A. Yes, sir.

Q. Did he ask you that more than once? A. Well, he might have asked two or three different times.

30 Q. But those questions—were they asked as part of a general conversation that you and Mr. Tutty were having? A. No, sir.

Q. And were they asked by him for information? A. It seemed that way.

Q. Yes. Now, will you tell us, Mrs. Flanagan, about the incident when Mr. Tutty tried to move the piano? Well, the piano stood in the front room downstairs? A. Yes, sir.

40 Q. Now, just tell us what Mr. Tutty did about that? A. He'd walk in and hit it with his cane a little and talk as if he was talking to people, imagining there were people behind it.

*Mary Flanagan—Cross.*

Q. Where were you? A. In the kitchen; maybe right there by him.

Q. With his cane? Did he walk around the house using his stick? A. Yes, sir.

Q. What would he say in this talking to the piano? A. Just a few words and then smile and go and sit down again.

Q. What were those few words, as you recall? 10  
A. Asking if the men were working all right.

Q. Whom did he ask that of? A. My girl, and oftentimes myself.

Q. Which girl? A. Margaret.

Q. And were you present when he asked Margaret about that? A. Yes, sir.

Q. How many times did he ask her? A. Well, say three or four times.

Q. When was the first time that you recall?  
A. I couldn't give you any idea unless it was around March. 20

Q. Of this year? A. Yes, sir.

Q. What else would he say besides ask if the men were working? A. When night would come he would see the shadow and hit the shadow with his cane and wonder what man was there and what he was doing.

Q. His shadow? A. Yes, sir.

Q. From the lamp in the room? A. From the table, yes. 30

Q. Would you ever reply to him when he made any such statements? A. No, sir.

Q. You never asked him what men he was talking to? A. No, sir.

Q. Well, you didn't seem to think that these actions were very unusual, did you? A. Well, as he wouldn't be talking to me, I wouldn't, no, sir.

Q. Would anybody in the room say anything to him about it? A. No, sir.

Q. How many times do you recollect that he 40

*Mary Flanagan—Cross.*

walked up to the piano and hit it with his stick?

A. Well, up to three times.

Q. At intervals of how long? A. Maybe twice in one week and maybe again in another two or three days.

Q. In the daytime or early in the evening or night? A. In the evening.

10 Q. What kind of an eater was Mr. Tutty? A. He was a very hearty eater; then he would have his hot drink and a little to eat between meals.

Q. A little to eat? A. Yes, sir.

Q. And three square meals a day? A. Yes, sir.

Q. What seemed to be his mental condition during these times when he would strike the piano with his stick and talk to himself? A. Well, I couldn't say, unless it was that he just felt as though he'd like to go over and do that.

20 Q. Right after an occurrence like that, would he talk to you understandingly? A. Well, he'd generally go sit down and sleep for hours.

Q. Did he undress when he went to sleep at night? A. No, sir.

Q. Did anybody stay in the room with him downstairs? A. Yes, sir.

Q. Who? A. My husband.

Q. He slept there every night? A. He sat in a chair and watched him.

30 Q. Well, was your husband acting as nurse to Mr. Tutty? A. Yes, sir.

Q. And receiving compensation for it in addition to the board? A. No, sir.

Q. He received no compensation for those services at all? A. No, sir.

Q. Would Mr. Tutty wake up during the night and see your husband there? A. Yes, sir.

Q. And recognize him? A. Yes.

40 Q. Converse with him? A. At times.

*Mary Flanagan—Cross.*

Q. Did Mr. Tutty know what time of the day or night it might be? A. I couldn't say.

Q. Could he tell time? A. Yes, sir.

Q. Did he ever ask your husband? A. He'd hear the clock strike.

Q. Would he ever ask your husband why he was sitting up there so late in the evening? A. I couldn't say. 10

Q. Or why he didn't go to bed? A. No, sir.

Q. Did Mr. Tutty ever make any comment on the fact that he didn't go to bed himself? A. Yes, sir.

Q. What? A. He'd often lie down to sleep, but he had the asthma so bad it would smother him.

Q. Inconvenient for him to breathe when lying on the bed? A. Yes. He tried it several times.

Q. Did he ever tell you it was easier to breathe sitting up? A. Yes, sir. 20

Q. Did he ever make any comment on the fact that he didn't take his clothes off during the night? A. No, sir, but he said he felt very comfortable with them on.

Q. Did you ever suggest to him that he take his clothes off? A. Yes, sir.

Q. What did he say? A. He'd say he was very comfortable and would keep them on for that night and pass it off that way.

Q. How long a period of time was it he slept in the chair downstairs without removing his clothes at night? A. I should say it was all of two months. 30

Q. You mean the length of time? A. Length of time.

Q. How often would he change his underclothes? A. My husband changed them when it was necessary. Sometimes he changed them twice in one day. 40

*Mary Flanagan—Cross.*

Q. Would Mr. Tutty suggest that he would like to have them changed? A. Yes, sir.

Q. So that he knew everything that was going on? A. Well, when he wouldn't be comfortable, they would have to be taken off of him.

Q. Did he know what the trouble was with him? A. Yes, sir.

10 Q. He knew he had asthma in an advanced stage? A. Yes, sir.

Q. Was your husband the only one that stayed up nights with him? A. I believe his son stopped up a night, Mr. Rourke stopped up a night and his daughters were with him over night.

Q. In those instances would each one of those persons sit up all night with him? A. Well, I couldn't say.

20 Q. Did your husband have a cot in the room or anything like that to rest on? A. No, sir, an easy rocking chair.

Q. You never stayed up all night with him? A. Yes, sir.

Q. How many times did you stay up? A. Well, I couldn't say exactly. I know I stayed up three nights out of five a week or two weeks before he was taken away.

30 Q. Did Mr. Tutty ever say it wasn't necessary for any of you to stay up all night with him? A. Yes, sir.

Q. Or that he didn't want you to stay up all night? A. Yes, sir.

Q. He didn't want to trouble you like that? A. Yes, sir.

Q. What would you reply to that? A. I didn't like to leave him alone.

Q. What did you tell us on your direct examination about the mine that Mr. Tutty had in his mind?

*Mary Flanagan—Cross.*

WITNESS: Had in his mind?

MR. VOGT: Yes.

Q. Well, from the time he first come to live with me he said he would like to stay and he wouldn't forget me before he died.

MR. VOGT: I guess you didn't understand my question. 10

WITNESS: Oh, on his mind.

THE COURT: Men working in a mine. You spoke something about it. He declared he saw men working in a mine, or they were working in the mine.

WITNESS: Well, I would take him by the arm and put him sitting down again.

Q. Just relate to the Court and myself again about that time when he thought this mine was behind the piano. What did he say? A. Well, when I come there I would hear him shouting, saying there's nobody there working. 20

Q. What did Mr. Tutty say first? A. He didn't say anything. He'd walk there and make a noise with his cane and try to move the piano to see if there was anybody there.

Q. What would he say to you? A. "Oh, I thought there was." 30

Q. Anything else beside that? A. He'd imagine he heard a noise and say that about their working.

Q. Did he say what they were working at? A. In a mine.

Q. What did you say to him about that? A. I didn't say anything. I took him by the arm and put him sitting down.

Q. After he sat down would he say anything? A. No, sir.

Q. Nothing at all? A. No, sir. 40

*Mary Flanagan—Cross.*

Q. Would he drop right off to sleep then? A. Sometimes. More times he would sit and smoke a few minutes.

Q. Would you hold any conversation with him while he was smoking? A. No, sir.

10 Q. At any time, Mrs. Flanagan, when Mr. Tutty displayed one of these what you call peculiarities, right after that did you have conversation with him to which he replied to you distinctly so that you understood what he was talking about? A. I couldn't say.

Q. You don't recollect about that? A. No, sir.

Q. After you would take him over and set him down in the chair, would he show any desire to go back and look behind the piano again right away? A. He'd imagine if he could get back in that room, he could go out in the street and walk around.

20 Q. What made you think so? A. That's what he'd say.

Q. What would he say? A. He would get up, maybe, and walk back to some place, and then he'd see the door and try to open the door, would hit it with his cane.

Q. What would he say, anything? A. No, sir.

Q. He had been used to going out the door, had he not? A. Yes, sir.

30 Q. Whereabouts in the room did the spittoon sit? A. We kept it right by his feet.

Q. Alongside of his chair? A. Yes, sir.

Q. Then you say that he'd pick it up and throw it out of the room? A. Yes, sir, against the wall.

Q. You would bring it back? A. Yes, sir.

Q. Would he say anything about it? A. Only smile and say, "That was a good girl. I will soon need it", and all like that.

Q. Was there a looking-glass in the parlor—in the front room downstairs? A. No, sir.

40 Q. In the kitchen? A. Yes, sir.

*Mary Flanagan—Cross.*

Q. And would it be in the looking-glass in the kitchen that he'd look in when he thought he saw pigs? A. Yes, sir.

Q. Would he be standing in front of the looking-glass? A. No, sir, sitting in the chair.

Q. Could he see the looking-glass? A. He'd look up at it.

Q. What would he say? A. Call me to see what I thought about that. 10

Q. What else would he say? A. I'd ask him what it was. He'd say then—

Q. He'd say what? A. He'd say for me to look and see the pigs and cows and things and imagine they were out on the street.

Q. Did you ever look in the looking-glass when he called you? A. No, sir.

Q. What did you say to him when he'd call you to look? A. I'd tell him there was nothing there. 20

Q. What would he say then? A. "Oh, all right. I thought there was."

Q. That would be all the conversation? A. That would be all.

Q. How many times did he call you to look in the looking-glass? A. Only twice.

Q. Do you remember when the first time was? A. No, sir, I couldn't say.

Q. This would always be in the evening that these spells would strike him? A. Yes, sir. 30

Q. How often during the day did you give him medicine? A. One kind every two hours, and another every four hours.

Q. Both day and night? A. Yes, sir.

Q. And your husband would see that he got the medicine at night? A. Yes, sir.

Q. And it was between this giving one kind of medicine and giving the other kind of medicine that he'd have whiskey? A. Yes. He'd take his medicine with a glass of water. 40

*Mary Flanagan—Cross.*

Q. Did he know when medicine was due and ask for it? A. No, sir.

Q. He never suggested to you perhaps you had forgotten it? A. No, sir.

Q. Did he ever take it himself? A. No, sir.

Q. Now, how often did his son William call to see him while he was at your place? A. Oh, he might call three or four times a week, and not come again for two weeks.

10

Q. How often did Mr. Tutty's daughters call? A. Once.

Q. Just once? A. When we sent word he was sick they came to see him.

Q. How often was the priest there? A. Four times.

Q. Do you recall when he came first? A. Thanksgiving afternoon.

20

Q. Who else was present at that time? A. There was nobody present but myself and the children, and we left the room.

Q. So that you don't know what took place between Mr. Tutty and the priest that afternoon? A. No, sir.

Q. When did he come next time? A. Next morning.

Q. And who was present then? A. Only them, Mr. Tutty and the priest.

30

Q. Had Mr. Tutty asked you or any member of your family to get the priest for him? A. Yes, sir.

Q. And had you sent for the priest? A. Yes, sir.

Q. Who did you send? A. His son went for the priest.

40

Q. Did you tell his son to go? A. He asked him himself, and asked me if I wouldn't send, but his son had a horse and wagon and went down and told the priest.

*Mary Flanagan—Cross.*

Q. When did he ask you to get the priest? A. That morning, Thanksgiving morning.

Q. And when did his son come there? A. In the afternoon.

Q. And it was in the afternoon that he asked you to get the priest? A. To go down and bring him up.

Q. And it was that afternoon that he was there? **10**  
A. Yes, sir.

Q. And the next morning, the day after Thanksgiving, was anybody with Mr. Tutty besides the priest? A. Myself.

Q. Anyone else? A. No, sir.

Q. When did the priest come next time? A. It seems to me two or three days later.

Q. And did you send for him or did he come himself? A. He had promised to come.

Q. And who was present with Mr. Tutty then? **20**  
A. Nobody.

Q. And when was the last time the priest came?  
A. Around last December.

Q. And had he promised to come then, or was he sent for? A. He was sent for.

Q. By you? A. Well, Mr. Rourke went and got him.

Q. At Mr. Tutty's suggestion or at your suggestion? A. At mine.

Q. And who was with the priest and Mr. Tutty **30**  
at that time? A. Mr. Rourke and Mr. Flannigan and Mr. Tutty.

Q. You mean Mr. Will Tutty? A. Yes, sir.

Q. So that that last time was the only time Mr. Will Tutty was present when Mr. John Tutty and the priest were together? A. Yes, sir.

Q. Now, when was it, Mrs. Flannigan, that this first will was drawn at your house? A. I couldn't give any date for it.

Q. What month was it? A. It seems to me it **40**  
was in December.

*Mary Flanagan—Cross.*

Q. That's after the priest had been there, at least two and probably three times? A. Yes, sir.

Q. Was it in the early part of December or the latter part? A. Well, it was—it must have been early, I think it was early in December.

Q. And who was present when that will was drawn? A. Mr. Davenport and his wife.

10 Q. Anyone else that you recollect? A. And myself.

Q. That's all? A. That's all.

Q. And how long after that was it the will was changed? A. Inside of a week, I am not sure.

Q. And who was present that time? A. Mr. Davenport, Father Carew and myself.

Q. Who suggested that Mr. Davenport be sent for? A. I couldn't say. Mr. Tutty asked for a lawyer and Father Carew mentioned his name,  
20 brought him there.

Q. Had Mr. Tutty told you he intended making a will? A. Yes, sir.

Q. How long before that? A. Several months.

Q. Had he told you that more than once? A. Yes, sir.

Q. Mr. Tutty's wife was dead, wasn't she? A. Yes, sir.

Q. And had been for some years? A. Yes, sir.

Q. Will you tell us what Mr. Tutty said when  
30 he told you he intended making a will? A. He said that he was getting so old that he believed he'd make peace on earth with himself and his children and the church. That's the kind of a conversation he'd go on with when such things come in his head.

Q. Do you recollect when it was when he first suggested to you that he was going to make a will?

A. We talked after he had the priest there in the start.

40 Q. That was the first time he suggested to you he was going to make a will? A. No, sir.

*Mary Flanagan—Cross.*

Q. When was it that he first suggested that to you? A. A month or two after he came to live with me.

Q. And did he say anything more to you about making the will between the time he suggested it and the time the priest was there? A. Yes, sir.

Q. How often? A. He seemed to talk continually about it. 10

Q. It was on his mind? A. Yes, sir.

Q. Did he ever tell you what he intended to do with his property? A. Yes, sir.

Q. Did he ever tell you what he owned? A. Yes, sir.

Q. When did he tell you that? A. Oh, late last summer.

Q. What did he say he owned? A. He owned a building.

Q. Is that what he said? A. Yes, sir. 20

Q. Anything else? A. And he had a bank account.

Q. Anything else? A. No, sir.

Q. Did he tell you whether he owned any vacant lots or not? A. Yes, sir.

Q. He did tell you that? A. Yes, sir.

Q. Did he tell you that he owned anything else? A. No, sir.

Q. Did he tell you that he owned any stocks or bonds of any corporation or anything like that? 30

A. No, sir.

Q. Where did he say he owned the building? A. In Newark.

Q. In Newark? And that was the only building he owned? A. Besides his home.

Q. And where was that? A. Allen Mine.

Q. Did he tell you in what banks he had bank accounts? A. Yes, sir.

Q. Where? A. Morristown and Rockaway.

Q. Did he say in what bank in Morristown? A. 40  
Yes, sir.

*Mary Flanagan—Cross.*

Q. Which one? A. The National.

Q. The National what? A. The National bank.

Q. Which National bank? A. I couldn't say.

Q. He didn't tell you which national bank it was? A. No, sir.

Q. Did he tell you what bank he had his account in in Rockaway? A. Yes, sir.

10 Q. Which one? A. The national bank, I told you, is all I understood. I paid no attention to him.

Q. You don't know whether there is more than one national bank in Morristown, do you? A. No, sir. Rockaway.

Q. I said Morristown. A. There's only one bank in Rockaway.

Q. Now, what did Mr. Tutty tell you he was going to do with his property?

20 WITNESS: With his property?

MR. VOGT: Yes.

A. Why, he had it put on the will what he did with his property.

Q. But you said he told you what he intended to do with it. What did he tell you? A. He told me he'd like to sell one building.

Q. Did he say which building? A. Yes, sir.

Q. Which one? A. Newark.

30 Q. Yes. What else did he tell you? Is that all he told you about it?

WITNESS: About the property?

MR. VOGT: Yes.

A. Yes.

Q. Did you see the will after it was drawn? I mean to read it through? A. No, sir.

Q. You never read what was in that will? A. No, sir.

40 Q. So you don't know how he had disposed of his property? A. Yes, sir.

*Marij Flanagan—Cross.*

Q. How did you know that? A. I watched it getting wrote down.

Q. So that you did know what was in the will?

A. Yes, sir.

Q. Who wrote it down? A. Mr. Davenport.

Q. And in what room in your house? A. In the kitchen.

Q. Where did Mr. Davenport sit? At the table? 10

A. Yes, sir.

Q. And where were you? A. Sitting there, too.

Q. Was Mr. Tutty sitting there, too? A. Yes, sir.

Q. Did Mr. Davenport write it in his own handwriting? A. Yes, sir.

Q. You were a witness to that will? Did you sign your name as a witness? A. No, sir.

Q. Who were the witnesses? Who signed besides Mr. Tutty? A. Mrs. Davenport. 20

Q. Yes. Anyone else? A. No, sir.

Q. Just Mr. Tutty and Mrs. Davenport? A. Yes, sir. Until the second time. Mr. Smith was there and signed it.

Q. We are talking about the first time. A. Yes, sir.

Q. That's your recollection as to what took place at the time the first will was drawn? A. Yes, sir.

Q. Had Mr. Tutty ever told you that he had made a will before that? A. No, sir. 30

Q. What time of the day was it that Mr. Davenport was there? A. In the evening, about seven.

Q. After you had had supper? A. Yes, sir.

Q. And Mr. Tutty was through with his? A. Yes, sir.

Q. Did he know Mr. Davenport was coming? A. Yes, sir.

Q. Who had told him that? A. Well, Father Carew had told him in the afternoon. 40

*Mary Flanagan—Cross.*

Q. Did Mr. Tutty know Mrs. Davenport? A. Yes, sir.

Q. And did he speak to Mr. Davenport and his wife when they came in? A. Yes, sir.

Q. Now you say about a week after that the will was changed. Is that right? A. Yes. Not quite; a few days.

10 Q. Who drew the will when it was changed? A. Mr. Davenport.

Q. Was Mrs. Davenport with him? A. No, sir.

Q. Who signed that will besides Mr. Tutty? A. Tom Smith.

Q. Mr. Tutty and Tom Smith. Is that all? A. Yes, sir.

Q. So that you didn't sign either one? A. No, sir.

20 Q. And was the changed will written in Mr. Davenport's handwriting? A. Yes, sir.

Q. And at the same table in the kitchen? A. Yes, sir.

Q. And you know what the contents of that will were? A. Yes, sir.

Q. Did you read it after it had been written, or did you see Mr. Davenport write it down? A. I seen him write it down.

Q. Which side of Mr. Davenport did you sit on? A. Up in front of him.

30 Q. Across the table? A. No, sir, one side.

Q. Which side? A. The right-hand side. Mr. Tutty was at the left.

Q. That is, you sat on Mr. Davenport's right? A. Yes, sir.

Q. Did Mr. Davenport bring paper and ink with him? A. Yes, sir.

Q. And was the will written in ink or lead pencil? A. Fountain pen.

40 Q. How long did Mr. Davenport stay? A. Well, I should judge an hour.

*Mary Flanagan—Cross.*

Q. Mr. Smith lived right next door, didn't he?  
A. Yes, sir.

Q. Who called him in? A. Mr. Davenport.

Q. Did Mr. Tutty ask Mr. Davenport to? A.  
No, sir.

Q. Who did? A. Mr. Smith asked for a witness—or Mr. Davenport asked for a witness.

Q. Who did he say that? Mr. Tutty? A. Yes, 10  
sir.

Q. And what did Mr. Tutty say? A. "Get anybody that is near by."

Q. Then Mr. Davenport went and got Mr. Smith? A. Yes, sir.

Q. Did Mr. Tutty's son collect his rents for him? A. I couldn't say.

Q. Did Mr. Tutty ever tell you that William was collecting rents for him? A. No, sir.

Q. What do you mean then when you say that 20  
Mr. Tutty would complain that William didn't bring the rents around on time? A. Well, he seemed to make remarks that he would call to see him so many times when it was not due, and then when it would come due, he'd stay away.

Q. Did William pay his father rent? A. Yes, sir.

Q. For the Mount Hope property—Allen Mine?  
A. Yes, sir.

Q. And was it that rent Mr. Tutty referred to? 30  
A. Yes, sir.

Q. If William brought the rent in on time, Mr. Tutty felt all right, but if it was a little late, he was irritated? A. Yes, sir.

Q. Did you ever have any conversation with Mr. Tutty concerning what property he intended to leave by his will to his son William? A. Yes, sir.

Q. When? A. At the time he made his will, he said he'd leave him his home. 40

*Mary Flanagan—Cross.*

Q. At the time he made the first will? A. No, sir.

Q. Had you had any conversation with Mr. Tutty up to the time he made the first will concerning the property he intended to leave his son William? A. No, sir.

Q. None at all? A. No, sir.

10 Q. So that the only conversation you had with him was at the time he made the second will? A. I didn't conversate with him. He done it all of his own accord.

Q. Who did he make the statement to? A. The lawyer.

Q. Mr. Davenport? A. And Father Carew took a copy of it before the lawyer ever come there, what he intended to do.

20 Q. So that Mr. Tutty had told Father Carew how he intended to leave his property? A. Yes, sir.

Q. But you don't know what he had told Father Carew? A. Well, I know pretty well.

Q. You didn't know at the time? A. I didn't know at the time what he was going to tell him, no, sir.

Q. Father Carew took this memorandum down to Mr. Davenport? A. Yes, sir.

30 Q. That was—was that the memorandum regarding the first will or the second will, Mrs. Flanagan? A. The first.

Q. After the first will was drawn, did Mr. Tutty say anything to you about what property he was going to leave his son William? A. Yes, sir.

Q. What did he say? A. He said he'd leave him the home.

Q. He would leave him the home? A. Yes, sir.

Q. And did he say that it was for that reason that he had to change his will? A. No, sir.

40 Q. He didn't mention that to you at all or to anyone that you heard? A. No, sir.

*Mary Flanagan—Cross.*

Q. Did he say that he had left him the home?

A. Yes, sir.

Q. And he said that he left him the home because he said it ought to be in the Tutty name?

A. Yes, sir.

Q. And Mr. Will Tutty's two sisters were both married? A. Yes, sir.

Q. And Mr. Will Tutty had no brother? A. **10**  
No, sir.

Q. Now did Mr. Tutty tell you why he was going to change his will? A. Yes, sir.

Q. What did he say about that? A. Because it seems that Will wanted a little more.

Q. Yes. What else? A. So he had the lawyer come and change it.

Q. Did he say what little more Will wanted? A. Yes, sir.

Q. What? A. Another lot. **20**

Q. Did he say where that other lot was? A. Yes, sir.

Q. Where? A. Across the road.

Q. Across the road from where? A. From where he was living.

Q. That is, from where Will was living? A. Yes, sir.

Q. Did Mr. Tutty say anything else? A. No, sir.

Q. Did he say he thought Will ought to have it? A. He didn't leave it to Will; he left it to his children. **30**

Q. That is, to Will's children? A. Yes, sir.

Q. By the second will? A. Yes, sir.

Q. And it was so he could make the change in his first will to leave this lot to Will's children that he sent for Mr. Davenport? A. Yes, sir.

Q. Did you have any more conversations with Mr. Tutty about his wills? A. No, sir, only that he was more content that it was settled. **40**

*Mary Flanagan—Cross.*

Q. When did he say that? After making the second will? A. Yes, sir.

Q. And Father Carew asked him if that was satisfactory to him, and you heard that? A. Yes, sir.

Q. And Mr. Tutty said yes, he was satisfied? A. Yes, sir.

10 Q. Did he ever mention the will to you again while he lived with you?

THE COURT: The will or a person?

MR. VOGT: Oh, I didn't mean the son. Did he ever mention the subject of the will again to you while he lived with you.

A. No, sir.

Q. How long had his son Will rented the homestead up at Allen Mine from his father? Do you know? A. Twenty years or more, I suppose; at least, I know it's that long.

Q. Did his father ever live with him up there? A. No—I couldn't say.

Q. Did you ever visit up there, Mrs. Flanagan? A. Yes, sir.

Q. You are on good terms with Will, aren't you? A. So far as I know.

Q. And your family is? A. Yes, sir.

Q. You are here under subpoena? A. Yes, sir.

30 Q. And received a witness fee for coming?

WITNESS: Sir?

MR. VOGT: You received a witness fee for coming?

A. Yes, sir.

Q. You have no interest in this matter, one way or the other?

MR. RATHBUN: I don't think that is a proper question. I object to it.

40 Objection overruled.

*Mary Flanagan—Cross.*

BY THE COURT:

Q. Have you any interest in this proceeding or this will contest? A. Yes, sir.

BY MR. VOGT:

Q. What interest, Mrs. Flanagan, have you? A. When my uncle come to live with me he said he was going to make a will and share it up as good as his adviser would advise him, so he made the will. 10

Q. Did you understand that he was going to share it up with you? A. Yes, sir.

Q. So that you expected to be a beneficiary under his will? A. Yes, sir.

Q. And you are not, as I understand it, under the will now in question? A. No, sir.

Q. Was there any particular reason that you know of why you should have been a beneficiary under your uncle's will? A. Yes, sir. 20

MR. RATHBUN: I don't think that is material.

Objection noted and overruled.

Q. What reason was there, Mrs. Flanagan? A. Because from the time he come there he always told me.

Q. Well, why should you have shared with Mr. Tutty's two daughters and son in the disposition of his estate? A. They was his own wishes. 30

Q. Apart from that there was no reason why you should?

WITNESS: Should what?

MR. VOGT: Share in his estate.

A. It was his wish.

Q. Apart from the fact that he wished it, there was no other reason why you should share in the estate? A. No, sir. 40

*Mary Flanagan—Cross.*

Q. How much money did Mr. Tutty pay you while he lived with you? A. That I couldn't tell you at the present time.

Q. Have you any idea how much it was? A. No, sir.

MR. RATHBUN: I don't think that is material. I object.

10

Objection overruled.

Q. Who collected the rents from the Newark property for Mr. Tutty?

Objected to by Mr. Rathbun as not cross-examination.

Objection sustained.

Q. Did Mr. Tutty write his own name? A. No, sir.

20 Q. Was that due to his lack of education or due to his illness? A. Lack of education.

Q. And who signed checks for him? A. Whoever he'd ask that had learning.

Q. Do you know who generally signed them? A. Yes, sir.

Q. Who? A. Mr. Flanagan. He was always there.

30 Q. Was your rent paid in cash or by check, Mrs. Flanagan? I mean your board. Was the board that Mr. Tutty paid paid to you in cash or by check? A. In cash.

Q. All the time? A. Yes, sir.

Q. You never received a check for it? A. No, sir.

Q. Did you receive any checks from Mr. Tutty for any purpose while he lived with you? A. No, sir.

Q. Did Mr. Flanagan? A. No, sir.

*Mary Flanagan—Re-direct.*

## RE-DIRECT EXAMINATION:

Q. How long did you remain up the night that he left your house? A. Until eleven o'clock.

Q. And then you gave up his coming and went to bed? A. I gave up his coming, yes.

Q. Up to that time you expected him to return?  
A. Yes, sir.

Q. Now, when he came there to your house in the Spring of 1913, did he say anything in reference to his son? A. Yes, sir.

Q. What did he say? A. He talked continually about that rent he owed him.

Q. Well, did he give any reason why he came to you rather than to stay with his son? A. His son wouldn't have him to stay with him.

Q. Now just state anything that you recall that John Tutty told you in reference to his son Will when he came to your house to secure board. A. He'd like to stay in Jersey for a time and he couldn't stay there. His son wasn't satisfied, nor his son's wife to work for him.

Q. That's all that you recall that was said?  
A. Yes.

Q. You spoke about changing his underclothing—your husband's changing his underclothing sometimes twice a day? A. Yes, sir.

Q. Was that because of the soiled condition they got in? A. Yes, sir.

Q. Was that due to his physical condition? A. Yes, sir.

Q. General weakness? A. Yes, sir.

Q. You have also said that when he went to the piano and thought there were men working in the mine behind the piano, that you took him by the arm and set him down. Did you have any trouble in doing that? A. No, sir.

Q. He didn't resist? A. No, sir.

Q. Did he yield readily to your suggestions?  
A. Yes, sir.

*Mary Flanagan—Re-direct.*

Q. And is—was he easily influenced in doing what you wanted him to do? A. Yes, sir.

MR. VOGT: I object to that.

No ruling, as the question was answered.

10 Q. And what did you do at any time to indicate that he was—or say to him either, that indicated that he was easily influenced to do what you wanted him to do? A. Because he was very easy and anything I'd say to him, he'd be satisfied.

Q. He didn't—did he try to combat your views in anything? A. Yes, sir.

Q. What? I mean, did he try to oppose your views? A. No, sir.

Q. And how was he when Will was around? Did he attempt to oppose Will's views, or did he yield to what he wanted? A. No, sir.

20 Q. Which is it? Did he oppose his views? Is that what your answer meant? A. He wouldn't have anything to say much.

Q. And would he yield readily to what suggestions Will might make to him? A. No, sir.

Q. Well, would he do what Will suggested to him to do? A. Well, he'd come there and look at him and see him and often times wouldn't have anything to say.

30 Q. I mean if Will made suggestions to him and told him what to do, would he do those things readily? A. If he thought to himself that it was right, he would.

Q. Well, what do you mean by saying he was easily influenced? What did you mean when you said he was easily influenced? A. If I'd say anything to him, to come and sit down, he wouldn't see these things, he'd come and sit down. Is that what you mean?

40 Q. Well now, from what that showed, do you think he was easily influenced? A. No, sir.

*Mary Flanagan—Re-direct.*

Q. What did you ever hear Will say to him that he promptly or easily and readily did? A. He asked him if he'd go for a drive with him, and he had promised to come there and bring him out, and he said he'd go.

Q. Now who looked after the giving of medicine to him? A. I did; me and my husband.

Q. Who watched the time? Did he or you? **10**  
A. I did.

Q. You did? A. Yes, sir.

Q. Did he take any particular notice of the passage of time? A. Yes, sir. He'd often say, "It's near time for a few more pills."

Q. He would, himself, at the time? A. Yes, sir.

Q. Well, would it be near the time? A. Yes, sir.

Q. So that you didn't always look after it, then? A. Well, I'd be waiting for the time to come to give it to him. **20**

Q. What's that? A. I'd be waiting for the time to come to wait on him.

Q. You have testified that the first you observed about his failing condition was on Ash Wednesday. Now, when is Ash Wednesday? A. It seems to me it was around last February, last year.

Q. How long before Easter? A. Five weeks. **30**

Q. Is Ash Wednesday—what's that? A. Five weeks.

Q. So that you were in error then when you told Mr. Vogt that Ash Wednesday was in November? A. I couldn't—I didn't remember at the time.

Q. But you know that Ash Wednesday comes a few weeks before Easter? A. Yes, sir.

Q. And you observe Easter as one of the religious days in your church, don't you? A. Yes, **40**  
sir.

*Mary Flanagan—Re-direct.*

Q. When did he tell you the first time that he didn't think he was ever going to get any better?

THE COURT: When did he tell you that first?

A. Why, I am most sure it was around March month. When he got so feeble he kind of gave himself up.

10 Q. He was getting worse and worse all the time before he left your house? A. Yes, sir.

Q. What Doctor attended him? A. Dr. John Walters.

Q. Of Wharton? A. Yes, sir.

Q. You have testified that in the execution of these two wills prepared by Mr. Davenport on one occasion Mrs. Davenport acted as witness and on another Mr. Smith acted as witness. What did 20 Mr. Davenport do? A. Changed the will a little.

Q. Well, did he sign either one of those papers?

WITNESS: Mr. Davenport?

MR. RATHBUN: Yes.

A. Yes, sir.

Q. He acted as witness also, then, did he? A. Yes, sir.

Q. There were only two witnesses to the will—that is, only two persons who signed their names 30 as witnesses? A. Yes, sir.

Q. And the first will was Mr. and Mrs. Davenport and the second will Mr. Davenport and Mr. Smith. Is that correct? A. Yes, sir.

Q. For how long a period did Mr. Tutty, from time to time, soil himself and necessitate the changing of his underclothing? A. Well, coming on the last, quite regular, maybe twice a day and maybe only once a day.

Q. I mean covering what period, from what 40 month, or how long before he went from your house? A. Oh, over a month.

Q. Over a month? A. Yes, sir.

*Mary Flanagan—Re-cross.*

## RE-CROSS EXAMINATION:

Q. I asked you, Mrs. Flanagan, how many witnesses there were to the wills that you saw written. A. Besides the lawyer that wrote them.

Q. You didn't tell me that. A. Well, you didn't ask me.

Q. I asked you how many witnesses signed the will. Do you recollect what you said? A. One witness besides the lawyer. 10

Q. Did the lawyer act as a witness also, or did he simply do the writing that Mr. Tutty wanted done? A. Yes, sir.

Q. Now which? A. He done the writing. I couldn't say whether his name was at the bottom or not.

Q. You sat where you could see it being written? A. Yes, sir. 20

Q. You don't recollect whether Mr. Davenport signed as a witness or not? A. I am most sure his name was on the paper.

Q. Who told you that Ash Wednesday came in February?

WITNESS: Who told me?

MR. VOGT: Yes.

A. I told myself.

Q. When did you find it out? A. Since I've been thinking this over. 30

Q. During recess? A. Yes, sir.

Q. You haven't been talking it over with anyone? A. No, sir.

Q. Sure of that? A. Yes, sir.

Q. What day in February did it come on? A. The 27th.

Q. What day was Easter on? A. The 12th of April.

Q. This year? A. Yes, sir.

Q. Have you looked that up since this morning session? A. No, sir. 40

*Mary Flanagan—Re-cross.*

Q. Did Easter come early or late this year? A. Well, it come later than last year. It came in March last year, I believe.

BY THE COURT:

Q. I want to ask, Mrs. Flanagan, this question with reference to some matters that your conversation goes to, and that is that you said that Mr.  
**10** Tutty asked how long your mother had been dead, and such questions as that. Is your mother living or dead? A. Dead.

Q. Now when did she die? A. She died four years last July.

Q. So that at that time she was, as a matter of fact, not living, at the time he asked you? A. No, sir.

Q. You have spoken about— A. (Interrupting) That was around last April, only a few days  
**20** before he left.

Q. Well, your mother, at that time, of course, was not living, was she? A. No, sir.

Q. These funerals that he spoke about—seeing funerals go by. Can't you tell us when that was—what month that he stated to you that he saw funerals go by? A. It was March month, around the blizzard. There was snow.

Q. Now, directing your mind to what you have said as to a conversation between Father Carew  
**30** and Mr. Tutty, that in answer to some question that Father Carew had put to Mr. Tutty, Mr. Tutty answered, referring to the will, that it was all right. Do you recall so testifying? A. Yes, sir.

Q. Which will did he refer to, if you can tell us from what he said? A. When Farther Carew took down the note of his—what he had intended to do, he asked him if it was all right, and he said yes.

**40** Q. So that would be the second will in question at that time, wouldn't it? A. No, sir.

*Mary Flanagan—Re-cross.*

Q. Which will would it be? A. That's the first writing.

Q. That's the first writing? Is that the writing where you are mentioned as a beneficiary? A. Yes, sir.

Q. And, if you know, to what extent? How much, in other words, or what did you receive or were you to receive in it? A. Whatever would be left after the debts and his expenses, doctor bills and funeral bills were all paid. 10

Q. You were to receive the remainder? A. Yes, sir.

Q. And how much were the daughters to receive? A. One hundred dollars each.

Q. Two daughters, were there? A. Yes, sir.

Q. And is that the way that that paper provided after it was signed by Mr. Tutty. A. Yes, sir. 20

Q. So that you were to receive the entire balance after each daughter received one hundred dollars, and the doctor's bill and funeral expenses and his expenses were paid? A. Yes, sir.

Q. And no mention of William Tutty in that previous will—the first will? A. Only the home.

Q. He was to receive the home? A. Yes, sir.

Q. Was there any other mention of real estate property other than the home in the will? A. A lot left to three grandsons. 30

Q. In the first will? A. Yes, sir. I must contradict myself. I don't think that it was. That change was made when the lawyer was brought back.

Q. Which change do you refer to? A. The change, the lot being left to the grandsons.

Q. So that the first will didn't provide for this lot to go to the three grandchildren? A. No, sir.

Q. What happened to the lot in that will, if you remember from the reading of the contents of 40

*Mary Flanagan—Re-cross.*

the will or having heard it read? Who was to get the lot in question? A. He was to leave the lot.

Q. That was part of his estate out of which probably you would have received something? A. Yes, sir.

Q. What is the value of the lot? Do you know?

10 A. I couldn't say.

Q. Have you any idea of the value of that lot?

A. I have heard him say it was three hundred dollars.

Q. You have stated that you or others, or both you and others, have or did generally lead him around. Now why was that necessary? Was he blind or what was the trouble? A. No, sir. From sitting so much he seemed to be weak around the limbs.

20 Q. So it was for the physical inability, was it?

A. Yes, sir.

Q. He could see, could he? A. Yes, sir.

Q. And what have you to say about his mental faculties; sufficient were they, or were they not to tell him where he was going? In other words, did he know whether he was in any given place in any given room? A. At times, coming evening, he wouldn't know whether he was in the room. He imagined he was out in the street, coming on the last week or two before he left.

30

Q. How did you know that? A. Why, he told me.

Q. What would he say, or do you remember what he said to you about it? A. If he would spit around or anything, if you'd say anything to him, he would say, "Oh, I thought I was out."

Q. That is, he thought he was outdoors. A. Yes, sir.

Q. And you didn't deem it to be very serious, 40 did you, his stating that? A. No, sir.

*Mary Flanagan—Re-cross.*

Q. You have stated also that he said he owned a building, in Newark, I think, and had a bank account and owned vacant lots. Now what I would like to know is when did he say that to you? What month and what part of the month, if you can tell us? A. Last July and August.

Q. He hasn't said anything about that regarding what property he owned since last August? **10**  
A. Oh, yes, sir.

Q. When was the last he told you about what property he owned? A. Around the time of making his will.

Q. And when do you fix that? A. I couldn't give any special date.

Q. What month? A. December.

Q. At that time, what did he tell you that he owned or possessed? What did he say it was? A. His home in Newark—his house in Newark and his accounts. **20**

Q. You don't know whether anything else other than those things; anything else that he said he had? The home in Newark and his accounts? A. No, sir.

Q. Now, Mrs. Flanagan, when Mr. Tuttle—Mr. Tutty left your home May 3, 1914, what have you to say with reference to his mental condition? I mean by that whether he knew what he was about at that time or whether he didn't. The question is, did he know what he was about? A. He knew he was going for a drive, but he didn't know he was going to leave me for good. **30**

Q. What have you to say about this question, as to whether he understood that day, May third, which was a Sunday, as you stated, the different little matters or things that he attended to or was engaged in? Did he know what he was doing generally that day? Was he a man that was doing things and didn't comprehend it? A. Yes, sir. **40**

*Mary Flanagan—Re-cross.*

Q. He was the latter, was he? A. Yes, sir.

Q. And why do you say he was that? What did he do that you think he didn't understand?

A. He was sitting out on a lounge on the lawn and came in the house and sat on a chair when he should have went to the toilet.

Q. What else, if anything, did he do or say?

10 A. He came in the house and asked me if I was near ready to go out with him and I told him to sit down in the chair a little while and I would get supper ready, so that was all I noticed that evening.

Q. What was there strange about his asking you if you were ready to go out with him? A. It was evening and he just got that notion.

Q. Did you ever go out with him? A. Not after he was taken sick. I used to take walks  
20 before that.

Q. That was especially strange to have him ask you whether you were ready to go with him? Why was it? A. Because he had been out in the yard that length of time and I thought it was sufficient for him.

Q. Now you told us those incidents of that day on Sunday the third. Is there anything else that occurred that day that you remember that appear to you as being strange? A. Yes, sir. He was  
30 getting changed in the morning and he took out his tobacco bag and he imagined he was picking green bugs off of it.

Q. How do you know that? A. Because he called me over to him to help him.

Q. What did he say? A. He said: "Come here, Mary, and help me pick these bugs off. Can't you see them crawling around?"

Q. What followed that? A. I hurried him along and filled his pipe with his tobacco and put the  
40 bag away so as to not have that on his mind.

*James Flanagan—Direct.*

Q. What did he say to you to explain why he thought his tobacco was bugs? A. Just imagination.

Q. He did have tobacco, did he? A. Yes, sir.

Q. Did anything else occur that day other than those three things? A. I couldn't say at the present time.

Q. You think he was of unsound mind on that day, do you? A. Yes, sir. 10

Q. And for the reasons that you have stated? Is that true? A. Yes, sir.

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JAMES FLANAGAN, a witness produced on the part of the caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

20

Q. Where do you live? A. West Dover Heights.

Q. And you are the husband of the last witness? A. Yes, sir.

Q. And a nephew by marriage of John Tutty, deceased? A. (No answer.)

Q. Your wife's name was Tutty, I believe? A. Yes, sir.

Q. How long did John Tutty live with you? A. Well, I don't know. My wife told me he came there in May. I don't know. 30

Q. About how long?

## BY THE COURT:

Q. Were you there? A. No, sir, I was not there.

## BY MR. RATHBUN:

Q. Where were you when John Tutty came there to live? A. South America.

Q. When did you return? A. 26th day of June. 40

*James Flanagan—Direct.*

Q. 1913? A. Yes, sir.

Q. And found Mr. Tutty there at that time? A. Yes, sir.

Q. And how long did he remain there? A. He remained there until the third day of May.

Q. 1914? A. 1914.

Q. He was there continuously all that time? A. 10 Yes, sir.

Q. What was he doing at your house? A. Stopping there.

Q. Boarding there? A. Yes.

Q. How long had you known him? A. Oh, I knew Mr. Tutty for about twenty-five years.

Q. Where did he live when you first saw him? A. Over to Allen Mine.

Q. Do you know how long he was away from Allen Mine? A. No, sir, I do not.

20 Q. Do you know how long he lived in New York? A. No, sir.

Q. Do you know with whom he lived in New York? A. No, sir, I do not.

Q. You never visited him while he was in New York? A. No, sir.

Q. Did you ever talk with him as to why he was stopping with you rather than with his son? A. Yes, sir.

30 Q. When did you talk with him? A. Why, shortly after I came back from South America.

Q. And what did he say to you? A. He said they didn't want him up there at the house.

Q. He had only one son? A. Yes, sir.

Q. Is that all—his son Will? A. Yes, sir.

Q. Did they give any reason why they didn't want him there? A. No, sir.

Q. Did he say how he knew they didn't want him there? A. Yes, sir.

40 Q. What did he say about that? A. He said he asked him to write a letter for his trunk. He

*James Flanagan—Direct.*

said he wouldn't write no letter for him; he didn't want him there at all.

Q. How often did Will come down to your house while his father was there? A. I couldn't tell you that, because I was working all the day-time.

Q. Well, how often did he come there at night—during the evenings? A. He came there four or five different times in the evenings. 10

Q. So that you saw him there four or five different times? A. Yes, sir.

Q. Did Will ever say anything to you about his father having made a will or ought to make a will? A. No, sir.

Q. Did you ever talk to Will about his father's property? A. No, sir. I never thought about his property at all.

Q. Did you notice anything peculiar or queer about John Tutty while he was staying at your house? A. Yes, sir. 20

Q. When did you first notice his being—notice anything about him peculiar or queer? A. Just after Ash Wednesday.

Q. Of this year? A. Yes, sir.

Q. And what did you observe? A. Why, he used to ramble; used his cane; hit everything around the house with it, especially in the night time. 30

Q. Well, when he hit these things with the cane, did he say anything as to why he did it? A. Yes, sir.

Q. What would he say? A. We had a flour barrel setting in the kitchen with a spread over the top of it. He used his cane and walked over to the barrel and would start to hit the flour barrel with the cane, saying, "Git up, Dan, git up." Then he'd get mad because it wouldn't go, and hit it all the harder. 40

*James Flanagan—Direct.*

Q. You have also told about his hitting the wall with the cane? A. Yes, sir.

Q. Did he say anything on those occasions? A. Yes, sir.

Q. What? A. He was trying ground; said it was bad ground in the wall.

10 Q. Do you work in a mine yourself? A. No, sir, not at present.

Q. You have worked in a mine? A. Yes, sir.

Q. And do you know what they do in regard to sounding the walls of a mine? A. Yes, sir.

Q. And is that what they do to find out whether there are bad spots in the wall? A. To find out whether there is any loose ground.

Q. And he did the same thing in your house that miners do in the mines? A. Yes, sir.

20 Q. Now what else did you observe? A. Why, he pulled off the table cloth and pretty near pulled off the lamp. I asked him what he was doing. He said he wanted to get up there to try that ground so the men could work. He wasn't able to get up on the table.

Q. How often did he do this? A. Four or five different times.

30 Q. Anything else that you noticed? A. No, sir, only that he used to want to go out when he wasn't able to walk—not without somebody on one side of him and his stick in his other hand.

Q. Did he merely express the wish that he could go out, or try to go out? A. Try to go out.

Q. Try to go out? A. Yes, sir.

Q. What time of day or night would this be? A. Sometimes in the morning, sometimes in the afternoon.

Q. Any at night? A. No, sir.

40 Q. How long had he been unable to walk? A. Well, he was—he was able to walk all the time; get hold of something; but he couldn't walk across

*James Flanagan—Direct.*

the floor sometimes if he didn't have a stick or somebody to help him across the floor.

Q. Why? A. His feet were too sore. He couldn't raise his feet high enough on the floor.

Q. Was that due to his age, or due to sickness, or what? A. Due to the disease he had in his feet.

Q. What disease did he have in his feet? A. I don't know. 10

Q. Do you know what he was suffering from in the last of his living? A. No, sir, I do not.

Q. Do you know of any complaint that he had? A. Well, I heard the doctor say that he had dropsy in his feet once.

Q. Did his feet swell? A. Yes, sir.

Q. And was the swollen condition of his feet the reason he couldn't use his feet much? A. Yes, sir. 20

Q. And how far up did the swelling extend? A. Up to his hips.

Q. And for how long a period was that? A. Oh, it was over a month.

Q. Do you know whether he had such a disease known as Bright's Disease? A. No, sir, I don't know whether he did or not.

Q. Where was his bed room? A. Bed room? Upstairs.

Q. Did he go to bed every night during his—the last of his stay with you? A. No, sir. He couldn't lay down. 30

Q. He didn't go to bed at all then? A. No.

Q. And for how long a period was that? A. I think it was shortly after Christmas.

Q. And where did he spend the night? A. In a big rocking chair.

Q. In what room? A. In the kitchen.

Q. Was he—who looked after him at nights? A. I looked after him by night. 40

*James Flanagan—Direct.*

Q. Was he taking medicine all the time during that last period? A. Yes, sir.

Q. Who gave him the medicine? A. My wife gave it to him. Nights she left it there for me to give.

Q. And would you give it to him? A. Yes, sir.

10 Q. He didn't attempt to take the medicine himself without your assistance? A. No, sir.

Q. Who dressed or undressed him? A. I did. Sometimes he'd undress himself right in the middle of the floor.

Q. And how often did you change his clothing—underclothing? A. I sometimes changed his clothes twice a day.

Q. Why was it necessary to change—or why did you change it twice a day? A. Because the man didn't know when he wanted to use the toilet.

20 Q. And he'd soil himself and his clothes? A. Yes, sir.

Q. How long did that continue? From what time until what time? A. Well, I think it started after Easter.

Q. Did that continue until up to the time he left? A. Just about up to the time he left.

Q. What was his general physical condition when he left, as to weakness or strength? A. He didn't have much strength.

30 Q. And had his weakness increased during his latter—during the latter part of his stay with you? A. Yes, sir.

Q. Well, how feeble was he? A. Well, he was so feeble he couldn't get into the wagon. The wagon backed in to the stoop.

Q. The night he left? A. The evening he left, yes. I had to lift him in.

Q. Did you know when he left that he was going for good? A. No, sir.

40 Q. What did the old man say about it? A. He thought he was going for a ride.

*James Flanagan—Direct.*

Q. What did he say? A. I didn't hear him say anything.

Q. Did he say anything to you as he left—

WITNESS: (Interrupting) Sir?

Q. (Continued) Or just before he left?

MR. RATHBUN: Did he say anything to you as he left or just before he left?

10

A. No, sir.

Q. Who asked you to lift him into the wagon?

A. Mr. William Tutty came there and he held the horse and his father tried to get in the wagon and couldn't, and I lifted him into the wagon.

Q. What kind of a wagon did he have? A. A road wagon.

Q. A road wagon? A. Yes, sir.

Q. Did he sit on the seat? A. Yes, sir.

Q. What did William Tutty say when he came there after him? A. Why, he said the old man was in bad shape. He said he didn't know when he wanted to go out to the closet. 20

Q. What else did he say? A. I didn't hear him say anything.

Q. I mean the night that he came there after him? A. He said he wanted to take him out for a ride.

Q. Did he tell you he was going to take him to his own home? A. No, sir. 30

Q. Was there anything said by him—that is by William Tutty—which conveyed the idea to you that he was going to take him away permanently? A. No, sir.

Q. Did he take any of the old man's clothing that night? A. No, sir.

Q. Did he ask you to get any of them that night so he could take it? A. No, sir.

Q. When did he get the clothing? A. I think it was on the Monday evening after. 40

*James Flanagan—Direct.*

Q. And this was on Sunday night he went away? A. Yes, sir.

Q. What was the mental condition of John Tutty the night he left your house? A. Well, he didn't seem to be very good.

Q. How did he indicate that? A. He was weak.

10 Q. Did he seem bright and alert or dull and slow? A. Very dull and slow.

Q. For how long a period do you think his mental faculties had been impaired? A. I don't think his mental faculties were any good after Ash Wednesday, excepting certain days.

Q. And what happened Ash Wednesday? A. Why, he got a weakness.

Q. What's that? A. He got a weak spell Ash Wednesday evening.

20 Q. And he seemed to be worse that night, did he? A. Yes, sir.

Q. And from then on you think his mental faculties were impaired? A. Yes, sir.

Q. And he grew worse and worse until he left your house? Is that true? A. Well, there was times that he was quite good.

Q. How long would those spells last when he was apparently quite good? A. Oh, they'd last a couple of days at a time sometimes.

30 Q. Did John Tutty ever speak to you about making a will? A. No, sir.

Q. Did you know he made a will? A. I heard that he did, yes.

Q. You didn't get that information from him? A. No, sir.

Q. And you were not present when he made it? A. No, sir.

40 Q. You were not present when either one of those wills were made at your house? A. No, sir. I came in shortly after they were, though. I came from work shortly after one night. I never knew what was on.

*James Flanagan—Cross.*

Q. Were you there when Father Carew was there? A. Yes, sir.

Q. Did you ever hear him talk to Father Carew about disposing of his property? A. No, sir.

Q. Did you ever hear Will Tutty talk to Father Carew about the disposition of John Tutty's property? A. No, sir.

Q. Did Will Tutty ever speak to you about what he might have said to Father Carew— A. (Interrupting) No, sir. 10

Q. (Continued) About the property? In your opinion, was John Tutty, during the last two or three months of his living in your house, a man that could be easily influenced or not? A. I don't think he could be very easily influenced.

Q. You don't think he could? Did you ever try? A. No, sir. It made no difference to me what the man done. 20

Q. What's that? A. It didn't make no difference to me what he done.

Q. Well, if he was doing anything, wouldn't you try to stop him? A. Yes, sir.

Q. Well, would he stop? A. Sometimes he would and sometimes he wouldn't.

Q. Well, when he stopped, would he do it promptly, without any difficulty on your part? A. Yes, sir.

Q. You say sometimes he would and sometimes he would not. A. (No answer.) 30

## CROSS EXAMINATION BY MR. VOGT:

Q. What is your occupation, Mr. Flanagan? A. Laborer.

Q. And have you worked as a laborer ever since you returned from South America? A. Yes, sir.

Q. Where? A. I worked in Pennsylvania and worked up at the Picatinny Arsenal.

Q. Where did you work between June 26th, 1913, and May 3rd, 1914? A. Pennsylvania and the Picatinny Arsenal. 40

*James Flanagan—Cross.*

Q. And how long were you in Pennsylvania?

A. In Pennsylvania two months—three months.

Q. Where are you now? Picatinny Arsenal?

A. Yes, sir.

Q. How long have you been there? A. I have been there going on two years.

10 Q. Well, now, what do you mean? You didn't come back from South America until a year ago last June. A. I mean this is going on a year up to the Picatinny Arsenal.

Q. Well, when you came home from South America, did you then go up in Pennsylvania to work? A. No, sir, I stayed home three days.

Q. I mean shortly after you came home? A. Yes, sir.

20 Q. You were in Pennsylvania in July and August of last year? A. Yes, sir, and part of September.

Q. Then you came back home and since then have been at the Picatinny Arsenal? A. Yes, sir.

Q. Where is Picatinny Arsenal? A. In Morris County, up from Wharton.

Q. Over on the Green Pond Mountain, over towards Lake Denmark? A. Yes, before you come to Lake Denmark.

Q. How far from Wharton? A. About two miles and a half.

30 Q. Did you live at Wharton and go back and forth? A. I went back and forth.

Q. Every day? A. Yes, sir.

Q. What time in the morning did you leave home? A. Seven o'clock.

Q. What time did you get home in the evening? A. Six o'clock.

Q. How would you go back and forth? Walk? A. Walk sometimes and sometimes on the train.

40 Q. So that it was only between six o'clock at night and seven in the morning that you were home? A. Yes, sir.

*James Flanagan—Cross.*

Q. And you don't know anything that happened during the daytime at your house? A. I did after January 21st.

Q. What happened January 21st? A. There were a whole lot of us laid off. They didn't have any work for us in the powder works.

Q. And were you one of those laid off? A. Yes, sir. 10

Q. And how long were you laid off? A. I was laid off two months—three months; about three months.

Q. From January 21st until three months thereafter, were you out of work entirely? A. Yes, sir.

Q. Then what did you get to do? A. I didn't get anything to do.

Q. You are working now, are you not? A. Yes, sir.

Q. Where? A. The Arsenal. 20

Q. When did you go back to the Arsenal? A. In April.

Q. So that you were working there from sometime in April until Mr. Tutty left your house? A. Yes, sir.

Q. Now, from that time in January until you went back to the Arsenal in April, did you do any work at all? A. No, sir.

Q. Were you looking for work? A. Yes, sir.

Q. And were you away from your home in the daytime? A. Yes, sir; a few hours some days; not all the time. 30

Q. Not all the time? A. No, sir.

Q. How many times did you see Will Tutty down at your house calling on his father?

THE COURT: Altogether, during the time the father was at your home.

A. I may have seen him six times.

Q. And not more than that? A. Not that I 40

*James Flanagan—Cross.*

can think of. I might have seen him more. I can't recall it now.

Q. Were Mr. Tutty and his son on good terms?

A. They didn't appear to be on the best of terms, no.

Q. They did not? What led you to believe that they were not on good terms? A. Well, the old man said he didn't pay him his rent.

10

Q. Did he tell Mr. Will Tutty that? A. Yes sir.

Q. In your presence? A. Yes, sir.

Q. How many times? A. Once that I know of.

Q. When was that, Mr. Flanagan? A. I can't just tell you the date now.

Q. What month? A. I think it was in April month.

Q. Of this year? A. Yes, sir.

20

Q. In the early part of April or the latter part? A. The early part.

Q. And Mr. Tutty told his son that he hadn't brought his rent to him? A. Yes, sir.

Q. What did the son say? A. He said that he would.

Q. What did Mr. Tutty say to that? A. He said that he didn't.

Q. Anything else said by either one? A. Nothing, only that the father had it that he didn't.

30

Q. Where were you during that conversation? A. In the house.

Q. In the same room they were in? A. Yes, sir.

Q. Anybody else there beside yourself? A. Yes, sir.

Q. Who? A. My wife and Will Tutty and his wife.

Q. And Mr. John Tutty talked intelligently? A. Yes, sir.

40

*James Flanagan—Cross.*

Q. Knew what he was talking about? A. No, I don't think he knew what he was talking about.

Q. Why not? A. Because the man had paid his board that week—or his rent.

Q. You know that, do you? A. Yes, sir.

Q. Did you see him pay it? A. No, sir.

Q. How did you know that he had? A. Because my wife told me he did.

10

Q. Did you wife tell you that Will had paid it to her or to his father? A. Paid it to his father.

Q. What day of the week was it that Mr. Tutty and his son had this conversation? A. I couldn't just tell the day now.

Q. When Mr. Tutty accused his son of not having paid the rent, did Mrs. Flanagan tell him that he had? A. Yes, sir.

Q. And what did Mr. Tutty say then? A. Said he didn't.

20

Q. So that, notwithstanding Mrs. Flanagan had corrected him, he still insisted that it had not been paid? A. Yes, sir.

Q. What time of the day was that? A. In the evening.

Q. After supper? A. Yes, sir.

Q. And where were you all sitting? In the front room downstairs? A. No, sir, sitting in the kitchen.

Q. What else did Mr. Tutty say that night which you recollect? A. I don't recollect him saying anything else that night.

30

Q. Did you have any conversation with him yourself that night?

WITNESS: Mr. Tutty?

MR. VOGT: Yes.

A. No, sir.

Q. How long did Mr. Will Tutty stay? A. I couldn't just tell you that; probably half an hour or so.

40

*James Flanagan—Cross.*

Q. Is that all that you recall having occurred that leads you to think that Mr. John Tutty and his son were not on good terms? A. Yes, sir.

Q. Then, as you understand it, Mr. John Tutty was not on good terms with his son because he had the idea he had not paid his rent. Is that right?

A. No, that was not it. He was not on good terms  
10 on account of that.

Q. And yet, as a matter of fact, Mr. Tutty had paid his rent? A. Yes, sir, that particular month.

Q. How did Mr. Will Tutty treat his father? Respectfully and properly? A. Well, Will Tutty was there lots of times when I was not there.

Q. I mean when you were there, Mr. Flanagan.

A. Well, at times he didn't seem to be very well pleased with his father.

Q. Well, now, give us an instance of that. A.  
20 Why, he snapped the old gentleman off on anything he'd say.

Q. How? What did Mr. Will Tutty say that you thought snapped the old gentleman off? A. Why, he'd get angry with him.

Q. Tell us what happened. A. He told his father that he didn't know what he was talking about.

Q. What would the old gentleman say? A. Yes, sir; he didn't know what he was talking about.

30 That would make the father mad.

Q. What had Mr. John Tutty said that led Mr. William Tutty to say his father didn't know what he was talking about? A. About the rent.

Q. Well, now, are you detailing the same conversation you gave us just a moment ago? A. Yes, sir.

Q. Well, now, tell us something else that happened, Mr. Flanagan, that led you to think that Mr. Tutty and his father were not on good terms.

40

MR. VOGT: I will withdraw the question.

*James Flanagan—Cross.*

Q. In this particular instance of the rent matter, Mr. John Tutty was in the wrong, was he not?

A. Yes, sir.

Q. So that there was nothing regarding that that led you to believe that Will Tutty was on bad terms with his father? A. No, not at that time.

Q. Will was in the right, was he not? A. Yes, 10  
sir.

Q. Tell us of an instance that led you to think that John Tutty and his son were not on good terms, if you can recall any. A. I don't know of any.

Q. Now, did you converse with Mr. John Tutty from time to time while he was there at your place? A. Very little.

Q. But you did talk with him— A. (Interrupting) Yes, sir. 20

Q. (Continued) On different matters? A. Yes, sir.

Q. What, for instance, would be a subject of your conversation? A. Why, we'd play cards and talk; play dominoes.

Q. You would play with Mr. Tutty? A. Yes, sir. Sometimes he'd be—

Q. (Interrupting) What kind of cards? A. We played Forty-five.

Q. Any other game? A. No, sir. 30

Q. And Mr. Tutty knew how to play that game? A. Yes, sir.

Q. And he knew how to play dominoes? A. Yes, sir.

Q. Did he ever beat you? A. Yes, sir.

Q. And while you were playing cards, you would talk to each other? A. Yes, sir.

Q. Would anybody else sit in the game besides you and he? A. Sometimes.

Q. Who? A. My wife. 40

*James Flanagan—Cross.*

Q. Anybody else? A. Sometimes Mr. Rourke.

Q. Anybody else? A. No, sir.

Q. Could more than two people play Forty-five at once? A. Yes. Nine could play it at once.

Q. When, according to your recollection, Mr. Flanagan, was the last time that you played cards or dominoes with Mr. Tutty? A. Shortly after  
 10 Christmas.

Q. So that during the time that you were laid off from the powder works, you didn't play any of that time at all? A. No, sir.

Q. Did you see him playing with anybody else? A. No, sir.

Q. How many times did you play cards with him altogether? A. Quite a good many times—in clear weather.

Q. But not since shortly after Christmas? A.  
 20 No, sir.

Q. What would the old gentleman do with himself around the house? A. Read his book.

Q. What kind of book did he have? A. A prayer book.

Q. Prayer book? A. Yes, sir.

Q. Did he ever read it to the family or read it out loud? A. No, sir; read it to himself.

Q. And when do you recollect seeing him reading it last? A. Just after Easter.

30 Q. Did he carry the book around with him or keep it on the book shelf, or what? A. Stood it on the window sill.

Q. Get it himself, or would somebody get it for him? A. Somebody would have to take it off the sill and give it to him.

Q. And would he ask for it? A. Yes, sir.

Q. Who gave him his medicine? A. My wife gave him medicine, and I did.

Q. Who would give it to him at night? A. I  
 40 would.

*James Flanagan—Cross.*

Q. And you sat up with him every night? A. Yes, sir.

Q. For how long a period? A. For nearly three months.

Q. That is, the three months prior to May 3rd? A. Yes, sir.

Q. Would you stay awake during all the night? A. Yes, sir. 10

Q. Even at the time you were working at the powder works in the daytime? A. Yes, sir.

Q. So that during that time— A. (Interrupting) I slept on a chair so I could hear him if he got up.

Q. You slept on a chair in the same room? A. Yes, sir.

Q. And he slept on a chair? A. Yes, sir.

Q. Would he get up during the night? A. Yes, sir. 20

Q. Frequently? A. Yes, sir.

Q. Ask you for anything? A. No, sir. He'd go by the stove. I was afraid he'd set fire to the house.

Q. Stove in the same room? A. Yes, sir.

Q. A stove that was going all that time? A. Yes, sir.

Q. Did he ever tell you he was cold? A. Sometimes he would.

Q. And would he say that he thought the stove ought to be burned up a little bit? A. He'd ask me was there any fire in the stove, sometimes. 30

Q. Did he ever tell you that his medicine was due? A. Yes, sir. He'd ask me was it due.

Q. You don't know what kind of medicine he took, do you? A. I know he took small tablets and large ones.

Q. Did he take any whiskey during the night? A. Very seldom.

Q. But he did at times? A. Yes, sir. 40

*James Flanagan—Cross.*

Q. And how much would he take? A. Just a little wine glass full in hot water.

Q. Did you get the hot water? A. I did.

Q. Would he ask for it? A. Yes, sir.

Q. Did he ever ask you what you were doing sitting up so late? A. Yes, sir.

10 Q. And what did you say to him? A. I told him I was looking to see that he wouldn't turn over the lamp.

Q. What did he say to that? A. He said, "You needn't be afraid; I won't turn it over."

Q. Did you keep a lighted lamp in the room over night? A. Yes, sir.

Q. Was he a sound sleeper or a light sleeper? A. Sometimes he wouldn't sleep at all in the night.

Q. Would he know what time it was? A. No, sir.

20 Q. Could he tell the time? A. He couldn't see the clock.

Q. The clock was in another room? A. No, sir; he couldn't tell the time with any clock.

Q. Could he in the daytime? A. Yes, sir.

Q. So that the reason he couldn't at night was because of the poor light or the low light? A. Well, we had a good light.

Q. What was the reason he couldn't tell the time at night? A. He was too sleepy.

30

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At this point the hearing of this matter was adjourned to Friday, October 30th, 1914, at ten o'clock in the forenoon.

R. C. MATTHEWS,  
Stenographer.

40

**Testimony.****MORRIS ORPHANS' COURT.**


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In the Matter of the application for probate of a certain paper writing purporting to be the last Will and Testament of JOHN TUTTY, late of the County of Morris, Deceased.

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Book Three.  
On Caveat.

10

Transcript of shorthand notes of testimony taken in the above matter before Hon. Joshua R. Salmon, Judge of said Court, at the Court House in Morristown, New Jersey, on Thursday, the 3rd day of December, in the year One thousand Nine hundred and Fourteen, by R. C. Matthews, stenographer.

20

**APPEARANCES :**

ELMER KING, Esq., Proctor for and of Counsel with Proponents.

MESSRS. CHAS. A. RATHBUN & LYMAN M. SMITH, Proctors for and of Counsel with Caveators.

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JAMES FLANAGAN, a witness produced on behalf of the Caveators, resumes the stand.

30

FURTHER CROSS EXAMINATION BY MR. KING :

Q. Did you see Mr. Tutty on May 8th, 1914? A. May 8th? No, sir.

Q. When did you see him prior to May 8th, 1914? A. On Sunday, the 3rd.

Q. What knowledge have you of his condition on May 8th?

WITNESS: On May 8th?

40

*James Flanagan—Re-direct.*

MR. KING: Have you any?

A. Nothing only what his son said.

Q. I am asking what you saw—what you saw, what you know. A. No, sir. I didn't see him May 8th.

Q. Do you know whether on May 8th he was mentally able to know the property that he had?

10 A. No, sir.

Q. You don't know whether he was able at that time to fairly distribute his estate, if he wished? You have no knowledge about that, have you? A. No, sir.

Q. Then, getting down to the facts, of the case, on the day he made the will you have no knowledge of his mental or physical condition? A. No, sir.

20 RE-DIRECT EXAMINATION BY MR. RATHBUN:

Q. When did you see him, if you did see him at all, after he left your house? A. I didn't see him after he left our house.

Q. Did you see William Tutty after John Tutty left your house? A. Yes, sir.

Q. And did William Tutty tell you anything about the condition of John Tutty?

30 MR. KING: I object.

THE COURT: I think probably that this can be admitted, subject to having it eliminated in the future if it appears to be unsound subject to being struck out if it is shown to be improper.

The question being read by the stenographer, Mr. King withdrew his objection.

A. Yes, sir.

Q. Now what did he tell you?

40 MR. KING: I object because there is no date fixed.

*James Flanagan—Re-direct.*

Q. After he left your house? A. I think it was on the 4th of May.

Q. The 4th of May? Now, what did he tell you?

MR. KING: I object.

THE COURT: This, I think, should be admitted subject to the condition of which we spoke; future disposition on a motion to strike out.

10

A. He said Mr. Tutty was in a bad way and didn't have any control of himself at all.

Q. Did you see him after the 4th—that is, did you see William Tutty after the 4th day of May?

A. Yes, sir.

Q. Where? A. At our house.

Q. And how long after May 4th? A. I think it was the 5th of May.

Q. Were you talking with him or he with you—

20

A. (Interrupting) No, sir.

Q. (Continued) On that date with regard to John Tutty? A. No, sir.

Q. Did you see William Tutty after that and before John Tutty died? A. Not to talk to, no, sir. No, sir; I didn't see him to talk to after that.

Q. Then those are the only two occasions you saw William Tutty after John Tutty left your house? A. Yes, sir.

30

Q. Judging from the condition of John Tutty on the day he left your house, in your opinion was his condition such as to permit, within a day or two thereafter, of his becoming in fit condition to execute a will?

MR. KING: I object.

THE COURT: Let us see what his opinion is now as to his condition then, when he last saw him prior to his making the will. Find out when this man last saw John Tutty, and his opinion as to his condition then.

40

*James Flanagan—Re-direct.*

Q. How did John Tutty appear, mentally, on the last day he was at your house? A. Very poor.

Q. And how did he exhibit that to you? That condition? A. By shoving everything around.

Q. And in what manner would he do this shoving things around? In other words, what do you mean by shoving things around? A. Why, go in  
 10 one place and shove a chair over against something.

Q. Did he seem to have any purpose in what he did? A. No, sir.

Q. And, in your opinion, from these actions, was he, at that last day he was at your house, in a mental condition to execute papers such as wills or deeds?

MR. KING: I object.

20 MR. RATHBUN: And you say—when you speak of the last day, you mean that Sunday he left the house; May 3rd?

WITNESS: Yes, sir.

THE COURT: I will overrule the objection. Let it be noted.

A. No, sir.

30 The stenographer was here directed to read the question formerly objected to by Mr. King and passed over for the time.

Q. Judging from the condition of John Tutty on the day he left your house, in your opinion was his condition such as to permit, within a day or two thereafter, of his becoming in fit condition to execute a will?

40 MR. KING: I object to that question because it does not correctly state the facts. The will was executed on May 8th, more than

*James Flanagan—Re-cross.*

two or three days after the 3rd.

Objection sustained.

The Court having stated that, in the absence of evidence to the contrary, it would conclude that the witness knew the requisites of the execution of a will, Mr. King further cross examined the witness as follows:

## RE-CROSS EXAMINATION BY MR. KING:

10

Q. What do you mean by the execution of a will? You say he was not able to do it. What do you think the execution of a will means? What is that? A. He didn't understand what he was doing when he done it.

Q. No. I don't mean that. That is mental condition. What do you understand the execution of a will to mean? What is that thing? A. That's to distribute his belongings.

20

Q. To do what? A. Distribute his—

Q. (Interrupting) No; the execution of a will That's a will. Why was it this man was not able to execute a will? What do you say the execution of a will means? What is that? A. I don't know.

Q. Why did you say that he was not able to execute a will? Why did you say that, if you don't know what execution means? A. Well, he wasn't fit to make a will.

30

Q. No, no. I am not speaking of that. I am speaking of the execution. Then do you say you don't know what execution of a will means? A. Yes, sir.

Q. Well, take the other branch now—as to disposition of a man's property. In your opinion, how much mental calibration—how much mental acumen does a man have to have—need to have, in order to dispose of his property by will and have the will good? A. I don't know.

40

Q. How much mentality must he have in order

*James Flanagan—Re-cross.*

to dispose of property through a will, at the time he makes a will? Do you know that? A. No, sir.

Q. In law, what are the fundamentals that a testator must have in order to be able to make a will? A. (No answer.)

Q. In law, what are the fundamentals the testator must have in order to make a valid will?  
 10 Do you know? A. No, sir. I don't know.

Q. How much mental acumen—I am trying to get a word this man will understand. How much —

THE COURT: Common sense.

Q. I will use that word. How much common sense must a man have in order that his will may be valid, applying such common sense to the time he executes his will? What must he know? That's  
 20 the word. What must he know in order to make a valid will? A. He must know what he's doing.

Q. Assume that he did know what he was doing. What else must he? Suppose a man said to him "This is a will," and he had enough common sense, as the Court puts it, to know that was a will. Is that all he requires? Is that all that he requires?  
 A. Yes, sir.

Q. When he was over at your house, did you ever feed the old man on whiskey? A. No, sir.  
 30 gave him a drink.

Q. How often did you give him a drink? A. Whenever he asked for it.

Q. How often did he ask for it? A. Probably two or three times a day.

Q. What sized drink did you give him? A. Small drinks.

Q. Didn't he kick about the size of it? A. No, sir.

Q. Ever have more than three a day? A. Yes,  
 40 sir.

*James Flanagan—Re-cross.*

Q. And what is the greatest number he ever had? A. Four, I think.

Q. In a day? A. Yes, sir.

Q. Why did you give him whiskey? A. Because the man asked for it.

Q. Is that the only reason? A. Yes, sir.

Q. He was perfectly competent to ask for a drink of whiskey? A. Yes, sir. 10

Q. You thought he needed it? A. Yes, sir.

Q. You thought he had common sense enough for that. Were you there through the day or at night? A. I was there through the night.

Q. Well, you went to work in the day, didn't you? A. Well, in the latter part of it I was not working.

Q. Well, these days and nights when you were stopping at home, when you were out of work, were more than three drinks given him in the day and night? A. I couldn't say that because I used to sleep in the day time. 20

Q. Oh. Then did you go to work at night? A. No, sir. Not at that time.

Q. You stayed up with him? A. Yes, sir.

Q. And then you would give him three drinks at night? A. No, sir.

Q. You used to give him whiskey, didn't you? A. Yes, sir. 30

Q. When he asked for it? A. Yes, sir.

Q. Did you ever give him as many as three drinks in a night? A. No, sir.

Q. Then about the three drinks that he had in the day, that is what someone told you about it or what you heard? A. I have known that he had three drinks.

Q. You have known it? A. Yes, sir.

Q. He may have had some you didn't know about? A. He may have had. I couldn't say. 40

*James Flanagan—Re-direct.*

## RE-DIRECT EXAMINATION BY MR. RATHBUN:

10 Q. In regard to the making of a will, would you consider the mere fact that a man—for instance a lawyer, or a layman or anyone else—should hand to a man such as John Tutty, and say to him “That’s a will,” do you mean to say that you think that would be sufficient for him to decide upon and to know that he was executing a will? Is that what you mean? A. No, sir.

Q. What, in your own words, do you think a man—what, in your own words, do you think the condition of a man should be in order to enable him to make a will? A. I think that a man must be able to tell what to put in the will.

20 Q. Anything else? Now you say put in a will. What do you mean? A. Why, to have written down in a will.

Q. Yes. And what do you mean by that? To be able to tell what to put in it? What do you mean by that? A. He should be able to dictate to the person that’s drawing up the will what to put into it.

Q. Well, I know. But what would you put in the will? In your own language?

THE COURT: That is, put in regarding what?

30 A. Regarding the distribution of your estate.

Q. Yes. To distribute your estate, you mean property, and how and to whom you were going to distribute it? A. Yes, sir.

Q. All that you mean to be put in the will? A. Yes, sir.

40 Q. And when you said on your direct examination, or re-direct, that you didn’t think John Tutty was in a condition to execute a will, did you mean to convey to the Court the statement

*James Flanagan—Re-cross.*

*James Corbett—Direct.*

that you didn't think he was possessed of faculties enough to know what to put in a will? Or, in other words, how to distribute his property, and what to tell the person to do in regard to the disposition of his property? Is that what you meant? A. Yes, sir.

10

RE-CROSS EXAMINATION BY MR. KING:

Q. What is a lucid interval?

Question withdrawn.

---

JAMES CORBETT, a witness produced on behalf of the Caveators, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RATHBUN:

20

Q. Where do you live? A. Mount Hope.

Q. How long have you lived there? A. Twenty years.

Q. What is your occupation? A. Laborer.

Q. Did you know John Tutty? A. Yes, sir.

Q. And you know William Tutty? A. Yes, sir.

Q. Do you know where William Tutty lives? A. Yes, sir.

Q. Were you called to the home of William Tutty on May 8th last? A. Yes, sir.

30

Q. And who called you? A. William Tutty.

Q. Where were you when he called you? A. Home.

Q. How far from his house? A. A couple of minutes' walk.

Q. And you went with him to his house? A. Yes, sir.

Q. Anyone else go with you? A. No, sir.

Q. When you got to his house, whom did you find there, that you saw? A. Mr. Stickle, Mr.

40

*James Corbett—Direct.*

Miller and Will Tutty—and Mr. Tutty, John Tutty.

Q. And by Mr. Stickle you mean the lawyer, John Stickle? A. Yes, sir.

Q. And where were they? What part of the house? A. I think they were in the middle part of the house.

10 Q. They were all in a room then in the house?  
A. Yes, sir.

Q. And where was John Tutty? A. He was right there too.

Q. Sitting up or lying down? A. Sitting up.

Q. Did—What conversation did you have with John Tutty, if any? A. I didn't have any, sir.

Q. Did you say anything to him or he to you?  
A. No, sir.

Q. What were you there for?

20 MR. KING: I object.

Q. Well, what were you asked to come there for? A. To witness a will.

Q. And whose will? A. John Tutty's.

Q. Did you witness it? A. No, sir.

Q. After you got there you refused to witness it?

MR. KING: I move that be struck out.  
Motion granted.

30 Q. Did you witness the will? A. No, sir.  
Q. Why not? A. Because I wouldn't sign it.  
Q. Why wouldn't you sign it?

MR. KING: I object.

MR. RATHBUN: I withdraw the question.

Q. What caused you to change your mind?

MR. KING: I object.

40 Q. Well, when you went there you intended to

*James Corbett—Direct.*

witness the will, didn't you? When you started for William Tutty's house? A. Yes, I intended to witness the will.

Q. But you changed your mind after you got there? A. Well, I wouldn't sign my name. That's what it was.

Q. What caused you to change your mind? A. I didn't know anything about a will. That's what it was. 10

Q. Did anyone else come in there while you were there? A. Well, me and another witness came in there together; me and Mr. Miller.

Q. Mr. Miller arrived there with you? A. Yes, sir.

Q. And where did you meet Mr. Miller? A. Right in there.

Q. I thought you said you went in there together. He got at the house about the same time you did? A. Yes. We both went in together. 20

Q. Did he witness the will while you were there? A. No, sir.

Q. Was there a paper drawn up, written on and produced while you were there, which they said was a will?

MR. KING: I object. That question contains three requisities—drawn up, written on and produced. 30

Question withdrawn.

Q. Was there any paper writing there that you saw? A. There was a paper there, yes.

Q. Any writing on it? A. I didn't see the paper. I could see the paper, but didn't see any writing.

Q. Who had the paper? A. Mr. Stickle.

Q. Mr. Stickle had it? A. Yes, sir.

Q. After you got there, what was said to you and by whom? A. He asked me— 40

*James Corbett—Direct.*

Q. (Interrupting) Who? A. Mr. Stickle. He asked me if I would sign this paper. I said no.

Q. Did he tell you what kind of a paper it was? A. No, sir. He told me it was a will.

Q. Did you tell Mr. Stickle you wouldn't sign it? A. Yes, sir.

Q. What did you tell him? A. I told him I  
10 wouldn't sign it.

Q. Did you give him any reason for not signing it? A. No, sir.

Q. Did John Tutty say anything to you? A. No, sir.

Q. Did William Tutty say anything to you? A. No, sir.

Q. They didn't urge you to act, then, as a witness? A. No, sir.

Q. Was John Tutty sitting up or lying down?  
20 A. Sitting down.

Q. Was it light or dark in the room? A. Light.

Q. Day-time or night? A. Yes, sir. Day-light.

Q. About what time? A. About ten o'clock, I guess.

Q. In the morning? A. Yes, sir.

Q. Well, what was the personal appearance—the physical appearance of John Tutty? A. Well, I couldn't say. He looked all right to me so far as I knew.

Q. Did you hear him talk any—say anything there? A. No. I did not.  
30

## NO CROSS EXAMINATION.

BY THE COURT:

Q. I want to ask this question. In response to Mr. Stickle's request that you sign the paper as a witness, you said no? A. Yes, sir.

Q. Why did you say it? A. Because I didn't  
40 know anything about a will.

*James Cahill—Direct.*

Q. Because you didn't know anything about the will? A. Yes, sir.

Q. By that you mean what was written in the paper? A. Well, I didn't see the paper.

Q. And you didn't know what was in the paper? A. No, sir.

Q. Was that the only reason? A. Yes, sir.

10

JAMES CAHILL, a witness produced on behalf of the Caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live, Mr. Cahill? A. Wharton.

Q. And what is your business? A. Carpenter by trade.

Q. Did you know John Tutty? A. Yes, sir.

20

Q. How long have you known him? A. Forty years.

Q. Did you know or learn of his death?

WITNESS: Did I what?

MR. RATHBUN: Did you learn of his death?

WITNESS: Learn of his death?

MR. RATHBUN: Yes.

A. Yes.

30

Q. Now, did you attend his funeral? A. No.

Q. How long before his death did you see him?

A. I saw him the Sunday he was taken away from Mr. Flanagan's, about four o'clock, half past four.

Q. Mr. Tutty took him from Mrs. Flanagan's?

A. Yes, sir.

Q. Where were you at the time? A. I was calling up to see Mr. Tutty and a man by name of Anderson that was sick next door.

Q. Did you have any conversation with him? 40

*James Cahill—Direct.*

A. Yes. I went over and shook hands with him.

Q. What did he say to you, if anything? A. He didn't know me until I told him my name.

Q. What else did he say to you, if anything?

A. All I could get out of him was "If I live until morning, I am going to New Jersey."

Q. Did he tell you where in New Jersey he was going? A. No.

Q. Did you say anything to him about where he was at that time? A. No.

Q. Did he say where—how long were you talking with him? A. About three quarters of an hour.

Q. Was he in the house or out of the house? A. Out doors on the lawn—in the yard.

Q. And you don't recall anything he said except that he was going to New Jersey on the next day?

A. That's all I could get out of him.

Q. You told him who you were, you say? A. Yes, I had to tell him. I asked him how he felt. He asked me my name and I told him.

Q. When had you seen him before that? A. Oh. It's ten or eleven months.

Q. Did you see him very frequently ten or eleven months before that? A. Yes. I used to meet him at the barber shop.

Q. Had you ever worked together? A. No.

Q. You didn't? A. No.

Q. Well, did there appear to be anything the matter with him that day you saw him?

WITNESS: What?

MR. RATHBUN: Did there appear to be anything the matter with him the last day you saw him?

A. Well, the man didn't know what he was saying, according to my judgment, from the way he acted.

*James Cahill—Cross.*

Q. Yes. How was he physically? A. Well, he had a very poor leg; a very sore leg.

Q. Did he appear strong or weak? A. Very weak. Very weak.

## CROSS EXAMINATION BY MR. KING:

Q. How long did you talk with him? A. About three quarters of an hour, I should judge. 10

Q. Three quarters of an hour? A. Half or three quarters of an hour.

Q. Do you mean to tell the Court that you talked with a man who didn't know what he was saying for half or three quarters of an hour? A. That's all I could get out of him.

Q. What did you talk of with a man like that? A. I sat there smoking my pipe.

Q. You said you were talking with him three quarters of an hour. You said you talked with him three quarters of an hour. A. Well, two words is a talk, or three words is a talk. 20

Q. Well, two words or three words isn't talking three quarters of an hour. A. I sat alongside of him.

Q. Well, is it true that you talked with him three quarters of an hour? You didn't talk with him the three quarters of an hour you sat there? A. Every time I could get a word out of him. 30

Q. Did you talk with him three quarters of an hour? A. I ain't telling a lie. I'd talk with him every time he'd answer me.

Q. Did you talk with him three quarters of an hour? A. I sat there that long. Once in a while I'd ask him how he felt.

Q. For the whole three quarters of an hour did you ask him? A. Yes, sir.

Q. How many times did you ask him? A. I couldn't tell you. 40

Q. How often? A. I didn't count it down.

*James Cahill—Cross.*

Q. I asked you how many times you thought you asked him that question? A. I should think about twenty times in three quarters of an hour.

Q. So that at least once every other minute, perhaps, you asked him how he felt? A. Not every other minute. That's too often.

10 Q. Well, when you asked him the first time, and he didn't answer you, why did you ask him again? A. To see if he would realize what I was saying.

Q. Weren't you satisfied the first time that he was out of his mind? A. No. I thought perhaps the man would realize his memory once in a while.

Q. You thought his mind might come back? A. Yes.

Q. Well now, tell us why did you think that? A. Every man has an idea.

20 Q. What was your idea? A. That he might talk sense to me.

Q. So you expected all the time he might talk sense to you? A. Yes.

Q. What was there about him to indicate that that condition might arise? A. I couldn't tell how it indicated, but that's the way he talked to me.

Q. He did talk? A. Yes. He would be away to Jersey if he lived until morning.

30 Q. Was that all he said? A. Sure.

Q. Didn't you say a moment ago that he said to you—"He asked me my name and I told him?" A. That was when I went into the yard first.

Q. Then it's quite true that he talked to you twice instead of only once? A. I sat there three quarters of an hour.

Q. Did he talk to you twice? A. He spoke twice.

40 Q. And which of these sentences, if either, did he make for the first statement to you? A. The

*James Cahill—Cross.*

first statement he said "If I live until morning I am going to New Jersey."

Q. What did you say to him?

WITNESS: What would I say to him?

MR. KING: What did you say that produced that answer?

A. I asked him how he felt. He said "If I feel anyways good in the morning, I am going to New Jersey." 10

Q. Did he have his eyes open? A. Yes.

Q. Look at you? A. Yes.

Q. Call you by name? A. No. Not at first. He did afterwards.

Q. When did he first know you? A. After I told him.

Q. When you told him who you were, what did he say? A. He said "I didn't know you until you told me." 20

Q. Did he talk to you any more after that? A. Very few words.

Q. What? A. Wishing he was stronger and could get to New Jersey.

Q. That was the first thing? A. That was the only question I could get out of him.

Q. When you told him who you were, what words did he use back to you? A. He said "I am feeling bad and if I am well, I am going back to New Jersey in the morning." 30

Q. It was perfectly true he was feeling bad, wasn't it? A. The man was bad; a sick man.

Q. His leg had been bothering him, did you say? A. That's what the talk was.

Q. He asked you your name? A. Yes.

Q. And indicated to you that he didn't know who you were? A. He didn't know who I was.

Q. When he asked your name, was he looking 40

*James Cahill—Cross.*

at you or did he have his eyes closed? A. Looking at me.

Q. He looked at you and asked your name? A. Yes.

Q. Nothing strange about that, is there? Don't old people and sick people forget names and faces?

10 WITNESS: What?

MR. KING: You didn't think it odd, did you?

A. I thought it odd that he wanted to get out of there and go to New Jersey.

Q. You told him who you were? A. Yes.

Q. When you told him, what did he say? A. Didn't say anything.

20 Q. He didn't at any other time, ask you who you were, did he? A. Once in a while he might. He looked at me very foolish.

Q. Get down to hard tack. Did he, at any other time, ask you who you were? A. No.

Q. Didn't you believe he knew who you were, or at the least recognize you when you told him?

A. Well, I guess he must.

Q. When was this that you saw him? A. I don't remember the date. The day they took him away.

30 Q. From where? A. From Flanagan's.

Q. To where? A. To William Tutty's.

Q. What time of day was it? A. Might have been five o'clock when I left up there. I don't know what time Will took him.

Q. Did you notice whether he rambled in his speech except his saying he was going over to New Jersey? A. That's all I could get out of him.

Q. Did he speak to anyone else? A. No one else there.

40 Q. Was he restless? A. A little.

*James Cahill—Re-direct.*

*Alice Grimes—Direct.*

Q. Sleepy? A. No.

Q. When you were not talking with him, did he have his eyes open or closed? A. Open.

Q. Looking at you? A. No. Looking around; not at me; poking around the yard with his cane.

Q. Were there leaves there to poke at? A. Yes, or dry grass. 10

Q. From his actions, he was just busy, was he not? A. Not very solid.

Q. What? A. He was not very solid in his actions.

Q. And you were there for three quarters of an hour? A. Yes, sir.

Q. Do you know whether he had had anything to drink before you saw him? A. I couldn't tell you anything about it. Nothing while I was there. 20

RE-DIRECT EXAMINATION BY MR. RATHBUN:

Q. Mr. Cahill, how old are you? A. About sixty—about sixty-five.

THE COURT: About sixty or sixty-five?

WITNESS: Well, about sixty-five.

MRS. ALICE GRIMES, a witness produced on behalf of the Caveators, being duly sworn, testified as follows: 30

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live? A. Wharton.

Q. And how long have you lived there? A. About six years.

Q. Did you know John Tutty? A. Yes, sir.

Q. How long had you known him? A. From the time he came to James Flanagan's. I don't know how long he was there. From the time he 40

*Alice Grimes—Direct.*

came there when he was able to walk around.

Q. About how long? A. Must have been more than a year anyway.

Q. And you frequently went to the home of James Flanagan? A. Yes, sir.

Q. In sometimes this year you were there during a time with Mrs. Flanagan? A. Yes, sir.

10 Q. Do you remember when that was? A. In March; the latter part of March.

Q. And how long were you there at that time? A. I used to go back and forth every day. I used to be there every day.

Q. What were you doing there at that time? A. Well, I went there to take care of her and her child.

Q. And who looked after the house? A. The children. She has grown up daughters.

20 Q. What's that? A. She has grown daughters to do that.

Q. Did you see John Tutty there during that time? A. Yes, sir.

Q. And did you have any conversation with him? A. Sometimes.

Q. Did you do anything for him? A. Well, I might help him up and down a step or keep him from going down a step or something like that.

Q. Did he know who you were? A. Sometimes.

30 Q. When you say sometimes, do you mean sometimes he didn't? A. Sometimes he wouldn't know me at all; wouldn't recognize me; would call me Mrs. Flanagan. Other times he called me by name.

Q. How often did he call you Mrs. Flanagan? A. Sometimes when I was there he was asleep and slept all the time I was there. Some days he was very well and other days he didn't recognize me at all, and I wouldn't bother talking to him.

40 Q. Some days he called you Mrs. Flanagan? A. Yes. If he seen me coming down stairs, he

*Alice Grimes—Direct.*

would call me by her name. Sometimes he knew me and sometimes not.

Q. Do you remember about how frequently he happened to call you Mrs. Flanagan? A. Oh, maybe two or three times.

Q. And during what period did that cover? A. Between the latter part of March until he went away. I was there mostly every day. I was there until he went away. 10

Q. Were you there from the latter part of March until May 3rd? A. May 3rd.

Q. And you were there every day, you say? A. Every day.

Q. Well, what was his general physical condition? A. Very poor sometimes, and sometimes he seemed better.

Q. You say poor. What lead you to think so? A. Well, he couldn't get up off of a chair without help. Sometimes he'd start to go through the door. He'd want to go out. I didn't think he was capable of going alone. He'd slip and fall. 20

Q. What made him slip and fall? A. He didn't seem to have very good use of his limbs.

Q. I think one of the witnesses said they were swollen? A. Yes. Very bad, sore legs, as far as I have seen.

Q. What other physical disability, if any, did you notice, except these swollen legs and the weakness? A. Well, he was quite a good deal of care. He had to have attention and have food sometimes held for him, or anything to drink, they had to hold it there. 30

Q. Was that because he hadn't the strength to hold it, or because he was nervous and shaky? A. Must have been from want of strength.

Q. Now how did he appear mentally? A. Well, he seemed to wander a good deal in his mind. Sometimes he talked rational, and other times you couldn't understand anything he said. 40

*Alice Grimes—Direct.*

Q. Do you recall some of the things that he said which seemed to be unusual or indicate an irrational condition? A. Yes. He talked about things I didn't know anything about and people I didn't know anything about, and I didn't pay any heed to what they were. I let him go on and talk and just shake my head yes and no.

10 Q. They might have been people he actually knew?

WITNESS: Beg pardon?

MR. RATHBUN: You say he talked about people you didn't know. They might have been people who actually lived?

A. Yes, he spoke about different members of the family.

Q. What I am after is what indicated—the talk  
20 which you heard which indicated he was irrational. Do you recall? A. Sometimes he'd get out of patience and say nobody come to see him, and then he'd say he didn't care whether they come or not.

Q. And what else did he talk about that you recall? A. Oh, he wandered in his talk. Talked about work and about mines and all such things as that. Go around sounding the walls and say that was a good place and push things out of the  
30 way so he could have passage and get through. I didn't understand and just shook my head.

Q. He was a miner at one time? A. Yes.

Q. This talk you just referred to, did it indicate that he thought he was in a mine? A. Yes. Used to test the walls with his cane; then he'd want to start some place to go to a passage what he'd claim was there.

Q. How frequently did that occur? A. I  
40 couldn't just make a stated time of it. I don't know. Times he talked to me, knew me and spoke

*Alice Grimes—Direct.*

on different topics that both understood, and of people he knew and I knew.

Q. This mine talk that you referred to, did that occur more than once? A. Might have been two or three times.

Q. Now did his condition appear to change at all from the time when you first came there to the time he left? A. Yes, it did. 10

Q. In what respect? A. Well, he seemed to be able to understand what was going on around in the beginning. Towards the latter end he didn't seem to realize anything at all.

Q. Then the condition became worse later? A. Yes, he seemed to be getting weaker.

Q. How did he appear mentally? Did that condition change at all? A. Well, only when he would recognize you and then wouldn't know you.

Q. I mean this occurrence when he didn't recognize you or talked about things such as mines. Did that occur more frequently toward the end of his being there than at the beginning? A. Well, lots of times I went in there and didn't talk to the man at all. I'd go right on and wouldn't pay any attention. 20

Q. But referring to the time in March when you went there for quite a spell. Did his wandering in his talk occur more frequently during the end than at the earlier part of your stay there? A. Yes. He seemed some days that he didn't know anyone that was around the place. Then, again, maybe in the same day would recognize you and talk to you. 30

Q. Did he sleep in bed or a chair? A. Sat up in a chair; had a big arm chair.

Q. Do you know why he slept in a chair? A. He claimed it smothered him—that he couldn't lie down.

Q. Do you recall any other peculiar act on his 40

*Alice Grimes—Direct.*

part than what you may have testified to? A. Well, he'd take the notion sometimes and get right up, no matter what time of day or night, and want to go away; want to start right out; get up from the chair and start right out without hat or coat. He might have been dozing or got up out of a sleep and do that. You couldn't say his mind  
 10 was affected to make him do that.

Q. You say he had to change his clothes sometimes somewhat more frequently. He soiled his clothes? A. Yes.

Q. Did you see Will Tutty there very frequently? A. Once or twice.

Q. And do you remember when he came? Those occasions? A. I couldn't say the day.

Q. Well, what was the character of the relations between John Tutty and his son, William  
 20 Tutty? A. Well, I don't know.

Q. You don't know whether friendly or otherwise? A. I didn't take no part in the conversations. I was generally out of the room when his son visited him.

Q. Were you there the night John Tutty left? A. I was there in the morning.

Q. You were not there when he left? A. I was there after he went away. He had gone when I came.

30 Q. Did you see William Tutty there after John had gone? A. No, sir.

Q. Didn't see him at the Flanagan house at all after that? A. No, sir.

Q. Do you know whether John Tutty took his clothing with him that night? A. I don't believe so.

Q. You don't know? A. I couldn't say to that.

*Alice Grimes—Cross,*

## CROSS EXAMINATION BY MR. KING:

Q. Do you know whether John Tutty had good or poor eyesight? A. Why, I saw him reading without glasses at times, and then he wore glasses at other times.

Q. While he was at Flanagan's did you ever give the old gentleman whiskey? A. No, sir.

Q. Did you ever see him drink any? A. No, sir. 10

Q. Did you ever see him while he was there after he had drunk whiskey? A. I couldn't say when they give it to him.

Q. Did you smell it from his breath? A. No, I wasn't that near to him.

Q. Didn't get that near to him? A. No.

Q. These times you came down the stairs, would the old man look at you and call you Mrs. Flanagan, or listen and call you Mrs. Flanagan from the footsteps? A. When I came down stairs into the room, he'd call me by her name and tell me to do something. 20

Q. Then he would hear the footsteps and know there was someone coming? A. He faced the stairway and could see.

Q. Did he look at you? A. Yes.

Q. Turned toward you? A. He'd generally turn his head. 30

Q. Was that because he couldn't see you, but knew somebody was coming down? A. Yes.

Q. And thought the person coming downstairs could help him? A. Yes.

Q. So that he recognized a person to help him, recognized his need and recognized somebody coming downstairs? A. Yes.

Q. Then looked at that person, but didn't recognize the person. He thought it was, and called you, Mrs. Flanagan? A. Yes. 40

*Alice Grimes—Cross.*

Q. Told you what he wanted? A. Sometimes a drink of water.

Q. All reasonable requests? A drink of water or something like that? A. He would sometimes tell me he guessed he'd get ready and go for a walk for an hour or so.

10 Q. Anything out of the way with that? A. I understood the man wasn't able to go.

Q. He was able to walk around the house? A. With the help of a cane.

Q. He might have thought he could go out? A. Yes.

Q. He wasn't able to walk, you thought? A. No.

Q. All those things were reasonable? Peculiar, perhaps, but reasonable? A. Yes.

20 Q. Did he ever ask you an unreasonable thing? A. No, I don't believe he did.

Q. Now you said sometimes that his mind wandered. What would he say to you that indicates that? A. Why, he would sit and talk to me of people that I don't know or didn't know who they were or anything about; things I didn't understand or know of at all, as if he thought I ought to.

30 Q. Don't lots of old people do that? A. (Continuing) Then he turned around and talked very sensible.

Q. True. But you don't know but that these were people he might have known in his younger days? A. He might have.

Q. Didn't he talk about these people as if they existed, in a rational way? A. Yes.

Q. Then from these people, if they existed, he would go on and talk about people and events with which you have knowledge? A. Yes.

40 Q. And in talking about those people and events,

*Alice Grimes—Cross.*

did he talk in a rational way, as much as you would expect from a man as old as he was? A. Yes.

Q. He did have times of forgetfulness, you say. What showed or indicated that to you? A. Well, I have seen him there eat a big meal, and he'd eat that meal and probably ten or fifteen minutes after would say "Don't you think it's time for my dinner?" 10

Q. An act of forgetfulness? A. It looked so.

Q. Yes. Outside of that, what? A. I think a man that couldn't take care of himself any better than he could couldn't really be in his senses.

Q. He wasn't able to control his bowels? A. No.

Q. And that was—because he was unable to do that, you say, indicates unsoundness of mind? A. Yes. 20

Q. There were but three occasions, I think you said, on which he went up to the wall and tapped and said "That's a good place for a rift" or a shaft, or whatever it was. Wasn't he illustrating to you, as old people frequently do? You have seen old people get down and mark on the floor. He showed you on the wall. You have seen old people do that, haven't you? A. Yes.

Q. Wasn't this old gentleman doing practically the same thing to you? A. Yes. 30

Q. Indicating the shaft and that part to illustrate it? A. Yes.

Q. A common occurrence with old people? A. Yes.

Q. Before he went away, he did have what you would term lucid intervals, when there was not any question about this old man having a full comportment of senses? Do you understand that? A. I think I would have to look that up. 40

*James Monahan—Direct.*

Q. There were times when he was there that you thought that he might have been erratic or forgetful. These times were followed by times when you thought he had full common sense, didn't you? A. Yes, sir.

Q. Didn't he, for long spells at a time, have good common sense, then he might become erratic  
10 or queer? A. Yes.

Q. Were not the times he had this good common sense much more than the times he was erratic or queer? A. Well, I don't know about that.

Q. You wouldn't want to say? A. No, I wouldn't say yes or no.

Q. Well, have you given in detail to the Court your observation, your total observations about the condition of Mr. Tutty, as you saw him? Nothing more you want to add? If there is  
20 nothing, I have finished my cross examination.

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JAMES MONAHAN, a witness produced on behalf of the Caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live, Mr. Monahan? A. New York City.

30 Q. And where in New York City? A. On Briggs avenue; 2824 Briggs avenue.

Q. And your wife is a daughter of John Tutty? A. Yes, sir.

Q. And she is a sister of William Tutty? A. Yes, sir.

Q. How old a man was John Tutty? A. Well, I should judge he was about eighty years old; somewheres along there, as near as I know.

40 Q. Did John Tutty ever live with you? A. Yes, sir.

*James Monahan—Direct.*

Q. When? A. Well, he lived with me about two years and a half; from 1910 till 1913, something like that. I don't know the exact months. Just about two years and a half, I think.

Q. And do you remember when he left you? A. I think it was on May 9th, 1913; somewhere along and first of May. I don't exactly know the date.

Q. And where did he go after he left you? A. He went to Mount Hope-Rockaway-Wharton. I don't know exactly which house he stopped in at the time. 10

Q. And did you see him after that—after he left your house? A. I never saw him until after he was taken sick.

Q. And when did you see him? A. I saw him in December, about the 20th, I think. I saw him after he got sick. That was in 1913.

Q. Where was he when you saw him? A. Mr. Flanagan's. 20

Q. How did you learn of his sickness then?

WITNESS: How did I what?

MR. RATHBUN: Learn of his being sick at that time.

A. Why, we got a letter from somebody up there. I don't know whether it was Mr. Tutty or not—William Tutty.

Q. Who went out there with you? A. I went by myself. 30

Q. And what was his condition then? A. Well, he looked very feeble to me when I went in. He sat there in the chair.

Q. How long did you remain? A. About half an hour.

Q. He recognized you at that time, did he? A. No, sir.

Q. How do you know that?

WITNESS: Sir? 40

*James Monahan—Direct.*

MR. RATHBUN: How do you know he didn't recognize you?

A. He just looked at me when I went in, and I asked him how he was getting along, and so forth, and he looked at me several times, and before I went out he asked Mrs. Flanagan who I was.

10 Q. You heard him ask her? A. Yes. Just when I was going out he asked her who that man was.

Q. What time was this? Day or night? A. Daytime.

Q. Morning or afternoon? A. In the afternoon.

Q. And then you went back to New York? A. Yes, sir.

Q. After you left his house? A. Yes, sir.

20 Q. When did you see him next? A. About February. About a month after. Somewhere around the 26th.

Q. Where was he then? A. In the same place.

Q. What was his condition at that time? A. His condition was not very much changed, but he appeared to me a little weaker.

Q. How did he exhibit that? A. Well, his looks, and he seemed to get a little thinner, I think, in his face.

Q. Thinner in his face? A. Yes, sir.

30 Q. How long were you there at that time? A. I wasn't there more than half an hour.

Q. Anyone with you? A. I think that William Tutty was with me.

Q. Nothing unusual occurred at that time? A. No. Nothing any more than I just asked him how he was.

Q. Nothing unusual on his part? A. No, nothing I know of.

40 Q. You noticed no peculiarities at that time? A. No.

*James Monahan—Direct.*

Q. Well, when next did you see him? A. I saw him about March 7th, I think it was.

Q. And at the same place, I suppose? A. In the same place.

Q. And who was with you at that time? A. I was by myself.

Q. Anything unusual at that time? A. Nothing no more than the time before. Just sat there in the chair. 10

Q. When next did you see him? A. I saw him about the 15th.

Q. Of March? A. March again.

Q. The same place? A. In the same place.

Q. Anyone with you? A. Mrs. Tutty was with me—Mrs. William Tutty.

Q. Anything unusual occur? A. Well, while I was in there he seemed to be very uneasy in the chair, and he was sitting in front of the stove and there was a flour barrel right alongside of him, and he had a cane and hit the flour barrel a couple of times, but I don't know just exactly. I didn't pay much attention, but he said "Get up" and I asked Mrs. Flanagan at the time, I said "What is the matter with him?" She says— 20

MR. KING: Just a moment.

Q. Where was John Tutty when you asked that? A. Sitting in front of the stove in the chair where he always used to sit in. 30

Q. Mrs. Flanagan was in the same room? A. In the same room.

Q. All there together? A. Yes.

Q. In the presence you asked her what was the matter? A. Yes. Then she said—

MR. KING: I object.

Objection sustained. 40

*James Monahan—Direct.*

Q. What else happened there, or what took place?

WITNESS: Do you want to know about hitting the barrel?

MR. RATHBUN: Yes.

A. I asked what's the matter when he tapped the barrel.

10

BY THE COURT:

Q. What did John Tutty say or do about hitting the barrel? A. I didn't ask him about it.

Q. What did he say or do in addition to hitting the barrel? A. He said "Get up there."

BY MR. RATHBUN:

Q. Why did you turn and ask Mrs. Flanagan instead of asking John Tutty what's the matter?

20

MR. KING: I object, for the reason that if opinion evidence is to be given, it must be done subject to certain conditions or facts which proponent of the question claims existed, so that the other counsel might have reasonable opportunity to object. This is without giving the opposite counsel that right. I further think the reason why he did that thing is not proper evidence.

30

Objection overruled and question admitted.

A. Well, my idea was this, that—

MR. KING: I move to strike that out.

Motion granted.

BY THE COURT:

Q. What was the reason for your asking Mrs. Flanagan?

MR. KING: I also wish to note an objection to the question asked by your Honor.

40

*James Monahan—Direct.*

A. Well, Mrs. Flanagan was sitting closer to me. She was right close to me and could hear me, where the old man was very deaf and couldn't hear me if I asked him, and Mrs. Flanagan said —

MR. KING: No.

BY MR. RATHBUN:

10

Q. Mr. Tutty was very deaf, you say? A. Very deaf.

Q. And that was the real reason then you didn't speak to him? A. That was it a good deal and Mrs. Flanagan was close by me.

Q. Was there anything to indicate a reason why he should hit that barrel? A. Nothing that I know of.

Q. Was there anything moving in the barrel, that you could hear? A. No.

20

Q. Like a dog or cat or anything like that? A. Nothing.

Q. What was that barrel? Do you know what it contained? A. I understand it was a flour barrel.

Q. It was a flour barrel, you say? A. Yes, sir.

Q. Well, did anything else of a peculiar character take place at that time? The conversation or his actions? A. No, nothing except I asked him how he was and he said "I don't know." I asked him how he was and he said he didn't know.

30

Q. How long were you there that time?

WITNESS: How long was I there?

MR. RATHBUN: Yes.

A. About half an hour.

Q. Did he take much part in the conversation?

A. Why, he didn't take any part in the conversation.

Q. Did he suggest any subjects of conversation?

40

A. No.

*James Monahan—Direct.*

Q. Did he start the conversation on any line?  
That's what I mean. A. No.

Q. Then do I understand that all that he said was in answer to questions put by you or the others there? In other words, only made replies to your questions? A. That's all. Said "I don't know." Then I asked him if, when he'd got better,  
**10** if he'd like to go out and take a walk or go down to town. He says "I don't know; I don't care." That's about all I could get out of him.

Q. Appeared to be indifferent, listless? A. Yes. Well, he didn't seem to be so uneasy, but he was looking kind of weak, you know. If he wanted to get up, he had to have somebody help him to raise up. That's rather peculiar.

Q. Did he appear to take any interest in what was being said or going on? A. No.

**20** Q. When were you there again? A. I think it was on about April 5th or 6th.

Q. And anyone with you at that time? A. No.

Q. How long were you there that time? A. I suppose three quarters of an hour.

Q. What was his condition then? A. I couldn't see that there was very much change, although he was there sitting in the chair. For that reason you couldn't tell much about him.

Q. How about his interest in the conversation?  
**30** A. Nothing at all.

Q. He took no interest at that time in anything said or done? A. No.

Q. Was there anything peculiar which might have taken place at that time? A. Nothing at that time.

Q. Did you see him again? A. No.

Q. Did you go out to Mount Hope after that?  
A. I went out the day before the funeral.

Q. The day before the funeral? A. Yes.

**40** Q. And where did you go? A. To Mr. William Tutty's.

*James Monahan—Direct.*

Q. Who went with you? A. I was by myself.

Q. How long were you there? A. I was there until the next afternoon, after the funeral.

Q. You stayed there until after the funeral? A. Yes, sir.

Q. Well, did any of the others come while you were there? A. Mr. Cahill came there the night before the funeral—late in the night it seems to me—or morning rather, about two or three o'clock as near as I can judge. 10

Q. Did you have any conversation with William Tutty at the time? A. Well, yes, I had.

Q. Did he say anything in regard to a will at that time? A. He did. He showed me the will or a paper that he had made out—that was made out and giving him power of attorney to act for the old gentleman to do his business for him, as far as I know about it, and also showed me another will that had been made out previously to Mrs. Flanagan. 20

Q. Yes. A. (Continuing) And—

Q. (Interrupting) Well, what did he say, if anything, with regard to a later will?

MR. KING: I still renew my objection that you cannot defeat a testator's intention by the declaration whether this was a will or anything in connection with it. I still quite insist, Judge, that that evidence could not be legal. Here's a written will. A declaration by the person holding the will certainly has no weight as to whether it was a will in the manner required by law. 30

Objection overruled and noted.

A. Well, he said that there was a will—that he had a will made out to suit himself to take the place of the Flanagan will.

Q. Who had the will made out to suit himself? A. Mr. Tutty. 40

*James Monahan—Direct.*

Q. Which Mr. Tutty? A. William Tutty.

Q. Can you phrase it just the way William Tutty said it?

WITNESS: Will I relate the question that I asked him?

MR. RATHBUN: Yes. Just tell us.

10 A. I said "I suppose you have got another will made out." "Yes," he says, "I had the will made out to suit myself.

Q. Now was there anything said with regard to a will that Mr. Lyman Smith had drawn? A. Well, not at that time. I don't just remember now.

Q. Was there any further conversation that you had with William Tutty? Anything about the will that Lyman Smith had drawn? A. Well,  
20 that was a good while ago though since we had that conversation about the will that was made out by—

Q. (Interrupting) You mean long before the death of John Tutty? A. Yes.

Q. Now did you see Mr. John Stickle after the death of John Tutty? A. Not until after the funeral.

Q. And how long after it—how soon after the funeral? A. Well, I think the funeral was over  
30 about one o'clock, and in the afternoon, I guess it was about three o'clock that I saw Mr. Stickle, as near as I can judge.

Q. And where did you see Mr. Stickle? A. In Mr. Tutty's house.

Q. And what was he doing there? A. He came there to read the will.

Q. And did he read the will? A. He did.

Q. Did you ask him any questions in regard to it? A. I did. After the will was read I says to  
40 him "It's very funny the way they have it made

*James Monahan—Direct.*

out; the sisters is cut off and Mr. Tutty gets it all." "Well," he says—Mr. Stickle says—"The old man didn't know nor he didn't care. He supposed that he was going to live longer than what he did and it would be no more than right to give his son Will the property for his care and the trouble he'd have with him."

Q. Who was there when this conversation was going on? A. There was Mr. Cahill and Mr. William Tutty, and, I think, Mrs. Monahan. 10

Q. Did Mr. Cahill say anything to Mr. Stickle? A. I don't remember.

Q. At that time did you go into any conversation with Mr. Stickle in regard to the condition of John Tutty when he drew the will? A. No.

Q. Didn't go into that? Now do you know anything about the relations existing between John Tutty and William Tutty, as to whether they were friendly or otherwise? A. Well, the old man didn't seem to be on very good terms with him. 20

Q. How do you know that? What was done or said which leads you to say that? A. Well, it was on account of some money he owed him for back rent.

Q. Well, I know. It isn't a question of what it was about. What was said or done by John Tutty or William Tutty which causes you to say that? A. Well, he said that— 30

Q. (Interrupting) You say "He." Who do you mean? A. John Tutty. Before he left New York. That he was going up and make his son William pay him his back rent. If he didn't, he'd sue him for it, and he used to say that he was a mean son to him and everything like that and—

Q. (Interrupting) "Everything like that." That doesn't convey any idea to the Court. What did he say about William Tutty? A. He said he was going up to make him pay his back rent. 40

*James Monahan—Direct.*

Q. Well, is that all? What is there about that statement which indicated any ill feeling towards the son? A. He appeared to be very angry about it. That's all I know.

10 Q. Did he indicate enmity against his son on any other occasion or in any other manner? A. Yes. He told me at the house a couple of times that he had been up to visit him that he had some arrangements with him about fixing up the house and painting it and he wouldn't do anything, and he wouldn't drive him down to Dover and let him walk to Dover, and he was very angry about it, to be treated in such a manner.

Q. Did he visit his son very frequently while he was stopping at your house? A. I don't remember no more than about three times.

Q. During the whole period? A. Yes.

20 Q. Did William Tutty visit him at your house very often? A. Never.

Q. He never visited him? A. No.

Q. Do you know whether or not John Tutty ever had any correspondence with his son William? A. Yes.

Q. Did John Tutty write letters to William? A. No, I used to write letters for him.

Q. John Tutty couldn't write? A. No.

30 Q. And then Will Tutty would write to him from time to time? A. Well, when he'd send his rent, he'd write to him and send a check to him or a money order and just say what was enclosed. That's about all.

Q. Did John Tutty ever have any conversation with you indicating how he was going to dispose of the property? A. Yes.

40 Q. What did he say to you? A. Well, he said he was going to leave the Newark property to the two daughters, and he was going to leave the old homestead to his son William—that is, in a

*James Monahan—Direct.*

way that it would always remain in the name of the Tutty family, and—

Q. (Interrupting) Just a moment. What was the property in Newark? What did it consist of?

A. House and lot.

Q. Where? A. High Street, Newark.

Q. Do you know anything about the value of that property? 10

WITNESS: The value of it?

MR. RATHBUN: Yes.

A. Oh, I suppose between three and four thousand dollars.

Q. And then the property at Mt. Hope consists of what? A. Well, the house and a couple of acres of ground, I believe.

Q. And do you know anything about the value of that? A. I think that property is worth about three thousand dollars. 20

Q. Any other property that you know of? A. Nothing that I know of.

Q. Any money in the bank—John Tutty? A. Yes, I knew he had a little money in the bank.

Q. You don't know how much? A. Well, less than a thousand dollars.

Q. Do you recollect when it was that he said he was going to leave the Newark property to the daughters— A. (Interrupting) That was in 1910, or the beginning of 1911, after he came down to my place to live. 30

BY THE COURT:

Q. At the same time he said he would leave the old homestead to William?

BY MR. RATHBUN:

Q. Is that true? A. Yes.

Q. What were his feelings toward the daughters? Friendly or otherwise? A. They seemed to be very friendly. 40

*James Monahan—Cross.*

Q. Do you know of anything which occurred between the time when he said he was going to leave the Newark property to the daughters and the Mount Hope property to William Tutty which estranged him from the daughters? Do you know of anything? A. No, I don't.

**10** CROSS EXAMINATION BY MR. KING:

Q. Did you ever see the old gentleman, in these visits which you have stated, read the newspaper?

WITNESS: What's that?

MR. KING: Did you ever see the old gentleman on any of these visits which you have spoken about read the newspaper?

A. No.

Q. He was able to talk with you, wasn't he?

**20** A. Well, he could speak; say "I don't know."

Q. You didn't expect to carry on an extended conversation with a man as deaf as he, did you?

A. No, I did not.

Q. When you came there he recognized you?

A. No.

Q. At no time? A. No.

Q. At no time? A. At no time.

Q. Did he recognize you? A. No.

Q. Did you ever tell him who you were? A.

**30** Yes.

Q. What did he then say? A. "Oh. I didn't know you."

Q. Then after you told him who you were, did he talk to you? A. No.

Q. Did you talk with him? A. I asked him how he was.

Q. What did he tell you? A. He said, "I don't know."

**40** Q. Is that all he ever told you about his condition? A. That's all he ever told me.

*James Monahan—Cross.*

Q. Why did you come up to see him these times?

A. Well, there's one thing, the first time I come up because I heard of his being so sick.

Q. Why didn't your wife come? A. My wife was there before me.

Q. Why didn't you and she come at the same time? A. It wasn't convenient.

Q. Why not? A. I had business to attend to. 10

Q. What is your business? A. I am a salesman.

Q. Did you sell in the vicinity of Mount Hope? A. I have sold stuff there.

Q. I am speaking of this time. On the days of these visits, were you in the vicinity of Mount Hope? A. Yes.

Q. Taking the first visit you made, where is the nearest place you attempted to sell goods? A. McAfee, New Jersey. 20

Q. Over in Sussex County. Then did you come from there around to Dover? A. Yes.

Q. Did you try to sell in Dover? Solicit any trade in Dover? A. No, I didn't visit any place in Dover, except to go to the hotel.

Q. I mean for the sale of your goods. A. Oh, I went to Mount Hope then.

Q. Did you try to sell goods there? A. I go to see them whether I sell goods or not.

Q. What goods do you sell? A. Rock drilling machinery. 30

Q. The second occasion you went there, did you try to sell any goods then? Were you around there to make a visit to the old man, or were you there incidentally to some other business? A. Well, that second time it was to make a visit to the old man.

Q. Now, taking the third visit—I think March 7th—then did you go to visit the old man? A. Yes. 40

*James Monahan—Cross.*

Q. And the next time was March 15th. For a visit? A. That time was on my trip around from McAfee.

Q. Then taking those two times you were not on your regular trip up there— A. (Interrupting) Yes.

10 Q. (Continued) Why didn't your wife go with you then? A. Well, I didn't know as it was any need of the two of us going. That's the way we figured it.

Q. You realized when you were there to see him that the old man was quite ill. Did your wife go to take care of him? A. She was up there before that.

Q. Did she remain there to see—to take care of him? A. I think she did.

20 Q. How long did she stay? A. I think three days.

Q. On the occasions of these other visits, was your wife there? A. No.

Q. If he was so ill, why wasn't she there to take care of her father? A. I don't know.

Q. Did you have a sister-in-law? A. Yes, I have.

Q. Did she visit him? A. Yes.

30 Q. Did either of these daughters— A. (Interrupting) She went there before—just before he died.

Q. While he was at Flanagan's was either one of them there? When you called on him at Flanagan's? A. Yes, sir.

Q. You realized he was a pretty sick man? A. Yes.

Q. Did you tell your wife? A. Yes.

Q. Why didn't your wife go up? A. I don't know. We thought she couldn't do him any good if she did go.

40 Q. You don't know that? A. Yes.

Q. On all these occasions, did he talk to you at all? A. No.

*James Monahan—Cross.*

Q. You asked him about his health? A. I'd ask him how he was.

Q. To that he would reply? A. Yes. "I don't know.

Q. What? A. "I don't know," he'd say.

Q. Did he talk with anybody else while you were there? A. No.

Q. Did he try to talk with anybody else? A. **10**  
No.

Q. Did anybody try to talk with him? A. Not any more than what I'd say to him.

Q. Was he very deaf? A. Very deaf.

Q. You would have to get close to his ears? A. Have to holler.

Q. Speak very loud? A. Very loud.

Q. Did you ever take up any whiskey for the old man? A. No.

Q. Did you ever give him any? A. No. **20**

Q. At no time? A. No.

Q. Now is this the Mr. Stickle sitting next to me with whom you had a conversation concerning the will? A. I think that's the gentleman.

Q. No, not what you think. Is he the man? Is this Mr. Stickle— A. (Interrupting) That's the man.

Q. That is the man? He is the man who drew the will, is he not? A. I suppose he is.

Q. Didn't you know when you spoke to him that he had drawn the will? A. Yes, sir. **30**

Q. At the time you spoke to him, had he yet read the will? A. He had read the will, yes.

Q. You were very much surprised at its contents, were you not? A. Yes.

Q. Why were you surprised? A. Well, I thought the thing was going to be divided up fair with the three, the sisters and himself.

Q. You thought it was going to be divided up as he told you in Brooklyn, the homestead to Wil- **40**

*James Monahan—Cross.*

liam and the High Street property to the two daughters? A. Yes.

Q. Do you know whether the old man had made a will in that way?

WITNESS: Do I know it?

MR. KING: Yes.

10 A. Yes, he did by the first will.

Q. Where was that drawn? A. Dover.

Q. How do you know? A. He told me so.

Q. What did he do with that will? A. I think William Tutty got it from Mr. Smith.

Q. No, what did the old man do with it? A. Left it in Dover with Mr. Smith.

Q. He told you that in that will he had made this provision? A. Yes.

20 Q. And, of course, you were satisfied and contented with that, and your wife?

WITNESS: I didn't get that.

MR. KING: You were satisfied and contented with that division?

A. Yes.

Q. So when you found another will had been made, with provisions disadvantageous to your wife and sister, you were very much put out? A. I didn't like it, no.

30 Q. You didn't like it? A. On her account, of course.

Q. The first you realized this other will had been drawn was after the reading of it? A. Of course, I didn't know the contents, no.

Q. I say the first you knew another will had been drawn was after the reading of this will?

WITNESS: I don't understand what you mean.

40 MR. KING: The first time you knew that other disposition had been made of the old man's estate—

*James Monahan—Cross.*

A. (Interrupting) I knew that will had been made, but not the facts.

MR. KING: (Continuing) Was when Mr. Stickle read this will?

Q. You didn't know that the Stickle will had been drawn when you went to the funeral? A. Yes. 10

Q. Who told you? A. William Tutty.

Q. When was that, in reference to when the old man died, that William Tutty told you Stickle had drawn the will? A. He told me that up—

Q. (Interrupting) No, when did he say it? A. The night before the funeral. I think it was on the 19th—that night; you might say it was morning; around two or three o'clock in the morning.

Q. How did the subject happen to come up? A. 20  
Well, I asked him, I said, "I suppose"—no, he showed me the paper giving him power of attorney to transact the business, and then he showed me a will that was drawn up in favor of Mrs. Flanagan, and I said to him, "I suppose you got the other will made out." He says, "Yes"—

Q. (Interrupting) What do you mean? Showed you what will? A. He said, "Yes, I got that will made out the way I want it," to that effect.

Q. Is that what he said, or do you put in the words "to that effect?" A. That's what he said. 30

Q. Didn't you say before, "I had the will made out to suit myself?" A. "To suit myself," or "The way I want it."

Q. What did he say? A. He said, "I had the will made out to suit myself."

Q. Yes. Do you want to stick to that? A. Yes.

Q. Why did you just use the other words? Now what are you using, the words he said or— A. (Interrupting) The words he said. 40

*James Monahan—Cross.*

Q. Why should there be this difference? A. I don't know.

Q. Any explanation for that? I mean the difference in your testimony. A. I don't know that he said, "Made the will out the way he wanted it" or "to suit himself." Wouldn't it be the same thing?

10 Q. You are trying to tell us what he said. Why did you make that change? A. I just thought it would answer the same purpose.

Q. Why did you suppose he got another will made out? A. Because he told me.

Q. No. But you said, "I suppose you've got another will made out." Why did you suppose he had? A. I just wanted to put the question up to him.

20 Q. No, but you supposed it. You know what suppose means? Why did you say "suppose?" Why did you say that? A. Because I saw the paper he had giving him power of attorney.

Q. That, you knew, was only to act during the lifetime of the old man? A. Yes.

Q. You knew what the power of attorney was? A. Yes.

Q. You knew the will operated after his death, separate and distinct from the power of attorney? A. Yes.

30 Q. Then why did you suppose he had had a will made out? A. What else would I do?

Q. Why did you suppose he had done that? A. Well, he told me before this that he had Stickle there the day that this other paper was made out—Mr. Stickle from Rockaway—

Q. (Interrupting) Made out the power of attorney? A. Yes.

Q. Go on and answer why you supposed he had made another will.

40 WITNESS: I don't get right just what you are asking.

*James Monahan—Cross.*

MR. KING: You used the words "I suppose you've got another will made out."

WITNESS: What else would I say?

MR. KING: Why would you suppose he had another will made out?

A. I asked him that question.

Q. Why did you suppose he had another will made out? A. I don't know how to get around that. I supposed he had another will made— 10

Q. (Interrupting) You did? What would indicate that? What was said to indicate that? A. It would be natural. That's all I know.

Q. Well, that's what they did. Why would it be natural for him to get the will made out? A. Well, I don't know as I have any other answer to it.

Q. Now, when you saw Mr. Stickle after the will was read, what did you first say to him? A. I said, "It's very funny," I told him, "the way that will was made out, to cut off his sisters and give them nothing, and give it all to Will." 20

Q. Now just a moment. Is that what you said? Are those the words? A. As near as I can get. I can't repeat it word for word.

Q. Are you repeating or giving it generally? A. I am repeating as near as I can.

Q. Giving us the truth? A. And the truth it was. 30

Q. Now is that as near as you can remember? A. Yes.

Q. Let me read to you your first testimony, and you will explain the difference. "It's very funny the way they have it made out; the sisters is cut off and Mr. Tutty gets it all." Now is that what you said, or what you have just spoken of a few minutes since? Which is right? They are different. What did you say to him? A. I said it 40

*James Monahan—Cross.*

was very funny that it was made out in that way and the sisters cut off and Will Tutty taking— Will to get the whole thing.

Q. Now who heard that statement made by you?

A. Mr. Cahill and Mr. Stickle and Mr. Tutty.

Q. That's Mr. Tutty sitting here? Mr. William Tutty? A. Yes.

10 Q. What did Mr. Stickle say to you? A. He says, "The old man didn't know nor the old man didn't care. He supposed that he was going to live longer and that it would be only right to give it to the son for the care and trouble he'd have with him while he'd be alive.

Q. Did William Tutty hear Mr. Stickle say that the deceased didn't know and didn't care? A. Yes, sir.

20 Q. What did Tutty, if anything, say to Mr. Stickle in reference to Stickle's statement that the deceased didn't know or didn't care? A. He didn't say anything to Mr. Stickle that I heard.

Q. Didn't Tutty repudiate that gentleman's statement? Say that that was not true? A. No, he did not.

Q. He did not say anything to Stickle? A. Nothing to Stickle.

30 Q. Don't you know that that statement of Stickle's, if it was true, was a repudiation of this will? You know that don't you? If Mr. Stickle told you that Mr. Tutty didn't know what was in the will, then this was a repudiation of the will. A. That's the words that came out.

Q. Nevertheless, you knew that if Stickle told the truth that it was a repudiation of the very paper that Mr. Stickle had drawn? A. Yes.

Q. And if it were true that paper writing could not be produced as the will of the deceased? A. Yes.

40 Q. Have you any doubt that Tutty, the beneficiary under the will, knew the very same thing?

*James Monahan—Cross.*

MR. RATHBUN: I object.

Question withdrawn.

Q. Tutty heard it? A. Yes.

Q. William Tutty heard it? A. Yes.

Q. When you heard Stickle say that there, if you knew that that was a practical repudiation of the paper by the man who drew it, and who witnessed it, what did you say to Stickle? A. Didn't say nothing. 10

Q. Why didn't you then say to him, if that were true, why did you draw it? A. I didn't want to start an argument.

Q. You were arguing? A. No, sir, I was not.

Q. What did you think of an attorney-at-law, an officer of the court, repudiating his own act to you? A. That's his words. You've got them.

Q. What I am after is why you didn't come back after him and say, "Why did you draw it?" Why didn't you come back and say that. Why didn't you come back and say anything that would show that you repudiated the acts done by Mr. Stickle? A. I didn't want to start any argument. That was all. 20

Q. Was there anybody else except the three there—the four? A. I ain't quite sure, but I think Mrs. Monahan was right by the door. I'm not quite sure whether she was in the house. 30

Q. Did you authorize—you knew of this statement. You have known of this statement which you say Mr. Stickle made and you say Mr. Tutty made ever since the time of the making of them, didn't you?

WITNESS: Since the time of what?

MR. KING: Since the time of making them.

A. Yes.

Q. Did you authorize either counsel on the other side of this case to attempt to settle it? 40

*James Monahan—Cross.*

MR. RATHBUN: I object.

Q. Did you ever authorize or depute either counsel on the other side to suggest that the caveat would be withdrawn in case a distribution was made of the property?

MR. RATHBUN: I object.

10

Objection overruled.

A. No. The only thing—

MR. RATHBUN: That can be answered yes or no.

A. No.

BY THE COURT:

Q. Of whom does the family consist? That is, Mr. Monahan, what children did John Tutty leave?  
20 What family did Mr. Tutty leave? Did he leave a widow? A. No.

Q. What children, starting with your wife? A. Two daughters and a son.

Q. Who is the oldest, the son? A. The son.

Q. William Tutty. Who is next in point of age?  
A. Mary Ann Tutty-Monahan.

Q. Who next in point of age? A. Margaret Cahill.

Q. Cahill? A. Cahill.

30

Q. Any others? A. No.

Q. No child or children of a deceased child or children of John Tutty? A. Yes, there are children dead.

Q. Did they leave any children, those that have died, of his children? A. No.

Q. But he has children dead that left no children? A. Yes, sir.

40

Q. These are the only three that stand in relation to him, excepting the children of the children, that is, the three, if they have any? A. Yes.

*James Monahan—Cross.*

Q. This Margaret Cahill is related to the witness Cahill that was here to-day? A. No.

Q. The name is the same? A. No relation whatever. There might be some distant relation; cousin to her husband.

Q. That is, Margaret Cahill's husband is a cousin to James Cahill? A. That's it.

MR. KING: Before recess I should like to ask Mrs. Grimes a couple of questions, as she may wish to leave. 10

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MRS. ALICE GRIMES rises, and without resuming the stand, testifies as follows:

FURTHER CROSS-EXAMINATION BY MR. KING:

Q. Do you remember the old man's reading when you were over at his house? A. Yes, sir. 20

Q. Did he read very much? A. Not long periods.

Q. What did he read? The paper? A. In the prayer book.

Q. Ever read the newspaper? A. I never saw him.

Q. How often did you see him read the prayer book? A. Probably every day when I was there.

At this point a recess was taken until 2:15 o'clock in the afternoon. 30

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AFTER RECESS.

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*Peter J. Cahill—Direct.*

PETER J. CAHILL, a witness produced on behalf of the caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live? A. 404 Stanhope Street, Brooklyn.

10 Q. And your wife is one of the daughters of John Tutty? A. Yes, sir.

Q. And what is her name? A. Margaret.

Q. Did John Tutty ever visit your house? A. Yes, sir.

Q. How frequently? A. Oh, sometimes a couple of times in a year.

Q. And what was the character of the visits, as to duration? A. Oh, I think he has stayed there from one to two weeks—three weeks.

20 Q. And down to what time did he continue making these visits? A. Up to about, I think about two years before he died.

Q. Did you see him at Mr. Monahan's? A. No, I did not.

Q. You didn't visit there? A. No, sir.

Q. Did you see him at the Flanagans' at Mount Hope after he had gone to live there? A. Once.

Q. When was that? A. On the 31st of January.

Q. 1914? A. 1914, yes, sir.

30 Q. And what were you doing there at that time? A. Well, me and my daughter went up to see him. He had been sick.

Q. What is your daughter's name? A. Mollie; Mollie Soper, her married name.

Q. And how old is she? A. She's about twenty-six years old.

MR. RATHBUN: All right. Go on.

A. (Continued.) We went up on a Saturday  
40 night to see him, and with the intention of taking

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him to Brooklyn with us if he would go, and after our going there, I went in and he was sitting by the table. Him and a couple more were eating supper. I think it was about five o'clock in the evening—between five and six—and I shook hands with him, asked him how he felt and he said "Bad," and looked up at me, and then my daughter shook hands with him and kissed him and asked him how he felt, and he made her about the same answer. I shook hands with the rest of the people—Mr. Flanagan and Mrs. Flanagan—and then I walked into the front room and my daughter sat right across from the table where they were eating, and in a short while Mr. Tutty got up and came in the room and I fixed the chair close to where I sat for him and sat down and pulled my chair over. He sat down and looked at me for a while and said, "What woman is that you've got with you?" I said, "That's my daughter, Grandpop, Mollie. Don't you know her?" "Indeed and I don't," he says. 10

Q. Did he know your daughter, previous to that?

A. Previous to that, yes. Then I called Mollie in and she was talking to Mrs. Flanagan, I believe, and I called her in and told her and she went over and put her arms around his neck and said, "Grandpa, don't you know me?" and he hesitated a little while and said, "I do, me child." 20

Q. When did you see him after that? I withdraw that. Go ahead. A. (Continuing.) After conversing with the people of the house, and an odd word to him once in a while, I asked him if he wouldn't come to Brooklyn with us. I come up to bring him down, and he started to make an answer, but Mrs. Flanagan spoke up and said that we would have to see the Doctor before he could go. I says, "All right then," and I says—she says "The doctor is coming to-day." I says, "All right, 30 40

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- we will come and see the doctor and if he says he's fit to move, we will take him to Brooklyn, if Grandfather's willing to go." I left there shortly after that, probably in the course of fifteen or twenty minutes. Mr. Carbury, a friend of mine—I was going there, and I had promised him to go back and have supper there and stay there for the night.
- 10 It had been raining; was a nasty night, and the first thing I knew Mr. Carbury had sent a machine over for us. Only for that I wouldn't have left so quickly as I did. Being he had sent the machine over, we went to Mr. Carbury's and had supper, so after supper, we were afraid that Dr. John would not call on him the next day, as I understood he was careless sometimes in keeping his appointments, and I called on Dr. John and told him what I had done and asked him if he
- 20 thought he was fit to move to Brooklyn. He told me that he would be. I says, "I'd like you to go over to-morrow and tell then"; that I wouldn't want to take him out against their will, if they thought he wouldn't be fit to move, so he promised me that he would—he'd go over. I was to meet him over there, I think it was around ten o'clock. I wouldn't be positive—or twelve o'clock. I went over, anyhow, and waited and Dr. John didn't show up. I think I waited there until after three
- 30 o'clock—between three and four o'clock. Meantime his son had come in, so I left there then and William asked me to go up to the house with him. I told him I didn't have time; that I was going to go back that night. William came over as far as Carbury's with me and kept pressing me to go up and call on him, and my time being short, I didn't see that I had time to go up and back, and finally Mr. Carbury offered the use of the machine to take me up to Tutty's house and bring
- 40 me back in time to get the train, so on the way

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going up me and William had a talk about getting the old man out of there and he said he would do what he could—

MR. KING: The same objection raised before. A statement by any person in relation to the physical condition of the deceased is incompetent except he be a professional.

10

Q. In this conversation on this ride to William's house, did William say anything about the condition of the old man?

MR. KING: I object.

Objection overruled.

A. Yes.

Q. What did he say?

MR. KING: I object.

Objection overruled.

20

A. He said about the old man was pretty sick and with complicated diseases, and that they were influencing him down at Flanagan's and had influenced him to make this other will.

Q. Anything else? Did he say anything else on that ride that you recall? A. Not that I recall now, only our most conversation was in getting the old man removed away from there.

Q. How long did you remain at William's house?

30

A. Oh, possibly fifteen or twenty minutes.

Q. Then you went home to Brooklyn? A. I went back to Carbury's house, and then to the train.

Q. When did you see the old man last? A. I didn't see him then until I saw him dead, on the twentieth of May.

Q. What time did you get there?

WITNESS: When?

MR. RATHBUN: I withdraw the question.

40

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Q. You went to Mount Hope after he died? A. Yes, sir.

Q. And at whose house did you go? A. William Tutty's.

Q. And what time did you arrive there? A. Around about two or half past two in the morning of the twentieth.

10 Q. The twentieth of what month? A. May.

Q. And when did the funeral take place? A. On the twentieth of May.

Q. The same day, later in the day? A. Yes, sir.

Q. Who were there when you arrived, that you saw? A. The only person I saw was James Monahan.

Q. Yes. That's your brother-in-law? A. Yes, sir.

20 Q. Go ahead. What else? A. He was sitting in the kitchen and I went in and shook hands with him and then I walked out and knelt down to say a prayer for the dead, and while I was on my knees William Tutty came out of the other room.

MR. RATHBUN: Yes.

WITNESS: Want me to go on?

MR. RATHBUN: Yes. Anything said by William Tutty at that time?

30 A. (Continuing.) Yes. The first thing, I shook hands with him, and I says, "The old man's gone at last". He says, "Yes", and right away he says, "I've got the Flanagan will". I says, "Yes". He says, "I'll show it to you". I says, "Don't be in a hurry. There's time enough to see it". He says, "You might as well see it now". He walked in—I think he walked into the bar room and got the will and brought it out and give it to me to read. I  
40 read it over and Mr. Monahan came out from the

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kitchen. After I read the will over I asked Mr. Monahan if he had seen it. He said, "No", so I just handed it to him. He looked at it. After that I says—I asked him how he got it. He said that he had a note to Mr. Davenport, I believe, to get the will, and I says, "I suppose now it goes back to the will Smith has". He says, "No, I got another will made". Oh, yes. He says, "I got—went down the next morning after I brought him here and got Mr. Stickle to come up and we got another will made"; so Jim Monahan said something about the will; I can't just recall the words Jim said, but Will said, "I had the will made out my way this time". I said, "Yes". He said, "Yes, it's all right this time". No more said about it then until—nothing more said about the will, I don't think, then until after the funeral. Yes, and I understood, going to the funeral—

MR. KING: I object.

WITNESS: Well, I was only—

MR. KING: I object.

Q. Did anything else take place—was anything else said at that conversation that you have been telling about? A. Well, not just then, but shortly afterwards we walked out the door, me and Mr. Monahan and William Tutty, and I looked around and I says, "The house ought to be painted—it wants painting". He said, "Yes, he never done no work around the house". I says, "Why don't you do it?" He says, "Why would I do it. I'm paying rent. The old son of a bitch was after suing me and collecting" some \$250 back rent that he hadn't paid. I believe he told me he settled that before he left it go to a suit.

Q. Well, now then, you had another conversation the next day, that is, later in the day, after the funeral, you say? A. Well, yes, after the funeral.

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Q. Well, what took place then? A. After William went down to Rockaway and brought Mr. Stickle up, he read the will. We were all sitting around—

Q. (Interrupting.) That is, Mr. Stickle read the will? A. Mr. Stickle read the will. We were all sitting around the room, and after the will was read and we saw the conditions of it, Jim Monahan spoke up and said something about how he didn't see how the old man made the will that way, cutting out the girls and leaving it all to William Tutty; it was not his intention, and he had directed the question to Mr. Stickle. Mr. Stickle said, "Well, the old man, he didn't know or didn't seem to care". That's just about the words that Mr. Stickle used.

Q. Well, did you say anything? A. I didn't say anything, no. With that I'd got up and said, "It's pretty well done", just like that, and walked out on the porch. I heard William Tutty say when I was going out, "Well, I am the oldest of the family and the only son, and I am entitled to it". I says, "Well, that's pretty good, too", and I walked out. I didn't have much to say. I wasn't interested in it. It was my wife. It was nothing to me. I went out and stood on the porch. There was some of them talking in the room for, I suppose, ten or fifteen minutes. I don't know just the time. Finally William and Mr. Stickle went out and William untied the horse and Mr. Stickle got in the wagon to go back to Rockaway. William walked back to the stoop and he says, "I will have a talk with him going down in the wagon and see if we can't make a little better division". I says, "What's he got to do with it? It's up to you now to do right by your sisters". He says, "We'll see". That's the last talk I had with Mr. Tutty. Before he got back from Rockaway we left.

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Q. Do you know anything about the relations between John Tutty and William Tutty—father and son—as to being friendly or otherwise? A. Oh, they seemed to be a little at loggerheads for some time. The old man used to—every time he talked to me, he had something to say about William. He didn't pay his rent. There was a dollar and some cents between what he did pay and ought to pay. It seemed to hurt the old man. I says, "What of that dollar? He is your own son and the only son you got". He says, "Peter, he's entitled to pay me, and he's getting the place cheap". I says, "You don't need it; you're not starving for it". He even spoke about his letting the place run down—not taking care of it; that he didn't work the place, didn't raise any vegetables and crops, and had cut down two apple trees. He was sore about that. William claimed they covered the view of his hotel from the little road what run alongside of Cumming's house. He was very sore about it. He told me once or twice that he was going to drive him off the place altogether; that he could get more rent for it if he rented it to a stranger. I said the son's taking better care of it than a stranger would.

BY THE COURT:

Q. When was the last time, Mr. Cahill, that he talked to you about it? A. The last time he talked to me about it, I think, was in September, 1912.

Q. Prior to that you heard him speak frequently about it? A. Yes. Whenever he was over to the house. He talked about it often; would bring up these questions without any reason at all; simply talking about the old house—the place in Rockaway, since that's home to him, and he'd tell about it.

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BY MR. RATHBUN:

Q. What were his relations with your wife and her sister? A. Pleasant as far as I know.

Q. You never knew of any estrangement between your daughters and the father? A. No, I did not. No, sir.

10 Q. Did he ever—did the father ever say anything about making a will, or how he was going to leave the property? A. He spoke twice to me about that. Both times he was going on a visit up to the upper end of New York, and he told me that he was going to leave the property in Newark to the two daughters and he'd—the first or second time, he told me about it, he said he was going to cut William off altogether. Before that time, he was going to leave an entailed will that it would always have the Tutty name. I told him I thought  
20 that was a poor way to leave it to him; if he was going to go away, let him do as he liked about it, and if he wanted to sell the place, let him do so.

BY THE COURT:

Q. When was the last time? A. The last time was in September, 1912.

30 Q. 1912? A. Yes, sir. And at that time he told me—that's the time he told me he was going to come up and have the writing to cut him out of the will altogether, because they had some difficulty about this rent business. He wouldn't pay him the rent. And I told him, "I don't think, Grandpop, you ought to do anything like that. He's your son, your only son, and he's entitled to that place. You ought to leave it to him". He said the property in Newark he was going to leave to the two girls and had already provided in the will for that, but what money he had, left, he hadn't done anything with that, but he intended to  
40 leave it to the two women; that he was going to fix it with Smith when he come to Dover.

*Peter J. Cahill—Cross.*

BY THE COURT:

Q. That also was in September? A. Yes, sir.

CROSS EXAMINATION BY MR. KING:

Q. Won't you tell me what words he used to you about this Stickle will?

WITNESS: About what? 10

MR. KING: About the making of the Stickle will.

WITNESS: Who?

MR. KING: Your father.

WITNESS: The father?

MR. KING: No, I mean William Tutty.

WITNESS: You mean that morning? 20

MR. KING: Yes.

A. Oh, he said yes, he got a will made his own way this time.

Q. What else did he say that morning? A. He told me about his father suing him for the—

Q. (Interrupting.) No, tell me what he said.  
A. He told me his father had sued him for the back rent.

Q. The first time?

WITNESS: The first time what? 30

MR. KING: We are talking about—you know you were up there and he produced the first will—your Flanagan will. What did William say to you that morning about your father-in-law making a will?

A. He said—I said to Mr. Tutty, “I suppose it goes back to the will Smith has got. He said, “No”—

Q. (Interrupting.) I am not asking you that. 40

*Peter J. Cahill—Cross.*

I am asking you what William Tutty said to you about his father—

MR. RATHBUN (Interrupting): He is saying the exact words that Mr. Tutty said.

Q. (Continued.) I want to know what it was William Tutty told you about this, William's getting his father to make a will; not what you told anybody else. What did William Tutty tell you?  
 10 A. William Tutty told me that he had the will made to suit him this time—his way.

Q. What else did he say? A. I don't think he said anything just then, right afterwards; he went outdoors.

Q. What else did William Tutty say to you that time about getting his father to make a will? Use his words. If that's all you remember about it, that will end it. A. He said that after bringing his father home that night, he went to Rock-  
 20 away and got Stickle. Is that what you want?

Q. You know the question. Is that what William Tutty said? A. Yes.

Q. Go ahead and tell us. A. He went to Rock-away the next morning, got Mr. Stickle and brought him up.

Q. Is that what he said? A. Yes.

Q. What else did William Tutty say? A. He  
 30 come in with the—

Q. (Interrupting.) What did William Tutty say? A. He said he had the will made his own way.

Q. What else did he say?

WITNESS: I don't know what you are trying to get at.

Q. Is that all William Tutty said that morning about getting his father to make a will? A. That's about all of it.

40 Q. About all. What more is there? That's the

*Peter J. Cahill—Cross.*

point. Anything? A. I don't think so. I don't think there's any more that he said.

Q. You think you have covered it all, do you?

A. I think I have.

Q. When he told you that he had gotten Mr. Stickle to make this will, did he show you the will? A. No, sir.

Q. Did you ask him for it? A. No, sir. He told me Mr. Stickle had the will, 10

Q. Did you ask him what was in it? A. No, sir.

Q. Wasn't your curiosity sufficiently aroused when he told you he had gotten Stickle to make the will to ask what was in it? A. No, sir.

Q. Didn't he tell you Stickle was coming to read the will? A. Not then.

Q. If not, how were you to know the contents? A. Naturally the will is read. 20

Q. When you found out he had gotten another will, did you tell your wife? A. Yes. She already had knowed it.

Q. It wasn't new to her? A. No. She knew from Sunday night. He had told her.

Q. Did she tell you? A. No. She hadn't seen me.

Q. Didn't you see your wife when you went there? A. No, sir.

Q. Where was she? A. In bed. 30

Q. You saw Tutty? A. Yes, sir.

Q. Did he come to you, you say, as you were saying prayers for the dead? A. Just after I got off my knees. I was not two minutes off my knees.

Q. Why did he show you the Flanagan will? A. I don't know. That's always been—

Q. (Interrupting.) Did you know there was a Flanagan will? A. Yes. I had heard of it.

Q. Who told you of that? A. The first report 40

*Peter J. Cahill—Cross.*

come to us from—yes, Mr. Tutty—Mr. William Tutty.

Q. When did you get that report? A. In December.

Q. That there was a Flanagan will made? A. Yes, sir.

10 Q. How did you know there was a Smith will made? A. Yes.

Q. Who told you that? A. Mr. John Tutty.

Q. That's the old man? A. Yes, sir.

Q. Told you what was in it? A. Yes, sir.

Q. That satisfied you, didn't it? A. It did, but I didn't question the man about it. I wasn't looking for information.

Q. It satisfied you, didn't it? A. Yes.

20 Q. Now, in reference to this will, you are now dissatisfied? A. Not dissatisfied. It's nothing to me.

Q. You don't quite mean that? A. Well, as far as I am concerned, it's nothing to me.

Q. Nothing to you? A. No, it's my wife's.

Q. Aren't you intersted in your wife's affairs? A. To assist her, yes.

Q. Then you are interested in it? A. Yes, to assist her.

Q. Did Monahan hear this? A. Yes.

30 Q. Did Monahan hear all of these statements you have repeated? A. As far as making the will, I think he heard all that.

Q. And then Monahan knew of the first will—not the first will, the Flanagan will? A. Yes.

Q. Well, did Monahan read the Flanagan will? A. Right at the table where I read it.

Q. Where was Tutty? A. Right there.

40 Q. Then did all these things or statements made by Tutty take place in the presence of Monahan and yourself? A. Yes, but not there. Right there it didn't.

*Peter J. Cahill—Cross.*

Q. So that Monahan heard what you heard?  
A. He should have heard.

Q. And what you detailed to the Court?

WITNESS: What's that?

MR. KING: You detailed to the Court the statements made by Tutty, as you remember them?

10

WITNESS: Yes.

Q. Now what time did Mr. Stickle get up there?  
A. I should judge about three o'clock. Between three and four o'clock, anyhow. I ain't positive as to the time.

Q. The family were there? A. Yes, sir.

Q. After the funeral, what did you people wait for? A. To hear the will read.

Q. I thought you told me that you knew about the Stickle will, as I will call it. A. Not as to the contents. 20

Q. You told me Will said it was made in his favor. A. To suit himself.

Q. That didn't cover the contents of it? A. That didn't tell the contents of it.

Q. That didn't tell the contents of it? A. No.

Q. Why didn't you ask him the contents of the will? A. I didn't think it necessary.

Q. You may not have thought it necessary, but but why? Wasn't your curiosity aroused? A. Yes, sir. 30

Q. You let it go until Stickle came? A. Yes.

Q. When Mr. Stickle came there, did you tell the lawyer that your brother-in-law told you he had had it made his own way? A. No, sir, I don't know as I ever spoke to the man.

Q. You didn't speak to him? A. I don't think so, no.

Q. Well, who was talking with Mr. Stickle when he made these statements you have given? A. Mr. Monahan. 40

*Peter J. Cahill—Cross.*

Q. And you were there and heard it? A. Yes, sir.

Q. Did Monahan tell you that he knew the Stickle will had been made before it was read?

A. No, sir. Monahan got this news at the same time I got it.

10 Q. What time was it when Tutty told you he had had the will made? A. It might be close on to three o'clock.

Q. Stickle came at four? A. Oh, three o'clock in the morning, and that is four in the afternoon that Stickle came.

Q. And did you see your wife between three o'clock in the morning and four o'clock in the afternoon? A. Yes, sir.

Q. Did you talk with your wife as to what Tutty had told you? A. Yes.

20 Q. And did you tell her what Tutty told you? A. Yes.

Q. You said your wife knew of the Stickle will. What did she tell you? A. She told me Will told her Sunday night he had had the will made.

Q. Did she tell you whether Will told her what was in the will? A. No.

Q. Did she tell you whether she asked him what was in the will? A. No, I don't think she did. No.

30 Q. Her curiosity was not aroused? A. No.

Q. When the will was read by Mr. Stickle, you were very much surprised? A. She did tell me she thought there was something funny going on.

Q. How many wills did the old man have drawn? A. I believe he had three within the last four or five months.

Q. Within the last four or five months? A. Since December, yes. I understand he had three done.

40 Q. Did you see any objection to that?

WITNESS: To what?

*Peter J. Cahill—Cross.*

MR. KING: Having three wills made?

A. I don't think if a man were in his common sense he would make them.

Q. You think it indicates, because a man makes three wills in four or five months, that he is not competent? A. I don't think a man really knew what he was doing.

Q. Is it your idea because a man makes three wills in five months he is incompetent to make a will? A. My opinion is he didn't know what he was doing or he wouldn't make the wills. 10

Q. Then none of them, in your opinion, is any good? A. Well, he had a will made.

Q. Now, never mind that. A. I said I didn't think the man would make them.

Q. He told you what was in the Smith will? A. Yes, sir.

Q. Where was he living then? A. Stopping at my house then. 20

Q. Was the Smith will made before he came to your house? A. I believe so.

Q. When he made that—when he was at your house, was he competent to make a will? A. I think he was, yes.

Q. How long did he stay at your house? A. I think two or three, three weeks that time.

Q. He didn't like the city; did he? A. No; he didn't like it as well there as in the country because he couldn't travel around so much. Sometimes when he went out, he got lost in the blocks. He wanted to get back in the country so he could prowl around. 30

Q. Did he come up in the country? A. He went to Monahan's place from my place.

Q. Where was that? A. Bedford Park.

Q. Is Bedford Park rural or citified? A. New York.

Q. Rural or Citified? A. Rural. 40

*Peter J. Cahill—Cross.*

Q. How long did he stay there? A. He stayed there, I think, until he came to Jersey in the spring, a year and a half after that.

Q. While at your house, did he pay any board?  
A. No, sir.

Q. None at all? A. No, sir.

Q. Do you know whether he paid board up at  
10 Monahan's? A. I don't know. I believe he did.

Q. When did you first learn that the old gentleman was sick? A. In December, I think; along, about December 13th or 14th, sometime.

Q. When did your wife come up to see him? A. As soon as we got word.

Q. How long did she stay? A. I don't know—three or four days.

Q. Then what did she do? A. Came back home.

Q. How long did she stay home? A. She—I  
20 don't know whether she went back up again to see him before he was buried. I don't think so.

Q. Your best recollection is that she didn't go back to see him? A. I don't think so.

Q. So that she wasn't giving him very much care? A. Well, there wasn't very much chance for her to give him any care.

Q. Why not? A. Because there was no place for her to stay in that house.

Q. Whose house? A. Mrs. Flanagan's.  
30

Q. Why wasn't he taken somewhere else? A. He had refused to go anywhere else. When I was up there, the first thing they put up to me was the doctor question, and when I went to see the doctor, he promised me to come there and tell them he was fit to go to Brooklyn, but he disappointed me. Then William promised me to do what he could to get him out of there, and if he didn't take him to his house, he was to let me know about it and I would take him down there.  
40

The old man was in pretty bad condition I thought

*Peter J. Cahill—Cross.*

at that time, and I wouldn't remove him without the consent of the doctor.

Q. You asked him whether he wanted to go back to Brooklyn? A. Yes.

Q. What did he say? A. He would come when he got well.

Q. What else did he talk to you about? A. I don't know as he talked to me about anything in particular. 10

Q. Did he talk about the Flanagans? A. No, he did not.

Q. He seemed to be satisfied there? A. He seemed to be.

Q. The Flanagans did give him fair attention? A. I guess they did all they could for him.

Q. What time in December did you see him? A. Not in December.

Q. January? A. The 31st of January. 20

Q. At that time you asked him to come back with you? A. Yes.

Q. Did he talk to you intelligently? A. Sometimes, at periods.

Q. What was the period when he didn't? A. As I told about him asking me what woman it was I had with me.

Q. That's the only time? The only time that you point to as showing the fact that he had not common sense? A. Yes. 30

Q. Just a moment until I check you about that. This daughter of yours—when had he seen her last?

WITNESS: Previous to that?

MR. KING: Yes.

A. Well, it had been about two years.

Q. Two years before? A. Yes.

Q. Did the daughter come up with you? A. Yes, sir. 40

*Peter J. Cahill—Cross.*

Q. Your wife? A. No, sir.

Q. When you went in the house, did your daughter go with you? A. Yes.

Q. When did your daughter first speak with the old man? A. Right after I shook hands with him.

10 Q. What did she say? A. Shook hands with him, said "How do you do, Grandpa?", and kissed him.

Q. Did he hear that? A. Yes.

Q. How do you know that? A. He answered.

Q. What did he answer? A. "Poorly."

Q. So that when she asked him, he said "Poorly"? A. Yes.

Q. You saw nothing strange about that? A. No.

20 Q. A while after that she came in the front room? A. Yes, sir.

Q. Did she tell him who she was? A. No.

Q. Did you tell your father-in-law this was your daughter? A. Yes.

Q. Why? A. Because he asked me.

Q. When? A. When she first came in the room.

Q. There had been no intimation then that this was his granddaughter? A. No.

30 Q. You didn't think it necessary, did you? A. No.

Q. How long afterwards was it when he asked you who this woman was? A. Possibly fifteen minutes.

Q. And you were then in the other room? A. Yes.

Q. How did he get in the other room? A. Walked in with a cane.

40 Q. What did you and he talk about? A. Nothing in particular. The first thing he asked me after I fixed the chair for him—when he come

*Peter J. Cahill—Cross.*

in he had one hand on the door and the other on the cane, and I stepped up and put him on the chair—he asked me to sit down, and the first thing he asked me was “Who’s that woman you’ve got with you?” and I told him. My daughter hadn’t come in the room yet. When she come in I told her, so she took hold of his hand and kissed his and said “Grandpa, don’t you know me?” He said “I do, me child.” She sat down beside him. He asked how my wife was and I think, how the other daughter was.

10

Q. How many children have you? A. Three.

Q. Did he ask you how the other daughters were? A. Children I think he did. Kittie. He was very fond of Kittie.

Q. Did he mention Kittie by name? A. Yes.

Q. Did you tell him that?

WITNESS: What?

20

MR. KING: How Kittie was?

A. Yes, sure.

Q. What did Mr. Stickle say to you about this will? A. Nothing—not direct to me, nothing.

Q. What did he say to Monahan about the will? A. The answer I give you.

Q. What was that? A. He said “He didn’t seem to know or care.” That’s about the words he used.

30

Q. I want the words about that. A. That’s what he said to Monahan. He didn’t seem to know or care.

Q. What other words? A. He used some other words about the old man thought he would be sick a good while and would be a burden on his son, William, and thought it would be little enough. I believe that’s the two words I think he used.

Q. If he thought—did you ask Stickle why, if the old man thought he was going to be a burden

40

*Peter J. Cahill—Cross.*

on William, why he said he didn't know or care?

A. No. Monahan and him was talking and I got up and went on the porch.

Q. What were the words you said he used? "He didn't seem to know or care"? A. "Didn't seem to know or care".

Q. To whom was he speaking? A. Monahan.

10 Q. Of whom? A. Mr. Tutty—John.

Q. You say he also said he expected to be sick a good while? A. Yes, I heard him mention this also.

Q. And thought he ought to give his property to his son, William? A. Yes.

Q. The old man was sick when he made the will? A. Yes.

Q. Actually living at Will's house at that time? A. At the time he was there one day, I believe, when he made the will.

20 Q. At Will's house? A. Yes.

Q. And of course you and your wife were anxious to get him away from Flanagan's? A. Yes.

Q. Anything objectionable in taking him to Will's house? A. No.

Q. You wanted him to go to Will's house? A. To go to Will's house or to our house, either one. That wasn't a fit place because that man had a big family and no accommodations.

30 Q. Didn't you ever write to Will to ascertain whether he had taken the old man? A. Wrote a couple of letters to William and never got no answer.

Q. You never came to see about it? A. Only that once I was up there.

Q. From January 31st until he died? A. No, sir.

Q. Never called on him? A. No, sir.

40 Q. Did your wife call? A. No, sir.

Q. Neither one made any investigation? A.

*Peter J. Cahill—Cross.*

Only by writing, by letter from the Flanagans.

Q. Neither one made any investigation to find out where he was? A. Yes. We had a letter from the Flanagans every week but never got no answer, only one, I guess, from William Tutty.

Q. The Flanagans wrote you he wasn't there?  
A. No, sir.

Q. They wrote he was there? A. They wrote and told us how he was. 10

Q. When you found he was still at the Flanagans, what, if anything, did you think— A. (Interrupting.) In their letters they always kept telling us he was improving.

Q. They said he was improving? A. Yes.

Q. Was he improving? Where are those letters?  
A. I don't know if I have them at home or not. Would you like—

Q. (Interrupting.) Which Flanagan wrote you he was improving? A. Mrs. Flanagan—the girl. The children wrote the letters for them. 20

MR. KING: That doesn't mean anything.

A. (Continued.) They come from the Flanagans. The girls wrote the letters. Margaret, I think her name is, and she used to write for the mother.

Q. And she wrote for the mother that the old man was getting along well—improving? Now when you found out he was improving, did you still want him to go to William's or to your house? A. Yes. William Tutty promised me he would do all in his power to get him out of there, and if he wouldn't consent to come to his house, he would let me know and I would come and get him and take him to my house. 30

Q. He didn't do that? A. I never heard a word from William Tutty from that day until father died.

Q. Why didn't you come up and find out what the trouble was? 40

*Mary Ann Monahan—Direct.*

WITNESS: What was that?

MR. KING: Why didn't you come up and find out what the trouble was?

A. I thought—I was leaving that to William to do.

Q. So you left it to William Tutty? A. Yes.

10 Q. These letters from the Flanagans satisfied you he was getting pretty good care? A. Well, he was no worse than when I seen him.

Q. Oh, no. Didn't you say they wrote you he was getting better? A. Yes, improving. Then I said he was no worse than when I saw him.

Q. If he was improving, he was better than when you saw him? A. Yes.

Q. They did write a letter to that effect? A. Yes, a couple was to that effect.

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MARY ANN MONAHAN, one of the Cavetors, being duly sworn in her own behalf, testified as follows:

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live, Mrs. Monahan? A. I live in New York.

30 Q. Where in New York? A. 2894 Briggs Avenue, Bedford Park.

Q. And how old are you? A. 42.

Q. You are a daughter of John Tutty? A. Yes, sir.

Q. How old was he? A. He'd be eighty-four in November.

Q. This last November? A. Yes.

Q. And when did he die? A. He died on the 18th of May.

Q. 1914? A. 1914.

40 Q. At Mount Hope? A. Yes, sir.

*Mary Ann Monahan—Direct.*

Q. He lived with you at one time, did he not?

A. Yes, he lived with me for two years and a half.

Q. And when did he leave your house? A. He left on the 3rd of May, 1913.

Q. The 3rd of May, 1913? A. Yes, 1913.

Q. And where did he go? A. He went to Mount Hope when he left my house. 10

Q. Yes. When did you see him after he left your place? A. In December, 1913.

Q. Where did you see him? A. In Mrs. Flanagan's.

Q. Why did he live with you in New York instead of out at Mount Hope?

MR. KING: I object. That's a conclusion. Objection overruled.

A. It was his wishes to live with me. 20

Q. He wished to live with you? Where had he lived before he lived with you? A. He lived at Rockaway.

Q. At Rockaway? What was his occupation? A. Well, he didn't do anything in years.

Q. What had been his occupation? A. Miner.

Q. Miner. And where did he carry on that work? A. Mount Hope.

Q. And I presume he lived at one time in the house William Tutty now lives in? That was the homestead? A. That's the old homestead. 30

Q. But you say he hadn't worked as a miner for a number of years? A. Yes.

Q. What was his condition, physically, while he was with you? A. He was very well when he left me.

Q. And how about his hearing or eyesight? A. Well, he was very deaf.

Q. Even when he was with you? A. Yes.

Q. How about his eyesight? A. He could see quite well; could read with his glasses. 40

*Mary Ann Monahan—Direct.*

MR. RATHBUN: I wish you would speak a little louder.

A. He could read with his glasses and read the newspaper.

Q. Did he do much reading? A. Oh, quite some in the mornings.

10 Q. Well, he went to Mount Hope and you say you saw him next in December, 1913. Do you remember that date? A. Yes. On the 17th of December.

Q. And where did you see him? A. In Mrs. Flanagan's.

Q. At Mount Hope? A. Yes—Wharton.

Q. At Wharton? Anyone go there with you? A. My sister, and my brother. He took me to the Flanagans.

20 Q. Well, what occurred when you met your father? A. Well, he didn't know me when I went there.

Q. How did you know that? A. Well, he asked Mrs. Flanagan what woman that was.

Q. Did you hear him ask Mrs. Flanagan? A. Yes, sir.

Q. What was said to him? A. I asked him—I told him who I was and "Oh" he said, "Oh, now I know you".

30 Q. Where were you standing when he asked this question of Mrs. Flanagan? A. We were standing in the kitchen where he was.

Q. How big a room was this kitchen? A. I couldn't say. It wasn't very big.

Q. Well, about how big? Can you tell us? About how many feet long and how many feet wide? A. No, I couldn't tell you.

Q. Was it dark or light when you went there? A. Light.

40 Q. What time of day was it? A. About four o'clock in the afternoon.

*Mary Ann Monahan—Direct.*

Q. How long were you there? A. I stayed there over night.

Q. You stayed at the Flanagan's all night? Well, what did you observe about his condition, physical or mental, while you were there? A. I thought he was very weak, and he didn't seem—his breathing was very bad.

MR. RATHBUN: Yes. Go ahead.

10

A. (Continued.) And he used to have coughing spells.

Q. Did you attempt to have any conversation with him? A. No. He'd just answer the question if you asked him how he was. He never had any conversation with anybody.

Q. Did he make any inquiries about your family? A. He asked me how all the folks were, that's all.

20

Q. Have you children of your own? A. Yes, sir.

Q. What time did you leave the next day? A. I guess about twelve o'clock.

Q. In the afternoon? A. Yes, sir.

Q. When you went back to New York? A. To my brother's.

Q. You went to your brother's? When were you there again? A. I think it was the 17th of May.

30

Q. Did anyone go there with you? A. My sister, Mrs. Cahill.

Q. That was the day before he died? A. Yes.

Q. What was his condition then? A. Oh, he was very bad all the time.

Q. He didn't recognize you at all that time? A. Well, I went in and spoke to him and kissed him and he just looked at you and stared, and he didn't seem to know anybody then. About two hours after I was sitting fanning him and he knew me then. He asked me what time I came.

40

*Mary Ann Monahan—Direct.*

Q. And the next day he died? A. Next day he died.

Q. You remained there until after the funeral?  
A. Yes, sir.

Q. Now did your father ever say anything to you about a will—about how he was going to dispose of his property? A. Yes.

10 Q. What did he tell you, and when? A. He always told me about the property in Newark would be mine and my sister's divided.

Q. He told you that on several occasions? A. Yes, he often told me that.

Q. And what did he say with regard to the other property? A. He said the old homestead would be my brother's

Q. Did he ever tell you that he had made a will? A. Yes, he told me he had made a will  
20 with Mr. Smith.

Q. When did he tell you that? A. Right after he came to my house.

Q. Did he, at that time, tell you where the will was? A. Yes, he told me Mr. Smith had the will.

Q. And after that did he ever tell you about making any changes in his will? A. No, he never said that. He always said that will would stand.

30 Q. When did you first learn there had been any change in the will? A. My brother told me of the will that he had made around December.

Q. 1913? A. Yes.

Q. What did your brother say? A. That he heard there was a will made in favor of the Flanagan's.

Q. What else did he say? A. And for us to come up and see if we couldn't see about it.

40 Q. And what else, if anything? A. I guess that's all.

*Mary Ann Monahan—Direct.*

Q. When did you first learn about the will which has been offered here for probate? A. On the 17th of May.

Q. And from whom did you learn it? A. From my brother.

Q. What did he say about it? A. He said he had another will made.

Q. Yes. Go ahead. What did he say, if anything? A. He said he had a will made with Mr. Stickles. 10

Q. Yes. Did he tell you how it was made?

WITNESS: When?

Q. Did he tell you what was in the will, or how it had been made? A. No, he didn't tell me anything about what was in the will.

Q. Did he tell you when it was made? A. He said he had it made the day after he had taken my father to his house. 20

Q. And what did you say in reference to it? A. I said "I suppose it's made all right". He said "Oh, yes".

Q. Did you attempt to explain to him what you meant by being made all right? A. No, I didn't ask him any more questions.

Q. Did he—did your brother say anything to you about the Smith will, or, that is, the one made by Mr. Smith? 30

WITNESS: My brother?

MR. RATHBUN: Yes.

A. No, he never said anything about it.

Q. And you didn't know, then, how the will was until you heard Mr. Stickle read it the day of the funeral? A. No.

Q. You heard it read by Mr. Stickle? A. Yes, I heard it read.

Q. What did you say then? A. I said I didn't think that was right. 40

*Mary Ann Monahan—Direct.*

Q. What did Will say? A. Well, he said that was his wishes.

Q. Did he say anything else? A. No. He said he'd try to make it a little different if we'd wait until he come back.

Q. Did he tell you that? A. He told it. He didn't tell it to me exactly.

10 Q. Oh, you heard it said? A. Yes.

Q. Now while you were there at the house, Will Tutty's, just before your father died, did you notice anything unusual about your father?

A. Yes, he used to see things out of the windows and see funerals.

Q. See what? A. Funerals.

Q. That were not taking place? A. No funerals. He used to see a cow outside.

20 MR. RATHBUN: Go ahead.

A. (Continued.) He'd see dogs outside when there was nothing out there.

Q. How did you know he saw these things?

A. He used to say so.

Q. And did you say anything about it? A. No. I'd just look out and know there was nothing out there.

30 Q. Did your brother or his wife say anything about it? A. No, I don't think they did. I don't remember.

Q. Do you know whether this condition of his had continued for any length of time?

MR. KING: I object because the woman wasn't there.

Q. Did you hear Will Tutty say anything about it?

40 MR. KING: I object.  
Objection overruled.

*Mary Ann Monahan—Direct.*

A. No, I didn't.

Q. Did you hear Mrs. Tutty say anything about it?

MR. KING: I object.

Objection sustained.

Q. Do you know anything about whether the relations between your father and your brother were cordial or not? A. No, my father used to be always talking about him and saying he didn't use him right as a son. He said he'd let him walk to Dover and they had been quarreling all the time when he came up there, and when he came back, he'd be sick for a day or two, he'd be so nervous. 10

Q. Do you know of any making up between your father and your brother, prior to his leaving the Flanagan house? A. No, I don't. 20

Q. Do you know any reason why your father should have cut down the portion of yourself and your sister— A. (Interrupting.) No, I don't.

MR. KING: Wait a minute.

Q. (Continued.) and giving the bulk of the estate to your brother?

MR. KING: I object.

Q. Do you know of any reason of your father's for discriminating against you and your sister in favor of your brother? 30

MR. KING: I object.

Objection overruled.

A. No.

Q. Mrs. Monahan, do you remember Father Ferguson being at the house of William Tutty, either the day your father died or the day before?

A. Yes. The day before. 40

*Mary Ann Monahan—Direct.*

Q. And was there any conversation with your father and Father Ferguson when you were present there? A. Well, Father Ferguson came in—

MR. KING: Just a moment.

Q. In regard to a will? A. No.

10 Q. Did your father say anything about a will at that time? A. No, he never mentioned it. Oh, yes, he mentioned once about a will—about Mr. Smith's will.

Q. What? A. He mentioned Mr. Smith's will to me.

Q. You don't mean Mr. Smith's will. You mean the will of your father's drawn by Mr. Smith? A. Yes.

20 Q. Then he did speak something about a will? A. Yes, he said he wanted to go down and fix the will that Mr. Smith made.

Q. What time of day was this? A. About five o'clock.

Q. This was the day before he died? A. Yes.

Q. Who was present when this was being said? A. I was fanning him—sitting by him.

Q. You were fanning him? A. Yes.

30 Q. Can you tell us just what he said about this? A. That was all. He asked me when I came and I told him I was there quite a while. "Well," he said, "I want to go to Dover with you and Jim to Mr. Smith's to fix that will", and then he'd look out the window and see something.

Q. What did you say to him, if anything? A. I said "Why, Father, I heard you made another will".

Q. What did he say? A. He said "I did not."

*Mary Ann Monahan—Cross.*

## CROSS EXAMINATION BY MR. KING:

Q. Did he see these funerals and dogs and cows before he said to you that he wanted to go down to Mr. Smith's to change the will? A. Yes, he seen things out of the window before that.

Q. Yes. Did he see things afterwards? A. Yes.

Q. When he said he wanted to go down to Mr. Smith's to make a will, he apparently knew he had made a will? A. He knew he made one for Mr. Smith. 10

Q. And he knew Mr. Smith drew it? A. Yes.

Q. And he knew he wanted to change that one? A. Yes. It was a detailed will and he wanted to have it the other way.

Q. At any rate, he knew he wanted to change it? A. That's what he told me.

Q. This was perfectly sensible, wasn't it? A. At times I suppose. 20

Q. Then at times the day previous to his death, at times he knew where he was and would be perfectly sensible? A. Oh, at times.

Q. How often? A. I wasn't there very long.

Q. Only while you were there? A. Not very often. I didn't hear him speak very many times after that.

Q. When his mind did clear, it cleared perfectly, as you illustrate by this will? That's right, isn't it? In reference to what other matters did you notice that his mind cleared? A. That's all from the time I went there. 30

Q. Why, he knew you. Didn't you tell us that he knew you? A. He didn't know me when I came.

Q. Didn't you say he asked you how long you had been there? A. I'd been there three hours then.

Q. Then when he spoke that to you, that was 40

*Mary Ann Monahan—Cross.*

perfectly coherent, wasn't it? A. When I went in and sat down for three hours?

Q. When he asked you that, it was perfectly intelligent, wasn't it? He saw you and recognized you and asked you how long you had been there? That's true, isn't it? A. Yes, he recognized me then.

10 Q. Then he was perfectly normal—I mean his mind was. Now, if it wasn't normal, tell me what the matter was with him. A. He was raving.

Q. He was raving? A. Yes, half the time.

Q. Was he raving when he said that to you? A. Not at that time.

Q. When he said that to you what was the matter with his mind? Nothing at all, was there? A. I don't know.

20 Q. Why didn't you go up to see your father during the months of January or February and March? A. Well, where he was there was no room for anybody, I didn't think. Only four rooms and six children and a sick man.

Q. Yes, but that wasn't any reason why you couldn't go to some other house and get lodging and see him during the day. A. If I went there, I wanted to stay with him for a few days.

30 Q. Is there any reason why you couldn't have stopped somewhere else? Stopped at your brother's? A. My brother didn't want me. He told me I could stay in the Wharton Hotel if I wanted to visit my father; I thought I was just as well at home.

Q. You got a little spunky about it? That's the reason you didn't go? A. That isn't the reason I didn't go.

Q. Why didn't you go and see your father? A. I did go.

40 Q. You didn't go until the day before he died. You didn't go before that since December. From

*Mary Ann Monahan—Cross.*

December until May you never saw your father.

A. I wasn't sent word how he was or anything else.

Q. Didn't your husband tell you? A. Yes, he used to go there when I asked him and see how he was.

Q. What did he report to you? A. He said he didn't see much change in him. 10

Q. From the time he first saw him in December—January, he didn't report to you that you, as a daughter, ought to go and see your father? A. No.

Q. He didn't give you any such unfavorable reports that they were inducive to your going to Wharton to see your father, or you would have gone? A. I suppose I would.

Q. He was your father? A. Yes.

Q. You were interested in him? A. Yes. 20

Q. If he were sick, you would go? A. Yes, and take care of him.

Q. Yet your husband's reports to you were insufficient in induce you to go and take care of him? A. There was no room for me there.

Q. If you had had to sleep under a tree, if he were sick, you would have gone to take care of him? A. I suppose I would.

Q. None of the reports made to you by your husband were sufficient to make you go and take care of him? That's true, isn't it? And that's the reason you didn't go? You understand that, don't you, Mrs. Monahan? A. I didn't think he was dangerously sick. 30

Q. No report made to you by your husband? A. Oh, yes. He said he was the same all the time.

Q. There was no report made to you impressing you that it was your duty to go up and take care of your father? A. I couldn't take care of him in that place. 40

*Margaret Cahill—Direct.*

Q. No. Now don't do that. No report made to you by your husband told you that or from which you thought it necessary to go up and take care of your father?

THE COURT: We ought to have an answer, Mrs. Monahan, one way or the other.

10 A. Well, I didn't think it was—

THE COURT: Necessary?

A. Continued.) Necessary to go up there. I didn't think he was that bad.

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MRS. MARGARET CAHILL, one of the Caveators, being duly sworn in her own behalf, testified as follows:

20 DIRECT EXAMINATION BY MR. RATHBUN:

Q. You are one of the daughters of John Tutty?

A. Yes, sir.

Q. And you live with your husband in New York—or Brooklyn? A. In Brooklyn.

Q. And did you visit your father after he had gone from New York to Mount Hope? A. Yes, sir.

30 Q. And when did you visit him—how often and where? A. I visited him at Wharton, at Mrs. Flanagan's, the 14th of December, and May 17th in Mount Hope.

Q. And with whom did you go on December 14th, 1913? A. Myself.

Q. Anyone else go with you? A. No.

Q. And did you have any conversation with your father? A. Very little.

Q. How long did you remain? A. I stayed with him all night.

40 Q. And what time did you arrive? A. In the

*Margaret Cahill—Direct.*

day time, about two in the afternoon of a Sunday.

Q. And went away the next day, at what time?

A. I went up to my brother's in the afternoon.

Q. So that you were there at the house from two o'clock until— A. (Interrupting.) Next Afternoon.

Q. Next afternoon sometime? A. About three o'clock. 10

Q. Did you go back again before going back to Brooklyn? A. Yes, sir.

Q. And how long were you there then? A. Stayed over night, my sister and I.

Q. You and your sister both stayed? A. All night.

Q. What time did you leave the next day? A. I went the next afternoon and then went back to my brother's and then came back from Brooklyn on the 18th of December. 20

Q. Can you tell us anything of your conversations with your father during this trip? A. No, he didn't have anything to say at all. I went over to him, shook hands with him and kissed him, and he just looked at me and stared and didn't have anything to say. I went and took off my wraps and says, "Father, don't you know me?" and he said, "No, me child, I don't know you".

Q. Did you make yourself known? A. I said, "Don't you know Maggie?" and he says, "I think I do". 30

Q. While you stayed, did you stay in the room with him? A. Yes, my sister and I stayed up all night with him in the same room, and he moaned and groaned all night as if he was in terrible pain.

Q. What was his physical condition? A. They said he had a complication of diseases. I don't know what they were. His legs was all swollen.

Q. Was he sitting up or lying down? A. Sitting up. He never lay down. 40

*Margaret Cahill—Direct.*

Q. Sitting up in a chair? A. Yes.

Q. Did you notice anything peculiar about his actions or speech? A. Well, he didn't seem to speak much at all. Just nod his head or something like that.

Q. Well, did he—was there anything peculiar about his actions at that time? A. No, he didn't  
 10 act any way peculiar to me, only I noticed he was getting very thin and feeble.

Q. Did he say anything about your family—  
 inquire about your children? A. Yes, he asked me how all the folks was when I told him who I was. He wanted to know who came with me and I said nobody.

Q. Did he ask you about any of them in particular? A. No, sir.

Q. Did he mention anyone by name? A. No.  
 20 sir. He told me he had a very bad cold and a very bad leg, and he showed them to me.

Q. How many children have you? A. Three.

Q. Did any of them go up there at any time while you were— A. (Interrupting.) No, sir, only my daughter came up to the funeral—the married one.

Q. Which daughter? A. My married daughter, Mollie.

Q. She went up there with you? A. Yes, up  
 30 to the funeral. With my husband she came. I was there the day before.

Q. Did he say anything to you about a will while you were there? A. No, sir, not at that time.

Q. At any time? A. Well, he did home in my own house. He told me about the will he had made.

Q. Yes. What did he say about that? A. He  
 40 said he had a will made—drawn, by which my sister and I was to have the property in Newark and my brother the old homestead.

*Margaret Cahill—Direct.*

Q. Well, between that time—what time was that? A. That's about two years ago—two years last December.

Q. Between that time and the time of his death, did you do anything to estrange his feelings or affections toward you? A. No, sir, never had any difficulty with my father at all; always loved him.

10

Q. How old is your youngest child? A. Nineteen years old.

Q. Have you an adopted child? A. Yes, sir.

Q. How old is she? A. Two years in December.

Q. Did you see Father Carew at any time you were up there? A. Yes, sir.

Q. Which visit? A. The December visit.

Q. The December visit. Did you hear him say anything to your father about fixing up matters of his estate? A. Yes. My brother brought Father Carew there.

20

MR. KING: If the statement was made to the priest, it is not admissible.

Q. What did your father say to Father Carew?

WITNESS: What did my father say?

MR. RATHBUN: Yes.

A. Father Carew asked him how about that will he had made, that is the Flanagan will. He said he made no will. He said, now if you want to know how the will is, he says, I will tell you. He said the old homestead was going to go to William Tutty and the property he owned in Newark was to go to Margaret Cahill and Mary Ann Monahan, equally divided, but he said he had a proposition of selling it and get a good price for it and then he was going to share equally between us.

30

Q. Did he say anything else to Father Carew?

40

*Margaret Cahill—Direct.*

A. No, that's all he said to him. Just told him how he had the will made.

BY THE COURT:

10 Q. That was December 14th, 1913? A. 1913. He did make mention about the property across the way, too. He said that had nothing to do with the old homestead and told who he bought it from.

BY MR. RATHBUN:

20 Q. Now you said you were there on May 17th last, May 17th, 1914. What took place after you arrived? A. Nothing took place only he was expecting Father Carew all the time, and he didn't know me at all then. At the time I got there he was looking out the window and seeing funny things and getting his cane on the pattern on the couch and climbing up the window shade and doing all such funny things as that all the evening.

Q. Yes. What did he talk about? A. He hadn't any conversation at all.

Q. You didn't hear him talk at all? A. Not a word I heard him say, only nod his head anything you asked him.

Q. Was your sister there? A. Yes, she was there a little ahead of me.

30 Q. Did you hear her say anything to him or him say anything to her? A. No. I sat in the room. When he said anything to her, Father Ferguson was there. Father Ferguson was there and asked him how he felt. He said "Mr. Tutty, you will be all right".

Q. While he was there—after he was there, did you hear your father say anything? A. He said, "Yes, I will be all right". That's all, and shook his head.

40 Q. Did you hear him say anything about a will? A. No, he never mentioned any will.

*Margaret Cahill—Direct.*

Q. Did he say anything about going to have a will—fix a will? A. No, not that I heard.

Q. The Smith will or anything else? A. My sister told me about that.

Q. You didn't hear it? When did you first learn about the will which is offered for probate here? This will which is offered for probate— which is being contested? A. Oh, my brother 10 told me that afternoon, Sunday afternoon, that he had the will made out to suit himself.

Q. What Sunday afternoon? A. December 17th.

Q. That was the day before your father died? A. The day before he died.

Q. Where were you? A. In the dining room where father was.

Q. Just tell us all he said to you at that time. A. He said that he had been sworn in as a—to take care of all my father's belongs, and had got 20 the Flanagan will and he read the will for me for I couldn't read it, and he told me to sit over closer to the table because he was afraid the old man would catch on; he was sitting in the rocking chair. So I did and he read the contents of the will to me—my brother.

Q. And did he tell you how he got the Flanagan will? A. He said he got it from Mr. Davenport through a note he got from Mr. Stickles.

Q. Now do you recall any other thing which was said at that time by your brother? A. I said 30 it was very funny, making the poor old man make up wills when he didn't know what he was doing.

Q. What did he say? A. That's the way the world goes. Nobody got along in this world only a robber. That's the way to get along.

Q. What were the relations between your father and William Tutty? A. Well, that I don't know much about.

Q. You didn't hear your father talk much about it? A. I always heard my father say he was an awful mean son; he didn't know who he was tak- 40

*Margaret Cahill—Direct.*

ing after. He wasn't taking after him or any of the Lawson family; his disposition nobody could get along with.

Q. There was no estrangement between you and your father? A. None at all.

Q. Or between your father and your sister, so far as you know? A. Neither one of us. We  
10 would have been only too glad to have him come with us, if we could have gotten him to come there, after he was sick.

Q. Did you ever hear your brother say anything disrespectful of your father? A. I certainly did.

Q. When and where? A. When he was bringing me on from Mrs. Flanagan's to the old homestead, he swore at my father terrible.

Q. What did he say? A. He called him all the  
20 G. D's sons of b's he could think of. Thinking everything of strangers and nothing of his own. I told him if he didn't stop, I would have to jump out of the wagon. I couldn't stand it any longer. He said, "To Hell with him. He ought to be in Hell burning up."

Q. What excuse did he give for talking that way about him? A. Well, because—about the rent he owed I guess, and he always was quarreling with his father.

Q. What excuse did your brother give for talk-  
30 ing about his father that way? A. He said he couldn't help it because he was so mean, but he was anything but mean. He was a good father.

Q. Is that what you told him, or are volunteering here now? A. No, I told him that to himself. If he didn't stop, I would jump out of the wagon; I couldn't stand it.

THE COURT: When was this, Mr. Rathbun?

40 WITNESS: In December.

MR. RATHBUN: Riding from Wharton to Mount Hope in December.

*Margaret Cahill—Cross.*

Q. Did you hear the will which is now being offered for probate read the day of the funeral?

A. Yes.

Q. And will you tell us what took place—what you heard? A. Oh, I didn't hear anything—after the will was read, Mr. Stickle said he thought the old man didn't know nor didn't care, and that he thought he didn't have very much money, but whatever he had he'd give to my brother. He thought that's the way he took it. And we were dissatisfied—my sister and I—with the will. 10

Q. Did you hear your brother say anything—

A. (Interrupting.) No, I didn't hear him say anything.

Q. (Continued.) About why he happened to get the whole estate? A. He said he was the only Tutty and the only one entitled to anything and the only son. 20

## CROSS EXAMINATION BY MR. KING:

Q. Did your daughter go up to see her grandfather between the 17th of December and the time you went up at the funeral? A. No, sir.

Q. Are you sure of that? A. She went up with my husband in January.

Q. Where was she living then? A. About four blocks from me in Brooklyn. 30

Q. Married? A. Yes, sir.

Q. Is your daughter in Court? A. Not to-day.

Q. Won't you tell me what Tutty said to you about this will on the afternoon of the day previous to your father's death?

WITNESS: In the afternoon?

MR. KING: Yes.

A. He said he had Flanagan's will; that's all he said. 40

*Margaret Cahill—Cross.*

Q. He said what? A. He said he'd got Flanagan's will, and he read it to me right in there.

Q. What did he say about the Stickle will? A. He didn't say anything about the Stickle will. He said he had a new will drawed up to suit himself.

10 Q. To suit himself, when? Did he say who drew it? A. No, he didn't tell me. I didn't know who drew it until Mr. Stickle came up there.

Q. When he told you he had the will drawn up to suit himself, what did you say about that? A. I thought he referred back to the old will.

Q. You knew there was a will after the Flanagan will? A. Yes.

Q. Then you knew it was the will he had drawn? A. Yes, but I thought he simply referred back to the one Mr. Smith had.

20 Q. You don't mean that when he said he had the will drawn up to suit himself? So you didn't think he had any other will? A. I didn't think he was that mean.

Q. You didn't think when he spoke of another will that he referred to any other than the Smith will? A. Yes—no.

30 Q. In the Flanagan will, to whom did he give the property? A. Well, just the same as Mr. Stickle's will, except he put himself in Mrs. Flanagan's place. Everything was made just the same, all but there is another hundred dollars.

Q. The Flanagan will read like the Stickle will except that the Stickle will made your brother Executor— A. (Interrupting) And attorney also.

Q. Who was Executor in the Flanagan will? A. Mrs. Flanagan.

Q. But he, your brother, got the same property in both wills? A. Yes, sir.

*Margaret Cahill—Re-direct.*

## RE-DIRECT EXAMINATION BY MR. RATHBUN:

Q. Do I understand you to say that the Flanagan will and the Stickle will are the same except that your brother got what the Flanagans got?

A. That's the only difference I could get out of it when I heard both.

Q. Didn't your brother get anything under the Flanagan will? A. Yes, he got the old home-  
stead. **10**

Q. Under the Stickle will he gets the old home-  
stead? A. Yes.

Q. And the Newark property also? A. Yes.

Q. Then the Stickle will isn't the same as the Flanagan will? A. How are they different?

Q. Well, all the Newark property that the Flanagans got goes to your brother now? A. Yes.

At this point the further hearing of this **20**  
case was adjourned to Thursday, December  
24th 1914, at ten o'clock in the forenoon.

R. C. MATTHEWS,  
Stenographer.

**30**

**40**

**Testimony.****MORRIS ORPHANS' COURT.**


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IN THE MATTER

*of*

**10** The Application for Probate of a  
 Certain Paper Writing Purport-  
 ing to be the Last Will and  
 Testament of JOHN TUTTY, late  
 of the County of Morris, de-  
 ceased.

On Caveat.  
 Book Four.

**20** Transcript of shorthand notes of testimony taken  
 in the above matter before Hon. Joshua R. Salmon,  
 Judge of said Court, at the Court House in Morris-  
 town, New Jersey, on Friday, the nineteenth day  
 of March, in the year one thousand nine hundred  
 and fourteen, by R. C. Matthews, stenographer.

APPEARANCES :

ELMER KING, ESQ., of Messrs. King & Vogt, Proc-  
 tor for and of Counsel with Proponent.

MESSRS. CHARLES A. RATHBUN and LYMAN M.  
 SMITH, Proctors for and of Counsel with Cave-  
 ators.

**30**

MARY SPEARE, a witness produced on behalf of  
 the Caveators, being duly sworn, testified as fol-  
 lows :

DIRECT EXAMINATION BY MR. RATHBUN :

Q. Where do you live, Mrs. Speare? A. 372  
 Menahan Street, Brooklyn.

**40** Q. And you are a daughter of Mr. Tutty—of  
 Mrs. Cahill, who has testified in this case? A. Yes,  
 sir.

*Mary Speare—Direct.*

Q. And a granddaughter of John Tutty, deceased? A. Yes, sir.

Q. Did you see your grandfather at any time in 1914—at any time during 1914? A. Yes. I saw him the thirty-first day of January, 1914.

Q. Where did you see him? A. At the home of Mrs. Flanagan, in Wharton.

Q. Was there anyone with you? A. I was in company with my father. 10

Q. What time did you go to Mrs. Flanagan's? A. About five o'clock in the evening—Saturday evening.

Q. And about how long were you there? A. Between six and seven we left Mrs. Flanagan's.

Q. And you left Mrs. Flanagan's between six and seven and went where? A. I went to the home of Mr. Carbury.

Q. And that's where you spent the night? A. Yes, sir. 20

Q. And did you see your grandfather at Mrs. Flanagan's? A. Yes, sir.

Q. Did you see him when you first went into the house? A. Yes, sir. I saw him in the kitchen.

Q. Did you say anything to him or he to you? A. Yes. I asked him—I went over and shook hands with him and asked him how he felt. He said he felt very bad.

Q. How did he appear to you? A. He appeared very bad to me. 30

Q. In what way? A. He looked very sick and feeble.

Q. What room was this in that you saw him first? A. In the kitchen.

Q. And how long did you remain in the kitchen? A. For about fifteen minutes after we arrived at Mrs. Flanagan's.

Q. And what did he say or do while you were there? A. He didn't say anything to me. 40

*Mary Speare—Direct.*

Q. After your greeting—after your greetings he said nothing? A. He said nothing.

Q. Did he say anything to your father during that fifteen minutes? A. Well, after we went into Mrs. Flanagan's, he went into the front room and stayed there. A little while after that my grandfather got up from the table and went into the  
10 front room where my father was.

Q. He or we went into the front room? A. My father.

Q. Your father went into the front room or your grandfather? A. My father went in first and a little while after my grandfather followed him.

Q. You remained in the kitchen? A. Yes.

Q. Then did you go into the front room after that? A. Why, yes. When my grandfather went  
20 into the front room he asked my father who was the woman he had with him. My father called me in and told me what grandfather had said. I went over and asked him if he didn't know me.

Q. What did you say to him? A. "Grandfather, I am Mollie. Don't you know me?" He hesitated, then said, "Yes, me child, I do."

Q. Was he looking at you? A. He stared at me for a while before he said it.

Q. He didn't reply at once? A. No, sir, he  
30 hesitated.

Q. And then did he say anything after that to you? A. No, sir.

Q. That's all he said? A. That's all he said.

Q. Did you remain in the front room? A. Yes, we stayed in the front room until we went home—to Mr. Carbury's.

Q. Did your father and grandfather remain in the front room all the time you were there? A. Yes, sir.

40 Q. And did you notice anything—hear any con-

*Mary Speare—Direct.*

versation between them? Your grandfather and your father? A. Nothing in particular until we were going home, or going to Mr. Carbury's, and then my father asked him if he wouldn't go back to Brooklyn with him. He didn't have a chance to make answer when Mrs. Flanagan said he couldn't leave without the privilege from the doctor. Then we left. 10

Q. Well, when you left, did your grandfather say anything to you? A. No, he didn't say anything.

Q. Bid you good-bye or anything like that? A. I just shook hands with him and kissed him and said I would come in next day to see him, but he didn't say anything.

Q. Do you know whether he knew you when you left? A. He said he knew me when I told him who I was, so I thought he did. 20

Q. Now, do you know whether your father went to see the doctor? A. Why, after dinner—we had dinner at Mr. Carbury's—my father went to see Dr. John Walters.

Q. You didn't take your grandfather back the next day? A. Why, he, the doctor, promised my father—

MR. KING: No, no.

MR. RATHBUN: I only ask for what you know yourself. 30

Q. Now, did you see your Uncle Will that night? A. No, but the next afternoon I saw him.

Q. Where did you see him? A. At the home of Mrs. Flanagan.

Q. What's that? A. At the home of Mrs. Flanagan.

Q. Then you went back to Mrs. Flanagan's the next day? A. The next morning we went back to Mrs. Flanagan's. 40

*Mary Speare—Direct.*

Q. How long did you stay that day? A. Until about three o'clock, Sunday afternoon, the same day.

Q. You went in the morning and stayed until about three o'clock. A. Yes.

Q. How did your grandfather appear that time? A. Just about the same. He said his legs hurt him and he was very feeble.

10 Q. And what time did your Uncle Bill come back? A. I guess between half-past two and three o'clock. Just before we left he came in.

Q. What did your Uncle Will say, if anything, in regard to your grandfather? A. He didn't say anything to me.

Q. Did you hear him say anything? A. No, sir.

Q. Not to your father? A. Not at the home of Mrs. Flanagan.

20 Q. When you went over to his home afterwards, Will said something about your grandfather? A. He said he was a sick man and he had some complicated disease.

Q. Anything else? A. He spoke about the will grandfather made at Mrs. Flanagan's. He said that the Flanagans had influenced him to make the will.

30 Q. Did he say why he thought the Flanagans had influenced your grandfather? A. No, he didn't say.

Q. Did he say anything about how he knew the will had been made? A. Not in my hearing.

Q. There was nothing said between you as to having your grandfather leave the Flanagans? A. I said nothing to my uncle about it.

Q. When did you see your grandfather next? A. He was dead when I saw him the next time.

Q. And when did you go there next? A. The 20th of May, 1914.

40 Q. And that was at the home of your uncle? A. Yes, sir.

*Mary Speare—Direct.*

Q. Who went with you that day? A. My father.

Q. What time did you get there? A. About half-past two in the morning.

Q. And you found your Uncle Will there? A. Not when we entered the home. We first saw my Uncle Jim Monahan. But after we got in, we went into the room where my grandfather was laid out, and while saying a prayer for the dead my uncle came into the room from his front room. **10**

Q. And then what happened? What was said by your Uncle Will? A. After we greeted him, why, my father said to him that the old man was gone at last, and he said yes; so he started to tell my father how he had—was in possession of the will made for the Flanagans' and then offered to show it to him. My father said it wasn't necessary. They had lots of time, but he insisted, notwithstanding, and went into the bar room and brought the will out and showed it to my father. **20**

Q. Did you see him do that? A. Yes, sir.

Q. Now what was said in regard to it? A. After my father read the will he turned around and asked him how he came to get it. He said he received a note from Mr. Stickles to Mr. Davenport to secure the will, and then my father said, "I suppose it dates back to the will that Mr. Smith has". He says, "No, I had another one made". Then he told my father the day after he brought my grandfather to his home he went to Rockaway and fetched back Mr. Stickles and had a new will made. **30**

Q. Did he say anything about what had become of the Smith will? A. No, sir.

Q. Did he say anything about why he had—how he come to have the will made by Mr. Stickles? A. No, sir. **40**

*Mary Speare—Direct.*

Q. Did he say anything about what was in the will? A. No, sir.

Q. Well, did you hear him say anything else?

A. Well, after they had finished looking at it—my father and uncle had looked at the will and read it, he returned to the bar room with it and my father and uncle went out of the room and I was sitting  
 10 at the dining table and I heard him say—my uncle say something to him about the new will and he said, “Yes, he had it made to suit himself this time.”

Q. That was said in the bar room? A. Yes.

Q. Where was the bar room? Right off from the dining room? A. Right off from the dining room, yes, sir.

Q. Now, were you present at the funeral? A. Yes, sir.

20 Q. And did you return to the house after the funeral? A. Yes, sir.

Q. Were you present when the will was read? A. Yes, sir.

Q. Just tell us what you recall of what took place and what was said at that time? A. After the funeral we returned to the home of my uncle, and he went to Rockaway to get Mr. Stickles to read the will. When they came back we went into the dining room to hear the will read, and after  
 30 it was read my father got up from the dining room and went into the kitchen, and two of the boys were sitting beside me when the will was read—Silvie and Willie—and they went out on the porch and I followed my father.

Q. Well, while you were out there, where was your Uncle Will? A. My Uncle Will went into the dining room.

Q. Well, did he remain there in the dining room? A. He remained there for a short time

*Mary Speare—Cross.*

until he was ready to take Mr. Stickles back to Rockaway.

Q. He had gone for Mr. Stickles and brought him there to read the will? A. Yes, sir.

Q. And then took Mr. Stickles back? A. Yes, sir.

Q. Did you see your Uncle Will go away with Mr. Stickles? A. Yes, sir. 10

Q. Did you see him come out of the house with Mr. Stickles? A. Yes, sir. I saw him come out of the house and untie the horse.

Q. Did he say anything then in regard to Mr. Stickles? A. My father came out on the stoop and sat on a chair, and after he untied the horse, he came back to my father and said he would—

MR. KING: Who's the he?

A. (Continuing.) Uncle Will. He said that he would have a talk with Mr. Stickles going on the way to Rockaway about making a better distribution, and my father said, "Well, what has Mr. Stickles to do with it?" He said, "It's up to you to do right with your sisters." 20

Q. Who was in the room while the will was being read? You have mentioned a few. Name all those who were in the room at the time the will was read. A. Mr. Monahan and Mrs. Monahan, Mr. and Mrs. Tutty, Silvie Tutty and Willie Tutty, my father, mother and myself and Mr. Stickles. 30

CROSS EXAMINATION BY MR. KING:

Q. Did you say that your father—your grandfather did not have testamentary capacity?

WITNESS: I don't understand you.

MR. KING: Do you know what testamentary capacity is?

WITNESS: No. 40

*Mary Speare—Cross.*

Q. Do you think your father had a sound mind—your grandfather? A. Well, I don't know anything about his mind except that he didn't recognize me when I went to see him.

Q. Could that have been a matter of sight rather than of mentality? A. No, not when I was very close to him. He surely could have seen me.

10 Q. You say he could?

WITNESS: What's that?

Q. You say he could? Isn't it true that the way the women dress these days—one day with a puff on their sleeves and the next with a puff on their skirts, and one day with narrow skirts— A. (Interrupting.) Not by their clothes but by their features.

Q. With veils on and hats down over their eyes? A. That doesn't change their features any.

20 Q. You think this old man could readily pick you out whether you were dressed in the style of 1912, '13 or '14? A. Yes. Because I was right beside him and called him grandfather.

Q. What relationship had your speaking to him and calling him grandfather to do with his eyesight? A. Nothing.

Q. Was he looking at you? A. Yes, sir.

Q. Standing or sitting? A. Sitting.

30 Q. Where were you? A. Right beside him. I stood there and greeted him and kissed him.

Q. You called him grandfather when you were kissing him? A. Yes, sir.

Q. That's the time you expected him to see you? A. Yes, sir.

Q. You don't mean to tell the Court that he could see you while you were so close to him? A. Yes, sir.

40 Q. And you said you spoke to him at the time you kissed him? A. At the same time, not at the same instant.

*Mary Speare—Cross.*

Q. Which did you do first? A. Kissed him and then spoke to him.

Q. When did you expect him to recognize you? When you kissed him or when you spoke to him?

A. When I spoke to him.

Q. Didn't you speak to him first? A. No, I didn't speak to him first.

Q. You thought it perfectly safe to kiss the old gentleman before you told him who you were? A. Sure. **10**

Q. Had he turned his face toward you? A. Yes, he turned around to me.

Q. When did he turn around? A. When we went in my father greeted him first.

Q. Did he look at your father and look at you? A. He looked at him first, then he seen another person there.

Q. How do you know that? A. He looked in my direction. **20**

Q. How far away were you? A. Just a few feet.

Q. Did you speak to him then? A. No.

Q. Had your father gone out of the room when you kissed your grandfather? A. No, he was right beside me.

Q. Then you told him who you were? A. Not at that time I didn't tell him who I was.

Q. When you said to him that you were his granddaughter, what did he say then? A. That was some time after that I told him I was his granddaughter. **30**

Q. How do you know he didn't know who you were when you kissed him? A. He asked my father who that woman was he had with him.

Q. When was that? In the other room? A. That was in the other room.

Q. That was when you told him who you were the second time? A. The first time. **40**

*Mary Speare—Cross.*

Q. When you first went in the house, he was in the kitchen? A. Yes.

Q. You spoke to him then? A. Yes.

Q. Then this was the second time you spoke to him? A. After a while, he wanted to know who I was and I went over and told him.

10 Q. That was the second time? A. The first, then, isn't it?

Q. Did you tell him who you were when you entered? A. I did not. I said to him, "Hello, Grandfather". I never told him who I was. He didn't seem to recognize me. I asked him how he was feeling and he said "Bad".

Q. That was perfectly intelligent, wasn't it? A. A fair answer to your question? A. Yes.

20 Q. You knew at the time that he realized what you said, and that what he told you was true? A. No, that was a good answer to my question.

Q. You went—when you went in the other room and your father went in and he went in, was it then that you had this talk with him when your father said, "This is my daughter"? A. My father didn't say that. Before we went into the room he asked my father who I was. He said to him, "What woman have you with you?" My father said, "It's Mollie." Father called me in and I went over and said, "Grandfather, don't you know me?"

30 He hesitated, looked at me and stared a while and said, "Yes, me child, I do."

Q. Is that what you said before? You didn't say on your direct examination that he stared at you for a while, did you? A. Yes, I did.

Q. You said he stared at you for a while? You are sure about it? A. I said he stared and hesitated.

Q. Did you? Did you say on your direct examination he stared at you and hesitated? A. Yes, I

40 did.

*Mary Speare—Cross.*

Q. How long did he stare at you? A. Well, for a few seconds.

Q. How many seconds are you going to make it? A. I don't know. I didn't count them.

Q. How many do you think? A. I haven't any idea.

Q. You say his eyes were staring. How do you describe that? How did his eyes appear to you? **10**  
What are staring eyes, as you call them? A. Well, an eye that's looking at you and doesn't seem to recognize you.

Q. That's a staring eye? A. That's what I think.

Q. If you passed down the street and met a lady and she looked at you and didn't recognize you, that's what you would call a staring eye? A. Yes.

Q. So you told him then who you were, or your father did? A. My father told him first, and then **20**  
I went over and told him again. And then he said to me, "Yes," he said—

Q. (Interrupting.) Then he said, "Yes, me child I do"? Is that right? A. Yes, sir.

Q. To the best of your recollection. Anything out of the way in that answer? A. No, sir.

Q. Now, what did your Uncle William—what language did your Uncle William use when he said that your grandfather had made a will?

WITNESS: I don't quite understand what you **30**  
mean.

MR. KING: The words of the declaration by your Uncle William that your grandfather had made a will.

A. Why, he said that he had a new will made.

Q. Yes. What else? A. Why, one time, and then my father—they were in the bar room, he said he had it fixed to suit himself this time—or made to suit himself this time. **40**

*Mary Speare—Cross.*

Q. Is that exactly what he did say? A. Yes, sir.

Q. Well, is it your idea that your father was repeating the language of your grandfather?

A. No, sir.

Q. What was your idea about it? A. Why, I took it for granted that he had it fixed to suit himself.

Q. You took that for granted because you are opposed to the present will? A. The present will has nothing to do with me.

Q. It has something to do with your father and mother, hasn't it? A. Not my father; my mother only.

Q. Then it would have this to do with you, that your mother is interested in putting it— A. (Interrupting.) Not in that way.

Q. Now, your idea is that when Tutty said he had it made to suit himself this time—that's what Tutty said, isn't it? A. Yes. William Tutty.

Q. William Tutty said he had it made to suit himself this time? A. Yes.

Q. Now, did he—about whom was he speaking? A. Himself.

Q. Then wasn't what he said, "I had it made to suit myself," instead of saying, "He had it made to suit himself?" A. Himself.

Q. Why didn't he speak in the present tense, you know, "I had it made to suit myself"?

WITNESS: Why didn't he?

MR. KING: Why didn't he say that. You said, "He had it made".

A. That's exactly what I did say, my dear sir.

Q. I am speaking of what he had said. A. It was made to suit himself this time.

Q. You have said twice that William Tutty said, "He said he had it made to suit himself". Now

*Mary Speare—Cross.*

you tell me what he said. A. He said—that was what I am trying to tell you—William Tutty said it was made to suit himself this time.

Q. It was made? A. Me meant the will.

Q. Now you said a little while ago, speaking of William Tutty, "He had it made to suit himself".

A. I didn't mean it that way.

Q. What was said? A. It was made to suit himself this time. 10

Q. Tell me what you heard William Tutty say.

A. The will was made to suit himself this time.

Q. "The will was made to suit himself this time." Is that exactly what he said? A. Yes, sir.

Q. Then if you did say before, "He had it made to suit himself this time," you want to change that? A. Yes. Well, he said, "his way".

Q. Now, who is "himself"? A. William Tutty. 20

Q. Why do you say William Tutty rather than your grandfather? A. Because it wasn't grandfather.

Q. That's your interpretation put on it. Have you any authority for stating that the word "himself" applied to William and didn't apply to the grandfather, and if you have, what's your authority for it? (Witness hesitates.) Can you answer? What's your authority for stating that "himself" applies to William rather than your grandfather? A. Well, he was asked if it would go back to the will Mr. Smith drew, and he said no; he had another will made to suit himself this time. 30

Q. Wasn't "himself" there the grandfather? A. No.

Q. Why wasn't it? A. They were not speaking about the grandfather. We don't know he made this will.

Q. Oh, that is it. I can see the animus now. 40

*Mary Speare—Re-direct.*

Why did the word "himself" mean William Tutty and not your grandfather? A. Because he was the one who brought Stickles there to have the will made.

10 Q. Are you willing to leave the witness stand with this theory—that it was William Tutty because he went and got Mr. Stickles to draw the will? A. Yes. That's the way I interpret it.

Q. And it's your thought now that Will Tutty got your grandfather to make that will the way he did? A. Yes.

Q. You believe that is so? You believe he used undue influence to persuade your grandfather to draw this will making him the principal beneficiary? A. Yes, I do.

Q. You believe all that? A. Yes, sir.

20 Q. And you believe there is an unequal distribution made in that will, do you not? A. Yes, sir.

Q. And, having that in mind, you think that word "himself" applies to William Tutty rather than to John Tutty? A. Yes, sir.

Q. And you haven't anything beyond that? A. I think it's plain enough.

30 Q. Plain enough to you. That's the way you feel about the whole matter. And isn't it true that if there is anything on which another interpretation could be put, you believe that interpretation should be against the last will and testament of John Tutty and for the purpose of defeating this will? For that reason you have made efforts for the purpose of defeating the probate of this will. Isn't that right? A. Well, that's what I think about it.

## RE-DIRECT EXAMINATION BY MR. RATHBUN:

40 Q. Did your uncle use the first, second or third person of the pronoun in that statement? You

*Mary Speare—Re-cross.*

understand what I mean by first, second or third?

A. Yes, I understand what you mean. What I heard him say was that the will was made—

Q. (Interrupting.) Well, which did your uncle use? A. He used the first person, he being speaking.

Q. "I had the will made to suit myself"? Then when you were answering Mr. King's question why did you use the third person? A. He asked me what he said and I said "He said". That was the way I started my answer. 10

Q. As a matter of fact your uncle spoke in the first person and said, "I had the will made to suit myself"? A. Yes, sir.

## RE-CROSS EXAMINATION BY MR. KING:

Q. Now what are you going to do with this word really? A. I said that was the way I started my answer. 20

Q. You gave one explanation on direct examination, another on cross examination, and on re-direct another. You are going to stand by it now, "I had the will made to suit myself"? A. Yes, sir.

Q. That's what he said? A. Yes, sir.

Q. You knew it all along? A. Yes.

Q. You knew that just as well when you got on the witness stand as you know it now? A. Yes. 30

Q. Why didn't you tell it then? A. I don't know why I didn't say it. I meant it that way.

*Mary Ann Monahan—Direct—Cross*

MARY ANN MONAHAN, a witness produced on behalf of the caveators, being recalled to the stand, testified as follows:

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Did you see your brother, William Tutty, and his wife at their home on October 22nd, 1914? A. Yes, sir.

Q. And at that time you were talking about—you were talking about estate matters and so on? A. Yes. We went up there, my sister and I, to make a settlement.

Q. You were talking about the will and estate matters? A. Yes.

Q. Did Mrs. Tutty, in the presence of Mr. Tutty, say anything about the Flanagan will? A. Yes.

Q. Now, what did she say?

MR. KING: I object.

Q. What did Mrs. Tutty say in the presence of Mr. Tutty?

MR. KING: I object. I can see no reason why the statement of a witness, not to the will, can, even if made in the presence of an executor or beneficiary under the will, be admitted for the purpose of testing the legality of the will.

After argument:

MR. KING: To avoid further argument and loss of time, I will withdraw the objection.

A. She said that he might as well have it as the Flanagans.

Q. He might as well have what? A. Have the property in Newark as the Flanagans.

CROSS EXAMINATION BY MR. KING:

Q. Well, was there anything wrong about that?

*Lyman M. Smith—Direct.*

Why shouldn't John Tutty have it—Will Tutty?

A. Why shouldn't it be to my sister and I as well as him? We are heirs as well as he is.

Q. Well, why shouldn't William have it? What is wrong about the statement? Do you know of any reason why William should not have the Newark property if his father wanted to give it to him? Any reason at all? A. I don't know of any reason. **10**

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LYMAN M. SMITH, a witness produced on behalf of the caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

Q. You live in Dover, Mr. Smith? A. I do.

Q. You are a practicing lawyer? A. Yes, sir. **20**

Q. And are you the Smith that is referred to in some of the testimony as having drawn a will for John Tutty? A. Yes, sir.

Q. And are you the one to whom Mr. William Tutty applied for the former wills of John Tutty?

A. Yes, sir.

Q. Do you know when he came there to get the will? A. I can tell you by referring to a receipt that he gave me.

Q. You have the receipt in your possession? A. **30**  
Yes, sir. (Referring to paper.) On the 14th day of May, 1914.

Q. This paper is the paper which he presented to you— A. (Interrupting.) Yes, sir.

Q. (Continuing.) —and on that you had a receipt— A. (Interrupting.) Had him make a receipt.

MR. RATHBUN: I think I will offer that.

The receipt in question is admitted in evidence and is marked Exhibit C-1 on the part of the caveators. **40**

*Lyman M. Smith—Direct.*

Q. Did he say anything to you about drawing a will—a will for John Tutty? A. He came in and presented this paper and said that his father had sent down—I think he said that his father had sent down for the will, and I read the paper and I went to the safe and took it out and that was—it was in with a bunch of wills and I picked it out and  
 10 handed it to him, and then I had him sign this receipt, and I think it was when I was writing, or during the time I was getting the will, that I asked him how his father was and he said not very well. Then he signed the receipt and started towards the door. I was busy that day. I think there were several people in there, if I am not mistaken. He stood, if I recall, at the door. I don't remember whether he had his hand on the door or not, but he said, "If my father wants a will  
 20 drawn, I will bring him down". "But," he says, "If I do bring him down, I want you to look after my interests, for I think I am entitled to the bulk of the estate". That's the substance of what he said. I don't know whether those are the words or not. That's the impression he gave me at that time. He had said several times that he was coming down—that is, to bring him down and have a will made.

Q. Then he had been to the office before the day  
 30 on which he got the will? A. Yes.

Q. How often before that? A. Several times. I don't remember. I don't remember whether he was there between—I know one day in the latter part of 1913 he came to me and said that his father was up at Flanagan's and that he was not properly kept and he was dirty and hadn't had a bath; that he didn't think it was the proper place for him and I advised him then to get him over to his own home. I told him to telephone to his  
 40 sister.

*Lyman M. Smith—Cross.*

At this point Mr. King raised the objection that if Mr. Smith were the attorney for Mr. William Tutty, these communications were privileged and not properly admissible in evidence.

Q. Did you make any charge for this? A. No.

Q. Are you his attorney? Were you employed by him? A. I never made any charge.

10

MR. RATHBUN: I think it fair for the Court to investigate as to whether you were his attorney. If you were, your mouth is sealed as to what was said.

MR. KING: Let me cross examine on that subject.

## CROSS EXAMINATION BY MR. KING:

Q. Were you in your law office at that time? A. I was.

20

Q. And did he call at your office? A. Yes.

Q. The same as any other client? A. Well, he had been there several times before. I never did any business for him.

Q. He had been to see you? He called for the purpose of transacting business with you then, or such business as he might bring to you thereafter?

A. I suppose I would have done any business if he brought it, yes.

30

Q. Let me put it this way. That lawyers, in the country, at least (I have found this true), have friends coming in and talking to them about matters which they don't give to them. Isn't that true? A. Yes.

Q. Hasn't that been your experience? A. Yes.

Q. Then, if the same client subsequently comes in and brings the matter to us, we take it up. Then don't you make a charge which you think is fair

40

*Lyman M. Smith—Cross.*

compensation for what you have done? A. Yes, sir.

MR. KING: Yes, Senator Rathbun suggests that sometimes we get a retainer.

WITNESS: I didn't in this case.

10 MR. KING: I don't think that Mr. Rathbun should ask this witness those questions.

Q. You are also counsel in this case? Associated with Mr. Rathbun as solicitors? A. Yes.

Q. And, of course, interested in breaking the will, if possible? A. If just to break it.

Q. Well, really the justness doesn't enter into it. A. Well, I get paid whether or not.

20 Q. I know that. You are not particularly interested in the equities. You are playing the game as all lawyers do—you to break the will, I to support it if I can. A. Yes, that's right.

BY MR. RATHBUN:

Q. Do you recollect what William Tutty came to you first for on these several occasions? A. Well, no particular business that he came for that I could find out.

30 Q. Just in reference to his father? A. Well, he talked generally. He didn't talk business when he came there before. The only time he ever talked with me about it was that time he came there and said his father was not properly kept.

Q. Did he know at that time that you had drawn a will for his father? A. I think that he did.

40 Q. Was any reference made to it by him which indicated to you that he knew you had drawn a will for his father? A. There may have been. I am not sure about that. I am not sure whether he mentioned the fact that he knew I had a will or not.

*Lyman M. Smith—Cross.*

Q. You had been attorney for his father? A. Yes.

Q. Had you drawn more than one will for his father? A. I drew two, I think.

Q. Have you ever done any other business for the father than drawing the wills? A. Yes, I assisted him when he was Guardian of Frank Monahan. 10

Q. Had you ever done any business for William Tutty? Legal business? A. I can't remember that I ever did. Possibly I did, but I don't remember it. I can't recall now what it was if I ever did.

Q. And when he came there to your office at the time he was talking about his father being at Monahan's—I mean at Flanagan's—was there anything it what he said to you indicating that he was looking to you as his attorney? A. Well, he seemed to be quite excited when he came in and told me these circumstances about his father being up there and improperly kept and ill treated, and he asked me to go up and see how he looked. 20

Q. Well, was there anything which led you to think—was there anything said by him which led you to think that he would employ you to act as his attorney?

MR. KING: No, it isn't what this man thought. It is for the Judge to say from his evidence and not what Mr. Smith thought. 30

THE COURT: It appears that he said he wanted you to look after his interests.

MR. SMITH: Well, that was after the drawing of the Stickles will.

MR. KING: Yes, but even then the evidence is that he wanted Mr. Smith to go up and see his father.

THE COURT: It looks as though Mr. Tutty came to see Mr. Smith for Mr. Smith to undertake something for Mr. Tutty. 40

*Lyman M. Smith—Cross.*

MR. SMITH: I don't know whether it was at that time or some other time, but I remember Mr. Tutty saying if there was any trouble about the will, he was going to employ Mr. Elmer King.

10 I may say, your Honor, that if there was any thought in my mind that I was employed by Mr. Tutty, I was also employed by his sisters because I didn't know there was any difference between him and his sisters, and if I was acting for all, I must have presumed I was acting for all parties because I remember telling him to telephone to his sisters to come up and get his father away from there.

MR. RATHRUN: I will ask Mr. Smith this question.

BY MR. RATHBUN:

20 Q. Mr. Smith, was there anything in the relations between you and Mr. Tutty at that time, or was there anything said by Mr. Tutty at that time which you, as a member of the bar, considered a privileged communication and which you should refrain from discussing? A. No, not alone in connection with Mr. Tutty, because I presumed that he was acting with his sisters, and I knew I had drawn a will for Mr. Tutty and that one they  
30 would never upset because it was favorable to all parties.

MR. KING: I move to strike out of the contents of that answer the words "favorable to all parties".

THE COURT: Yes, eliminate that. If insisted upon, it ought to be eliminated.

MR. KING: I insist upon it.

I wish to renew my objection that anything  
40 said on those occasions when Mr. Tutty came

*Lyman M. Smith—Cross.*

to Mr. Smith and asked advice and asked Mr. Smith to do things for him—I think those things ought not to appear here.

Objection sustained.

MR. RATHBUN: I ask an exception to that ruling on the ground that it does not appear that Mr. Smith was in the employ of William Tutty, and, therefore, that any communication made by William Tutty to Mr. Smith was not privileged. 10

BY MR. RATHBUN:

Q. Now, Mr. Smith, do you know—do you recall the contents of the will—the substantial parts of the will which you delivered to Mr. William Tutty and to which this receipt, offered in evidence, was given—Exhibit C-1? A. Well, I think—

MR. KING: The question is, do you? 20

MR. RATHBUN: Do you recall?

A. Well, I may say, as near as I remember, the real estate—

Q. (Interrupting.) My question is merely, do you recall the contents? A. I think I do.

Q. What were the main provisions of that will?

MR. KING: I object. First, on the ground that the will is still in existence and ought to be produced. 30

THE COURT: Where is this paper?

MR. RATHBUN: I don't know. It was delivered to Mr. William Tutty. Presumably it has been destroyed.

THE COURT: I think the paper ought to be produced. Have you made any effort to locate it, Senator?

MR. RATHBUN: I am afraid I have not. I will ask Mr. King to produce it now.

MR. KING: That's as sudden as a proposal 40

*Lyman M. Smith—Cross.*

of marriage. I don't go around with wills in my pocket. I haven't it here.

BY MR. RATHBUN:

Q. Have you a carbon copy of that will in your possession? A. I think not.

10 Q. Did you go to Mr. Tutty's with Mrs. Monahan and Mrs. Cahill on October 22nd, 1914? A. I went there with them, but what day it was I don't remember.

Q. And it was in reference to this will and the adjustment of matters? A. Yes.

Q. Did you hear Mrs. Tutty say anything in reference to the Flanagan will or the property? In the presence of William Tutty?

MR. KING: This was after the caveat?

MR. RATHBUN: Yes.

20 MR. KING: And the parties went up for the purpose of getting an adjustment, if possible?

MR. RATHBUN: Yes.

MR. KING: I object because it is not proper. Whatever statement Mrs. Tutty may have made is not receivable against William. Second, they went up for the purpose of a compromise, and any statements made seeking a compromise are not competent.

30 THE COURT: I think it is too far removed to have any binding force on William Tutty. I don't think it is a proper subject for investigation, Senator. I will grant you an exception.

*William Tutty—Direct.*  
*Lyman M. Smith—Direct.*

WILLIAM TUTTY, a witness produced in behalf of the caveators, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Mr. Tutty, have you in your possession the will of John Tutty which Mr. Lyman Smith gave you, and for which you gave the receipt which has been offered in evidence? A. I have not. 10

Q. What has become of it? A. It was destroyed.

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NO CROSS EXAMINATION.

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LYMAN M. SMITH, a witness produced on behalf of the caveators, being recalled, testified as follows: 20

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Now, Mr. Smith, can you tell us—will you tell us what the contents of the will which you delivered—the will of John Tutty which you delivered to William Tutty on May 14th, 1914, were? A. The first provision, I think, provided for the payments of his debts, and the second related to the homestead, and I think that it provided that William Tutty was to have the life use of it, and after his death it was to go to his three sons, and the property in Newark (there was a property in Newark) was to be divided between the two sisters, and there—he was supposed—Mr. Tutty was supposed to have considerable money in the bank— 30

MR. KING: I object. Not what he was supposed to have. Give the provisions of the will. 40

*Lyman M. Smith—Cross.*

A. (Continuing.) The last provision provided for the division of the money—I wouldn't say money. I don't remember whether it said residue or money, but it provided for the equal division of whatever was left that had not previously been disposed of equally among the three.

Q. Yes. What do you mean by the three? A.  
10 William Tutty and his two sisters.

Q. And when you spoke about the Newark property to go to the two sisters, you meant William Tutty's sisters? A. Yes, sir.

Q. And when you spoke about the three children— A. (Interrupting.) That's William Tutty's three sons. I have forgotten their names.

## CROSS EXAMINATION BY MR. KING:

Q. When he came to your office to have this  
20 will drawn, of which you have just given us the contents, who came with him? A. He came alone.

Q. Where was he living? A. He had been going back and forth between New York and Mount Hope, or Mr. William Tutty's place, and I can't remember whether he came at that time from New York or lived up at his son's.

Q. What was the date of that will? A. Well,  
30 I think it was some time between May first—probably between May first and August first. I can't remember exactly when it was.

Q. What year? A. I think it was in 1910.

Q. He had mental capacity at that time, hadn't he? A. I think he did.

Q. If you had any doubt about it, you would have executed the will? A. No, I don't think so.

Q. Now, when he came May fourteenth, 1914, did Mr. William Tutty say, "If my father wants  
40 a will drawn, I will bring him down"? A. That

*Lyman M. Smith—Cross.*

was the substance of his words. I don't know as they are the exact words. He had said several times prior to that—

Q. (Interrupting.) No, I am not asking that. Is that what he said? A. As near as I can remember those are the words.

Q. Then he further said, "If I do bring him down, I want you to look after my interests, because I am entitled to the bulk of the estate"? A. I think that's what he said. **10**

Q. Now, what did he ask you to do about looking after his interests? A. That's all.

Q. He didn't offer to pay you for looking after his interests? A. No.

Q. He didn't ask you to influence his father? A. No.

Q. He simply asked you—told you to look after his interests? You didn't take that to mean that he wanted you to exercise any influence on his father? A. At that time Mr. Tutty had been in there— **20**

Q. (Interrupting.) No. You didn't, at that time, take that to mean that you were to exercise any undue influence over this old gentleman? A. I understood that's what he meant, yes.

Q. Why didn't you get up and knock him down? A. There were several people in the office at that time. **30**

Q. Do you permit a man to tell you—

MR. RATHBUN: I object to that.

Q. Do you permit a man to come into your office and make a proposition that you were to unduly influence a man to make a will and let him get out alive?

MR. RATHBUN: I object to that.

Q. Well, what efforts did you make to get your hands on William Tutty? A. Didn't make any. **40**

*Lyman M. Smith—Cross.*

Q. Did you stand and take it? A. I probably would not if I had given it a second thought. I didn't think anything about it. I was busy with other people and it didn't occur to me.

Q. When did it first come to your mind that that was what he wanted you to do? A. I don't know that.

10 Q. Did he ever come in your office after that? A. I don't think he ever did, no.

Q. That's the last time he was there? A. Yes, the last time.

Q. He told you that if his father wanted another will drawn, he'd bring him down? A. That's my impression.

Q. So you had the reasonable notion that William might bring him down to get a will made? A. Yes, sir.

20 Q. Now, you say that as he went out the door was when he told you he wanted you to look out for his interests? A. I couldn't say positively. I think it was about that time.

Q. Did you permit him to go away without your advising him he mustn't bring his father? A. Why, he did go away.

Q. I mean without telling him he should not bring his father down. Why didn't you say, "You can't bring your father down here if that's what  
30 you want?"

MR. RATHBUN: I object.

A. I didn't think particularly about it. There was several people in the room and I was very busy at that time and there was so much said that what was said didn't occur to me at that time.

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*Burt Rourk—Direct.*

BURT ROURK, a witness produced on behalf of the caveators, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. RATHBUN:

Q. Where do you live? A. Wharton.

Q. Did you know John Tutty? A. Yes, sir.

Q. How long have you known him? A. I have known him as long as I have known anybody, I believe. 10

Q. How old are you? A. I am about forty-five.

Q. Did you see him at any time while he was at Flanagan's? A. Yes, sir. The first I knew him being at Flanagan's was in June. I couldn't say what date. He used to come in quite often to my house and set down and smoke and chat around—that is, talk. 20

Q. Yes. Now, in any—how often—you say that happened often? A. Quite often. Maybe two or three times a week some weeks, and then maybe it would go two or three weeks he maybe wouldn't come in.

Q. In any of these conversations did he refer to his property—what he intended to do with his property when he died? A. Well, he spoke one Saturday—that was in July, around after the Fourth some time—that he thought he had a will made quite right; that he calculated to leave the property at the Tebo Mine to his son William, and the Newark property to both the daughters, and any other questions I didn't ask him because he was quite hard of hearing and he merely told me that himself without asking him. 30

Q. Do you know anything about his feelings toward his son William? Did he ever express himself? A. Oh, he has, but I don't just remem- 40

*Burt Rourk—Cross.*

ber the way he has spoken, and then I never paid much attention to it.

## CROSS EXAMINATION BY MR. KING:

THE COURT: Can't we fix the date, as to this Saturday, or perhaps Mr. King will bring that out on cross examination.

10

MR. RATHBUN: He said July, 1913.

O. That was in 1914? A. 1913.

Q. When he came over and sat down at your home and used to smoke and chat, did he— A. (Interrupting.) Well, he'd talk quite freely and of course I couldn't make him understand very well because he was quite deaf and then I wouldn't ask him any questions.

20

Q. When he talked, did he talk intelligently? A. Yes, he seemed to be all right until he took sick. Well, one night I was there he was quite bad.

Q. When was that? A. That was about the fifth or sixth of March, in 1914.

Q. Where was he then? A. He was at Flanagan's.

30

Q. Now, did he get over that sickness? A. Well, he got over that sickness, yes. And then I went to see him about three or four times before his son William brought him home. I was to see him about a week before he brought him home.

Q. Talk with him? A. Well, at that time he was sleeping—that is, drowsy, kind of, sleeping in a chair. Of course, I didn't have any talk.

Q. Well, on these occasions when you did see him, did you talk with him? A. When he was not sleeping. Yes, I did speak to him.

40

Q. Did he talk to you? A. Yes, he did talk to me. He used to speak to me about meeting me in different places that he had never met me be-

*Burt Rourke—Cross.*

fore, and then he'd talk like that, I should judge, about ten minutes or so, then he'd come back all right and probably be all right when I'd be leaving him.

Q. And when he was all right, as you call it, his actions were intelligent and his conversation intelligent? A. Oh, yes. He'd act different then.

Q. In other words, his mind would wander. 10  
Isn't that right? A. Yes.

Q. Going back to this time previous at Flanagan's what have you to say about his mental condition, not physical? A. I and a brother of mine went down to see him. While we was there, his son William came in.

Q. I am asking what you have to say about his mental condition? Did he talk then?

WITNESS: What?

MR. KING: Did he talk when he was down 20  
at Flanagan's in March?

A. He talked right along, yes.

Q. Talk with you? A. When I'd go there, yes. If he wasn't sleeping. If he was sleeping I couldn't talk to him.

Q. Did he talk intelligently to you? A. Yes, until the sixth of March. On the sixth, when he was over at Flanagan's, he took a bad spell.

Q. Did you go over when he had this bad spell? 30  
A. I was over, yes, sir, all night.

Q. Sitting up with him or taking care of him?  
A. Well, I was sitting there a while with his brother and son William.

Q. He was pretty badly off that night? A. Yes.

Q. And so badly that some of the neighbors sat up with him for fear he might die?

WITNESS: What?

MR. KING: He was so badly that some of 40

*Dr. John Walters—Direct.*

the neighbors sat up with him for fear he might die?

A. That was my idea. I thought he might die.

Q. On this occasion when you were sitting there, was he sleeping or unconscious or what? A. Well, he had—I couldn't say whether he was unconscious or not, but he had quite a hard time to get his breath and we'd bring him to the door. He said he couldn't breathe in the house.

Q. You didn't talk with him when he was as sick as that? A. No.

Q. And he didn't—the old man didn't talk, did he? A. Only just when he motioned that he wanted to get to the door or something.

Q. He had enough intelligence to know he wanted to get to the door? A. He knew he wanted to get where there was some air.

Q. An old man? A. What's that?

Q. He was an old man, wasn't he? A. Oh, why, not so terrible old.

Q. Well, what is so terrible old? A. What is that? Eighty years.

Q. Eighty years? A. Yes.

MR. RATHBUN: That is our case.

DR. JOHN WALTERS, a witness produced on behalf of the proponent, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KING:

Q. Doctor, you are a practicing physician at Wharton? A. Yes, sir.

Q. As such physician, have you been in attendance upon John Tutty? A. Yes, sir.

Q. Have you in mind when he died? A. I think it was during May, 1914.

*Dr. John Walters—Direct.*

Q. For how long did you attend him before his death? A. Well, it's for some months. I couldn't just tell you now.

Q. Can you tell me how—approximately how many months? A. I wouldn't be surprised if it were about five or six months.

Q. During that time, how often did you attend him? A. Quite frequently. 10

Q. I wish you would tell the Court—give the Court a general summary of the time you first went to see him, and then follow it down by telling the Court generally what you found his condition to be, directing your attention to two parts, the physical part and the mental part. A. The physical part was fair at first, and the mental part I could not find any fault with. He was subject to attacks of spasmodic asthma, and during those attacks, or several of them, he expressed himself as very desirous to know whether he'd—whether they would prove fatal or not. Some of them passed off with much more rapidity than others; some lasted a day or two or three. He was equally concerned from the first to the day of his death. I don't know that he ever had one but what he would intelligently question me as to what I thought of the end of it and how soon it might happen. He felt that feeling of impending death. In that sense he acted as rational as any man under those conditions. I, with my family, was out that way on the last day that he was alive. I was up there but didn't go up to see him. He had been free from one for a short time and it was a little late and I didn't care to stop, as I saw him on the porch and he waved to me and took his hat off. The next day I learned he died rather suddenly. 20

Q. Did you find him a man with a fair amount 30

*Dr. John Walters—Direct.*

of stamina, mentally? A. Yes, for his age I consider he was equal to the standard.

Q. Physically he was equal to the standard or not? A. Well, no, although a man pressing—getting on to eighty or past (I think he was eighty something) you can't expect very much of physically.

10 Q. Were you his attending physician at the time he was at Flanagan's? A. Yes, sir.

Q. Was there any time that you know of when Mr. John Tutty was either given or had an excessive amount of liquor?

WITNESS: What my opinion might be, not what I know—

MR. KING (Interrupting): I am asking you just what you saw.

20 A. I saw those sleepy spells and they always appeared late in the afternoon and evening. On some occasions I'd notice that he had something to drink, and that it was given to him rather frequently, according to what I knew of him.

Q. Was that condition in relation to the time he was at Flanagan's? A. Yes.

Q. Do you remember when he was taken from Flanagan's to Mr. William Tutty's? A. I heard of his being taken there.

30 Q. Did you attend him as physician after that time? A. I did.

Q. When he was at William Tutty's, what have you to say about his condition concerning these sleepy spells? A. They were absent.

Q. So that after he was at William's, you noticed the absence of those conditions which you had observed in the afternoon? A. I did.

Q. Doctor, now to put it all in a heap, the statutory requirements are that a man shall know  
40 the property that he has to dispose of; in law he

*Dr. John Walters—Cross.*

is compelled to know the natural beneficiaries of his bounty; the next is, he has got to know the disposition which he makes of his property to those persons under his will. Assuming that as a standard, was there any time in which you attended him when he was not competent, in your opinion, to make a valid will? A. I would say he was entirely competent from the first to the last that I saw him, that is, during a period of forty years. 10

Q. What have you to say as to whether he was a strong-minded man or not? A. He was a set-minded man, yes.

Q. Easily influenced? A. Not readily, no.

## CROSS EXAMINATION BY MR. RATHBUN:

Q. Doctor, how often did you attend him while he was at the Flanagans? A. Well, it would depend upon how he was as to how frequently I made my visits. I suppose when he had those attacks I came daily for a day or two, maybe three. Then it would go a week—sometimes two. 20

Q. Can you tell us, Doctor, the number of times you were there attending him while at Flanagan's? A. Not here, I couldn't tell you correctly.

Q. Can you tell us when you saw him last while at Flanagan's? A. I think the second day before he—I wouldn't be sure of it. 30

Q. Did you prescribe liquor for him at any time? A. No, sir.

Q. Did you see any liquors there? A. Sometimes.

Q. Do you know who took the liquor there? A. No, sir.

Q. You never saw it brought there then? A. No, sir.

Q. And the time he was under the influence of 40

*Dr. John Walters—Cross.*

liquor, you thought that was it? A. That's my opinion.

Q. How did he manifest that to you? A. Of all the times I saw him, he never was in a semi-stupor condition unless it was towards night, and from what I heard I was convinced that that was the cause of it.

10 Q. Well, on those occasions did you test him at all? A. I couldn't arrive at a conclusion concerning his case so as I could satisfy myself it was positively so. The condition of his arterial system was such from the disease he suffered from that I couldn't distinguish between the amount of liquor he had and the lack of secretion from the kidneys that he might have.

20 Q. So that it seemed he'd be in a semi-conscious condition without the use of liquor? A. Well, it had something to do with it.

Q. You speak of the secretion of the kidneys. Did he have Bright's disease? A. Yes.

Q. How long had he had it? A. It was a chronic case. I couldn't tell you. Before I saw him.

30 Q. Has the form of Bright's disease which he had a tendency to cause a semi-unconscious condition? A. Not so pronounced as he showed it unless it produced a stupor from which he would not recover.

Q. Did his form of Bright's Disease have a tendency to do that, isn't it? A. It might. It would have to be an extremely active form.

Q. It did have the tendency to produce a sort of comatose condition? A. Not to the extent—

Q. (Interrupting.) I am not asking to what extent. It had a tendency to produce a comatose condition from time to time? A. It produced what we call a semi-stuperous condition and other

*Dr. John Walters—Cross.*

times directly the opposite. That is, the secretion of the kidneys.

Q. Did his form of Bright's Disease have a tendency to produce at times a coma condition? A. Not a marked one, no.

Q. Does it, Doctor? Will you kindly answer? Did his form of Bright's Disease have a tendency to produce a coma condition? A. Not the kind he suffered from. He didn't have that form. **10**

Q. As I understood you, you said that the disease which he had produced in him a condition—a semi unconscious condition which sometimes you could hardly tell whether it was that or from the liquor that he might have had? A. To an extent.

Q. Well, to an extent. Then there is, to a degree anyway, a tendency toward that semi-unconscious condition? A. Well, we would classify it—

Q. (Interrupting.) I haven't tried to reach the extent. I want to get one answer at a time. I asked you whether there was a tendency—if that form of disease which he had had a tendency towards at times producing a semi-unconscious condition? A. If it is not to a completion— **20**

Q. (Interrupting.) Doctor, just answer in that case. I want that one answer. In his form of Bright's Disease did it have a tendency at times to produce a semi-unconscious condition? A. My answer to that was it was intensified, due to intoxicants, I take it, in his case. **30**

Q. Then it did have a tendency, did it, to produce a semi-unconscious condition? A. That is, a sleepy condition.

Q. Did it have a tendency to produce a sleepy condition? A. Yes.

Q. Now then, the use of liquor would augment that? A. I said it does.

Q. Well, in his condition? A. I presume it did. **40**

*Dr. John Walters—Cross.*

I am only telling my opinion. I presume from what I heard he had it. On every evening I'd see him he was suffering more or less from the effects of it.

Q. Now you say you presumed that the liquor that he drank increased this tendency. Why did you presume? A. Because it happened—it happened periodically. If he went and had a sleep,  
 10 it passed over, as it does.

Q. But you don't know, as a matter of fact, whether he had drunk any liquor or not? A. I saw them give him some.

Q. Who gave it to him? A. The people attending him.

Q. And who were they? A. Mrs. Flanagan, Mr. Flanagan.

Q. Did you see William Tutty give him some?  
 20 A. No, I don't know that I ever saw William do that.

Q. Did you see William Tutty give him any at William Tutty's home? A. Never.

Q. How frequently did he have this condition of stupor? A. He had that most every evening I saw him to an extent.

Q. You can't tell us—that was how often in a week? A. No, sometimes I was there two or three days in succession, and then there was a week that  
 30 I'd not be there—sometimes two weeks as I recall it.

Q. How many times did you attend him while he was at Williams's house? A. I think I was called there the first or second day after he went up there, and I saw him some few days before he died, and was to have seen him Sunday as he died on Monday, but as I say I passed by because he sat there smoking and he spoke to me as I passed.

Q. You think you saw him once or twice? A.  
 40 No, twice. I think I saw him on two or three oc-

*Dr. John Walters—Cross.*

casions. But not—that is I didn't—I stopped on my way by.

Q. How did he appear? A. He appeared very much concerned about what would happen to him. He had that fear of impending death.

Q. It seemed to worry him? A. Yes. The last words he mentioned to me I think was "Do you think this will end it?"

10

Q. Didn't he, in any of these times when you saw him at William Tutty's—did he have any indication of the stupor or sleepy or semi-unconscious condition? A. No. He appeared neat and clean and well-kept when I saw him there.

Q. Were you sent for on those occasions, or did you just call? A. I was sent for on those occasions, as I recall it, in the short time he was there. There were times I called on my own accord.

20

Q. At Flanagan's, were you sent for? A. At times, if he was taken, they would send for me, and other occasions, if I hadn't seen him and thought it necessary to see him again, I'd call on my own account.

Q. When was this that you say you saw him on the porch and he waved to you? A. That was Sunday afternoon, toward evening—I suppose from five to six o'clock, and he had an attack and died before I got there the following morning.

30

Q. And where were you when he waved to you? A. I was on the road going toward my home.

Q. Was there anyone with you? A. My wife and, I think, my two boys.

Q. Were you coming to call on him? A. No. He sat there smoking. I remember he had on a white shirt and black vest and dark pants and coat.

Q. Were you running the car? A. I was running the car, yes.

40

*Dr. John Walters—Cross.*

Q. That is, an automobile? A. Yes, an automobile.

Q. Which side of the car were you on? A. I was on the left.

Q. Towards him or away from him? A. Towards him. I only know that because it's a left hand drive car.

10 Q. You didn't have anything to say to him? A. I merely acknowledged his—

Q. (Interrupting.) He saluted you before you did him? A. Yes, sir.

Q. Doctor, do you know Mr. Cahill? A. Mr. Cahill introduced himself to me, yes.

Q. Did you see him January 31st? A. I saw him during the time that Mr. Tutty was at the Flanagan's, yes.

20 Q. And he called to ask you whether John Tutty could be removed to Brooklyn? Was that his purpose? A. Yes. That is, I don't know as he said Brooklyn. He asked if he could be moved.

Q. At that time did you not suggest to him that it would be proper to have a Guardian appointed for John Tutty? A. I did not.

30 Q. And did you not suggest to him that you could help him to have a Guardian appointed? A. I did not. The only thing I said about that was Mr. Flanagan wanted me to forcibly put him out of there. I said I have no right to do so. I said, "He's a man capable of attending to himself." Mr. Cahill wanted me to meet him there and I said, "provided that is suitable to my work, I will do so." I was busy and didn't do it.

Q. And you think he was rather a stubborn, contrary man, do you? A. I have always known John Tutty to have a mind of his own, and if he thought to do a thing, he'd do it, and if not, he wouldn't.

40 Q. He impressed you as stubborn and contrary?

*Dr. John Walters—Re-direct.*

A. Stubborn after a good, wholesome fashion, yes.

Q. Not contrary? A. No, I wouldn't call it contrary.

## RE-DIRECT EXAMINATION BY MR. KING:

Q. Wanted him forcibly put out of where? A. Flanagan's.

Q. Who wanted that done? A. Mr. Cahill.

Q. What relation is Cahill to the Flanagan's? A. Son-in-law, he told me.

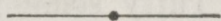
Q. To the Flanagan's? A. Not the Flanagan's to Tutty.

Q. Why did he want him put out of Flanagan's? A. He said the people neglected him where he was. He wanted him cared for.

Q. Was he cared for at Flanagan's? A. He seemed entirely satisfied. I suggested his leaving there and he said "No."

Q. Did he get good care at Flanagan's? A. I wouldn't consider it as good as he could have gotten.

Q. Did he get better care while at his son William's? A. He had a much better appearance.



30

40

*George W. Fichter—Direct.*

GEORGE W. FICHTER, a witness produced on behalf of the Proponent, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. KING:

Q. Mr. Fichter, you knew John Tutty? A. I did.

10 Q. The deceased? A. Yes.

Q. When did you see him before he died? A. I think on a Thursday before he died on Monday.

Q. Where did you see him? A. It might have been Thursday or Saturday. I called there three days a week.

Q. You are in the produce business? A. Yes.

Q. And was he at William's place? A. He was.

20 Q. Well now, whether it was Thursday or Saturday, tell the Court, please, what condition you found him in, mentally and physically, when you talked with him or he with you.

WITNESS: When what?

MR. KING: When he talked with you or you with him.

30 A. I sold Mrs. Tutty some produce and after having taken it in, I went in the bar room and had a cigar, and Mr. Tutty—that is the old gentleman—sat in the rear of the bar-room, as far away, perhaps, as from me to you. Will spoke to me (that's his son) and the gentleman spoke to me and asked how my people were. I told him "All well." He asked me how my mother was, I believe, and I told him she was well.

40 Q. As a matter of fact, is your mother still living? A. My mother is still living, or she was this morning. He asked me how old my mother was and I said "Eighty-five last birthday." He said "That's about my age." That's all that was said, as I remember.

Q. When you went there on the occasion of these

*George W. Fichter—Cross.*

visits to sell produce, did you frequently see the old gentleman around? A. Well, I can't say. I have only been in the business about a year, and I saw him, of course, when I would go there when he had come to Mr. Tutty's. I never saw him over at Wharton before that.

Q. Is that where the Flanagan's live—in Wharton? A. Yes. That's what I understood, that he was there. 10

Q. Tutty lives at Allen Mine? A. Yes, sir.

## CROSS EXAMINATION BY MR. RATHBUN:

Q. You didn't see him, then, when he was at Flanagan's? A. No, I don't think I ever saw him at Flanagan's.

Q. So that you saw him probably two or three times while he was at William Tutty's? A. Yes, probably two or three times. 20

Q. And he was sitting, you say, about twenty feet from where you were? A. Yes, I was in one end of the bar-room and Mr. Tutty sat in the other.

Q. Anyone else there at the time? A. His son, William Tutty, himself.

Q. No one else? A. No one else.

Q. What did William Tutty say to his father about you? 30

WITNESS: About me?

MR. RATHBUN: Yes.

A. Nothing that I remember.

Q. Did he tell him that "This is George Fichter"? A. Not that I remember.

Q. What time of day was this? A. It was in the forenoon.

At this point a recess was taken until 1:30 o'clock in the afternoon. 40

*William Hooper—Direct.*

## AFTER RECESS.

WILLIAM HOOPER, a witness produced on behalf of the Proponent, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. KING:

10 Q. Mr. Hooper, where do you live? A. Tebo, near Mount Hope.

Q. How near is that to Allen Mine?

WITNESS: Sir?

MR. KING: How near is that to Allen Mine?

A. Well, you might call it Allen Mine.

Q. The same thing? A. Yes.

20 Q. Did you know John Tutty? A. Yes, sir.

Q. How many years did you know him before he died? A. Oh, twenty-four or twenty-five.

Q. Did you know him when he was living over at Flanagan's, in Wharton? A. Well, I knew him before that. I knew him, yes, right along, but I didn't see the man at that time.

30 Q. Did you see him before he went over to Wharton and down to New York to stay? A. I have seen him for the last twenty-five or thirty years. I didn't pay any particular attention to him.

Q. Do you know when he came back and was boarding at Mr. William Tutty's—just before he died? A. Yes, sir.

Q. How long did he stop at William Tutty's, if you know? A. That is, before when he was sick?

Q. Yes, before he died how long had he been living at William Tutty's? A. Well, I couldn't just say about that.

*William Hooper—Direct.*

Q. Did you see him while he was there? A. Yes, sir.

Q. How often did you see him? A. Oh, probably once or twice a week.

Q. How near did you live to William's?

WITNESS: To me?

MR. KING: Yes.

10

A. About a couple of hundred yards—a hundred and fifty yards.

Q. And you saw the old man once or twice a week? A. Yes, as near as I can remember. I couldn't exactly say.

Q. When you saw him, did you ever talk with him? A. Well, no. I didn't know the old gentleman—I wasn't acquainted with him to have any conversation.

Q. Did you ever talk with him? A. Yes, sir. 20  
Once in a while. I always passed the time of day with him.

Q. Did he pass the time of day with you? A. Yes, sir.

Q. In your talks with him or when passing the time of day, did you ever notice anything irrational or unusual about his mental condition? A. No, sir.

Q. How was he physically, Mr. Hooper?

WITNESS: Sir? 30

MR. KING: How was he physically—his body?

A. Well, before he was taken sick, as far as I know—I didn't hardly know—when I was passing by I passed the time of day with him—fairly as far as I know.

Q. That is his last sickness, when he was taken sick and died with William? A. Oh, how was he at the last sickness? Well, I was down there and 40

*William Hooper—Direct.*

he was breathing heavy when I was there, but he was conscious.

Q. When was that in reference to the time he died? A. Well, that was just a few days before he died; probably two or three; I don't know.

Q. Prior to this last sickness— A. (Interrupting.) This was the sickness I have reference to.

10 Q. (Continuing) Previous to that time, and while at William's, what was his condition?

WITNESS: Ahead of that?

MR. KING: Yes.

A. Well, I don't know. Walking around. That's all I can say. I didn't pay any particular attention. I used to see him as I went by.

Q. That was before this last sickness? He was able to walk around? A. Yes.

20 Q. Was he able to talk? A. Yes, sir.

Q. Did you see him talk with anybody and hear him talk with anybody? A. Well, he'd pass the time of day.

Q. That is, to you. Did you see him talk with anyone else? A. Yes, different people. I didn't pay any attention.

Q. You did see him do that? A. Yes, sir.

Q. When you saw him you passed the time of day? A. Yes. I have known the gentleman, but  
30 we were not very much acquainted to hold a conversation with one another. I have known the man twenty-four or twenty-five years.

Q. Did you know him—before he went to Flanagan's, how was he? A. I couldn't say now just about that. You know I can't follow a man individually.

Q. Did you find much difference between him four or five years before his death and at the time he came to William's, just prior to his last sick-  
40 ness? Did you notice any difference in his phy-

*William Hooper—Cross.*

sical or mental condition? A. No, not except that old age was coming on the gentleman the same as it comes on us all.

Q. How did that affect him? A. Well, it didn't seem to affect him intellectually.

Q. It didn't? A. No, not as far as I know.

## CROSS EXAMINATION BY MR. RATHBUN:

10

Q. How many times did you say you saw him while at William Tutty's house? A. Well, I would probably see him two or three times a week.

Q. That is, before his last sickness? A. While at William Tutty's house.

Q. Well, before the sickness or after? (Witness hesitates). Well, how long was he at William Tutty's house? Do you know? A. No, I couldn't say.

20

Q. Do you know how many times you saw him there altogether? A. No indeed, I don't. Any time I'd see the gentleman I'd speak "Good morning" or "Good afternoon."

Q. Do you know how many times you saw him there altogether? A. Before his sickness?

Q. I don't know what you mean by before his sickness. I mean at William Tutty's house. How often did you see him there, at any time? A. I have been seeing the man on and off for the last twenty-five years.

30

Q. You hadn't seen him at William's Tutty's house for a number of years, had you, except just before he died? A. Why, on and off, I have seen him, yes, sir.

Q. Well now, let me see. He lived in New York for a while, didn't he? A. Really, I don't know. He lived in Rockaway.

Q. You didn't see him at Flanagan's at all, I understand. A. No, not at Flanagan's.

40

*William Hooper—Cross.*

Q. He left Flanagan's and went to William Tutty's house? A. Yes, sir.

Q. Now, how many times did you see him after he left Flanagan's house—

WITNESS: (Interrupting) And came back to William Tutty's?

MR. RATHBUN: Yes.

10

A. I couldn't tell you. I saw him different times.

Q. Can you give us any idea? A. I saw him two or three times a day—not to have any conversation. I seen Will Tutty and him taking a little walk through the yard—not to have any conversation myself.

Q. You say two or three times a day? A. Well, probably not. I am not going to be positive about that.

20

Q. Now, how many times did you have conversation with him while he was at William Tutty's house? A. Well, it's like I told you. I never had very much conversation with Mr. Tutty; no conversation, but just merely speaking, after he came back from Wharton.

Q. When was that? A. I think it was in May month I am not positive.

Q. And how long before he died? A. Why, probably two or three days; I am not sure. It might be a week. I am not sure.

30

Q. Where was he when you had this conversation with him? A. Down in Mr. Tutty's home.

Q. And what was the conversation about? A. Oh, we didn't hold much of a conversation. I asked him how he was getting along. He said "Not very good." The man was then in ill health; didn't feel very well. We didn't have much conversation; merely stated a few words.

40

Q. Can't you tell us what he said to you? A.

*William Hooper—Cross.*

No. He didn't say very much. The poor man was short of wind. He didn't feel like talking.

Q. What were you doing there?

WITNESS: Who? Me?

MR. RATHBUN: Yes.

A. I was down as a witness.

Q. A witness to what? A. Why to show that the gentleman had his full faculties for changing this system. 10

Q. For changing this system? A. Whatever it is; I don't know about it; the will or whatever it is.

Q. Who told you that they wanted you as a witness to show you thought he had his faculties?

A. Well now, don't hurry me too much until I have it right. Well, I was asked to drop down and to see how the gentleman was; whether he was capable or not, and I found out he was. 20

Q. Who asked you? A. Mr. Tutty.

Q. What did he say to you when he asked you that? A. He just merely asked me whether I would come down and be a witness for his father in the changing of this will or whatever thing it is. I didn't inquire.

Q. Did you act as a witness? A. I did, yes, sir. My signature should be here.

Q. How many papers did you witness? More than one? A. I couldn't tell you that. I am not positive. 30

Q. You think there's only one paper that you witnessed? A. I am not positive. I signed my name and my signature should be here or somewhere else.

Q. Is that your signature on that paper, Exhibit C-1? A. That's my signature; that's my writing right there.

Q. You wrote that? A. Yes. 40

*William Hooper—Cross.*

Q. Where were you when you wrote that? A. I was into Mr. Tutty's house.

Q. That is, in Mr. William Tutty's house? A. Mr. William Tutty's house.

Q. And who was there at the time? A. Mr. Tutty, Mrs. Tutty, and—that was the son—John Tutty and myself.

10 Q. And did they come there especially for you to get you to come and sign this paper? A. Well, Mr. Tutty asked me would I come down and see the gentleman—and see his father—and I came down and I signed, and I seen everything was all right and I went there to sign and I signed. When I seen that the paper was all right for signing I signed.

Q. John Tutty was there, was he? A. The old man, John Tutty? He was.

20 Q. Are you sure? A. Yes, sir, he was there; oh, sure.

Q. Did he sign anything? A. Yes, sir. He wasn't able to write his name, but he signed.

Q. He put his mark? A. Yes, sir.

Q. Did you say anything to him or he to you at this time, just before you signed the paper? A. Why, I asked him how he was getting along, don't you know. He said "Not very good." That was all. The poor man was not in very good health, don't you know, to talk, and I didn't have any conversation at all outside of that.

30 Q. Nothing else said by him, as I understand it, except that he was not feeling very well? A. Wasn't feeling very well, no, sir.

Q. Why didn't you have any more conversation with him?

WITNESS: Why didn't I?

MR. RATHBUN: Yes.

*William Hooper—Cross.*

A. Why, he was like myself, he didn't have much wind, nor I haven't got much either.

Q. He didn't act as though he could talk with you very well? A. No, sir. No, sir.

Q. Did he know who you were when you came into the house? A. Yes, sir.

Q. When you went into the house did John Tutty tell you what he wanted you there for? A. 10  
Well now, I couldn't exactly tell you that, sir, whether he did or not.

Q. Was this in the day or night time? A. That was in the evening, somewhere about six o'clock I should imagine.

Q. Where was John Tutty? Sitting up or lying down? A. Sitting up. I don't know whether he was on the couch or in a rocking chair or something, but he was sitting up, anyway.

Q. Did you know what it was that you were signing? A. Yes, sir. 20

Q. Who told you? A. Mr. Tutty told me.

Q. Which Mr. Tutty? A. Mr. William Tutty. I can read a little but if it isn't too hard reading, and I seen what I was signing before I signed.

Q. Now had you seen him on any other occasion at William Tutty's house after he left Flanagan's? A. Yes, sir. Yes, sir; I seen him going forth and back to the yard.

Q. I mean when you were near him and could talk with him. A. No, sir. Not to my knowledge. I am not sure about that. I couldn't say. 30

Q. This the only time that you recollect when you were at William Tutty's and saw John Tutty—that is, after he left the Flanagan house? This occasion when you signed this paper as witness? That's the only time, is it?

WITNESS: The only time I seen him?

MR. RATHBUN: That you were near and 40  
could talk with him.

*Catherine Tutty—Direct.*

A. Oh, yes. I didn't have much talk with him after his sickness, no.

Q. You were talking over this matter with William Tutty this noon, were you not? A. Well, now, here. Hold on, now. Why, very little. I was wondering how I was going to be questioned. That's all right. Go ahead.

10 Q. And did you not say that if Rathbun asked me this, what shall I answer? A. That's all right. Go ahead. Go right along, Senator. Very good. Yes, sure. Go ahead.

Q. Did Mr. Tutty tell you what to answer? A. I was wondering as to what to say and I am not much of a scholar and I wanted to be placed right. I swore with me hand on that book and I'll tell the truth. I wouldn't tell no lies for nobody.

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MRS. CATHARINE TUTTY, a witness produced on behalf of the Proponent, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. KING:

Q. Mrs. Tutty, you are the wife of William Tutty? A. Yes, sir.

Q. And did Mr. John Tutty live with you before  
30 his death? Yes, sir.

Q. He died at your house? A. He did.

Q. When did he come to your house? A. I think on May the third.

MR. KING: That doesn't mean anything.

WITNESS: I think on May the third.

Q. What year? A. 1914.

Q. And when did he die? A. The twenty-eighth, —no, the eighteenth of May, 1914.

40 Q. The same year? A. The same year.

*Catherine Tutty—Direct.*

Q. Now, when he came to your house, what was his condition? A. Well, he was quite sick—quite feeble, but then he knew everything. When he came in he said "Thank God, I am home."

Q. That was his old home, wasn't it? A. Yes.

Q. What was his condition of cleanliness when he came there? A. Well, he was better than times I had seen him that I went to see him. Still, he could have been a great deal cleaner. 10

Q. Had you seen him down at Flanagan's? A. Yes, sir.

Q. What was his condition of cleanliness then? A. Anything but clean. His trousers were all spotted and his face was tobacco all over. He has been so that on Sunday afternoon he hadn't been shaved, had an old blue shirt on him, old dirty trousers and shoes untied.

Q. Was his body washed? A. It didn't look so from what I could see of it. 20

Q. When he was brought to your house he said "Thank God, I am home"? A. He said that when he came in.

Q. What was his mental condition that you noticed? A. Just the same as ever.

Q. Was he normal? A. Yes. Then after he came in he said to my sister, who was there and he said "Well, Margaret, you are looking very slim, but Catharine is much stouter than she used to be." 30

Q. Your name is Catharine? A. Yes, sir.

Q. Now did you know whether your father-in-law, after coming to your house, wanted to make a will? Did he ever say anything to you about it? A. No, not after he came the last time. He never mentioned it to me, not after he had been sick and came to stay with us.

Q. But before that? A. Yes. 40

*Catherine Tutty—Direct.*

Q. Did you know whether your husband had gone down to get Mr. Stickle to draw the will?

A. Yes.

Q. Who told you that? A. My husband told me.

Q. How—who told you? A. My husband.

Q. So that you never heard John Tutty say any-  
10 thing about it? A. No.

Q. Did you ever hear your husband ask John Tutty to make a will in his favor or make a will?

A. No.

Q. Do you know whether your husband used any influence—whether he spoke to his father or gave him much greater measure of consideration at your house? A. None whatever. No.

Q. You looked after him, didn't you? A. I looked after him some of the time. He did mostly.

20 Q. Who? A. My husband.

Q. Did you ever ask him to make a will in your husband's favor? A. No, sir; I never thought of such a thing.

Q. How many times did Mr. Stickle come to the house? A. Well, twice, I believe.

Q. He did? Now do you know the mental condition of your father-in-law the first time Mr. Stickle came? A. I meant to say once before he died and once after.

30 Q. Was he there once or twice before he died? A. Once.

Q. You say now only once or was it twice? A. Well, that's all I can remember.

Q. Was that the day the will was executed. I mean when these people came in—these outside people? A. I don't just remember.

Q. You don't know that? Well, when you did see Mr. Stickle there, did you also see John Tutty that day? A. I saw him that day, yes, sir.

*Catherine Tutty—Direct.*

Q. What was his mental condition the day Mr. Stickle was there? A. Just the same.

Q. When he was at your house, did you give him any liquors or stimulants? A. A little—very little in milk.

Q. Did he ask for liquor? A. Yes.

Q. What did you do about it? A. I asked my husband. He was not inclined to give him any, but I thought a little wouldn't hurt him. 10

Q. You didn't give him any to produce a stupor? A. No, sir.

Q. Over at Flanagan's, did you notice whether he was ever in a stupor there? A. Well, sometimes he was all right and knew me and looked up at me and would say "Isn't this Kittie?" and shake hands with me and say he was glad to see me. Other times he would be in a stupor and his face almost touched the ground, like that (illustrating) and I'd say to Mr. Flanagan "I think that's terrible." 20

Q. Did you notice the smell of liquor about him at those times? A. No.

Q. You did not, did you say? A. I didn't. I think he must have had it.

MR. RATHBUN: I move to strike that out.

MR. KING: I consent.

Q. Were these conditions that you observed in the morning or afternoon when his head was bent over? A. Well, I just don't remember because sometimes I was there afternoons and sometimes in the morning, and it might have been around one o'clock or something like that he'd begin it and he wouldn't know anything. Breathing very heavy. 30

Q. Now did he have any of those spells while at your house? A. No, sir.

Q. There was no time at your house that he breathed heavily or appeared to be partly stupi- 40

*Catherine Tutty—Direct.*

fied? A. No. When he was sleepy, I didn't notice that he breathed heavy.

Q. When he was not asleep did he have any of those spells?

WITNESS: What's that?

MR. KING: Did he appear stupified?

10 A. I never knew him to be stupified at our house when awake. I didn't ask him anything much he was so hard of hearing. I might have talked longer with him but he was so hard of hearing I'd get tired.

Q. What have you to say about his eye sight? Could he see readily or not? A. He could see very good.

Q. Was he able to read?

WITNESS: After he came over to our house?

20 MR. KING: Yes.

A. No, he never read anything, I don't think.

Q. Did he walk around much? A. Yes, he walked around all the time. He wanted to be on the go all the time. His cane, he had some nickname for it. I forget what it was.

Q. Out of the house or just in the house? A. Both.

30 Q. Nobody ever went with him? A. My husband would go with him at night generally.

Q. Well, in the daytime when it was light, would he go alone? A. Yes, he went alone in the day. He had a disease that he had to go in and out a lot, and he used to go himself. He could help himself. That is, I mean to say, he'd go out if he had to and take care of himself very nicely. I know I have went out with him when my husband was not home and he'd say "Never mind. That's all right."

40 Q. Did you ever see any action on the part of

*Catharine Tutty—Cross.*

your husband, any kind of solicitation or any influence exercised by your husband, or by you, on this old man to make a will as he did? A. No, sir. None whatever.

## CROSS EXAMINATION BY MR. RATHBUN:

Q. What time of the day or night did John Tutty come to your house? A. I just couldn't say but I think it must—it might have been half past seven or eight o'clock. **10**

Q. Between half past seven and eight o'clock on May 3rd, 1914? A. Yes, sir.

Q. And your husband brought him there? A. Yes, sir.

Q. Had you made any arrangements with John Tutty to have him come to your house on May 3rd? A. None whatever. I didn't know he was coming at all. It surprised me very much. **20**

Q. You were surprised when your husband brought him there? A. Very much. I thought my husband brought him up—Grandpa said—

Q. (Interrupting) Never mind. You didn't know he was going to bring him? A. No.

Q. And what did John Tutty say to you when he came? A. Well, I just said "Hello," and he said—he didn't say anything. He probably didn't hear me because he was deaf, but he said "Thank God, I am home." That's all he did say until he came over further in the room and I pulled over a rocking chair for him to sit down on. My sister and I sat on the couch and he remarked that my sister had become so thin and I had gotten fleshier. **30**

Q. And was that true? A. That was true.

Q. And your sister's name is what? A. Margaret Walsh.

Q. And she had gotten thin, had she? A. Yes, **40** sir.

*Catharine Tutty—Cross.*

Q. Much thinner? A. Very thin.

Q. How much less? A. I couldn't tell you that. She had lost a great deal and I had gained quite some.

Q. How much had you gained in pounds? A. I can't just remember. I must have gained twelve or thirteen pounds.

10 Q. In what time? A. Quite a little while. Getting fleshier all the time.

Q. But you had seen him at Flanagan's just a few days before, hadn't you? A. I had. He didn't pass any remarks, but I suppose it was because my sister was so thin and I had been getting fleshier and I had been thin too.

Q. You were a frequent visitor at the Flanagan's? A. Sometimes two or three times a week.

20 Q. On any of these visits did you suggest to him coming to live with you? A. He had asked to come over.

Q. What did you say? A. I will just tell you how it come. One day I went over and he said to me that William was coming after him. I said "Did he promise to take you?" He said "Yes." I said "Do you want to come home, Grandpa?" He said "Yes." I said "Then some fine day we'll come over and take you home."

30 Q. After he got to your house on this May 3rd, I suppose he soon went to bed, didn't he? A. No. He didn't go to bed at all.

Q. Where did he rest? A. He rested on the couch. It seemed that while he was over there he couldn't lie down, but occasionally my husband would get him so that he could lie down.

Q. It is a fact that he didn't go to bed at all while he was in your house? A. Just on the couch.

40 Q. Just lay on the couch? A. Yes. It seemed when he lay down he smothered.

*Catharine Tutty—Cross.*

Q. Well, how soon after he got to your house that night did he go to the couch and lie down and go to sleep for the night? A. I couldn't say. It must have been after I went to bed because he didn't before I went.

Q. He was still sitting up when you left? A. Still sitting up.

Q. Did you go to bed early that night? A. Not very early; about eleven o'clock. **10**

Q. About eleven o'clock Sunday night? A. We were up until eleven o'clock.

Q. And left him still up? A. Yes.

Q. Did your husband still sit up with him when you went to bed? A. (No answer.)

Q. What was he talking about all this time between, say eight o'clock and eleven? A. Well, I don't know as he said anything in particular, not that I can remember just now. **20**

Q. Nothing was said? You didn't ask him how he liked it at Flanagan's? A. Not that night. I didn't.

Q. You didn't talk anything about his experiences at Flanagan's at all? A. No, not that night.

Q. Didn't talk about what he should pay you in case he was going to stay there? How much a week? A. No indeed, no, sir.

Q. Did your husband say anything about compensation? A. No, sir. **30**

Q. That subject was not mooted at all that night? A. No, sir.

Q. Well, can't you tell us anything that was talked about with the old man that night? A. No, I can't.

Q. Can you recollect anything that was talked about by any of you that night while you all sat there together? A. No, I don't remember.

Q. How about your sister-in-law—your sister? **40**

*Catharine Tutty—Cross.*

How late did she sit up? A. She went to bed when I did.

Q. Eleven o'clock? A. Yes.

Q. You all sat there from eight o'clock until eleven? A. Of course we didn't sit there. We walked around and were busy with the children. My sister had two children. We were in different parts of the house; we didn't sit there all the time.

10

Q. Well, were you moving around too? A. Surely I was.

Q. How old are these children of your sister's? A. Well, I think one was eleven and one is—I don't know; six or seven.

Q. Well, what time were they put to bed? A. They went to bed earlier.

Q. Then they went to bed before John Tutty arrived? A. No, they were there.

20

Q. They were there when John Tutty came in? A. Yes.

Q. How long did they sit up after John Tutty came in? A. I don't know. I haven't any idea.

Q. About how long? A. I haven't any idea.

Q. Did they talk with him? A. No.

Q. Did he talk with them? A. No, he'd just look at them and smile.

Q. Paid no particular attention to them? A. No.

30

Q. And you don't know how soon after he came in it was before they went to bed? A. No, I don't remember.

Q. Now did your sister go and take the children to bed, or did they go without her assistance? A. She has to take them to bed.

Q. She took them to bed that night, did she? A. Yes.

Q. Was that on another floor or the same floor? A. Another floor.

40

*Catharine Tutty—Cross.*

Q. An upper floor? A. Yes.

Q. How long did she remain out of the room with the children? A. I don't remember.

Q. About how long? A. I couldn't tell you. I didn't pay any attention.

Q. I know, but this is rather unusual thing for him to be brought in that time of night. A. He would not have been brought in that night but he wouldn't leave my husband come in without him. 10

MR. RATHBUN: That ought to be struck out. It must be hearsay.

THE COURT: Eliminate that.

Q. Now, you don't remember how long your sister was out of the room? A. Well, it couldn't be such a great while, of course, to put the children to bed. It might be half an hour; twenty minutes. 20

Q. Do you know whether or not she came back into the room that night? A. Well, she had to come back into the room. The stairs are leading right down into it.

Q. She could have gone to bed the same time the children did? A. She didn't.

Q. Were you reading or sewing or anything of that kind? A. No, sir.

Q. Playing cards? A. No.

Q. Doing nothing in particular? A. Nothing that I just can remember. 30

Q. Was the bar room open? A. No.

Q. Did anyone else come in? Any outsiders come in? A. No.

Q. Did your sons come in? A. Oh, yes; my sons.

Q. You think they did? A. They came in after. They had been out, you know, for the evening.

Q. What time did they come in? A. I don't 40

*Catharine Tutty—Cross.*

know. They generally come in about ten or half past.

Q. This night in particular? A. I don't know. It was always about that time.

Q. Do you know how late they sat up? A. No, I don't know. Yes, they went to bed. They have to get up early in the morning.

10 Q. That's what they did that night? A. They spoke to grandpa; went over and shook hands with him.

Q. You think that night when they came in they went to bed? A. Yes. I was going to say—

Q. (Interrupting) Just a minute. What time did your husband go to bed that night? A. He didn't go. He sat up with Grandpa.

Q. Sat up with John Tutty? A. Yes, sir.

Q. What time did he get up in the next morning  
20 --Monday morning?

WITNESS: Beg pardon.

MR. RATHBUN: What time did you get up next morning?

WITNESS: Did I?

MR. RATHBUN: Yes.

A. Half past five.

Q. Half past five? What time did your husband get up? A. He had already got up. He had  
30 been sitting up with Grandpa.

Q. He had been sitting up with his father? A. Yes, sir.

Q. Why did he sit up all night with his father? A. Because Grandpa couldn't lie down. His breath was short; a sort of asthma I think the doctor called it.

Q. What time Monday did your husband go to Stickle's—go to get Mr. Stickles? A. Monday  
40 morning.

*Catharine Tutty—Cross.*

Q. I say what time Monday morning? A. Well, it was before noon, anyway. I don't know just what time. It might have been ten o'clock.

Q. What time did he have breakfast that morning—that Monday morning? A. Well, he never had breakfast very early. It might have been nine or ten o'clock.

Q. And then, shortly after he had breakfast, he went to Rockaway to get Mr. Stickle? Is that correct? **10**

WITNESS: Oh, you were speaking about my husband? What time did he have breakfast?

MR. RATHBUN: Yes.

A. Well, he might have had breakfast about eight o'clock in the morning.

Q. Did he go to Rockaway to get Mr. Stickle before your father got his breakfast or after? A. **20**  
Oh, after.

Q. Now what time did he come back with Mr. Stickle? A. Well, they came back—it was before noon. I don't know just what time. It might have been half past ten.

Q. And how far is your home from Mr. Stickle's office or residence?

WITNESS: What's that?

MR. RATHBUN: How far is your home from Mr. Stickle's residence or office? **30**

A. I should judge about two miles and a half.

Q. How many? A. Two and a half or two and a quarter.

Q. And did your husband drive? A. Yes, sir.

Q. Anyone go with him? A. No, sir.

Q. Did he tell you what he was going for? A. I knew what he was going for.

Q. Who told you? A. He did.

Q. When did he tell you that he was going for **40**

*Catharine Tutty—Cross.*

Mr. Stickle? A. Why he told me Sunday night that his father said he wanted to get lawyer Stickle in the morning.

Q. When was this he told you?

WITNESS: When was it?

MR. RATHBUN: Yes.

10 A. When he was bringing him home.

Q. When did your husband tell you this? A. Oh, he told me that Sunday night.

Q. Where was he when he told you this?

WITNESS: Where was he.

MR. RATHBUN: Yes.

A. Well, in the house, but I don't know just whether we were in the dining room or somewhere else.

20 Q. Who was present? A. No one but myself and he.

Q. You had gone into another room or your bed-room? A. No, it was downstairs somewhere.

Q. Then you had gone into another room to where John Tutty was? A. I don't know whether it was in the dining room or the kitchen.

Q. Where was John Tutty? A. In the dining room. That was where the talk was, in the dining room.

30 Q. And your husband told you that he was going on Monday to get Mr. Stickle to come and draw a will for his father. Is that correct? A. That's right, yes, sir.

Q. You didn't say anything to your father-in-law? A. No, sir.

Q. You didn't hear your father-in-law express any reason for making the will? A. No. I heard him say before he was sick—

40 Q. (Interrupting) What do you mean, "before he was sick?" A. Before he came to my house the last time, when he was with—

*Catharine Tutty—Cross.*

Q. When he was at Flanagan's? A. When he was with—yes. He told me he'd never go back to New York again. He said "My two daughters' names are on the will for the property in Newark," and that's Mary Ann and Margaret, "But," he says, "I am going to have their names crossed off."

Q. Did he tell you about having made a will in favor of Mrs. Flanagan? A. No, sir. 10

Q. When did you first hear about the Flanagan will?

WITNESS: When did I what?

MR. RATHBUN: When did you first learn about the Flanagan will?

A. Well, my husband went over there one evening about eight o'clock, I think, and Mr. and Mrs. Davenport were there and he had a suspicion, but he came out before anything went on. 20

Q. And he came and suggested to you that he was making a will? A. No, he said "I think there's something going on."

Q. I say, when did you first learn the Flanagan will had been drawn? A. Oh, I don't remember. It seems to me—I don't remember just when it was.

Q. Well, how long before John Tutty's death? Can you tell that? A. Well, I think it was shortly after he made the will. 30

Q. And shortly after Mr. Stickle came there? A. No, before.

Q. Shortly after the Flanagan will was made? A. Yes.

Q. When he told you about the will in which his two daughters were mentioned, did he tell you how the rest of the property was disposed of by the same will? A. Yes, I think he did. 40

*Catharine Tutty—Cross.*

Q. What did he say about it? A. Well, I want to be sure. He said the property where we live was my husband's.

Q. And the Newark property was your husband's sisters'? A. Well, at that time he never said anything about the old homestead. He didn't at that time say anything about that.

10 Q. What did he tell you about the homestead property? A. Well, it was sometime ago; a good while ago while he was going up and down from our house to his daughters' and so on. He said on one occasion—there was some fixing to be done and he might as well fix it because the property would be his some day.

Q. This was before he commenced to board with the Flanagans? A. Yes.

20 Q. I mean before the time he told you at Flanagan's that he was going to cross off the names of his daughters out of the will. Did he tell you what had been done with the homestead—the old homestead? A. No.

Q. Did he tell you what provision he had made for your husband? A. No, not at that time.

Q. Didn't you ask him? A. No.

30 Q. How did he come to talk about that? A. I don't know how it came up. It seems to me he came away from New York mad one day he said he'd tell me what the trouble was, but wasn't at my house long enough.

Q. How long after he came last year to the Flanagan's was it that he was talking to you about this will? A. Not such a great while.

40 Q. That doesn't convey much. A day or two, two weeks or a month? A. Maybe two weeks; two weeks anyway. It seemed as though he came away mad, the way he spoke. I judged he was a little niffed. He said he would never go there again.

*Catharine Tutty—Cross.*

Q. Well, he'd had trouble with your husband too, hadn't he? A. Well, he had a little trouble. The only trouble he had with my husband was in business affairs.

Q. Over the payment of rent and so on? A. We always paid him rent.

Q. And chopping down trees? A. I was talking with him about that—

10

Q. (Interrupting) But there was trouble between him and your husband about the trees? A. No, they never had any trouble at all about trees.

Q. What's that? A. They never had any trouble about trees. The only time they ever had any trouble about trees was when he wanted the back rent this time for eleven years. There was due him only \$1.67 for eleven years on the month. He was to pay \$16.67; that was to make it to an even \$200 a year, sir. My husband only paid him \$15, but he never kicked. He gave him a clear receipt. In order not to have any trouble, we paid him the back rent.

20

Q. When did you pay him that? A. I don't know. It seems to me in October.

Q. While he was at the Flanagan's? A. Yes, while he was at the Flanagans'.

Q. Now, when your husband told you that his father was going to make a new will and he wanted him to go to get Mr. Stickle, weren't you a little bit surprised at this being done so suddenly? A. I was not.

30

Q. And yet you are sure that you said nothing to the old man about it? A. No, sir.

Q. And you didn't hear your husband say anything to the old man about it? A. No.

Q. Do you know how long your husband was away from home on Sunday night with the horse and wagon before he came back with his father?

40

*Catharine Tutty—Cross.*

A. No, I don't know. He was not very long gone.

Q. Well, an hour, two hours, what? A. Well, it might be two hours.

Q. He didn't intend to bring him home? A. No, sir.

Q. Did the old gentleman say where he had been when he came in, as to where he had been driving?

10 A. No. He didn't say that he had been driving anywhere, but he said that my husband wanted to take him back; that he only took him for a drive; he didn't take him to bring him home. He wanted to bring him for a drive and then bring him back, but he said no, he was not going back—

Q. (Interrupting) Is this something you heard — A. (Interrupting) No, Grandpa told me that.

Q. When did he tell you that? A. The first thing he said, Grandpa said, he didn't want to  
20 bring him home—that was it, "The lad" didn't want to bring him home. That's the words he said.

Q. When did he tell you this? A. The night he came.

Q. You say the old gentleman told you that he wanted William to bring him to your house, but that William didn't want to do so? Was that it?

A. Well, he wanted to bring him home, of course, if he wanted to come. He didn't say that he  
30 didn't.

Q. I am asking you if that is what the old gentleman said—that he, the old gentleman wanted to come to your house and told William to bring him there, but he William, didn't want to do so. A. No, but that night—he wanted to bring him home, but I didn't want him to bring him home when my house was all upside down. I was cleaning house and the carpets were all up.

Q. You said he, referring to the old man you  
40

*Catharine Tutty—Cross.*

call Grandpa, told you that someone didn't want to bring him to your house. He wanted to take him back to Flanagan's. A. That was my husband.

Q. He did say\* your husband didn't want to bring him to your home? A. Yes, that night.

Q. That's correct then, is it? A. Yes.

Q. Well, did he tell you finally how he persuaded William to bring him to your house? A. No, he just said my husband wanted to go back for his clothes and he wouldn't go back for his clothes. He said he would never go there again. 10

Q. Did he tell you how he persuaded William to bring him to your house? A. No. My husband intended—

Q. (Interrupting) Did he tell you of any arrangements he had made with William which induced William to bring him to your house? A. No. 20

Q. Now you didn't speak about the will, as I understand it, at any time, to the old gentleman? A. No, sir.

Q. And you never heard your husband speak to him about a will? A. No, sir.

Q. Did you give him any liquor on that Monday? A. No—I think I did. The day he died?

Q. No, that Monday that the will was drawn, or rather, Mr. Stickle came there? A. No, I didn't. The day after he came. I don't remember whether I gave him any or not that day. I didn't always give it to him. He'd ask for it when I gave it to him. 30

Q. Did you get it from the bar-room yourself? A. Well, yes.

Q. How often did you give it to him, and in what quantities? A. Sometimes once a day, and sometimes not at all unless he asked for it. 40

*Catharine Tutty—Cross.*

Q. How much at a time? A. Some in a little milk—maybe a small wine glass partly filled in milk.

Q. Did he ask for it frequently? A. Yes, but he didn't get it.

Q. How often did he request it? A. He might ask three times a day.

10 Q. How many times did you give it to him? A. Once generally.

Q. Once generally? A. Yes.

Q. How often sometimes, occasionally? A. Well, maybe late in the afternoon, a little drop then.

Q. What was the greatest number of times you gave it to him?

WITNESS: In a day?

20 MR. RATHBUN: Yes.

A. Twice.

Q. What? A. Twice.

Q. You didn't leave a bottle around for him so he could help himself? A. No, sir.

Q. How long was Mr. Stickle there? A. Oh, I don't know. It might have been an hour.

Q. Were you in the room at all where Mr. Stickle was? A. Not at that time.

30 Q. What's that? A. Not that day; not at that time.

Q. You didn't go in the room while Mr. Stickle was there? A. I went in the room after everything was all over.

Q. How did you learn everything was all over? A. Mr. Stickle was getting ready to go home. He was in a hurry to get home.

Q. Did your husband tell you everything was straightened out? A. No, I don't remember having any conversation that morning.

40

*Catharine Tutty—Cross.*

Q. Weren't you a little bit solicitous about what was happening—what was taking place? A. I don't know that I was.

Q. You didn't tell the old gentleman that if he was going to stay at your house, you thought you ought to have all the property? A. Yes, sir.

Q. Or that William ought to have all the property? A. No, sir. 10

Q. Why was there then, if you know, such promptness in making a change of the will after the old man got to your house? A. I don't know that there was any promptness. I don't know.

Q. Well, there wasn't much time lost, was there, between the time when he came to your house and the time when Mr. Stickle was gotten there to draw a will? There was not much time lost, was there? A. Well, of course that was—he wanted to have Mr. Stickle in the morning. That's all. 20

Q. Who was there when Mr. Stickle arrived that Monday morning? A. Why, my sister, Mrs. Walsh.

Q. Your sister? That was all? A. That was all.

Q. Did you know how the old man was going to make the will? In whose favor? A. No, sir.

Q. Didn't you know it was going to be made in favor of your husband? A. No, sir; I did not.

Q. Didn't your husband tell you that? A. No, sir. 30

Q. Sure of that? A. No, I don't remember.

Q. Don't you think you can recollect whether he told you that? A. All I can remember him saying was that he wanted John Stickle in the morning, that's all. That was on a Sunday night.

Q. When you were told that by your husband, didn't you ask him how his father was going to make his will? A. No, sir. 40

*Catharine Tutty—Cross.*

Q. What he was going to do with the property?

A. No, sir.

Q. And did you tell him that if the will was going to be made, you and he ought to have everything for taking care of him, the old man? A.

No, sir.

10 Q. You had said, before this, hadn't you, that you wouldn't have the old man in the house and work for him? A. No, sir.

Q. And clean up after him? A. I never said it. Absolutely no.

Q. And that you wouldn't work as a nurse for him? A. No. I gave him the best of care.

Q. Hadn't you said before he came there that you wouldn't act as nurse for him? A. No, sir.

Q. And wouldn't look after him? A. No, sir. I didn't say I wouldn't look after him.

20 Q. Didn't you say to Mrs. Monahan—Mr. Monahan, "I suppose I put my foot in it when I wouldn't let him stay here" (referring to your own house) and that if you had, there would have been no other will made? A. No, sir.

Q. Had there been any trouble between you and your father in law? A. Not between him and I, no.

Q. What? A. No, sir.

30 Q. Well, he had lived there with you at one time, didn't he? A. Yes.

Q. And was there any ill will between you and him or between your husband and him when he left? A. No. He always said, "Good bye," when he was going. We never had any—he never went away with any ill-feeling.

Q. Can you tell, us, then, why, when he came from New York or Brooklyn, that he didn't come to your house instead of going to the Flanagans' to live? A. Well, yes. He said that—we were

*Catharine Tuity—Cross.*

talking about boarding. He said that his daughter, Mary Ann, wanted twenty dollars a month "and you want fifteen," and he said the Flanagans want twelve, and he says, "When I pay any more than that, I will go to some institution."

Q. When did he tell you that? A. That was while he was over at Flanagans. But he said—he had told me that—oh, no. 10

Q. What's that? A. That isn't worth telling.

Q. What did he tell you additional? A. Nothing.

Q. Yes— A. (Interrupting) Well, I was thinking of what his daughter said about what he gave her—twelve dollars a month.

Q. Well, when he came from the daughter's in New York, did he come directly to your house? A. I think he did, unless he stopped at Newark.

Q. You wouldn't keep him for less than fifteen dollars. Is that correct? And so he went to Flanagan's? A. We didn't say we wouldn't keep him for less than fifteen. 20

Q. You asked him fifteen, so he wouldn't stay there. Isn't that true? A. I think that's the way it was.

Q. When Mr. Stickle came there Monday morning, where were you? A. I think I was in the kitchen door.

Q. Where was the old gentleman? A. In the dining room. 30

Q. Where was your sister? A. I think she was out with her children in the yard.

Q. The children were not at school? A. No.

Q. Not even the eleven-year-old one? A. No. Her mother had been sick and she was up to my house for a few days.

Q. Then they didn't live there? A. No, they lived in Newark.

Q. What's that? A. In the city. 40

*James Robinson—Direct.*

Q. How long did they stay there? After the death of Mr. Tutty? A. No. They went home before.

Q. They went home before that? A. I think so.

10 JAMES ROBINSON, a witness produced on behalf of the proponent, being duly sworn, testified as follows:

## DIRECT EXAMINATION BY MR. KING:

Q. Mr. Robinson, how long have you known John Tutty? A. Well, I have known Mr. Tutty about fifteen years, to the best of my knowledge.

Q. Did you know him at the time he was at Flanagan's? A. I knowed him before he went there and after he came away from there.

20 Q. Did you see him when he was at Flanagan's? WITNESS: Sir?

MR. KING: Did you see him when he was at Flanagan's?

A. No, sir.

Q. Before he went to Flanagan's, what was his mental condition? A. Well, when he left over at William Tutty's, he was in good mental condition, as far as I know.

30 Q. Did you see him when he came back from Flanagan's? A. Yes, sir.

Q. May fourth, I think it was; something like that. When did you see him about that time? A. After he came back from Flanagan's to Mr. Tutty's, I saw him up there.

Q. How many times did you see him? A. Well, I saw him almost a couple of times a day, when passing up and down there.

40 Q. What did you do? A. I used to go up and down by the house to go to work.

*James Robinson—Cross.*

Q. Step in sometimes to have a drink? A. Yes, sir, I have on some occasions.

Q. Did you see him when you would step in?

A. Yes, sir.

Q. Talk with him? A. Yes, sir.

Q. Had the old man known you for years? A. Yes, sir.

Q. Was there any time when he didn't recognize you and talk with you? A. No, sir. **10**

Q. Talk rationally with you? A. No, sir.

Q. Do you know what I mean by rational?

WITNESS: What's that?

MR. KING: Do you know what I mean by the word rational? Did he talk clearly, to show that he understood?

A. Yes, sir.

Q. What did you talk about? A. We talked about different occurrences that had happened in years gone by since he has been over in that part around there. **20**

Q. Did he talk peculiarly to you?

WITNESS: Sir?

MR. KING: Did he ever talk peculiarly to you?

WITNESS: What do you mean?

MR. KING: I mean, did he talk irrationally, as if he didn't understand—as if he didn't know? **30**

A. No, sir.

CROSS EXAMINATION BY MR. RATHBUN:

Q. What was the extent of your conversation with him?

WITNESS: Sir? **40**

*James Robinson—Cross.*

MR. RATHBUN: What was the extent of your conversation with him while he was at William Tutty's?

A. Well, we always passed the time of day and talked about different things.

Q. Can you tell us about any one thing he talked about? A. Different things that happened around  
10 the mines there while he'd been there.

Q. Do you recall any one thing he talked about? A. Yes, sir. He rode down—he asked me on one occasion for a ride to the barber shop, and I gave him a ride to the barber shop and back to William Tutty's residence, and we talked about Richard mine and how many years it had been worked and about his working there in the mines for over forty years, and that.

Q. Where was this barber shop that you took  
20 him to? A. About two miles from Mr. Tutty's home; on over near Wharton.

Q. Who kept the barber shop? A. An Italian.

Q. Wasn't there a barber shop nearer William Tutty's than that? A. There was one by the railroad.

Q. Only a hundred feet away or something like that? A. Something like that, yes.

Q. And yet you say he asked you to take him to this Italian barber shop? A. I was going and he asked me for a ride down.  
30

Q. Did you bring him back? A. Yes. I was going down and right back, so I gave him a ride.

Q. When was that? Do you remember? A. Not much more than a week before he died. About a week before he died; ten days or something like that.

*Mary Cunningham—Direct.*

MARY CUNNINGHAM, a witness produced on behalf of the proponent, being duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. KING:

Q. Mrs. Cunningham, you are a sister of Mrs. William Tutty? A. Yes, sir.

Q. Were you at Mrs. Tutty's house when Mr. John Tutty came there in May, 1914? A. No, sir.

Q. Aren't you the sister to whom Mrs. Tutty referred? A. No, sir.

BY THE COURT:

Q. What is your name? A. My name is Mrs. Cunningham. My sister that you speak of is Mrs. Walsh. She is sick in a hospital at Newark.

BY MR. KING:

Q. What was the condition of Mr. Tutty when he came there in May, 1914? A. I went over there one afternoon. They didn't expect to have him there. I was sitting in a rocking chair and my sister said, "Grandpa is here," and I walked over. I said, "How do you do, Mr. Tutty?" He looked at me and said, "It's Mary, isn't it?" He didn't talk much. He seemed to be choking. This was probably a week before he died. He'd look at me now and then. He was trying to light a match to light his pipe with. He said, "Will, light that for me." Will took the pipe and put it in his own mouth and lighted it for him and passed it to his father. Then he said, "Take me out," and they took him out in the yard. I said, "Take care of yourself, Mr. Tutty," and he said, "I can't do that. Others must take care of me now."

Q. Your sister mentioned an occasion when he said you were getting much thinner? A. Not I. That was Mrs. Walsh.

*William Tutty—Direct.*

Q. Did you notice any impairment intellectually in Mr. Tutty? A. No, not at all. He didn't talk a great deal.

Q. Rather deaf? A. Yes. He told me how he suffered with this choking.

Q. How often did you see him? A. That was the only time I had seen him—that day.

10 Q. How often did you see him after that time? A. That was the only time.

## NO CROSS EXAMINATION.

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WILLIAM TUTTY, the proponent, being duly sworn in his own behalf, testified as follows:

## DIRECT EXAMINATION BY MR. KING:

20 Q. James Monahan, in his testimony, was asked this question, or answered as follows, speaking of you: "I said, 'I suppose you have got another will made,'" and that you replied, "Yes, I had a will made out to suit myself," and he says that that took place on the occasion of the day of the funeral, or when he first came there; I have forgotten which. Did you make any such remark to him? A. No.

30 Q. Did you say to Peter J. Cahill, or in his presence, on the occasion of the reading of the will or at any other time after your father's death, "I've got another will made?" Did you tell him that you had your father to make another will?

WITNESS: Did I tell my father to make another will?

MR. KING: Did you tell Peter J. Cahill that you had gotten your father to make another will?

*William Tutty—Direct.*

A. Not that I remember.

Q. It is a question, do you remember. Did you tell him that or didn't you? A. I didn't.

Q. Did you tell Peter J. Cahill that you went and got Stickle to make it, speaking of the will?

A. No.

Q. Did you say to Peter J. Cahill, "I had the will made my way this time"? A. No, sir. 10

Q. Did you say to him, "It is all right this time," speaking of the will? A. No, sir.

Q. Did you say to him, "I am the oldest of the family and the only heir and I am entitled to it?"

A. No, sir.

Q. Did you say to Mrs. Monahan that you had had your father make another will? That you had had your father to make another will?

WITNESS: At what time was that?

MR. KING: At the time of the funeral. 20

A. No, sir, I did not.

Q. Well, did you ever tell Mrs. Monahan that you had had your father make another will? A. I did before he came from Flanagan's.

Q. What's that? A. Before he came from Flanagan's house I did.

Q. What had you had done? A. That my father had another will made.

Q. That isn't what I am asking you. The question is, did you ever tell her that you had had your father make another will? A. No, I never told her. 30

Q. Did you tell Mrs. Monahan that you would try to make the terms of the will a little different if they would wait until you came back, and I refer you now to the time when you went to Rockaway with Mr. Stickle?

WITNESS: Did I tell—

MR. KING: Did you ever tell Mrs. Mona- 40

*William Tutty—Direct.*

han that you would try to make it a little different, speaking of the distribution under the will, if she would wait until you came back from your walk with Mr. Stickle?

WITNESS: After leaving Mr. Stickle home, you mean, at Rockaway?

10 MR. KING: Yes. Did you ever tell her you were going to make a different distribution than the will itself made?

A. No, I didn't that I know.

Q. What's the difficulty about it? Do you think that you did or you didn't? A. No, I didn't.

Q. Did you or did you not? A. Not that I remember, no. I did not.

20 MR. KING: Well, now, I want you to remember about it. I want you to say "yes" or "no" to it.

WITNESS: I said no.

Q. In the making of this will or prior to the making of the will, did you ask your father to make a will in your favor? A. No, sir. I am not—my father came from Flanagans'—

30 MR. KING: Just a moment. Let me ask you the questions, because you've got to pay me anyway.

Q. Did you ever induce your father to make this will now offered for probate? A. No, sir.

Q. Did you ever use any undue influence to induce him to make this will? A. No, sir.

Q. You are the man who went for Mr. Stickle? A. Yes.

Q. How did you come to go? A. Because he requested me to.

40 Q. Who did that? A. My father.

*William Tutty—Direct.*

Q. What did he say? A. For me to go down after John Stickle and bring him up.

Q. Didn't he tell you what Stickle was to come for? A. Yes, he told me to draw up another will.

Q. Did he tell you what he was going to put in his will? A. No, sir.

Q. Did you ask him? A. No, sir.

Q. Did you go down after Mr. Stickle? A. Yes, 10  
sir.

Q. Bring him up? A. Yes, sir.

Q. When Mr. Stickle and your father were consulting about the will, where did you stay? A. Outside the house.

Q. Were you in while these men were talking? A. No, sir.

Q. Did you hear what your father said to Mr. Stickle? A. No, sir, I did not.

Q. Who took Mr. Stickle back home? A. I did. 20

Q. Was the will executed that day? A. No, sir.

Q. When was it executed? A. That was on the 4th, and the Thursday following, I think.

Q. The Thursday following when? A. I guess the 4th it was, and I think the day was Monday.

Q. So that he was up Monday and the will was executed Thursday? A. Yes, sir.

Q. That Thursday did you go down for Mr. Stickle? A. Yes, sir. 30

Q. How did you come to go down? A. Because it was his wish.

Q. Whose? A. My father's.

Q. How did you know Mr. Stickle would be ready? A. He told me when I fetched him back to Rockaway.

Q. Did Mr. Stickle tell you what day to come down? A. I think he did.

Q. On that day you went? A. I did. 40

*William Tutty—Cross.*

Q. When you came back with Mr. Stickle, did you go into the house, the second time? A. Yes, sir.

Q. When you came with Mr. Stickle, did you go into the room where your father was? A. No, I didn't that I know.

10 Q. Were you in the room when the will was read, if it was? Did you hear the will read to your father? A. No.

Q. Did you see it executed? A. No, sir.

Q. Were you in the room when it was executed? A. No.

Q. Was your wife in the room when it was executed? A. No, sir.

Q. When did you first know the contents of the will? A. On the day that Mr. Stickles read it at the funeral, on the 18th.

20 Q. That was the day of the funeral? A. Yes, sir.

Q. What was your father's mental condition on the day he executed the will? A. All right.

Q. Did you notice whether he had any of these spells that he had had over at Flanagan's? A. I noticed he had none.

Q. He had none? A. No.

Q. Did you see him after the paper was executed—see your father? A. Yes, sir.

30 Q. Was he excited or nervous? A. No.

Q. Before Mr. Stickle was brought there was he excited or nervous? A. No, sir.

Q. Did you do anything, by suggesstion; by persuasion or in any way to induce him to make this will? A. No, sir, I did not.

## CROSS EXAMINATION BY MR. RATHBUN:

Q. How far did Mrs. Flanagan live from you?

40 A. About three miles.

*William Tutty—Cross.*

Q. Were you—when you left home on Sunday, May third, to go to see your father, were you expecting to bring him back to your house that night? A. No, sir.

Q. And you arrived at Flanagan's and got him into the wagon—got your father into the wagon—for the purpose of taking a drive. Is that it? A. That is it. 10

Q. And you didn't tell the Flanagans you were going to take him to your home, did you? A. I didn't, no.

Q. And where did you drive? A. I drove right home from Flanagan's right around by Luxemburg. I intended to come in through the Pines.

Q. What's that? A. I went around through Luxemburg, if you know where that is, just near Wharton.

Q. You said something else. What was that? 20  
A. I said I intended to come in through the Pines, as they call it—go one way and come back the other.

Q. How far is that? A. It might have been two miles around, if he wanted to come back. I didn't intend when we started out for him to come home.

Q. Well, how long a drive did you take after leaving Flanagan's before you reached your own home? A. About three miles. 30

Q. And you must have driven very slowly then.  
A. Well, I don't think I drove very hard.

Q. What? A. I didn't drive very hard.

Q. Did you make any stops? A. No, sir.

Q. Your wife says you got there between half past seven and eight o'clock. Is that true? A. I think it is. About that time, because she was after coming home from Rockaway.

Q. Well, didn't you take a longer drive than that three miles? A. No, sir. 40

*William Tutty—Cross.*

Q. What did you do? Walk your horse most of the way? A. No, not all the way.

Q. Did you stop to get a drink anywhere? A. No, sir.

Q. Did you stop and have a drink anywhere with your father? A. No, sir.

10 Q. Where did you expect to take your father when you left Flanagan's? A. I expected to take him around the Morris County Road, by the Pines and back there to Flanagan's again.

Q. When did you change your mind? A. Well, he didn't want to come back. He wouldn't stand for it.

Q. Of course, you were going towards your home all the time, weren't you? A. In that direction, yes.

20 Q. Well, in one case you would have come almost a straight road to your home, after turning the corner a short distance from the Flanagans', and in the other case you made a circuit towards your home. Isn't that all the difference? A. Well, it was pretty near a straight road both ways, only one was a little longer than the other.

Q. Well, isn't it something like the crown of a hat? One way coming around corresponding to the rim, and the other corresponding to the crown? Isn't that about the difference? A. Yes.

30 Q. So from the time you left Flanagan's you were on your way, really, to your own home, weren't you? A. Yes, sir.

Q. And you didn't intend to take your father back to Flanagan's that night, did you? A. It was not my intention, no.

Q. Now, when did you speak about the will? You and your father?

WITNESS: What will do you mean?

40 MR. RATHBUN: The new will.

*William Tutty—Cross.*

WITNESS: The Davenport will?

MR. RATHBUN: No, this one that's now in controversy.

A. Well, it was on the road home.

Q. Yes. And how near were you to home before you commenced to talk about it? A. Oh, it might be a mile.

10

Q. And what was said about it? A. I mentioned the Davenport's will, and he said that he didn't know of any Davenport will being drawn.

Q. You mean by the Davenport will what we have been calling the Flanagan will, drawn by Mr. Davenport? A. Yes.

Q. And you spoke to him about that and he said he didn't know of any being drawn? Then what? A. I told him there was one drawn.

Q. What did he say then? A. Well, he said he expected to have another drawn by Mr. Stickle.

20

Q. Yes. Go on and tell us the whole conversation about it. A. Well, that's about as much as I know about it.

Q. What did he say of how he was going to dispose of his property? A. He didn't say nothing to me about how he was going to dispose of it.

Q. Did he tell you how the will that Mr. Stickle was to draw was to differ from the Davenport will? A. No, sir, he did not.

30

Q. Did you tell him what was in the Davenport will? A. No, I didn't tell him.

Q. Well, did you say to him, "What's the use of drawing another will if Mr. Davenport has drawn one?" A. No, sir.

Q. You didn't tell him that? You didn't even suggest to him, "Hadn't you better get the Davenport will first and find out whether that's all right?" A. I guess I suggested it to him.

Q. And what did he say about that?

40

*William Tutty—Cross.*

WITNESS: What did he say about the Davenport will?

MR. RATHBUN: Yes, what did he say when you made that suggestion to him?

A. Well, he told me he'd order—have a power of attorney and withdraw the other wills.

10 Q. And is that the reason you had a power of attorney drawn? A. I suppose so, yes.

Q. What? A. Yes, sir.

Q. And what else did he suggest about the power of attorney, as to what you were going to do under that? A. I don't know as we said very much.

Q. What's that? A. I said I didn't understand very much about it myself.

20 Q. What did you suggest to him about the power of attorney? A. I suggested that I thought he'd have to have a power of attorney to get them—the other wills.

Q. Then you had Mr. Stickle draw a power of attorney to get the other wills? A. Yes, sir.

Q. Have you that power of attorney? A. I think so.

Q. Is it here? A. Not with me, no.

Q. Did you get the other wills? A. Yes, sir.

Q. How soon after? A. The next day, I guess.

30 The next day after I got the power of attorney.

Q. You went to Mr. Davenport and got the wills? A. Yes, and Mr. Smith.

Q. How many? A. Two.

Q. Two from Mr. Davenport? A. One from Mr. Davenport and one from Mr. Smith.

Q. You didn't get the one from Mr. Smith until sometime afterwards, did you? A. The same time as from Mr. Davenport; the same week.

40 Q. This exhibit (referring to Exhibit C-1) shows you got it on May 14th, 1914, from Mr. Smith,

*William Tutty—Cross.*

and that was eleven days after this Sunday. A. Well, that's the time I got the both of them.

Q. You got the one from Mr. Davenport the same day, you think? A. Yes.

Q. Well, why didn't you get these wills—first, how did you know about Mr. Smith having a will?

A. I heard my brother-in-law, Mr. Monahan, speak of it. 10

Q. When did you hear him speak about it? A. It might be five or six months before that.

Q. Did you know what was in this Smith will? A. No, sir, I did not.

Q. Mr. Monahan didn't tell you what was in the will drawn by Mr. Smith? A. No.

Q. How did you hear about the Davenport will?

A. I was in the house that night when Mr. Davenport and his wife came in there about half past seven, on the eighth of December, and I had a kind of suspicion something was going on and I went over the next day and Mrs. Flanagan had send him there to make a will. 20

Q. And that will had been drawn? A. Yes.

Q. That's the will you got that time? A. Yes. On the eighth of December that was.

Q. Did Mrs. Flanagan tell you how the will was drawn—anything about what was in it? A. She didn't tell me about it, no.

Q. Did Father Carew tell you? A. No. 30

Q. Did Mr. Tutty tell you? A. No, sir.

Q. You didn't learn from anybody what was in that will? A. Not at that time.

Q. What was the first you learned about what was in the will drawn by Mr. Davenport? A. When I was down with the power of attorney and got them.

Q. Well, why did you go to the trouble and expense of having another will drawn by Mr. Stickle 40

*William Tutty—Cross.*

without knowing whether the will drawn by Mr. Davenport or the will drawn by Mr. Smith was satisfactory? A. It was my father's own wish when he heard tell of having the other ones.

Q. But he knew about the Smith will, didn't he? A. I suppose he did at the time when he had it drawn.

10 Q. And you knew about it too? A. I did, yes. Through other sources.

Q. Now tell us what else was said between you and your father that night on the way home. That Sunday night on the way home, about the will and about the property. A. We hadn't any talk about the property, but he said he wanted to draw another will by his own lawyer, Mr. Stickle.

Q. And what did he say in regard to the Newark property, as what he was going to do with it? A. He didn't say anything to me in regard to it at all.

Q. Are you very sure about that? A. I am positive.

Q. Didn't you mention the Newark property to him? A. No, sir, I did not.

Q. Did not? A. No, sir.

Q. Didn't you know that Mrs. Flanagan was left the Newark property in the will drawn by Mr. Davenport? A. I did, yes, later on.

30 Q. And didn't you call your father's attention to that fact? A. How could I when I didn't know at the time?

Q. Didn't he tell you that he wanted to leave that to you—the Newark property? A. No, he didn't.

Q. Did he tell you he wanted to leave the homestead to you? A. Yes, he told me that.

Q. And when did he tell you that? While you were driving home that night? A. No, sir.

40 Q. When did he tell you? A. A year before.

*William Tutty—Cross.*

Q. A year before? A. Yes, sir.

Q. Now, you haven't told us all the conversation that took place between you and your father on that drive, have you? A. Yes, that is near all of it.

Q. That's all that was said? A. That's all I remember.

Q. You took all that time to drive home and hold that little conversation between you and your father? A. That's quite a little conversation. 10

Q. What's that? A. That's quite a little conversation.

Q. Did you tell him that if he would make everything over to you, you would take him to your home and take good care of him the rest of his life? A. I did not.

Q. Did you tell him that if he was going to your home, he ought to make better provisions for you in the will? A. No, sir. 20

Q. Did he tell you anything about your sisters? A. Not any more than that he had left—in the Smith's will he had it drawn in their names, but he told me while over to Flanagan's that if he lived until Spring, he was going to sell that Newark property and that their share would be very small.

Q. And when did he tell you about your sisters? 30

WITNESS: In regards to that?

MR. RATHBUN: Yes.

A. It was on the 18th or 19th of February or January, I think.

Q. January or February, which one? A. Either one. I ain't positive.

Q. That was the property which, by the Flanagan will, he had already willed to the Flanagans? 40

A. Yes, the same one.

*William Tutty—Cross.*

Q. Yes, and he had made the Flanagan will in December, two months before he had this conversation with you. Isn't that right? A. Yes.

Q. Then how did he come to tell you in January or February that he was going to sell the Newark property and the share, therefore, of the sisters would not amount to much?

10           WITNESS: How did he come to tell me?

MR. RATHBUN: Yes.

A. I don't know how it was he come to tell me that.

Q. Where were you? A. In Flanagan's. My sisters were there too.

Q. In Flanagan's house was it? A. Yes.

Q. What time? Day or night? A. In the forenoon.

20           Q. Did you go there very often in the forenoon? A. I was there maybe two or three times a week in the forenoon or afternoon.

Q. Generally in the afternoon? A. Sometimes in the morning. Went down and stayed over night sometimes.

Q. To sit up with him because his condition was so bad? A. No. If he got bad spells they sent for me.

30           Q. Did you take whiskey to him? A. Yes, on two occasions I think.

Q. Did you give him whiskey? A. Only twice.

Q. Had you given him any whiskey this Sunday night when you took him on this drive? A. No.

Q. You didn't have a flask of whiskey in your pocket? A. No, sir.

Q. Sure of that? A. Certainly I'm sure of it.

Q. Why did you go so promptly for Mr. Stickle? A. Because it was his wish for me to go after him.

40           Q. Wasn't it your wish too? A. Well, I'd like to know whose else it would be besides.

*William Tutty—Cross.*

Q. You were very anxious to get Mr. Stickle, weern't you? A. Yes, sir.

Q. You were very anxious to go and get Mr. Stickle, weren't you? A. Yes. So long as it was my father's wish, yes.

Q. And because you expected improved conditions in that will? A. I don't know.

Q. You expected to get more under the new will that was drawn, didn't you? A. I suppose I did if I could get it. 10

Q. Why certainly. And you lost no time to go down to Rockaway and get Mr. Stickle to come there after your father had arrived at your house, did you? A. I went down the next morning.

Q. Yes, very promptly? A. About nine or ten o'clock.

Q. Now, how late did you sit up that Sunday night with your father? A. I sat up all night. 20

Q. Sat up all night? A. Yes, sir. On and off.

Q. What were you talking about while sitting there with him? A. Oh, different things.

Q. Talking about this will? A. No, sir.

Q. Not a word about this will? A. Not at that time, no.

Q. Talking about the property? A. We talked about it before.

Q. When did you talk before? A. On the road home. 30

Q. Did you talk about the property—either the Newark property or the Tebo Mine property? A. Not on that night, no.

Q. What was the subject of your conversation? A. I can't exactly tell you.

Q. You can't recall anything you talked about? A. Well, no. I had quite some work to do around—outside work. I wasn't in there all the time either.

Q. Was there any reason why your father 40

*William Tutty—Cross.*

should prefer you and give you all the estate to the exclusion of your sisters? A. I couldn't tell you that. That wasn't up to me.

Q. There was no special reason that you know of, was there? A. Not that I know of.

Q. They had been quite as good to him as you had, hadn't they? A. As far as I know.

10 Q. As a matter of fact, he had lived with your sisters more than with you, hadn't he? A. About the same.

Q. And after the death of your mother, he didn't live with you, did he? A. I wasn't there on that place then.

Q. He didn't live with you after your mother's death, until the last ten days of his life? A. Yes, he lived with me before the last ten days of his life.

20 Q. When had he lived with you before? A. At different times since his second wife died in Rockaway. That's 1910. He was the same with me as with the other people.

Q. How long had he lived with you at any one occasion? A. Two months.

Q. Two months at a time you say? A. Yes.

Q. Well, he lived with your sisters a year at a time, didn't he? A. Well, I guess he did.

30 Q. Your father had more trouble with you than with your sisters, hadn't he? A. Only on account of that back rent.

Q. Well I know. He had employed a lawyer to make you square up, hadn't he? A. No, sir.

Q. So you don't know of any trouble that he had with your sisters, do you? A. Not that I know of.

40 Q. And yet, notwithstanding the fact that, so far as you know, he had never had any trouble with your sisters, but had had trouble with you over the rent— A. (Interrupting) Only in that

*William Tutty—Cross.*

other matter—he didn't want to pay them twenty dollars board down here.

Q. You were asking fifteen, so one offset the other, didn't it? A. Well, he got it cheaper from me.

Q. So far as you know, there was nothing why he should have preferred you to them, was there?

A. Well, that was his own choice. It wasn't mine. **10**  
That was his will and testament. He's the man that drewed it.

Q. Was there anything said by you to him on that night while driving home that if he were living with you, that he ought to pay board? A. No, sir, there was not.

Q. How did you expect to get compensated? A. I always supposed he had enough to pay his own way...

Q. I know. But you had insisted that he should pay fifteen dollars a month board, and that was the reason he went to Flanagan's to live. A. Yes. **20**

Q. Now here you are bringing him home that Sunday night and nothing said about compensation, you say. Is that correct? A. Yes. I was bringing him home, but I didn't bring him home on my own account. He wanted to come himself.

Q. Yes, he was willing to come before if you would board him for twelve dollars a month, wasn't he? A. I don't know. I don't think so. **30**

Q. You don't think he would have boarded with you even though you would have boarded him for twelve dollars a month? A. I never charged him any board when he was there, except one month.

Q. Your wife said—no, I am not sure. But you said you asked him fifteen dollars a month board. Is that right? A. Yes, sir.

Q. And he went to Flanagan's because he was getting board there at twelve dollars a month, and he wouldn't pay more than that. Isn't that right? A. Yes. **40**

*William Tutty—Cross.*

Q. And yet you were bringing him home—started home with him that night and you mean to say that there was nothing said about compensation that night? A. No, sir.

10 Q. Didn't you tell him "Father, I will take you to my home, if you want to go there, and I will keep you, provided you make everything over to me?" A. No, sir. I didn't say anything of that kind. I did tell him if he wanted to come to my home, he was welcome to come there.

Q. Did you tell your wife that?

WITNESS: Tell my wife that?

MR. RATHBUN: Yes.

A. When I fetched him there, she seen him.

20 Q. You heard your wife testify, did you not, that the old man wanted to come to your house, but you didn't want to bring him there that night? Did you tell her that? A. Yes, sir.

Q. Now you say you told him he was perfectly welcome to come to your house? Which is right? A. I wouldn't turn my father down if he was in the wagon with me if he wanted to come.

Q. What will did you show to Mr. Cahill on the night your father died? A. I didn't show him any will.

30 Q. Didn't you show him the Flanagan will? A. I guess not.

Q. What? A. No, sir.

Q. Didn't you have the Flanagan will out? A. No, sir.

Q. Let him see it? A. No, sir.

Q. Did you show him the Smith will? A. No, No, sir.

Q. Did you show him any will? A. No, sir, I did not.

40 Q. Talk to him about any will? A. I did, yes.

*William Tutty—Cross.*

I described it to him the best I could; how the thing read.

Q. Did you show him the Flanagan will on any night? A. No, sir.

Q. At any time? A. No, sir.

Q. Did you show him the Smith will at any time? A. No, sir.

Q. Did you show the will that Mr. Stickle drew? A. No, sir, I didn't. 10

Q. So that you never talked with him—never showed him any will? A. I might have talked with him about the wills; described them the best I could. That's all.

Q. Did you talk to him about any will? A. I think so, yes.

Q. When and where? A. That night in my house.

Q. Was that the night your father died or the night before the funeral? Which was it? A. The night before the funeral. 20

Q. And what else did you talk to him about? A. I talked to him about Smith's and Davenport's will.

Q. Davenport's is the Flanagan will? A. Yes.

Q. You did talk to him about it? A. Yes.

Q. Told him what was in those wills? A. The best I could, yes.

Q. You had seen them? A. Yes, I had read them. 30

Q. You had them in your possession at that time? A. I'd read them.

Q. You had them in your possession at that time? A. No.

Q. Where were they? A. I'd read them and destroyed them.

Q. Destroyed the Flanagan will too? A. Yes, sir.

Q. When did you destroy the Flanagan will? A. The 11th or 12th, I think. 40

*William Tutty—Cross.*

Q. 12th of May, 1914? A. After I'd got them.

Q. Where were you when you destroyed the Flanagan will? A. Out at my home.

Q. What did you do with it? How did you destroy it? A. Burnt it.

Q. Burnt it up? Put it in the stove? A. Yes.

Q. How about the Smith will? A. Burnt.

10 Q. You burnt that also? A. Yes, sir.

Q. Burned that in your house? A. Yes.

Q. When did you burn that? A. About the same time.

Q. You didn't get the Smith will until May 14th. Did you burn them both together? A. Yes, sir.

Q. At the same time? A. Yes, sir.

20 Q. Did you have any papers there at the time Mr. Cahill or Mr. Monahan were there, or either of them? A. No, sir.

Q. Didn't have any papers at all? A. No.

Q. You didn't show either of them any papers whatsoever? A. I described it to them.

Q. You didn't show either one of them any will or any paper writing? A. No, sir.

Q. Didn't hand over any paper writing to them to read? Is that right? A. That's right.

30 Q. Did you go to Father Carew to persuade him—to have him go and persuade your father to make a new will? A. No, sir.

Q. Didn't you know of a will in which you were only left five dollars? A. Yes, sir.

Q. And then you got Father Carew to see your father and have him change it so as to give you the homestead? A. No, sir.

Q. That's not true? A. That's not true.

40 Q. Did you ask Father Carew to intercede in your behalf with your father? A. Father Carew sent for me to meet him there one day, and my two sisters was there. That's the only time ever

*William Tutty—Cross.*

I was with Father Carew there. That night my two sisters sat up with him; around March 6th, I think.

Q. Well, did you ask Father Carew to intercede with your father? A. (Interrupting) No, sir.

Q. (Continued) In your behalf? A. No.

Q. In regard to the property in any manner whatsoever? A. No, sir. 10

Q. In regard to drawing a will in your favor? A. In regard to a will or nothing.

Q. Now you took—you brought Mr. Stickle from Rockaway to your home, did you not? A. I did.

Q. And afterwards took him back to Rockaway? A. Yes.

Q. On your way to your home with Mr. Stickle, what did you tell him with regard to the will? A. I didn't tell him—I had no conversation with him with regard to the will at all. 20

Q. What did you tell Mr. Stickle when you saw him about what you wanted him to do? A. I told him what my father wished him to do; to make him a will.

Q. But you didn't tell him—what did you talk about on your way? A. About the weather and such things as that.

Q. Did you talk to him about the property, where it was situated? A. No, sir. 30

Q. Did you talk to him about the Newark property? A. No, sir.

Q. You didn't talk to him about it? A. No, sir.

Q. Is that Newark property rented? A. Not now, no.

Q. What does it consist of? House and lot? A. House and lot.

Q. What rent were you getting from it last? A. Twenty-five dollars, I think. 40

*William Tutty—Re-direct.*

Q. Twenty-five dollars a month? A. Yes.

Q. Now, Mr. Tutty, let me try and refresh your recollection a little bit about what took place the night before the funeral and see whether you are not mistaken about the Flanagan will. Did you not bring out some checks which purported to have been signed by your father? A. That was  
 10 not the will.

Q. You brought out the checks, didn't you? A. Yes.

Q. And didn't you compare the signatures on the checks with the signature on the will? A. No, sir, I did not.

Q. Did you compare them with anything else? A. Nothing but the checks alone.

Q. What? A. With the checks alone.

Q. You took all these checks and compared  
 20 them with each other, you mean? A. Yes. There was \$350 in checks that Mr. Flanagan and Mrs. Flanagan drew on the Rockaway Bank. That's all that was referred to.

Q. Yes. Now at that time didn't you also bring out the Flanagan will and show it to Mr. Cahill and Mr. Monahan? A. I did not.

## RE-DIRECT EXAMINATION BY MR. KING:

Q. Mr. Tutty, did the Flanagans ever come over  
 30 to take your father back from your place to theirs? A. No, sir.

Q. Mr. Smith has testified that you made a remark to him that if you brought your father down to his place to have a will drawn, he was to look out for your interests. Mr. Smith says there were people in his office at that time and that he was rather busy. What have you to say, first, did you use that language? A. No.

Q. What have you to say of the occasion? Why  
 40 did you go? A. I went there for to withdraw

*William Tutty—Re-cross.*

*John F. Stickle—Direct.*

that will under the power of attorney. He had moved across the street from the bank in a new building, that is to where he is now, and he was busy piling his books away and stuff like that.

Q. Did you go in and draw the will, did you say, or withdraw? A. I withdrew it.

Q. Mr. Smith says there were people in his office. Were there any people there? A. No, sir. 10

Q. You say he was moving from one office to another? A. He had moved and the books and everything else was in the office across the street.

RE-CROSS EXAMINATION BY MR. RATHBUN:

Q. Mr. Tutty, aren't you a little mistaken about people moving the day you got this will from Mr. Smith? A. I don't think so.

Q. Wasn't it a month before when you were there when Mr. Smith was moving? A. No, I don't think so. I am pretty sure it was not. At the very time, I think. He got up on a shelf and got this will. 20

Q. On a shelf, eh? A. Well, he had a shelf for his books.

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JOHN F. STICKLE, a witness produced on behalf of the proponent, resumed the stand. 30

DIRECT EXAMINATION BY MR. KING:

Q. Mr. Stickle, you are the same Mr. Stickle who drew this will, are you not? A. Yes, sir.

Q. Did you read the will after the funeral?

WITNESS: After the funeral?

MR. KING: Yes.

A. Yes, sir.

Q. From where did you obtain the will? A. I had the will in my possession from the time it 40

*John F. Stickle—Direct.*

was signed until it was brought here to the Surrogate's office. Mr. Tutty—John Tutty wanted me to take care of it and keep it.

10 Q. Did you say, in the presence of James Monahan, on the occasion of the reading of the will—let me read his evidence as I have it. "After the will was read I says to him," meaning you, "it is very funny the way that thing is made out; the sisters is cut off and Mr. Tutty gets it all. Well, he says, meaning you, "The old man didn't know and didn't care. He supposed he was going to live longer than what he did and it would be no more than right to give his son William his property for his care and the trouble he would have." First, did you say that the old man didn't know and didn't care, about his will? A. No, sir, I didn't say that.

20 Q. You've been a practitioner in this state a long while? A. Yes.

Q. Haven't you drawn hundreds of wills? A. I don't remember how many; a considerable number.

Q. A great many? A. Yes, sir.

Q. Don't you know as a lawyer that the statement that this man didn't know and didn't care would tend to defeat the very paper which you had drawn? A. Yes.

30 Q. Did you make any such statement? A. No, sir.

Q. Did you make the statement that Tutty supposed he was going to live longer and it would be no more than right to give his son William his property for his care and the trouble he would have? Did you say that? A. I don't remember it.

Q. Did you make any explanation to Monahan as to why he made the will or why he drew it as he did? A. I don't think I did.

40 Q. Did you then say anything which would dis-

*John F. Stickle—Direct.*

parage the legality of the will in any way? A. No, sir.

Q. Did you then believe that that was a valid will? A. Certainly; I knew it was.

Q. Did Mr. William Tutty come to you and ask you to draw a will for him, William Tutty? A. No, sir.

Q. Did you say to Peter J. Cahill—I will read you what he said. “Stickle said, ‘The old man was old and he didn’t know or didn’t seem to care?’” Did you use those words or any words similar to these in relation to the condition of John Tutty at the time you drew his will? A. No, sir. 10

Q. Did you say to Peter J. Cahill, “The old man thought he would be sick a good while and be a burden to his son, William, and that was the reason why he gave this property to his son, William?” A. No. 20

Q. Did the old man say that to you? A. No.

Q. Was Mr. William Tutty in the room when you received the first instructions, or was he in the room when you finally executed the will? A. No, sir.

Q. To the best of your knowledge, had William Tutty anything to do with the terms of the will, the drafting of the will or the contents of the will? A. No, sir. 30

Q. There was some question between John Tutty and his father concerning the retention of moneys which John Tutty, the father, claimed was due from William. Did John Tutty ever consult with you about that matter? A. Yes, sir.

Q. Did you have John Tutty and William Tutty, the son, meet together? A. Yes, sir.

Q. And did you settle it? A. Yes, sir.

Q. How and when?

WITNESS: I might explain a little bit before— 40  
it might not be in answer to your question.

*John F. Stickle—Direct.*

MR. RATHBUN: Before you answer, Mr. Stickle, I'd like to know to what you are referring.

WITNESS: A little memorandum.

MR. RATHBUN: What was that memorandum made?

10 WITNESS: About the time of that.

MR. RATHBUN: What do you mean about the time?

WITNESS: Made about on the date. Something of that kind.

MR. RATHBUN: I object to his referring to it.

BY MR. RATHBUN:

20 Q. Do you remember all the data unless you refresh your memory from some memorandum?  
A. No, I don't think I would.

Q. What is the paper you have in your hand?  
A. A little memorandum. It has on it some few things here, giving dates and so forth.

Q. When was the memorandum made in reference to the dates upon it; on or about the time?  
A. Yes, about the time.

30 Q. And that data concerns the settlement of this account between William and John Tutty?  
A. Yes.

Q. Where did you obtain this paper from? A. I made it myself.

Q. You obtained it from your office? A. Yes.

Q. Is it in your handwriting? A. Yes.

Q. When was it made? A. Well, I will tell you pretty soon.

Q. What's that? A. I will tell you pretty soon.

40 Q. Answer it now, won't you? A. If you will give me time and chance.

*John F. Stickle—Direct.*

Q. Will you answer the question just when that was prepared? A. As I was going to say—

Q. (Interrupting) You have no right, Mr. Stickle, to look at that memorandum yet. Can you tell when that memorandum was made?

THE COURT: The date of making the memorandum.

10

WITNESS: It was what I was going to—

Q. (Interrupting) Can you tell when that was made? A. Some of it was made in January, 1913, and some of it in September, 1913, and October, 1913, and May the 4th, 1914.

Q. Can you give the dates of those months when it was made? A. Yes, that's what I read.

Q. You gave the months. Can you give the dates of the months? A. Yes. January 25, 1913, was the first.

20

Q. Now on January 25, 1913, you made any entry there, did you, on that slip of paper? Is that correct? A. I don't know that I made it on this slip of paper. I won't say whether I did or not. That's the first entry. I might have made it from my book.

Q. Let's see about the second entry. A. Yes. On September 15th, 1913—

Q. (Interrupting) Did you make that entry on that day? A. I think I did.

30

Q. Is there anything there to indicate that you did? A. No, nothing in particular. On October 17th, 1913, I made this entry.

Q. On that piece of paper? A. Yes.

Q. You are sure you made it on the same day? A. Yes.

Q. Are there any other dates? A. May 4th, 1914.

Q. Did you make that entry on that date?

WITNESS: On May 4th?

40

*John F. Stickle—Direct.*

MR. RATHBUN: Yes.

A. Did I make it on this paper? I don't think so.

Q. All right. Any other date there? A. Yes, there's another date—the 8th.

Q. 8th of what? A. May, 1914.

Q. Did you make that entry on that day on that paper? A. I don't know that I did.

Q. Is there any other date on that paper? A. Except what I have read.

MR. RATHBUN: Then I submit, your Honor, the only date he can use to refresh his recollection is that one of October 17th.

BY MR. KING:

Q. Mr. Stickle, the dates on that paper, if not made originally on that paper, you said were taken from your books? Is that not correct? A. Yes, sir.

Q. Mr. Stickle, did you have John Tutty and William Tutty at your office in reference to the rent matter? A. Yes, sir.

Q. Was it in the year 1913 or 1914, when? Your best recollection? A. October 17th, 1913.

Q. Well, what happened that day? A. They were at my office, both of them, and they settled up the dispute about the rent and Mr. William Tutty paid John Tutty \$130 in settlement for the back rent and they were satisfied, and everything passed off all right and so on, and they retired friendly and all right.

Q. Mr. Stickle, when you drew this will—when you received these instructions from Mr. Tutty, had you any doubt then about his absolute ability to make a will? A. No, sir.

Q. And when you executed the will, had you any doubt then about his ability to execute the will properly? A. No, sir.

*Lyman M. Smith—Direct.*

*James Monahan—Direct.*

Q. And that he did have testamentary capacity?

A. Yes, sir, he had.

Q. Was there anything that you saw at the time you received the first instructions, or at the time you executed the will or in between, or anything before or after that indicated to you that any influence had been used by William Tutty on John Tutty to secure the making of this will? 10

A. No, sir.

NO CROSS EXAMINATION.

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LYMAN M. SMITH, a witness produced on behalf of the caveators, resumes the stand.

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Mr. Smith, when did you move? A. In the middle of April, 1914. 20

MR. KING: I move to strike that out. Mr. Tutty said he had moved.

Motion withdrawn.

---

MR. JAMES MONAHAN, a witness produced of the caveators, resumes the stand.

DIRECT EXAMINATION BY MR. RATHBUN:

Q. Did you hear Mrs. Tutty say, "I suppose I put my foot in it when I wouldn't let him," referring to John Tutty, "Stay here," referring to her house. "If I had, there would have been no other will made?" A. Yes, sir. 30

Q. Did you hear her say that she wouldn't have John Tutty in the house and wouldn't look after him? A. No, sir.

Q. You didn't hear that? A. No. 40

---

*Margaret Cahill—Direct.*

MARGARET CAHILL, a witness produced on behalf of the caveators, resumes the stand.

DIRECT EXAMINATION BY MR. RATHBUN:

10 Q. Did you hear Mrs. William Tutty say she wouldn't have John Tutty, your father, in the house, and wouldn't work after him? A. Yes, she told Will that she wouldn't have him brought there because she wasn't able to work for him.

Q. And wouldn't act as a nurse and take care of him? A. No, she wouldn't have him brought there.

CASE CLOSED.

20 The matter was adjourned to Thursday, April 1st, 1915, at ten o'clock in the forenoon, for argument.

R. C. MATTHEWS,  
Stenographer.

30

40

**Mch. 19/15. Exhibit C-1 on part of  
Caveator.—R. C. M.**

ALLEN MINE, N, J, MAY 13th, 1914.

MR. LYMAN SMITH,

Dear Sir:-,

Please deliver to my son, William J, Tutty, my  
Will and Testament which I left with you.

Yours truly

his 10  
JOHN × TUTTY  
mark

Witness

WILLIAM. HOOPER

[Written on back]

May 14 1914 Received from Lyman M Smith  
The within mention will on the date aforesaid

WILLIAM J TUTTY 20

30

40

2/11/50

52  
Barnes

## Court of Errors and Appeals of New Jersey.

IN THE MATTER OF THE APPLI-  
CATION FOR PROBATE OF A  
CERTAIN PAPER WRITING PUR-  
PORTING TO BE THE LAST  
WILL AND TESTAMENT OF  
JOHN TUTTY, late of the  
County of Morris, deceased.

On Appeal.

### BRIEF ON BEHALF OF APPELLANT, WILLIAM J. TUTTY.

This is an appeal from the decree of the Prerogative Court reversing a decree of the Morris Orphan's Court, admitting the will of John Tutty to probate. The decree of the Prerogative Court was predicated upon the finding that the will was *procured by undue influence exercised upon the testator by William J. Tutty, one of the beneficiaries thereunder.*

The determination of this question will be dispositive of this appeal.

#### Statement of Facts.

Testator was eighty-four years old at the time of his death, on May 18th, 1914. The will in controversy was executed ten days previously. Testator's family consisted of two daughters, Mary Monahan and Margaret Cahill, and one son, William J. Tutty (188). He also had a niece, Mary Flanagan (70). The daughters were both married

and lived in New York (18). Mrs. Flanagan lived in Wharton (55). The son William J. Tutty lived in the old homestead consisting of a small frame dwelling and a few acres of land at Allen Mine, Morris County, New Jersey (21-25).

Testator's property, at the time of his death, consisted of the old homestead, a few acres of land lying detached, a home and lot in Newark and about \$200 in the bank, a total value of about \$6,000.00 (177).

From 1910 to 1913 he boarded with his daughter, Mrs. Monahan (213). In May, 1913, he went to the home of his niece, Mrs. Flanagan (55). He remained there until May 3rd, 1914, when he went to the home of his son, William Tutty (72), where he died. At each of these three places he paid his board.

During all the time William lived in the homestead he paid his father a monthly rental (105); on one occasion a dispute arose as to the amount, and the father employed John F. Stickle, a lawyer at Rockaway, N. J., to bring suit against his son. The result was a payment of the total rent claimed (338). This settlement was made October 17th, 1913 (338).

The testator made two wills before the one now admitted to probate. Under the will now assailed \$100 is given to each daughter, certain real estate devised among his grandchildren and the residue to his son William (2A).

For a period commencing four or five months before his death, while sick with the grip (60) witnesses on behalf of the caveator testify that testator did strange things, such as looking behind the piano (58), striking a barrel and addressing it as if it were a horse (123), imagining people were on the road when there were none (58), funeral processions passing, &c. (59), and frequently struck at the walls as though he were in a mine (95). He had been a miner in his lifetime (213). But during all this time he seemed otherwise mentally alert (166). He knew and recognized his friends and relatives who came to visit him and conversed intelligently

with them (81-82). Mary Flanagan, who testified regarding these peculiarities, admittedly did not think they were serious and ascribed them to the use of medicine (89).

Outside of the testimony of contestant and her husband, her sister, a disappointed granddaughter and the niece, the evidence shows that testator possessed ready and comprehending intelligence (279, 287, 309, 312, 338, 276, 268). There is evidence that he was not only self-willed but even stubborn, and was not easily influenced (269-274-275).

With the conditions as above outlined we come to the time of the making of the will in question.

The testator on Monday, May 4th, 1914 (32), sent for John F. Stickle, a counsellor at law of this State, who has been admitted to practice since 1864 (20). Mr. Stickle had been testator's lawyer and had known him for twenty years (41). He was the same lawyer who had compelled the settlement with the son (338).

When Mr. Stickle arrived at the testator's home, at the Allen Mine, the latter recognized him, shook hands with him and said he wanted to see Mr. Stickle on a little business (21). He took Mr. Stickle into an adjoining room and told him he wanted to make a will and advised him as to the manner in which he wished to dispose of his property (21-29). Mr. Stickle told the testator that he would prepare the will and return in three or four days (21). On May 8th he returned to the testator's home and the will was executed in the presence of Edwin Blanchard, Daniel Kearns and Mr. Stickle (22-23-24). Mr. Stickle unhesitatingly declares that the testator, though somewhat feeble in body, was mentally alert and understood what he was doing at the time of the execution of the will (24), and that the will was the free act of the testator (338-339). He is corroborated by the only two other persons present at the time, Daniel Kearns and Edwin Blanchard (45). At the time of the execution of the will the testator told Mr. Stickle that he had made two prior wills

and that he wished to "take them up" and directed Mr. Stickle to prepare a memorandum authorizing the two attorneys, Mr. Davenport and Mr. Smith, who held the respective wills, to surrender them (34). The testator, at the time he gave his instructions to Mr. Stickle, told him (with relation to the devise to William Tutty) that he (the testator) "hadn't very much and he expected to stay with William while he lived and that his condition was such that he required a great deal of waiting on \* \* \*. He felt that what he had would not be any more than to compensate him (William Tutty) if he lived any length of time" (39-40).

### POINT.

**The will was not the product of undue influence exercised upon the testator by William Tutty.**

### Argument.

Undue influence is such influence as induces a testator to do something that he otherwise would not have done and which he is unable to refuse. It is such influence as destroys free agency.

Bennet & Bennet, 5 Dick, 439.

Westcott *vs.* Shepard, 6 Dick, 315.

Hampton *vs.* Westcott, 4 Dick, 522.

White *vs.* Starr, 2 Dick, 244.

Clifton *vs.* Clifton, 2 Dick, 227.

Elkinton *vs.* Brick, 17 Stew. 154.

Ordinarily the burden of proving such influence rests upon the party asserting it. Under our decisions an exception to this rule arises where the testator is mentally enfeebled, the chief beneficiary occupies a confidential relation with the testator

and the will is executed under such circumstances as to indicate that an opportunity arose for the exercise of undue influence by such beneficiary. When all these elements are present the burden is cast upon the proponent to prove that the testator was not unduly influenced. Confidential relationship alone is insufficient, other circumstances must exist.

*In re Cooper's Will*, 75 N. J. E. 177, 180.

It requires the presence of "slight circumstances in addition to such relation to throw upon the beneficiary the burden of showing that the testator's mind was not unduly influenced".

*In re Cooper's Will*, 75 Eq. 177, 181.

*In Sparks Case*, 63 N. J. E. 242.

The decision, upon which the decree was based, from which this appeal is taken in the case at bar, holds that, under the circumstances, the burden of proof was shifted to the proponent and cites as authorities *Lynch v. Clements*, 24 N. J. E. (Chancery, 1874), 431, and *Dale vs. Dale*, 11 Stew. Eq. 274.

In the *Lynch* case the Court held that the facts of the case showed that the will was procured by the chief beneficiary thereunder by undue influence exercised over the testator. In the opinion in the Prerogative Court in the case at bar the case of *Lynch v. Clements* is cited because it contains a statement of what influence, in the procurement of a will, is, in the legal sense, undue. But the decision is of value from a standpoint not mentioned by the Vice Ordinary, for it shows the facts upon which the Court rests its conclusion that undue influence was exercised, *facts which are absent in the case at bar*.

In the *Lynch* case the testator was an elderly man and feeble but was not so affected by old age or disease as to expose his will to successful attack on the ground of lack of testamentary capacity. Testator died on November 25, 1861. The will was

dated September 13, 1861. At his death he was seized of a farm in Paterson upon which he had lived. He left him surviving his widow, two sons and two daughters. Both of the girls had lived at home, working with their parents. One of the sons had enlisted in the war. The other son James, the chief beneficiary, left home when about sixteen years of age; had subsequently, for about fifteen years, led a profligate and disreputable life in the City of New York. He lent his father money at different times, and at his death held a mortgage for \$3,000 on the farm. He had changed his name and become a gambler. The will gave \$1,000 to one daughter \$500 to the other, \$1.00 to one son, and the residue, both real and personal, to the widow for life, and after her death to James. The real estate, under power of sale, was sold. Before the death of his mother James had secured from his mother \$8,000 of the principal which he had spent in gambling. In July following her death he filed a bill to secure what was left. The testimony, in which the Court placed credence, showed that James was present at the funeral of a deceased sister, held at the father's home on September 4, 1861; that he came again nine days afterwards; on the day the will was made he went out alone with his father, who afterwards sent for a Mr. Tuttle, instructed him how to draw the will, and signed it *that evening*. James and the testator had a conversation on September 5th about a will. James suggested that \$1,000 be given to one sister, \$500 to the other, and \$1.00 to the other son. It also appeared that on one occasion when James' mother refused to give him money he swore at her and said he had done wrong in having the will made so as to give her the power to use the money. On another occasion James, it was claimed, had said that his father had made the will as he told him to make it. The Court, in holding that undue influence had been established, said that the facts necessitated the inference that the will was made under

the control and at the dictation of James; that the testator was afraid of James' power as the holder of the mortgage on the farm; that he made the will as he was directed to make it in the vain hope that he might treat the family with leniency.

From these facts it is at once evident that the position of the chief beneficiary in the case cited is totally dissimilar from that of John Tutty. There is no testimony in the case at bar that in making this will he was under the control or power of his son, or that the son occupied a position of ascendancy over the father.

In *Dale v. Dale*, likewise cited by the Vice Ordinary in his opinion, it appears that testator executed her will on April 28th and died on May 8th following. She left two sons, Frederick S. Dale and T. Nelson Dale. She left all her property to T. Nelson Dale and his children, except a legacy of \$1,000 each to the two children of Frederick S. Dale. This evidence showed that, for a long time preceding her death, the testatrix had been suffering from a disease which accelerated, if it did not directly cause, her death. From expert medical testimony it appeared that the *disease directly affected the brain by causing the formation of deposits thereon. She had prolonged periods of coma.* The will was made ten days preceding her death. "At the time of signing the will, and also at the time of her death she was visiting the family of a Mr. Winters, friends of hers, in Philadelphia. She had been at the latter place four weeks at the time of her death. She had gone there from the house of Nelson, where she had lived from the 5th of February preceding. From this time till about April 1st she was under the roof of Nelson. From the time she went to Philadelphia till the execution of the will she was in correspondence with him. The most material part of the correspondence related to the execution of the will. So for three months, preceding the execution of the instrument under which Nelson received almost the entire property of his mother, to the exclusion

of a brother, he was in a position in which, by continuous personal presence, or by correspondence following the then personal intercourse, he had the opportunity to exercise, over the unhealthy mind of his mother, an influence in directing the disposition of her property in his favor." The evidence showed that Nelson went to great lengths to foster a misunderstanding between testatrix and her son Frederick.

In the Dale case not only was the physical condition of the testatrix far worse than in the case at bar, but it clearly appeared that the beneficiary occupied a position in which he had it in his power to exercise a dominant influence over his mother.

The evidence, in the case at bar, lacks those elements which our decisions declare are necessary to shift the burden of proof; but on the contrary, contains convincing proof that the will in question was the free act of the testator, for:

A.

*In the case at bar testator was not as the mentally weakened persons whose wills were the subject of assault in the cases cited.* His family physician, who is the best qualified to speak intelligently regarding the matter, states that he was subject to attacks of spasmodic asthma (267); that he also suffered from Bright's disease (270); that he was always able to converse intelligently (267); and that he frequently expressed concern as to the likelihood of the attacks of asthma proving fatal (267). Even Mrs. Flanagan says he would converse intelligently (81). On the day before his death the testator, sitting on the porch of his home, had waved his hat to the doctor as he passed (207). The physician says that, considering his age, the testator's mentality was equal to the standard (268). The condition of drowsiness and so called "sleepy spells" to which the testator was subject while at the home of Mrs. Flanagan, were, in the physician's

opinion, caused by the use of whiskey (268-270). Mrs. Flanagan herself admitted that she gave the testator two or three glasses of hot whiskey a day (86). The "sleepy spells" disappeared after he was taken to his son's home (268). The evidence shows an elderly man, physically weakened by disease, but mentally alert and bright.

### B.

*The chief beneficiary did not occupy a confidential relationship with the testator, nor did he occupy a position of ascendancy over the testator by which he had it in his power to exercise a dominant influence over him.*

There is no evidence that the son was consulted by the testator as to the terms of his proposed will or that the testator in any way confided in him or sought his judgment. The evidence shows that the son treated his father well and, during the short time (just prior to his death) that the father lived at the son's house he was better cared for than he had been at the home of Mrs. Flanagan (275). Mere kindness affords no evidence of undue influence. The motive which actuated the testator in making the will as he did, is found in the statement he made to his lawyer. He felt that it was only fair, in view of his expressed intention to spend the remainder of his days with his son (39-40). This was a perfectly proper motive and bears no earmarks of improper influence. The fact that those days developed to be few in number in no way vitiates the act resulting from the worthy motive.

### C.

*The surrounding circumstances, indicating the exercise of improper influence, mentioned in the cases cited, are absent.*

William Tutty had nothing to do with executing the will. He was neither present at the time of the

conference between testator and his lawyer nor at the time of the execution of the will. Not a witness testifies to any fact which shows importunity or persuasion on the part of William. The case of the caveator is founded on inference and on statements which the disappointed beneficiaries testify were made by William Tutty respecting the will in question.

It appears that the testator asked William to have Mr. Stickle come to his home (314). It was the testator's family lawyer and friend of twenty years who drew the will, the one for whom William could have no kindly feeling, and who, if the testator were being unduly influenced, would be the last person to whom William would go to carry out any fraudulent intention.

Respondent produces no evidence to contradict the testimony of proponent's witnesses that, at the time of the execution of the will, testator was mentally alert and fully comprehended his acts. The case is barren of evidence, negating the testimony of Mr. Stickle that, at the time of the receipt by him of instructions, the testator was mentally bright, decisive and clear in his statements.

The will was not written on the moment; four days intervened for thought and consideration, and then the testator reaffirmed his testamentary disposition and solemnly published the will in the presence of two of his neighbors and his lawyer.

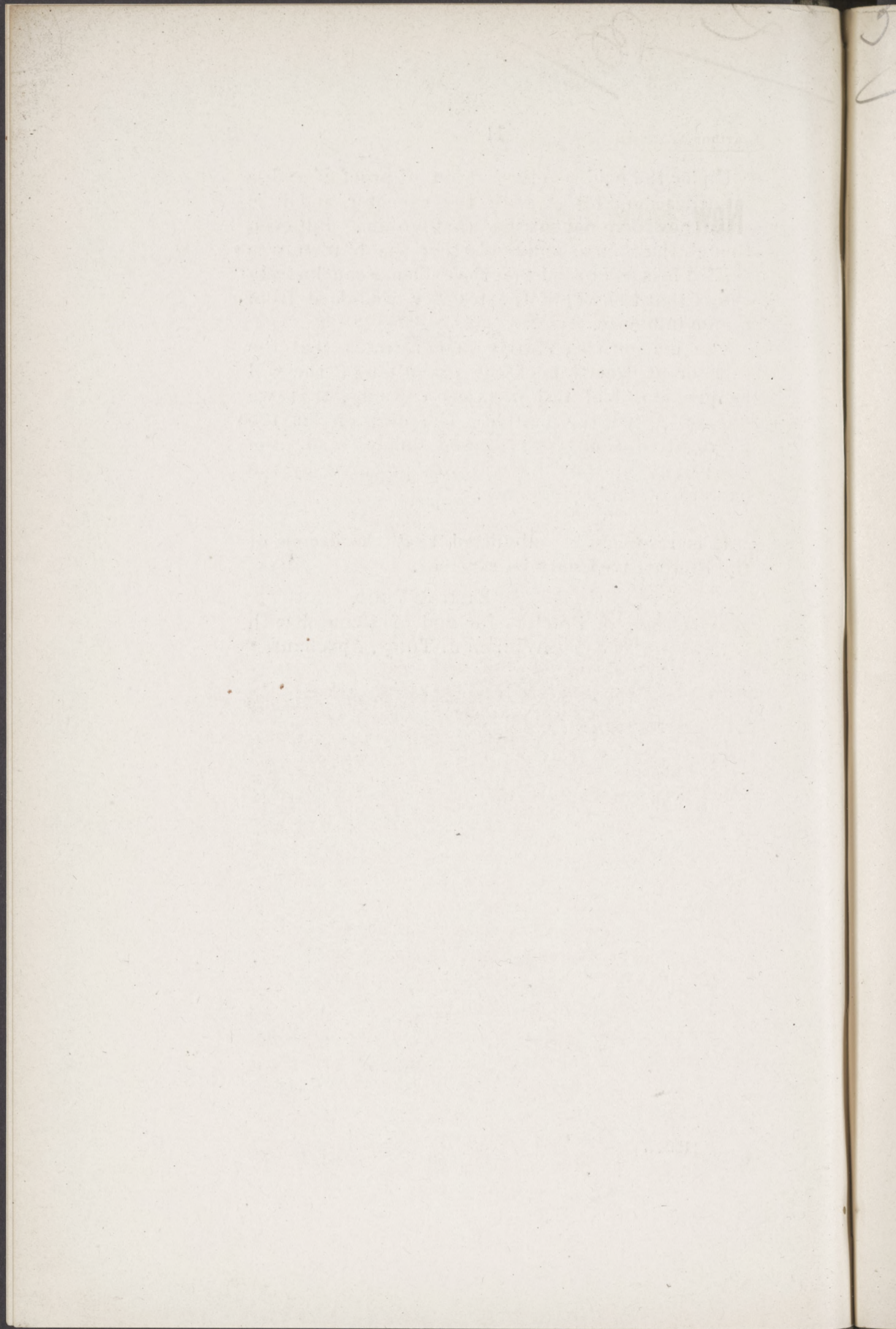
Mr. Stickle's statement, at the time of the receipt of the instructions, that he would return in three or four days for the purpose of attending to the formal execution of the will, is convincing evidence of the mental vigor of the testator as it appeared to Mr. Stickle during this talk. His condition was not such as would make him a victim of importunity or persuasion. Dr. Walters clearly expresses it when he testifies: "I have always known John Tutty to have a mind of his own, and if he thought to do a thing, he'd do it, and if not, he wouldn't".

Under the evidence the burden of proof of undue influence should rest with the caveator, and it is clear they have not satisfied that burden. But even though the Court should hold that the burden was shifted it is submitted that the evidence conclusively shows that the will of the testator was free from undue influence.

The evidence so clearly demonstrates that the testator at the time of the execution of the will in question, had testamentary capacity, that we do not argue the matter. The decision in the Prerogative Court was based solely upon the determination that the will was procured by the exercise of undue influence.

It is respectfully submitted that the decree of the Prerogative Court be reversed.

KING & VOGT,  
Proctors for and of Counsel with  
William J. Tutty, Appellant.



## New Jersey Court of Errors and Appeals

*In re* Application to Probate  
a Paper Writing Purport-  
ing to be the Will of JOHN  
TUTTY, deceased.

### Brief for Respondents.

#### I.

#### Statement.

By this appeal the appellant seeks to obtain a reversal of the decree of the Prerogative Court setting aside a decree of the Orphans' Court of the County of Morris admitting to probate a paper writing purporting to be the last will and testament of John Tutty, deceased. The opinion of Vice-Ordinary Stevens set out in the case (pages 6 to 12), clearly, succinctly and convincingly sets forth the main facts in the case and the law of the State in reference to the same.

The reading of the case shows an old man, eighty-four years of age, in feeble physical condition, suffering from Bright's disease, afflicted with hallucinations for weeks before his death, who had made one will which had been drawn by Mr. Lyman M. Smith, of Dover, and which had equitably distributed his estate and a year or two afterwards, within a few weeks of each other and near the end, having drawn three different wills, the last of which is now in dispute. The second and third wills, described both as 'the Davenport and Flanagan wills, had been drawn while the said John Tutty

boarded in the home of the Flanagans. William Tutty, the son, had learned of these and was anxious about their contents. On a Sunday night, two weeks before the death of his father, he drove to the Flanagans, who lived not more than three miles distant, got the old man into his wagon under the pretense that he was just going to take him out for a drive and would bring him back again, but instead took him directly to his home, although taking so long a time that it required about two hours to cover the three miles. During this trip home William Tutty prevailed upon his father to draw a new will. At first William Tutty testified that nothing was said on that trip home about the will, but on later cross examination he admitted that something had been said, but his recollection of what was said on that trip home is very indefinite, hazy and meagre. It does appear, however, that, as a result of whatever was said about the will, William Tutty took his father to his own home; sat up all night and went off post haste the next morning to employ John F. Stickle, a lawyer, to come to his house and draw the will of his father and also a power of attorney which he suggested to the old man should be drawn. A further reference to this will be made in the brief examination of the testimony in the case.

John F. Stickle was taken to the home of William Tutty by the latter where he received instructions from John Tutty, and three or four days later he returned and had the will executed. It was executed with all due formalities. In fact, Mr. Stickle was unusually careful apparently because, although it had always been his custom to have but one other witness besides himself, in the execution of a will, yet

on this occasion, for some reason or other, he deemed it advisable to have two outsiders as witnesses besides himself. One of these witnesses, Daniel Kearns, had known the testator for forty-five years and yet the old man failed to recognize him when he came into the room. During the stay of the two witnesses there was scarcely any conversation but both recognized the fact that the testator was in a very feeble condition. Although Mr. Stickle's testimony was given less than six weeks after the will was executed, yet his recollection of what occurred the day he received the instructions and the day the will was executed, is most unsatisfactory. He himself, is getting along in years, hard of hearing and forgetful. It is scarcely believable that William Tutty should have called for Mr. Stickle and driven him for a distance of four or five miles without informing him about the business in hand. William Tutty was too eager about the matter not to have even mentioned the matter to Mr. Stickle. The most charitable view to take is that Mr. Stickle had forgotten very much of what took place. To set the facts clearly before the Court in brief outline, we shall refer to the testimony of the principal witnesses.

## II.

### Examination of Testimony.

Mrs. Flanagan, with whom John Tutty boarded for a whole year, testifies to the hallucinations with which John Tutty seemed to be possessed from time to time.

He imagined the piano was a mine and that men were working in the mine; that horses and people were passing when no one was without (Case, pp. 58 and 95); that he saw funeral processions when there were none; that he saw

pigs in the mirror (Case, p. 59), and that some one was going to take him away, and as recently as Ash Wednesday before the will was made, he thought water was running down the wall of the house and that there was danger of all getting wet (Case, p. 60). Her cross examination shows that she had spoken to the doctor and had been informed that the day sleeping was due to the disease (Case, p. 89, ll. 25-25). He threw the cuspidor at the wall (Case, p. 96).

It appears from her testimony that John Tutty made a will in November, 1913, which favored her, and a few days later, after William Tutty and Father Carew had been there, he made a new will (Case, pp. 63-66). It also appears he was moved from her home by William Tutty on May 3, 1914 (Sunday between seven and eight P. M.), under the pretext of taking him for a drive (Case, p. 69). It appears from her cross examination that William Tutty took whiskey to the old man and the old man got other whiskey at the saloon. Her husband had to change his under-clothes sometimes twice a day (Case, p. 93, ll. 30-40; p. 111), and even the day he left the Flanagans he did strange things (Case, p. 120). Will Tutty and his wife had been unwilling to have the old man at their house (p. 111). The old man was easily influenced (pp. 111-112).

James Flanagan testified that John Tutty told him that he had asked his son Will to write a letter for his trunk but he would not because he did not want the old man there (p. 122, ll. 35-40). After Ash Wednesday John Tutty acted queerly; hit the flour barrel and said, "Git up, Dan, git up," rambled, hit the wall with his cane (p. 123), pulled the table cloth off the

table (p. 124). The old man had dropsy (p. 125), and had no control of himself (p. 126); he had to be lifted into the wagon the last day he was there (p. 129), and he was weak, very dull and slow, not alert, and his mental faculties were impaired from Ash Wednesday (p. 128). The father and son were not on good terms about the rent (p. 132), although the son had paid (p. 133), and the son would snap the old man off (p. 134, ll. 10-30). Flanagan sat up with him all night during the last three months (p. 137).

On May 4, 1914, Will Tutty told witness his father was in a "bad way and didn't have any control of himself" (p. 141, ll. 1-15). John Tutty was in bad mental condition when he left the Flanagans (p. 142). In his opinion he did not have ability to make a will because he did not know what he was doing (p. 143), and he did not know what to put in a will (p. 146).

James Cahill saw John Tutty the Sunday he left Mrs. Flanagan's; did not know him until Cahill told him his name, and then Tutty said, "If I live until morning, I am going to New Jersey." Tutty did not know what he was saying (p. 152).

Mrs. Alice Grimes had known John Tutty six years, but he would not recognize her at times and would call her Mrs. Flanagan (p. 158). "Seemed to wander a good deal in his mind. Sometimes he talked rational, and other times you couldn't understand anything he said" (p. 159, ll. 30-40). Acted strangely (pp. 160-161). On cross examination she testified that within a few minutes after eating a hearty meal he would say, "Don't you think it's time for my dinner?" (p. 165). Would not say that his

“common sense times” were more frequent than his “queer” times (p. 166).

James Monahan, a son-in-law of John Tutty, testified that the latter lived at his home in New York City from 1910 to May 9, 1913 (p. 167). In December, 1913, this witness saw John Tutty at the Flanagans' but was not recognized (p. 168). On March 15, 1914, Monahan saw him again; found him listless and worse; saw him strike the flour barrel and say “Get up” (p. 169); no interest in conversation (p. 172). After the death of John Tutty, this witness went to the home of William Tutty and the latter said, “that he had a will made out to suit himself to take the place of the Flanagan will” (p. 173, ll. 35-40, and p. 174, ll. 1-10). After the funeral John F. Stickle told this witness: “The old man didn't know nor didn't care” (p. 175); John and William Tutty were not on good terms and the old man threatened to sue the son (p. 175, ll. 30-40), and was angry at him because he would not even drive him to Dover (p. 176), and William Tutty never visited the old man in New York. The old man said he was going to leave the Newark property to the two daughters and the homestead to William (pp. 176-177).

The cross examination shows that the old man did not recognize the witness any time he went to see him (p. 178). The old man was very deaf (p. 181). He had told this witness about the Smith will (p. 182).

Peter J. Cahill was a son-in-law and lived in Brooklyn. In January, 1914, he called on John Tutty with his daughter but the old man did not recognize her (p. 191). William Tutty told him that the “old man was pretty sick” \* \* \* “that they were influencing him down at Flanagan's' and had influenced him to make this other

will" (p. 193). He next saw William Tutty May 20th about 2:30 A. M., the day of the funeral. About the first thing William said to him was that he had gotten the Flanagan will (p. 194). Cahill read this and handed it to Monahan and then asked Will Tutty how he got it and afterwards said to him, "I suppose now it goes back to the will Smith has," to which he replied, "No, I got another will. \* \* \* I had the will made out my way this time" (p. 195, ll. 1-20). This witness also told about William Tutty finding fault about his father having brought suit against him for rent (p. 195, ll. 30-40), and that the father and son were at loggerheads for some time (p. 197), but that there never had been any estrangement between the father and daughters and that John Tutty had said he intended to leave the Newark property to the daughters (p. 198).

On cross examination it was disclosed that Cahill first learned of the Flanagan will in December from William Tutty, and John Tutty informed about the Smith will (p. 202). Testator made three wills in the last three or four months (p. 204).

Mary Ann Monahan, a daughter of the testator, lived in New York City and testified that her father, John Tutty, would have been 84 in November and died on May 18th, 1914; that he lived with her two and one-half years, leaving on May 3, 1913; he had been a miner and was very deaf (p. 213). She saw her father December 17, 1913, and then he did not know her (p. 214, ll. 20-30), and did not converse with any one (p. 215); next saw him on May 17th when he was very bad (p. 215, ll. 30-40). John Tutty had told her that Smith had made a will and that she and her sister were to have the New-

ark property (p. 216). William told her about the Flanagan will and asked her to come up and see about it (p. 216, ll. 30-40). He told her on May 17th that the old man had made a new will and when she said, "I suppose it's made all right," he replied, "Oh, yes" (p. 217). After the will was read, she said she did not think it right and Will said, "That was his wishes" (p. 218). The relations between the father and son were not cordial (p. 219). The day before John Tutty died he denied having made a new will (p. 220, ll. 35-40).

Margaret Cahill, another daughter, testified that she was at Flanagans' December 14th, 1913, and her father failed to recognize her and she stayed up all night with him and he "moaned and groaned all night" (p. 225). John Tutty had told her about the Smith will (p. 226, ll. 35-43; 227). On May 17th he acted queerly (p. 228). Sunday afternoon Will Tutty told her he had made the will to suit himself (p. 228), and read to her the Flanagan will (p. 229, ll. 20-25). She criticized the act of getting her father to draw wills "When he didn't know what he was doing," and he replied "That's the way the world goes. Nobody got along in this world only a robber" (p. 229, ll. 20-35). The father had said that Will was so mean he didn't know whom he took after (p. 229, ll. 35-40), and Will used scandalous language about the old man (p. 230, ll. 15-25). She heard Mr. Stickle, on the day the will was read say that John Tutty "Didn't know nor didn't care" (p. 231).

Mary Spears, a grand-daughter, testified that Will Tutty said that the Flanagans had influenced John Tutty to make the Flanagan will. This was January 31, 1914 (p. 238). She next saw William Tutty May 20th, 1914, about 2:30

A. M. He told her father he had the Flanagan will and got it from the bar-room and showed it to him (p. 239). She heard William Tutty say that he had the new will made "To suit himself" (p. 240), *i. e.*, he said, "I had the will made to suit myself" (p. 249). She also testified that her grandfather did not recognize her when she went to his house in January (p. 236).

Lyman M. Smith testified that on May 14, 1914, William Tutty obtained the will he had drawn for John Tutty about three years before. As he was leaving the office he said, "If my father wants a will drawn, I will bring him down. But, if I do bring him down, I want you to look after my interests for I think I am entitled to the bulk of the estate" (p. 252). This was four days before John Tutty died.

The Smith will provided for an equitable division (pp. 259-260).

Burt Rourk testified that he saw John Tutty in July, 1913, and was told that the old man intended leaving his property to his son and daughters (p. 263). Saw John Tutty a week before he left the Flanagans'; drowsy and his mind wandered; at times somewhat clear (p. 264).

Dr. John Walters, a witness for the appellant, testified that John Tutty had Bright's disease and of such form as might produce stupor (p. 270); he had the fear of impending death (p. 273), and was satisfied at the Flanagans' (p. 275).

William Hooper, a witness for the appellant, testified on cross examination, that he went to William Tutty's to sign a paper; William Tutty wanted him to show the old man had his faculties (p. 283). Those present were Mr. Tutty, Mrs. Tutty, John Tutty and the witness (p. 284).

William Tutty told witness what he was signing (p. 285); it was Exhibit C. 1 (p. 341).

Catharine Tutty, wife of the proponent, testified that she noticed bad condition of John Tutty while at Flanagans' (p. 289), and she gave him stimulants also after he came to her house. Never read anything after that (p. 290). Will Tutty, her husband, brought John Tutty to the house between 7:30 and 8 o'clock May 3, 1914 (p. 291). She went to bed about 11 o'clock and John Tutty was still up; nothing in particular was said all of that time (p. 293); the old man said nothing to the two children of Mrs. Tutty's sister (p. 294); William Tutty sat up with the old man all night (p. 296); he had breakfast at 8 or 9 o'clock and then went after Stickle (p. 297). They came back about 10:30 (p. 297). She knew he was going after Stickle because Sunday night when *no one was present but she and her husband* he told her John Tutty wanted him to get lawyer Stickle in the morning, and that it was for the purpose of having a will drawn (p. 298). While at the Flanagans' John Tutty had told her he was going to have the daughters' names crossed out of the will (p. 299). She learned of the Flanagan will shortly after it was made and her husband had a *suspicion* "something going on" (p. 299.) John Tutty had trouble with William (301). She was not surprised about the suddenness of the will making (p. 301). She does not remember whether she gave any liquor to the old man the day Stickle first came (p. 303). She didn't even ask how the will was to be drawn (p. 305). She had wanted \$15 per month and the Flanagans \$12 (p. 307), for his board.

William Tutty, the chief beneficiary and proponent of the will, was called as a witness. The

most casual reading of the testimony shows how uncertain he was and even on his direct examination his own counsel had difficulty in getting definite answers (pp. 312-314). He pretended that he did not know what his father was going to put in the will and remained outside of the house while Mr. Stickle was in talking with his father and did not hear what his father said (p. 315), and he denied that he did anything "By suggestion; by persuasion or in any way to induce him to make this will" (p. 316, ll. 30-35). On cross examination he admits that he did not expect to take his father back to his house when he got him into the wagon at Flanagan's nor did he tell the Flanagans that he was going to take him to his own home, but, notwithstanding, he admits that he "drove right home from Flanagan's right around by Luxumberg" (p. 317). On this ride home he mentioned to his father the making of the Davenport or Smith will and the father said he did not know of any such will but he would have a new one drawn by Mr. Stickle. At first he claims this was about all there was said (p. 319, ll. 1-20), but later he admits that he might have suggested the getting of the Davenport will and finding out whether that was all right (p. 319, ll. 35-40), and also that he "have a power of attorney and withdraw the other wills" (p. 320, ll. 1-10), and the next day he got the power of attorney and the three wills (p. 320, ll. 25-35), but corrects himself that it was eleven days later and after the new will had been drawn (p. 321, ll. 1-10). He was suspicious of the Davenport will (p. 321, ll. 15-25). At page 319 this witness says: "He didn't say nothing to me about how he was going to dispose of it," referring to the property, although later he ad-

mits that they were talking about the property on the road home (p. 325, ll. 28-30). He admits that he was anxious to get Mr. Stickle and, in answer to the question, "You expected to get more under the new will that was drawn, didn't you?" he replied: "I suppose I did if I could get it" (p. 325, ll. 1-10). He admits that he sat up all night and went after Mr. Stickle the next morning between nine and ten o'clock (p. 325); there was no special reason that he knew of why his father should prefer him to his sisters and that they had been quite as good to the father as he had (p. 326). He admits that he talked with Cahill the night before the funeral about the will although denies having shown them any will (p. 329). He claims to have destroyed the Flanagan and Smith wills on May 11th or 12th by burning them in the stove (p. 330), but later admits he did not receive the Smith will until the 14th and all wills were burned at the same time. Although he admits that he knew his father had made one will in which he only left him \$5 and that Father Carew subsequently interceded in his behalf, yet he claims that he had nothing whatsoever to do about getting Father Carew to do this (pp. 330-331).

### III.

#### **The will was the product of undue influence.**

What constitutes undue influence is too well settled in New Jersey to require any citations of authorities. It is in the application of the rule that the difficulties have arisen. As the Ordinary said in the case of *Westcott v. Shepard*, reported in 51 Equity, 315 at page 320:

"If influence be brought to bear upon a testator, his mental condition, so far as it

affects his will power, is always a matter of inquiry, because, as I had occasion to remark in *Elkinton v. Brick*, 17 Stew. Eq. 154, 166, 'It is impossible to distinguish, by a fixed rule, between acts which are the bounds of legitimate influence and acts which make the influence undue. Similar acts may be trifling and of no importance in the case of one person, and over-mastering in the case of another. Their effect must depend upon the relation between the parties, the character, strength and condition of each.' "

The circumstances surrounding each case are so different that it is impossible to cite any decision which is exactly parallel to the one at bar, but the cases cited by the Vice-Ordinary, viz., *Lynch v. Clements*, 24 N. J. Equity, 431, and *Dale v. Dale*, 11 Stewart, 274, and particularly the Lynch case, have striking similar characteristics. The appellant seeks to distinguish those cases from the one at bar and asserts that there is no testimony "in the case at bar that in making this will he (John Tutty) was under the control or power of his son, or that the son occupied a position of ascendancy over the father." The most cursory reading of the testimony, and particularly that relating to the eventful ride when William Tutty took his father from the Flanagans' to his own home, indicates very strongly the power of the son over the father and the readiness with which the father subjected his will to that of the son's. What explanation can the appellant make for the sudden change of attitude of John Tutty and the absolute reversal of his former intention, all so suddenly brought about in the short ride of three miles from Flanagans' to the son's home?

Prior to this time he had been unwilling to stay at his son's house because the latter demanded fifteen dollars a month board. William Tutty makes no claim that as an inducement to his father's coming to his home he had agreed to board him at a lower rate. The case is devoid of all explanation of this remarkable change in the attitude of John Tutty. The attitude of liberality toward the son William, exhibited in the will is entirely incompatible with the former determination of John Tutty to provide accommodations as cheaply as possible, and is not explained by anything which appears in the testimony. The compelling inference is that the disputed will was made under similar influences and conditions to the so-called Flanagan wills, viz., disease had so undermined the will power of John Tutty that his mind had become so plastic as to produce the result that when the Flanagans asked him to make a will in their favor he acquiesced and when William Tutty asked him to make a will in his favor, he quite as quickly submitted. The explanation given by Mr. Stickle that the old man thought he was going to be a care to the son is not sufficient. The old man had the sense of impending death as testified to by Dr. Walters. He was in constant fear of this. He believed his death was imminent and he must have realized that the value of any services which might then be rendered him by his son could not be worth more than a small fractional part of what he gave his son, and it cannot be doubted that if his mind had been clear and if it had not been diseased or weakened by disease, or affected by intoxicants, he would have realized the disparity in value between the probable services of William Tutty and his wife and the amount which

was being given to William Tutty by his will. Apparently he forgot the obligations to his daughters with whom he had lived for three years, and apparently he had forgotten the care and treatment which had been given him by the Flanagans, in whose homes he had been entirely satisfied and had received good treatment. That he was forgetful is also shown by the testimony of William Tutty himself that the old man had forgotten that he had ever made either the Smith or the Flanagan wills. Surely a man who is so forgetful, who is so susceptible, who acts in such an inexplicable manner is one to be unduly influenced. Moreover, it appears in the testimony of William Tutty, as well as the others, that there was no reason why John Tutty should have favored William Tutty more than his two sisters. On the other hand, the testimony shows that the relations with his daughters had always been friendly; that he had intended to give them the Newark property and make an equitable disposition of his property; that frequent estrangements with his son had occurred and on at least one occasion he had said that his son was not entitled to receive \$5 from him. It is true that the estrangement with his son grew out of quarrels between them as to the rent, supplemented, perhaps, by the unwillingness of the son to have the father at his home. Surely if his mind had been alert, as alleged in the brief of the appellant (although no suggestion of it can be found in the testimony), he would have recalled these things and would not have cut his daughters off with the nominal sum of \$100 and given the rest of his property to his son. A strong-minded man, a man mentally alert and bright, or a man self-willed as John Tutty appears to have been for-

merly, is not swerved so easily; does not make a radical departure from his former attitude so readily. The conclusion that the will was the product of undue influence is irresistible.

As we have heretofore noted, William Tutty had gained knowledge of the drawing of the Flanagan wills; his "suspicion" had been aroused; he must have realized that his father had not much longer time to live because this was apparent to everyone. He expected to get more under the new will if, as he says, he "could get it." He knew that delay was dangerous for his schemes and that "he who hesitates is lost;" on Sunday night he goes to the home of the Flanagans'; through misrepresentation gets his father into his wagon, by the help of Mr. Flanagan who had to lift him in, and takes him to his own home; but, before doing so, he extorts from his father an agreement to draw a new will in his favor. So elated is William Tutty over the outcome that he takes his wife apart and whispers into her ear the glad information that the father was going to draw a new will the next day; so anxious is he about the matter, lest some other influence should come over his father, that he sits up all night with him and post-haste next morning goes to Rockaway, gets Mr. Stickle and takes him back to the old man to draw the will, but denies that he told Mr. Stickle anything on that ride home. If these circumstances do not indicate that influence which the law properly terms "undue influence," and do not vitiate the resultant act, then in our minds it would be difficult to establish the same except by positive testimony which, generally speaking, cannot be done, and in this case could not be done because of the fact that William Tutty kept the old man at his own

home and away from the influences of others. His admissions on the night before the funeral, although denied by him but testified to by Mary Spears, Peter J. Cahill and James L. Monahan, that this time he had a will drawn to suit him (William Tutty), are entitled to great weight in view of the attendant circumstances, and confirm the contentions of the respondents. It cannot be said that these statements by William Tutty are altogether improbable; that he would not be so foolish as to make such statements. He is not an educated man; does not know the law, and undoubtedly felt confident that having gotten the paper drawn by a lawyer it could not be set aside, and therefore, in a spirit of boasting, he gave utterance to the statements made by these several witnesses.

#### IV.

**William Tutty, the proponent, being the chief beneficiary, carried the burden of showing that the will was not the product of undue influence.**

*In re Miller's Estate*, 98 Atl., 468.

This is not merely due to the fact that he was the chief beneficiary but also to the testimony to which we have already referred, and that portion of William Tutty's testimony in which he admitted that he intended to get as much as he could; his statement to Mr. Smith when he went after the will which he had drawn, when he said, referring to his father, "If I do bring him down I want you to look after my interests, for I think I am entitled to the bulk of the estate;" and the fact that the will was drawn at William Tutty's home by a lawyer whom William Tutty had gone to procure and

after William Tutty had had this long talk with his father and the other circumstances pointed out.

Although this burden to show that there was no undue influence rested upon William Tutty, he has not met it or made much of an effort to do so. There was a certain denial by him of such influence but there was no frank, honest statement of the events of that Sunday night; no adequate explanation nor attempt to make an explanation of those events. As we have pointed out before, his testimony was given in a most unsatisfactory manner and even his own counsel had to urge him to give answers and had to admonish him that it was his case and not his counsel's case.

We therefore respectfully submit that John Tutty was in such a weakened physical condition that he was susceptible to undue influence; that the son, William Tutty, had the opportunity to unduly influence him; that he desired to influence him in his favor; that he did unduly influence him and that the paper writing purporting to be the last will and testament of John Tutty was the product of undue influence exercised by William Tutty, and that the decree of the Prerogative Court should be affirmed with costs.

LYMAN M. SMITH,  
CHARLES A. RATHBUN,  
*Proctors of Respondents.*

